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# Reforming the Supreme Court Appointment Process, 2004-2014: A 10-Year Democratic Audit\*

Adam M. Dodek\*\*

The way in which Justice Rothstein was appointed marks an historic change in how we appoint judges in this country. It brought unprecedented openness and accountability to the process. The hearings allowed Canadians to get to know Justice Rothstein through their members of Parliament in a way that was not previously possible.<sup>1</sup>

— The Rt. Hon. Stephen Harper, PC

[J]udicial appointments ... [are] a critical part of the administration of justice in Canada ... This is a legacy issue, and it will live on long after those who have the temporary stewardship of this position are no longer there. If the act of appointing judges is a priority, the process of appointing them is no less so. Indeed, the integrity and

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\* This paper is dedicated to Professor Emeritus Jacob Ziegel of the University of Toronto's Faculty of Law. I know of no one who cares more passionately about the importance of the Supreme Court of Canada appointment process. In appreciation.

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<sup>1</sup> News Release, "Prime Minister announces appointment of Mr. Justice Marshall Rothstein to the Supreme Court" (March 1, 2006), online: <<http://pm.gc.ca/eng/news/2006/03/01/prime-minister-announces-appointment-mr-justice-marshall-rothstein-supreme-court>>.

fairness of the process is not unrelated to the excellence and independence of the judiciary.<sup>2</sup>

— The Hon. Irwin Cotler, PC, OC, QC (Minister of Justice and Attorney General of Canada, 2003–2006)

## I. INTRODUCTION

As Irwin Cotler stated above, judicial appointments matter. They matter because Supreme Court of Canada judges exercise important functions not only in the administration of justice but also in Canadian democracy: the Supreme Court is a critical institution in our society. As Prime Minister Harper declared, the process by which our high court judges are appointed also matters. It matters for the Supreme Court but also for the other branches of government: the executive and the legislative (*i.e.*, Parliament). The recent appointment of Justice Nadon raises serious questions about that appointment process that deserve attention.

On October 22, 2013, the Governor-in-Council directed a reference to the Supreme Court of Canada regarding the eligibility of Justice Marc Nadon to be appointed to that Court<sup>3</sup> and introduced legislation in an omnibus budget bill to clarify that federal court judges were qualified for

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<sup>2</sup> Irwin Cotler, “The Supreme Court Appointment Process: Chronology, Context and Reform” (2007) 58 U.N.B.L.J. 131, at 131 [hereinafter “Cotler, ‘The Supreme Court Appointment Process’”]. To the same effect, see Shimon Shetreet & Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary*, 2d ed. (Cambridge: Cambridge University Press, 2013) 102: “In any system, the methods of appointment have direct bearing on both the integrity and independence of the judges. Weak appointments lower the status of the judiciary in the eyes of the public and create a climate in which the necessary independence of the judiciary is liable to be undermined. Similarly, political appointments that are seen by the public as not based on merit may arouse concern about the judge’s independence and impartiality on the bench.”

<sup>3</sup> Order in Council P.C. 2013-1105. This reference asked the Supreme Court to answer two questions: (1) “Can a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec be appointed to the Supreme Court of Canada as a member of the Supreme Court from Quebec pursuant to sections 5 and 6 of the *Supreme Court Act*?”; and (2) “Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled *Economic Action Plan 2013 Act, No.2*?” The Supreme Court heard the reference on an abridged timetable on January 15, 2014 and issued its decision (technically an “advisory opinion”) on March 21, 2014. See *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, 2014 SCC 21 (S.C.C.) [hereinafter “*Supreme Court Reference*”]. See generally Justice Canada, Press Release, “Government of Canada Takes Steps to Clarify Certain Eligibility Criteria for Supreme Court Justices”, October 22, 2013, online: <[http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc\\_32973.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc_32973.html)>.

appointment under the *Supreme Court Act* for the three seats designated for Quebec.<sup>4</sup> Less than a month before, on September 30, 2013, the Prime Minister had announced Justice Nadon as his “nominee” to replace Justice Morris Fish as one of the three Quebec judges on the Supreme Court.<sup>5</sup> Two days later, on October 2, 2013, Justice Nadon appeared before a committee of Members of Parliament (“MPs”) for what has become known colloquially as “a parliamentary hearing”.<sup>6</sup> The next day the Prime Minister confirmed his selection of Justice Nadon.<sup>7</sup> On October 7, 2013, Justice Nadon was officially sworn in as a member of the Supreme Court of Canada.<sup>8</sup> Later that day, Toronto lawyer Rocco Galati launched a challenge to Justice Nadon’s appointment in the Federal Court of Canada.<sup>9</sup> On October 8, 2013, the Supreme Court announced that Justice Nadon would not participate in matters before the Supreme Court in light of the challenge to his appointment.<sup>10</sup> Justice Nadon and the Supreme Court were placed in limbo for the next five months until the Court’s decision on March 21, 2014, which declared his appointment to be *void ab initio* and the government’s legislative amendments *ultra vires*.<sup>11</sup>

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<sup>4</sup> See Bill C-4, *A second act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures (Economic Action Plan 2013 Act, No. 2)*, S.C. 2013, c. 40, ss. 471 and 472. *Supreme Court Act*, R.S.C. 1985, c. S-26.

<sup>5</sup> Press Release, “PM Announces Nominee for the Supreme Court of Canada”, September 30, 2013, online: <<http://pm.gc.ca/eng/news/2013/09/30/pm-announces-nominee-supreme-court-canada>>.

<sup>6</sup> The Committee is not, strictly speaking, a “parliamentary committee”. Rather, it is a “committee of parliamentarians”. As discussed *infra* in Part II, this is a distinction with a difference. The committee is composed of MPs but it is created not by Parliament, but by the executive, and therefore it is not subject to the rules of Parliament, including parliamentary privilege. This distinction is discussed in note 235 regarding MP Joe Comartin’s comments regarding Rothstein J. at the October 2011 hearings for Justices Moldaver and Karakatsanis.

<sup>7</sup> See Order in Council P.C. 2013-1050, referenced in *Supreme Court Reference*, *supra*, note 3, at para. 9.

<sup>8</sup> Supreme Court of Canada, News Release, October 7, 2013, online: <<http://scc-csc.lexum.com/scc-csc/news/en/item/4399/index.do>>.

<sup>9</sup> *Supreme Court Reference*, *supra*, note 3, at para. 9; *Galati et al. v. The Right Honourable Stephen Harper et al.*, Federal Court of Canada, File No. T-1657-13. See Sean Fine, “Justice Nadon steps aside from Supreme Court until legal challenge resolved” *The Globe and Mail* (October 8, 2013), online: <<http://www.theglobeandmail.com/news/politics/supreme-court-justices-appointment-challenged-in-court/article14743436>>.

<sup>10</sup> Supreme Court of Canada, News Release, October 8, 2013, online: <<http://scc-csc.lexum.com/scc-csc/news/en/item/4401/index.do>>; Sean Fine, “Justice Nadon steps aside while legal challenge heard” *The Globe and Mail* (October 9, 2013) A3; Tobi Cohen, “Supreme Court appointment challenged; Judicial review; Activist lawyer argues Nadon not qualified” *National Post* (October 9, 2013) A5.

<sup>11</sup> *Supreme Court Reference*, *supra*, note 3.

At the moment that Rocco Galati brought his legal challenge, it should have been apparent that the appointment process had failed, at least to the extent that it is supposed to serve a vetting function. Only seven days had elapsed between the time that the Prime Minister announced Justice Nadon as his nominee on Monday, September 30, 2013 and Justice Nadon's swearing in as a Supreme Court justice on Monday, October 7, 2013.

The appointment process failed to adequately address the issue of whether Justice Nadon was qualified for appointment to the high court under the *Supreme Court Act*.<sup>12</sup> This is obvious. However, the appointment process failed in at least three other respects. First, it constituted a failure of transparency in several ways. The controversy following Justice Nadon's appointment raised many unanswered questions about how the appointments process operated: what were the qualifications upon which candidates were selected and evaluated? How did the Minister of Justice choose the so-called "long list" of candidates to be considered? How many candidates were on this "long list"? How did the Supreme Court Selection Panel operate? What was its mandate from the Minister of Justice? How did the members decide on the recommendations for the shortlist? Consensus? Unanimity? Majority vote?<sup>13</sup>

The appointment process also failed to produce accountability. Neither the Minister of Justice nor the Prime Minister provided an adequate explanation of why they selected Justice Nadon for this important post. This was unfair both to Justice Nadon and to the Canadian people. The accountability failure is connected to the transparency failure: in the absence of identifying the criteria for selection, it becomes impossible to explain how a candidate meets those unknown criteria.<sup>14</sup>

Many questions have been raised about the Nadon appointment and the *Supreme Court Reference* will no doubt be the subject of much discussion for years to come. It is not my intention or desire to dissect those

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<sup>12</sup> See *Supreme Court Act*, R.S.C. 1985, c. S-26, ss. 4-5.

<sup>13</sup> We have learned more about the operation of the appointment process for Justice Nadon through the Government's response to Order Questions submitted by Irwin Cotler, MP and Stéphane Dion in 2014. See Order Paper Question 73, House of Commons, Sessional Paper, 8555-412-74; Order Paper Question 239, House of Commons, Sessional Paper 8555-412-239.

<sup>14</sup> Cf. Carissima Mathen, "Choices and Controversy: Judicial Appointments in Canada" (2007) 58 U.N.B.L.J. 52, at 71 [hereinafter "Mathen, 'Choices and Controversy'"]: "The lack of clarity around the most important criteria for our highest judges is unacceptable and demands sustained and serious thought."

issues here.<sup>15</sup> Rather, the Nadon appointment provides a useful vantage point to gaze back and evaluate the changes to the Supreme Court appointment process over the past decade.<sup>16</sup>

Thus, this paper analyzes the Supreme Court appointment process over the 10-year period from 2004 through the end of 2013. The year 2004 has been selected because the vacancies caused by the departures of Justices Iacobucci and Arbour in that year led to the beginning of a decade of reforms to the appointment process. The changes begun by Liberal Minister of Justice Irwin Cotler in 2004 led to further reforms by the Conservative government when it took office in 2006. Between 2004 and 2013, eight Supreme Court Justices have been appointed under variants of a reformed appointment system: Rosalie Silverman Abella and Louise Charron (2004), Marshall Rothstein (2006), Thomas Cromwell (2008), Michael Moldaver and Andromache Karakatsanis (2011), Richard Wagner (2012) and Marc Nadon (2013).<sup>17</sup> In 2014, Justice LeBel is scheduled to retire and we can anticipate a similar process being used as in the past three appointments by Prime Minister Harper.

This paper conducts a *democratic audit*<sup>18</sup> of the Supreme Court appointment process<sup>19</sup> and not an evaluation of the judges appointed

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<sup>15</sup> On the issues before the Court in the *Supreme Court Reference*, see Michael Plaxton & Carissima Mathen, “Purposive Interpretation, Quebec, and the *Supreme Court Act*” (2013) 22:3 Const. Forum 15 (cited in the *Supreme Court Reference*, *supra*, note 3, at para. 58); Paul Daly, “More on Section 6 of the Supreme Court Act: Legislative History and Purpose”, *Administrative Law Matters* (October 16, 2013), online: <<http://administrativelawmatters.blogspot.ca/2013/10/more-on-section-6-of-supreme-court-act.html>>; House of Commons Standing Committee on Justice and Human Rights, 41st Parl., 2nd Sess., Tuesday November 19, 2013 (Evidence), online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6307059&Language=E&Mode=1&Parl=41&Ses=2>>; and Thursday November 21, 2013, online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6317974&Language=E&Mode=1&Parl=41&Ses=2>>.

<sup>16</sup> I do not think it is too early to conduct a retrospective of the reforms despite admonitions to the contrary. As my colleague Carissima Mathen relates, Justice Rothstein was asked at his hearing whether he thought the process was a good one. He replied: “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.” Parliament of Canada, *Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada* (February 27, 2006), quoted by Mathen, “Choices and Controversy”, *supra*, note 14, at 53, note 9.

<sup>17</sup> The Supreme Court declared the appointment of Justice Nadon to the Supreme Court to be *void ab initio* in the *Supreme Court Reference*, *supra*, note 3. However, the appointment is still considered for purposes of evaluating the reforms to the appointment system between 2004 and 2013.

<sup>18</sup> As discussed in Part III, *infra*, I take the concept of a “democratic audit” from William Cross, “Foreword” in Ian Greene, *The Courts* (Vancouver: UBC Press, 2006) vii, at vii.

<sup>19</sup> I do not address the changes made by Minister of Justice Vic Toews in 2006 to the Judicial Advisory Committees (“JACs”) that screen the pool of candidates for other federal

through this process. Evaluating Supreme Court judges for their supposed “merit” is an exercise fraught with difficulty, not the least because of its subjectivity.<sup>20</sup> It may also be more a matter of taste or judgment than objective criteria.<sup>21</sup> Moreover, as I discuss in Part III, the process has largely failed to publicly articulate the criteria upon which the judges are selected.<sup>22</sup> In the absence of an articulation of the criteria for appointment, those selected cannot be evaluated based on unknown criteria. Thus, instead of evaluating the judges, I evaluate the process used to select them through the idea of a *democratic audit*.

This paper has five parts in addition to this introduction. Part II presents a short history of the Supreme Court appointments process

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appointments. See Department of Justice Canada, Press Release, “Minister Toews pleased to announce changes to Judicial Advisory Committees” (November 10, 2006); Canadian Judicial Council, News Release, “Canadian Judicial Council calls on government to consult on proposed changes” (November 9, 2006); Canadian Judicial Council, Press Release, “Judicial Appointments: Perspective from the Canadian Judicial Council” (February 27, 2007); Canadian Bar Association, News Release, “CBA Says Recent Changes to the Judicial Appointment Process Must Be Reversed” (March 20, 2007); Canadian Association of Law Teachers, Press Release, “Canadian Association of Law Teachers Reiterate its Position Concerning Reforms to Federal Judicial Appointments and Criticizes Reforms Recently Envisaged by the Federal Minister of Justice” (November 29, 2006); Rainer Knopff, “The Politics of Reforming Judicial Appointments” (2008) 58 U.N.B.L.J. 44; F.C. DeCoste, “Howling at Harper” (2008) 58 U.N.B.L.J. 121; Peter Russell, “An Error of Judgment” *The Globe and Mail* (February 27, 2007) A21. On the pre-reformed s. 96 appointment process, see E. Neil McKelvey, “Foreword: Appointment of Section 96 Judges” (2008) 58 U.N.B.L.J. 5. See generally Canadian Bar Association, *Report of the Canadian Bar Association Committee on the Appointment of Judges in Canada* (Ottawa: Canadian Bar Foundation, 1985).

<sup>20</sup> Cf. Allan C. Hutchinson, “Looking for the Good Judge: Merit and Ideology” [hereinafter “Hutchinson”] in Nadia Verrelli, ed., *The Democratic Dilemma: Reforming Canada’s Supreme Court* (Montreal & Kingston: Institute of Intergovernmental Relations, 2013) 99 [hereinafter “Verrelli”].

<sup>21</sup> Because of the nature of the work of the Supreme Court — a limited caseload, a long lag time between hearings and decisions, the collegial nature of decision-making — I do not think that one can begin to judge a Supreme Court judge until she or he has spent five years on the high court. Thus, I think *The Globe and Mail’s* negative assessment of Justice Karakatsanis one year after her appointment was grossly unfair. See Editorial, “Weak process for weighty choices” *The Globe and Mail* (April 4, 2013) A16 (characterizing Justice Karakatsanis as “struggling to make an impact” and being “a long way from pulling her judicial weight” because she had only written three decisions in her 18 months on the high court). For responses, see Patrick LeSage & Susan Lang, “Both merit praise” *The Globe and Mail* (April 5, 2013) A16: “We disagree with your criticism, both direct and indirect, concerning the contributions of Justice Karakatsanis. ... A judge’s contributions should not be measured on the basis of the number of judgments written, particularly in an appellate court where collegial decision-making and judgment-writing are so important”; Morris Chochla, “Unwarranted” *The Globe and Mail* (April 10, 2013) A16: “Supreme Court Justice Andromache Karakatsanis has superb qualifications and accomplishments. ... Your criticism of Justice Karakatsanis is unwarranted.”

<sup>22</sup> An exception was Minister of Justice and Attorney General Irwin Cotler, who in 2004 publicly articulated the criteria upon which candidates were identified for the “long list” and the criteria used to select the ultimate nominees for appointment. See *infra*, at 120-21.

between 2004 and 2013. It sets out the mechanisms under which each of the eight judicial appointments was made during this period.<sup>23</sup> Part III introduces the concept of a democratic audit and identifies the drivers of change to the appointments process. It argues that prior to 1992 proposed reforms to the Supreme Court amendment process were motivated by concerns about federalism: incorporating a role for the provinces in the appointment process. However, after the failure of the Charlottetown Accord (1992), the motivation changed to concerns about the “democratic deficit” so that reforming the Supreme Court appointment process became part of a democratic reform agenda proposed first by the opposition Reform Party, then by Liberal leader Paul Martin, both in his leadership campaign and during his tenure as Prime Minister, and finally by the Conservative Party led by Prime Minister Stephen Harper. This part also addresses an issue that did not factor into the reforms: any perceived deficiency in the quality of past appointments or concerns about the legitimacy of the Supreme Court itself. Since 1992, the key factors that were articulated as the basis for changing the appointment process have been (1) transparency; (2) accountability; and (3) public knowledge about the Supreme Court and its judges. These are the factors that I use for evaluation through this democratic audit.

In Part IV, I conduct the democratic audit and find that the reforms have largely failed to deliver on the promised transparency and accountability. Conversely, I also conclude that the reforms have been very successful in serving a public education function about the Supreme Court and the work that Supreme Court judges do. Part V offers my recommendations for “re-forming the reforms” in order to achieve the goals of transparency and accountability in the appointment process. I argue that the government should publish a detailed protocol to be styled *Guide to Appointment of Supreme Court Justices*, which would set out the qualifications, consultation to be followed, procedure for evaluation, *etc.* I propose a revamped advisory committee which would operate in a more open and transparent fashion and produce a report on their work. The public hearings of nominees should continue, but only if the Minister of Justice also appears to answer questions about the process and about why the nominee was selected. Finally, the paper ends with a brief conclusion in Part VI.<sup>24</sup>

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<sup>23</sup> There are actually only six appointment “events” to be evaluated since there were double appointments in both 2004 (Abella and Charron) and 2011 (Karakatsanis and Moldaver).

<sup>24</sup> This paper was written just after the *Supreme Court Reference*, *supra*, note 3 and prior to the release of the *Reference re Senate Reform*, [2014] S.C.J. No. 32, 2014 SCC 32 (S.C.C.). It thus



## II. A SHORT HISTORY OF THE SUPREME COURT APPOINTMENT PROCESS, 2004-2013

The 10-year period between 2004 and the end of 2013 produced more changes to the appointment process for Supreme Court judges than any period since the Court was created in 1875. Reform of the Supreme Court appointment process began when Paul Martin became Prime Minister in December 2002. As discussed below in this Part, Martin had made reform of the Supreme Court appointment process part of his Democratic Action Plan, both as a candidate to succeed Jean Chrétien as the leader of the Liberal Party in 2002 and then as Prime Minister in 2003. The changes were first implemented with the surprise announcements by Justices Frank Iacobucci and Louise Arbour in the spring of 2004 that they both intended to step down from the Court at the end of June.<sup>25</sup>

Prior to 2004, the appointment process was closed, secretive and largely unknown and unknowable to the vast majority of Canadians.<sup>26</sup> More was known about the process for electing a new Pope than about the process for selecting a new Supreme Court justice. While vacancies were publicly known — through the public announcement of a justice's retirement or, as in the case of Justice Sopinka, by a sudden death — no information was publicly available about the selection process. The lack of transparency caused some to believe that the process was partisan,<sup>27</sup> understandably so since lack of information will lead to speculation, and speculation about politics naturally leads to pondering about partisanship

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does not consider the implications of these decisions on substantive reforms to the Supreme Court amendment process. That issue is deserving of a separate, independent paper.

<sup>25</sup> See Steven Edwards, "Arbour nomination confirmed: Supreme Court justice to be UN Rights Commissioner" *Ottawa Citizen* (February 21, 2004) A3 and Tonda MacCharles, "Supreme Court judge Iacobucci to retire; Two Ontario seats now open on bench Martin break replacement promise" *The Toronto Star* (March 23, 2004) A6. Both announcements came as a surprise because Justice Iacobucci could have served on the Court until 2012 and Justice Arbour until 2022. Justice Iacobucci had served on the high court for 13 years and the announcement of his departure was less surprising than that of Justice Arbour, who had served on the Court for less than five years at the time she announced her resignation. See The Supreme Court of Canada, "The Honourable Mr. Justice Frank Iacobucci", online: <<http://www.scc-csc.gc.ca/court-cour/judges-juges/bio-eng.aspx?id=frank-iacobucci>> and The Supreme Court of Canada, "The Honourable Madam Justice Louise Arbour", online: <<http://www.scc-csc.gc.ca/court-cour/judges-juges/bio-eng.aspx?id=louise-arbour>>.

<sup>26</sup> Former Minister of Justice Irwin Cotler admitted that the consultative process for Supreme Court appointments was "never well known — indeed, it may be said to have been relatively unknown". Cotler, "The Supreme Court Appointment Process", *supra*, note 2, at 136.

<sup>27</sup> Cotler, "The Supreme Court Appointment Process", *id.*

and patronage. Jacob Ziegel rightly described the process as one “shrouded in vagueness, and unsubstantiated rumour and gossip”.<sup>28</sup>

In March 2004, Minister of Justice Irwin Cotler appeared before the House of Commons Standing Committee on Justice and Human Rights examining the Supreme Court appointment process and lifted the shroud that had hidden the process from public view for so long.<sup>29</sup> Minister Cotler’s testimony was both historic and illuminating in shining significant light on the process.<sup>30</sup> In his testimony, Cotler explained that

... what I would like to do now, in the interests of both transparency and accountability, is to describe to you the consultative process or protocol of consultation that is being used to select members of the Supreme Court. I cannot claim, nor would I, that this consultative process or protocol has always been followed in every particular. I can only undertake to follow it as the protocol by which I will be governed as

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<sup>28</sup> Jacob S. Ziegel, “Merit Selection and Democratization of Appointments to the Supreme Court of Canada” (June 1999) 5:2 Choices 3, at 6 [hereinafter “Ziegel, ‘Merit Selection’”]. Ziegel posed many questions about the process:

Obviously, the Minister of Justice is involved and so, we are told, is the Prime Minister’s Office, since by convention the Prime Minister makes the actual decision. If that is the case, does the Cabinet do more than simply rubber stamp the Prime Minister’s choice? What role does the Chief Justice of Canada play? To what extent does the Minister of Justice confer with the attorney general or attorneys general of the province or the region from which the candidate is to be appointed? What is the role of lobbyists for special interests or on behalf of specific candidates? In the Charter era, how much attention does the federal government pay to the constitutional philosophy of prospective appointees? There are no sure answers to any of these questions.

*Id.* If someone as knowledgeable as Professor Ziegel did not know the answers to these questions, we can assume that few experts and even fewer members of the public did.

<sup>29</sup> The Committee itself described Cotler’s appearance as “the first time that [the Supreme Court appointments process] had been made public. Canadians had their first opportunity to learn who was consulted about Supreme Court appointments and the criteria by which candidates are assessed for their fitness to be a Justice.” Canada, Report of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Improving the Supreme Court of Canada Appointments Process* (Ottawa: Communication Group, 2004), at 5 (Chair: Derek Lee, MP), online: Parliament of Canada, <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1350880&Language=E&Mode=1&Parl=37&Ses=3>>. See also Peter W. Hogg, “Appointment of Thomas A. Cromwell to the Supreme Court of Canada” in J. Cameron, P. Monahan & B. Ryder, eds. (2009) 47 S.C.L.R. (2d) 413.

<sup>30</sup> My colleague Carissima Mathen was less impressed with Mr. Cotler’s appearance. She called the process

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. The candidates were not even interviewed.

Mathen, “Choices and Controversy”, *supra*, note 14, at 57 (citation omitted).

Minister of Justice. I might add that this is the first time that this protocol or appointments protocol is being released, which I would say is yet another expression of the beneficiary of this parliamentary review.

The first step taken in this appointments process is the identification of prospective candidates. As you are aware, candidates come from the region where the vacancy originated — be it the Atlantic, Ontario, Quebec, the Prairies and the North, and British Columbia regions. This is a matter of convention, except for Quebec, where the Supreme Court Act establishes a requirement that three of the justices must come from Quebec.

The candidates are drawn from judges of the courts of jurisdiction in the region, particularly the courts of appeal, as well as from senior members of the bar and leading academics in the region. Sometimes, names may be first identified through previous consultations concerning other judicial appointments.

In particular, Mr. Chairman, the identification and assessment of potential candidates is based on a broad range of consultations with various individuals. As Minister of Justice, I consult with the following: the Chief Justice of Canada and perhaps other members of the Supreme Court of Canada, the chief justices of the courts of the relevant region, the attorneys general of the relevant region, at least one senior member of the Canadian Bar Association, and at least one senior member of the law society of the relevant region.

I may also consider input from other interested persons, such as academics and organizations who wish to recommend a candidate for consideration. Anyone is free to recommend candidates, and indeed, some will choose to do so by way of writing to the Minister of Justice, for example.

The second step is assessment of the potential candidates. Here, the predominant consideration is merit. In consultation with the Prime Minister, I use the following criteria, divided into three main categories: professional capacity, personal characteristics, and diversity.

Let me begin with professional capacity. Under the heading of professional capacity are the following considerations, and I will just cite them: highest level of proficiency in the law, superior intellectual ability and analytical and written skills; proven ability to listen and to maintain an open mind while hearing all sides of the argument; decisiveness and soundness of judgment; capacity to manage and share consistently heavy workload in a collaborative context; capacity to manage stress and the pressures of the isolation of the judicial role; strong cooperative interpersonal skills; awareness of social context; bilingual capacity; and specific expertise required for the Supreme Court. Expertise can be identified by the court itself or by others.

As I mentioned, Mr. Chairman, this goes to what might be called the professional capacity. This is the comprehensive set of criteria here. Not every candidate must have each of these criteria. This is the composite set of criteria through which evaluation takes place.

[*Translation*]

Under the rubric of personal qualities, the following factors are considered: impeccable personal and professional ethics, honesty, integrity and forthrightness; respect and regard for others, patience, courtesy, tact, humility, impartiality and tolerance; personal sense of responsibility, common sense, punctuality and reliability.

The diversity criterion concerns the extent to which the court's composition adequately reflects the diversity of Canadian society.

[*English*]

Mr. Chairman, these are the criteria.

In reviewing the candidates, I may also consider jurisprudential profiles prepared by the Department of Justice. These are intended to provide information about the volume of cases written, areas of expertise, the outcome of appeals of the cases, and the degree to which they have been followed in the lower courts.

After the above assessments and consultations, as I've described, are completed, I discuss the candidates with the Prime Minister. There may also have been previous exchanges with the Prime Minister. Indeed, I may be involved in a consultation more than once with a range of persons with whom I've indicated that I engaged in consultations. A preferred candidate is then chosen. The Prime Minister, in turn, recommends a candidate to cabinet and the appointment proceeds by way of an order in council appointment, as per the Constitution.

This concludes the description of the current protocol or appointment process, which I'm sharing with you.<sup>31</sup>

Cotler explained "the old process" at the same time as work was under-way within government to reform it and create a new process for appointing Supreme Court judges.

Cotler appeared before the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness

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<sup>31</sup> Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 37th Parl., 3rd Sess., March 30, 2004 (The Hon. Irwin Cotler), reproduced in Cotler, "The Supreme Court Appointment Process", *supra*, note 2.

(“Justice Committee”) because earlier that month Prime Minister Paul Martin’s Minister of Democratic Reform, the Honourable Jacques Saada, asked that committee for “recommendations on how best to implement prior review of Supreme Court of Canada Justices”.<sup>32</sup> The Justice Committee also heard testimony from retired Supreme Court justice Claire L’Heureux-Dubé and from academics. It produced a report that recommended that as an interim process the Minister of Justice appear before the committee to explain both the process followed for filling the vacancies and the qualifications of the two nominees. The committee report further recommended a more permanent process involving the creation of an advisory committee composed of MPs from each official party, representation from the provinces, members of the judiciary, the legal profession and lay members which would provide the Minister of Justice with a shortlist of candidates for appointment. Again, the Minister of Justice would appear before the committee to explain both the process and the appointee’s qualifications.<sup>33</sup> Each of the Conservative Party, Bloc Québécois and New Democratic Party (“NDP”) filed dissenting opinions to the effect that the recommendations did not go far enough in various respects.<sup>34</sup>

Initially, Prime Minister Martin announced that he intended to give MPs a role in screening the nominees that he selected for the Supreme Court.<sup>35</sup> However, with a federal election intervening and pressure on the government to have the vacancies filled by the end of the summer, the federal government backtracked from its reform plans and put in place an

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<sup>32</sup> See Letter to Mr. Derek Lee, Chair, House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, March 16, 2004, online: <[http://epe.lac-bac.gc.ca/100/205/301/prime\\_minister-ef/paul\\_martin/06-02-03/www.pm.gc.ca/eng/news.asp?id=121](http://epe.lac-bac.gc.ca/100/205/301/prime_minister-ef/paul_martin/06-02-03/www.pm.gc.ca/eng/news.asp?id=121)>. The letter asked the House Justice Committee to “undertake a review and report to the House of Commons with recommendations on this matter as soon as possible. I would ask that you consult with the Minister of Justice and parliamentarians from both Chambers as part of this review.” *Id.* See also Office of the Prime Minister, News Release, “Parliament to Review Appointments” (March 16, 2004), online: <[http://epe.lac-bac.gc.ca/100/205/301/prime\\_minister-ef/paul\\_martin/06-02-03/www.pm.gc.ca/eng/news.asp?id=119](http://epe.lac-bac.gc.ca/100/205/301/prime_minister-ef/paul_martin/06-02-03/www.pm.gc.ca/eng/news.asp?id=119)>. The Justice Committee had previously begun looking at the appointment process for all judicial appointments pursuant to a motion referred to the Justice Committee from the House of Commons originally moved by Bloc Québécois MP and Justice Committee member Richard Marceau. See Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 37th Parl., 3rd Sess., March 23, 2004 (Mr. Derek Lee, Chair).

<sup>33</sup> See House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Improving the Supreme Court of Canada Appointment Process* (May 2004), 37th Parl. 3d Sess. (Mr. Derek Lee, Chair).

<sup>34</sup> *Id.*

<sup>35</sup> See Janice Tibbetts, “Martin determined to let MPS screen judges” *National Post* (May 17, 2004) A4.

interim process as recommended by the Justice Committee whereby the Prime Minister would select the nominees and the Minister of Justice would appear before a committee of MPs.<sup>36</sup>

Thus, in August 2004, Minister of Justice Irwin Cotler appeared before an interim *Ad Hoc* Committee on the Appointment of Supreme Court Judges to explain both the process that led to the Prime Minister's selection of Justices Abella and Charron as well as the basis for selecting them.<sup>37</sup> The committee was composed of seven MPs plus a representative of the Canadian Judicial Council and the Law Society of Upper Canada.<sup>38</sup> The panel questioned Minister Cotler and prepared a report, with dissenting opinions expressed about the process, not the nominees. The Prime Minister then formally appointed Justices Abella and Charron to the Supreme Court.<sup>39</sup>

In 2005, Cotler introduced a "permanent reform" process consisting of four stages. In the first stage, the Minister was to conduct the same sort of consultations and review as in the past with a view to creating a "long list" of five to eight candidates. In the second stage, an Advisory Committee was to assess the candidates and produce a confidential short list of three names "along with a commentary of the strengths and

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<sup>36</sup> See Kim Lunman & Brian Laghi, "Commons panel to accept judges, but wants stronger vetting process" *The Globe and Mail* (August 26, 2004) A1; Tonda MacCharles, "Naming process draws fire; Justice minister to face special hearing today Charron, Abella picked for skills in public, private law" *The Toronto Star* (August 25, 2004) A7; Kim Lunman & Michael Valpy, "MPs will scrutinize top-court nominees" *The Globe and Mail* (August 24, 2004) A1; Kim Lunman, "MPs working on hearings for top-court nominees" *The Globe and Mail* (August 23, 2004) A4. See generally Irwin Cotler, P.C., M.P. & Charlie Feldman, "Supreme Court Appointments: When and How Should Parliament Exercise Oversight?" (March 2014) 8 J.P.P.L. 253, at 267 [hereinafter "Cotler & Feldman"].

<sup>37</sup> 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 Supreme Court Appointments, August 24, 2004, Ottawa, online: <[http://www.collectionscanada.gc.ca/webarchives/20071116083626/http://www.canada.justice.gc.ca/en/news/sp/2004/doc\\_31212.html](http://www.collectionscanada.gc.ca/webarchives/20071116083626/http://www.canada.justice.gc.ca/en/news/sp/2004/doc_31212.html)>. The Minister appeared before an *ad hoc* committee rather than a parliamentary committee because there had been a general election in June 2004 and the 37th Parliament was dissolved on May 23, 2004. The 38th Parliament was not summoned into session until October 4, 2004. See Parliament of Canada, PARLINFO, Parliaments, online: <<http://www.parl.gc.ca/parlinfo/Lists/Parliament.aspx>>.

<sup>38</sup> See *Report of the Interim Ad Hoc Committee on the Appointment of Supreme Court Judges*, Appendix A, August 2004, online: <<http://www.justice.gc.ca/eng/tp-pr/cp-pm/cr-rc/scj2-jcs2/>>. Chief Justice John Richard of the Federal Court of Appeal served as the Canadian Judicial Council's representative and Julian Porter served as the Law Society of Upper Canada's representative. See also Cotler & Feldman, *supra*, note 36, at 267-68.

<sup>39</sup> See *Report of the Interim Ad Hoc Committee on the Appointment of Supreme Court Judges*, Appendix A, *id.*, and Kim Lunman, "Top-court nominees endorsed – but not by all" *The Globe and Mail* (August 27, 2004) A5.

weaknesses of each candidate” to the Minister. The Committee was also to provide the Minister with the complete record of consultations and other material upon which it relied. The Minister could request the Committee to undertake further consultations if the Minister felt they were incomplete.<sup>40</sup> In the third stage, the Prime Minister, with the advice of the Minister of Justice, would select and appoint a candidate from the short list.<sup>41</sup> In the fourth stage, the Minister of Justice would appear before a committee to explain both the process and the selection.

The Liberals had the opportunity to put their plan into action when Justice Major announced his retirement in August 2005, effective Christmas Day later that year.<sup>42</sup> Minister of Justice Irwin Cotler consulted with the persons previously identified and created a list of five to eight candidates which he sent to the Advisory Committee that he created.<sup>43</sup> The Advisory Committee was composed of four MPs (one from each of the recognized political parties in the House of Commons), one retired judge nominated by the Canadian Judicial Council, one member nominated by the provincial Attorneys General in the region, one member nominated by the provincial law societies in the region and “two eminent people of recognized stature in the region” nominated by the Minister of Justice of Canada.<sup>44</sup> Minister Cotler apparently gave the Advisory Committee a mandate letter, “setting out

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<sup>40</sup> Cotler, “The Supreme Court Appointment Process”, *supra*, note 2, at 144-45.

<sup>41</sup> *Id.*, at 145. According to the protocol established by Minister Cotler, there was a proviso for “exceptional circumstances” which would allow the government to select a candidate not on the short list. *Id.*

<sup>42</sup> See Supreme Court of Canada, News Release (August 3, 2005), online: <<http://scc-csc.lexum.com/scc-csc/news/en/item/2061/index.do>>; and Cristin Schmitz, “Race begins after resignation opens spot on Supreme Court” *The Gazette* (August 3 2005) A10.

<sup>43</sup> Cotler, “The Supreme Court Appointment Process” *supra*, note 2, at 143. Elsewhere it is asserted that Minister Cotler created a long list of eight candidates for the Justice Major vacancy. See Ben Alarie & Andrew Green, “Policy Preference Change and Appointments to the Supreme Court of Canada” (2009) 47 *Osgoode Hall L.J.* 1, at para. 7 [hereinafter “Alarie & Green, ‘Policy Preference’”].

<sup>44</sup> Cotler, *id.*, at 143; Canada, Department of Justice, News Release, “New Supreme Court of Canada Appointments Process Launched” (August 8, 2005), online: <[http://www.collectionscanada.gc.ca/webarchives/20071116083829/http://www.canada.justice.gc.ca/en/news/nr/2005/doc\\_31586.html](http://www.collectionscanada.gc.ca/webarchives/20071116083829/http://www.canada.justice.gc.ca/en/news/nr/2005/doc_31586.html)>. For the members of the Advisory Committee see Canada, Department of Justice, News Release, “Minister of Justice Announces Members of New Advisory Committee for Next Supreme Court Appointment” (October 11, 2005), online: <[http://www.collectionscanada.gc.ca/webarchives/20071116092711/http://www.canada.justice.gc.ca/en/news/nr/2005/doc\\_31640.html](http://www.collectionscanada.gc.ca/webarchives/20071116092711/http://www.canada.justice.gc.ca/en/news/nr/2005/doc_31640.html)> and Canada, Department of Justice, Background, “Members of the Advisory Committee on Supreme Court of Canada Appointments” (October 11, 2005), online: <[http://www.collectionscanada.gc.ca/webarchives/20071116092120/http://www.canada.justice.gc.ca/en/news/nr/2005/doc\\_31642.html](http://www.collectionscanada.gc.ca/webarchives/20071116092120/http://www.canada.justice.gc.ca/en/news/nr/2005/doc_31642.html)>.

the objectives of the Committee, describing the merit-based criteria, establishing timeframes and providing for a general procedure, particularly in relation to confidentiality”.<sup>45</sup> Cotler also apparently met with the Committee before it began its work.<sup>46</sup>

The Advisory Committee shortened the list to three names after reviewing the résumés and publications of the candidates and consulting with third parties (the same persons the Minister had consulted with earlier). The committee submitted its list to Minister of Justice Cotler, but the Liberal government fell at the end of November 2005 and after an election in January 2006, the Conservative Party led by Stephen Harper formed the government. The new Harper government chose Justice Rothstein from the shortlist but, in a deviation from the Liberal plan, had the nominee appear, instead of the Minister of Justice, before an *ad hoc* parliamentary committee.<sup>47</sup>

Justice Rothstein thus became the first nominee ever to appear for a public hearing prior to being appointed to the Supreme Court. He appeared not before a parliamentary committee but before an *ad hoc* committee of parliamentarians composed of MPs from the political parties in proportion to their representation in the House.<sup>48</sup> Professor Peter

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<sup>45</sup> Cotler, *id.*, at 143-44.

<sup>46</sup> *Id.*, at 144.

<sup>47</sup> Prime Minister’s Office, News Release, “Supreme Court nominee to face questions from Parliamentarians” (February 20, 2006), online: <<http://pm.gc.ca/eng/media.asp?id=1025>>; Prime Minister’s Office, News Release, “Prime Minister Harper announces nominee for Supreme Court appointment” (February 23 2006), online: <<http://pm.gc.ca/eng/news/2006/02/23/prime-minister-harper-announces-nominee-supreme-court-appointment>>. Minister of Justice Toews (as he then was) was present at the hearing but he did not take questions from the parliamentarians. He explained the process and the basis for the Prime Minister’s selection of Justice Rothstein. I am not enamoured of the nomenclature “parliamentary hearing” to describe the questioning of Justice Rothstein and of successive nominees. The hearing involves parliamentarians but it is not governed in any way by the rules of Parliament, and the term gives the misleading impression that Parliament as an institution has some role in the process. The process is accurately described as “*ad hoc*” and, given the function that the hearings have served to date, the participants needed not be parliamentarians. Indeed, for reasons described in Part IV, the composition of the *ad hoc* committees has been problematic because of the overlap in membership between the selection/advisory committees and the *ad hoc* committees. The “parliamentary hearings” have been more akin to a television interview than to a parliamentary hearing.

<sup>48</sup> Prime Minister’s Office, News Release, “Prime Minister announces appointment of Mr. Justice Marshall Rothstein to the Supreme Court” (March 1, 2006), online: <<http://pm.gc.ca/eng/media.asp?id=1041>>; Donald R Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008), at 18 [hereinafter “Songer”].



Hogg supervised the proceedings, providing introductory comments “on the limits of judicial speech”, in order to guide the committee “as to the kinds of questions that could or could not be answered by the nominee”.<sup>49</sup> The members of the committee were free to ask Justice Rothstein any questions, but as per Professor Hogg’s admonitions, they were aware that Justice Rothstein had the prerogative to decline to answer questions involving issues that could be put before him on the Supreme Court.

The three-hour hearing was televised live and was widely considered a tame affair, in part due to Justice Rothstein’s amiable personality and self-deprecating style.<sup>50</sup> The committee did not vote on the appointment and did not produce a report, although Minister of Justice Vic Toews did invite the MPs to share their views with the Prime Minister, who reportedly watched the proceedings on television. The Prime Minister confirmed Justice Rothstein’s appointment two days after the hearing.<sup>51</sup>

Two years elapsed before the Harper government would have another chance to fill a vacancy on the high court. In the interim, it did not make any formal policies or issue any plans on how it would approach the appointment process. This became apparent after April 9, 2008, when Justice Michel Bastarache announced that he would be stepping down from the Supreme Court, effective June 30, 2008.<sup>52</sup> More than six weeks later, the Minister of Justice announced the following process to replace Justice Bastarache. First, the Minister of Justice and Attorney General would consult with the Attorneys General of the four Atlantic provinces as well as leading members of the legal

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<sup>49</sup> Peter W. Hogg, “Appointment of Justice Marshall Rothstein to the Supreme Court of Canada” (2006) 44 Osgoode Hall L.J. 527, at 528, 531 [hereinafter “Hogg, ‘Appointment of Justice Marshall Rothstein’”]. A copy of Hogg’s opening remarks to the Committee is appended to his 2006 article. See also House of Commons, Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada, News Release (Transcript), (February 27 2006), online: <[http://www.collectionscanada.gc.ca/webarchives/20071125225650/http://www.justice.gc.ca/en/news/sp/2006/doc\\_31772\\_1.html](http://www.collectionscanada.gc.ca/webarchives/20071125225650/http://www.justice.gc.ca/en/news/sp/2006/doc_31772_1.html)>.

<sup>50</sup> For critical comments on the Justice Rothstein hearing, see Mathen, “Choices and Controversy”, *supra*, note 14, and Michael Plaxton, “The Neutrality Thesis and the Rothstein Hearing” (2008) 58 U.N.B.L.J. 92 [hereinafter “Plaxton, ‘The Neutrality Thesis’”].

<sup>51</sup> Prime Minister’s Office, News Release, “Prime Minister announces appointment of Mr. Justice Marshall Rothstein to the Supreme Court” (March 1, 2006), online: <<http://pm.gc.ca/eng/media.asp?id=1041>>; Songer, *supra*, note 48, at 18.

<sup>52</sup> Supreme Court of Canada, News Release (April 9, 2008), online: <<http://scc-csc.lexum.com/scc-csc/news/en/item/2798/index.do>>.

community. Members of the public were invited to submit their input through a Department of Justice website. Based on this process, the Minister would prepare a list of an unspecified number of qualified candidates which would be reviewed by a selection panel composed of five MPs — including two Members from the government caucus and one member from each of the recognized Opposition caucuses, as selected by their respective leaders. This body — known for the first time as “the Supreme Court Selection Panel” — was tasked with the responsibility for assessing the candidates and providing an unranked short list of three qualified candidates to the Prime Minister of Canada and the Minister of Justice for their consideration. Finally, the nominee was to appear at a public hearing of an *ad hoc* parliamentary committee, as did Justice Rothstein.<sup>53</sup>

The Minister of Justice completed his consultations and submitted his list of qualified candidates to the Supreme Court Selection Panel. That body was beset by partisan bickering and on September 5, 2008, the Prime Minister bypassed the panel and announced Justice Cromwell as the nominee for appointment. The Prime Minister stated that an appointment would not be made until Justice Cromwell appeared at a public hearing of an *ad hoc* parliamentary committee.<sup>54</sup> Two days later, the Prime Minister asked the Governor General to dissolve Parliament, triggering an election October 14, 2008. Soon after Parliament reconvened in November, Canada was beset by a parliamentary crisis and on December 4, 2008, the Governor General prorogued Parliament at the Prime Minister’s request.<sup>55</sup> Prime Minister Harper dispensed with the parliamentary hearing and on December 22, 2008, he formally appointed Justice Cromwell to the Supreme Court.<sup>56</sup> Given fractious and fragile parliamentary relations and the wide support for Justice Cromwell, there

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<sup>53</sup> Department of Justice of Canada, News Release, “Minister of Justice Announces Selection Process for the Supreme Court of Canada” (May 28, 2008), online: <<http://www.marketwired.com/press-release/minister-of-justice-announces-selection-process-for-the-supreme-court-of-canada-862003.htm>>.

<sup>54</sup> Prime Minister of Canada, Press Release, “PM Announces Nominee for Supreme Court Appointment” (September 5, 2008), online: <<http://pm.gc.ca/eng/news/2008/09/05/pm-announces-nominee-supreme-court-appointment>>.

<sup>55</sup> See generally Peter H. Russell & Lorne M. Sossin, eds., *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009).

<sup>56</sup> Government of Canada, News Release, “Prime Minister Harper announces appointment of Thomas Cromwell to Supreme Court of Canada” (December 22, 2008).

was minimal criticism of the Prime Minister's dispensing with the process for parliamentary consultation and hearing.<sup>57</sup>

On May 13, 2011, a newly re-elected Conservative government was suddenly faced with two vacancies. Justices Ian Binnie and Louise Charron jointly announced their retirement on what would otherwise have been a sleepy post-election Friday afternoon.<sup>58</sup> The Prime Minister instituted the following process. First, the Minister of Justice and Attorney General would consult with the Attorney General of Ontario as well as leading members of the legal community in order to identify a pool of qualified candidates for appointment to the Supreme Court. Members of the public were invited to submit their input regarding candidates through a Department of Justice website. Based on this process, the Minister of Justice would create a list of unspecified numbers of qualified candidates. Second, this "long list" of qualified candidates would be reviewed by a selection panel composed of five MPs: three government MPs and one from each of the opposition parties, the NDP and the Liberals, as selected by the leaders of those parties. The Supreme Court Selection Panel was tasked with assessing the candidates and providing an unranked short list of six qualified candidates to the Prime Minister and the Minister of Justice for their consideration. Third, while it was unstated, it was implied that the Prime Minister and Minister of Justice would only make a selection of a "nominee" from this shortlist. Fourth, the selected "nominees" would appear at a public hearing of *ad hoc* parliamentary committee to answer questions from MPs as Justice Rothstein had done in 2006.<sup>59</sup>

This process was followed in 2011 for the appointments of Justices Moldaver and Karakatsanis,<sup>60</sup> in 2012 for the appointment of Justice

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<sup>57</sup> See, e.g., Janice Tibbetts, "Justice can no longer be delayed" *Edmonton Journal* (December 23, 2008) A7; Kirk Makin, "Top-court appointment process bypasses review process" *The Globe and Mail* (December 23, 2008) A4; Editorial, "Hurry, without hearing" *The Globe and Mail* (December 23, 2008) A14; Editorial, "Harper abandons zeal for reform" *The Toronto Star* (December 26, 2008) A57; David Asper, "Picking the lesser evil" *National Post* (December 27, 2008) A25.

<sup>58</sup> See Supreme Court of Canada, "News Release" (May 13, 2011), online: <<http://scc-csc.lexum.com/scc-csc/news/en/item/3701/index.do>>; Prime Minister of Canada, "Statement by the Prime Minister of Canada on the Upcoming Retirement of Two Supreme Court Judges" (May 13, 2011), online: <<http://pm.gc.ca/eng/news/2011/05/13/statement-prime-minister-canada-upcoming-retirement-two-supreme-court-judges>> [hereinafter "Prime Minister of Canada, 'Upcoming Retirement'"]. The announcement was surprising because Justice Binnie did not have to retire until 2014 and Justice Charron until 2026.

<sup>59</sup> Prime Minister of Canada, "Upcoming Retirement", *id.*

<sup>60</sup> *Id.*

Wagner<sup>61</sup> and in 2013 for the appointment of Justice Nadon.<sup>62</sup> The Office of Federal Judicial Affairs — the body that oversees and administers federal judicial appointments — administers the appointment process, at least respecting the Selection Panel.<sup>63</sup> It is not clear what role the Office of Federal Judicial Affairs plays in compiling the long list. In each of those appointments, the hearing took place two days after the Prime Minister’s announcement of the nominee. In 2011, Professor Peter Hogg reprised the role of counsel to the parliamentary committee that he had performed in 2006 at the Rothstein hearing. In both 2012 and 2013, former Quebec Court of Appeal Justice Jean-Louis Baudouin exercised this function. The day after each of these hearings, the Prime Minister formally appointed his nominee to the Supreme Court.<sup>64</sup>

Thus, as seen in Table 1, between 2004 and 2013, various appointment processes were used. However, since 2011, the Government seems to have settled on a process involving a “Supreme Court Selection Panel” consisting of five MPs and an *ad hoc* committee of MPs which questions the “nominee” at a public hearing.

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<sup>61</sup> Prime Minister of Canada, “Statement by the Prime Minister of Canada on the Retirement of Justice Marie Deschamps” (May 18, 2012), online: <<http://pm.gc.ca/eng/news/2012/05/18/statement-prime-minister-canada-retirement-justice-marie-deschamps>> [hereinafter “Prime Minister of Canada, ‘Justice Marie Deschamps’”].

<sup>62</sup> Prime Minister of Canada, “Statement by the Prime Minister of Canada on the Retirement of Justice Morris Fish” (April 23, 2013), online: <<http://www.pm.gc.ca/eng/news/2013/04/23/statement-prime-minister-canada-retirement-justice-morris-fish>> [hereinafter “Prime Minister of Canada, ‘Justice Morris Fish’”].

<sup>63</sup> According to the Federal Judicial Affairs website, “The Minister of Justice has given FJA the mandate to administer the Supreme Court of Canada Appointments Selection Panel process, established to evaluate candidates for appointment to the Supreme Court of Canada.” Office of the Commissioner of Federal Judicial Affairs, “Our Role”, online: <<http://www.fja-cmf.gc.ca/fja-cmf/role-eng.html>>.

<sup>64</sup> Strictly speaking, Supreme Court judges are appointed by the Governor in Council. See *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 4(2). The Governor in Council is the Governor General acting on the advice of the Queen’s Privy Council for Canada, *i.e.*, the federal cabinet. See *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 13 (reprinted in R.S.C. 1985, App. II, No. 5). See generally Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp. (Toronto: Carswell, 2007), at § 9.4(b) [hereinafter “Hogg, *Constitutional Law of Canada*”]. The Prime Minister advises the Governor General on behalf of the Queen’s Privy Council for Canada. It has become clear that the choice of all Supreme Court judges is the personal prerogative of the Prime Minister. See A. Anne McLellan, “Foreword” (2000) 38 Alta. L. Rev. 603, at 604 [hereinafter “McLellan, ‘Foreword’”]; Cotler, “The Supreme Court Appointment Process”, *supra*, note 2; and Tonda MacCharles, “Supreme Court pick defends qualifications: Justice Marc Nadon concedes he doesn’t meet any diversity expectations for upper chamber” *The Toronto Star* (October 3, 2013) A28 (stating that Justice Minister Peter MacKay noted that the selection of Supreme Court justices was the decision of the Prime Minister) [hereinafter “MacCharles, ‘Supreme Court pick defends qualifications’”].

**Table 1: Modes of Appointment of Supreme Court Judges  
2004–2013**

Judge (Year)	Advisory Committee	Public Hearing	Others
Abella and Charron (2004)	No	Yes. Minister of Justice appeared before <i>ad hoc</i> committee.	
Rothstein (2006)	Yes. 4 MPs, 1 provincial rep, 1 retired judge, 1 Law Society rep, 2 public	Yes. Nominee appeared before <i>ad hoc</i> committee of parliamentarians and judicial and law society representatives.	
Cromwell (2008)	No	No	Prime Minister had intended to proceed with both advisory committee and public hearing
Karakatsanis and Moldaver (2011)	Yes. 5 MPs (3 Conservative, 1 NDP, 1 Liberal)	Yes. Nominees appeared before <i>ad hoc</i> committee of MPs.	
Wagner (2012)	Yes. 5 MPs (3 Conservative, 1 NDP, 1 Liberal)	Yes. Nominee appeared before <i>ad hoc</i> committee of MPs.	
Nadon (2013)	Yes. 5 MPs (3 Conservative, 1 NDP, 1 Liberal)	Yes. Nominee appeared before <i>ad hoc</i> committee of MPs.	

### III. DEMOCRATIC AUDIT AND DRIVERS OF CHANGE

#### 1. The Concept of a Democratic Audit

The concept of a democratic audit of Canadian political institutions was conceived by a group of political scientists in the first decade of the 21st century in response to two apparently contradictory phenomena: the increasing identification of a “democratic deficit” among political leaders, government commissions, academics, citizen groups and the media,

and the continued veneration of Canadian democracy around the world.<sup>65</sup> Led by Professor William Cross, Bell Chair for the Study of Canadian Parliamentary Democracy at Carleton University, the Canadian Democratic Audit series audited Canadian federalism,<sup>66</sup> legislatures,<sup>67</sup> cabinets and first ministers,<sup>68</sup> citizens,<sup>69</sup> elections,<sup>70</sup> political parties,<sup>71</sup> advocacy groups,<sup>72</sup> communications technology,<sup>73</sup> and the courts.<sup>74</sup>

The participants in the Canadian Democratic Audit selected participation, inclusiveness and responsiveness as the audit benchmarks to evaluate the particular feature of Canadian democracy.<sup>75</sup> They chose these benchmarks based on normative considerations of the meaning of democracy that they believed were relevant to Canada in the 21st century. In defending their choice of the above three benchmarks, they explained: “We believe that any contemporary definition of Canadian democracy must include institutions and decision-making practices that are defined by public participation, that this participation must include all Canadians, and that government outcomes must respond to the views of Canadians.”<sup>76</sup>

While these benchmarks are instructive, I do not adopt them for purposes of my “audit” of changes to the Supreme Court appointment process over the past decade. Rather, I am inspired by the idea and the methodology of the democratic audit. Instead, I have selected the following three benchmarks: (1) transparency; (2) accountability; and (3) the promotion of public knowledge about the work of the Supreme Court of Canada and its judges.

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<sup>65</sup> See William Cross, “Foreword” in Ian Greene, *The Courts* (Vancouver: UBC Press, 2006) vii, at vii [hereinafter “Greene, *The Courts*”]. This Foreword is contained in each of the nine substantive volumes of The Canadian Democratic Audit Series identified in notes 66-74, *infra*. See generally William Cross, “Constructing the Canadian Democratic Audit” in William Cross, ed., *Auditing Canadian Democracy* (Vancouver: UBC Press, 2010) 1 at 1-11.

<sup>66</sup> Jennifer Smith, *Federalism* (Vancouver: UBC Press, 2004).

<sup>67</sup> David Docherty, *Legislatures* (Vancouver: UBC Press, 2005).

<sup>68</sup> Graham White, *Cabinets and First Ministers* (Vancouver: UBC Press, 2005).

<sup>69</sup> Elizabeth Gidengil *et al.*, *Citizens* (Vancouver: UBC Press, 2004).

<sup>70</sup> John Courtney, *Elections* (Vancouver: UBC Press, 2004).

<sup>71</sup> William Cross, *Political Parties* (Vancouver: UBC Press, 2004).

<sup>72</sup> Lisa Young & Joanna Everitt, *Advocacy Groups* (Vancouver: UBC Press, 2004).

<sup>73</sup> Darin Barney, *Communication Technology* (Vancouver: UBC Press, 2005).

<sup>74</sup> See Ian Greene, *The Courts* (Vancouver: UBC Press, 2006).

<sup>75</sup> William Cross, “Constructing the Canadian Democratic Audit” in William Cross, ed., *Auditing Canadian Democracy* (Vancouver: UBC Press, 2010) 1, at 1.

<sup>76</sup> William Cross, “Foreword” in Ian Greene, *The Courts*, *supra*, note 65, at vii. This Foreword is contained in each of the nine substantive volumes of The Canadian Democratic Audit Series identified in notes 66-74, *supra*.

I have selected transparency and accountability because these values were and continue to be the dominant factors, concerns about which precipitated changes to the appointment process and that continue to be used to justify those changes, as expressed in the statement by Prime Minister Harper in the quote at the beginning of this paper.<sup>77</sup> For example, in announcing the members of the Selection Panel to advise on the appointment to fill the vacancy created by Justice Fish's retirement in 2013, the Justice Canada News Release stated: "The Selection Panel plays a critical role in ensuring transparency and balance in the Supreme Court appointment process."<sup>78</sup> The exact same language was used in 2012 upon the retirement of Justice Deschamps,<sup>79</sup> and in 2011 upon the retirement of Justices Binnie and Charron.<sup>80</sup> I am not alone in asserting that the reforms were intended to increase transparency and accountability.<sup>81</sup>

As discussed in Part III.4, promoting public knowledge about the work of the Supreme Court of Canada and its judges was not a causal factor in precipitating the changes ushered in by the Martin government and continued by the Harper government. However, since 2004, it has been invoked as an explanatory factor for the changes. Thus, when Peter Hogg opened the proceedings for MPs to interview Justice Rothstein in February 2006, he stated that the purpose of the new process was "to make appointments to the Court more open, and to promote public

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<sup>77</sup> News Release, "Prime Minister announces appointment of Mr. Justice Marshall Rothstein to the Supreme Court" (March 1, 2006), online: <<http://pm.gc.ca/eng/news/2006/03/01/prime-minister-announces-appointment-mr-justice-marshall-rothstein-supreme-court>> [hereinafter "Appointment of Mr. Justice Marshall Rothstein"]: "The way in which Justice Rothstein was appointed marks an historic change in how we appoint judges in this country. It brought unprecedented openness and accountability to the process. The hearings allowed Canadians to get to know Justice Rothstein through their members of Parliament in a way that was not previously possible."

<sup>78</sup> Justice Canada, News Release: "Minister of Justice Announces Members of the Supreme Court of Canada Selection Panel" (June 11 2013), online: <[http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc\\_32908.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc_32908.html)>.

<sup>79</sup> Justice Canada, News Release, "Minister of Justice Announces Members of the Supreme Court of Canada Selection Panel" (August 8, 2012), online: <[http://www.justice.gc.ca/eng/news-nouv/nr-cp/2012/doc\\_32776.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2012/doc_32776.html)>.

<sup>80</sup> Justice Canada, News Release, "Minister of Justice Announces Members of the Supreme Court of Canada Selection Panel" (August 5, 2011), online: <[http://www.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc\\_32624.html](http://www.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc_32624.html)>.

<sup>81</sup> See Plaxton, "The Neutrality Thesis", *supra*, note 50, at 97 (asserting that the new appointments process was supposed to generate greater transparency and accountability); Lorne Sossin, "Judicial Appointment, Democratic Aspirations, and the Culture of Accountability" (2008) 58 U.N.B.L.J. 11, at 33 (stating that the hearing process created by Prime Minister Harper in 2006 ensures that there is a forum for political accountability to play a role in the appointments process) [hereinafter "Sossin, 'Judicial Appointment'"].

knowledge of the judges of the Court”.<sup>82</sup> And when after those hearings, the Prime Minister formally announced the appointment of Justice Rothstein to the Court, the Prime Minister stated that “[t]he hearings allowed Canadians to get to know Justice Rothstein through their members of Parliament in a way that was not previously possible”.<sup>83</sup> Similar statements were repeated in the appointments of 2011, 2012 and 2013.<sup>84</sup>

Other benchmarks could have been chosen for this audit, such as representativeness,<sup>85</sup> bilingualism,<sup>86</sup> provincial participation,<sup>87</sup> parliamentary oversight,<sup>88</sup> “merit”,<sup>89</sup> or enhancing the legitimacy of the Supreme

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<sup>82</sup> Peter W. Hogg, “Notes for opening remarks to Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada”, February 27, 2006, reproduced in Appendix to Peter W. Hogg, “Appointment of Justice Marshall Rothstein”, *supra*, note 49, at 537-38.

<sup>83</sup> “Appointment of Mr. Justice Marshall Rothstein”, *supra*, note 77.

<sup>84</sup> See Moldaver & Karakatsanis Transcript (2011) [hereinafter “Moldaver & Karakatsanis Transcript”]; Wagner Transcript (2012) [hereinafter “Wagner Transcript”]; and Nadon Transcript (2013) [hereinafter “Nadon Transcript”].

<sup>85</sup> Cf. Lorne Sossin, “Should Canada Have a Representative Supreme Court?” [hereinafter “Sossin, ‘Representative Supreme Court’”] in Verrelli, *supra*, note 20, 27; Sossin, “Judicial Appointment”, *supra*, note 81; Indigenous Bar Association, “Respecting Legal Pluralism in Canada: Indigenous Bar Association Appeals to Harper Government to Appoint an Aboriginal Justice to the Supreme Court of Canada” in Verrelli, *supra*, note 20, 65; Indigenous Bar Association, “Indigenous Bar Association Urges Prime Minister Harper to Remove Barriers to Judicial Appointments for Indigenous Judges” in Verrelli, *id.*, 67; Sonia Lawrence, “Reflections on Judicial Diversity and Judicial Independence” in Adam Dodek & Lorne Sossin, eds., *Judicial Independence in Context* (Toronto: Irwin Law, 2010); K.D. Ewing, “A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary” (2000) 38 *Alta. L. Rev.* 708; Richard Devlin, A. Wayne Mackay & Natasha Kim, “Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a ‘Triple P’ Judiciary” (2000) 38 *Alta. L. Rev.* 734 [hereinafter “Devlin, Mackay & Kim”]; Ian Peach, “Legitimacy on Trial: A Process for Appointing Justices to the Supreme Court of Canada”, Saskatchewan Institute of Public Policy, Public Policy Paper 30 (February 2005) 9 [hereinafter “Peach”]; Isabel Grant & Lynn Smith, “Gender Representation in the Canadian Judiciary” in Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice* (Toronto: Ontario Law Reform Commission, 1991) 57.

<sup>86</sup> Cf. Sébastien Grammond & Mark Power, “Should Supreme Court Judges be Required to be Bilingual?” in Verrelli, *supra*, note 20, 49; Sossin, “Representative Supreme Court”, *id.*, at 43-44; Parliament of Canada, *Bilingualism of Supreme Court Judges* (Ottawa: Library of Parliament, 2011); Philip Slayton, *Mighty Judgment: How the Supreme Court of Canada Runs Your Life* (Toronto: Allen Lane, 2011), at 250-52 [hereinafter “Slayton”].

<sup>87</sup> Cf. Erin Crandall, “Intergovernmental Relations and the Supreme Court of Canada: The Changing Place of the Provinces in Judicial Selection Reform” [hereinafter “Crandall”] in Verrelli, *supra*, note 20, 71; F.C. DeCoste, “The Jurisprudence of ‘Canada’s Fundamental Values’ and Appointment to the Supreme Court of Canada” in Verrelli, *supra*, note 20, 87 [hereinafter “DeCoste, ‘The Jurisprudence’”]; and Eugénie Brouillet & Yves Tanguay, “The Legitimacy of Constitutional Arbitration in a Multinational Federative System: The Case of the Supreme Court of Canada” in Verrelli, *supra*, note 20, 126.

<sup>88</sup> See Irwin Cotler, P.C., M.P. & Charlie Feldman, “Supreme Court Appointments: When and How Should Parliament Exercise Oversight?” (March 2014) 8 *J.P.P.L.* 253.

<sup>89</sup> Cf. Janice Tibbetts, “Judge wants merit to be criteria for supreme job” *The Edmonton Journal* (March 4, 1999) A10; R. Foot, “Retired high court judge opposes calls for reform” *National Post* (October 28, 1999); Peach, *supra*, note 85; Hutchinson, *supra*, note 20.



Court.<sup>90</sup> Others have argued strenuously that the entire appointment process should be overhauled to make it more independent of government and provide checks and balances in the appointment process.<sup>91</sup> However, these are all normative claims regarding what the appointment process should be about. My goal in this paper is to assess the reforms based on what those who control and shape the process have claimed they are about. As set out below, the clear intention of the reforms was to enhance transparency and accountability in the appointment process and, secondarily, to increase understanding of Supreme Court justices and their work.

## 2. Federalism and the Era of Mega-Constitutional Politics, 1875–1992

When Parliament created the Supreme Court in 1875, it vested the power of appointment of Supreme Court justices with the federal Cabinet.<sup>92</sup> This decision was consistent with the prevailing political values of the time and the desire of the Fathers of Confederation to centralize power in a strong central government.

The Supreme Court was a controversial institution from the moment of its creation. It was the subject of much criticism which even involved appeals for its abolition.<sup>93</sup> The quality of appointments frequently came under attack, especially for patronage.<sup>94</sup> With abolition of appeals to the

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<sup>90</sup> Cf. Peach, *id.*

<sup>91</sup> Peter Russell and Jacob Ziegel have been the most notable proponents of this view. See *e.g.*, Peter H. Russell, “Conclusion” in Kate Malleson & Peter H. Russell, eds., *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University of Toronto Press) 420; Jacob S. Ziegel, “A New Era in the Selection of Supreme Court Judges?” (2006) 44 *Osgoode Hall L.J.* 547; Jacob S. Ziegel, “Appointments to the Supreme Court of Canada” (1994) 5 *Const. Forum* 10; and Ziegel, “Merit Selection”, *supra*, note 28. See also F.L. Morton, “Judicial Appointments in Post-Charter Canada: A System in Transition” in Kate Malleson & Peter H. Russell, eds., *id.*, 56.

<sup>92</sup> Strictly speaking, Supreme Court judges are appointed by the Governor in Council. See *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 4(2). The Governor in Council is the Governor General acting on the advice of the Queen’s Privy Council for Canada, *i.e.*, the federal Cabinet. See *Constitution Act, 1867*, s. 13. See generally Peter W. Hogg, *Constitutional Law of Canada*, *supra*, note 64, at § 9.4(b). The Prime Minister advises the Governor General on behalf of the Queen’s Privy Council for Canada. It has become clear that the choice of all Supreme Court judges is the personal prerogative of the Prime Minister. See *supra*, note 64.

<sup>93</sup> See James G. Snell & Frederick Vaughn, *The Supreme Court of Canada: History of the Institution* (Toronto: Osgoode Society for Canadian Legal History, 1985) 28 [hereinafter “Snell & Vaughn”].

<sup>94</sup> Snell & Vaughn, *id.*, at 82-85, 119; Ian Bushnell, *The Captive Court* (Montreal & Kingston: McGill-Queen’s University Press, 1992) at 115.

Judicial Committee of the Privy Council in 1949, the Supreme Court became truly supreme and calls to reform the appointment process by giving the provinces or the Senate some role began.<sup>95</sup> However, formal proposals to reform the appointments process began in earnest during the era of Canadian mega-constitutional politics which coincides with the ascension of Pierre Trudeau as Prime Minister in 1968.

In 1968, Prime Minister Pearson published a policy statement entitled *Federalism for the Future*.<sup>96</sup> It identified the Supreme Court as one of the central institutions of Canadian federalism and stated a willingness to discuss questions relating to the “composition, jurisdiction and procedures” of the Supreme Court at future constitutional meetings as part of any review of the Canadian Constitution.<sup>97</sup> Later that year, Pierre Trudeau became Prime Minister and issued his own policy statement, which became a blueprint for his inaugural first ministers’ conference in 1969.<sup>98</sup> Trudeau’s policy statement squarely identified “the manner of selection of the members of the Court” as an item for reform and constitutional entrenchment. According to Trudeau, “[j]udges should not be regarded as representatives of several different governments which could conceivably be allowed to appoint them.” Thus, Trudeau proposed that there be “some form of participation” by the provinces in the appointment process. Moreover, Trudeau suggested that nominations for potential appointees could be submitted to a reformed Senate for approval.<sup>99</sup>

The entrenchment of the Supreme Court in the Constitution and provincial participation in the selection of its judges thus became part of constitutional discussions and proposals from 1969 until 1992: provisions were included in the *Victoria Charter* (1971),<sup>100</sup> Bill C-60

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<sup>95</sup> Snell & Vaughn, *id.*, at 194, 204; Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa: Queen’s Printer, 1969), at 44-45.

<sup>96</sup> The Rt. Honourable Lester B. Pearson, Prime Minister of Canada, *Federalism for the Future: A Statement of Policy by the Government of Canada* (1968), reproduced in Anne F. Bayefsky, *Canada’s Constitutional Act 1982 & Amendments: A Documentary History*, vol. 1 (Toronto: McGraw-Hill Ryerson Limited, 1989) 61 [hereinafter “Bayefsky”].

<sup>97</sup> *Id.*, at 68.

<sup>98</sup> See The Right Honourable Pierre Elliott Trudeau, Prime Minister of Canada, *The Constitution and the People of Canada: An Approach to the Objectives of Confederation, the Rights of People and the Institutions of Government* (1968), reproduced in Bayefsky, *supra*, note 96, at 78.

<sup>99</sup> *Id.*, at 88-89.

<sup>100</sup> *Canadian Constitutional Charter, 1971 (The Victoria Charter)* articles 22-42, reproduced in Bayefsky, *supra*, note 96, at 215-17.

(1978),<sup>101</sup> the report of the Pepin-Robarts Commission (1979),<sup>102</sup> as well as on the agenda during most of the constitutional conferences in the 1970s.<sup>103</sup> However, during the intense constitutional negotiations of 1980-1981, the Supreme Court fell off the constitutional agenda,<sup>104</sup> except respecting the amending formula. Thus, when the Constitution was patriated and the *Constitution Act, 1982* enacted, the only mention of the Supreme Court was contained in Part V of that Act under the amending formula.<sup>105</sup>

Entrenching the Supreme Court and reforming the appointment process re-emerged on the constitutional agenda in the Meech Lake Accord (1987)<sup>106</sup> and in the Charlottetown Accord (1992).<sup>107</sup> In both cases, the proposals would have empowered the relevant provinces to submit names of nominees to the Prime Minister. The proposed reforms during this era were confined to giving the provinces a larger and formal role in the appointment process. Federalism concerns soon fell off the reform agenda for the Supreme Court as new concerns began to dominate the political discourse.<sup>108</sup>

### 3. The Democratic Deficit and Democratic Reform, 1993–2004

With the defeat of the Charlottetown Accord in the October 1992 referendum, the era of mega-constitutional politics ended. In the 1993 election that brought Jean Chrétien and the Liberals to power, the Reform Party took Ottawa by storm. Although it fell two seats short of forming

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<sup>101</sup> Bill C-60, *The Constitutional Amendment Bill*, 30th Parl., 3rd Sess. (June 20, 1978), ss. 100-115, reproduced in Bayefsky, *id.*, at 387-93.

<sup>102</sup> Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Hull, QC: Minister of Supply and Services, 1979).

<sup>103</sup> See Bayefsky, *supra*, note 96, at 309-40, 437-529, 537-85.

<sup>104</sup> Tom Kent blames Trudeau for not wanting to cede any control over the appointment process. See Tom Kent, "Supreme Court Appointments: By Parliament, Not PM, and Shorter" in Verrelli, *supra*, note 20, 93, at 96 [hereinafter "Kent"]: "Trudeau's determined dedication to the Charter was joined with scant regard for most of politics and its practitioners. Willing as he was to upset many appalcarts, the existing concentration of authority in the prime minister was to him the natural order of things. Amid the constitution-making turmoil of 1981 there were no voices strong enough to say him nay."

<sup>105</sup> See *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 41(d), 42(d) (as discussed in *Supreme Court Reference*, *supra*, note 3).

<sup>106</sup> Peter W. Hogg, *Meech Lake Constitutional Accord Annotated* (Toronto: Carswell, 1988).

<sup>107</sup> Consensus Report on the Constitution in Kenneth McRoberts & Patrick Monahan, eds., *The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto: University of Toronto Press, 1993).

<sup>108</sup> Some scholars have continued to raise them. See F.C. DeCoste, "The Jurisprudence", *supra*, note 87; others *supra*, note 86.

the Official Opposition party, the Reform Party with its 52 seats made a huge impact on national politics over the course of the next decade in many areas of public policy. In the area of fiscal policy, it helped galvanize support against budget deficits. In the area that might be considered “democratic policy”, Preston Manning’s Reform Party promoted populist initiatives like Senate Reform, free votes in the House of Commons, judicial elections and referendums, all aimed at the devolution of power from the Prime Minister. The Reform Party hammered away at the democratic reform agenda and succeeded in placing it on the national political agenda.

The Reform Party squarely raised Supreme Court selection as part of its democratic reform political agenda.<sup>109</sup> Throughout the 1990s, Reform Party platforms consistently took aim at judicial appointments. Reform platform “Blue Books” called generally for “more stringent and more public ratification procedures for Supreme Court justices in light of the powers our legislators are handing to the courts”.<sup>110</sup> In 1991, Reform added a call for the (reformed) Senate to ratify Supreme Court appointments.<sup>111</sup> In 1996-1997, Reform called for a more “democratic and accountable” system for all judicial appointments.<sup>112</sup> Reform advocated a role for the provinces in the appointment process<sup>113</sup> and term limits for Supreme Court justices.<sup>114</sup>

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<sup>109</sup> On the critical role of the Reform party in this respect, see Crandall, *supra*, note 87, at 77-78. For criticisms of the Prime Minister’s power of appointment over Supreme Court justices during this period see Jacob S. Ziegel, “Merit Selection”, *supra*, note 28; Peter McCormick, “Could We, Should We, Reform the Senate and the Supreme Court?” (January-February 2000) Policy Options 7; Ted Morton, “Reforming the Canadian Judiciary”, Remarks prepared for the Calgary Congress, Citizens Centre for Freedom of Democracy, September 30, 2006 (on file with the author).

<sup>110</sup> Reform Party of Canada, *Principles & Policies 1990* (Calgary: Reform, 1990), at 7, online: <<http://contentdm.ucalgary.ca/cdm4/document.php?CISOROOT=/reform&CISOPTR=2230&REC=19>>. This language is repeated verbatim in: Reform Party of Canada, *Principles & Policies The Blue Book 1995* (Calgary: Reform, 1995), at 38, online: <<http://contentdm.ucalgary.ca/cdm4/document.php?CISOROOT=/reform&CISOPTR=2156&REC=2>> [hereinafter “*Blue Book 1995*”].

<sup>111</sup> Reform Party of Canada, *Principles & Policies 1991* (Calgary: Reform, 1991), at 7, online: <<http://contentdm.ucalgary.ca/cdm4/document.php?CISOROOT=/reform&CISOPTR=2212&REC=20>>. See also *Blue Book 1995, id.*, at 38.

<sup>112</sup> Reform Party of Canada, *Blue Book 1996-1997 Principles & Policies of the Reform Party of Canada* (Calgary: Reform, 1996), at 28 <<http://digitalcollections.ucalgary.ca/cdm4/document.php?CISOROOT=/reform&CISOPTR=2128&REC=7>> [hereinafter “*Blue Book 1996-1997*”].

<sup>113</sup> *Id.* This is also stated in Reform Party of Canada, *Blue Book Principles & Policies of the Reform Party of Canada 1999* (Calgary: Reform, 1999), at 13 <<http://contentdm.ucalgary.ca/cdm4/document.php?CISOROOT=/reform&CISOPTR=2258&REC=18>> [hereinafter “*Blue Book 1999*”].

<sup>114</sup> *Blue Book 1996-1997, id.*, at 28; *Blue Book 1999, id.*, at 13. The Canadian Constitutional Foundation (“CCF”) continues to advocate for term limits for Supreme Court justices. See online:

Democratic reform became a leading political issue in the first years of the 21st century.<sup>115</sup> The democratic reform movement was supported by academic and popular writings and translated into a vast array of political party initiatives, some of which became government policy. In *The Friendly Dictatorship*,<sup>116</sup> *Globe and Mail* columnist Jeffrey Simpson captured the spirit of the Chrétien age in what has become the defining political analysis of that period. University of Moncton Professor Donald Savoie wrote academic volumes that catalogued and critiqued the centralization of power.<sup>117</sup>

The opening years of the 21st century saw the makings of a democratic reform movement. In 2001, Gordon Campbell's Liberal Party swept to power in British Columbia<sup>118</sup> promising various democratic reforms.<sup>119</sup> In New Brunswick, the government created a Commission on Legislative Democracy in December 2003 to examine and make recommendations regarding electoral, legislative and democratic reform.<sup>120</sup> In Prince Edward Island, a 2003 report recommending electoral reform was followed by another commission detailing the proposed reform and a

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<<http://termlimits.ca/>>. For reasons that I hope to describe elsewhere at another time, this is a solution in search of a problem.

<sup>115</sup> I first chronicled the democratic reform movement in Adam M. Dodek, "The Past, Present and Future of Fixed Election Dates in Canada" (2010) 4 J. of Parliamentary and Political L. 215. The following paragraphs largely reproduce material contained in pages 218-223 of that article.

<sup>116</sup> Jeffrey Simpson, *The Friendly Dictatorship* (Toronto: McClelland & Stewart, 2002).

<sup>117</sup> See Donald J. Savoie, *Court Government and the Collapse of Accountability in Canada and the United Kingdom* (Toronto: University of Toronto Press, 2008) [hereinafter "Savoie"] and *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999). For a more recent compelling account of the democratic deficit and the need for reform, see Peter Aucoin, Mark D. Jarvis & Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (Toronto: Emond Montgomery, 2011).

<sup>118</sup> There were two important drivers for Campbell's democratic reform agenda. First, the B.C. Liberals had never held power in modern B.C. politics. Second, in the May 1996 election, the B.C. Liberal Party had lost the provincial election by six seats despite winning the popular vote. Attorney General and Minister Responsible for Constitutional Reform Geoff Plant explained the May 1996 election as a "turning point" for democracy in British Columbia. See Geoff Plant, "The Government's View" in Gordon Gibson, ed., *Fixing Canadian Democracy* (Vancouver: The Fraser Institute, 2003) 169, at 170.

<sup>119</sup> These included fixed election dates, fixed dates for tabling of the budget, a set legislative calendar, holding open cabinet meetings to be televised and broadcast over the Internet, overhauling campaign financing laws, introducing free votes in the legislature and establishing a Citizen's Assembly on electoral reform to be followed by a province-wide referendum on proposed changes to the electoral system. See B.C. Liberal Party, *A New Era for British Columbia* (2001) 30 (on file with author).

<sup>120</sup> See Commission on Legislative Democracy (N.B.), *Final Report and Recommendations* (Fredericton: Commission on Legislative Democracy, 2004), at 4 ("How We Did Our Work") and 181-82 ("Background Appendix: Mission, Mandate, and Terms of Reference").

failed plebiscite in November 2005 rejecting reform.<sup>121</sup> In Quebec, the Estates General on the Reform of Democratic Institutions (the Beland Commission) presented a report to the Minister Responsible for Reform of Democratic Institutions in March 2003.<sup>122</sup>

In Ontario, Dalton McGuinty's opposition Liberals made democratic reform one of five key pillars of their 2003 platform,<sup>123</sup> and after winning the election that year created a Democratic Reform Secretariat and named a Minister Responsible for Democratic Renewal.<sup>124</sup> Ontario's Liberals implemented various democratic reform initiatives, most notably fixed election dates and a Citizen's Assembly on Electoral Reform culminating in a province-wide referendum on voting day in October 2007 under the province's first fixed election date.

By 2003, several leading political scientists commented on the centrality of the democratic deficit in Canadian public policy discourse: "Few would have foreseen five years ago that the very infrastructure of democracy would today be the most active area of public policy deliberation and innovation in this country."<sup>125</sup> This was the political context surrounding Paul Martin's embrace of the democratic reform agenda when he began publicly challenging Jean Chrétien for the Liberal Party leadership.<sup>126</sup> Mr. Martin's advocacy for changing the Supreme Court appointment process must be viewed through this prism.

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<sup>121</sup> See Andre Barnes & James R. Robertson, *Electoral Reform Initiatives in Canadian Provinces* (Ottawa: Library of Parliament, August 18, 2009), at 7-10.

<sup>122</sup> *Id.*

<sup>123</sup> Ontario Liberal Party, *Government That Works for You: The Ontario Liberal Plan for a More Democratic Ontario* (Toronto: Ontario Liberal Party, 2003).

<sup>124</sup> The author served as Senior Policy Adviser to the Hon. Michael Bryant, Attorney General of Ontario and Minister Responsible for Aboriginal Affairs during the time that he was also the Minister Responsible for Democratic Reform (October 2003 to June 2005). In June 2005, the Hon. Marie Boutrogianni became the Minister Responsible for Democratic Reform and the Minister of Intergovernmental Relations for the duration of the Ontario Liberals' first mandate until the first fixed-date election was held in October 2007. After that election, no Minister Responsible for Democratic Reform was appointed and the Democratic Renewal Secretariat ("DRS") was organizationally abandoned. See Government of Ontario, "Browse by Organization", online: <<http://www.infogo.gov.on.ca/infogo/searchDirectory.do?actionType=searchtelephone&infoType=telephone&locale=en>>.

<sup>125</sup> Paul Howe, Richard Johnston & André Blais, "Introduction: The New Landscape of Canadian Democracy" in Paul Howe, Richard Johnston & André Blais, eds., *Strengthening Canadian Democracy* (Montreal: Institute for Research on Public Policy, 2005) 3, at 6.

<sup>126</sup> On the centrality of democratic reform for Paul Martin's policy agenda, see Susan Delacourt, *Juggernaut: Paul Martin's Campaign for Chrétien's Crown* (Toronto: McClelland & Stewart, 2003), at 258-59.

Martin put forward a package of reforms to strengthen the role of Parliament and reduce the power of the Prime Minister's Office ("PMO").<sup>127</sup> These included more free votes for MPs, increased independence for parliamentary committees, creating an independent ethics commissioner and improving the system for private members' bills. Martin proposed that Supreme Court nominations be subject to review by a parliamentary committee.<sup>128</sup> The key event was a speech Martin gave at Osgoode Hall Law School on October 21, 2002, in which he laid out a six-point plan for democratic reform in order to reduce the "democratic deficit".<sup>129</sup> The entire thrust of Martin's plan was to reduce or "check" the power of the executive and strengthen Parliament. Martin promised to change the culture of Ottawa away from "Who do you know in the PMO?"<sup>130</sup>

On the day that Paul Martin became Prime Minister in December 2003, he announced that his government would "change the way things work in Ottawa in order to re-engage Canadians in the political process" and that his government would "introduce a number of reforms to the way House of Commons affairs are conducted in order to provide Canadians with more responsive government".<sup>131</sup> The purpose of such reforms was to "restore Canadians' trust that their government is listening to them. This is best done by confirming Parliament as the centre of national debate and renewing the capacity of Parliamentarians — from all parties — to shape policy."<sup>132</sup> In a separate press release on democratic reform, the Prime Minister announced

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<sup>127</sup> John Gray, *Paul Martin: The Power of Ambition* (Toronto: Key Porter Books, 2003), at 228; Susan Delacourt, *Juggernaut: Paul Martin's Campaign for Chrétien's Crown* (Toronto: McClelland & Stewart, 2003), at 258-59, 297; and Brooke Jeffrey, *Divided Loyalties: The Liberal Party of Canada, 1984-2008* (Toronto: University of Toronto Press, 2010), at 410-12.

<sup>128</sup> Paul Martin, Speech at Osgoode Hall Law School (October 21, 2002) [hereinafter "Paul Martin, Speech"]. See Campbell Clark, "Martin's plan gives back bench more clout; His proposal to transform Parliament would bolster MPs and cut PMO's power" *The Globe and Mail* (October 22, 2002), A1 [hereinafter "Clark"].

<sup>129</sup> While Martin used the term "democratic deficit" in 2002 to describe the weakened role of Parliament and parliamentarians in Canadian politics, two years earlier three scholars at Dalhousie Law School (now Schulich School of Law at Dalhousie University) described the judicial appointment process as a "democratic deficit". See Devlin, Mackay & Kim, *supra*, note 85. The authors also credit Dr. Alexandra Dobrowolsky of St. Mary's University for suggesting the title to them. For Mr. Martin's reflections on his changes to the process, see Paul Martin, *Hell or High Water: My Life In and Out of Politics* (Toronto: Douglas Gibson, 2008), at 406-407.

<sup>130</sup> Paul Martin, Speech, *supra*, note 128. See Clark, *supra*, note 128.

<sup>131</sup> Prime Minister's Office, Press Release, "A New Approach: Prime Minister Martin Announces New Government will be guided by a new approach" (December 12, 2003), online: <[http://epe.lac-bac.gc.ca/100/205/301/prime\\_minister-ef/paul\\_martin/06-02-03/www.pm.gc.ca/eng/news.asp?id=3](http://epe.lac-bac.gc.ca/100/205/301/prime_minister-ef/paul_martin/06-02-03/www.pm.gc.ca/eng/news.asp?id=3)>.

<sup>132</sup> *Id.*

that his government would “specifically consult the Standing Committee on Justice and Human Rights on how best to implement prior review of appointments of Supreme Court of Canada judges”.<sup>133</sup> Minister of Justice Irwin Cotler has written that the Prime Minister spoke to him that same day, emphasizing the importance of reforming the Supreme Court appointments process and of Parliament’s role in that reform.<sup>134</sup>

In February 2004, the Martin Government issued a “Democratic Action Plan” that was entitled *Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform*.<sup>135</sup> It built on Martin’s December 2003 announcements and made them official government policy. The Democratic Action Plan called for prior parliamentary committee review of all high-level appointments made by the federal government. On Supreme Court appointments, the Democratic Action Plan was less than concrete. It committed the government to consult the relevant parliamentary committee(s) on how best to implement review of Supreme Court appointments. Importantly, Martin’s Democratic Action Plan identified three pillars: (1) “Ethics and integrity”; (2) “Restoration of the representative and deliberative role of MPs”; and (3) “Accountability”.<sup>136</sup>

As discussed in Part II, in March 2004 the Justice Committee began considering reforms to the Supreme Court appointments process. Considerations were interrupted by the federal election, which was held on June 28, 2004 and returned a Liberal minority government. The Liberal Party had included its commitment to give Parliament a role in reviewing Supreme Court appointments in its spring election platform.<sup>137</sup> Again, this was made in the context of “tackling the democratic deficit”.<sup>138</sup> In

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<sup>133</sup> Prime Minister’s Office, Press Release, “Democratic Reform” (December 12, 2003), online: <[http://epe.lac-bac.gc.ca/100/205/301/prime\\_minister-ef/paul\\_martin/06-02-03/www.pm.gc.ca/eng/news.asp?id=1](http://epe.lac-bac.gc.ca/100/205/301/prime_minister-ef/paul_martin/06-02-03/www.pm.gc.ca/eng/news.asp?id=1)>.

<sup>134</sup> Cotler, “The Supreme Court Appointment Process” *supra*, note 2, at 134.

<sup>135</sup> Privy Council Office, *Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform* (Ottawa: Privy Council Office, February 4 2004), online: <<http://www.pco-bcp.gc.ca/docs/information/publications/aarchives/dr-rd/docs/dr-rd-eng.pdf>>. Paul Martin’s Osgoode speech references Parliament committee review of all government appointments generally, but does not mention the Supreme Court specifically. Paul Martin, “Democratic Deficit” (2002/2003) 24:1 Policy Options 10 [text of speech].

<sup>136</sup> Privy Council Office, *id.*

<sup>137</sup> See Liberal Party of Canada, *Moving Canada Forward: The Paul Martin Plan for Getting Things Done* (Ottawa: Liberal Party of Canada, 2004), at 7.

<sup>138</sup> *Id.*

Paul Martin took office with a detailed plan to make government work better for Canadians — to make it more democratic, more ethical, more accountable. The new government has:

- Restored Parliament to the centre of national debate and decision-making by implementing broad democratic reforms to give your MP a greater voice.



August 2004, Prime Minister Martin selected Justices Abella and Charron to fill the vacancies created by the departures of Justices Arbour and Iacobucci. Minister of Justice Irwin Cotler appeared before an *ad hoc* committee of parliamentarians instead of the Justice Committee because the new post-election Parliament had not yet been summoned.

In November 2005, the Martin government fell and Stephen Harper became Prime Minister after the January 2006 election. A central issue in the campaign was the Gomery Commission and ethical government. Prime Minister Harper and his Conservative Party were elected in January 2006 with the campaign slogan “Demand Better” and promised sweeping democratic reforms. Accountability and transparency were central themes in the Speech from the Throne in 2006 and in the Prime Minister’s response to it.<sup>139</sup> One of the new Government’s first orders of business was to enact the *Accountability Act*.<sup>140</sup>

As described earlier, the Harper government literally picked up from where the Martin government had left off, appointing Marshall Rothstein from the shortlist submitted to Liberal Minister of Justice Irwin Cotler. The Harper government explicitly added the parliamentary hearing as a “Process designed to increase openness and accountability”.<sup>141</sup> Importantly, the announcement by the Prime Minister added an additional justification for the parliamentary hearings, stating that “The Supreme Court is a vital institution that belongs to all Canadians ... the public deserves to know more about the individuals appointed to serve there, and the method by which they are appointed. ...”<sup>142</sup> These three themes: (1) openness or transparency;

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- Most votes in the House of Commons are now free votes, in which MPs can represent the views of their constituents as they see fit. Since Paul Martin became Prime Minister, 72% of House votes have been free votes.
  - Parliamentarians now have the authority to review most senior government appointments, including those of heads of Crown Corporations.
  - The government has committed that Parliament will play a role in reviewing Supreme Court appointments.

<sup>139</sup> See Canada, Speech from the Throne to Open the First Session of the 39th Parliament of Canada, online: <<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=aarchives/sft-ddt/2006-eng.htm>>; and Prime Minister of Canada, “Turning a New Leaf: Notes for an Address by the Right Honourable Stephen Harper, Prime Minister of Canada, In Support of Measures Contained in The Speech from the Throne” (April 5, 2006), online: <<http://pm.gc.ca/eng/news/2006/04/05/prime-minister-backs-speech-throne>>.

<sup>140</sup> Bill C-2, *An Act providing for conflict of interest rules, restrictions on election financing and measures respecting administrative transparency, oversight and accountability*, S.C. 2006, c. 9.

<sup>141</sup> Prime Minister of Canada, “News Release: Supreme Court Nominee to Face Questions from Parliamentarians” (February 20, 2006), online: <<http://pm.gc.ca/eng/news/2006/02/20/supreme-court-nominee-face-questions-parliamentarians>>.

<sup>142</sup> *Id.*

(2) accountability; and (3) learning about the individuals appointed to serve on the Supreme Court were repeated by Minister of Justice Toews at the parliamentary hearing for Justice Rothstein and in the announcements, appointments and parliamentary hearings in 2011, 2012 and 2013.<sup>143</sup>

#### 4. Public Perception of the Supreme Court of Canada

In the epigraph at the beginning of this paper, Irwin Cotler linked concerns about the integrity and fairness of the appointment process to the independence of the judiciary. While this linkage is correct as a matter of theory and at times and places as a matter of fact as well, it is important to acknowledge that public dissatisfaction with the Supreme Court of Canada was not a driver of reforms to the appointments process over the past decade.<sup>144</sup>

Academics who studied media coverage of the Supreme Court between 2000 and 2001 opined that “the Supreme Court has dominated the Canadian political landscape in terms of its credibility and prestige”.<sup>145</sup> While this has not been the case throughout the Supreme Court’s history, it does accurately describe the place of the Supreme Court over the last 30 years. Public opinion polls in the 1980s and 1990s consistently showed high levels of support for the Supreme Court as an institution,<sup>146</sup> especially compared to other

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<sup>143</sup> See *supra*, notes 58, 61 and 62. The anomalous appointment process of Justice Cromwell in 2008 is discussed in Part II, *supra*.

<sup>144</sup> Professor Cotler identified six factors as providing the impetus for reform: (1) the impact of the Charter as transforming the legal and political landscape in Canada; (2) the centrality of the Supreme Court of Canada in this “constitutional revolution”, which elevated the profile of “unelected, unrepresentative, and unaccountable judges” allegedly usurping the democratic decision-making process; (3) “the perception of an ‘activist Court’ propagating ‘liberal values’”; (4) “the dynamic of judicial decision-making intruding upon, if not overtaking policy decisions that ought to be made by Parliament;” (5) fallout from the Gomery Commission that was extended to the judicial appointments process because it implicated Liberal-appointed Federal Court judges; and (6) “the perceived anomaly of the executive — effectively the Prime Minister — making appointments to the Supreme Court alone, without any Parliamentary input or accountability”. Cotler, “The Supreme Court Appointment Process”, *supra*, note 2, at 133. This explanation provides the immediate context for the reforms in 2004-2006.

<sup>145</sup> Florian Sauvageau, David Schneiderman & David Taras, *The Last Word: Media Coverage of the Supreme Court of Canada* (Vancouver: UBC Press, 2006), at 26 [hereinafter “Sauvageau, Schneiderman & Taras”].

<sup>146</sup> A Focus Canada survey of the justice system in 1989 found a high level of support for the Supreme Court. Seventy-six per cent of respondents indicated “a lot” or “some” confidence in the Supreme Court. Shirley Ouellet, *Public Attitudes towards the Legitimacy of Our Institutions and the Administration of Justice* (Ottawa: Department of Justice, Canada, Research and Development Directorate, 1991) [hereinafter “Ouellet”]; Supreme Court of Canada Microlog no. 96-00418; the same level of support is reported in Julian Roberts, *Public Confidence in Criminal Justice: A Review of Recent Trends, 2004-05: A Report for Public Safety and Emergency Preparedness Canada*

branches of government.<sup>147</sup> A 1989 poll found that a majority of Canadians had confidence in the Supreme Court to make appropriate Charter decisions.<sup>148</sup> A 1999 survey specifically investigating support of the Supreme Court revealed that of those respondents who were aware of the Supreme Court,<sup>149</sup> 76.6 per cent expressed support for the high court.<sup>150</sup>

Sauvageau, Schneiderman and Taras report that a 2001 Gallup poll indicated that the Supreme Court enjoyed the greatest respect from Canadians compared to almost all other Canadian institutions, including federal and provincial governments and the House of Commons.<sup>151</sup> Supreme Court commentators noted the high levels of public support when proposing changes to the appointment process. In a 2000 symposium on judicial appointments, Professor F.C. DeCoste stated that “[s]o far as the citizenry is concerned, our judges appear to be enjoying substantial popular support.”<sup>152</sup>

Even attacks on the Supreme Court for “judicial activism” did not have a significant impact on public support for the Supreme Court as an institution.<sup>153</sup> While support for the outcomes in specific cases has been found to be somewhat linked to approval of the Supreme Court as an institution, it does not have significant impact on that widespread

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(Minister of Public Safety and Emergency Preparedness, 2004), at 13, online: <<http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/pblc-cnfdnc-crmnl/index-eng.aspx>>.

<sup>147</sup> A different Focus Canada Poll in 1988 found that 59 per cent of respondents were “very” or “somewhat” satisfied with the federal government. Ouellet, *id.*, at 5.

<sup>148</sup> *Id.*, at 11. Ouellet does not report the exact number.

<sup>149</sup> A total of 76.3 per cent of respondents were “somewhat” or “very” aware of the Supreme Court of Canada. See Joseph Fletcher & Paul Howe, “Public Opinion and the Courts” in Paul Howe & Peter H. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen’s University Press, 2005) 255, at 265 [hereinafter “Fletcher & Howe”]. The data cited in this paragraph are from a 1999 Institute for Research on Public Policy poll which Fletcher and Howe designed in 1999. Elsewhere in the article they also use data from an unnamed 1987 “academic survey”.

<sup>150</sup> Fletcher & Howe, *id.* When differentiated by region, Quebec scored the lowest on both of these points: only 42 per cent awareness and 69.8 per cent satisfaction. Fletcher & Howe, *id.*, at 265. The data cited in this paragraph are from a 1999 Institute for Research on Public Policy poll which Fletcher and Howe designed in 1999. Elsewhere in the article they also use data from an unnamed 1987 “academic survey”.

<sup>151</sup> Sauvageau, Schneiderman & Taras, *supra*, note 145, at 26-27, citing Josephine Mazzuca, “Armed forces, Supreme Court and public schools top institutional list for respect and confidence” (May 28, 2001) 61 Gallup Poll 30.

<sup>152</sup> F.C. DeCoste, “Introduction” (2000) 38 Alta. L. Rev. 60, at 608. He cited polls from 1999 that showed that 62 per cent of Canadians supported judicial over parliamentary supremacy and that 77 per cent of Canadians were favourably disposed to the Supreme Court of Canada. Janice Tibbetts, “Judges should have final say, poll suggests” *The Edmonton Journal* (April 14, 1999) A3 [hereinafter “Tibbetts, ‘Judges should have final say’”], cited in F.C. DeCoste, *id.*, at 608.

<sup>153</sup> Fletcher & Howe, *supra*, note 149.

support.<sup>154</sup> Similarly, while political views influence opinions about specific Supreme Court decisions and may indirectly reduce support for the Supreme Court,<sup>155</sup> a high level of support for the Court persists, even among people who disagree with the outcome of high-profile cases.<sup>156</sup>

Public support for the Supreme Court remained high into the 2000s. Ipsos-Reid data from the early years of the decade found that 70 per cent of respondents approved of the Supreme Court's actions "over the past year or so".<sup>157</sup> Interestingly, despite this strong approval, the same poll found that only 10 per cent of Canadians believed that the Supreme Court was completely free of any political influence, while 84 per cent thought the Court's decisions were influenced by partisan politics "to some degree".<sup>158</sup> A 2010 Environics poll also found high support for the Supreme Court. The poll found that the Supreme Court (together with the military and the justice system) enjoyed ongoing, relatively high levels of confidence. The Supreme Court had a 69 per cent confidence level, down three per cent from the Environics 2007 poll. In contrast, Parliament and political parties enjoyed lower levels of confidence and were declining faster: Parliament enjoyed 42 per cent confidence, down

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<sup>154</sup> Lori Hausegger & Troy Riddell, "The Changing Nature of Public Support for the Supreme Court of Canada" (2004) 37:1 Can. J. Poli. Sci. 23, at 24-25. Their exact phrasing in their conclusion is that they found "some support" for this hypothesis. Fletcher & Howe, *id.*, at 281.

<sup>155</sup> Fletcher & Howe, *id.*, at 229.

<sup>156</sup> Fletcher & Howe, *id.* Among people who disagreed with the outcome of all three cases (a total 10 per cent of respondents), 58 per cent of them agreed that the Supreme Court, not Parliament, should have the last word on constitutional review. *Id.*, at 284.

<sup>157</sup> Darrell Bricker & John Wright, *What Canadians Think About Almost Everything* (Toronto: Doubleday Canada, 2005), at 14. The book does not mention the exact year the data was recorded, only that this time period "includes the controversial Robert Latimer appeal", and therefore it must be 2002, or possibly 2001 as *Latimer* was decided by the Supreme Court in 2001. See *R. v. Latimer*, [2001] S.C.J. No. 1, 2001 SCC 1, [2001] 1 S.C.R. 3 (S.C.C.). Thanks to Emily Alderson for this deduction and for her excellent research in this section generally. Contrary to Fletcher and Howe's findings, support for the Supreme Court's actions was *highest* in Quebec (77 per cent). Paradoxically, Quebec is also ranked the province the "most likely to oppose an SCC decision". *Id.*, at 15. Support for the Supreme Court's actions was lowest in Saskatchewan and Manitoba (62 per cent), although this may be due to the recently concluded case of Robert Latimer, a Saskatchewan resident. Fully 59 per cent of Canadians disagreed with the Supreme Court's decision to uphold his sentence. Although Bricker and Wright do not hypothesize on reasons for Supreme Court support, this may be another instance where specific support has some mild impact on diffuse support. Bricker and Wright break down Supreme Court approval by demographics: approval increases with education (78 per cent among university graduates and 59 per cent among those with a high school education), and with income (74 per cent among those earning above \$30,000 annually and 65 per cent among those earning less). *Id.*, at 15.

<sup>158</sup> *Id.*

13 per cent from 2007, and political parties were once again the least confidence-inspiring at 19 per cent, down 13 per cent.<sup>159</sup>

Conversely, polls show a high level of dissatisfaction with the appointment process for Supreme Court judges and even a desire for judges to be elected.<sup>160</sup> Thus, public opinion polls reveal what might be considered a paradox: a high level of public support for the Supreme Court but a desire for change in the appointment process.<sup>161</sup> This may represent inconsistent public opinion, which is not unusual, or it might reflect public sophistication in terms of dissatisfaction with the process of appointment rather than with the results.

Reforms to the appointments process were not a response to any perception that the persons appointed had been problematic in some way.<sup>162</sup> Reflecting on his experience as Minister of Justice, Irwin Cotler wrote that the Supreme Court of Canada “is respected across the country and around the world as a model of what a vital, modern, and independent judicial institution should be”.<sup>163</sup> According to the Minister of Justice who began the reform process, the existing process had produced excellent appointees.<sup>164</sup> While it is easy to dismiss such statements as political rhetoric, the thrust of the political discourse over the past 25 years has been about empowering Parliament and reining in the Prime Minister, not changing the Supreme Court.

Thus, when Minister Cotler appeared at the Ad Hoc Committee on Supreme Court of Canada Appointments in August 2004 after the appointment of Justices Abella and Charron, he commented that the appointments process “has been critiqued not with regard to the quality of appointments, but with respect to the lack of transparency and Parliamentary input. And, yes, there has been a lack of transparency, an absence of Parliamentary input, and very little by way of public

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<sup>159</sup> Environics, *Focus Canada* (2010), at 19, online: <[http://www.queensu.ca/cora/\\_files/fc2010report.pdf](http://www.queensu.ca/cora/_files/fc2010report.pdf)>.

<sup>160</sup> Sauvageau, Schneiderman & Taras, *supra*, note 145, citing Chris Cobb, “Canadians want to elect court” *National Post* (February 4, 2002) A1.

<sup>161</sup> See Tibbetts, “Judges should have final say”, *supra*, note 152 (noting that only 8 per cent of Canadians support the way in which judges are appointed).

<sup>162</sup> See Alarie & Green, “Policy Preference”, *supra*, note 43, at para. 2: “the evidence shows that the judicial appointments process to the Supreme Court has been satisfactory”; Rory Leishman, “No Need for Radical Reform of the Federal Judicial Appointment Process” (2007) 58 U.N.B.L.J. 112, at 120; Cotler, “The Supreme Court Appointment Process”, *supra*, note 2.

<sup>163</sup> Cotler, “The Supreme Court Appointment Process”, *id.*, at 132.

<sup>164</sup> *Id.*

involvement.” According to then-Minister Cotler, that is what his government was “seeking to reform and rectify”.<sup>165</sup>

#### IV. AUDIT

This section analyzes the reforms between 2004 and 2013 in terms of (1) transparency; (2) accountability; and (3) the promotion of public knowledge about the work of the Supreme Court of Canada and its judges. The first two factors are linked because transparency is not an end in itself; it is a necessary pre-condition for ensuring accountability.<sup>166</sup> Transparency relates to the openness of the process whereas accountability involves explanation for actions or decisions.

Accountability is an important feature of responsible government under the Canadian Constitution.<sup>167</sup> Individual ministers “are accountable to Parliament for the exercise of the powers, duties and functions vested in them by statute or otherwise”.<sup>168</sup> Under our parliamentary system of government, accountability “derives directly from the responsibility of ministers”.<sup>169</sup> The Ministry is collectively accountable for all the policies and actions of the government; ministers “must be prepared to explain and defend the Government’s policies before Parliament at all times”.<sup>170</sup> This is accountability in the constitutional sense, but accountability may be understood in a broader sense as “a means of making responsible the exercise of power”.<sup>171</sup> In her testimony before the Gomery Commission,

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<sup>165</sup> Department of Justice, Speeches, 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 Supreme Court Appointments” (August 25, 2004), online: <[http://www.collectionscanada.gc.ca/webarchives/20071116083626/http://www.canada.justice.gc.ca/en/news/sp/2004/doc\\_31212.html](http://www.collectionscanada.gc.ca/webarchives/20071116083626/http://www.canada.justice.gc.ca/en/news/sp/2004/doc_31212.html)> [hereinafter “Speaking Notes”].

<sup>166</sup> For example, Dean Sossin has asserted that “[a]n accountability culture suggests a focus both on transparent criteria for selection and justification to ensure that the criteria were appropriately applied.” Sossin, “Judicial Appointment”, *supra*, note 81, at 39.

<sup>167</sup> See Canada, Privy Council Office, *Responsibility in the Constitution*, “Constitutional Responsibility and Accountability”, online: <<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=constitution/table-eng.htm>> Part VII [hereinafter “*Responsibility in the Constitution*”].

<sup>168</sup> Canada, Privy Council Office, *Accountable Government: A Guide for Ministers and Ministers of State* (2011), at 2 [hereinafter “*Accountable Government*”].

<sup>169</sup> *Responsibility in the Constitution*, *supra*, note 167, “The Principles of Accountability”, at Part VIII.

<sup>170</sup> *Accountable Government*, *supra*, note 168, at iv.

<sup>171</sup> *Responsibility in the Constitution*, *supra*, note 167, at Part VIII. On accountability generally, see Mark Bovens, Robert E. Goodin & Thomas Schillemans, eds., *The Oxford Handbook of Public Accountability* (Oxford: Oxford University Press, 2014).

Jocelyn Bourgon, Canada's former top civil servant, explained that "where authority resides, so resides accountability, and if one has authority to strike a decision, then one has an obligation to provide an account"<sup>172</sup>.

Transparency is but one means of making responsible the exercise of power. Thus, in auditing accountability, we will seek to evaluate the extent to which the process makes those responsible for the exercise of power through the appointment process explain or account for such decisions.

## 1. Transparency

In terms of transparency, we seek to evaluate the availability of information about the operation of the appointment process. We seek to understand factors including the following: (1) how the process works; (2) the criteria for selection; (3) who is consulted; (4) the role of the public; (5) how the Minister of Justice prepares the so-called "long list", and how many names are on it; (6) what the Selection Panel does; and (7) who makes the ultimate decision. When these questions are considered, the inevitable conclusion is that we know much less about the process in 2014 than we did a decade ago when Justices Abella and Charron were appointed to the Court. The continuing controversy surrounding the appointment of Justice Nadon in 2013-2014 has demonstrated just how opaque the appointment process has become.

### (a) *How Does the Process Work?*

Since the reforms were initiated in 2004, no government has published comprehensive guidelines on how the selection process works. Since the Rothstein appointment, the transparency of the appointment process has been significantly reduced. The only information known about the process is what the Prime Minister has announced in successive press releases:

- To identify a pool of qualified candidates for appointment to the Supreme Court of Canada, the Minister of Justice and Attorney General will consult with the Ontario Attorney General, as well as leading members of the legal community. Members of the public are invited

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<sup>172</sup> Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities (The Hon. John Gomery, Commissioner) (Ottawa), vol. 47, December 8, 2004, at 8235, quoted in Savoie, *supra*, note 117, at 257.

to submit their input with respect to qualified candidates who merit consideration at [www.justice.gc.ca/eng/scc-csc.html](http://www.justice.gc.ca/eng/scc-csc.html).

- The list of qualified candidates will be reviewed by a selection panel composed of five Members of Parliament — including three Members from the Government Caucus and one Member from each of the recognized Opposition Caucuses, as selected by their respective leaders — to review the list of qualified candidates.
- The Supreme Court Selection Panel will be responsible to assess the candidates and provide an unranked short list of six qualified candidates to the Prime Minister of Canada and the Minister of Justice for their consideration.
- The two selected nominees will appear at a public hearing of an *ad hoc* parliamentary committee to answer questions of Members of Parliament. This is a process that was first established for the appointment of the Honourable Mr. Justice Marshall E. Rothstein in 2006.<sup>173</sup>

This limited information about the operation of the process is deficient, as will become apparent in the successive sections.

*(b) What Are the Criteria for Selection?*

There has been a decrease in transparency in terms of publication of the criteria for selection since the reforms began in 2004. Under the tenure of Minister of Justice Cotler, such criteria were clearly articulated as: professional capacity;<sup>174</sup> personal characteristics;<sup>175</sup> and diversity on the

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<sup>173</sup> Prime Minister of Canada, “Upcoming Retirement”, *supra*, note 58. See also Prime Minister of Canada, “Marie Deschamps”, *supra*, note 61; and Prime Minister of Canada, “Justice Morris Fish”, *supra*, note 62.

<sup>174</sup> Professional capacity included: (1) “the highest level of proficiency in the law, superior intellectual ability and analytical and written skills;” (2) “proven ability to listen and to maintain an open mind while hearing all sides of an argument;” (3) “decisiveness and soundness of judgement;” (4) “capacity to manage and share consistently heavy workload in a collaborative context;” (5) “capacity to manage stress and the pressures of the isolation of the judicial role;” (6) “strong cooperative interpersonal skills;” (7) “awareness of social context;” (8) “bilingual capacity;” and (9) “specific expertise required for the Supreme Court.” Speaking Notes, *supra*, note 165.

<sup>175</sup> Personal characteristics included: (1) highest level of personal and professional ethics: “honesty; integrity; candour;” (2) “respect and consideration for others: patience; courtesy; tact; humility; fairness; tolerance;” and (3) “personal sense of responsibility: common sense; punctuality; reliability.” *Id.*



Court.<sup>176</sup> Since 2006, the criteria for evaluating candidates for appointment are no longer published by the government.

In each of the appointments in each of 2006, 2011, 2012 and 2013, Peter Hogg or Jean-Louis Baudouin identified qualities that they believed Supreme Court justices should have.<sup>177</sup> The list of qualities differed as between Professors Hogg and Baudouin, which is problematic in and of itself. Moreover, there is no indication that the qualities identified by Professors Hogg and Baudouin were used by the Minister of Justice in creating the long list, by the Selection Panel in creating the short list of candidates, or by the Minister of Justice and the Prime Minister in selecting the nominee. Additionally, the articulation of the qualifications shows the important link between transparency and accountability. If the parliamentary hearings are supposed to serve an accountability function, it becomes difficult for MPs to fulfil this function if the criteria for selecting candidates — which should then become the criteria for evaluating the nominee — are unknown or articulated only at the beginning of the parliamentary hearing.

*(c) Who Is Consulted and What Is the Nature of those Consultations?*

We do now know the people who are consulted for their opinions about potential candidates for appointment. In 2004, Minister of Justice Cotler explained that he consulted with the following individuals:

- the Chief Justice of Canada, Beverley McLachlin;
- the Attorney General of Ontario, Michael Bryant;
- the Chief Justice of Ontario, Roy McMurtry;
- the Treasurer of the Law Society of Upper Canada, Frank Marrocco;
- the President of the Canadian Bar Association, William Johnson; and
- the President of the Ontario Bar Association, Jonathan Spiegel.<sup>178</sup>

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<sup>176</sup> *Id.* As discussed in Part III, there is no indication that the criteria were actually used by Minister Cotler or by subsequent selection panels.

<sup>177</sup> See Rothstein Transcript (2006) [hereinafter “Rothstein Transcript”]; Moldaver & Karakatsanis Transcript; Wagner Transcript; and Nadon Transcript, *supra*, note 84. See also Hogg, “Appointment of Justice Marshall Rothstein”, *supra*, note 49, at 538.

<sup>178</sup> Speaking Notes, *supra*, note 165. In his appearance before the Justice Committee in March 2004, Cotler explained that he would consult with the following individuals:

Similar explanations have been provided by successive Ministers of Justice in each of the appointments since 2004.<sup>179</sup>

To say that certain people were consulted in making a decision does not reveal the quality of those consultations.<sup>180</sup> Tom Kent has asked: “How wide are the consultations that precede the decision, what considerations are weighed, what alternatives considered ...?”<sup>181</sup> In the absence of published criteria for appointment and consultation guidelines,<sup>182</sup> we do not know the answers.

There are consultations and then there are consultations. A consultation may be a *pro forma* affair wherein the person being consulted is asked for suggestions which are then politely filed away. Such appears to have been the case with the federal government’s consultation with the Attorney General of Quebec over the Nadon appointment.<sup>183</sup> Consultations may also be a true dialogue: a discussion and an exchange of ideas. Such was clearly the case in the summer of 2004 in the case of discussions between Minister of Justice and Attorney General of Canada Irwin Cotler and the Ontario Attorney General over the two pending appointments to the Supreme Court from Ontario.<sup>184</sup>

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- the Chief Justice of Canada and perhaps other members of the Supreme Court of Canada;
  - the Chief Justices of the courts of the relevant region;
  - the Attorneys General of the relevant region;
  - at least one senior member of the Canadian Bar Association;
  - at least one senior member of the Law Society of the relevant region.

<sup>179</sup> See Rothstein Transcript, *supra*, note 177; Karakatsanis & Moldaver Transcript; Wagner Transcript; and Nadon Transcript, *supra*, note 84.

<sup>180</sup> For an especially biting commentary on the nature of consultations, see the commentary by University of Toronto law professor Douglas Sanderson, “Welcome to My World – Consultation and Canada Post”, *Ultra Vires* (January 29, 2014), online: <<http://ultravires.ca/2014/01/welcome-to-my-world-consultation-and-canada-post/>>.

<sup>181</sup> Kent, *supra*, note 104, at 96.

<sup>182</sup> See, e.g., Ontario, Ministry of Aboriginal Affairs, *Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal Rights and Treaty Rights* (June 2006), online: <<http://docs.files.ontario.ca/documents/258/3-maa-draft-guidelines-for-ministries-on.pdf>>.

<sup>183</sup> See Paul Journet, “Le Québec lésé par le retrait du juge Nadon, dénonce Cloutier” *La Presse* (October 9, 2013), quoted in Irwin Cotler, P.C., M.P. & Charlie Feldman, “Supreme Court Appointments: When and How Should Parliament Exercise Oversight?” (March 2014) 8 J.P.P.L. 253, at 277.

<sup>184</sup> As Carissima Mathen notes, in his appearance before the *ad hoc* committee in August 2004, Minister Cotler noted that he spoke to some people, including Ontario Attorney General Michael Bryant, several times about various candidates. See Mathen, “Choices and Controversy”, *supra*, note 14, at 57, note 26. In 2004, I was serving as Senior Policy Adviser to the Attorney General of Ontario Michael Bryant, and although I did not participate in any discussions between the two Attorneys General, I can certainly attest that such discussions took place, on more than one occasion, and from my perspective they appeared to be real, substantive discussions of the merits of various candidates for the country’s highest court.

On the nature or the quality of the consultations, we also know less in 2014 than we did in 2004. In 2004, Minister of Justice Irwin Cotler explained the consultations that he had undertaken thusly:

In order to assess the candidates, I met with each of the people I mentioned earlier. Indeed, I consulted them several times so as to verify information which I had received and to assess whether a point of view expressed by one person was shared by the others. Potential candidates may have been identified later on in the process, at which point I would again go back and seek the views of people I had previously spoken to. I point this out to suggest that the consultations were not a one-shot exchange where I spoke to each person once and that's it. Rather, there was an ongoing and overlapping dialogue between me and the other consultees.

In assessing the candidates, I asked questions that were related to the criteria mentioned earlier.

Again, I cannot stress enough that the main focus was merit. Although my discussions were confidential, I can tell you that some of the consultees were particularly well-placed to provide certain types of input — for example, the Chief Justice of Canada on the expertise required for the Court; the Chief Justice of Ontario on issues such as collegiality and ability to handle a heavy workload; and the Attorney General of Ontario; the Law Society; and the CBA on the candidate's reputation in the legal community.<sup>185</sup>

Minister Cotler explained that he had personally read the opinions and writings of the candidates.<sup>186</sup>

*(d) What Role Does the Public Play?*

Several Ministers of Justice writing after the fact have claimed that members of the public were always free to provide their views of prospective candidates to the Minister.<sup>187</sup> In 2005, when Justice Major announced his retirement from the bench, Minister of Justice Irwin Cotler invited public

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<sup>185</sup> Speeches, Speaking Notes, *supra*, note 165.

<sup>186</sup> *Id.* This is perhaps not surprising given that Minister Cotler was a law professor with a reputation for reading broadly.

<sup>187</sup> See The Honourable Anne A. McLellan, P.C., "The 'New' Selection Process", 31:3 *Law Matters* (June 2006) 4; and Cotler, "The Supreme Court Appointment Process", *supra*, note 2, at 137.

input<sup>188</sup> and also took the unprecedented step of running advertisements in daily newspapers in the Western provinces (Manitoba, Saskatchewan and Alberta) from where Justice Major's replacement was likely to come.<sup>189</sup> The advertisements invited written representations from "any person or group, to propose candidates for appointment to the Supreme Court".<sup>190</sup> It is not known whether the Minister received any submissions from members of the public or what the contents of any such submissions were.

Beginning with the 2011 vacancies, the Minister of Justice explicitly sought public input in the process. When Justices Binnie and Charron announced their retirement in May 2011, the Prime Minister issued a statement setting out the process which included the following element:

To identify a pool of qualified candidates for appointment to the Supreme Court of Canada, the Minister of Justice and Attorney General will consult with the Ontario Attorney General, as well as leading members of the legal community. Members of the public are invited to submit their input with respect to qualified candidates who merit consideration at [www.justice.gc.ca/eng/scc-csc.html](http://www.justice.gc.ca/eng/scc-csc.html).<sup>191</sup>

When Justices Karakatsanis and Moldaver appeared before the committee of parliamentarians in October 2011, the Minister of Justice asserted that "Members of the public were also included in this process and were provided the opportunity to submit input with respect to qualified candidates who would merit consideration."<sup>192</sup>

I remain deeply skeptical about the public input element for several reasons. First, the public outreach is limited and generally passive; it is very Web 1.0. Members of the public are invited to e-mail their views to a Justice Canada e-mail account. There is no outreach or public consultation with members of the public who might be knowledgeable about prospective candidates: lawyers and lawyers' organizations.<sup>193</sup> Second, members of the public are generally not familiar with Supreme Court nominees and

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<sup>188</sup> Canada, Department of Justice, News Release, "Justice Minister Invites Public Input Concerning Supreme Court of Canada Vacancy" (August 30, 2005), online: <[http://www.collectionscanada.gc.ca/webarchives/20071116084213/http://www.canada.justice.gc.ca/en/news/nr/2005/doc\\_31614.html](http://www.collectionscanada.gc.ca/webarchives/20071116084213/http://www.canada.justice.gc.ca/en/news/nr/2005/doc_31614.html)>.

<sup>189</sup> See, e.g., *Winnipeg Free Press* (August 31, 2005) A6.

<sup>190</sup> *Id.*

<sup>191</sup> Prime Minister of Canada, "Upcoming Retirement", *supra*, note 58.

<sup>192</sup> Nadon Transcript, *supra*, note 84. Almost identical language was used by Minister of Justice Nicholson at Justice Wagner's hearing in 2012 and at Justice Moldaver's and Justice Karakatsanis' hearing in 2011. See Wagner Transcript, *supra*, note 84; Moldaver and Karakatsanis Transcript, *id.*

<sup>193</sup> Ministers of justice have claimed that they have consulted with heads of selected legal organizations, but this cannot be considered broad-based consultation with members of the legal community, let alone "public consultation".

the Minister of Justice is unlikely to get much substantive input that would actually be useful.<sup>194</sup> Third, it is not clear that the Minister of Justice does anything with the public input, let alone passes it along for consideration to the Supreme Court Selection Panel for its consideration or to the parliamentary committee. There is no public summary provided of the public input. It thus appears to me that the sole reason for the invitation to members of the public is to enable the Minister of Justice to claim that members of the public participated in the process.

*(e) How Does the Minister of Justice Prepare the So-Called “Long List” and How Many Names Are on the “Long List”?*

The amount of disclosure of the process has differed across time. The most disclosure occurred with the appointment of Justice Rothstein and it has decreased over time.

Thus, at the beginning of the process that led to the appointment of Justice Rothstein, Minister of Justice Cotler stated that he would submit a

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<sup>194</sup> To test my assumption, I made an access request for 2011 requesting the following:

1. Number of e-mails received by Department of Justice in connection with May 13, 2011 announcement from the Prime Minister soliciting input into nomination process for Supreme Court of Canada judges to send e-mails to SCC\_Selection\_Process@justice.gc.ca; 2. Copies of contents of all e-mails received by [this e-mail address] between May 13, 2011 and September 30, 2011; and 3. Copies of all memoranda, analysis, documents, etc. in connection with any public input into the Supreme Court of Canada appointment process May 1st to September 30, 2011.

I received 81 pages of correspondence in response to my request. No records were withheld (names were blocked out under s. 19(1) of the *Access to Information Act*, R.S.C. 1985, c. A-1 (personal information)). There were no memoranda, analysis or briefing notes in connection with the correspondence, which leads me to believe that nothing was done with it. There was no indication that the public input was fed into the decision-making process in any way. Of the 81 pages, most of letters or e-mails consisted of members of the public generally dissatisfied with the legal system in some way. These 81 pages included routing slips, draft responses and responses from the Minister of Justice. All told, there were only 18 public responses. Only several are notable. The *batônnier* of the Barreau du Québec wrote to the Prime Minister on June 21, 2011 advocating the importance of candidates' ability to hear cases in both official languages without the aide of an interpreter: Letter from the Barreau du Québec to Prime Minister Stephen Harper, dated June 21, 2011 (on file with author). One e-mailer stated that "...the Chief and Rosalie [Abella] must go. Send them on international mission to spread democracy in third world country." E-mail to the Hon. Rob Nicholson, dated June 22, 2011 (on file with author). Only one member of the public actually recommended candidates from Ontario (one other recommended a judge from New Brunswick). A thoughtful lawyer who claimed to be "a current practitioner in, and follower, of the [Supreme] Court" recommended two members of the Ontario Court of Appeal and gave a paragraph explanation for each judge as to why they would be good Supreme Court judges. See E-mail to the Honourable Robert Nicholson, Minister of Justice and Attorney General of Canada, dated May 17, 2011 (on file with author).

list of five to eight names to the Advisory Committee.<sup>195</sup> At Justice Rothstein’s hearing, Minister of Justice Toews explained that his predecessor Irwin Cotler had submitted a list of six candidates to the advisory committee to produce an unranked shortlist of three.<sup>196</sup> In none of the subsequent appointments has the Minister of Justice disclosed how many names he provided to the Supreme Court Selection Panel.

(f) *What Does the Selection Panel Do and How Does it Work?*

Some information about the work of the Supreme Court Selection Panel is available through the Office of the Commissioner for Federal Judicial Affairs (“FJA”) which supports the work of the Selection Panel. Thus, the FJA website explains that in July 2013, the Selection Panel “was provided with examples of decisions written by each of the candidates put forward to replace the Honourable Morris J. Fish at the Supreme Court of Canada”.<sup>197</sup> The FJA further explains:

Each candidate was asked to identify 5 decisions for particular consideration by the Panel, preferably dealing with issues coming within the usual scope of the Supreme Court of Canada. These decisions were to address issues requiring a consideration of principles and policy in novel contexts rather than decisions where the dispute is primarily factual. As far as possible, the choice of the 5 decisions was to reflect at least one of each of the following areas of law: Constitutional law (*Charter* or Federalism); Criminal law (or national security); Civil law; Administrative law; and the Candidate’s choice.<sup>198</sup>

The website then provided the names, citations and links to the five decisions that Justice Nadon had provided to the Selection Panel.<sup>199</sup> Similar information was available for the appointments in 2011 and 2012.

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<sup>195</sup> See Cotler, “The Supreme Court Appointment Process”, *supra*, note 2, at 144-45.

<sup>196</sup> Rothstein Transcript, *supra*, note 177.

<sup>197</sup> Office of the Commissioner for Federal Judicial Affairs, Supreme Court Nomination, Examples of Decisions, Note [hereinafter “Examples of Decisions”] (available on request from the Office of the Commissioner for Federal Judicial Affairs and on file with author). In a 2014 article, former Minister of Justice Irwin Cotler provides the table of contents for a “binder” that MPs on the Nadon Supreme Court Selection Panel reportedly received. See Cotler & Feldman, *supra*, note 36, at 275.

<sup>198</sup> Examples of Decisions, *id.*

<sup>199</sup> *Id.* Those decisions were *Martin v. Canada (Attorney General)*, [2013] F.C.J. No. 51, 2013 FCA 15 (F.C.A.), leave to appeal refused [2013] S.C.C.A. No. 122 (S.C.C.); *Siemens Canada Ltd. v. J.D. Irving Ltd.*, [2012] F.C.J. No. 1120, 2012 FCA 225 (F.C.A.); *Canada (Attorney General) v. Jodhan*, [2012] F.C.J. No. 614, 2012 FCA 161 (F.C.A.); *Mercier v. Canada (Correctional Service)*, [2010] F.C.J. No. 816, [2012] 1 F.C.R. 72, 2010 FCA 167 (F.C.A.), leave to appeal refused

It has not been made clear on what basis the selection panels conduct their work. It is not clear whether they work by consensus or majority vote.

For the nomination of Justices Karakatsanis and Moldaver in 2011, Minister of Justice Nicholson stated that “[t]he list of six candidates, which included the two nominees, was unanimously approved by the panel”.<sup>200</sup> Similar language was used by the Minister of Justice for the nomination of Justice Wagner in 2012,<sup>201</sup> but was absent in the nomination of Justice Rothstein in 2006 and Justice Nadon in 2013.<sup>202</sup> Subsequent comments by one member of the selection committee for Justice Nadon’s appointment assert that confidentiality prohibits members of the panel from even disclosing how it operates.<sup>203</sup> The government has simply not made clear the basis upon which the shortlist is reached.

(g) *Who Makes the Ultimate Decision?*

Where once it was unclear who actually makes the final decision for appointment, it is now clear that the decision is the Prime Minister’s, advised by the Minister of Justice. While some scholars have asserted that puisne judges are appointed on the recommendation of the Minister of Justice and the appointment of the Chief Justice is the Prime Minister’s prerogative,<sup>204</sup> subsequent Ministers of Justice have clearly indicated that the selection of all justices of the Supreme Court is the choice of the Prime Minister.<sup>205</sup>

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[2010] S.C.C.A. No. 331 (S.C.C.); and *Khadr v. Canada (Prime Minister)*, [2009] F.C.J. No. 893, [2010] 1 F.C.R. 73, 2009 FCA 246 (F.C.A.).

<sup>200</sup> Moldaver & Karakatsanis Transcript, *supra*, note 84.

<sup>201</sup> Wagner Transcript, *id.*: “A list of three candidates, which included our nominee, were unanimously approved by the panel.”

<sup>202</sup> Nadon Transcript, *id.*: “the selection panel completed their report and submitted this unranked list that I referred to of three qualified candidates, which of course included our nominee, Marc Nadon.”

<sup>203</sup> NDP MP Françoise Boivin, who was a member of the Supreme Court Selection Panel, stated that confidentiality prohibited her from even disclosing how the panel operated. See Twitter, @FBoivinNPD, online: <<https://twitter.com/FBoivinNPD/status/396800646881370113>>: “You dont sign off. It could be unanimous, it could be majority. Cant tell coz of confidentiality!”

<sup>204</sup> See Devlin, Mackay & Kim, *supra*, note 85, at 763, citing S.I. Bushnell, “The Appointment of Judges to the Supreme Court of Canada: Past, Present and Future” in *Judicial Selection in Canada: Discussion Papers and Reports* (Canadian Association of Law Teachers Special Committee on the Appointment of Judges, 1987), at 1.

<sup>205</sup> See McLellan, “Foreword”, *supra*, note 64, at 604; and Cotler, “The Supreme Court Appointment Process”, *supra*, note 2. See Rothstein Transcript, *supra*, note 177; Karakatsanis & Moldaver Transcript, *supra*, note 84; Wagner Transcript, *supra*, note 84; and Nadon Transcript, *supra*, note 84. See also Tonda MacCharles, “Supreme Court pick defends qualifications”, *supra*, note 64 (stating that Justice Minister Peter MacKay noted that the selection of Supreme Court justices was the decision of the Prime Minister).

At each of the four committee hearings, the Minister of Justice explicitly stated that the “Governor in Council will act on the advice of the Prime Minister”.<sup>206</sup> At the Rothstein hearing, Justice Minister Toews explained that the committee was 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 Justice Rothstein.” In 2006, it was reported that the Prime Minister watched the hearings on television. It is unknown whether he watched the subsequent hearings.<sup>207</sup>

*(h) Conclusion: A Transparency Deficit*

The reformed Supreme Court appointment process provides many opportunities for disclosure: prior to a vacancy being announced; when a vacancy is announced; when the nominee is announced; during the public hearing; and at the moment of formal appointment by the Prime Minister. Despite frequent and repeated claims by successive governments about the openness and transparency in the process, we have seen that more is unknown about the process than is known. I am not alone in concluding that the process is wanting in transparency.<sup>208</sup> Writing years after the Rothstein hearing but before the 2011 appointments, Supreme Court observer Philip Slayton concluded that “the private nature of the current practice leads to public suspicion and skepticism”.<sup>209</sup> I am not sure that substantial change has occurred since Slayton wrote those words that would lead him to change his assessment. My audit of the reforms since 2004 leads me to conclude that they have not fostered significant change in transparency: there is still a serious transparency deficit in the Supreme Court appointment process. As discussed in the next section, the public hearings have failed to address this transparency deficit.

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<sup>206</sup> Rothstein Transcript, *supra*, note 177.

<sup>207</sup> In 2013, the Prime Minister departed for Indonesia the day after the Nadon hearing. See Prime Minister of Canada, Media Advisories, “Public event for Prime Minister Stephen Harper for Thursday, October 3rd”, October 2, 2013, online: <<http://www.pm.gc.ca/eng/news/2013/10/02/public-event-october-3-2013>>.

<sup>208</sup> See, e.g., DeCoste, “The Jurisprudence” *supra*, note 87, at 87: “both the process and the substance of appointment offend in disgracefully equal measure the principles of transparent government”; Kent, *supra*, note 104, at 96.

<sup>209</sup> Slayton, *supra*, note 86, at 246.



## 2. Accountability

One of the articulated purposes of the reforms was to increase the role of MPs and reduce the unfettered discretion of the Prime Minister in the selection process. Based on these criteria, the reforms to the selection process have not achieved their stated objectives.

### (a) *Fettering of Discretion*

The process that has developed allows the executive to preserve its control over the selection process while maintaining that it has increased transparency and accountability.<sup>210</sup> The government is able to control both the input and the output of the selection process, thereby severely constraining the opportunities for any external actors to influence the decision-making process.

The executive is able to wholly control the inputs. It provides the selection panel with a closed list of candidates. The Selection Panel is not permitted to consider candidates outside this list. The discretion of the Selection Panel is further circumscribed by the length of the list which it is assigned to consider. The list of candidates that the government provides to the Selection Panel has been mislabelled as a “long list”, giving the false impression that there are a large number of names on this list. However, the so-called long list does not appear to be significantly longer than the short list. Since 2006, the government has refused to disclose how many candidates are on this list. In 2006, it did disclose that there were six candidates on the “long list”. In the case of the two appointments in 2011, it was reported that there were 12 or 13 persons under consideration.<sup>211</sup> By controlling the input in this fashion, the government is able to shut out any unwanted candidates. It may also overlook other worthy candidates.

Second, the government is able to control the output of the process through the composition of the committee.<sup>212</sup> For the appointment of Justice Rothstein in 2006, MPs were in a minority on the advisory committee that produced the shortlist. Moreover, each of the four official parties had equal representation on the advisory committee. Since it obtained a

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<sup>210</sup> Kirk Makin cited Professor Bruce Ryder of Osgoode Hall Law School as saying that the process imparted “an illusion of accountability”. Kirk Makin, “Screening process has its detractors” *The Globe and Mail* (October 19, 2011) A8.

<sup>211</sup> *Id.* (reporting that there were 12 names on the list supplied to the selection panel).

<sup>212</sup> Irwin Cotler and Charlie Feldman raise concerns about having parliamentary secretaries and ministers of the Crown on the selection panels. See Cotler & Feldman, *supra*, note 36, at 268.

majority in the 2011 election, the current government has maintained a majority of three members out of the five on the Selection Panel. The Selection Panel is thus akin to a parliamentary committee where the governing party has a majority and thus is able to control the process and the outcome. However, in terms of both transparency and accountability, the operation of the selection committee is far worse than that of a parliamentary committee. A parliamentary committee operates under prescribed rules of procedure; the selection committee does not. For the most part, parliamentary committees conduct their proceedings in public; the selection committee's proceedings are completely secret. Parliamentary committees produce reports after their reviews of legislation or other issues; the selection committee does not.

Finally, the parliamentary hearings do not restrain the power of the Prime Minister either formally or informally.<sup>213</sup> In 2004, Conservative Party members involved in the proceedings, including future Ministers of Justice Vic Toews and Peter MacKay, criticized the hearings as a “sham” because the Prime Minister's selection had effectively been made.<sup>214</sup> The same could similarly be said of hearings over which Ministers Toews, Nicholson and MacKay presided. At the 2006 hearing, Minister Toews at least stated that the goal of the hearing was to inform the Prime Minister's eventual decision, which was to be made two days after the hearing.<sup>215</sup> The Prime Minister reportedly watched the hearing on television.<sup>216</sup> At the conclusion of the hearing, Minister Toews encouraged members of the committee to forward their comments directly to the Prime Minister regarding their views on the suitability of Justice Rothstein for appointment to the Supreme Court.<sup>217</sup> In the three subsequent hearings, even this pretence was dispensed with and the Prime Minister made the formal announcement the next day. In one case, the Chief Justice announced the swearing-in dates for the new justice before the Prime Minister had formally appointed the “nominee”, thus demonstrating the *pro forma* nature of the hearings.<sup>218</sup>

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<sup>213</sup> The *National Post* has written that the process allows PMs to appoint poorly qualified or fringe candidates without any sort of political accountability. Editorial, “A land without Borking” *National Post* (October 18, 2011) A14 (noting further that in the case of the 2011 appointments of Justices Moldaver and Karakatsanis, the Prime Minister had not abused his privilege).

<sup>214</sup> *Ad Hoc* Committee – discussed in Mathen, “Choices and Controversy”, *supra*, note 14, at 64.

<sup>215</sup> Rothstein Transcript, *supra*, note 177.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Cf. Editorial, “Harper v. Harper” *The Globe and Mail* (October 4, 2012) A14 [hereinafter “Harper v. Harper”] (claiming that the Prime Minister treats the hearings as a “mere formality”).

(b) *Holding Decision-makers to Account for Their Decisions*

Accountability “is a means of making responsible the exercise of power”.<sup>219</sup> It requires decision-makers to account for their decisions. In the judicial context, judges are held accountable through the issuance of reasons for their decisions. In the government context, under our system of responsible government, ministers are personally accountable to the House of Commons for the exercise of power; ministers must answer for all actions carried out under their authority.<sup>220</sup> This is a fundamental precept of ministerial responsibility under our Constitution.<sup>221</sup> Based on these understandings of accountability, the reforms must be judged a failure.

To begin, the committee of parliamentarians that interviews the Prime Minister’s nominee has failed to meet any accountability function. The first failure is temporal: the time that the government has given the committees of parliamentarians to prepare for questioning the nominee is simply inconsistent with the exercise of any serious accountability function. This is seen in Table 2 below. In 2004, Mr. Cotler gave the *ad hoc* parliamentarians one day’s notice in announcing the government’s nominees.<sup>222</sup> In 2006, Prime Minister Harper gave MPs three days’ notice; in subsequent hearings in 2011, 2012 and 2013, two days’ notice was provided.<sup>223</sup> This is simply insufficient time for MPs to prepare for hearing in any serious manner.<sup>224</sup> A *Globe and Mail* editorial stated that two days was not enough time to read the nominees’ judgments and any speeches they may have given and to prepare probing questions, and added that the scrutiny was needed.<sup>225</sup>

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<sup>219</sup> *Responsibility in the Constitution*, *supra*, note 167.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* See also Hogg, *Constitutional Law of Canada*, *supra*, note 64.

<sup>222</sup> Carissima Mathen wrote about the 2004 hearing that “[t]he hearing clearly was not designed to facilitate greater involvement by the legislative branch. The one-day notice period strains any contrary conclusion.” Mathen, “Choices and Controversy”, *supra*, note 14, at 62.

<sup>223</sup> There was of course no parliamentary hearing for Justice Cromwell’s appointment in 2008. See discussion *supra*, at 127-28 and accompanying notes.

<sup>224</sup> Editorial, “Even good judges need public scrutiny” *The Globe and Mail* (October 18, 2011) A14; Sean Fine, “New Supreme Court judge prepares for vetting”, *The Globe and Mail* (October 2, 2013) A8 [hereinafter “Fine, ‘Vetting’”] (quoting Professor Kathleen Mahoney as saying: “How do you possibly prepare in such a short period of time?” and Professor David Schneiderman as saying that a longer process would be a chance to “see if people had views about the quality of this appointment”); “Harper v. Harper”, *supra*, note 218.

<sup>225</sup> Editorial, “Even good judges need public scrutiny”, *id.*

**Table 2: Time Elapsed for Supreme Court Appointments, 2004-2013**

<b>Judge appointed</b>	<b>Date vacancy announced</b>	<b>Nominee(s) announced</b>	<b>Time elapsed (in days)</b>	<b>Public hearing</b>	<b>Time between nomination and public hearing</b>	<b>Appointment confirmed</b>
Abella and Charron	February 21, 2004 (Arbour)/ March 23, 2004 (Iacobucci)	August 24, 2004	185 days (from date of Arbour's announcement)	August 25, 2004	1 day	August 27, 2004
Rothstein	August 3, 2005	February 23, 2006	205 days	February 27, 2006	4 days	March 1, 2006
Cromwell	April 9, 2008	September 5, 2008	150 days	N/A	N/A	December 22, 2008
Karakatsanis and Moldaver	May 13, 2011	October 17, 2011	158 days	October 19, 2011	2 days	21 October 2011
Wagner	May 18, 2012	October 2, 2012	138 days	October 4, 2012	2 days	October 5, 2012
Nadon	April 23, 2013	September 30, 2014	161 days	October 2, 2013	2 days	October 3, 2013

After the Nadon hearing, Justice Minister MacKay was asked why in each of the four hearings held during Prime Minister Harper's tenure, the committee had only been given two days to prepare for the hearing. Minister MacKay responded: "As a lawyer you're very often called before the court on short notice, and expect to make a case."<sup>226</sup> This is not a satisfactory explanation as to why the government has provided MPs with such little time to prepare for what is purportedly an important function.

It is instructive that the American selection process which served as the inspiration for the Canadian reforms takes less time overall to fill a vacancy and much more of that time is devoted to preparation for the Senate confirmation hearings. In Canada, due to the mandatory retirement of Supreme Court judges at age 75,<sup>227</sup> some vacancies are easily predicted<sup>228</sup> and the pool of candidates is restricted due to regional requirements. The Americans have no mandatory retirements and the President is not restricted by regional considerations, as a matter of either statute or convention. Despite these greater uncertainties, the American process works quicker and more publicly in announcing a nominee and giving typically four to six weeks for the Senate to prepare for confirmation hearings. Perhaps in part due to the lack of time to prepare for the hearings, the Canadian hearings have been criticized as mere "window dressing".<sup>229</sup>

The second failure is structural. In each of the four hearings to date, there has been overlap in membership between the MPs on the selection panel and those on the committee interviewing the nominee.<sup>230</sup> The blame cannot only be laid at the feet of the government on this issue but

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<sup>226</sup> Sean Fine, "Nadon skates through nomination hearing" *The Globe and Mail* (October 3, 2013) A3 [hereinafter "Fine, 'Nadon skates'"].

<sup>227</sup> See *Constitution Act, 1867*, s. 99(2).

<sup>228</sup> However, of the eight vacancies considered in this paper, only two (Justice Major in 2005 and Justice Fish in 2013) announced their retirement within a calendar year of their mandatory retirement date. Justice Binnie retired three years before his scheduled retirement date, which could hardly be considered a huge surprise (it was well known that he had to retire in three years' time so the vacancy was expected; it simply came earlier than might have been anticipated). The other resignations were well before the scheduled retirement dates and could be fairly characterized as "surprise resignations": Justices Arbour and Iacobucci in 2004; Justice Bastarache in 2006; Justice Charron in 2011; and Justice Deschamps in 2012. The judges of the Supreme Court have provided the Prime Minister with ample lead time to appoint their successors to the Court in time for the fall session, which begins the second week of October. However, the Prime Minister has taken significant time to announce each nominee. See Table 2, above.

<sup>229</sup> Fine, "Vetting", *supra*, note 224. See also "Harper v. Harper", *supra*, note 218; Editorial, "Judging the judges" *Ottawa Citizen* (October 18, 2011) A10; Editorial, "Judging the judges" *The Vancouver Sun* (October 20, 2011) A16.

<sup>230</sup> Cf. Cotler & Feldman, *supra*, note 36, at 260.

equally at the feet of the opposition parties. Both the Liberals and the NDP have also chosen to put MPs on the interview committee who were members of the selection committee.<sup>231</sup> In such cases, MPs are in the position of interviewing someone whom they themselves recommended. We would not expect the government MPs to challenge the Prime Minister's selection, but we might expect opposition MPs to exercise the sort of accountability function that they do generally in the House of Commons as opposition MPs. However, opposition MPs are unlikely to do so when they themselves have been part of the process. In part, they are being asked to challenge their own decisions. The answer to the question *quis custodiet ipsos custodes* — who guards the guardians? — is not supposed to be “themselves”.<sup>232</sup>

Moreover, when on occasion MPs on the committee of parliamentarians have been critical of various qualifications of the selected nominee, the attempt at accountability has been misdirected at the nominee instead of at those who participated in selecting the nominee. The most egregious example occurred in 2011 during NDP MP's Joe Comartin's aggressive questioning of Justice Moldaver regarding his lack of proficiency in French. Such questioning was both hypocritical and misplaced. It was hypocritical because Mr. Comartin had been a member of the selection panel<sup>233</sup> which according to the Prime Minister unanimously recommended Justice

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<sup>231</sup> This problem may be tied to the short notice given for the parliamentary hearings. In 2006, three days' notice was given. In each of 2011, 2012 and 2013, two days' notice was provided. It is thus not surprising that the parties chose to put their representatives from the selection panel on the committee of parliamentarians interviewing the candidate. In 2013, when asked why only two days was given to the MPs to prepare for interviewing the Prime Minister's nominee, Minister of Justice Peter MacKay responded: “As a lawyer you're very often called before the court on short notice, and expect to make a case”. Fine, “Nadon skates through”, *supra*, note 226.

<sup>232</sup> The phrase is attributed to the Roman poet Juvenal from his *Satires* (Satire VI, lines 347-48). See Wikipedia, s.v. “*Quis custodiet ipsos custodes*”. The phrase is frequently used to invoke questions of accountability for the exercise of power. See, e.g., Martin M. Shapiro, *Who Guards the Guardians? Judicial Control of Administration* (Athens, GA: University of Georgia Press, 1988); Thomas C. Bruneau & Scott D. Tollefson, eds., *Who Guards the Guardians and How: Democratic Civil-Military Relations* (Austin, TX: University of Texas Press, 2008); Afsheen John Radsan, “Sed Quis Custodiet Ipsos Custodes: The CIA's Office of General Counsel?” (2008) 2 J. National Security L. & Pol'y 201; Arthur H. Garrison, “The Judiciary in Times of National Security Crisis and Terrorism: Ubi Inter Arma Enim Silent Leges, Quis Custodiet Ipsos Custodes? (When in Times of War the Law Falls Silent, Who will Guard the Guardians?)” (2006) 30 Am. J. Trial Advoc. Rev. 165; and C. Lloyd Brown-John, *Canadian Regulatory Agencies: Quis custodiet ipsos custodes?* (Toronto: Butterworths, 1981), cited in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] S.C.J. No. 4, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 2 (S.C.C.).

<sup>233</sup> “Minister of Justice Announces Members of the Supreme Court of Canada Selection Panel” (August 5, 2011), online: <[http://www.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc\\_32624.html](http://www.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc_32624.html)>.

Moldaver for inclusion in the shortlist.<sup>234</sup> Mr. Comartin and the other members of the selection panel should have explained why they recommended Justice Moldaver for appointment. Comartin's blatant and hypocritical attempt to score partisan political points for his party in Quebec was not lost on the media covering the hearing.<sup>235</sup>

While Mr. Comartin's disquiet over the French proficiency of a Supreme Court candidate was understandable, it was a concern that should have been raised in the selection panel process.<sup>236</sup> Instead of hectoring Justice Moldaver on why he did not learn French, the proper question should have been why Justice Moldaver was recommended "unanimously" by the Supreme Court Selection Panel despite his lack of French proficiency. That was a question that should have been targeted at Mr. Comartin and his colleagues and not at Justice Moldaver, who cannot be faulted for not thinking "in his wildest dreams" that he would ever be a candidate for the Supreme Court.<sup>237</sup>

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<sup>234</sup> Prime Minister of Canada, "PM announces appointment of Justice Moldaver and Justice Karakatsanis to the Supreme Court of Canada" (October 21, 2011), online: <<http://www.pm.gc.ca/eng/news/2011/10/21/pm-announces-appointment-justice-moldaver-and-justice-karakatsanis-supreme-court>>: "A selection panel, comprised of Members of Parliament from both Government and opposition parties, provided a unanimously approved list of six names for consideration to the Prime Minister and the Minister of Justice."

<sup>235</sup> Tonda MacCharles, "Appointments highlight secret process: Questions have also been raised about Prime Minister Harper's commitment to bilingualism" *The Toronto Star* (October 18, 2011) A6 (calling Joe Comartin's criticism of Justice Moldaver "a strange twist" because Comartin sat on the selection committee); Tonda MacCharles, "Top court accountability an illusion: Supreme Court judges are appointed by PM, 'nominees' just a show" *The Toronto Star* (October 22, 2011) A6. Cf. Tobi Cohen, "Top judicial nominees face grilling by panel of MPs" *Edmonton Journal* (October 20, 2011) A11 (reporting that interim NDP leader Nycole Turmel stated that the NDP did not support the Prime Minister's decision to consider a non-bilingual judge for the Supreme Court despite the fact that the NDP had been part of the process that had put Justice Moldaver on the short list). Mr. Comartin also took an unfair swipe at Justice Rothstein in the Moldaver hearing, asserting, erroneously, that in the parliamentary hearing in 2006, Justice Rothstein had made a commitment to learn French. A review of the transcript from that hearing reveals that Justice Rothstein made no such commitment. Rothstein Transcript, *supra*, note 177. Justice Rothstein took the highly unusual step of speaking to the media to defend his reputation, which had been publicly besmirched by Mr. Comartin. See Kirk Makin, "Judge rebukes NDP MPs for claiming he broke vow to learn French" *The Globe and Mail* (November 2, 2011), online: <<http://www.theglobeandmail.com/news/politics/judge-rebuked-ndp-mps-for-claiming-he-broke-vow-to-learn-french/article4248773/>>. Mr. Comartin did not apologize for his comments. Rather, he clouded the matter by speculating that the promise may have come about through speaking to a third party as part of the work of the Supreme Court Selection Committee in 2006. It is an interesting question whether Justice Rothstein could have sued Mr. Comartin for libel since parliamentary privilege does not apply to the hearings.

<sup>236</sup> It likely was but we do not know because panel members are bound by confidentiality obligations.

<sup>237</sup> Moldaver and Karakatsanis Transcript, *supra*, note 84. Justice Moldaver undertook to learn French and two years later his efforts were on display at the *Senate Reference* hearing, where

Moreover, it demonstrates that the proper person to be questioned about the Prime Minister's selection is either the Prime Minister or the Minister of Justice, because one of them should account for the selection of the Supreme Court justice. Of the six sets of Supreme Court appointments since 2004,<sup>238</sup> only two provided any semblance of accountability on behalf of the executive. Thus, as discussed in Part II, in 2004, Minister of Justice Irwin Cotler appeared before the *ad hoc* committee and explained the basis upon which he had recommended Justices Abella and Charron and the qualities that they possessed.<sup>239</sup> In no other case did either the Minister of Justice or the Prime Minister explicitly articulate the reason why the nominee had been selected. In each of the four parliamentary hearings that we have had to date, the Minister of Justice simply "introduced" the nominee as one would introduce any speaker, by reading his or her bio.

Only in 2006 did Minister of Justice Vic Toews go beyond the nominee's bio to provide additional description of the nominee which may be taken as justification. Minister of Justice Toews said:

Justice Rothstein is well known as a brilliant jurist with remarkable intelligence and great analytical skills. He is well respected among his judicial colleagues, works collegially, and is highly respected in the legal profession. His output of judicial writing is prolific, with over 900 decisions during his 13 years on the bench. His writing is clear, precise, and complete.

Justice Rothstein is known as an extremely hard worker with the highest degree of integrity and personal and professional ethics. He has been described as pleasant, engaging, and thoughtful. He is also an excellent speaker, and I assume that he will have the opportunity to prove me correct in that respect. He is known as a good listener and as one who seeks out all points of view with respect to legal arguments. He is respectful of counsel and is open to sharing his knowledge and

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he asked counsel questions in French. While some might take issue with the quality of Justice Moldaver's French, it is abundantly clear that he has embraced the task of learning the language seriously and making his best efforts to participate in Supreme Court proceedings in French as quickly and thoroughly as possible.

<sup>238</sup> I treat multiple appointments as a single "set" because in each case they were appointed together. Thus, the six are (1) Justices Abella and Charron (2004); (2) Justice Rothstein (2006); (3) Justice Cromwell (2008); (4) Justices Moldaver and Karakatsanis (2011); (5) Justice Wagner (2012); and (6) Justice Nadon (2013).

<sup>239</sup> Carissima Mathen gave Cotler low marks for accountability in his August 2004 appearance before the *Ad Hoc* Committee. See Mathen, "Choices and Controversy", *supra*, note 14, at 62.



experience with law students and others. I am confident that he will make an excellent addition to the Supreme Court of Canada.<sup>240</sup>

In none of the hearings since 2004 did the Minister of Justice answer any questions and in all hearings since 2006, the Minister of Justice's role was described as "chair"; the Minister simply presided over the proceedings and introduced each nominee, effectively reading the nominee's bio. Not only have the hearings failed in accountability, they have defeated accountability by shifting the focus away from the figures who should be held accountable for the appointment selection — the Prime Minister and the Minister of Justice — and onto the person who has been nominated. Nominees may be able to answer many questions, but what they cannot answer is why the Prime Minister selected them.

*(c) Accountability Misplaced*

It is hard to imagine a "perfect" candidate for the Supreme Court. Every candidate has strengths and weaknesses. The hearings have succeeded to some degree in raising some of the perceived deficiencies of each of the candidates: the lack of French proficiency for Justices Rothstein and Moldaver; the relative appellate inexperience of Justices Karakatsanis and Wagner; and the supernumerary status of Justice Nadon.

The hearings have distorted accountability by attempting to require the nominees to account for their deficiencies. These are questions of qualifications, not of accountability. It is valid to ask a judge how he or she will be able to function at the Supreme Court with only a year or two of appellate experience or without the ability to follow hearings in French. But these questions do not go to the critical question of accountability: why was *this* nominee chosen over other qualified ones? That is not a question that the nominee can or should answer. Rather, it is a question for those who make the ultimate decision: the Prime Minister or the Minister of Justice.

*(d) Unexpected Accountability: The Nominee*

The reforms have succeeded in producing accountability of a different sort: accountability for the nominee who is about to ascend to the

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<sup>240</sup> Rothstein Transcript, *supra*, note 177.

highest judicial office in the land. Supreme Court judges, whose decisions cannot be appealed, have limited accountability. They are protected by life tenure, restricted only by mandatory retirement at age 75, and can only be removed in exceptional circumstances. Supreme Court justices are subject to the jurisdiction of the Canadian Judicial Council, and while there have been complaints against Supreme Court justices from time to time, none have ever been validated.<sup>241</sup> Supreme Court judges are accountable to their colleagues and they are held accountable through their decisions, which must be accompanied by reasons. Those decisions may be critiqued by academics, lawyers, ministers, parliamentarians, the media and members of the public, but Supreme Court judges are never called to account publicly for their decisions, other than through their reasons for judgment. Under our system, such attempts would be considered inconsistent with our notion of judicial independence.

Supreme Court judges interrogate lawyers at oral argument; Supreme Court judges themselves are never interrogated. The public hearing for the nominee is the only time that future Supreme Court judges may explain themselves publicly. There is something humbling in requiring a potential justice to explain him- or herself prior to ascending to the highest judicial office. This is a form *ex ante* accountability which, while not as strong as *ex post* accountability, is a form of accountability nonetheless.<sup>242</sup>

### 3. Public Education

The reforms should be judged a success in terms of achieving the objective of improving public knowledge about the Supreme Court and its judges. As discussed in Part IV, this objective has developed over time; it was not part of the motivation in the design of the process.<sup>243</sup> At the Rothstein hearing, Minister of Justice Toews stated that “Canadians deserve to know more about those individuals who are appointed to the

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<sup>241</sup> No Supreme Court of Canada justice has ever faced any serious complaint of judicial misconduct that raised the spectre of removal.

<sup>242</sup> See Devlin, Mackay & Kim, *supra*, note 85.

<sup>243</sup> Writing in 1999, Jacob Ziegel argued that public hearings could serve an educative function for parliamentarians. See Ziegel, “Merit Selection”, *supra*, note 28, at 14: “There is also another reason that justifies the introduction of a separate confirmation procedure ... it will help to educate our elected representatives on the impact of the Charter on traditional concepts of responsible government and give them a better appreciation of where the line should be drawn between their role and the Charter’s role.”

Supreme Court, and we are here today to provide that opportunity”.<sup>244</sup> Such statements were repeated by successive Ministers of Justice in 2011, 2012 and 2013.<sup>245</sup> The media has recognized that the hearings give Canadians a chance to get to know the judges before they ascend to the nation’s highest court.<sup>246</sup>

There has been significant media interest in the public hearings. The Rothstein hearing was broadcast live on CBC Newsworld, while the others have aired on CPAC. Many journalists attended and reported on each hearing.

The hearings have succeeded in humanizing the judges and the process of judging. Canadians have learned about each of the judges as individuals, including their backgrounds and something about their personalities. They learned that Justice Rothstein is witty and good-humoured, and that he once worked on a railway dining car. They learned that Justice Karakatsanis worked in her family’s Greek restaurant and that she is trilingual. They learned of Justice Moldaver’s working-class origins in Peterborough, Ontario, of the impact of his parents on his development and the precipitous beginnings to his legal career in law school. And of course, Canadians learned about his lack of proficiency in French and his commitment to learn French from his brother, who holds a doctorate in French literature. Justice Wagner told Canadians about his family

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<sup>244</sup> Rothstein Transcript, *supra*, note 177.

<sup>245</sup> See Karakatsanis and Moldaver Transcript, *supra*, note 84 (emphasis added): This public hearing is intended to bring openness and transparency to the appointments process by allowing Canadians to learn more about those individuals who *will be appointed* to the Supreme Court of Canada ... To the two nominees, thank you very much for opening up about yourself and your vision of this. I think you’re going to be a great part of the fabric of this country. You said you and your families are so proud of your being here. I can tell you all of us are very proud. (Minister of Justice Nicholson)

Wagner Transcript, *id.*:

This public hearing is intended to bring openness and transparency to the appointments process by allowing Canadians to learn more about those individuals *who are nominated* to the Supreme Court of Canada ... I believe that this process is a very worthwhile one to gain some transparency, and let Canadians get some familiarity with those who occupy such important positions as those on the Supreme Court. (Minister of Justice Nicholson)

Nadon Transcript, *id.*:

This process, which was begun by our government, is intended to bring greater openness and transparency to the judicial appointments process by allowing Canadians, through this procedure, to learn more about those individuals who *may be appointed* to the Supreme Court of Canada, our highest court in the land. ... This entire process has been very helpful ... in giving Canadians a better understanding not only of who sits and aspires to be a part of the Supreme Court of Canada but also, as Judge Nadon has said, of the quality of the jurists that we have in this country, which is exceptional. (Minister of Justice MacKay)

<sup>246</sup> Editorial, “Judging the judges” *Ottawa Citizen* (October 18, 2011) A10; Editorial, “Judging the judges” *Vancouver Sun* (October 20, 2011) A16.

upbringing in Montreal, how he won his first legal battle at the University of Ottawa by convincing the administration to let him pursue his bachelor's degree at the same time as his law degree, and how he was affected by the events of September 11. Canadians famously learned much about Justice Nadon's hockey prowess, but also about his legal career and his work on the Federal Court.

The hearings have revealed the work of judging in considerable depth. Carissima Mathen opined that the Rothstein hearing "provided a significant educational benefit to those who are not familiar with appellate court decision-making, which incidentally would include many lawyers".<sup>247</sup> While there are those who feel that much more about the judicial process could be revealed through the process,<sup>248</sup> ultimately the hearings should be judged a limited public education success.

## V. TOWARDS A TRULY REFORMED SUPREME COURT APPOINTMENTS PROCESS

### 1. Do We Need Reform?

There are some who believe that the appointment process that has served the Supreme Court well for 129 years<sup>249</sup> is only in need of minor change.<sup>250</sup> Political Scientist Nadia Verrelli has rightly questioned whether various suggested reforms to the appointment process would produce a better Supreme Court than we have had so far.<sup>251</sup> Verrelli's question also raises the possibility that reforms could produce a worse Supreme Court than we have had so far, or could damage the Court as an institution.<sup>252</sup> But doing nothing is also a risk to the Court. As I have shown, the current reforms have failed to meet the promised goals of transparency and accountability. While this failure is certainly no fault of the Supreme Court or of its judges, it has the potential to sow public cynicism about the appointment process and, perhaps, about the Supreme Court. Writing

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<sup>247</sup> Mathen, "Choices and Controversy", *supra*, note 14, at 70.

<sup>248</sup> See, e.g., Plaxton, "The Neutrality Thesis", *supra*, note 50.

<sup>249</sup> That is, from the Supreme Court's creation in 1875 until 2004, when the reforms began.

<sup>250</sup> See McLellan, "Foreword", *supra*, note 64, at 606: "The challenge for Canadians is to take a good judicial appointments process and make it even better."

<sup>251</sup> Nadia Verrelli, "Reforming the SCC: Rethinking Legitimacy and the Appointment Process" in Verrelli, *supra*, note 20, 114, at 122.

<sup>252</sup> Mathen, "Choices and Controversy", *supra*, note 14, at 71-72: "Hasty and ill-conceived changes may prove impossible to reverse in the event that they make the current situation worse, not better."

in 2006, Sauvageau, Schneiderman and Taras argued that “[t]o some degree, the court sits precariously on top of a volcano of political distrust and conflict. Although there have been long periods during which the volcano has remained dormant, there are times when the volcano threatens to erupt.”<sup>253</sup>

Politicization of the Court would threaten its stature and its independence. To date, the Court has benefitted from the perceived evenhandedness of appointments to it.<sup>254</sup> We have never had a movement to impeach a Supreme Court judge the way that the Americans had with calls to impeach Earl Warren or, more seriously, to impeach William Douglas in the 1970s. Our judges are not seen as carrying the allegiance of the party of the Prime Minister who appointed them;<sup>255</sup> we have no equivalent of *Bush v. Gore*.

We should not, however, confuse stability with complacency. Lorne Sossin was correct when he wrote in 2008 that “[t]he system of appointing judges in Canada should continue evolving because it is out of step with Canada’s legal and political culture, not because the judges we have are unworthy.”<sup>256</sup> Having promised transparency and accountability in reforming the Supreme Court appointments process, our political leaders should now deliver on it, lest the failure to do so cultivate contempt for themselves, continued loss of trust in our political institutions and a decline in respect for the Supreme Court.

To begin, the government should deliver on its promise of transparency over the appointment process. It should publish a detailed protocol on the Department of Justice website which sets out the process of appointment from beginning to end. Similar guidance documents are

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<sup>253</sup> Sauvageau, Schneiderman & Taras, *supra*, note 151, at 26.

<sup>254</sup> Writing in 1999, Jacob Ziegel stated, that “If major controversies have been avoided over the appointment of Supreme Court judges since the adoption of the Charter ... this is largely because successive Prime Ministers — Trudeau, Mulroney, Chrétien — have shared similar constitutional philosophies and because the full impact of the Charter has not yet sunk in.” Ziegel, “Merit Selection”, *supra*, note 28, at 9-10.

<sup>255</sup> On the relative lack of partisan polarization in Canada, see generally Benjamin Alarie & Andrew Green, “Should They All Just Get Along? Judicial Ideology, Collegiality, and Appointments to the Supreme Court of Canada” (2007) 58 U.N.B.L.J. 73.

<sup>256</sup> Lorne Sossin, “Judicial Appointment”, *supra*, note 81, at 12. There may be different considerations for appointments to the Supreme Court as compared to other levels of court. It is the court of last resort and the most visible court in the country. Conversely, lower courts are where most citizens would access the Canadian justice system. The different considerations are beyond the scope of this paper.

published by the Privy Council Office.<sup>257</sup> This protocol — perhaps to be entitled “Guide to the Appointment of Supreme Court Justices” — would include the constitutional and statutory context for appointment of Supreme Court justices and the information set out below.

The proposed Guide to the Appointment of Supreme Court Justices would clearly set out the qualifications for appointment and the desired qualities for candidates. In order to promote transparency and accountability, these qualities need to be publicly articulated at the beginning of the process and not raised after the nominee has been selected, as Professors Hogg and Baudoin did in each of the public hearings to date. Moreover, as discussed in Part III, Professors Hogg and Baudoin were not consistent in the criteria that they articulated, nor was there any indication that the Supreme Court Selection Panels or the Minister of Justice had actually used the criteria they suggested.

As to the actual criteria, there is no shortage of suggestions of necessary qualities for Supreme Court justices. Former Minister of Justice Irwin Cotler articulated criteria in 2004,<sup>258</sup> and it may be that the government has continued to use these criteria. The Judicial Appointments Commission in England and Wales has a detailed list of “qualities and abilities”.<sup>259</sup> Academics have suggested various qualities necessary for a

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<sup>257</sup> See, e.g., *Accountable Government*, *supra*, note 168; Canada, Guide to Making Federal Acts and Regulations: Cabinet Directive on Law-Making, online: <<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=legislation/cabdir-dircab-eng.htm>>; Canada, Governor in Council Appointments Guide, online: <<http://www.appointments-nominations.gc.ca/prsnt.asp?page=gicIntro&lang=eng>>. See generally Canada, Privy Council Office, Reports and Publications – by Title, online: <<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=publications-eng.htm>>.

<sup>258</sup> See *supra*, note 31.

<sup>259</sup> Judicial Appointments Commission (England and Wales), Starting a Judicial Career, Qualities and Abilities, online: <<http://jac.judiciary.gov.uk/application-process/qualities-and-abilities.htm>>. According to the Judicial Appointments Commission, “merit” consists of five qualities and abilities: intellectual capacity (a “high level of expertise in your chosen area or profession”, the “ability quickly to absorb and analyse information”, an “appropriate knowledge of the law and its underlying principles or the ability to acquire this knowledge where necessary”); personal qualities (“integrity and independence of mind”, “sound judgments”, “decisiveness”, “objectivity”, the “ability and willingness to learn and develop professionally”, and the “ability to work constructively with others”); ability to understand and deal with people fairly (“an awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs”, the “commitment to justice, independence, public service and fair treatment” and the “willingness to listen with patience and courtesy”); authority and communication skills (an “ability to explain the procedure and any decisions reached clearly and succinctly to all those involved”, the “ability to inspire respect and confidence” and the “willingness to listen with patience and courtesy”); efficiency (“ability to work at speed and under pressure” and the “ability to organize time effectively

Supreme Court justice.<sup>260</sup> For example, Jacob Ziegel’s “wish list for the essential attributes of a Supreme Court judge” includes

complete personal integrity; robust health; industriousness and good work habits; a sense of collegiality with other members of the Court to enable the court to discharge its very heavy work load efficiently and without unnecessary friction; an excellent intellect and fine writing skills to match it; a deep understanding of the Canadian constitution and the Charter; and of the role of law in general in contemporary Canadian society; and not least, keep discernment in being able to project the consequences of a judgment on to a broader canvass.<sup>261</sup>

There may be objections to some of these criteria, but it is important to engage in an open discussion about them.

There should be an arm’s-length Advisory Committee to advise the Minister of Justice and the Prime Minister on the appointment.<sup>262</sup> As to the composition of the committee, the critical factor is that it not replicate party strength in the House of Commons, lest it become simply another committee controlled by the government of the day; the committee should have equal representation from all recognized political parties. There is a benefit to having some non-MPs on the committee to bring perspectives from other areas such as the bar, the bench and the public. However, such representatives should not dominate the committee, because judges and lawyers have a tendency to prefer people like themselves, which makes it unlikely that candidates who are considered outside the legal “mainstream” would be considered, as discussed below.

The Advisory Committee should be free to consider whichever candidates it identifies through its consultation process. It should be required to consider candidates submitted to it by the Minister of Justice, but it should not be restricted to these candidates. By submitting five to eight names to the Supreme Court Selection Panel, the Minister of Justice has

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and produce clear reasoned judgments expeditiously (including leadership and managerial skills where appropriate)”.

<sup>260</sup> See, e.g., Devlin, Mackay & Kim, *supra*, note 85, at 828.

<sup>261</sup> Ziegel, “Merit Selection”, *supra*, note 28, at 13 (citations omitted).

<sup>262</sup> Many favour some form of independent nominating commissions for Supreme Court justices. See Kent, *supra*, note 104, at 97; Hutchinson, *supra*, note 20, at 109; Canadian Assn. of Law Teachers, “Canadian Association of Law Teachers Panel on Supreme Court Appointments” (June 2005); Ziegel, “Merit Selection”, *id.*; Peach, *supra*, note 85; Devlin, Mackay & Kim, *supra*, note 85; Canadian Bar Assn., *Supreme Court of Canada Appointment Process* (Ottawa: Canadian Bar Assn., 2004); Martin Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995), at 256-67 [hereinafter “Friedland”].

been able to effectively control the process and minimize the role of the Advisory Committee. The Advisory Committee should prepare an un-ranked short list, along with an evaluation of the strengths and weaknesses of each of the recommended candidates on the short list and the reasons for their recommendation. The deliberations and recommendations of the Advisory Committee should remain confidential, but the procedures under which it operates should not. The mandate and rules of procedure of the Advisory Committee would be set out in the proposed Guide to the Appointment of Supreme Court Justices.

The Advisory Committee should complete a report on its work which would be submitted to the Minister of Justice at the same time as the short list is submitted. The Report should be released at the same time the Minister or the Prime Minister announces the nominee. Many modern judicial appointments processes contain some reporting requirement.<sup>263</sup> This is viewed as an essential element of accountability. For example, under the legislation creating the *ad hoc* Selection Commissions for appointments to the U.K. Supreme Court, those commissions must submit a report identifying who was selected and who was consulted.<sup>264</sup>

The report of the Supreme Court Advisory Committee should contain the following elements: (1) an explanation of the mandate and composition of the Advisory Committee as per the proposed Guide to the Appointment of Supreme Court Justices; (2) a reiteration of the criteria for evaluation as set out in the proposed Guide to the Appointment of Supreme Court Justices; (3) a timeline of the work and meetings of the committee, *i.e.*, when it was established, when and how it met; when it

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<sup>263</sup> See, *e.g.*, Ontario, Judicial Appointments Advisory Committee, *Annual Report for the Period from 1 January 2012 to 31 December 2012* (Toronto: Judicial Appointments Advisory Committee, 2013). The Ontario Judicial Appointments Advisory Committee (“JAAC”) submits an annual report to the Attorney General which contains, *inter alia*:

- recruitment and outreach strategy;
- legal background of judges appointment;
- appointments from representative groups (Women; Francophones; First Nations; Visible Minorities; and Persons with Disabilities);
- confidentiality policy;
- criteria for Appointment;
- an overview of the process;
- recommendations for changes; and
- profiles of the members of the JAAC.

<sup>264</sup> See *Constitutional Reform Act, 2005*, s. 28 (U.K.) discussed in Shimon Shetreet & Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary*, 2d ed. (Cambridge: Cambridge University Press, 2013) 141.



submitted its recommendations and its report to the Minister of Justice; (4) a profile of the candidates that it considered: (a) number submitted from the Minister of Justice, number suggested by others; (b) professional profile of candidates: judges, lawyers or academics; (c) demographics of candidates for consideration: gender; race; region; linguistic; age, *etc.*;<sup>265</sup> and (5) an explanation of who was consulted, by office although not necessarily by name.

Perhaps most controversially, I do not think that the Minister should be bound by the short list. We should not lose sight of the fact that statute vests the power of appointment with the Governor in Council, which acts on the advice of the Prime Minister. It is arguable that after the *Supreme Court Reference*, this power cannot be altered without a constitutional amendment. Even bracketing the constitutional issue, under our system of responsible government, it is the executive that must account to Parliament for its actions, and then indirectly to the electorate.

Moreover, there is no indication that we would improve the quality of appointments to the Supreme Court by completely fettering the discretion of the Minister of Justice and the Prime Minister. Professor Hogg has argued that the Advisory Committee should be dispensed with altogether because it compromises this 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 ... 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. Such persons are often excellent judges, but may not always be the best person for the Court at a particular time.”<sup>266</sup> Hogg cited the example of the appointments of Bo-

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<sup>265</sup> Cf. the discussion of diversity and representativeness of the judiciary in Devlin, Mackay & Kim, *supra*, note 85, and Sossin, “Judicial Appointment”, *supra*, note 81.

<sup>266</sup> Hogg, “Appointment of Justice Marshall Rothstein”, *supra*, note 49. Professor Hogg also expressed concerns about leaks from the Advisory Committee if too many people are involved with it. While this may have been a concern with the larger and more diverse committee used for the appointment of Justice Rothstein in 2005-2006, it was not a concern with the smaller, “closed” panels consisting solely of MPs used for the subsequent appointments of Justices Moldaver and Karakatsanis (2011), Justice Wagner (2012) and Justice Nadon (2013). On the issue of leaks from the committee of persons being considered, I am not particularly troubled by this for two reasons: (1) there is an increasing tendency for senior executive positions to be open competitions; (2) there is nothing unusual in the disclosure of candidates for senior executive positions. Indeed, such disclosure may foster accountability by allowing the media and the public to debate the pros and cons of different candidates. It may also assist the government in its deliberations by raising issues about a potential appointment such as bilingualism, a controversial past ruling, some questionable

ra Laskin (“[h]e would probably have been regarded as an ‘unsound’ candidate by an advisory committee in 1970”) and Bertha Wilson as ones unlikely to have been recommended by an advisory committee.<sup>267</sup> Hogg is most certainly correct in his assessment, but I do not think that this is reason to dispense with the Advisory Committee; it is reason to ensure that the Minister of Justice is not bound by its recommended short list. Under our constitutional system, the Prime Minister or his or her Minister of Justice is accountable for this appointment and any reformed appointment process should so hold them accountable.

The public hearings should continue but are in need of a drastic overhaul in order to properly serve an accountability function. To date, concerns regarding the politicization of the process and threats to the independence of the judiciary have not materialized.<sup>268</sup>

The three key changes are: (1) the composition of the committee of MPs; (2) the time for the committee of MPs to prepare for its work; and (3) the participation of the Minister of Justice. On the composition of the committee of MPs, this should not include members of the Advisory Committee who recommended candidates for the Minister’s consideration, including, in all likelihood, the candidate selected by the Prime Minister as his or her nominee. Simply put, including such persons in a supposed vetting function is nonsensical, as was seen in the incident involving Mr. Comartin’s challenging of Justice Moldaver’s French-language proficiency.

If the public hearings are to serve a serious accountability function, MPs must be provided with sufficient time to prepare for the hearings: to read and analyze the nominee’s judgments and writings, to consider the analysis and critique of academics and members of the media, *etc.*<sup>269</sup> Instead of two days’ notice, MPs and members of the public should be given at least two weeks’ notice to prepare for the hearings.

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past affiliation or, in the case of Justice Nadon, a serious challenge to his qualification for appointment under the governing statute. We live in an age of transparency and it is simply unrealistic for candidates for any position, especially high public office, to expect secrecy.

<sup>267</sup> Hogg, “Appointment of Justice Marshall Rothstein”, *id.*

<sup>268</sup> Such concerns were raised by the Bar, individual judges and others. See Canadian Bar Assn., *Supreme Court of Canada Appointment Process* (Ottawa: Canadian Bar Association, 2004); Bertha Wilson, “Methods of Appointment and Pluralism” in D. Magnusson & D. Soberman, eds., *Canadian Constitutional Dilemmas Revisited* (Kingston: Centre for Public Policy, 1997) 154, at 162; Kirk Makin, “Top-court Judge defends bench” *The Globe and Mail* (March 3, 1999) A5 (Justice Cory); Peach, *supra*, note 85.

<sup>269</sup> Mathen, “Choices and Controversy”, *supra*, note 14, at 71.

Most importantly, the Minister of Justice should be questioned at the hearing. The hearings have likely succeeded in making Canadians more aware of the work of the Supreme Court and of the new justices,<sup>270</sup> but they have utterly failed in providing direct accountability for the Prime Minister's selection. The Minister of Justice should explain the process and, whether the nominee was selected from the short list or whether the Prime Minister decided to select a candidate who was not on the short list, the Minister would have to explain and justify this decision.<sup>271</sup>

While I do not favour giving Parliament a veto over the appointment at this point,<sup>272</sup> I do think that MPs should have more than a *pro forma* role.<sup>273</sup> At present, they serve a function not much beyond staging in a play produced by the executive. At the least, after the hearing, MPs should submit a report on the nominee and on the hearing to the Minister of Justice and the Prime Minister for their consideration. This will slow down the process at a critical time and hopefully lead to more reflection by both the committee members and perhaps the Prime Minister and Minister of Justice.

## VI. CONCLUSION

Those who championed reforms to the appointment process in the 1990s and 2000s promised Canadians more openness and accountability. They claimed they would empower Parliament and check the unfettered power of the Prime Minister. On these bases, the reforms must be judged a failure, if not worse. Instead of transparency and accountability, they

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<sup>270</sup> I have no evidence to support this assertion; it is a speculation on my part based on my review of media coverage on the hearings.

<sup>271</sup> In his landmark report *A Place Apart: Judicial Independence and Accountability in Canada*, Martin Friedland favoured an independent nominating commission that would produce a ranked short list of two or three candidates. If the government did not choose from the short list, then it would be required to justify its choice before some sort of confirmation hearing. Friedland, *supra*, note 262, at 256-67.

<sup>272</sup> See *contra* Ziegel, "Merit Selection", *supra*, note 28; Bill C-60, *The Constitutional Amendment Act*, 30th Parl., 3d Sess. 1978; Pierre E. Trudeau, *The Constitution and the People of Canada* (Ottawa: Government of Canada, 1969); Peter H. Russell, "Constitutional Reform of the Canadian Judiciary" (1969) 7 *Alta. L. Rev.* 103.

<sup>273</sup> See Mathen, "Choices and Controversy", *supra*, note 14, at 62 (describing the August 2004 hearing in such terms). Though no doubt inadvertently, Minister of Justice Nicholson described the role of the Committee at the Karakatsanis and Moldaver hearing as being "intended to bring openness and transparency to the appointments process by allowing Canadians to learn more about those individuals who *will be appointed* to the Supreme Court of Canada...". Moldaver & Karakatsanis Transcript, *supra*, note 84 (emphasis added).

have brought opaqueness and obfuscation. Instead of addressing the democratic deficit, the reforms have exacerbated it. They have not increased public confidence in the appointment process, nor have they empowered Parliament. The democratic audit conducted in this paper concludes that there is a continued transparency and accountability deficit in the Supreme Court appointment process.

Conversely, it is unlikely that the failed reforms have damaged the judiciary or the Supreme Court. Despite Mr. Cotler's assertion in the epigraph of this paper of the link between the integrity of the appointment process and the independence of the judiciary,<sup>274</sup> there is no indication that the reform process has weakened the Supreme Court or decreased public confidence in the high court or its judges. In terms of making Canadians more aware of the individuals who sit on our highest court, and of the work done by them and by the Court as an institution, the reforms must be judged a success.

Are the reforms worth it? I do not believe we can return to the days before 2004 of a process shrouded in secrecy with unfettered and unaccountable executive power over appointments to our highest court. I have attempted to chart a path for further reforms, which I think would achieve the goals of transparency and accountability without compromising the Supreme Court as an institution. Whether our political leaders will have the will to tackle the new democratic deficit they have created remains to be seen.

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<sup>274</sup> Cotler, "The Supreme Court Appointment Process", *supra*, note 2, at 131.

