

# Justices of the Supreme Court of Canada **The “New” Selection Process**

The Honourable Anne A. McLellan, P.C.

The process by which we appoint judges to the Supreme Court of Canada (SCC) has been in the news again recently, due to the vacancy created by the retirement of the Honourable Jack Major. There has been a longstanding debate in this country around the judicial selection process and this debate has become progressively more heated and political since the passage of the Charter of Rights and Freedoms. The allegations around “activist” judges, usurping the “rightful role” of legislators has become part of our constitutional and legal discourse, as it has been in the United States for many years.

I have been directly involved in this discourse for some time, first as a Professor of Constitutional Law and then more directly as the Minister of Justice and Attorney General of Canada from 1997 to 2002. During that time I recommended to the Governor-in-Council dozens of names of men and women who were appointed to either the superior courts of the provinces and territories or to the federal courts. In addition, during that time I made recommendations to the Prime Minister regarding three new appointees to the Supreme Court of Canada and I participated in the consultations on the selection of Madame Justice Beverly Maclaughlin, as Chief Justice of Canada.

My comments in this short piece will focus on the “new” process of appointment for SCC judges, in light of the recent appointment of Mr. Justice Rothstein. I will describe this process and offer my thoughts on its transparency.

Puisne judges of the Supreme Court of Canada are appointed by the Prime Minister. When a vacancy arose, I would first contact the Prime Minister to confirm that I was about to begin a consultative process, albeit informal, with the Chief Justice of Canada regarding the skills and characteristics he/she would like the new judge to possess. I would then consult with the Canadian Bar Association (CBA), the relevant provincial attorney(s) general, provincial law societies, legal academics and any others with views on the appointment or the process. I always welcomed comments from the general public and in fact, solicited such comments. Based on that input, we would develop a short list of three to five names that we would then ask the CBA, the relevant provincial attorney(s) general and others to assess carefully. I asked for candid and detailed assessments of the short-listed candidates. At the same time, I asked officials within my department to begin a detailed assessment of the judgments and writings of the candidates. These assessments formed a valuable part of the overall evaluation process. Finally, I made a recommendation to the Prime Minister based on my consultations. Particular attention was paid to the views of the Chief Justice of Canada, as it related to his or her assessment of the needs of the Court. This consultative process, while informal, had an acknowledged structure and rhythm to it.

Not surprisingly, there was on-going criticism of this informal process as lacking not only transparency but participation by Members of Parliament (M.P.’s). While very few critics argued for a United States style appointment process, with its too often partisan nature,

there were many who argued for a more structured and transparent consultative Justices of the Supreme Court of Canada process. Then Prime Minister Chrétien felt that the existing process of informal consultation had produced high quality judges and a well regarded court, both at home and around the world. Prime Minister Paul Martin, however, believed that more transparency was required and asked then Minister of Justice Irwin Cotler to consult on a new process for appointments to the Supreme Court of Canada. The process that was used to fill the vacancy on the SCC left by the retirement of Mr. Justice Jack Major, was the result of those consultations.

Briefly, the new process involves the Minister of Justice compiling a short-list of between five – eight names that will then be submitted to an Advisory Committee for further review and assessment. That Committee will recommend a short list of three names to the Minister of Justice who will then make his/her final recommendation to the Prime Minister. Our constitutional framework provides that the Prime Minister appoint SCC judges. There is no veto power in any Committee of Parliament – unlike the United States nomination and appointment process where the President puts forward a nominee who is then confirmed, or not, by the Judiciary Committee of the Senate (Section 2(2) United States Constitution). After the change of government on January 23, Prime Minister Harper added an element to the declared process, requiring that his nominee, chosen from the previously mentioned short-list of three, appear before the House of Commons Standing Committee on Justice and Human Rights to make a public statement and answer questions from committee members. The Standing Committee would then make a “non-binding” recommendation to the Prime Minister in relation to the nominee. Concern was expressed by a number of individuals and groups that this public appearance by the nominee and the expectation that he would answer questions put to him by the all-party committee could devolve into the overly partisan process too often seen in the United States.

The consultative process by which then Minister Cotler compiled his short list of six candidates was extensive. He set out the process that he would follow in public protocols – these protocols included information regarding with whom he would consult and the criteria he would apply in selecting individuals for inclusion on his short list. Mr. Cotler went so far as to include advertisements in newspapers seeking input directly from the public, whether as to specific names or the general characteristics that people wanted to see reflected in this appointment.

The Advisory Committee to which Minister Cotler submitted his six names was made up of nine members; one (1) member from each of the four parties represented in the House of Commons, one (1) retired judge appointed by the Canadian Judicial Council, two (2) persons appointed by the Province (or in this case the Provinces of Alberta, Saskatchewan and Manitoba). One of these two people was selected by agreement among the three provincial attorneys general and the other was selected by agreement among the three law societies. Finally there were two (2) laypersons appointed by the federal Minister of Justice. The Chair of the Committee was Brent Cotter, Dean of the University of Saskatchewan Law School, who was chosen by his fellow committee members to be Chair. The Committee’s mandate was to take the six names provided by the Minister of Justice and do a detailed examination and assessment of each.

It is possible, in this process, for the Committee to add an additional name or names to the list submitted by the Minister of Justice. But before a name could be added, the Minister would need to consult in the same manner that he did for his original short list.

The Advisory Committee would create a short-list of three, from which the Minister of Justice would recommend one to the Prime Minister.

This is a highly consultative process – indeed one might say “top heavy” with consultation – consultation by the Minister of Justice – then by the Advisory Committee – and finally by the Standing Committee on Justice in the House of Commons. The public knows who is being consulted by the Minister – the public knows the characteristics and skills that the Minister is looking for in nominees and they can provide their own views and insights, either as it relates to individuals or to the process.

For those seeking Parliamentary involvement or oversight in relation to these important appointments – each of the four parties represented in the House of Commons has a member on the Advisory Committee which compiles the short-list of three and all parties are represented on the Standing Committee.

Therefore, this entire process involves consultation with elected officials, the judiciary, provincial attorneys general, provincial law societies, legal academics and the general public. It accommodates regional concerns and should accommodate other issues of diversity. In reality, based on my experience, regardless of the exact nature of the consultative process chosen, consensus forms around a relatively small number of possible nominees very quickly.

In contrast, looking at the process for appointments to the United States Supreme Court, we know very little about with whom the President consults before making his recommendation to the Senate Judiciary Committee. With whom did George Bush consult, if anyone, before nominating Harriet Myers? Our process of extensive consultation should ensure that a candidate’s credentials and suitability are assessed rigorously before any recommendation is made to the Prime Minister by the Minister of Justice. It would be interesting to know what process a President adopts, albeit informal, before making his nomination public and with whom he consults and what form those consultations take.

Of course, the Senate Judiciary Committee does conduct public hearings and often compiles a lengthy witness list, but not always. However, it seems that, too often, these witnesses are more interested in scoring partisan political points or destroying the reputation of the nominee or calling into question his or her good character rather than offering considered, dispassionate interventions on the candidate’s judicial skills and abilities and over-all suitability for the highest court in the land. Hence the relatively new concept in our English lexicon – “to be borked”.

The name of Mr. Justice Rothstein, a Manitoban, then sitting on the Federal Court of Appeal, was recommended to Prime Minister Harper by Justice Minister Vic Toews. To

this point the process was exactly as set out by former Minister of Justice Cotler. The new government decided Justice Rothstein should appear before the Standing Committee and answer questions. As mentioned earlier, there was much concern expressed about this by judges, politicians and others. Some saw this as a further “Americanization” of our institutions, potentially leading to an increased politicization of the judiciary. Others saw this as an important enhancement of transparency and an opportunity for not only parliamentarians, but the general public, to learn something of a person who would hold such an important position in our country before his appointment was made final.

In the end, most would agree that the “Rothstein hearing” was respectful, marginally informative and uneventful, with Professor Peter Hogg laying down the ground rules to M.P.’s in a “no nonsense” way – setting out the purpose of the hearing and the appropriate parameters for questions and comments.

To the credit of my former colleagues, they generally operated within those parameters and appointed themselves well. Mr. Justice Rothstein was candid, straight-forward, well prepared and leavened his answers with humor, where appropriate. Many commentators described the hearings as “boring” or “uninformative” - nothing was learned about the candidate or his judicial philosophy. Perhaps those critics were looking for the highly politicalized and theatrical nature of the U.S. confirmation hearing. But it is my view, that if the earlier consultation processes have worked effectively, it would be very unusual for there to be any shocking revelations or “smoking gun” at this late stage in the appointment process. All should be known long before someone like Mr. Justice Rothstein is nominated by the Prime Minister and appears before the Standing Committee.

So overall, my conclusion is that we have a balanced process – one respectful of our constitutional framework - the authority of the Prime Minister to appoint; the desire of elected M.P.’s to play a role; the desire on the part of Canadians to have a more transparent process in which they get to know something of the women and men who play such an important role in our society.

It is possible that in the future an appearance by a prospective SCC judge before the Standing Committee could become an unseemly spectacle that undermines the independence and integrity of the judiciary. If that were to happen, with no constitutional imperative to have a nominee appear before any committee, such excess could be avoided by simply not requiring future nominees to appear. Actually, that reality may be enough to ensure that M.P.’s, who have for so long argued to be part of the process, conduct themselves in a constructive and respectful manner.

As Irwin Cotler, M.P. said after Mr. Justice Rothstein appeared before the Standing Committee “it was a structured, after the fact job interview.” Overall, I think it was a benign addition to our judicial appointment process. Increased transparency around such important appointments is a good thing – most of the time.