SELECTING SUPREME COURT JUSTICES: IS TRUDEAU'S SUNNY WAY A BETTER WAY?

Peter H. Russell*

On August 2, 2016, Prime Minister Trudeau announced a new process for selecting Supreme Court of Canada justices. The lack of a guarantee in the new process for observing the convention of regional representation on the Court – in this case replacing retiring Justice Thomas Cromwell with another jurist from Atlantic Canada – was the main focus of public concern. That concern may well have been the main reason for suggesting the topic for the Ivan Rand Memorial lecture that I had the honour to give at the University of New Brunswick in October 2016. With the announcement on Monday, October 17 that Prime Minister Trudeau has decided to have Newfoundland & Labrador's Judge Malcolm Rowe appointed, that concern is over – for now. Though I will certainly discuss the regional representation convention later in my talk, I would first like to place the Trudeau government's reform of the selection process in a broad international and Canadian context and then look closely at all features of the new process.

The International Movement for High Court Reform

Over the past half century most of the world's constitutional democracies have recognized the need for some check and balance on the discretion of political heads of government in selecting members of their country's highest constitutional court. This idea has accompanied the adoption of constitutional or semi-constitutional bills of rights in many democracies: the judges who interpret and apply constitutional limits on elected governments should be selected and appointed through a process that is open and transparent and not controlled or dominated by the government that is subject to these judicially enforced limits on its actions.[1]

The most common approach to meeting this concern has been to establish judicial nominating committees to find outstanding candidates and recommend one or more of them for appointment. Final power to determine who will be appointed remains with the political, elected head of government, as is appropriate in a democracy, but the president or prime minister is required to choose a candidate recommended by the nominating commission.

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[1] See Peter H Russell, "Judicial, Recruitment, Training and Careers," in Peter Cane & Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010) 322.

Reforming the judicial selection process in Canada

In Canada interest in limiting the discretion of elected heads of government in the selection of Supreme Court justices came well before the "rights revolution". It initially focussed on the Court's role in interpreting the federal division of powers between governments rather than enforcing citizens' rights against governments. In 1949 when Parliament was debating amendments to the *Supreme Court Act* to end appeals to the Judicial Committee of the Privy Council, Léon Balcer, a Conservative MP, thought it questionable that the tribunal that would be settling disputes between the two levels of government was so thoroughly a creature of the federal government.[2] Another Quebec MP, Wilfred La Croix, proposed that four Supreme justices (on a bench to be expanded from seven to nine) be nominated by provincial governments.[3]

Later on, when our country plunged into those endless attempts at re-doing our Constitution, proposal after proposal gave the provinces a role in selecting Supreme Court justices. The most recent of these was section 19 of the Charlottetown Accord that would have required the federal government to name judges from lists submitted by the governments of the provinces and territories. Of course, as you know all too well, none of those proposals ever became law. And some of you may be saying to yourself "wasn't that a good thing?" From the time the Supreme Court was established in 1875, right up to the early years of this century, Canada carried on with a very simple unreformed process of filling vacancies on the Supreme Court of Canada. Let me briefly describe the unreformed process.

Although in law the appointment of a Supreme Court justice is made by the Governor-in-Council (i.e., the cabinet), in practice it is the Prime Minister who decides who is to fill a vacancy. The Minister of Justice has always assisted the Prime Minister in making his or her decision by looking for promising candidates in the region of the justice who is leaving the Court. In the modern period, the minister has had the help of a special assistant who performs a function similar to that of a chief scout for a sporting franchise. In the search for good candidates various soundings and consultations would take place – sometimes with the Supreme Court's chief justice, sometimes with provincial attorneys general, usually with provincial governments with which the federal government has friendly political relations and which is in the region in which the vacancy occurred, as well as with groups and individuals who might have strong views or useful information to impart. Even I, a non-lawyer political science professor, was consulted on one occasion. And of course, the government has always received heaps of unsolicited advice on who to appoint or who not to appoint, from groups and individuals. This is known as lobbying.

The central role of the Prime Minister in naming Supreme Court justices differs from the process of filling vacancies in the section 96 provincial courts and

[2] *House of Commons Debates*, 21st Parl, 1st Sess, Vol 1 (11 October 1949) at 661.

[3] *House of Commons Debates*, 21st Parl, 1st Sess, Vol 1 (27 September 1949) at 313.

the federal courts. These too, by law, are Governor-in-Council appointments, but when the Justice Minister brings names to the cabinet, cabinet ministers can weigh in and argue for or against a proposed appointment especially if it is to a vacancy on a court in their province. Appointments to the Supreme Court, on the other hand, like the selection of Governors General, provincial Lieutenant Governors and Territorial Commissioners, have been considered so important that the Prime Minister must be the key and final decision-maker in selecting the appointee.

It is essential to note that the process I have described was never written into the *Supreme Court Act* or any other legal instrument. The whole process, including the Prime Minister's role, remains in the informal, so-called "unwritten" part of our constitutional system. Usually we call these rules and practices constitutional conventions. Although, given the variations in the consulting part of the process, calling the process a convention implies more coherence and consistency than has occurred. The one constant of this conventional practice has been the unbridled discretion of the Prime Minister in deciding who will serve on the Supreme Court of Canada.

Reform in the modern ea

The defeat of the Charlottetown Accord in 1992 brought an end to efforts to reform the process of Supreme Court reform by constitutional amendment. But well before then, in the 1980s, there was strong interest in professional and academic organizations in reforming the judicial selection process not only for the Supreme Court but for section 96 courts and the Federal Court. The impetus for this, in part, came from new methods of judicial selection introduced by many provinces and Yukon, that aimed at removing political patronage as the dominant influence on appointments to provincial and territorial courts, the lowest trial courts in the court hierarchy but the courts where most Canadians have their first hand experience with the administration of justice. Again, though there were institutional variations across the jurisdictions, reform involved the introduction of independent nominating bodies that would recommend lists of candidates from which government would be required to choose. The aim was to make professional merit rather than political affiliation the primary criterion of selection. In 1987, the Canadian Bar Association published a report critical of "undue political favouritism" in the federal judicial appointment system and advocated reform along the lines of reform at the provincial level.[4] The Association of Canadian Law Teachers, much earlier than this, championed reforms to change judicial selection from a patronage-ridden system to one based on a search for excellence.

In 1988, the Mulroney government responded to this pressure by introducing Judicial Appointment Advisory Committees to assist it in filling vacancies on section 96 courts, with a committee for each province, and for federal courts (the Canadian Tax Court, the Court Martial Appeal Court and the Federal

[4] Canadian Bar Association, *The Appointment of Judges in Canada* (Ottawa: Canadian Bar Foundation, 1985).

Court of Canada).[5] But these advisory committees, unlike their provincial counterparts, were not nominating bodies. They were (and still are) screening bodies asked to respond to lists of legally qualified candidates sent to them by the Commissioner of Federal Judicial Affairs. So long as the committees could respond by designating some on their list as "highly recommended" rather than simply "recommended", considerations of merit could enter into the advice they gave government. But when the Harper government reduced the committees' mandate to advising simply whether a candidate was qualified or not qualified, considerations of merit was removed from the federal advisory process. The advisory committee system never applied to the selection of Supreme Court justices.

By the 1990s in the context of appointing Supreme Court of Canada justices, the importance of the Court's role in interpreting the Charter of Rights and Freedoms had supplanted federalism as the focus of concern. The politicians and the public now knew that whomever gets appointed to the Supreme Court of Canada has tremendous power on controversial matters of great interest to the public, such as abortion, gay rights, prostitution, police powers and criminal justice. There was growing interest in a system of selection that was open and known, and not entirely subject to the whims of the Prime Minister.

The first glimmer of reform came in 2004, when – out of the blue – the Martin government announced that Justice Minister Irwin Cotler would appear before an ad hoc committee of seven MPs and two members of the bar to answer questions about the persons the government had chosen to fill two Ontario places on the Supreme Court, Rosalie Abella and Louise Charron. The event was a political flop. The two Conservatives on the committee complained about being asked to rubber-stamp persons the government had already decided to appoint. And indeed Abella and Charron were appointed. *The Globe & Mail*'s lead editorial declared the process a "sham".[6]

For their next Supreme Court appointment, in 2005 – to fill the vacancy created by the retirement of Justice Major of Alberta - the Liberals introduced a more elaborate process. This time the Minister of Justice, Irwin Cotler, sent a list of eight candidates to a nine-person Advisory Committee consisting of four MPs (one from each party), a retired judge chosen by the Canadian Judicial Council, a lawyer chosen by the law societies of the Prairie provinces, a representative of the three Prairie provincial governments, and two lay persons of "integrity and distinction" from the Prairie region chosen by the Justice Minister. The committee's mandate was to assess the persons nominated by the minister and winnow the list down to three. The Minister of Justice would recommend one of these three to the Prime Minister. If that person were not appointed, Mr. Cotler would offer an explanation to the House of Commons Justice Committee.[7]

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[5] Peter H Russell & Jacob S Ziegel, "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees" (1991) 41 U Toronto LJ 4.

[6] Donald R Songer, *The Transformation of the Supreme Court of Canada* (Toronto: University of Toronto Press, 2008) at 16–17.

This advisory committee, it should be noted, was not a nominating committee, but a committee to select the best among the government's nominees. It should also be noted that implicit in the structure of the new process – the legal and provincial government representation – was observance of the convention of regional representation. Since there was already a British Columbia jurist, Beverley McLachlin, on the court, the appropriate governments and law societies to be represented were those of the Prairie provinces.

The process was completed by January 2006. But by then the country was in the midst of a federal election resulting in the Harper Conservatives forming a minority government. Vic Toews, the new Conservative Justice Minister, announced that Prime Minister Harper had chosen to appoint Justice Marshall Rothstein, a Federal Court judge with a professional career in Winnipeg and one of the three names submitted by the Advisory Committee. So the Harper Conservatives completed the process introduced by the Liberals. But they did a little more than that: they added a new wrinkle. Marshall Rothstein, the designated new Supreme Court justice, would be interviewed by an ad hoc committee of MPs on live television. The committee would be chaperoned by law professor Peter Hogg, to make sure its questioning did not venture into the justice-designate's views on any issues that might come before the Court. It was a sort of "getting to know you" session for the politicians and the people.

This new process with the Conservatives add-on was a pale imitation of the American system of filling Supreme Court vacancies. As in Canada, in the United States, it is the government of the day that does the nominating, and then elected legislators who react to the government's choice. The big difference, of course, is that in the American system the Senate has the constitutional power to advise and consent (or refuse consent) for the President's nominee, while Canadian parliamentary committees have no power to reject the Prime Minister's chosen candidate.

After the Rothstein appointment, the Harper government dropped the process the Liberals had established in 2005 and casually, from time to time, used truncated versions of what it had added to the Liberal process – small committees of MPs, always with a government majority, reviewing, in private, the person or persons the Prime Minister was considering for appointment. Some variant of this process was used to fill five vacancies, but not for the other three appointments that the Harper government made.[8] With so much adhocery, and no checks and balances on the government's nominating and selection process, it could not be said that up to 2016 Canada had reformed its system of selecting Supreme Court justices.

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[7] Peter H Russell, Rainer Knopff, Tom Bateman & Janet Hiebert, eds, "Introduction," in *The Court and the Constitution*: *Leading Cases* (Toronto: Emond Montgomery, 2008) at 15.

[8] Erin Crandall & Andrea Lawlor, "Courting Controversy: The House of Commons' Ad Hoc Process to Review Supreme Court Candidates" (2015) 38:4 Can Parliamentary Rev 35 at 38.

The Trudeau government's new process

With this international and Canadian background of reform experience as context, let me now examine the new process the Trudeau government has put in place. At the centre of the process is the Advisory Board for Supreme Court Appointments.[9] This new institution is most definitely a nominating body. It has a mandate to "actively seek out qualified candidates" and encourage them to apply and to provide the Prime Minister with "recommendations of at least three, but up to five, qualified and functionally bilingual candidates" for his or her consideration.[10] The position is to be advertised, so that lawyers and judges who are interested can apply, but the Advisory Board can seek out candidates who it thinks are promising and encourage them to apply, as can the federal, provincial and territorial governments.

The Board has seven members, four of whom are chosen by judicial and legal organizations. The one judicial member is Richard Scott, retired Manitoba Chief Justice, named by the Canadian Judicial Council. The three lawyers are Susan Ursel from Toronto, named by the Canadian Bar Association, Jeff Hirsch of Winnipeg, named by the Federation of Canadian Law Societies and Camille Cameron, a legal scholar and Dean of the University of Dalhousie's Schulich School of Law, named by the Council of Canadian Law Deans. The other three members, two of whom are non-lawyers, are nominated by the Minister of Justice. They are Lili-Anne Peresa, President and Executive Director of Centreaide of Greater Montreal, Stephen Kakfiw, former premier of the Northwest Territories and President of the Dene Nation, and Kim Campbell, former Canadian Prime Minister and federal Justice Minister in the Mulroney government. Campbell is the Board's chair.

With one qualification, the Advisory Board's membership measures up reasonably well to the norms of Canadian diversity. Women are in the majority outnumbering male members four to three. There is at least one member from each of what counts as Canada's "regions" in filling Supreme Court vacancies. The Board's ethnic diversity represents the Canada's multiculturalism, but while there is one Aboriginal member, there is no one from French Canada; as a result, it fails to reflect Canada's multinational character.[11]

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[9] Prime Minister of Canada, "Prime Minister announces new Supreme Court of Canada judicial appointments process" (2 August 2016), online: <pm.gc.ca/eng/news/2016/08/02/prime-minister-announces-new-supreme-court-canada-judicial-appointments-process>; Office of the Commissioner of Federal Legal Affairs, "The Indpendent Advisory Board for Supreme Court of Canada Judicial Appointments, online: <www.fja-cmf.gc.ca/scc-csc/index-eng.html>.

[10] Office of the Commissioner for Federal Judicial Affairs Canada, "Terms of Reference of the Advisory Board", (2 August 2016), online: <www.fja-cmf.gc.ca/scc-csc/mandate-mandat-eng.html> [FJA, "Terms of Reference"].

[11] For an account of how Canada has become a multinational, multicultural country, see Peter H Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests* (Toronto: University of Toronto Press, forthcoming in 2017).

With only two non-lawyers the Board might seem to be over-dominated by legal professionals. In this respect it contrasts sharply with Ontario's Judicial Appointments Advisory Committee (of which I was the founding chair) which since its beginning in 1989 has had a requirement that a majority of its 13 members be non-lawyers. I think that makes sense for selecting members of courts where so many citizens experience justice first-hand and whose justices frequently do not show sufficient respect for the people who appear before them or for their family members and friends in the courtroom.

The new Canadian Advisory Board is more like its counterpart in the United Kingdom. The five-person commission that makes recommendations on appointments to the UK's Supreme Court consists of the Court's President (its Chief Justice), deputy president and three members of the appointing committees or boards established for Scotland, Northern Ireland and lower courts in England.[12] There is no requirement that any of those three be non-lawyers. The United Kingdom, I should note, is at the extreme end of the reform spectrum in trying to rid the judicial appointment process of the influence of political patronage and political ideology. Fortifying judicial independence was the overriding goal of the reforms that took place under Tony Blair's Labour government and that have been carried on under Conservative administrations. The UK appointing commission gives only one name to the Minister of Constitutional Affairs who must give reasons to parliament if he or she does not accept the "recommendation".

At the other end of the spectrum are South Africa's 23-person Judicial Services Commission, 11 of whose members are elected politicians, three of whom must be from opposition parties,[13] and Israel's nine-person committee for judicial appointments and promotions, three of whom are elected politicians, traditionally one from the opposition plus two ministers.[14] Both these judicial selection bodies serve as nominating bodies not only for their country's highest constitutional court but for judges of all other courts (excluding South African magistrates).

The absence of any MPs from the Canadian Board's composition drew some initial outrage from Conservative politicians. But elected politicians are by no means excluded from the new process. Once the Committee has settled on its short list, the Minister of Justice is to consult with the Chief Justice of Canada, relevant provincial and territorial attorneys general, relevant cabinet ministers and opposition justice critics, as well as the relevant House and Senate committees. After the Prime Minister makes his or her selection from the short list submitted by the Advisory Board, the Minister of Justice and Chairman of the Advisory Committee will appear

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[12] See Kate Malleson, "The New Judicial Appointments Commission in England and Wales: New Wine in Old Bottles?" 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, 2006) 39 at 46.

[13] François du Bois, "Judicial Selection in Post-Apartheid South Africa", in Malleson & Russell, *supra* note 12, 280 at 284.

[14] Eli M Salzberger, "Judicial Appointments and Promotions in Israel: Constitution, Law and Politics", in Malleson & Russell, *supra* note 12, 241 at 248.

before the House Standing Committee on Justice and Human Rights to explain how the chosen nominee meets the statutory requirements and the criteria. Further to that, the nominee is to participate in a moderated question and answer session with members of the House Standing Committees on Justice and Legal Affairs and the Senate Standing Committee on Legal and Constitutional Affairs.[15] Representatives of the Bloc Québécois and the Green Party are to have an opportunity to participate in this part of the process. This means that parliamentarians will at least get to meet with the justice-designate, an opportunity not extended to them in the on and off private meetings with MPs under the Harper government. My own view is that MPs are not likely to have the time or capacity to engage in the work of looking for the best candidates for service on the Supreme of Canada. Those who do know or have heard of outstanding lawyers or judges whom they would like to see considered can encourage them to apply. I fear that at least some MPs would be too driven by partisan or ideological considerations if they were involved in assessing the pool of candidates that the Board assembles.

The reference to consulting on the short list with relevant provincial and territorial attorneys general held out a glimmer of hope that the new process would observe the convention of regional representation on the Supreme Court bench. Politically speaking, that glimmer of hope was clearly not enough to overcome unease in Atlantic Canada.

Let me now discuss the stated criteria for appointment from which regional representation is missing. The Advisory Board must be guided by two institutional criteria: the Supreme Court should be "gender balanced" and "reflect the diversity of Canadian society."[16] The appointment of a fifth male to a bench of four men and four women cannot reasonably be said to upset the gender balance. As for diversity, except for the absence of a justice with an Aboriginal background, the existing Supreme Court bench measures up fairly well. Two of the Ontario justices, Rosalie Abella and Michael Moldaver, have a Jewish Eastern European background, and the third, Andromache Karakatsnasis, is from Canada's Greek Eastern Orthodox community. This means that justices who are neither British or French in their ancestry form over 30 per cent of the existing bench, which is roughly in line with their proportion of Canada's current population. But while that may satisfy the multicultural dimension of Canadian society, it does not serve Canada's multinational structure. Aboriginal peoples should not be thought of as minority cultures. They are nations within, with governments of their own and their homelands in Canada. It has taken a long time for the country to accept this fact and build recognition of it into Canada's Constitution. The Supreme Court plays a huge role in adjudicating Aboriginal rights cases. The absence of an Aboriginal jurist with life experience and deep knowledge of Aboriginal law and tradition is a major flaw in the Court's present composition.

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[15] Office of the Commissioner for Frederal Judicial Affairs Canada, "Frequently Asked Questions" (2 August 2016), online: <www.fja-cmf.gc.ca/scc-csc/questions-eng.html>.

[16] FJA, "Terms of Reference", *supra* note 10.

It may very well be that it was the Advisory Board's effort to find a well-qualified Aboriginal person that prompted Mary-Ellen Turpel-Lafond, an outstanding Aboriginal scholar and jurist from western Canada, to make it clear that she would not be available to fill the vacancy created by Justice Cromwell's retirement. "I never go where I am not wanted," Turpel-Lafond told *The Globe and Mail*. [17] In making this statement she recognized and honoured regional representation for Atlantic Canada on the Supreme Court, and did the country a favour in not making one representational priority trump another. It would be very difficult to find a well-qualified, bilingual, Aboriginal jurist in Atlantic Canada.

Let me now turn to bilingualism, which is set out in the new policy almost as if it were a legal requirement of eligibility for appointment, which of course it is not. Much progress has been made in making the Supreme Court a bilingual institution since I did my study of the Court for the Royal Commission on Bilingualism and Biculturalism in the 1960s.[18] Then, I found that with no instantaneous translation facility and most justices from English-speaking Canada being unilingual, Francophone advocates from Quebec who wanted to present their case to the Court in their first language were at a serious disadvantage. Equally unacceptable was the fact that the Court's Official Reports contained English versions of all decisions but did not report all decisions, including some constitutional decisions, in the French language. Both of those lamentable institutional defects, as a result of the Commission's work, were soon remedied. Is the country now ready to take the next step and require that all who sit on its highest court be functionally bilingual?

The definition of functionally bilingual on the Commissioner for Federal Judicial Affairs Canada website requires that all members of the Court be able to read written submissions and hear oral arguments without translation services, but justices can speak in their first language when questioning counsel in the oral hearing – a reasonable modification, I would say.[19] Given the size of the pool of lawyers and judges from which Supreme Court justices are drawn and the popularity of French immersion over many decades in English-speaking Canada, I do not think the requirement of functional bilingualism will unduly restrict the availability of outstanding candidates to fill positions on the Court. The Deputy Commissioner of Federal Judicial Affairs told *The Globe & Mail* that Malcolm Rowe surpassed the level of competence required.[20] The one qualification I would make is that English/French bilingualism should not be a requirement for an outstanding

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[17] Sean Fine, "Trudeau waffles on approach to appointing top judge", *The Globe & Mail* (28 September 2016) A1 [Fine, "Trudeau waffles"].

[18] Peter H Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa: Queen's Printer, 1969).

[19] Office of the Commissioner for Frederal Judicial Affairs Canada, "Qualifications and Assessment Criteria" (2 August 2016), online: <www.fja-cmf.gc.ca/scc-csc/qualifications-eng.html> [FJA, "Qualifications"].

[20] Sean Fine, "PM makes judicial activist first Supreme Court nominee", *The Globe & Mail* (17 October 2016) A1.

Aboriginal candidate who is already fluent in his or her native tongue and one of Canada's official languages.

The new process directs the Advisory Board to observe one further institutional criterion: there should be a balance of public and private law expertise among the Court's members.[21] In Canada, like other countries with institutions based on the common law Westminster tradition, our highest court is supreme in all areas of law. That is not true in the United States, other Commonwealth countries or civil law countries. That means the Canadian Supreme Court must have strength in all fields of law. That is why it makes such good sense to give the Chief Justice of the Court an opportunity to be consulted on the Advisory Board's short list. This will enable her or him to inform the Board on how candidates they are recommending serve the functional needs of the Court in various areas of law.

Criteria that speak to institutional merit are not to be satisfied at the expense of individual merit. The criteria posted online set out, more thoroughly than any writing, official or unofficial, I have ever seen the personal and professional qualities that are expected of a Supreme Court justice. They include, deep and demonstrated legal knowledge ("the chief consideration"), analytical skill, clarity of expression, commitment to public service, moral courage, independence of mind, and personal integrity.[22] My brief summary does not do justice to the care with which this statement of personal qualifications has been written. This part of the new process makes it clear that the Advisory Board is being asked to look in the large pool of lawyers who are legally qualified to sit on the Court – meaning they have ten years of practice at the bar or service on a superior court – for truly outstanding candidates. It is indeed a search for excellence.

When Kim Campbell, Chair of the Advisory Board, appeared with Justice Minister Jody Wilson-Raybould before a panel of parliamentarians on October 24, 2016 to explain the process that led to the selection of Malcolm Rowe, Canadians learned much more about the new process than had been disclosed up to that time.[23] Campbell reported that the Advisory Board had received 31 applications from across Canada. She said the Board had actively sought out candidates who, if they wished to be considered, would still be required to apply. We don't know how many of the 31 applicants were persons that the Board sought out and how many applied on their own initiative. Applicants were required to set out their qualifications and reasons for being interested in serving on Canada's highest court. Transparency was well served by giving the public an opportunity to read the selected candidate's presentation of his qualifications. The Board examined applicants' legal writings (presumably, in the case of judicial applicants, that would include their judicial opinions), as well as professional and community references. It also conducted hour-long interviews with the top ten candidates. "Our goal," said Ms Campbell, "was to create a list that would

[21] FJA, "Qualifications", *supra* note 19.

[22] *Ibid.*

[23] Tonda MacCharles, "Ex-PM backs Rowe despite ruling", *Toronto Star* (25 October 2016) A7.

keep the prime minister up at night trying to figure out which one of these excellent people to appoint."[24]

The day after the explanation of the process to the House committee, the justice-designate appeared before a panel of MPs and Senators and an audience of 150 University of Ottawa law students. This was not a carefully managed question and answer session like the one which Marshall Rothstien underwent in 2006. Conservative Senator Denise Batters and NDP leader Thomas Mulclair asked sharp questions about Rowe's decision as a Newfoundland and Labrador Court of Appeal judge not to overturn an acquittal of a defendant in a rape case despite serious errors by the trial judge in allowing in evidence about the victim barred by rape-shield legislation.[25] Some Conservatives questioned Rowe on the statement he had made in his written application that judges in their adjudicative work inevitably "make law." That idea, which has long been accepted by most serious students of the judicial process, was a "no-no" for Harper's Conservatives. In his response, Rowe did not back away from acknowledging the creative aspect of adjudication, especially at the Supreme Court level, but expressed sensitivity to the need for caution in developing fields of law, such as Aboriginal rights. The Court, he said, must "not get ahead of governments and indigenous leaders who bear the prime responsibility of engaging in "negotiations and dialogue" and bringing along the public."[26] This part of the new process was an informative encounter that gave the country a fair indication of the direction in which this new member of their highest court will develop Canadian law, but it was not a "nomination hearing" as some media described it. One journalist wrote that a House of Commons committee would meet the next day "to indicate whether it supports the nomination…"[27] Unlike the United States where the Senate must confirm the President's nominee, the Prime Minister's nominee does not require confirmation by Canada's Parliament. On October 28, Prime Minister Trudeau announced Malcolm Rowe's appointment.[28]

Regional Representation

Having given an overview of what the new process calls for, let me now turn to the one point on which it has nothing to say – regional representation. The composition of the Supreme Court from its establishment in 1875 has had a pattern of regional

[24] *Ibid*.

[25] See Alyshah Hasham, "New Supreme Court nominee under fire for rape trial ruling", *Toronto Star* (21 October 2016) A1.

[26] Tonda Maccharles, "Supreme Court nominee Malcolm Rowe surprises observers in questioning", *Toronto Star* (25 October 2016), online: <https://www.thestar.com/news/canada/2016/10/25/supreme-court-nominee-rowe-shares-views-on-aboriginal-and-treaty-rights.html>.

[27] *Ibid*.

[28] "Justice Malcolm Rowe formally appointed to Supreme Court of Canada", *The Canadian Press* (28 October 2016), online: <www.theglobeandmail.com/news/national/justice-malcolm-rowe-formally-appointed-to-supreme-court-of-canada/article32564475/>.

representation.[29] Because of the need for justices with knowledge of Quebec's distinct civil law system, the first *Supreme Court Act* required that at least two positions on its first bench of six be filled by lawyers or judges from Quebec. That legal requirement was raised to three when the bench was expanded to nine in 1949.[30]

Representation of other regions has always depended on constitutional convention. But constitutional convention has not been a tightly defined set of rules. The first Supreme Court had two Ontario justices and two from the Maritimes (New Brunswick's Justice Ritchie and Nova Scotia's Justice Henry) along with the two mandatory Quebec appointees. I assume the west was left out because the fledgling provinces of Manitoba and British Columbia did not yet have enough legal talent for a Supreme Court appointment. The west got its first justice with the appointment of Justice A.C. Killam in 1903. Maritime jurists filled two places on the Court until 1906, when Charles Fitzpatrick, a Quebecer and Wilfrid Laurier's Justice Minister, had himself appointed to fill the place vacated by Justice Sedgwick of Nova Scotia. When Chief Justice Davies, Prince Edward Island's only Supreme Court member ever (and a former premier of the province), left the Court in 1924, he was not replaced by a Maritimer. From 1924 until the appointment of New Brunswick's Justice Crocket in 1932, there was no Maritimer on the Supreme Court bench, even though it had been expanded to seven members in 1927. When Justice Rand joined the Court in 1943, the Maritime contingent was back to two. Justice Crocket left the Court in 1948, leaving Rand as the only Maritime justice.

Finally, from 1949 until today, the pattern of regional representation, with one exception, has remained in place: three from Quebec, three from Ontario, two from the west and one from Atlantic Canada. The one exception occurred in 1979, when the vacancy created by the retirement of Ontario Justice Wishart Spence was filled by Justice William McIntyre from the British Columbia Court of Appeal. Joe Clark's Progressive Conservative government had secured Ontario's consent for this temporary departure from the standard pattern. The one exception, I think, proves the rule. Ontario is the only province that might be able to accept a reduction of its representation on the Supreme Court. Even then, Prime Minister Clark was wise to get Ontario to accept the appointment of a British Columbia judge to one of its places on the Court, and Ontario was gracious to accede to the request in order to accommodate a province that had not had a justice on the Court since 1962 and tends to see itself as a fifth region of Canada rather than just one of four western provinces. I cannot remember a whimper of protest from the Ontario people.

Failure to fill the existing vacancy on the Supreme Court with a jurist from Atlantic Canada turned out to be politically unthinkable for Prime Minister Trudeau. The reason for regional representation on the Supreme Court is not functional. Atlantic Canada does not have a distinct body of law that requires a

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[29] See Peter H Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw Hill Ryerson, 1987) at 138–139, Table 5.1.

[30] *Supreme Court Act*, RSC 1985, c S-26, s 6.

justice with knowledge of it. The reason for the constitutional convention is political justice in a country that has always had deep sectional divisions. The sense of injustice in Canada's smallest region which, if the convention had not been observed, would not just have had its representation on the Court reduced but eliminated, was clearly intense. The politicians and people of Atlantic Canada made that point clear. So did a unanimous House of Commons, including its Liberal caucus. The Prime Minister was listening.

The Trudeau government did give the assurance that it was "committed to include candidates from Atlantic Canada on the short list for the position."[31] If Justin Trudeau had let us down and had not selected an Atlantic Canadian person from that list, what would the consequences have been? In the 1981 *Resolution to Amend the Constitution*,[32] the Supreme Court of Canada made it clear that courts can identify a convention, but do not enforce convention. The penalties for breach of a constitutional convention are political. In this case, the penalty for the Liberal Party in the next election would have been significant. Political support that was so quickly garnered can just as quickly be withdrawn.

Is the New Process Constitutional?

Concern about the constitutionality of the new process for selecting Supreme Court justices stems from the Supreme Court's decision in the 2014 *Senate Reference* case. In that case the Court found the Harper government's legislation to have Senators selected though consultative provincial elections unconstitutional. A key rationale for this finding was that such a change "would fundamentally alter the architecture of the Constitution".[33] The Court went on to say that the "entire process by which Senators are selected" is subject to the general procedure for amending the Canadian Constitution – the federal Parliament plus seven provinces representing 50 per cent of the population.[34] That language sounded so sweeping that some constitutional scholars suggested it would rule out changes in how Supreme Court justices or Senators are selected even if the changes are effected through informal means by modifying constitutional conventions rather than through federal legislation such as the Harper government tried to use for Senate reform.[35]

I think it is most unlikely that the new procedure of appointing Supreme Court justices, if challenged in the courts, would be found to be unconstitutional. The new process is an addition to the constitutional convention that the Prime Minister

[31] Fine, "Trudeau waffles", *supra* note 17.

[32] *Resolution to Amend the Constitution*, [1981] 1 SCR 753, *sub nom Reference Re Amendment of the Constitution of Canada (Nos 1, 2 and 3)*, 125 DLR (3d) 1.

[33] *Reference re Senate Reform*, 2014 SCC 32 at para 54, [2014] 1 SCR 704.

[34] *Ibid* at paras 64–65.

[35] Dennis Barker & Mark D Jarvis, "The End of Informal Constitution Change in Canada?" in Emmett MacFarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 185.

advises the Governor-in-Council on whom to appoint to the Court. The purpose of conventions in our constitutional system is to provide guidelines or rules on the proper use of legal powers. The new judicial selection process limits the discretion of the Prime Minister to advise who should be appointed. It is designed to improve the information on which the Prime Minister's choice is based and make it more accountable.

The Supreme Court reform is in line with similar reforms to the Prime Minister's role in making vice-regal appointments and filling Senate vacancies. In 2012, with very little fanfare, Prime Minister Harper established the Advisory Board on Vice-Regal Appointments to assist him in selecting Canadians for appointment to the positions of Governor General, provincial Lieutenant Governors and Territorial Commissioners.[36] Last December, the Trudeau government established an Advisory Board to assist the Prime Minister in selecting Canadians to be summoned by the Governor General to fill Senate vacancies.[37] These new advisory bodies, like the new process for selecting Supreme Court justices, aim at reforming selection processes that up to now appear to have been dominated by political patronage by making them merit-based and more accountable. All three of these recent reforms have not been put into legislation but remain in the informal conventional part of our constitution. I think it most unlikely that a majority of the Supreme Court would find any of them unconstitutional.

One further reform would enhance these informal changes in the selection of vice-regal office-holders, Senators and Supreme Court of Canada justices. This is the adoption of a reform carried out in New Zealand and Great Britain aimed at making the so-called "unwritten" rules, practices and principles of their constitutions publicly accessible in a succinct, online succinct statement of them, called Cabinet Manuals. I have been a champion of bringing this reform to Canada.[38] Strong support for the idea has come from members of the Canadian Bar Association, the Canadian Political Science Association, leading journalists, as well as from senior members of all five of our parliamentary parties. I am hopeful that Justin Trudeau's government will take up the idea and make it a sesquicentennial project. Nothing could do more to improve the constitutional literacy of Canadian citizens.

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[36] "New panel to ensure 'non-partisan' vice regal appointments", *The Canadian Press* (5 November 2012), online: <www.cbc.ca/news/politics/new-panel-to-ensure-non-partisan-vice-regal-appointments-1.1221643>.

[37] Government of Canada, "Government Announces Immediate Senate Reform" (3 December 2015), online: <news.gc.ca/web/article-en.do;jsessionid=6a88cf7899a0658dc4c469669253e5b3bdd29c95b89a7d7c511369e2a9d53858.e38RbhaLb3qNe3eMc3n0?crtr.sj1D=21&mthd=advSrch&crtr.mnthndVl=12&crtr.mnthStrtVl=1&crtr.page=1&crtr.dpt1D=2100&nid=1023449&crtr.yrndVl=2099&crtr.yrStrtVl=2015&crtr.dyStrtVl=1&crtr.dyndVl=31>.

[38] Peter H Russell & Cheryl Milne, *Adjusting to a New Era of Parliamentary Government: Report of a Workshop on Constitutional Conventions* (Toronto: Asper Centre for Constitutional Rights, 2011).

Conclusion

Let me close by giving a positive answer to the question posed in the title of this lecture. Yes, Justin Trudeau's new sunny way of selecting Supreme Court justices is a better way than anything we have had before or than has been proposed in the past. It measures up to the best reforms in selecting provincial and territorial judges and to reforms instituted in other constitutional democracies, though it is *sui generis*, as are all those other efforts at eliminating the unbridled discretion of elected leaders in staffing the courts. Every jurisdiction expresses its own constitutional culture and experience in reforming the way judges are selected. Let us hope that the reformed process for selecting Supreme Court justices is a harbinger of sunny ways changing the process of filling vacancies in the provincial and territorial superior courts and courts of appeal, and the federal courts. Converting that process to a merit-based system and one that is not totally controlled by federal politicians promises even more benefits for Canadians than reform at the Supreme Court level.

There is certainly room for improving the new process of selecting Supreme Court justices. This first use of the process should lead to some changes, especially including the regional representation convention as one of the stated criteria. If the Trudeau government does this, it should ask the Advisory Board to confine its next search to the appropriate region rather than conducting a national search as it did in the first application of the new process. One of the great benefits of practices of government being regulated by convention is that they are much easier to change than legislation or the written Constitution.

The Advisory Board, I am pleased to see, is in place for five years. No adhocery here! This means it will be involved in replacing Chief Jurstice Beverley McLachlin who is now 73, and possibly Justice Abella who is in her 71st year, as well as other justices who, like Thomas Cromwell, decide to retire before reaching the mandatory retirement age of 75. The new process will have a work out over the next few years. If, following the 2019 election, a new party takes power in Ottawa, it will have discretion to decide whether to follow the new process, perhaps with some modifications, or not. That is the nature of constitutional conventions: governments are not bound by them unless they think they should be. That is their weakness. But their strength is their sensitivity to the changing winds of democratic politics. I have a hunch that the Advisory Board on Supreme Court Appointments, probably with some ongoing modifications, is here to stay.