VIRTUES AND SHORTCOMINGS IN CONSTITUTIONAL DYNAMISM: COMMENTARY ON PRIME MINISTER TRUDEAU'S 2016 CREATION OF AN INDEPENDENT ADVISORY BOARD FOR SUPREME COURT OF CANADA APPOINTMENTS AND ON THE INSTRUCTIONS FOR MAKING RECOMMENDATIONS FOR APPOINTMENT

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Background

Although some may question this view, the Supreme Court of Canada is a constitutional court in three different ways.[2] First, it is a constitutional court in that it is recognized in the 1982 Constitution[3] through the identification of powers and structures that cannot be amended except in accordance with the constituted procedures for amending the Constitution of Canada. It is true that the Court was created through an ordinary act of the Parliament of Canada[4] enacted under an authority conferred on it by the Constitution Act, 1867.[5] It might seem, therefore, that the Supreme Court is not a constitutionally entrenched institution since, in the ordinary course, Parliament has the power to repeal its own statutes. While the position that the court is not constitutionally entrenched is sometimes advanced, this is very likely a wrong conclusion. Under section 42 (d) of the *Constitutional Act, 1982* there is a general bar to the making of any amendments relating to the Supreme Court other than through the formal constitutional amending procedure required under section 42(d) – or in the case of changes to the composition of the Court under the requirement for unanimous federal and provincial consent as stipulated in section 41(d) of the *Constitutional Act*. In principle, there is no bar to constitutionally entrenching an institution and its features through the mere reference to it in the Constitution. The legislative status of the instrument that originally created and empowered such an institution does not determine the effect of giving it constitutional protection. Constitutions, while legal in form are conceived in light of

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[2] See e.g. Peter W Hogg, "Appointment of Thomas A. Cromwell to the Supreme Court of Canada" in Nadia Verelli, ed, *The Democratic Dilemma: Reforming Canada's Supreme Court* (Montreal & Kingston: McGill-Queen's University Press, 2013) 13 at 24. See also Warren J Newman, "The Constitutional Status of the Supreme Court of Canada" (2009) 47 SCLR 429.

[3] *Constitution Act, 1982*, s 41(d) and s 42(d), being Schedule B to the *Canada Act 1982* (UK), c 11.

[4] *Supreme and Exchequer Courts Act*, SC 1875, c 11.

[5] *Constitution Act, 1867 (UK)*, 30 & 31 Vict, c 3, s 101, reprinted in RSC 1985, Appendix II, No 5.

diverse social and political realities and aspirations and; therefore, carry with them the imperative for contextualized application.

The second way that the Supreme Court is a constitutional court is that it carries ultimate responsibility for the interpretation and application of the nation's constitutional provisions. When a court is labelled a constitutional court what is generally meant is that it is a judicial body, the sole function of which is to adjudicate constitutional issues – to take ultimate responsibility for deciding the scope of constitutional limits on governmental powers. The Supreme Court of Canada, however, is a general court of appeal with responsibility for hearing appeals (although usually only when it grants leaves to appeal) in any case, no matter the nature of the legal claim, from any Court of Appeal in Canada. In fact, it decides more non-constitutional cases than constitutional cases. Those other cases are important in clarifying – and developing – legal norms that shape transactions and relations across a broad range of regulatory, commercial and social relations in Canada. However, from the perspective of the Supreme Court's visible national role, its most notable function is to decide constitutional cases. As a result, constitutional decision-making has been the area of the Court's activity that has produced most of the public attention that is paid to the Court. The Supreme Court has, since its creation in 1870, been making constitutional decisions that have been vitally important to the exercise of government in Canada. These cases have until the last third of a century dealt with conflicts between the federal and provincial governments over regulatory authority and, as well, with issues over the jurisdiction of the nation's superior courts to hear jurisdictional and procedural challenges to the regulatory activities of provincial and federal governments. But it has been the constitutionalization of basic human rights and minority' rights in 1982,[6] and the court's decisions on the meaning and application of the *Charter*, that has drawn a much broader political and popular interest to the Court's work and, hence, broader awareness of the court's composition and workings – and, hence, the significance of the federal government's appointment decisions.

Charter cases raise questions that engage the broadest and deepest values of people; they touch on every person's idea of the good society and present issues on which there is seldom an expectation of common understanding or common position. Questions such as how to maintain the integrity of identities or faiths, or what just and equal treatment requires, or when the demand for accommodation is unreasonable, or what limits on free expression are vital to social solidarity, are all moral questions for a state and its people. These are questions for which there is seldom public indifference and the Court, in deciding such issues, is involved in mediating differences of opinion that are close to the people's deepest commitments. The Court's public reputation has become that of a constitutional court and, in particular, a human rights court.[7]

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[6] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11.

The third way in which the Supreme Court is a constitutional court is that, although not created by constitutional provision, it has attracted a number of constitutional or quasi-constitutional constraints with respect to the federal government's relationship with it, especially with respect to appointments. The most notable of the politically constituted restraints is the practice of allocating seats on the Court to regions of the country – two members from the four Western provinces, three from Ontario and one from Atlantic provinces, in addition to the legislated and, now, the constitutionally entrenched allocation of three seats from Quebec.[8]

Although the Supreme Court has become constitutionally bound since its creation, this does not mean that there is no room for innovation in the exercise of the governmental power to make appointments to it. While constitutions are generally designed to be rigid and only amendable with the consent of a large number of (diverse) jurisdictions, this does not mean that national self-national determination with respect to the rules, structures and relationships of governing bodies can never be exercised. There is often room for the organic development of the norms under which the state conducts its internal political relationships between orders, divisions and branches of government while acting with fidelity to the constitutional order. Although these practices, if clearly and purposefully articulated and invariably followed, might create a constitutional convention which could become politically binding, there can be much experimentation in the exercise of powers that responds to new realities and expectations that do not create constitutional obligations. Mature constitutional democracies are able to change political practice and, in this way, give flexibility to their basic rules without undertaking the difficult process of formal constitutional change.[9]

With respect to appointing judges to the Supreme Court there have been two developments over the past decade and a half that represent organic responses to the new *Charter* driven political sensibilities. They have created a strongly presumptive – and, possibly now, an unavoidable – condition for exercising the appointment power.[10] The first is that governmental executive power to appoint Supreme Court judges should be constrained by a process of identifying persons who

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[7] It would, however, be a mistake to overlook the widespread popular engagement with Supreme Court cases that dealt with issues of constitutional reform based on the nature and the constraints of Canadian federalism. The court's reputation as a constitutional court was certainly confirmed by its decisions in the many reference cases that, from the perspective of the federal principle, dealt with such questions as the role of provinces in making requests to the United Kingdom Parliament for amendments to the constitution, the necessity of Quebec's consent to constitutional amendments under the pre-patriation convention relating to amendments, the rules relating to provincial secession from the Canadian federation and constitutional reforms relating to the Senate of Canada.

[8] *Supreme Court Act*, RSC 1985, C S-26, s 6.

[9] See Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (New York: Basic Books, 2012) at 477: "We must look back backward in time and claim our constitutional inheritance, and we must also look forward in time and make our constitutional donation. [This] second responsibility does not reside on the clear surface of any explicit constitutional text..."

[10] For a description of this process, see David Schneiderman, *Red, White and Kind of Blue?: The Conservatives and the Americanization of Canadian Constitutional Culture* (Toronto: University of Toronto Press, 2015) at ch 5 (234–252), "Appointing Justices: Supreme Court Nominees and the Press".

are suitable for appointment and from which the government should ordinarily select the person it will appoint. This development tracks a long-standing political sense that the executive's power to appoint judges should be constrained through a process that seeks to remove the influence of party loyalty or membership, filters potential nominees for professional competence and ensures that the personal character of persons recommended matches the judicial ideals of restraint, responsibility and an impartial concern for any person or interest who comes before the court. This process also has the potential virtue of discovering persons eminently suitable for judicial appointment who would not otherwise come to the attention of the appointing power. To this end, it is often the case that bodies responsible for nominating candidates for appointment will advertise for people to make application for appointment. The idea of a committee based process for creating a short list of potential nominees for appointment was first adopted in making the Supreme Court appointment to replace Justice John Major in 2005. It was then abandoned, or reduced to a half-hearted form, during the appointments made by Stephen Harper's Conservative government, but was then then adopted again by Justin Trudeau's Liberal government in making the 2016 appointment to replace Justice Thomas Cromwell.

The second innovation in making Supreme Court appointments has been the creation of a process for some degree of Parliamentary review of persons nominated for appointment. This development was a response to the higher political sensitivity to Supreme Court nominations once the Court's *Charter of Rights* decisions became conspicuous. The established view that governments appointed judges based on competence and integrity and not on any sense of how a candidate would approach specific types of legal issues that might come before the Court began to be questioned. This awareness of political predisposition was undoubtedly a product of the court's *Charter* jurisprudence, not necessarily because Supreme Court justices became more blatant in their foundational values and beliefs, but because under the *Charter* there is no avoiding disclosure by judges of attitudes that the whole population is able to grasp and evaluate – values such as the responsible scope of personal liberty, what processes are fair for persons restrained or regulated by governmental action and when does differential treatment (or the absence of differential treatment) amount to inequality. Adoption of a process of parliamentary review of persons identified for appointment was initially adopted by the Harper government in the appointment of Justice Rothstein in 2006. The practice was not consistently followed by that government after its initial use. It was used in the appointments of Justices Karakatsanis (2011), Moldaver (2011), Wagner (2012) and Nadon (2013) (Nadon was later disqualified from sitting as a result of the Supreme Court opinion that he was constitutionally ineligible for appointment.)[11] The parliamentary process was not used in the Harper government appointments of Justices Cromwell (2008), Gascon (2014), Côté (2014) and Brown (2015). This history clearly, belies the claim of a virtual political entrenchment of this process.

[11] *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433.

Nevertheless, it seems likely that future appointments will involve some form of parliamentary engagement. As David Beatty wrote in 1990, the "*monopoly* [over appointments] enjoyed by the executive branch can no [longer] be defended."[12]

Supreme Court of Canada Judicial Appointment Process

On August 2, 2016 the process for making an appointment to the Court to replace Justice Thomas Cromwell was announced by Prime Minister Trudeau.[13] It had four main features – qualified persons could apply for appointment, a committee – called the Advisory Board – would be created to develop a list of persons that it considers suitable for appointment, with the proviso that the government would not be bound to nominate a person from that list, stipulations with respect to the factors of representativeness that the committee should take account of were identified and a weak process of parliamentary review of the person that the Prime Minister intended to appoint was announced. All of these represent a degree of political constraint on the government's power to appoint Supreme Court judges, although not a binding constraint; the Trudeau plan carefully avoided any hint of constitutional amendment that would arise from making a formal alteration of the statutory (and, now, likely constitutional) power of appointment. The second feature is expressed in the Terms of Reference as a constraint on the Advisory Board but, of course, when that feature is connected to the presumption of making an appointment based on the Advisory Board's recommendation, it becomes a derivative constraint on the government.

The Trudeau plan responds to the sense that Supreme Court appointments have become significant to Canadian public regulation and, therefore, a structure of higher accountability and restraint is desirable. The new appointment process was also a response to a degree of public dissatisfaction over some of the Supreme Court appointments made by his predecessor, Prime Minister Stephen Harper, and to dissatisfaction over his highly exigent and erratic – seemingly opportunistic – ad option of the consultation and review process that was initiated by Prime Minister Paul Martin. Further, notwithstanding a Canadian tradition of not criticizing Supreme Court appointments, at least two of his appointments received public criticism. This helped add to the anxiety that appointments to the Court might be made on bases other than a record of strong commitment to neutrality or commitment to the integrity of the legal process. Prime Minister Trudeau was faced with heightened public sensitivity with respect to Supreme Court appointments.

Elsewhere there had already been a strong development of regimes for restraining appointments to other courts – provincial lower courts, federal courts and provincial superior and appeal courts. However, the process created in 2016 for

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[12] David Beatty, *Talking Heads and the Supremes: The Canadian Production of Judicial Review* (Toronto: Carswell, 1990) at 263 [emphasis added].

[13] Office of the Prime Minister, News Release, "Prime Minister Announces New Supreme Court of Canada Judicial Appointment Process" (2 August 2016), online: <pm.gc/eng/news/2016/08/02/prime-minister-announces-new-supreme-court-canada-judicial-appointment-process> [*Judicial Appointment Process*].

Supreme Court of Canada appointments was less motivated by the desire to arrive at sounder appointments than it was a response to the particular pressures for greater governmental accountability in making appointments to the nation's Supreme Court and, in particular, the nation's court of last resort in human rights and minority rights cases – and other constitutional cases.

The 2016 process was adopted in response to the need to condition the exercises of a constitutional power. In that way, it is a constructed restraint for political purposes; it is a refinement of a constitutional process in the face of perceived and experienced dangers of a unilateral power. It works as a constitutional refinement without itself becoming constituted. In light of this undoubted statecraft purpose of restraining an executive authority that has become too great to sit comfortably within the liberal democratic paradigm of accountability, this process – or another process with similar features – is likely to persist and become part of political conventionality. That is not to say that the 2016 process is close to becoming a constitutional convention but it is purposive in precisely the way that political practices become conventions. For this reason, it is appropriate to look carefully at its elements with a view to determining whether they serve effectively the underlying purpose of preserving the integrity of the Supreme Court of Canada.

The feature of an open invitation to apply for a Supreme Court appointments is, from a functional perspective, relatively insignificant, although, of course, highly attractive from a cosmetic perspective. It is certainly true that the route into a Supreme Court judgeship should not track the methods of club membership and that there are undoubtedly talented and highly able lawyers who lie below the radar scan for making appointments. Nevertheless, it is not likely that anyone will ever be appointed to the Supreme Court who has not been a part of a network of esteemed lawyers (or judges) working within a national structure of legal scholarship, legal practice, courts, governmental branches and agencies or, it must be admitted, political parties. The open application regime is not misguided; it is simply unlikely to lead to an alteration in who it is that will receive a Supreme Court appointment.

A similar analysis might also apply to the creation of a committee to recommend persons for appointment. The likelihood of such a committee straying outside the reasonably well-recognized community of persons in the class of potential Supreme Court judges depends on the composition of the nominating committee, or Advisory Board. This means that the government has considerable ability to steer the results of the nomination process. If it appoints to the Advisory Board those whose expertise has been developed in well-known and well established circles of law and legal practice then the short-list of persons suitable for consideration for appointment would not differ much from the list that, for example, a committee of lawyers made up of adherents to the governing party would produce.

There are, though, two potential advantages that could flow from having a nominating committee. First, if the members of the committee appointed by the government have no ties to, no public adherence to, and no wish to gain the favour of, the governing party, its members will likely ignore party affiliation in selecting persons to nominate and this would serve to enhance public confidence in any appointment. The other benefit that can arise from a nominating committee occurs if the committee is comprised of persons from non-establishment legal and social communities. Sometimes nominating committees are specifically charged with finding candidates from communities that have not been widely represented in judicial appointments at any level and, in fact, that is an explicit part of the mandate given to the Advisory Board that was created by the August 2016 process.[14]

The question of representativeness is always central to public bodies' legitimacy. The only firmly established element of representation with respect to the Supreme Court has been provincial or regional representation. Interestingly enough the Terms of Reference for the Advisory Board did not include geographic representation. What is identified is the importance of bilingualism, expressed in the form of stating that it is a requirement for appointment.[15] The Terms of Reference also stated that in making its list the Advisory Board should take account of the government's desire to achieve a Supreme Court that is gender-balanced as well as one that reflects Canadian diversity including linguistic, ethnic and minority communities and gender identity and sexual orientation.[16] Judicial diversity in a nation's highest court, especially when it is a relatively small court – normally for reasons of allowing full-court collegial decision-making, as is the case in Canada – is a tricky aspiration. This is not because the idea of representativeness must take second place to notions of judicial merit and institutional legitimacy, since the two goals are hardly unrelated, but because the size of the court inevitably makes such representation partial and only achievable in any comprehensive way cumulatively over very long periods of time – if ever. When the very strong tradition of provincial or regional representation is added to the diversity representation goal there may be very little realism behind this declaration of intent.

This is not to deny that institutional legitimacy in any public body depends on all of the members of a society that are subject to its jurisdiction and its decisions being able to see that persons of their identity are eligible to serve in that institution and are legitimate aspirants for inclusion in the state's structures. It should also be

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[14] Three of the seven persons that Prime Minister Trudeau appointed to the Advisory Board that was created under the August 2, 2016 Court Judicial Appointment Process, *ibid*, could be said to have come from – or, at least, represent non-traditional legal communities. That document said that the Advisory Committee was to identify candidates who are representative of the diversity in Canada. However, it might be said that since the stated purpose of the new process is to continue the tradition of appointing "only the most exceptional and impressive individuals to the Court …[to] ensure that the best, most well-qualified people … are named to Canada's top court", this could be taken to confirm the priority of high standing in traditional legal communities.

[15] Office of the Commissioner for 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>: "[T]he Advisory Board must submit … the names of … qualified and functionally bilingual candidates …." at 6(1).

[16] *Ibid* at 8(f).

remembered that the application of general truths, especially perhaps the general truths expressed in a constitutional declaration of rights, are always contingent on the actual social needs and contexts that are present within the particularities of any application. It is judicial understanding of contexts, not the general precepts, that seem most at question, and when only one set of personal identities has access to that sensitive intellectual mix of fact and law, it is inevitable that uncertainty over judicial neutrality will arise. This state of awareness of representational need has clearly been established when it comes to gender; it is inconceivable, I believe, that the Supreme Court will ever have less than three members who are identified as female or less than three who are identified as male. The goal of a broader degree of representativeness expressed in the Terms of Reference clearly has resonance, even if it not likely to become a determining force in the political practice of making Supreme Court appointments.

In Canada, the questions of geographic and language representation exist at a very high level of sensitivity. Certainly, Prime Minister Trudeau discovered, following the issue of his new process for Supreme Court appointments, that federalism and the recognition of the Canadian provinces and regions in making such appointments are not trifling matters. It seems unlikely that any of the four regions represented in Court composition will graciously accept the loss of a seat to make room for the appointment of, for example, an Indigenous person. Such an appointment will, one thinks, need to take place within the existing allocation of regional seats. The force of the claim of the delegitimizing effect of ignoring the existing regional and provincial representation was evident in the reaction to the Terms of Reference. However, the actual appointment of Justice Rowe from Newfoundland prevented the appointment from becoming precedent breaking.

Bilingualism has become so firmly entrenched in national governance that the requirement in the Terms of Reference that nominated persons be functionally bilingual is hardly surprising. But it is a highly significant shift in the essential conditions for appointment. The requirement is not misplaced in light of Canada's national solidarity needs, but its effects will be dramatic. It disqualifies from appointment many, many fine lawyers and jurists who could serve with distinction and whose judicial corpus could enhance Canadian jurisprudence. It will tend to limit those who can be appointed to the Court to those Anglophones who have grown up in, or attended university in, a bilingual environment, or those who have benefited from intensive French language training either as superior court judges or as senior federal public servants. The requirement represents the fear of potential discrimination against francophone lawyers who file facta and make oral argument in French, but it does so through ordering the exclusion of a large number of Anglophone judges and lawyers, which in itself, is a possible threat to the Court's legitimacy.

The final feature of the 2016 appointment process relates to parliamentary engagement with the Supreme Court appointment process.[17] This process has three parts. The first is that the Minister of Justice and the Advisory Board chair would appear before Parliament to review the selection process. It seems unlikely that this meeting would engage any specifics with respect to the actual list of nominees or to the person appointed. The second element involves the Minister of Justice and the Chair of the Advisory Board appearing before the House of Commons Justice committee to explain how the nominated person satisfies the criteria for appointment. The third element is a moderated question and answer session with the nominee and some parliamentarians.[18] As a device to produce a process for reviewing the legitimacy of the exercise of executive power in making a Supreme Court appointment, it would be hard to imagine anything less rigorous or effective. This element was, it would seem, included to avoid abandoning the legislative hearing process instituted by Prime Minister Martin and first used in the nomination of Justice Rothstein, but, by no means, enhancing it. It seems included without conviction that this process is necessary or prudent. This is a pity.

It is clear that the Supreme Court's visibility and reputation will be increasingly formed around its decisions relating to the rights and protections included in the *Charter of Rights*. These decisions will raise questions of judicial method, as well as questions of the relationship between judges' values and the disposition of cases. The public has a right to know how the judges of the Supreme Court consider the factors of decision-making – the content and nature of the constitutional text, the precedents that bear on the issue before the Court, the governmental program that, it is argued, infringes rights, the context of the application of the challenged law (or application) and the understanding of the values and purposes that undergird constitutional recognition of the right that is being claimed. These are questions that speak to the jurisprudential frame of mind of the person nominated. Answers and explanations will differ from judge to judge and there is no bright line delineating which approaches are legitimate and which are not. But there is, even without clear standards for assessing what is a reasonable jurisprudential approach, value in this conversation between persons nominated and parliamentarians. Such a process illuminates the nature of constitutional standards and the nature of constitutional judgment – an awareness that serves both the political branch and the judicial branch well. Furthermore, there may be some attitudes that if they were to guide a nominee's decision-making would violate basic entrenched constitutional values, or would reflect notions about society and social relations that markedly deviate from ideas of inter-personal respect and the principles of liberty and fair process that stand at the heart of liberal democracy. While it is unlikely that this would often (or ever) be the case, the check of a parliamentary

[17] For consideration of legislative review of persons named for appointment to the Supreme Court of Canada, see John D Whyte, "Political Accountability in Appointments to the Supreme Court of Canada" (2016) 25 Constitutional Forum 109 at 112–116.

[18] *Judicial Appointment Process*, *supra* note 13: "A number of Members of Parliament and Senators – from all parties – will also have the opportunity to take part in a Q&A session with the eventual nominee, before she or he is appointed to the Supreme Court of Canada."

hearing that will explore the fit between the values of a nominee and the core values of the Canadian legal order[19] serves as a restraint on the executive power of appointment.

It could well be that the governance climate in Canada is not ready for this sort of exchange between members of the judiciary (or persons nominated to become Supreme Court judges), but it seems inevitable that the ever-evolving dynamic of political relationships will, at some point, come to recognize that it would be mature statecraft if this executive power were held accountable through a process of parliamentary review of decisions over who should sit on the Supreme Court.

The process announced by Prime Minister Trudeau was an exercise of political innovation that responded to a newly developed political sensibility with respect to the Supreme Court. It deserves respect for being responsive to that development. But the process for making Supreme Court appointments and the values that should be reflected in that process, require considerably more thought.

[19] One example of such a conflict could be the view that the terms of the constitution must be applied from an originalist perspective, or on what is sometimes known as a textualist basis (notwithstanding that neither an original understanding nor textual clarity are appropriate theories of interpretation to apply to general concepts such as "in accordance with the principles of fundamental justice"). This non-purposive approach to interpretation and application deviates from the Canadian precept of constitutional application being based on dynamic and contextual interpretations.