NO NEED FOR RADICAL REFORM OF THE FEDERAL JUDICIAL APPOINTMENT PROCESS

Rory Leishman*

Until recently, there was never any serious dispute over the federal judicial appointment process in Canada. It was generally understood and accepted that in appointing judges, the Governor General acts on the recommendations of the Prime Minister or Justice Minister. Today, this arrangement is widely contested. Why is that? What accounts for the recurring demands over the past 25 years for fundamental reforms to the judicial appointment process?

Professor Grant Huscroft, Associate Dean in the Faculty of Law at the University of Western Ontario, cites as one factor the emergence of rampant judicial activism. He contends:

> At the appellate level, law is being made in very profound and important ways on things that affect everyone's life in Canada. Difficult, social, value-laden questions are being decided by the courts in the *Charter* era. That's what's changed. And it was inevitable in that kind of changing role for the court that people would start looking at who was on the court.[1]

Of course judges have always engaged in law making—at least to the extent of crafting marginal adjustments to the common law and to the interpretation of statute laws and the *Constitution* to accommodate changing social and technical circumstances. Judicial activism is lawmaking of a different kind inasmuch as it entails the imposition of not just marginal and gradual changes, but those that are substantial and abrupt. When judicial activism, in this sense, becomes rampant, prime ministers and justice ministers are bound to take notice. In particular they are bound, as Huscroft suggests, to insist upon a judicial appointment process that will enable them to nominate judges who promise either to exercise judicial restraint or practice law-making judicial activism in a way that advances the government's social and political agenda.

Liberal MP Brian Murphy raised the issue of judicial activism with former Chief Justice Antonio Lamer during hearings on the judicial appointment process in the Commons Standing Committee on Justice and Human Rights on 18 April 2007. Murphy said: "What I would like to ask you, Justice Lamer, is whether you think

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* Rory Leishman is a freelance journalist based in London, Ontario; a former lecturer in political science at the University of Western Ontario; and the author of *Against Judicial Activism: The Decline of Freedom and Democracy in Canada* (Montreal & Kingston: McGill-Queen's University Press, 2006).

[1] Interview of Grant Huscroft and Peter Russel (3 March 2007) on *The House,* CBC Radio, Online: CBC <http://cbc.ca/thehouse/media/2007030502dcb989.ram>.

there has been rampant activism with respect particularly to the Canadian judiciary and its interpretation of the *Charter* over the last 25 years. Is it diminishing? And do you think this has anything to do with what we perceive on this side as an attack on the judiciary?" Lamer replied by suggesting that only 17 to 19 sections of the law have been declared inoperative since the *Charter* came into effect. "So who's getting nervous about all this?" he asked. "Those who talk about judicial activism do so because they don't agree with the judgment. When they agree with the judgment, they don't talk about judicial activism; they just don't mention it."[2]

Chief Justice Beverley McLachlin advanced much the same argument in Policy Options, where she noted that the dispute over judicial activism "often reduces itself to a debate about whether one likes or does not like a particular judicial decision".[3] Robert H. Bork, former Judge of the United States Court of Appeal, concurs. In *Coercing Virtue: The Worldwide Rule of Judges*, he wrote:

> What does it mean to call a judge "activist" and "imperialistic"? The terms are bandied about freely by politicians and members of the media in an unedifying cross fire of slogans that passes for public debate, by politicians and members of the media, so that it will be useful to give those terms more stable meanings.[4]

Bork specified: "Activist judges are those who decide cases in ways that have no plausible connection to the law they purport to be applying or who stretch or even contradict the meaning of that law. They arrive at results by announcing principles that were never contemplated by those who wrote and voted for the law."[5]

Does the Supreme Court of Canada engage in judicial activism in this precise sense? McLachlin denied the allegation in an address to the Canadian Club in Toronto on 17 June 2003, titled: "Judging, Politics, and Why They Must Be Kept Separate".[6] It was a timely topic given that the Ontario Court of Appeal had delivered a unanimous judgment just seven days earlier in *Halpern v. Attorney General of Canada* that touched off a national controversy by declaring "We would reformulate the common law definition of marriage as 'the voluntary union for life of two persons to the exclusion of all others'."[7] In her Canadian Club speech, McLachlin noted that it is the standard stock of some editorial pages to claim that

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[2] House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 39th Leg. 1st sess. No. 61 (18 April 2005).

[3] Beverley McLachlin, "Courts, Legislatures and Executives in the Post-Charter Era" (1999) *Policy Options* 20:5 at 41.

[4] Robert Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Toronto: Vintage Canada, 2002) at 13.

[5] *Ibid.*

[6] Beverley McLachlin, "Judging, Politics, and Why They Must Be Kept Separate" (Luncheon Address to the Canadian Club of Toronto, 17 June 2003), online: <http://www.canadianclub.org/static/speeches/2887.pdf> [McLachlin].

[7] *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 at para. 148.

"judges are acting more and more like legislators" and that it is therefore appropriate to rethink their manner of appointment. "Commentaries over the decision of the Court of Appeal of Ontario on the question of same-sex marriages pick up the first theme," she said, "while the nomination of a new judge to the Supreme Court of Canada will doubtless reactivate the second".[8] She added:

> Let us turn first to the charge that judges are usurping the legislative power of Parliament and the legislatures. To put it simply, it displays misunderstanding of what judges do. The reality comes down to this: Parliament and the legislatures are the supreme arbitrators of the social course of the nation, subject only to the constraints imposed by the *Constitution* and its traditions. The courts, by contrast, are the interpreters of the law and the *Constitution*. Drafting, debating, and passing laws are essentially political activities. Interpreting the laws and the *Constitution* are essentially legal activities...The aim of the judicial role ... is to interpret the laws that our common law tradition and the legislators have put in place.[9]

Did the Ontario Court of Appeal in *Halpern* merely "interpret the laws that our common law tradition and the legislators have put in place"? That is open to question. Instead of upholding the common law definition of marriage as the lawful union of one man and one woman to the exclusion of all others—a definition that Parliament explicitly incorporated into s. 1.1 of the *Modernization of Benefits and Obligations Act*, (2000)—the Ontario Court of Appeal invoked the analogous equality rights of homosexuals that the Supreme Court of Canada had read into s. 15 of the *Charter* in *Egan v. Canada*, as a reason for reformulating the common law definition of marriage to include same-sex couples.[10] Subsequently, in *Reference re Same-Sex Marriage*, McLachlin and her colleagues on the Supreme Court of Canada followed up by unanimously declaring that the government's draft bill to extend marriage for civil purposes to couples of the same sex "points unequivocally to a purpose which, far from violating the *Charter*, flows from it".[11]

For a striking illustration of the difference between judicial activism and judicial restraint, consider the contrasting reasoning in *Vriend v. Alberta* of Justice John McClung of the Alberta Court of Appeal and Justice Frank Iacobucci of the Supreme Court of Canada. In a quintessential exercise of judicial restraint, McClung wrote:

> Rightly or wrongly, the electors of the Province of Alberta, speaking through their parliamentary representatives, have declared that homosexuality (I assume that the term "sexual orientation" defends nothing more) is not to be included in the protected categories of the

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[8] McLachlin, *supra* note 6.

[9] *Ibid.*

[10] *Egan v. Canada*, [1995] 2 S.C.R. 513; See also *Barbeau v. British Columbia (Attorney General)*, 2003 BCCA 251, 225 D.L.R. (4th) 472.

[11] *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698 at para. 43.

IRPA.[12]

For McClung, this was the decisive consideration. He explained:

> In my view, "judicial legislation" should never be undertaken where, after inspection of the background of the statute, it must be concluded that the "omission" was a step that had been weighed and deliberately declined by the legislating body in whose jurisdiction it lay. This must be so whatever the private concerns of the reviewing judge...

Two years later, the Supreme Court of Canada reversed McClung and in a contrasting exercise of judicial activism, read sexual orientation into Alberta's Individual's Rights Protection Act (IRPA) as a prohibited ground of discrimination. Iacobucci acknowledged that the exclusion of sexual orientation from the Alberta Human Rights Act was "a conscious and deliberate legislative choice". He also conceded:

> In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the *Constitution* and have been expressly invited to perform that role by the *Constitution* itself.[13]

He emphasized:

> As others have so forcefully stated, judges are not acting undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with the democratic principles mandated by the *Charter*.[14]

Quite so. However, as *Vriend* illustrates, practitioners of judicial activism and judicial restraint differ in their approach to evaluating legislative enactments in relation to the generalities of the *Charter*. Peter Hogg notes that in interpreting the *Charter*, "judges will inevitably be influenced by their own social, economic and political values".[15] He adds:

> They will also be influenced by their attitudes towards the appropriate relationship between the courts and the other branches of government. An attitude of judicial restraint would be deferential to the decisions of the political branches, resulting in judicial invalidation of political decisions only in clear cases of *Charter* violations. An attitude of judicial activism

[12] *Vriend v. Alberta (Attorney General)*, (1996), 132 D.L.R. (4th) 595 at para 39.

[13] *Vriend v. Alberta (Attorney General)*, [1998] 1 S.C.R. 493 at para. 136.

[14] *Ibid.* at para. 142.

[15] Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1992) at 798.

> would be sympathetic to the expansion of the guaranteed civil liberties, resulting in frequent invalidation of the decisions of the political branches.[16]

Prime Minister Stephen Harper is a proponent of judicial restraint. Asked by a reporter during the 2006 election campaign if he believed judges are activists advancing their own social agendas, Harper responded: "Some are, some aren't." He added that in selecting new judges, "What we will be looking for is what I call judicial temperament. And that is the ability to competently and shrewdly and wisely apply the laws that are passed by the Parliament of Canada."[17]

Shortly after becoming Prime Minister a few weeks later, Harper announced plans for an all-party *Ad Hoc* Committee to review an impending nominee for the Supreme Court of Canada in an open public hearing. On 20 February 2006, Harper's choice, Justice Rothstein, appeared before the committee. During the hearing, Conservative MP Diane Ablonczy suggested that—in the opinion of the Prime Minister—a judge with an appropriate judicial temperament would be prepared to apply the law in a way that uses common sense and discretion, but without being inventive. Addressing Rothstein, she said: "I...would be very interested in knowing if this is your view of the role of a judge."[18] Rothstein responded:

> If I am correctly interpreting what he [the Prime Minister] said, I take it that what he meant is that judges should apply rather than depart from statutes and that they shouldn't be inventing laws of their own, if that's his reference to invention. If I've interpreted him correctly, I absolutely agree with that. I think they should apply the law, they shouldn t depart from the law, they shouldn't be inventing their own laws, and they should use common sense and discretion. Those are all aspects of a judicial temperament that I think are appropriate.[19]

Referring specifically to judicial evaluation of a statute in relation to the *Charter*, Rothstein added:

> ...the important thing is that judges, when applying the *Charter*, have to have recognition that the statute they're dealing with was passed by a democratically elected legislature, that it's unlikely the legislature intended to violate the *Charter*. Sometimes it happens. But they have to be aware of that, and therefore they have to approach the matter with some restraint. But the most important thing is that they apply a rigorous and thorough analysis, and if they do that, then I would say they are doing their job. If they depart from that, it might be a different matter.[20]

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[16] *Ibid.*

[17] Gloria Galloway, "Harper warns of activist judges" *The Globe and Mail* (19 January 2006) A1.

[18] House of Commons, *Ad Hoc* Committee to Review a Nominee for the Supreme Court of Canada, *Transcript*, (27 February 2007), online: <http://www.justice.gc.ca/en/news/sp/2006/doc_31772_1.html> [*Ad Hoc*].

[19] *Ibid.*

[20] *Ibid.*

With these answers, Rothstein implicitly embraced judicial restraint. Harper was pleased. In announcing that the Governor General had approved his recommendation to appoint Rothstein to the Supreme Court of Canada on 1 March 2006, Harper said:

> I am confident that Mr. Justice Rothstein will make an exceptional Supreme Court judge, and I congratulate him on his appointment. The way in which Justice Rothstein was appointed marks an historic change in how we appoint judges in this country. It brought unprecedented openness and accountability to the process. The hearings allowed Canadians to get to know Justice Rothstein through their members of Parliament in a way that was not previously possible.[21]

Can Rothstein be counted upon to fulfill his promise to exercise judicial restraint? Apparently so. In *Hill v. Hamilton-Wentworth Regional Police Services Board*, Chief Justice McLachlin created a new and entirely unprecedented tort of negligent investigation by the police that had never been recognized by the common law of Canada or any other nation.[22] In a dissenting opinion, Justice Charron repudiated this manifest exercise in judicial law-making by the majority of the Court. Charron stated: "The novel question before this Court is therefore whether the new tort of negligent investigation should be recognized by Canadian law. I have concluded that it should not." [23] She added: "It may be that compensation for the wrongfully convicted is a matter better left for the legislators in the context of a comprehensive statutory scheme. It is certainly not a matter that should be left to the vagaries of the proposed tort action."[24] Charron did not take this stance alone. Her dissent was joined by Rothstein and Justice Bastarache. In this way, Rothstein signalled that he stands by his belief that unelected judges should exercise restraint, by leaving legislating to elected legislators.

Prior to appearing before the *Ad Hoc* review committee in a public hearing, Rothstein had undergone a thoroughgoing review in private by a nine-member review committee established by Liberal Justice Minister Irwin Cotler. This initial review committee included a retired judge and four MPs representing all the parties in the House. Rothstein was one on a list of six persons that Cotler submitted to the committee as candidates to fill the vacancy on the Supreme Court of Canada left by the impending retirement of Justice Major on 25 December 2005. Following a series of consultations, Cotler's review committee narrowed the list down to three. To avoid delay in replacing Justice Major, Harper decided not to initiate an entirely new

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[21] Office of the Prime Minister, Press Release, "Prime Minister Announces Appointment of Mr. Justice Marshall Rothstein to the Supreme Court" (1 March 2006), online: <http://pm.gc.ca/eng/media.asp?id=1041>.

[22] *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41.

[23] *Ibid.* at para. 112.

[24] *Ibid.* at para. 187.

review process, but to choose a candidate from the short list of three prepared by Cotler's review committee.

A similar process for the selection of s. 96 judges has been in effect since 1988, when the Mulroney government created a network of regional judicial appointment advisory committees to assess the qualifications of lawyers applying for a federal judicial appointment.[25] Currently, there are 16 federal judicial advisory committees, including three in Ontario, two in Quebec, and one in each of the other provinces and territories.[26] Each committee has eight voting members representing the bench, the bar, the law enforcement community, and the general public. The Minister of Justice appoints all members, except the representative of the bench who is chosen by the Chief Justice or a senior judge of the province or territory. The members are appointed for a two or three year term subject to a single renewal.[27]

In announcing the creation of judicial appointment advisory committees, Justice Minister Ray Hnatyshyn avowed:

> The concept of merit is central to the new appointments process. I firmly believe that no government can afford to approach the issue of appointments to the bench without a commitment to selecting the best person available, determined by objective criteria.[28]

However, as might have been expected, this ideal was never achieved. Despite the assistance of judicial advisory committees in weeding out unqualified applicants, Hnatyshyn failed to fulfill his commitment to select none but the best persons for the bench.[29] In testimony before the Standing Committee on Justice and Human Rights on 20 March 2007, Peter Russell, Professor in the Department of Political Science at the University of Toronto, related that a number of scholars have found that the judicial advisory committees failed to eliminate political patronage during either the Mulroney government or the Chrétien and Martin governments. Russell explained that in reviewing the recommendations of the judicial advisory committees, the justice ministers in these governments "went over the highly recommended down to the recommended in order to appoint their political friends, playing politics with who gets to be a judge in the...superior courts of the provinces and territories and the federal courts. I think that's just shameful. I'm ashamed of it as a Canadian."[30]

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[25] A separate screening system is established to review appointments to the Supreme Court of Canada.

[26] Office of the Commissioner for Federal Judicial Affairs, *Federal Judicial Advisory Committee,* online: <http://www.fja.gc.ca/fja-cmf/ja-am/com/mem-eng.html>. On 10 November 2006, the Minister of Justice created a 17th judicial appointments advisory committee as a one-year pilot project to assess candidates for appointment to the Tax Court of Canada.

[27] *Ibid.*

[28] "Judicial Appointments: Perspective from the Canadian Judicial Council", *Canadian Judicial Council,* (20 February 2007), online: <http://www.cjc-ccm.gc.ca/article.asp?id=3072>.

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

[30] House of Commons, Standing Committee on Justice and Human Rights, *Evidence,* 39th Leg. 1st sess.

In a later appearance before the Justice Committee, Jacob Ziegel, Professor Emeritus of Law at the University of Toronto, agreed with Russell. Together, he and Russell recommended that the role and memberships of the judicial advisory committees should be enshrined in legislation rather than left to the discretion of the Justice Minister. In addition, Ziegel recommended:

> This role should be not merely to screen and evaluate applicants for appointments, but also to provide the federal government with a short list of highly qualified and not just acceptable candidates from which the federal government, absent special circumstances, will be required to choose one when a vacancy needs to be filled. [31]

In this way, Ziegel and Russell and other like-minded scholars aim to insulate the judicial appointment process from political interference.

Consider, though, the implications of this reform for the separation of legislative and judicial powers. Given that the predominance of judges with an activist or restrained judicial temperament on the appellate courts can have momentous consequences for the laws and the policies of Canada, surely the Prime Minster, the Justice Minister, and the rest of the cabinet, should retain a decisive role in the judicial appointment process. As the elected representatives of the people of Canada, they should remain free with the concurrence of Parliament to choose between the appointment of activist judges and restrained judges without interference from members of the judiciary, the bar, or any other special interest group on a judicial advisory committee. Correspondingly, to help educate the public on the role of the judiciary, nominees for the Supreme Court of Canada and the Chief Justices of the provinces should be required as a condition for appointment to give an account of their judicial philosophy in an open public hearing before the Commons Justice Committee or an all-party *Ad Hoc* committee like the one that reviewed Rothstein's nomination.

Granted, if the Prime Minister, Justice Minister, and the cabinet retain their dominant role in the judicial appointment process, there will be no end to political patronage in the selection of Canadian judges. Politics and patronage are inseparable. But this factor is not now, and never has been, a major problem in the selection of Canadian judges. Notwithstanding Russell's opinion, there is no reason for Canadians to be ashamed about the influence of political patronage in federal judicial appointments. After all, not even Russell contends that political patronage has done serious damage to the Canadian judiciary. In a joint study of judicial appointments during the Mulroney era, he and Ziegel found that while the process was marred by political patronage, the overall results were not bad.[32] Specifically, Russell and

No. 54 (29 March 2007).

[31] House of Commons, Standing Committee on Justice and Human Rights, Evidence, 39th Leg. 1st sess. No. 61 (18 April 2007).

[32] Russell & Ziegel, *supra* note 28 at 23.

Ziegel reported that 26 per cent of the 228 judges appointed by the Mulroney government were found in at least two independent evaluations to be "outstanding". Another 61 per cent were rated either "outstanding/good" or "good". And only two of the 228 were derided as "weak".

Furthermore, despite widespread public concern over *Halpern*, *Vriend*, and a number of other law-changing judicial decisions in recent years, the technical competence of Canadian judges has not become a matter of partisan dispute. In the report on the judicial appointment process that was tabled in the House of Commons on 29 May 2007, members of the all-party Justice Committee unanimously acknowledged:

> Many excellent appointments have been made to the provincial and territorial superior courts, the courts of appeal and the federal courts in the last several decades. The work of Canada's courts is, in general, widely respected both at home and abroad. The House of Commons Standing Committee on Justice and Human Rights does not wish to interfere with or disparage in any way the high regard in which Canadian courts are held.[33]

In short, the traditional process for federal judicial appointments has served the country well. It comports with the requirements of democracy; the separation of legislative and judicial powers; and respect for the independence of the judiciary. The process can be improved by legislating the role and memberships of the judicial advisory committees as well as stipulating in law that all nominees for the most senior judicial posts must undergo scrutiny before an all-party committee in an open public hearing prior to appointment. On no account, however, should Parliament agree to curtail the effective power of the Prime Minister, the Justice Minister, and the cabinet to make the final decision on federal judicial appointments.

[33] House of Commons, Standing Committee on Justice and Human Rights, "Preserving Independence in the Judicial Appointment System" by Art Hangar in 14th Report, 39th Leg. 1st sess. (2007) at 1.