The Supreme Court Appointment Process: Chronology, Context and Reform

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Introduction

If asked about my priorities when first appointed Minister of Justice in 2003, I would not have included judicial appointments amongst them; however, I learned to appreciate that this is a critical part of the administration of justice in Canada, if not in any country. This is a legacy issue, and it will live on long after those who have the temporary stewardship of this position are no longer there. If the act of appointing judges is a priority, the process of appointing them is no less so. Indeed, the integrity and fairness of the process is not unrelated to the excellence and independence of the judiciary.

Judicial appointees—and the appointments process—are of crucial importance to our country. The Supreme Court, as the highest appellate court and final arbiter for the resolution of legal disputes is at the pinnacle of our court system, and is both a fundamental pillar of our constitutional democracy and the guardian of the *Constitution*. It is vested with the responsibility for intervening in the case of a constitutional trespass, either when governments exceed their jurisdiction—in the context of federal-provincial relations—or when they violate rights protected under the *Canadian Charter of Rights and Freedoms*. In other words, our *Constitution* frames both the distribution of governmental power between the federal government and the provinces, otherwise known as legal federalism or the "powers process", as well as the limits on the exercise of governmental power, whether federal or provincial, otherwise known as human rights or the "rights process".

The witness testimony before the Parliamentary Standing Committee on Justice and Human Rights examining the judicial appointments process determined that the Supreme Court exercised these responsibilities in an exemplary fashion and that its excellence resonated beyond Canada's borders.[1] Our highest court is respected across the country and around the world as a model of what a vital, modern, and

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[1] House of Commons, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 37th Parl., 3d sess.

independent judicial institution should be. For example, representatives of the Québec and Ontario bar testified that the quality of judges on the Supreme Court is "impeccable".[2] Constitutional and legal scholars emphasized in their testimony before the Committee that courts from diverse jurisdictions continually cite rulings from the Canadian Supreme Court. Commentators concurred that it was difficult to discern an "ideological" or "political" predilection in the Court's decision-making.[3] I was always reminded of this when, as Minster of Justice or academic, I went to international scholarly conferences where the Supreme Court of Canada was cited as an international model. One might have asked, therefore, that if the excellence of the Court is not unrelated to the appointments process, why reform an appointments process that has produced such excellent appointees? To use the proverbial vernacular, "if ain't broke, don't fix it".

A confluence of several factors animated the impetus for reform. First, there was the transformative impact of the *Charter*, where Canada moved from being a Parliamentary democracy to being a constitutional democracy; where the courts moved from being the arbiters of legal federalism in inter-jurisdictional disputes to being the guarantors of constitutionally protected rights; and where individuals and groups were no longer passive bystanders to legal federalism, but were now rights-holders and rights-claimants who could petition government for redress of grievance.

Second, as a corollary, the Supreme Court of Canada assumed a central role in this constitutional revolution, importing into Canadian discourse that which U.S. constitutional scholar Alexander Bickel called the "anti-majoritarian paradox", where unelected, unrepresentative, and unaccountable judges were usurping the decision-making process.[4]

Third, there was the perception of an "activist Court" propagating "liberal values", which incrementally began to morph into a critique of a Liberal court propagating Liberal values.[5] Then opposition justice critic Vic Toews reflected this

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[2] House of Commons, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Evidence*, 37th Parl., 3d sess., No. 6 (25 March 2004) at 0925 (Denis Jacques), online: Parliament of Canada <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=8795&SourceId=76540 &SwitchLanguage=1> ("La qualité de nos juges à la Cour suprême du Canada est impeccable").

[3] Patrick Monahan, "Is it Jean Chrétien's court?" *The Globe and Mail* (27 June 2003) A15 ("In fact, however, the six Chrétien appointees are largely indistinguishable on political or ideological grounds from the three current Supreme Court members who were appointed by Mr. Chrétien's predecessor, Brian Mulroney.").

[4] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962).

[5] House of Commons, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Evidence*, 37th Parl., 3d sess., No. 8 (30 March 2004) at 1725 (Hon. Claire L'Heureux-Dubé), online: Parliament of Canada<http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=76982&Lang=1&PARLSES=373&JNT=0&COM=8795> ("It would be interesting to see if you could devise a process by which the public would better understand the role of the court. It would be wonderful for the court, the public, and everybody. We would stop talking about activism, which in my view is such a bad word. You only use that for people who are supposed to tell Parliament that the legislation is no good, not for people who are reactionaries or activists. The reactionaries are pushing

in his words: "this Liberal government has allowed judges to become the most powerful force in setting social policy in Canada. Whether it is by allowing convicted [murderers] to vote or by changing fundamental institutions like marriage, this government has substituted the supremacy of an elected Parliament with unelected judges."[6]

Fourth, the dynamic of judicial decision-making intruding upon, if not overtaking, policy decisions that ought to be made by Parliament also motivated Parliament to inquire into the appointments process underpinning those judicial decisions.

Fifth, the purported politicization of the Supreme Court by a fractious minority Parliament was further exacerbated by allegations in the Gomery Commission hearings that appointees to the Federal Courts (the allegation did not extend to the Supreme Court of Canada) were Liberal appointees, such that the fallout of the Gomery Commission was extended to the judicial appointments process. Finally, there was the perceived anomaly of the executive—effectively the Prime Minister—making appointments to the Supreme Court alone, without any Parliamentary input or accountability. Accordingly, and in light of the foregoing, shortly after my appointment as Justice Minister it became apparent to me that not only was the Supreme Court appointments process in need of reform, but the very constitutional framework which underpinned the process itself had to be explained and understood.

With the foregoing in mind, this article will be organized around five themes. First, I will discuss the chronology of developments that led to the consideration of a reform proposal—the roadmap to reform. Second, I will outline the pre-reform constitutional framework and consultative process, particularly as set forth in my submission to the Parliamentary Committee. Third, I will discuss the Parliamentary Committee's report itself, including the proposal for an interim reform process. Fourth, I will summarize the interim appointments process that resulted in the nominations of Justices Abella and Charron. Finally, I will summarize the comprehensive reform proposal that presaged the appointment of Justice Rothstein and now constitutes the basic appointment process to the Supreme Court of Canada.

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their agenda. Nobody is pushing an agenda, as a matter of fact."); House of Commons, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Evidence*, 37th Parl., 3d sess., No. 4 (23 March 2004) at 1230 (Peter Russell), online: Parliament of Canada <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=76518&Lang=1&PARLSES=373&JNT=0&COM=8795> ("In Canada it doesn't work—that is to say, we know now that with the Supreme Court appointments you can't predict which way the Supreme Court justice will decide by knowing he was appointed by the Liberals, so he'll be on the left, or by the Conservatives, so he'll be on the right. That kind of ideologically driven selection, which is characteristic of the American process, has not been characteristic of the Canadian process at the Supreme Court level.").

[6] *House of Commons Debates*, No. 16 (23 February 2004) at 1450 (Vic Toews).

1. THE ROAD TO REFORM

On 12 December 2003, Prime Minister Paul Martin's new Liberal government was sworn into office and I was appointed Minister of Justice. That same day, the Prime Minister announced—and it is a dramatic representation of the priority that he attached both to the judicial appointments process and to its democratization—that the government would "specifically consult the Standing Committee on Justice and Human Rights on how best to implement prior review of appointments of Supreme Court of Canada judges."[7] Indeed, in his first discussion with me on that day, the Prime Minister emphasized the importance he ascribed to the reform of the judicial appointments process and Parliament's role in that reform. On 4 February 2004, the then Liberal government reaffirmed this commitment in its Action Plan for Democratic Reform—again reflecting the importance that the Prime Minister and government attached to the reform of the appointments process.[8]

On 20 February 2004, Justice Arbour announced that she would be leaving the Supreme Court in June 2004 to become the United Nations High Commissioner for Human Rights. The same day, Prime Minister Paul Martin announced that the government would decide on the vacancy, but that MPs would be involved in the selection process. Shortly thereafter, a discussion ensued as to whether there would be an interim appointments process to fill Justice Arbour's vacant seat—what was referred to as a "one-off procedure"—or whether a permanent appointments process would be developed before her departure.

In a speech before the Quebec Chamber of Commerce, Prime Minister Paul Martin reiterated yet again the need for a new process of Supreme Court appointments as part of a larger project of democratic reform, saying, "[w]e want to give Parliamentarians the right to review...appointments to the Supreme Court of Canada."[9] Then, on 19 March 2004, I received a call from then Supreme Court Chief

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[7] Prime Minister's Office, Press Release, "Prime Minister Martin Announces New Government will be guided by a new approach" (12 December 2003) [on file with author] ("Parliament will play a greater role in the appointment process. Appointments to certain key positions, including heads of Crown Corporations and agencies, will now be subject to prior Parliamentary review. The government will consult with the appropriate House Committees on how best to proceed on prior review of these appointments, and will specifically consult the Standing Committee on Justice and Human Rights on how best to implement prior review of appointments of Supreme Court of Canada Judges. These committees will also have the opportunity to consider which other appointments could be subject to their review").

[8] See *House of Commons Debates*, No. 3 (4 February 2004) at 1530 (Hon. Jacques Saada).

[9] Hon. Paul Martin, (Speech before Québec Chamber of Commerce, Montréal, 17 March 2004), online: University of Toronto Faculty of Law <http://www.law-lib.utoronto.ca/conferences/judiciary/chronology.htm> ("In the same spirit of progressive reform, we want to give Parliamentarians the right to review the vast majority of appointments to senior government positions, including appointments to the Supreme Court of Canada. In the past, the process by which the Prime Minister appointed these judges unfolded behind closed doors. We have excellent Supreme Court justices who are recognized the world over. But the way we arrive at these appointments is from a bygone era, and we need to acknowledge this. This has to change. We aren't interested in submitting these appointments to politicized hearings that often make all sorts of noise but don't do much good. What we're interested in, rather, is to put to good use the knowledge and informed opinions of experts and Parliamentarians in order to help the Prime Minister make the best possible decisions.").

Justice Frank Iacobucci. Justice Iacobucci advised me that he had decided to retire from the Supreme Court for family reasons. As he put it, "Nancy [his wife] has always been there for me all these years, it is time for me to now be there for her and the family and our grandchildren." It was a very moving and emotional conversation with someone who had been a long-time colleague and friend. Later, at his retirement ceremony, I said "[w]e have, the Canadian people, have lost a giant of a Supreme Court judge, a giant of a man."[10]

The unexpected and dramatic announcements from two sitting Supreme Court Justices that they were both retiring in June 2004—coinciding with a decision of the Parliamentary Standing Committee on 23 March 2004 undertake an inquiry into the appointments process itself—accentuated and accelerated the need for establishing a reformed appointments process as soon as possible.[11] These developments also coincided with my projected appearance before the Parliamentary Committee on 30 March 2004.

2. The Pre-Reform Judicial Appointments Process: The Constitutional and Consultative Framework As The Contextual Basis For Prospective Reform

The pre-reform appointments process has traditionally been organized around two central considerations. First, respect for the constitutional framework governing the appointments process and second, the development of a comprehensive consultative process to give expression to—or to implement—this constitutional responsibility. The framework anchored in the *Supreme Court Act,* vests the constitutional authority for Supreme Court appointments with the Governor in Council—or the cabinet—by way of an Order in Council, such that the executive remains responsible and accountable for the exercise of this important power.[12] Section 5 of the *Act* sets forth the threshold requirement for appointment to the Supreme Court to the effect that any person may be appointed a Justice of the Supreme Court "who is or has been a judge of a superior court or a barrister or advocate with at least 10 years standing at the bar of a province."[13] Section 6 requires that at least three of the Justices of the

[10] Tonda MacCharles, "Iacobucci, a 'giant' of a judge, retires; Supreme Court justice known for his civility Canada's legal heavyweights bid fond farewell" *Toronto Star* (22 June 2004) A16.

[11] House of Commons, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Evidence*, 37th Parl., 3d sess., No. 4 (23 March 2004) at 1105 (Derek Lee), online: Parliament of Canada <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=76518&Lang=1&PARLSES=373&JNT=0&COM=8795> ("You will recall that previously the committee had been looking at the appointment process for all judicial appointments, based on a motion referred to the committee from the House and originally moved by our colleague, Mr. Marceau. Subsequent to that, at the invitation of the Prime Minister, who has spoken publicly on the issue, and following discussion among members, we have agreed to look at this issue in relation to Supreme Court appointments.").

[12] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 4(1).

[13] *Ibid.* at s. 5.

Supreme Court come from Québec.[14] By convention, three Justices are appointed from Ontario, two from the western provinces and one from Atlantic Canada. Justices hold office conditional on good behaviour and can only be removed by the Governor General on address of the Senate and the House of Commons.[15] The mandatory retirement age of Supreme Court Justices is seventy-five.[16]

The consultative process developed to implement this constitutional responsibility and secure the best candidates was never well known—indeed, it may be said to have been relatively unknown. This led some to believe, understandably, that the pre-reform process was both secret and partisan. However, the process was not so much secretive as it was unknown. Accordingly, in the interests of both transparency and accountability, I appeared before the Standing Committee to outline the process for Supreme Court appointments that I followed to fill the vacancies on the bench. I did not claim that this consultative process had always been adhered to in every particular by my predecessors, but I indicated that it was the protocol of consultation that I was now engaged in as Minister of Justice. Indeed, the Parliamentary Committee described my appearance as "the first time that [the appointments process] had been made public. Canadians had their first opportunity to learn who was consulted about Supreme Court appointments and the criteria by which candidates are assessed for their fitness to be a Justice."[17]

The first step in the appointments process is a consultative process whereby the Minister identifies prospective candidates from the region where the vacancy originates—be it Ontario, Quebec, Atlantic Canada, or the west. The protocol of that consultative process may be described as follows: first, the Minister of Justice identifies potential candidates who may be drawn from judges of the courts in the region—particularly the Courts of Appeal—as well as from senior members of the bar and leading academics in the region. Any interested person may also put a name forward for consideration. Sometimes, names may be identified from previous consultations concerning prior judicial appointments.

In particular, the identification and assessment of potential candidates is based on a broad range of consultations with various individuals. The Minister of Justice specifically consults with the following: the Chief Justice of Canada (and perhaps other members of the Supreme Court of Canada); the Chief Justices of the courts from the province or region with the vacancy; the Attorneys General of the province or region; at least one senior member of the Canadian Bar Association; and at least

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[14] *Ibid.* at s. 6 ("At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.").

[15] *Ibid.* at s. 9(1) ("Subject to subsection (2), the judges hold office during good behaviour, but are removable by the Governor General on address of the Senate and House of Commons.").

[16] *Ibid.* at s. 9(2) ("A judge shall cease to hold office on attaining the age of seventy-five years.").

[17] Canada, Report of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Improving the Supreme Court of Canada Appointments Process*, (Ottawa: Communication Group, 2004) at 5 (Chair: Derek Lee, M.P.), online: Parliament of Canada <http://cmte.parl.gc.ca/Content/HOC/committee/373/just/reports/rp1350880/justrp01/justrp01-e.pdf>.

one senior member of the law society of the relevant region. The Minister could also consider input from other interested persons, such as academics and organizations who wish to recommend a candidate for consideration. Anyone is free to recommend candidates, and indeed, some choose to do so by way of writing to the Minister of Justice.

The second stage in the appointments process is the assessment and evaluation of potential candidates, with the predominant consideration being merit. The specific criteria for appointment may be classified into three main categories: professional capacity, personal characteristics, and diversity. Professional capacity encompasses not only the highest level of proficiency in the law, but also the following considerations:[18]

- Superior intellectual ability and analytical and written skills
- Proven ability to listen and to maintain an open mind while hearing all sides of the argument
- Decisiveness and soundness of judgment
- Capacity to manage and share consistently heavy workload in a collaborative context
- Capacity to manage stress and the pressures of the isolation of the judicial role
- Strong cooperative interpersonal skills
- Awareness of social context
- Bilingual capacity
- Specific expertise required for the Supreme Court (expertise can be identified by the Court itself or by others)

Under the rubric of personal qualities, the following factors are considered:

- Impeccable personal and professional ethics: honesty, integrity, and forthrightness
- Respect and regard for others: patience, courtesy, tact, humility, impartiality, and tolerance

[18] Not every candidate must have each of these criteria; rather, they are the composite set of criteria through which evaluation takes place.

- Personal sense of responsibility: common sense, punctuality, and reliability

The diversity criterion concerns the extent to which the court's composition adequately reflects the diversity of Canadian society. As well, in reviewing the candidates, the Minister could also consider—where appropriate—jurisprudential profiles prepared by the Department of Justice. These are intended to provide information about the volume of cases written, areas of expertise, the outcomes of appealed cases, and the degree to which judgments have been followed in lower courts.

Upon completion of the aforementioned assessments and consultations, the Minister would discuss the candidates with the Prime Minister. Note that the Minister may be involved in an ongoing consultation with a range of persons as set forth in the above Protocol. Once a preferred candidate is chosen, the Prime Minister would, in turn, recommend the candidate to cabinet. The appointment then proceeds by way of an Order in Council appointment, as per the *Constitution*.

In my appearance before the Parliamentary Committee, after describing the appointments process as set forth above and sharing with them the protocol of that process, I commented on how the Committee was "engaged in an important review of the role [P]arliamentarians might play in the appointment process. This review may include both a review of the process of appointments and a review of the proposed nominee recommended by the process."[19] In terms of reviewing the appointment process, I urged the Committee to bear in mind the two factors set forth above: the constitutional framework, which vested authority in the executive branch of government; and the consultative process, which had been established to implement the constitutional responsibility through which candidates were identified and evaluated.

I also invited the Parliamentary review Committee to consider the following questions: what is the form that this Parliamentary review might take respecting the vetting of the proposed nominee, and what is the mechanism by which this review might be undertaken? I offered a number of options for consideration. First, the Committee could undertake its review by hearing representations from the Minister of Justice as to why the nominee was chosen. Second, the Committee could engage in a direct interview of the candidate. Third, the review could be conducted by an independent expert representative Committee—sometimes referred to as an "eminent persons panel"—which would include representatives from Parliament.

There were other issues that I indicated might arise from the modality of review. First, what might be the appropriate composition of the Committee undertaking the review? Second, should the process be confidential, or should some of the review be public? In the context of a direct interview with the candidate, what

[19] House of Commons, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Evidence*, 37th Parl., 3d sess., No. 7 (30 March 2004) at 1115 (Hon. Irwin Cotler), online: Parliament of Canada <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=76905&Lang=1&PARLSES=373&JNT=0&COM=8795>.

questions might be asked so as not to embarrass the candidate or politicize the process? I then identified for the Parliamentary Committee a number of guiding principles that might assist the Parliamentary review while helping to address some of the above questions. These principles, which underpinned both the Parliamentary review process—and the ultimate comprehensive reform of the appointments process that I subsequently proposed and which will be addressed below—are as follows.

First is the merit principle. The overriding objective of the appointments process, simply put, is to ensure that the best candidates are appointed based on merit. Indeed, a process that would discourage good people from applying is one that is not worth having. Additionally, the Supreme Court bench should, to the extent possible, reflect the diversity of Canadian society. A diverse bench ensures that a plurality of perspectives are brought to bear on the resolution of disputes.

Second, any reforms must preserve both the integrity of the Supreme Court and the administration of justice. The judiciary is an institution vital to the maintenance of the rule of law and the health of our democracy. It must not be politicized, nor should any damage be done to the reputation of its members.

Third, the appointments process must protect and promote judicial independence. The independence of the judiciary is a cornerstone of our legal system, and nothing should be done that might undermine or diminish this principle.

Fourth, the appointments process must be more transparent. The consultation process, which was comprehensive, was simply not known at that time.

Fifth, the appointments process needs to recognize the value of provincial input. While the consultation process did provide for important provincial input through consultation with appropriate provincial Chief Justices, provincial Attorneys General, provincial bar association leaders, and other interested provincial bodies that may wish to make recommendations, provincial participation needed to be enhanced and institutionalized.

Sixth, the appointments process needs to factor in the importance of Parliamentary input, as had begun with this Parliamentary review of March 2004. Finally, there is the importance of public input and public participation in the appointments process.

3. Parliamentary Committee Report and Proposed Interim Reform Process

In May 2004, the Parliamentary Committee published its report *Improving the Supreme Court of Canada Appointments Process.*[20] The report reflected a broad Parliamentary consensus on the need for a new Supreme Court of Canada

[20] *Supra* note 17.

appointments process in order to ensure greater transparency and openness as well as enhanced Parliamentary and public involvement.

The Parliamentary Committee also noted that the pace of the Committee's work had been accelerated by the unexpected resignations of Justices Arbour and Iacobucci. Accordingly, the Committee reasoned that, in order to have a full bench of nine Justices for the fall sitting, it would be necessary to appoint two new Justices at some point in the summer of 2004 so as to give the new judges sufficient time to prepare for upcoming cases. It acknowledged that the process for screening and selecting nominees was well underway by the Minister of Justice. Accordingly, the Committee concluded that since there appeared to be insufficient time to put a new long-term process into place, an interim procedure should be established.

The interim process recommended by a majority of the Committee was as follows: the Minister of Justice would appear in a public session to explain the procedure by which the two prospective appointees for the Supreme Court were selected. At a public hearing—and without revealing the contents of any private deliberations—the Minister would explain to Parliamentarians and all Canadians the process by which candidates were identified and evaluated, the nature of the evaluations conducted, and the qualifications of the candidates. This could involve, for example, an explanation as to what expertise was lost with the departure of Justices Arbour and Iacobucci and how the new Justices might fill any needs that may have been created. In the course of such a hearing, the Committee expected there would be a greater appreciation of the appointments process and that a further understanding of the work of the Supreme Court would result. The Committee noted that the establishment of an interim process should not preclude long-term consideration of the Supreme Court of Canada appointments process.

On 23 May 2004, while I was engaged in the consultation process for the identification and evaluation of the two prospective nominees for the Supreme Court of Canada, an election was called, putting all consultations on hold pending the results of the election. The Liberal party was re-elected on 28 June 2004 with a minority government, and I was subsequently reappointed Minister of Justice and resumed my consultations on 19 July 2004. During the next month, I met and consulted with on a number of occasions the Chief Justice of Canada, the Chief Justice of the Ontario Court of Appeal, the Ontario Provincial Attorney General and other persons designated in the Protocol. On 20 August 2004, I engaged in a series of discussions with the Prime Minister pursuant to which it was determined that the two nominees would be Ontario Court of Appeal Justices Abella and Charron.

4. Interim Process Resulting in Nomination of Justices Abella and Charron

The Interim *Ad Hoc* Committee on the Appointment of Supreme Court Judges was created for the purpose of reviewing the candidacy of the persons recommended for

appointment to the Supreme Court of Canada.[21] It was, as noted earlier, a mechanism that had been recommended in the Parliamentary Committee report of May 2004 as a necessary interim measure arising from the vacancies. The *Ad Hoc* Committee was put in place over the course of discussions with the House Leaders of all parties, who agreed that it was an interim body meant to complete a review so that two vacancies on the Supreme Court could be filled before the Supreme Court began its sittings on 4 October 2004. As a result, the review process had to be completed as soon as possible, and preferably no later than the end of August. The Committee recognized that the authority to make Supreme Court appointments was constitutionally vested in the Governor in Council, and that the role of the Committee was purely an advisory one.

The majority of the Committee's members were elected Members of Parliament, consisting of three members of the Liberal Party of Canada, two members of the Conservative Party of Canada, one member of the Bloc Québécois, and one member of the New Democratic Party. In accordance with the written understanding of the political parties, the Committee also included a representative of the Canadian Judicial Council and a representative of the Law Society of Upper Canada. The Committee was subject to special rules of procedure, which were agreed upon by all the parties represented in Parliament. Those parties had also agreed that the hearing of the Committee was to be as open and transparent as possible while ensuring the integrity of the process. The Minister of Justice was to appear before the *ad hoc* committee in order to describe to the Committee the scope and nature of the process used to select the nominees and to present to the Committee the information gathered about the professional qualifications and personal suitability of the nominees, having regard to the criteria as set forth in the Protocol. In particular, the Minister's presentation was to include reference to the consultations he undertook, the written information he reviewed, and the additional personal research he conducted.

Committee members were to have an opportunity to ask questions to the Minister in relation to these issues. No witnesses other than the Minister of Justice were to be called for the interim process. The Committee was to make its views known by way of a written report and provide its advice on the appointment of the proposed nominees by 27 August 2004. Either at that time or as soon as possible thereafter, the Committee could also provide input on the *Ad Hoc* Committee process itself and its implications for longer term reform, to be considered by the Justice Committee in the fall.

My appearance before the *Ad Hoc* Committee lasted for some two hours. Indeed, as I stated before the Committee, the appearance was "what one might call a historic occasion. For the first time ever, there is a public hearing and prior

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[21] *Report of the Interim Ad Hoc Committee on the Appointment of Supreme Court Judges* (Ottawa: Interim Ad Hoc Committee on the Appointment of Supreme Court Judges, 2004) (Chair: Derek Lee), online: Department of Justice <http://www.justice.gc.ca/en/dept/pub/scc_courtsup/>.

Parliamentary review of the nominations to the Supreme Court of Canada."[22] For the benefit of the Committee—and for the benefit of Canadians watching the televised hearing—I reviewed the nature of the appointments process: both the constitutional framework in which appointments are made and the nature of the appointments process itself. I added:

> This public hearing—like the prior Parliamentary hearings with its publication of the Protocol of Consultation—marks an important value-added dimension in the interests of increased transparency, Parliamentary participation, improved public awareness and understanding, and a better appreciation of the merits of the individual nominees and the strengths that they bring to the Court.

After describing in detail the process of consultation, the information I reviewed and the qualifications of the candidates, I concluded as follows:

> [W]e can all take pride in this extraordinarily talented group of members of the Ontario Bench and Bar. But decisions have to be taken, recommendations need to be made; and in Justices Rosalie Abella and Louise Charron we have two outstanding jurists whose unique repository of experience and expertise—and remarkable array of professional and personal qualities—not only commend their elevation to the Supreme Court, but promise that profound and enduring contribution to Court and country that will inspire us all.

Following this public session, the Committee proceeded to discuss its report in an *in camera* meeting. It then advised that it was satisfied that the two nominees "are eminently qualified for appointment to the Supreme Court of Canada."[23]

5. Comprehensive Reform Proposal For The Supreme Court of Canada Appointments Process

On 7 April 2005 I appeared before the then Parliamentary Committee to outline a comprehensive proposal for the Supreme Court of Canada appointments process.[24] The proposal reflected an appreciation of a diversity of views from a broad range of constituencies and perspectives—lawyers, judges, domestic and international academics, Parliamentarians, provincial legislators and others. In particular, this proposal was anchored in the deliberations of the Parliamentary Committee and its May 2004 report, in addition to the *ad hoc* committee proceedings of August 2004. Accordingly, the proposal took into account the recommendations of those groups,

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[22] Department of Justice, Press Release, "Speaking Notes for Irwin Cotler Minister of Justice and Attorney General of Canada on the Occasion of a Presentation to the Ad Hoc Committee on Supreme Court of Canada Appointments" (25 August 2004), online: Department of Justice <http://www.justice.gc.ca/en/news/sp/2004/doc_31212.html>.

[23] Interim *Ad Hoc* Committee on the Appointment of Supreme Court Judges, *supra* note 21.

[24] House of Commons, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 38th Parliament, 1st Sess.

including those relating to increased transparency and enhanced provincial consultation.

The reform proposal itself created a four-stage process that became the template used to fill the vacancy occasioned by the retirement of Justice Major on 25 December 2005. Justice Rothstein was appointed to the Supreme Court by the new Conservative government on 1 March 2006, effectively using this process. In the first stage of the new process, the Minister of Justice conducts a consultation to identify prospective nominees, similar to the one employed in the Protocol set forth earlier. To ensure that there is a broad base of input into the initial list, the Minister publicly invites the written views of any person or group with respect to meritorious candidates. This engenders a prospective list of five to eight candidates—depending on the province or region—who are then assessed by an Advisory Committee set up for this purpose. Given that some candidates might not wish to have their names considered through this new process, the Minister should seek the prior consent of candidates before putting their names forward.

In the second stage of the process, an Advisory Committee is established each time a vacancy arises. The Advisory Committee itself engages in a consultation and evaluation process, assessing the candidates based on a written mandate from the Minister as well as the established criteria contained in the public protocol. The Advisory Committee is composed of:

- One MP from each recognized party in the House
- One retired judge, nominated by the Canadian Judicial Council
- One member nominated by the provincial Attorneys General in the region
- One member nominated by the provincial law societies in the region
- Two eminent people of recognized stature in the region, nominated by the Minister[25]

The members are not to be regarded as "representatives" of particular constituencies or points of view. Rather, they bring a diverse set of experiences and perspectives to a common enterprise of assessing candidates for the Supreme Court on the merit-based principle.

The Minister provides a mandate letter to the Advisory Committee, setting out the objectives of the Committee, describing the merit-based criteria, establishing timeframes and providing for a general procedure, particularly in relation to

[25] Department of Justice, Press Release, "Speech for The Honourable Irwin Cotler, Minister of Justice and Attorney General of Canada, Proposal for the Reform of the Supreme Court of Canada Appointments Process" (7 April 2005), online:
Department of Justice <http://www.justice.gc.ca/en/news/sp/2005/doc_31432.html>.

confidentiality. The Minister also meets with the Committee before it begins its work to clarify these issues and to underscore the importance of collegiality and confidentiality in conducting the Advisory Committee's work. The Committee is empowered to seek the consent of the Minister to assess additional candidates that are not on the original list. Before consenting, the Minister once again consults with those whose views he or she sought in relation to the initial list. If the Minister agrees that the new candidate should be assessed, the candidate would, once again, be contacted to ensure he or she is agreeable to having his or her name stand.

The Committee's assessment of the candidates is based on: an appreciation of the relevant experience and expertise of the candidates; a documentary review (CVs, judgments, articles, and so on); as well as consultations with third parties. The Advisory Committee works on a democratic basis, with key committee decisions requiring a consensus or majority vote. Such decisions include who should be consulted, whether an additional candidate should be proposed, and who should be on the short list. This was the approach taken by a majority of the Justice Committee in its May 2004 Report. In my April 2005 proposal I agreed with the Justice Committee—and this also represented the preponderant view of the many consulted—that there should be no in-person interviews. The view expressed was that it was doubtful whether such interviews would elicit relevant information not already available to the Committee through other sources, including the comprehensive consultative and evaluative process. There was also a concern that the potential difficulty in controlling the direction of questioning could distort an assessment on merit-based criteria.

In the matter of confidentiality, it is clear that assessing candidates for the Supreme Court is an extremely important and sensitive responsibility. Accordingly, for the Advisory Committee process to work effectively—indeed, for it to work at all—it is vital that individuals who are consulted by the Advisory Committee be completely candid in their assessments. For the same reason, as recognized by the Parliamentary Committee, it is essential that there be the widest possible scope for discussion within the Advisory Committee. Candid discussions are only possible when the participants can be assured that their views are being held in the strictest of confidence. Robust protections for confidentiality will reassure potential candidates who might otherwise be hesitant about having their names put forward for consideration.

Therefore, confidentiality would be required not only of Advisory Committee members but also of persons being consulted. Given the intense public interest in these appointments, the latter group may present the greater challenge. For these reasons, Committee members as well as those who are consulted are asked to enter into written confidentiality agreements. It is true that there can be no guarantees that these undertakings will never be breached. However, I believed then—and now—that the collegial nature of this process, the stature and reputation of the members of the Advisory Committee, and the national importance of the task will discourage individuals from violating these obligations. A person deciding to undermine such an important process—thereby potentially damaging individuals and the institution of the Court—would face significant public condemnation. This itself acts as a strong

deterrent to such mischief-making. It is encouraging that the deliberations that led to the nomination of Justice Rothstein were not attended by any breach of confidentiality.

Once its deliberations are complete, the Advisory Committee provides a confidential short list of three names along with a commentary of the strengths and weaknesses of each candidate to the Minister. In addition, the Committee provides the Minister with the full record of consultations and other material on which it relied. If for any reason the Minister felt that the record of consultations was incomplete, the Minister could request that the Advisory Committee conduct further consultations.

In all but the most exceptional circumstances, the candidate will be appointed from the short list. There is a proviso of "exceptional circumstances" that exists as a safety valve. It is principally intended to recognize the legal reality that the ultimate responsibility to make these appointments lies with Cabinet. But it is also there for a practical reason. In implementing this process, the government is taking a bold step forward. It cannot anticipate every possibility or turn of events in the future. At some point, the Advisory Committee process may be significantly undermined by a major breach of confidentiality. In such a case, it would not only be the government's right, but its responsibility, to put a stop to the process and make the appointment in the manner in which it was previously done.

In my view, it would be exceedingly rare for a government to ever make an appointment from outside the short list. I say this for three reasons. First, a government would not want to face the significant public criticism that would arise from an exercise of this power. Second, a decision to appoint from outside the list would seriously undermine the credibility of the appointments process. Third, the exercise of such a power would affect the willingness of prominent Canadians to serve on future advisory committees. One must also ask why an Advisory Committee member would go through this process if there was a real risk that the government would ignore the Committee's recommendations.

The third stage of the process involves the selection and appointment of a person from the short list recommended by the Advisory Committee. Before the Government fell on 28 November 2005, I had already received the short list and had made my selection; however, I could—but did not—act on it during the election, pending the results.

As it happened, the new government concurred with my recommendation of Justice Rothstein as the nominee for the Supreme Court. Indeed, I was pleased that both the template of this proposal for appointments to the Supreme Court as well as the person who would have been my proposed nominee were adopted by the new government. It should be noted that while the newly elected Conservative Government adopted this overall template, it did add an important dimension—an in-person interview after the nominee was chosen before a specially constituted Parliamentary committee for that purpose. I concurred with this initiative, proposed

by the Conservative government, and believe that the interview with Justice Rothstein only enhanced the process, including in particular the public understanding of the judicial appointments process and the work of the Supreme Court of Canada.

At the fourth and final stage, after the appointment has been recommended, the original template envisaged that the Minister would appear before the Justice Committee to explain the nomination process and the candidate's personal and professional qualities. This would be similar to my appearance before the *ad hoc* Committee, though in this new proposal, it follows upon the three other considered stages as set forth above. As it now stands, the Conservative government has replaced the appearance by the Minister with the process by which the nominee, rather than the Minister, would appear before the Justice Committee.[26]

The Supreme Court of Canada is a pillar of our constitutional democracy and the guardian of our rights. It deserves an appointments process that is commensurate with its responsibilities and its excellence. During my period as Justice Minister, I had the unprecedented opportunity to not only participate in the appointment of three Supreme Court Justices, but also—in collaboration with Parliaments of the day, the bench, bar, and academia—to craft and oversee the development of the first-ever comprehensive proposal for, and review of, the Supreme Court appointments process. I trust that the template proposed will achieve its purpose, and with the passage of time be further refined and improved upon.

[26] Renamed Standing Committee on Justice and Human Rights in the 39th Parliament.