THE TRANSFORMATION OF THE SUPREME COURT OF CANADA

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DONALD R. SONGER

The Transformation of the Supreme Court of Canada

An Empirical Examination

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Contents

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Tables and Figures

Tables

Figures

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1 Introduction: The Changing Role of the Supreme Court in Canadian Politics

On 28 June 1971, the Supreme Court of Canada handed down decisions in four separate cases, all by unanimous vote of the five justices participating in each case. In *Schwartz v. Schwartz*[1] the Court settled an inheritance dispute among five children arising from ambiguous language in their deceased father's will. In *City of Victoria v. University of Victoria*[2] the city appealed from a decision by the Court of Appeal denying its tax claim against the university for taxes levied against a commercial building situated half on land left to the university in a will and half on property privately owned. The Court dismissed the university's appeal. In *Canadian General Insurance Company v. Western Pile and Foundation, Ltd.*,[3] the Court wrestled with complex factual issues over liability for damages caused by the collapse of a dam. And in *Phillips v. Samilo*,[4] the Court had been asked to decide which of several heirs was responsible for the tax liability of the deceased father, who had defrauded the government out of $300,000 in taxes owed from his various business schemes. It is probable that no reader of this book has ever heard of any of these cases, and the decisions of the Court were widely ignored even in 1971. These decisions do not appear in any history of Canadian politics or society, and even the leading newspapers of the day ignored them. For example, none of the decisions was even reported by the *Globe and Mail* the next morning.

In contrast, many of the Supreme Court's decisions over the past two decades have generated extended media coverage and heated political controversy. The Court began the new century by announcing, on 26 January 2001, a controversial decision that upheld in part a constitutional challenge to provincial law prohibiting child pornography. In *R. v. Sharpe*,[5] the accused was charged with two counts of possession of

child pornography under s. 163.1(4) of the Criminal Code. Prior to his trial, the accused brought a preliminary motion challenging the constitutionality of the act, contending that it violated his constitutional guarantee of freedom of expression. The Crown conceded that the prohibition of possession of child pornography infringed s. 2(b) of the Canadian Charter of Rights and Freedoms but argued that the infringement was justifiable under s. 1 of the Charter. Both the trial judge and the majority on the British Columbia Court of Appeal ruled that the prohibition of the simple possession of child pornography as defined under s. 163.1 of the Code was not justifiable in a free and democratic society.

In a divided decision (L'Heureux-Dubé, Gonthier, and Bastarache dissenting), the Court upheld the constitutionality of the prohibition of child pornography but limited its reach, allowing some private possession of child pornography. Specifically, the Court said that the law should be read as though it contained an exception for the following: (1) any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use; and (2) any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use. The public reaction was swift, and the media coverage was extensive. The decision attracted the attention of all the major television news broadcasts and was a major focus of leading newspapers throughout Canada. The *Globe and Mail* alone ran six separate stories highlighting different aspects of the case. A page one article was headlined: 'Top Court Rules 9-0: Child Porn Law Stays.' The same day, other stories were featured on page one of the *Globe* and on pages A4 and A5 under headings such as these: 'Activist Days Long Gone for Deferential Court'; 'Both Sides Claim Victory'; 'BC Defendant Unrepentant after Court Ruling'; and 'McLellan[6] Welcomes Balanced Judgment.' In all, the *Globe and Mail* devoted more than 120 column inches to the decision and to political and personal reactions to it, and that was just the first day after the decision was announced.

Other cases besides that one have elicited fierce public reaction and extensive media coverage. When the Court reversed a pre-Charter precedent to legalize abortion,[7] the reaction from the public was intense and heavily chronicled in the media. Once again, the Court's decision was literally front page news. The day after the *Morgentaler* decision

was announced, the headline covering the entire top of page one of the *Globe and Mail* declared 'Abortion Law Scrapped, Women Get Free Choice.' Front page coverage in the *Globe and Mail* also featured passionate responses from both supporters and opponents of the decision. Under the heading 'Jubilant,' the paper reported that 'feminists across the country rejoiced yesterday, calling the Supreme Court's rejection of Canada's abortion law the most important for women since they won the vote.'[8] In a parallel story headed 'Defiant,' a Roman Catholic cardinal was quoted as saying, 'The Supreme Court decision is a disaster … It is uncivilized.'[9] The political reaction to the decision was covered in great detail – for example, in a long feature headed 'Pro-Choice Supporters Celebrate as Anti-Abortionists Mourn.'[10] The text of the decision also received detailed coverage.[11] Follow-up stories focused on the reaction of women's groups around the country, on the personal life of the doctor at the centre of the case, on the legal history of the battle over abortion, and on the responses of government officials to questions about how they were going to implement the decision.

More recently, the Court again created political controversy when it provided official sanction for advocates of gay rights. In *Vriend v. Alberta*[12] the Court ruled that the Charter of Rights and Freedoms prohibited discrimination on the basis of sexual orientation. In 1990, in response to an inquiry by the president of the college at which he worked, Vriend disclosed that he was homosexual. Shortly thereafter, the college president requested his resignation. When Vriend refused to resign, the college terminated his employment. The sole reason given was his non-compliance with the college's policy on homosexual practices. When Vriend attempted to file a complaint with the Alberta Human Rights Commission on the grounds that his employer had discriminated against him because of his sexual orientation, the commission advised him that he could not make a complaint under the Individual's Rights Protection Act (IRPA), because that act did not include sexual orientation as a protected ground. The trial judge found that the omission of protection against discrimination on the basis of sexual orientation was an unjustified violation of s. 15 of the Charter of Rights. She ordered that the words 'sexual orientation' be read into the IRPA as a prohibited ground of discrimination. The majority on the Court of Appeal allowed the Alberta government's appeal; then, in a split decision, the Supreme Court overturned the Court of Appeal, insisting that protection against discrimination on the grounds of sexual

orientation was protected by the Charter even though it was not explicitly mentioned in the Charter. The media reaction was again extensive. For example, the *Globe and Mail* ran half a dozen articles on the decision, supplemented by an editorial and lengthy quotes from the actual opinions of the justices. One article noted that radio talk shows throughout Canada were being swamped by people calling in to express both support and outrage over the decision.[13]

These cases from 1971 and the Charter period illustrate that for much of its history the Supreme Court of Canada toiled in obscurity, well out of the limelight of political controversy. As recently as 1966 the Court was described as the quiet court in the unquiet country' (McCormick 2000, 1). But with the advent of the Charter of Rights and Freedoms, that all changed. Indeed, a major national newspaper recently asserted that the Supreme Court was of profound importance in the Canadian political system because 'the court's rulings have far-reaching effects, particularly in the age of the Charter of Rights and Freedoms.'[14] Another writer asserted that Canadian politics as a whole had been 'transformed' by the Charter (Morton and Knopff 2000, 13) Few now doubt that the Charter has placed the Court at centre stage in some of Canada's most dramatic policy debates. Given this transformation, it is increasingly important to examine how the Court rose to its current prominence. Many commentaries, both scholarly and popular, have critiqued the normative implications of the Court's recent role (see Morton and Knopff 2000; Mandel 1989 1994; Manfredi 1993; Russell 1983). Much less, however, is known about how the Court actually operates and about the empirical realities of its decision-making trends. This book attempts to fill those gaps by providing the most comprehensive empirical analysis to date of continuity and change on the Court in terms of its shifting agenda, the litigants appearing before it, and its patterns of decisions. The focus of the analysis is the period 1970 to 2003.

Over the past half century, the Supreme Court of Canada has undergone two institutional changes. Both have had a profound impact on its role in national life. In 1975 the Court gained substantial control over its docket. Specifically, cases coming before it as appeals 'as of right' were sharply limited; and an expansion of the 'leave to appeal' process provided it with it greater control over which cases it would hear. The second change came in 1982 with the adoption of the Charter of Rights and Freedoms, which transformed the nature of the questions coming to the Court, thereby greatly increasing the Court's role

in politically important issues. The time period examined in this study has been chosen to permit an analysis of the impact of these two significant institutional changes. The analysis begins five years before the Court acquired its enhanced agenda control. This is so that the Court *before* the changes can be compared with the Court *after* the changes. The analysis then continues until close to the present time.

Understanding the Transformation of the Supreme Court: Four Themes

Four themes emerge from the detailed analysis that follows. First, the Supreme Court's role in Canadian law and politics has been transformed, largely as a result of the *Charter*. Second, while it is still fashionable to think of the work of courts as divorced from the often disdained world of politics, to properly understand the current Court one must understand it as a court of law *and* a political court. Third, Canada's Supreme Court is clearly a political court, yet compared to many courts in the common law world (including the Supreme Court of its southern neighbour), it is politically moderate. Fourth and finally, almost by definition, courts in a country that has a strong attachment to the rule of law are staffed by people who may fairly be categorized as among the elite of the nation. Nevertheless, compared to many top appellate courts, the Supreme Court of Canada appears to be a rather 'democratic' court, one that largely reflects Canada's diversity.

Regarding the first theme, Canada adopted the Charter in 1982, yet the first case involving it did not reach the Supreme Court until 1984; hence evidence of the effects of the Charter on the Court do not begin to appear until 1984. Since that year, the Court's agenda has undergone a radical revision. As the examples at the beginning of this chapter illustrate, in the early 1970s the Court was still focusing largely on resolving disputes in private law. Since 1984, however, there has been a dramatic increase in the number of criminal appeals and a proportionately large increase in attention to challenges brought by rights claimants (see chapter 3). In addition, the agenda is now dominated by questions of constitutional and statutory interpretation – questions that have potentially widespread effects on society as a whole. This agenda change has taken place at roughly the same time that there has been a significant change in the composition of the Court, most notably with the addition of female justices. Since 1982 more women have served on the Supreme Court of Canada than on the highest courts of

Australia, the United Kingdom, and the United States combined. Also, decision-making processes have changed: the rapid increase in the number of cases has drawn the participation of interveners and resulted in a larger proportion of cases being decided by the full Court or by panels of seven justices (i.e., instead of five).

Regarding the second theme, the Supreme Court is of course the institution tasked with resolving the most perplexing legal issues facing the country. Law and precedent therefore loom large in the justices' deliberations. But the Court cannot be adequately appreciated unless it is understood as both a political and a legal institution. To begin with, the Court has played a major role in the resolution of many of the politically most controversial issues of public policy, especially since the adoption of the Charter (see chapter 6). Thus the Court produces politically important outputs regardless of the justices' preferences. The Court's agenda – in particular, the nature of the issues brought to it by politically motivated individuals and groups – guarantees that no matter who is on the Court, it will be intimately involved in the political process. Moreover, the Court is political in another sense (see chapter 7). The evidence is strong that in a substantial number of politically significant cases, the justices' private political attitudes and preferences influence their decisions. In this respect, the role played by the Supreme Court of Canada does not appear to be fundamentally different from the political role played by the top appellate courts in other common law countries such as the United States, the United Kingdom, Australia, and India, or from the role played by top civil law courts in most of modern Europe. Nevertheless, the evidence suggests that the *magnitude* of the influence of the justices' political attitudes may be more modest than in the United States and Australia.

Regarding the third theme, once one concludes that politics plays a role in judicial decision making, it is important to ask what the political consequences of that role are. It is not possible to give a completely objective answer to this question,[15] and a series of normative analyses of the Supreme Court of Canada have arrived at diverse conclusions, but to an outside observer with no attachments to any faction in Canadian politics, it appears that a good case can be made that overall, the Supreme Court has generally been politically moderate. The evidence for this is drawn from several of the chapters below. First, there have been relatively modest swings over time in the proportion of decisions favouring liberal versus conservative outcomes as a function of changes in the political composition of the Court (as measured by the party of

the appointing prime minister; see chapters 6 and 7). For example, changes brought about by changes in party control have been much smaller than in the United States. Journalists writing for Canada's national newspapers concur that most Supreme Court justices have been moderate (see chapter 2). Indeed, the justices themselves sense that most of their colleagues are not interested in pushing ideological agendas and that they are largely willing to compromise (see chapter 5). Finally, over the past third of a century the Court has reached a unanimous decision in the large majority of its cases. Chapter 8 of this book will suggest that political ideology plays little if any role when the Court is unanimous.

Finally, regarding the fourth theme, the Supreme Court of Canada can be understood as relatively 'democratic' compared to many other courts around the world. The justices in the courts of all industrially advanced modern nations are of course more highly educated and tend to be recruited from national elites. But compared to courts in many countries, the Canadian justices appear to be less elite. As noted, Canada has been appointing female justices for decades. Its justices are regionally diverse and have been drawn from a variety of Canadian universities and law schools. Both of Canada's main religious groups have always been represented. Moreover, the Court has long been open to a broad spectrum of the population. And finally, compared to most other common law courts, individuals win relatively often compared to the representatives of entrenched institutionalized power.

Evidence in support of each of these four themes is presented throughout the analysis that follows. However, to provide a descriptive account of the Court that flows more logically, the remainder of this book is organized according to more traditional notions of the functions of courts. The account starts in chapter 2, with a look at the justices who have served on the Court since 1970: how they are selected, what criteria are used in selection, and what types of men and women have been selected. Next, chapter 3 examines the Court's agenda. The process of determining which cases reach its docket is examined; the focus then turns to the nature of those cases. For both questions, a central concern is changes over time in processes and results. Chapter 4 examines the litigants. The first orienting question relates to who participates. That is, who brings cases to the Court? And who is defending their gains in the courts below? In the second half of the chapter, the focus shifts to who wins and who loses in the Supreme Court. Once again, both the overall pattern and changes over time are

examined. In chapter 5 attention turns to the Court's internal processes. Much of this chapter is derived from a set of interviews with the justices and some of their former clerks. In chapter 6, trends in policy making are examined. That is, the Court's decisions are examined in aggregate. Instead of asking which individuals (or litigants) win and lose, the analysis explores which policy positions have been favoured and how those trends have changed over time. In chapter 7 the focus remains on the Court's decision making, but the focus shifts to an individual level of analysis. Evidence of attitudinal decision making is explored, and so is the nature of the cleavages on the Court. Most of the analysis in that chapter focuses on the Court's divided decisions. The final substantive chapter, chapter 8, shifts attention from the divided decisions of the Court to the decisions in which it was unanimous. Particular attention is devoted to whether the justices' policy preferences have driven these unanimous decisions. Chapter 9 then summarizes and discusses this study's major findings in terms of the four themes outlined above.

An Outsider's Perspective and an Empirical Analysis

Two things stand out about the analysis that makes this book different from most writing on the Supreme Court of Canada. First, it is written from the perspective of an 'outsider'; second, it presents an empirical rather than a doctrinal or normative analysis of the Court. The author is an outsider in at least three senses. First, I have no special insider connection to the Supreme Court or to any of the present or former justices. Nor have I participated in any of the legal or political battles in which the Court has been involved. Second, I am a social scientist rather than a lawyer or law professor. I am not primarily concerned with the evolution of legal doctrine or even in the precise nature of the precedents spelled out in key decisions of the Court. This book is not in any sense an examination of Canadian law. Rather, my interest is in the role of the Court in Canada's political and legal system and in the similarities and differences in that Court's role compared to the roles played by appellate courts in other countries. Finally, I am an outsider in the sense that I am not a Canadian. I am a political science professor at a university in the United States who embarked on a study of the Supreme Court of Canada out of a broad interest in the comparative analysis of courts in the common law world. I hope that my status as an

outsider has enabled me to gain a perspective that may be somewhat different from those of 'insiders' and thus help to cast new light on some recurring themes in discussions of the Supreme Court of Canada.

There is by now a fairly large literature on the Supreme Court of Canada. In part, that is the result of increased public interest in the Court since the Charter of Rights was adopted. But most of that literature does one of two things. A number of scholarly works present a doctrinal account that carefully examines the legal doctrines enunciated by the Court and that traces the evolution of those doctrines over time. Other works provide a normative critique of the Court and its decisions. Many of the Supreme Court's decisions, especially since the adoption of the Charter, have evoked intense political passions. Out of those passions, both defenders and detractors of the Court have provided searing accounts that either justify or attack the Court from a variety of political perspectives. The current account does neither. Instead, it attempts to provide an empirical account that examines as objectively as possible both continuity and change on the Court since 1970. Wherever possible, quantitative and statistical analyses are employed both to provide a descriptive account and to test empirical hypotheses about the Court.

The analyses presented below are the first to combine the insights gained from in-depth interviews with the justices with a series of quantitative analyses of judicial decisions. No other studies of decision making in the top courts of Canada, the United States, or Britain contain such a rich combination of quantitative analysis and insights from judicial interviews. The study utilizes two main sources of data: a set of in-depth interviews with the Supreme Court justices, and the most comprehensive database of Canadian decisions spanning more than three decades, paying particular attention to decisions handed down by the Court in three pivotal issue areas: criminal law, Charter rights and liberties, and economic disputes.

Much of the research was made possible by a pair of grants from the National Science Foundation of the United States and Canadian Studies Grant program of the Canadian Embassy in Washington.[16] This support enabled the author to code all of the published decisions of the Supreme Court from 1970 through 2003. All decisions published in the *Supreme Court Reporter* have been coded. For each case, detailed information has been recorded regarding the nature of the issues, the litigants, the interveners, the votes of the justices, and the outcome of the

Court's decision, along with the history of the case before it reached the Supreme Court. In all, detailed information on more than seventy variables has been collected for each case.

The author also interviewed ten of the current or recent justices of the Supreme Court and four former law clerks to the justices. All of the interviews with the justices were held in the offices of the justices in the Supreme Court building in Ottawa on one of several trips the author made to Ottawa between 2001 and 2007. All interviews were conducted under the following ground rules: the comments of the justices would not be attributed to any justice, nor would any descriptive information about the justices be linked to the comments that would allow anyone familiar with the justices to make such attributions. Thus, accounts of the interviews refer to the justices only as 'Justice A,' 'Justice B, and so on. All justices are referred to using a male pronoun regardless of the actual gender of the justice. The interviews were opened ended, and the justices were encouraged to elaborate on their answers to all questions. Most interviews lasted between an hour and an hour and fifteen minutes. A copy of the interview schedule is provided in the Appendix.

An Overview of the Analysis

There have been plenty of studies defending or attacking Canada's Supreme Court on normative grounds. Less is known about how it operates. Indeed, one prominent scholar maintains that the 'internal decision making process of the Supreme Court of Canada has been shrouded in secrecy' (Baar 1988, 70). In this book an attempt is made to lift that veil and cast some light on the main features of the Supreme Court's decision-making process over the last third of a century. Interviews with the justices and with some former clerks on the Supreme Court explore how cases get to the Court, who determines which judges will hear the appeal, how the justices prepare for the hearing, what happens in conference, and why the negotiations surrounding the actual writing of the opinion are so crucial.

These interviews are supplemented with a quantitative analysis of all of the published decisions of the Court since 1970. Besides tracing changes in the characteristics of the lawyers appointed to the Supreme Court, trends in the agenda of the Court, variations in who participates, and variations in who wins appeals to the Court, the book devotes four chapters to the justices' decision making. First, interviews

with the justices are used to provide new insights into that process. Then the Court's decisions are analysed in aggregate so as to explain changes in trends in the Court's decisions. The focus then shifts to the individual voting decisions of the justices and the bases of divisions in the Court. Finally, the analysis focuses on the unanimous decisions of the Court, in order to integrate the perspectives of the justices with an empirical analysis that probes whether those unanimous decisions are consistent with an attitudinal explanation of judicial behaviour or, rather, reflect collegiality and compromise.

2 The Changing Profile of Justices on the Supreme Court

In chapter 1 it was noted that the Supreme Court of Canada has for more than a century been involved in the resolution of some of the most important political issues of the day. The extent of its impact and the visibility of its actions have increased dramatically since the adoption of the Charter of Rights and Freedoms. To begin to understand the Court's role in Canadian politics, one might ask who the judges actually are and how they reached the pinnacle of judicial power in Canada. Those two questions are the focus of the current chapter.

The Selection of the Justices

In the past few years, there has been more debate and controversy over the methods for selecting justices to the Supreme Court than at any other time in anyone's memory. This debate led to a modest change in the process when Abella and Charron were selected as justices in 2004 and to further modifications leading up to the appointment of Rothstein in 2006. At the time of this writing there are doubts whether the most recent 'reforms' will persist. No one can say what the future will hold for the process of selecting Supreme Court justices.

Prior to these recent changes, the formal contours of the process were widely understood, yet surprisingly little was known about the actual informal workings of the process for selecting Supreme Court justices. In most important ways, that statement still holds. As Sharpe and Roach recently put it, the 'actual appointment process is shrouded in mystery' (2003, 297). Formally, like all other federal judges, the justices are appointed by Cabinet, with a major role played by the Minister of Justice. The only formal criterion for selection is that the nominee

must have been a member of the bar for at least ten years. In practice, this has meant that the appointment of a new justice to the Supreme Court has been the unfettered, unilateral choice of the prime minister; the same with the choice of chief justice (McCormick 1994a). This is confirmed by the members of the Court. In the interviews conducted for this study, none of the justices seemed to know why they had been selected. And according to one former justice, there is not even any requirement that members of the bar or the judiciary be consulted; simply put, the prime minister names the justice (L'Heureux-Dubé 1991). As one study of the appointment process summarized the situation, the system 'offers no checks and balances either before or after appointment, no representation from the bar or the public, no formal procedures or criteria of selection other than experience at the bar' (Weinrib 1990, 114).

So there is no requirement for consultations. However, anecdotal accounts suggest that with at least some nominations, either the justice minister or the prime minister consulted fairly extensively with either senior judges or leading members of the bar. Early in Brian Dickson's term as chief justice, there did not appear to be any consultations with the bench or the bar. However, Brian Mulroney, once he became prime minister, established a regular practice of consultations for Supreme Court appointments. Dickson described it this way: 'The minister of justice or the prime minister would usually get in touch, not for nominations, but simply to say, "We are considering so-and-so or so-and-so, and what would be the reaction of the Court?"' Dickson would then share the information with the rest of the justices and report their reactions (Sharpe and Roach 2003, 298).

Since the prime minister has so much control over the selection of the justices, it is important to know what different holders of that office have looked for when appointing new justices. Unfortunately, there is little information about this in the record. There is a fairly extensive literature about judicial appointments. Most such studies conclude that the pre-2004 system was flawed and then suggest reforms (see Beatty 1990; Weinrib 1990; L'Heureux-Dube 1991; Ziegel 1987; Ziegel 1994). Yet few studies have probed the actual reasons for appointments. A constant theme of reform proposals is the need to take partisan and ideological considerations out of the selection process – this, even though there is little clear evidence that such factors are important in the current system. Indeed, there is some evidence that the judges themselves do not think that either partisanship or ideology plays a

central role. For example, in a survey of appellate judges, Miller (1998) reported that the judges prided themselves on not having been chosen for their politics. Several noted that they had been appointed to the trial court by a government of one party and then elevated by a different party. And when asked to state the main difference between judges in the United States and those in Canada, almost all the Canadian judges interviewed said that the biggest difference was the political nature of judicial selection in the United States (ibid., 264). A similar view was expressed in recent interviews with six Supreme Court justices. All stressed that partisan politics no longer plays a role in appointments to the Supreme Court, though none professed to know exactly which criteria were important to the prime minister doing the selecting (Greene et al., 1998). Nevertheless, three of the ten justices interviewed for the current project indicated that while they had no direct knowledge of the criteria applied by the government that appointed them, they agreed with the sentiment expressed by Justice J that 'any government can be expected to appoint justices who in at least a broad sense identify with the government's policies.'

Prior to 2004 it was widely recognized and accepted that the prime minister had nearly complete discretion as to the criteria or qualifications deemed essential for appointment and that any debate or consultations on potential candidates took place behind closed doors. Usually, the first thing anyone outside the government heard about the process was when the prime minister's choice was formally announced. The process seemed at first to be the same when two vacancies from Ontario arose in 2004. Whatever consultations took place in the Liberal government took place behind closed doors. However, after selecting two judges from the Ontario Court of Appeal as its 'nominees,' the government announced that the justice minister, Irwin Cotler, would appear before an ad hoc committee of seven MPs and two members of the bar and answer questions about the process as well as the qualifications of the nominees (Hogg 2006). The nominees, however, did not appear before the committee. The minister's presentation generated spirited debate within the committee – debate that included sharp attacks from both Conservative members. According to news accounts of the hearings, 'Conservative MPs angrily described yesterday's unprecedented hearing into two new Supreme Court of Canada appointments as a "rubber stamp" and both Conservative Party members of the committee refused to endorse either candidate' (Naumetz 2004; Lunman 2004). Nevertheless, two days later the

government issued a statement confirming the names of the new justices in which Cotler said, 'I am delighted that the ad hoc committee recognizes and acknowledges that Madam Justice Rosalie Abella and Madam Justice Louise Charron are "eminently qualified" for appointment to the Supreme Court of Canada.'

The reaction to the process used to select the justices in 2004 was mixed, breaking along party lines to some extent. Meanwhile, there was considerable disappointment among those in the public who had been led to expect a more transparent, merit-based process, one that would end any taint of partisanship. Some went so far as to call the process a 'sham.'[1] One *Globe and Mail* columnist described the hearing as 'a good day's work and a valuable lesson for democracy' (Ibbitson 2004). Yet in the same edition of that paper, the lead editorial described the process as a 'sham' that had prevented the public from enjoying an objective examination of the views of the nominees (*Globe and Mail* 2004a). A *National Post* writer went even further, declaring that 'this is the first time I can recall that a judicial appointment has been used as a political weapon, in the most partisan sense of the word' (Coyne 2004).

In response to such criticisms and to ongoing dissatisfaction with the selection process, when Justice Major retired in 2005 the government moved quickly to create a new and more elaborate process. After Paul Martin's Liberal government completed its own private consultations about possible candidates, the government announced that it would send a short list of about eight candidates to an advisory committee composed of an MP from each party, a nominee of the provincial attorneys general, a nominee of the provincial law societies (i.e., the organized bar), and two prominent Canadians who were neither lawyers nor judges (Hogg 2006). The committee would examine the qualifications of each nominee in a confidential process and then narrow that list from eight names to three. The government pledged that it would appoint one of those final three to the Supreme Court.

The advisory committee apparently functioned as anticipated, examining the professional backgrounds of each candidate as well as their writings and speeches. However, before Cabinet could meet to discuss the three candidates, the government was defeated in Parliament and forced to hold new elections. In those elections, held on 23 January 2006, the Liberals were defeated and replaced by the Conservatives. The new prime minister, Stephen Harper, decided that he would select the new Supreme Court justice from the list of three