

SPECIAL SERIES ON THE FEDERAL DIMENSIONS OF REFORMING THE SUPREME COURT OF CANADA

REFORMING THE SCC: RETHINKING LEGITIMACY & THE APPOINTMENT PROCESS

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INTRODUCTION

Mr. Justice Marshall Rothstein's appointment to the Supreme Court of Canada (SCC) on March 1st, 2006 made Canadian history. To date, he is the first and only Supreme Court judge appointed after facing questions posed by members of an *Ad-Hoc Committee to Review a Nominee for the Supreme Court of Canada* in a public hearing. Prime Minister Stephen Harper commented: "The way in which Justice Rothstein was appointed marks a 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" (Office of the Prime Minister, 2006).

In the spring of 2008, speaking to the need to replace Mr. Justice Michel Bastarache on the court, Justice Minister Rob Nicholson announced that the government would form an ad-hoc committee to devise a short-list of nominees, one of whom would be nominated for the position. He said that this open process would ensure the legitimacy of the appointment process, and in turn, maintain the legitimacy of the court. Shortly thereafter, Justice Nicholson announced that the prime minister had unilaterally nominated Mr. Justice Thomas Cromwell for the position. He did, however, state that Justice Cromwell would be appointed after facing questions posed by an ad-hoc committee. But Justice Cromwell faced no such committee. Instead, on December 22, 2008, he was appointed to the Court. Despite this move, the government continues to be committed to the enhancement of the legitimacy of the appointment process.

The prime minister's power to unilaterally appoint justices to Canada's final court of appeal has long been regarded as controversial. Jacob Ziegel (1999), Peter McCormick (2000) and Ted Morton (2006) for example, argue that the appointment process suffers from both a democratic deficit – it is a non-transparent, non-accountable process – and a federalism deficit – the federal government alone appoints justices to a court that rules on, among other things, federal-provincial relations. According to Lorne Sossin, the appointment process ought to be reformed because it is out of step with our legal and political culture (Sossin 2008, 12). The prime minister alone, with no formal or binding input from provincial premiers or other advisors and with no public scrutiny, determines who sits on Canada's highest bench – a bench that wields a lot of power as in most instances it has the final say in the way the Canadian Constitution is understood. Moreover, the perceived democratic and accountability deficits are magnified when the "activist" court renders decisions that seemingly contradict dominant ideologies and the will of the majority, or when the court intrudes upon or overtakes policy decisions that should be made by elected governments (Cotler 2008, 133). Today, court watchers are very interested in the activist stance of the court, particularly in connection with the Charter of Rights and Freedoms. Coupled with the old-fashioned system of prime-ministerial appointment, this activism seems to contradict Canadian democratic and federalism principles and leads critics to question the legitimacy and credibility of a court fashioned under the system.

The SCC in the post-Charter era plays a central role in Canadian life and this can be construed as problematic, controversial or even a conundrum. According to Irwin Cotler, the court represents the "anti-majoritarian paradox where unelected, unrepresentative and

unaccountable judges [usurp] the decision-making process” (Ibid., 132). Given the growing importance of the court, which deals with high-profile cases on the Charter of Rights and Freedoms and federalism, among other things, and given the ongoing debate regarding the prime minister’s unfettered power to appoint the SCC justices, many would argue that the time is ripe indeed to reform the appointment process. The question thus becomes: Should the appointment process be reformed to address the democratic and federalism deficits of the institution? The short answer is No.

The main issue underpinning common criticism of the Court and fuelling contemporary calls to reform how justices to the SCC are appointed is the Court’s power of judicial review and its ability and tendency to usurp the democratic decision-making process. How do we reconcile the fact that a non-elected body exercising judicial discretion and creativity has the power to overturn the decisions of a democratically elected government and the indirect power to alter and shape the substance and understanding of the Canadian Constitution? This paper argues that reforming the appointment process so as to ensure a provincial role to address the federalism deficit or a more transparent appointment process to address the democratic deficit does not deal with this fundamental concern. Rather, recognizing that judicial discretion and creativity are not absolute nor are they immune from challenges by governments or by the public (because of various institutional mechanisms in place that facilitate challenges), and expanding our understanding of legitimacy to acknowledge the importance and necessity of judicial discretion and creativity may in fact help us resolve this anti-majoritarian paradox. That said, the paper proposes that a proper understanding of the role of the Court *and* the mechanisms built into the Canadian political and judicial system to ensure that the Court properly and faithfully fulfills its role help to ensure the Court’s legitimacy and the legitimacy of its decisions far better than a reformed appointment process.

In the first part of the paper there is a focus on the role of the Court, followed by a review of how SCC justices are appointed and the criticism often associated with this informal process. The second part looks specifically at judicial independence and the judicial creativity of the Court in reviewing legislation and giving meaning to the Canadian Constitution and argues that judicial independence and judicial creativity and discretion do indeed legitimize the Court and judicial review. For the purposes of the paper, the concept of judicial independence is understood as an institutional matter. The principle was well defined by then Chief Justice Brian Dickson in *Beauregard v. Canada*, 1998: “Judicial independence means the preservation of the separateness and integrity of the judicial branch and a guarantee of its freedom from unwarranted intrusion by, or even intertwining with, the legislative and executive branches” (S.C.R. 56 at p. 77). Judicial creativity and discretion, used interchangeably, are understood as the court establishing new legal standards or adapting existing principles and legal standards to new situations based on their understanding of the principles and of the facts of the case before them.

THE ROLE OF THE SCC¹

Generally speaking, the SCC as an institution is understood to be an arbiter/adjudicator – the court resolves disputes between two parties by applying law and legal principles as determined in the political arena and by the courts themselves to the facts of the case. This understanding of the court’s task embraces the idea that an independent body is needed to settle disputes that arise between the parties before them (Knopff 1983, 586). Additionally, the court can be seen as a policy maker: the court conducts itself as a political actor by making policy choices and giving these choices the force of law (Weiler 1974, 6). Paul Weiler writes: “In deciding the appeal, judges move gradually, but inevitably from applying the law to interpreting the law to creating the law” (Ibid., 7). The SCC acts as both the arbiter/adjudicator and the policy maker; the two roles are interconnected in the sense that reviewing the impugned legislation or interpreting provisions of a constitution can lead to a new understanding of either a law or a constitutional power.

This power and the ability of the judiciary to review legislation and government action have come to be viewed as fundamental for three reasons. First, the language of the constitution is broad so as to ensure that it is adaptable to a changing society. However, the broadness of the language leads to the overlapping or ambiguity of powers and/or rights. Thus the courts, through judicial review, ensure the adaptability of the constitution while clarifying the meaning of it. Second, judicial review of a constitution by an impartial body is necessary as no one of the parties, including the government, can be both judge and jury in its own cause. Third, in public law cases, it is up to the courts to determine which aspect of the impugned legislation is the most important one; the government cannot tell them this (Lederman 1965, 110). In short, judicial review helps give practical meaning to the words and concepts of the law and the constitution, both of which can be vague and ambiguous.

In order for the court to fulfill its role, and to legitimize its adjudicative function and maintain the confidence of the public, it must be a genuinely independent and impartial third party; this is a normative requirement. Peter Russell writes: “Judicial independence is a hallmark of liberal democracy” (1987, xxx). In *R v. Valente*, the Court identified three conditions that secure this independence: first, security of tenure; second, financial security; and third, administrative independence (No. 2) [1985] 2S.C.R. 673). Judicial independence contributes to the idea that the Court is neutral and impartial when it reviews government legislation. However, the judiciary, and more specifically the SCC, are tied to and are “an integral part of a country’s political system” (Russell 1987, 21). First, the appointment of judges is dependent on the political system; second, the enforcement and effectiveness of court decisions is dependent on the actions of other branches of government; third, a cooperative relationship is needed between the judiciary and the other branches of government in order to ensure the maintenance of judicial

¹ We need to note that the Canadian judiciary and more importantly, the SCC is not, by the Constitution, established as a separate branch of government. As such, its role is not clearly defined or articulated in the Constitution. Despite this however, ‘it has become increasingly separate in practice’ and has carved out a role for itself, even if this role has not always been nor is always clear (Russell, 1987)

institutions; and fourth, judges are aware of the particular ideological leanings of the laws and adjudicate accordingly (Ibid., 21).

Essentially, this means that there is a tension between judicial independence and judicial impartiality. Where judicial independence is an institutional matter secured through, amongst other factors previously mentioned, the freedom from unwarranted intrusion by other branches of government on the judicial domain, judicial impartiality is a personal trait. It “refers to a state of mind or attitude of the tribunal in relation to the issues and parties in a particular case” (*R v Valente* at 15). The objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality: “judicial independence is but a means to an end” (Sossin 2008, 20). Though independence is the cornerstone, a necessary prerequisite for judicial impartiality - securing the independence of the courts – it does not necessarily guarantee their impartiality. The review of impugned legislation and the interpretation of the constitution are not simply technical and non-political actions of the SCC. In deciding cases, judges do consider and are influenced by socio-political factors. Thus a judge could very well be both independent and partial. Further to this, the decisions of the SCC are not isolated, nor do they occur in a vacuum. The courts in general, and the SCC in particular, “do promote change in public policies and assist individuals and groups who are challenging the activities of other branches of government” (Russell 1987, 3).

Acknowledging that there can be a tension between judicial independence and impartiality does not mean that these two concepts are meaningless in the real world of politics (Ibid., 22). A degree of impartiality, or at least the illusion of it, must be in place in order to sustain the legitimacy of the judiciary and, in turn, the laws of the state. However, this tension does raise the ubiquitous issue of subjectivity - is the law what judges say it is? For McCormick, Morton and others, the answer is yes and this is why the appointment process needs to be open, transparent and accountable.

HOW ARE SCC JUDGES APPOINTED?

The *Supreme Court Act*, 1985, states that any person, provided that they are or “have been a judge of a superior court of a province or a barrister or advocate of at least ten years at the bar of a province,” can be appointed to the SCC (*Supreme Court Act*, 1985). The Act further mandates that three of the nine SCC justices, all of whom are appointed by the Governor-in-Council on the recommendation of the prime minister, are from Quebec, where they are trained in the civil law. Other than these legislative requirements, the Act stipulates no other obligation for the Governor-in-Council to follow in the appointment of justices. However, conventions have developed over the years that ensure regional representation on the court. Typically, the remaining six seats of the SCC are filled by one judge from British Columbia, one from Alberta, Manitoba or Saskatchewan, three from Ontario and one from any of the four Atlantic Provinces.

In addition, an informal process of consultations is in place. In devising a short list of candidates, the justice minister consults various actors within the legal community, like the Chief Justice of the SCC, other SCC judges, the Chief Justice of the provincial superior court and the Attorney General of the province where there is a vacancy, and at least one senior member of the Canadian Bar and a senior member of the law society

from the province where there is a vacancy. Once a short list is devised, the justice minister consults with the prime minister and assesses the candidates according to their judicial record, professional capacity, personal characteristics and likely contribution to the court. A candidate is chosen by the prime minister, approved by cabinet and finally appointed by Order in Council (Peach 2005). Despite this informal process and the consultative conventions developed over the years, the ultimate choice of who is appointed to the court rests with the prime minister.

DEMOCRATIC AND FEDERALISM DEFICIT

According to critics, though mechanisms are in place to secure judicial independence, the appointment process muddles it by compromising the perceived impartiality of judges. The question of judicial independence is not necessarily whether government can influence the SCC in its decision-making process, but whether the prime minister can influence the direction of the Court, be it left or right-leaning, provincialist or centralist, through the appointment process. As it is now, there are no mechanisms in place to prevent this from happening as the prime minister can choose whomever he pleases to sit on the bench and this can influence the direction the court takes when giving meaning to the Constitution. So, because the process is perceived to be tainted, the impartiality of the judiciary could also be perceived as tainted.

Consequently, the problem facing the Court today is an apparent lack of legitimacy stemming from how its judges are appointed. The appointment process is undemocratic and accordingly the Court is criticized for the lack of transparency in its staffing and for being too removed from public scrutiny. According to critics, neither the judge who exercises judicial discretion when interpreting the Constitution nor the prime minister who appoints the judge to the court seems to be accountable to anyone (Sossin 2008, 11). Thus, the Court appears to suffer from a democratic deficit.

In addition to the democratic deficit the SCC “suffers from a federalism deficit” for the reason that one order of government unilaterally appoints the judges (McCormick 2000). Impartiality and independence are seemingly compromised: the court rules on the federal – provincial division of powers and because it does not mechanically interpret text “but reads purposes into policy consequences out of a constitutional document, it is wrong for one order of government to name the judge on its own” (Ibid., 9).

Both the democratic and the federalism deficits lead critics to call for a more transparent and accountable process when appointing justices. Such a process would be more in tune with Canada’s democratic and federalism principles and would help legitimize the SCC when fulfilling its role as an independent and impartial arbiter. A process reformed in the manner suggested by Harper and the critics – an ad hoc committee either to confirm or review the nominees to address the democratic deficit or a role for provinces to address the federalism deficit – appears to address these problems. But it does not affect the underlying theme fuelling current criticisms of the court - how do we reconcile the Court’s power of judicial review and its use or misuse, according to critics, of judicial discretion with liberal democratic principles?

ACCOUNTABILITY

For the critics, the legitimacy of the SCC as an institution is partially gained through a process of selection that is transparent and accountable. This includes the idea of the prime minister being prepared to justify his/her choice to legislators. He/she ought to account for the thought process employed when deciding on the next judge. But the legitimacy, transparency and accountability the critics look to ensure begin and end with the appointment process. It seems that they are only concerned with executive accountability. While this may satisfy the current concerns regarding the perceived independence and impartiality of the courts, it does not address the underlying issue fuelling calls for a more transparent process and that is the discretionary choices of judges on the bench. Peter McCormick for instance is concerned with the change of the Court's direction regarding Aboriginal rights (*R v. Marshall*, 1999) and the rape shield law (*R v. Ewanchuk*, 1999) since Justice Beverley McLachlin assumed the role of Chief Justice. He implies that her new position and her "left leaning" tendencies evident in *Marshall* and *Ewanchuk* clearly demonstrate that discretionary choices and the scope of rights and powers guaranteed in the constitution "are handled differently by different judges" (McCormick 2000, 9). McCormick argues that the Court in *Marshall* "abruptly changed its ground" despite the fact that "neither the law nor treaty had changed" (Ibid., 8). In *Ewanchuk* the Court "meekly retreat[ed] from the position it had so firmly proclaimed a few years ago [in *R v. Seaboyer*, 1991]." This would be more palatable if the process employed to appoint new justices to the SCC were open and transparent and more inclusive (Ibid., 9). While he is correct that an appointment process that eliminates prime ministerial unilateralism or involves legislative scrutiny whereby nominees are required to address questions, would strengthen the credibility and legitimacy of the SCC as an institution, it does not address the underlying issue of judicial creativity or discretion, in particular when judges give an expansive reading of the rights and/or powers guaranteed in the constitution. Once judges are appointed in a new "open, transparent and accountable" process and the legitimacy of the court as an institution is strengthened, what mechanisms are in place to ensure that the court does not abuse its discretionary power and that its decisions continue to be regarded as legitimate?

LEGITIMACY AND JUDICIAL CREATIVITY/DISCRETION

For legal positivists, the legitimacy of the court when rendering decisions rests upon the idea that it applies set and already established principles to the case before it (Weiler 1968, 426); anything that deviates from this ideal, like judicial discretion or creativity, damages the court's legitimacy and consequently the legitimacy of its decisions. The reality is the law must change in order to adapt to an evolving society. However, the changes cannot be so radical as to upset the system in place by swerving dramatically from the values of the society at large.

For the late Chief Justice Bora Laskin (1955-56), judicial creativity is required to fill in the gaps of the law. Gaps are sometimes simply there in the law, or they arise because society changes in a way that the Fathers of Confederation could not have imagined possible. Good examples of the latter are the environment or the internet, wholly new subjects of legislation. It is therefore, the duty of the courts to ensure that the law is in tune with society.

Judicial creativity is also necessary to correct mistakes (Reaume 1985, 448). Sometimes a rule is, simply put, wrong. As such, it becomes necessary for the courts to re-evaluate and re-assess law, making it acceptable, in certain situations, for the courts to overrule precedents as strict adherence to them may lead to the stifling of law. The idea of serving social ends should guide the courts. Nonetheless, the courts, when articulating the new “aspirations of society” (Weiler 1968, 427) or establishing new standards or principles or applying existing principles to new situations, need to be attuned to the present Canadian system of representative democracy and the reality that their views may be different from those of the government.

For this reason, judicial creativity must be constrained (Laskin 1955-56). First and foremost, change brought about by court decisions should be gradual; judges should only formulate principles that are already evident in society. Second, in restricting the sources used by the courts, the judicial process necessarily constrains creativity. For instance, Laskin proposes that sources should be limited to social consensus. This would limit change to that which society is ready to accept (Reaume 1985, 459). Third, if a statute is ambiguous, the courts should then refer to the policy behind the statute with a focus on parliamentary discussion and legislative history. If this is of no help, then the judge “would have to use his or her knowledge of the trend of social forces” (Ibid., 461). Judicial creativity does not necessarily mean that the law is what judges say it is, but it is a recognition that judicial review is not simply about the objective application of already established principles.

Further to this, judicial creativity is not absolute. Indeed, our constitution has built in mechanisms to ensure that it is limited and to ensure that courts are accountable to the constitution and the principles that underpin it, including the rule of law. To be absolute means that judicial decisions need not be questioned, studied, analyzed or revised. This is not the case in contemporary Canada. Academics and lawyers have made careers in the analysis, criticism, review and challenge of court decisions. Governments as well have the opportunity to review and challenge court decisions, and thereby can protect the legislative intent and the principle of parliamentary supremacy when they think the court simply misjudges public sentiment. A good example is the government’s response to the court decision in *R v Seaboyer*, 1991. In this case, the Court struck down provisions of the *Criminal Code of Canada* (CCC) known as the rape shield law for violating s7 (life, liberty and security of the person) and s11(b) (presumption of innocence) of the Charter. The government instead of accepting the decision at face value, decided to revise the rape shield law. After consultations with women’s groups and the close scrutiny of the revised legislation vis-à-vis the Court’s reasoning in *Seaboyer*, by a parliamentary committee’s (set up to review the proposed new legislation), a new law was passed and subsequently upheld in *R v. Ewanchuk*, 1991.² In this case, the Court did not, as McCormick accuses, “meekly retreat from its positions” articulated in *Seaboyer*. Rather, the Court considered the new law, the government’s objective in enacting the law, and balanced these with the

² This is a brief account of the process of revising the rape shield law. For a more detailed account, please see Hiebert, Janet, *Charter Conflicts: What’s Parliament’s Role*, (Kingston & Montreal: McGill-Queens University Press, 2002).

rights of both women and accused sexual offenders before finding that the new rape shield law does not infringe upon the rights of the accused.

Further to governments' ability to revisit court decisions, built in mechanisms in the Charter ensure that governments have the opportunity to protect parliamentary supremacy and ensure that the SCC is accountable to the will of the people. Section 1 of the Charter forces the Court to consider societal values and principles when interpreting sections of the Charter and when determining whether an impugned law contradicts the rights and freedoms entrenched therein. Similarly, section 33 of the Charter, the so-called notwithstanding clause,³ enables the legislature to override specified rights in its law-making process if it thinks that its legislative purpose requires such an action. In fact, in reaction to a decision of the SCC, the Quebec government subsequently invoked section 33 to shield its signage law from the reach of the Charter.⁴ The use of section 33 was also contemplated by the Alberta government of Premier Ralph Klein soon after the *Vriend* decision. In *Vriend*, the court ruled that the equality provision in the *Alberta Human Rights Code* includes sexual orientation. In the end, the Klein government responded to public disapproval of its inclination by deciding against the use of section 33 and sexual orientation continues to be protected in Alberta's code.

Measures built into the constitution to ensure that judicial creativity is not absolute and that the court continues to be accountable to the constitution and to the rule of law are strengthened when we consider the history of the court's decisions on the Charter. Analysts on the political right often refer to the court's expansive understanding of Charter rights as judicial activism, arguing that the court enables "court parties" to succeed in promoting and effecting the will of the minority irrespective of the will of the majority⁵. Miriam Smith (2002) effectively demonstrates that this is in fact false. Studying the evolution of the gay, lesbian and transgendered movement, Smith argues that the court in effect rendered decisions that reflected society's changing and expanding understanding of equality. The fact of the matter is, while Canadians understand the importance of judicial creativity, we also understand the necessity of it not being an absolute. More importantly, the court understands the importance of not abusing the power it has to overturn government legislation or to create new legal principles or adapt existing principles to new situations: it must maintain its legitimacy. As Marc Gold argues, "our courts are acutely aware of the principal role that they have assumed in Canadian society and they want their decisions to be deemed acceptable to the society" (1985, 15). At the same time, however, the court needs the freedom and ability to ensure that the constitution remains relevant. This inevitably means expanding or creating new legal principles to adapt to a constantly evolving society. Accepting this does not necessarily lead to questioning the legitimacy of the court and of court decisions.

Recognizing that judicial review does not solely require the objective application of principles does not colour the role of the court, the importance of it, or even its legitimacy

³ Section 33 of the Charter enables governments to override sections 2 and 7-15 of the Charter.

⁴ After the Court found that the signs law in Bill 101 was unconstitutional as it infringed upon the freedom of expression protected under the Quebec Human Rights Charter and the Canadian Charter, the Quebec government reinstated the law by invoking the notwithstanding clause (s. 33).

⁵ See Rainer Knopff and Ted Morton, *Charter Politics*, (Scarborough: Nelson Canada, 1992).

in performing its function. It is essential for the legitimacy of the court that the decisions that shape the law and give meaning to vague terms of the law are based on “the most reasonable application of our law” and not arbitrary rules (Russell 1987, 26). This does not mean that the appointment process need not be transparent or free from possible political manipulation. However, an open and transparent appointment process only partially legitimizes the court. It does not necessarily eliminate the reality of the subjectivity of judges or judicial discretion when judges interpret and apply laws and legal principles. The puzzle of juggling the accountability and legitimacy of the court and its decisions as well as addressing the anti-majoritarian paradox still lingers with a reformed appointment process.

CONCLUSION

It is not clear how the reforms proposed by government and other academics reviewed in this paper would ensure a better SCC than we have had to date. Without doubt, the appointment process would be more transparent and the prime minister held formally accountable to the legislators for his/her appointment, and the appointment process might continue to evolve as Sossin argues. But the process in place today, though not prescribed by law, is not as arbitrary as the critics imply. It is a well thought out process, one that involves input from various actors in the legal profession as well as elected politicians. Furthermore, simply reforming the appointment process does not ensure that the court remains a legitimate institution or that its decisions, especially if they seemingly contradict popular opinion, continue to be accepted as legitimate. To date there has not been a decision rendered that has offended the country or put our judicial system into doubt. In fact, the Standing Committee on Justice, Human Rights and Emergency Preparedness stated that “the Supreme Court exercised [its] responsibilities in an exemplary fashion and that its excellence resonated beyond its borders.” (Cotler 2008, 132).

The legitimacy of the SCC is, of course, contingent on how well it and its decisions reflect the mores and values of our evolving society. I would suggest, however, that this legitimacy is more a function of how the Court exercises its power of judicial review than it is of how its members are appointed. Legitimate decisions are products of a review process that provides latitude for the exercise of judicial discretion and creativity. But this latitude must be constrained by the constitutional mechanisms that enable governments and citizens to review, analyze, challenge and, if need be, ultimately to reject – either by re-enactment or resort to the “notwithstanding clause” – court rulings. It is these constraints, and the manner in which they are exercised, that are the sources of legitimacy.

Works Cited

Beauregard v. Canada, [1998] 2SCR 56.

Cotler, Irwin. “The Supreme Court Appointment Process: Chronology, Context and Reform,” *University of New Brunswick Law Journal* 58, 2008: 131.

- Gold, Marc. "The Rhetoric of Constitutional Argumentation," *University of Toronto Law Journal*, vol.35 [1985]: 154.
- Knopff, Rainer, "Federalism , the Charter and the Court: Comment on Smith's 'The Origins of Judicial Review in Canada'," *Canadian Journal of Political Science*, vol. 16[1983]: 586.
- Laskin, Bora. "Tests for the Validity of Legislation: What's the Matter?" *University of Toronto Law Journal* 11, 1955-56: 115.
- Lederman, William. "The Balanced Interpretation o the Federal Distribution of Legislative Powers in Canada (The Integrity Process of Interpretation)," in *The Future of Canadian Federalism*, ed. P-A. Crepeau and C.B. Macpherson (Toronto: University of Toronto Press 1965), 110.
- McCormick, Peter. "Could we, Should we, Reform the Senate and the Supreme Court?" *Policy Options* January-February 2000, IRPP: 7.
- Morton, Ted. "Reforming the Canadian Judiciary," *Remarks prepared for the Calgary Congress, Citizens Centre for Freedom and Democracy, September 30, 2006.*
<http://www.ccf.ca/pdf/CalgaryCongress/Morton-Ted.pdf>. Accessed April 23, 2009.
- Office of the Prime Minister. News Release: "Prime Minister announces appointment of Mr. Justice Marshall Rothstein to the Supreme Court." March 1, 2006.
<http://pm.gc.ca/eng/media.asp?id=1041>. Accessed April 22, 2009.
- Peach, Ian. "Legitimacy on Trial: The Appointment of Supreme Court Judges in Canada," *Optimum Online: The Journal of Public Sector Management* 35:1, March 2005: <http://www.optimumonline.ca/article.phtml?e=qdmanqddt&id=219&page=1>. Accessed April 23, 2009.
- R v. Valente (No 2)*, [1985] 2SCR 673.
- Reaume, Denise. "The Judicial Philosophy of Bora Laskin," *University of Toronto Law Journal* 35, 1985: 438.
- Smith, Miriam. "Ghosts of the Judicial Committee of the Privy Council: Group Politics and Charter Litigation in Canadian Political Science," *Canadian Journal of Political Science* 35:1, March 2002: 3.
- Russell, Peter. *The Judiciary in Canada: The Third Branch of Government*. Toronto: McGraw-Hill Ryerson Ltd., 1987.
- Sossin, Lorne. "Judicial Appointment, Democratic Aspirations, And the Culture of Accountability," *University of New Brunswick Law Journal* 58, 2008: 11.
- Weiler, "Two Models of Judicial Decision Making," *Canadian Bar Review* 46, 1968: 406.
- Weiler, Paul. *In the Last Resort: A Critical Study of the Supreme Court of Canada*, (Toronto: The Carswell Company Ltd., 1974).

Ziegal, Jacob S. "Merit Selection and Democratization of Appointments to the Supreme Court of Canada," *Choices* 5:2, June 1999, IRPP: 1.