



Principles for the Appointment of Justices to the Supreme Court of Canada:

Report of a Subcommittee of the Rule of Law and Lawyer Independence Advisory Committee

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June 2016

Prepared for: Benchers

Prepared by: Rule of Law and Lawyer Independence Advisory Committee

Purpose: Information

I. Background

1. The Rule of Law and Lawyer Independence Advisory Committee (the “Committee”) has been asked to report to the Benchers with respect to a proposal that the Law Society of British Columbia forward a submission to the Minister of Justice concerning the process for judicial appointments to the Supreme Court of Canada.
2. In March, 2016, it was announced that Mr. Justice Cromwell will resign from the Supreme Court of Canada (the “Court”) effective September 1, 2016. The current Government has stated its intention to review and renew the process for judicial appointments to the Court.
3. The Court is a vital component of our constitutional democracy. It plays a key role in maintaining the rule of law and in the legal fabric of Canada. There is accordingly a great public interest in the process by which Supreme Court Justices are appointed. Notwithstanding this public interest, the process by which candidates are evaluated and selected has been largely unknown. For a number of recent appointments to the Court, the appointment process has often changed from one appointment to the next. This has engendered significant debate about how candidates for the Court should be identified, assessed and selected.
4. The Law Society has in the past contributed to this debate through the Federation of Law Societies. In 2004, the Federation forwarded a submission to the Government recommending principles for the appointment process. This issue was subsequently examined by our Benchers in February 2005, who ultimately resolved to refer the matter to the Federation. In 2008, the Federation wrote to the Minister of Justice with its recommendations.
5. Given that the Government is now reviewing the appointment process, there is an opportunity for the Law Society of British Columbia to contribute to this important dialogue. The Law Society of British Columbia is statutorily mandated to uphold and protect the public interest in the administration of justice. The appointment of federal judges, and in particular, Justices of the Supreme Court of Canada, is a matter of great importance to the Canadian justice system.
6. In consultation with the President and the Executive Committee, the Committee has been asked to report to the Benchers regarding this issue. A Subcommittee was formed in the spring of 2016, consisting of Craig Ferris, QC, Jeff Campbell, QC, Jon Festinger, QC, and assisted by Michael Lucas. The Subcommittee reviewed a number of articles and other writings with respect to the appointment process. The Subcommittee also met and consulted with Professor Adam Dodek of the University of Ottawa, a leading scholar on Supreme Court of Canada appointments.
7. This report sets out the core values and principles that, in the Committee’s view, are essential to the process of appointing Justices to the Court. The Committee recommends that the Benchers resolve that the Law Society make a submission to the Minister of Justice with respect to these principles and the process for judicial appointments.

II. Statement of Principles

1. Transparency

8. The process by which Justices are appointed should be transparent, open and publicly available in written policy. A transparent appointment process allows Canadians to understand how Justices are appointed. This includes explaining the criteria upon which Justices are selected.
9. Transparency is linked to accountability for both the selection of the best candidate and for the appointment process itself. An appointment process based on undisclosed criteria and unknown procedures will be perceived as less legitimate than a process that is publicly explained and transparent. Public confidence in the legal system will be enhanced by openness and transparency.
10. Making the process transparent should not interfere with the discretion of the Executive to decide who should be appointed. It would, however, lead to a greater understanding of how the discretion is exercised. It would foster greater confidence in both the appointment process and the Court as a vital institution of our constitutional democracy.

2. Judicial Independence

11. The appointment process must protect and uphold the constitutional principle of judicial independence. The integrity of the justice system depends on the independence of the judiciary. Judges must be impartial in carrying out their duties, and must be seen to be impartial. Judicial independence is integral to the role of the Court in protecting constitutional values.

3. Merit and Diversity

12. The primary criterion for appointments to the Court should be merit. In order to maintain confidence in the institution of the Court, the appointment process should avoid any appearance of partiality or partisanship. Politicizing the appointment process threatens the legitimacy of the Court and the principle of judicial independence.
13. Candidates should be assessed against known criteria that are set out in writing and publicly available, so that it will be understood that the selection of candidates is based primarily on characteristics such as intellectual ability, professionalism, integrity, work ethic, interpersonal skills, and sound judgment. An appointment process based primarily on merit encourages the selection of candidates of the highest calibre, and enhances public confidence in the Court.

14. In addition to the well-established custom of regional representation and bilingualism, the Justices of the Court should otherwise reflect the diversity of Canadian society.

4. Public Participation

15. While the authority appoint Justices to the Court is within the discretion of the Executive, it is the Committee's view that some degree of public participation is important to the appointment process.

a. Advisory Committee

16. In the past, the appointment process has involved an independent Advisory Committee which reviews potential candidates and make recommendations to the Executive.

17. An Advisory Committee comprised of elected representatives, the public and the legal profession is an important opportunity for public participation. The membership of the Advisory Committee should be diverse, balanced and composed in a manner that focuses on identifying the best candidate. In this regard, the Committee should be structured in a way to avoid any unbalanced influence by any particular Party or interest group. In addition to Members of Parliament, the Advisory Committee should properly include representatives from the judiciary, the legal profession (such as the Federation of Law Societies, the Law Societies of the region and the Canadian Bar Association), the Attorney(s) General, and non-legal representatives from the region. It is also important that the Advisory Committee reflect the diversity of the region.

18. While greater transparency is an important objective, the deliberations of the Advisory Committee should be confidential in order to ensure open discussion and full, frank and fair consultation regarding the candidates for appointment.

19. As noted above, it is our respectful view that the participation of the legal profession is a critical part of the appointment process. The legal profession is a key stakeholder and has made significant contributions to the work of Advisory Committees in the past. It is important that the legal profession continue to participate in the appointment process in the future.

b. Public Hearing

20. Several recent appointments have involved a Parliamentary hearing. For some appointments, the Supreme Court nominees appeared in person at the hearing. In one case, the Minister of Justice appeared before the Committee to explain the appointment process and the reasons for selecting the candidate. The public hearing process was abandoned for the two most recent appointments to the Court.

21. The value of a public hearing process is that it allows Canadians to know more about the appointment process and the candidate who has been selected. It is grounded in the democratic ideal that important decisions should be open and transparent. The public hearings for recent appointments have likely enhanced public confidence in both the Justice and in the Court itself. It is the Committee's view that some form of public hearing is a valuable opportunity for public participation. A public hearing also ensures that the Minister is accountable for the process through which the candidate was nominated. In this regard, the hearing should include an appearance by the Minister of Justice to explain the appointment process and the qualifications of the candidate.
22. In the past, both the Law Society of British Columbia and the Federation of Law Societies have been cautious with respect to public involvement in the appointment process. The concern was that increased public involvement could lead to partisan or unseemly tactics which would undermine the institution of the Court. Although there are legitimate concerns with respect to the risks of a public hearing process, these concerns focus more on the type of hearing that should take place as opposed to whether there should be a hearing at all. In the Subcommittee's view, the Parliamentary hearings to date demonstrate that they can be conducted in a responsible and dignified manner.

III. Conclusion

23. The review of the appointment process by the current Government represents an opportunity for the Law Society to contribute to a matter of great importance for the Canadian legal system. It is submitted that engaging with the Minister of Justice on this issue would be consistent with the Law Society's mandate to act in protection of the public interest in the administration of justice.
24. The principles set out in this memorandum are intended to promote a process for judicial appointments that enhances public confidence in the Court and in the legal system. An appointment process that incorporates these principles would strengthen the tradition of appointing candidates of the highest quality to the Court and ultimately promote and protect the rule of law.