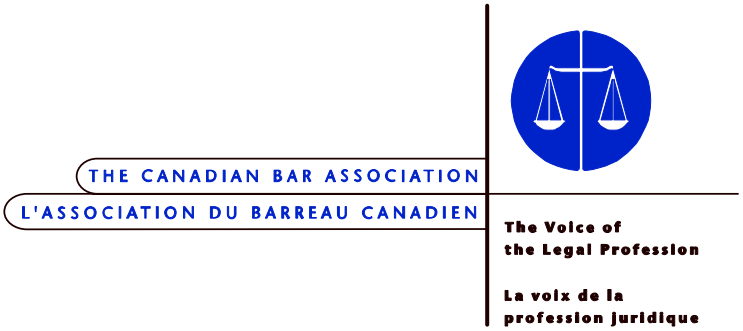

Federal Judicial Appointment Process

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Canadian Bar Association.

Federal Judicial Appointment Process

I. INTRODUCTION

The Canadian Bar Association (CBA) welcomes the review of the appointment process for federally appointed judges. The CBA has a long-standing interest in the appointment process for judges, and in ensuring that the independence of the judiciary is preserved and enhanced, that appointments are of the highest quality, and that the process for appointment of judges is open and transparent.[1]

At present, independent judicial advisory committees provide recommendations to the Minister of Justice for federal appointments to lower courts throughout Canada. These advisory committees work well and are recognized internationally. Merit criteria considered by the advisory committees are publicized on the website of the Commissioner of Federal Judicial Affairs.[2] At least two members of the seven-member advisory committees are non-lawyers from the community, thereby ensuring public involvement.

Nevertheless, the current system is not perfect. Recent events have caused the public to question the extent to which political patronage influences federal judicial appointments, and whether intervention of Parliament would bring more objectivity and transparency to the process. Change is required to restore public confidence. However, the CBA recommends that the federal government not heed the call to discard the current process in favour of American-style "confirmation hearings," either for Supreme Court of Canada or any other federally appointed judges. Some modifications would strengthen the process to ensure that it is open and

1 See, for example, the CBA's 1993 document, "Submission to the Minister of Justice on the Federal Appointment Process" and the CBA's 2004 submission, "Supreme Court Appointment Process".

2 http://www.fja.gc.ca/jud_app/assess_e.html.

transparent, and results in judicial appointments based solely on merit and which are ultimately representative of the diversity of Canadian society.

II. BACKGROUND TO THE CBA POSITION

In 1984, the CBA established the Committee on the Appointment of Judges in Canada. The Committee found widespread dissatisfaction with the method of judicial selection and appointments and identified a broadly based desire for change. A major dissatisfaction identified by the Committee was the extent of political patronage in judicial appointments. The Committee issued its report (McKelvey Report) in 1985.

The McKelvey Report concluded that the appointments system then in place was not designed to select the best potential judges. Although the quality of the Canadian judiciary was good, it was uneven, and some of the more evident weaknesses flowed from patronage appointments. The CBA made recommendations to ensure top-quality appointments and to reduce the inevitable political pressure on government from its party to make patronage appointments.[3] The key recommendations were:

- The final decision on appointment of judges must remain with the government. However, appointments must be made as the result of an established, well-known and understood advisory process to facilitate the selection of the best candidate,
- Nominations or suggestions for candidates should be encouraged from a wide variety of sources,
- The consultation process should involve the provincial attorney-general and the chief justice in the relevant court,
- Advisory committees should be established in each jurisdiction and for the federal courts with representation from the public, the legal profession, the judiciary and governments, and
- The criteria for appointment should be high moral character, human qualities (sympathy, generosity, charity, patience), experience in the law, intellectual and judgmental ability, good health and good work habits, and bilingualism if required by the nature of the post.

3 The CBA approved the report and its recommendations in 1986: *CBA Resolution 86-08-M.*

Subsequent to the McKelvey Report and the establishment of a new judicial advisory committee process for federal judicial appointments in 1988, the CBA passed a number of other resolutions on the judicial appointment process, adding to the Report findings and addressing contemporary developments:

- urging the federal government to give advisory committees a mandate to consider candidates for judicial elevation as well as for new appointments.[4]
- urging the Minister of Justice to make a written commitment not to appoint any person whom the advisory committee was 'unable to recommend'.[5]
- calling for objective criteria for judicial appointments, to eliminate from the process discrimination against women and members of minority groups, with the long-term goal of a judiciary which reflects the Canadian diversity.[6]
- recommending bilingualism as a merit criterion and urging the appointment of an adequate number of bilingual judges.[7]
- urging governments to avoid judicial appointments of persons actively involved in politics until two years after resigning or retiring from their position and, in any event, no person should be appointed unless recommended by the relevant judicial appointment committee on the basis of merit.[8]
- urging governments to reflect better the recognition of Indigenous legal systems in judicial appointments, and to give particular focus to the appointment of Aboriginal judges to appellate courts, including the Supreme Court of Canada.[9]

III. JUDICIAL INDEPENDENCE AND THE APPOINTMENT PROCESS

Any system of judicial appointments must respect the independence of the judiciary. As the Supreme Court of Canada stated in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*,[10] judicial independence protects citizens against the abuse of state power through separation between the judiciary and the executive and legislature. This separation protects the position of the courts as guardians of the Constitution, the rule of law,

4 CBA Resolution 89-08-M.

5 CBA Resolution 91-22-M.

6 CBA Resolutions 94-03-A, and 95-06-A.

7 CBA Resolutions 95-01-A and 05-02-A.

8 CBA Resolution 98-14-A.

9 CBA Resolution 05-01-A.

10 [1997] 3 S.C.R. 3 (*P.E.I. Reference*).

equality and the democratic process. Thus, we value judicial independence because of its importance to the parties engaged in the legal system and the public as a whole:

> Judicial independence serves not as an end in itself, but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice.[11]

Lamer C.J. for the majority in the *P.E.I. Reference* explains what is meant by judicial independence:

> Independence of the judiciary implies not only that a judge should be free from executive or legislative encroachment and from political pressures and entanglements but also that he should be removed from the financial or business entanglements likely to affect or rather to seem to affect him in the exercise of his judicial functions.[12]

In the same judgment, Lamer C.J. concludes that relationships between the legislature and the executive and the judiciary should be "depoliticized" and that the legislature and the executive cannot, and cannot appear to, exert political pressure on the judiciary.[13]

The McKelvey Report and the report of the CBA Committee on the Independence of the Judiciary in Canada (the de Grandpré Report, 1985) both concluded that the impact of an American-style confirmation process would be to reduce judicial independence. Exposing judges' personal opinions in a public forum increases the risk of a party attempting to gain political points by supporting or opposing a candidate on the grounds of his or her apparent ideology, rather than considering only merit. The spectre of a governing party attempting to "stack the court" is of even greater concern in Canada than in the United States - we do not change our governing political party as often, and lack the same internal checks that would ensure turnover of the official authorized to nominate. Such efforts could continue for years. The potential harm to judicial independence through the "entanglement" of a judge with the governing party and the political process is evident.

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11 *Provincial Court Judges' Assn. of New Brunswick* v. *New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner* v. *Alberta; Conférence des juges du Québec* v. *Quebec (Attorney General); Minc* v. *Quebec (Attorney General),* 2005 S.C.C. 44, at paragraph 6, quoting *Ell* v. *Alberta*, [2003] 1 S.C.R. 857.

12 At paragraph 130.

13 At paragraph 140.

IV. PROPOSED CHANGES TO PROCESS OF JUDICIAL APPOINTMENTS

A. Cooling Off Period for Politically-Involved Judges

As stated in the McKelvey Report, "Political activity, like any other social or community service, is one of the factors to be considered in assessing whether a candidate has the attributes of a good judge…"[14] It expands a citizen's interests from those of self to those of community and country:

> To take an active interest in politics is, in modern times, the first thing which elevates the mind to large interests and contemplations; the first step out of the narrow bounds of individual and family selfishness, the first opening in the contracted round of daily occupations. . . . The possession and the exercise of political, and among others of electoral, rights, is one of the chief instruments both of moral and of intellectual training for the popular mind . . . .[15]

At the same time, the de Grandpré Report bluntly stated:

> Guidelines exist which direct former politicians not to engage in any business involving the government for at least two years after they have withdrawn from political life. It would be improper for them even to sell pencils to the government. Yet paradoxically, it has not been held to be improper for a politician to move directly from the House of Commons onto the bench. In recent years we have seen cabinet ministers resign their portfolios one day and virtually the next assume positions on the bench on courts before whom the government is the most frequent litigant…It is difficult to preserve the appearance of an independent judiciary when such practices exist, regardless of the qualifications and the probity of judges.[16]

Canadians expect, and are entitled to have, judges who are well qualified and independent of political influence. If judicial candidates were intimately involved in the political sphere close to the time when they were appointed, public perception of patronage is heightened and judicial independence suffers through the "politicization" of the relationship between the judiciary and the branches of government. Therefore, a "cooling off" period between the political activity and a potential judicial appointment should be required of judicial candidates.

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14 At 60.

15 J. S. Mill, "Thoughts on Parliamentary Reform" (1859), in J. M. Robson, ed., "Essays on Politics and Society", vol. XIX, 1977, 311, at 322-23, cited with approval in *Sauvé v. Canada* (Chief Electoral Officer) [2002] 3 S.C.R. 519 at paragraph 38.

16 At 31-32.

It would not be appropriate, however, to require a "cooling off" period when the judicial candidate has engaged in *any* political activity, no matter how minor or trivial. Nor would it be fair to have a lifetime bar for individuals who have been actively involved in politics. Any restrictions on a judicial candidate's political activities must be consistent with Canada's democratic values, including the encouragement of a politically involved citizenry. Further, it is important that rules respecting the "cooling off" period are clear and objective, so that they are enforced without discrimination.

In our view, these objectives would be met by a two-year "cooling off" period for those actively involved in politics, namely Cabinet Ministers, Members of Parliament, the Senate or a provincial or territorial legislature, their partisan political employees, or employees of a political party. This means that such a person must have resigned or retired from his or her position at least two years prior to seeking an appointment.[17]

RECOMMENDATION:

1. **The CBA recommends that persons actively involved in politics (namely, Cabinet Ministers, members of Parliament, the Senate, or a provincial or territorial legislature, their partisan political employees, or employees of a political party) be subject to a two-year "cooling off" period before they are permitted to apply for judicial appointment.**

B. Appoint only Candidates with an Advisory Committee Recommendation

In 1991, the ratings categories for candidates were amended from two categories – qualified or not qualified – to three categories – recommended, highly recommended, or unable to recommend. In the past, Ministers of Justice have given their personal undertaking not to recommend to Cabinet any person not previously recommended by a committee.[18]

The CBA's position is that no person should be appointed unless recommended by the relevant judicial appointment committee on the basis of identified merit criteria.[19] The government should make this commitment publicly and formalize it in writing. To appoint a judge when an

17 Pursuant to CBA Resolution 98-14-A.

18 Millar, "The 'New' Federal Judicial Appointment Process: The First Ten Years" (2000) 38 Alta. Law Rev. 616 at 616-19.

19 Pursuant to CBA Resolution 98-14-A.

independent advisory committee has been unable to recommend the appointment would be to turn the advisory committee process into a mere fig leaf for political patronage. The public would be justifiably concerned.

RECOMMENDATION:

2. The CBA recommends that each federal Minister of Justice provide and publicize a written undertaking that no judge will be appointed if the relevant advisory committee is "unable to recommend" the appointment.

For the advisory committee system to remain relevant and their recommendations meaningful, it is vitally important that only the very best candidates receive the "recommended" and "highly recommended" designations. The Minister of Justice should make it clear in guidelines for committee members that "recommended" is a very high threshold, namely a lawyer who stands out from other candidates. The "highly recommended" category should be reserved for candidates who are so far beyond this threshold that they are truly exceptional.

RECOMMENDATION:

3. The CBA recommends that the Minister of Justice clarify the meaning of "recommended" and "highly recommended" to ensure that "recommended" is a very high threshold and that "highly recommended" should be reserved for judicial applicants who are so far beyond this threshold as to be truly exceptional.

C. Recognizing that Diversity Matters to Merit

Merit criteria now specifically include considerations of whether a candidate will contribute to the diversity of the bench. For instance, "bilingualism," and "awareness of racial and gender issues" are included as criteria. "Proficiency in the law" is another important merit criterion. Judges of diverse backgrounds bring unique skills and proficiencies in the law that are appropriately considered under "merit." These are further discussed below.

A bilingual judge contributes to a system where English or French litigants in a linguistic minority have equal access to justice. According to the report, *Environmental Scan: Access to*

Justice in Both Official Languages, commissioned by Justice Canada and completed by Recherche PGF-GTA Research in 2002 (Justice Report), Francophones outside Quebec are disadvantaged in the judicial system as a result of the lack of French language services, including French-speaking judges.[20] In particular, it states that, "there is a virtually universal shortage of [bilingual provincial superior court] judges in the Atlantic Provinces (with the exception of New Brunswick), Western Canada and the territories." The CBA calls on the federal government to appoint more bilingual judges to ensure equal access to justice for litigants in the official language of their choice,[21] something that was echoed by survey participants in the Justice Report. The federal government has language proficiency tests for public servants that could be taken by judicial candidates prior to appointment to determine whether they meet the bilingualism merit criterion.

RECOMMENDATION:

4. The CBA recommends that the Minister of Justice appoint an adequate number of bilingual judges to ensure equal access to justice for litigants in the official language of their choice.

In the same manner as bilingualism is a matter of merit, so too is experience with issues of gender and race. Judges may be called upon to consider self-defence from the perspective of a "reasonable woman", determine a *Charter* case of discrimination from the perspective of a reasonable person with the same characteristics as the claimant, or compose a jury address in a racially charged criminal case. If a judge's experience and knowledge contributes to a fulsome understanding of the issues involved in such cases, this is uncontrovertibly a matter of merit.

Even if advisory committees are explicitly to consider these experiential skills as part of the merit criteria, this has not necessarily resulted in a bench that reflects the diversity of Canadian society. The CBA has identified one aspect of this "democratic deficit"[22] as the lack of judges

20 49% of the lawyers surveyed believed it was easy to obtain services from judges in French in criminal proceedings, 43% of lawyers who practiced in the bankruptcy field thought it was easy to obtain services in French from a bankruptcy judge, and 56% of lawyers believed it was easy to obtain French services from judges in divorce and support matters. Chapter 2 of the Justice Report containing these findings is available online, at http://canada.justice.gc.ca/en/ps/franc/enviro/chapter2.html#2.

21 CBA Resolution 05-02-A.

22 Devlin, MacKay and Kim, "Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary or Towards a 'Triple P' Judiciary" (2000) 38 Alta. L. Rev. 734. Other aspects of the "democratic deficit" recognized by the authors include the lack of female judges, judges who are visible minorities, and judges with disabilities.

with experience in Indigenous law. There are fewer than two dozen Aboriginal judges, only four on superior courts, and one on a court of appeal. Indigenous law constitutes a third system of law, in addition to the common and civil law systems, that applies throughout Canada. The justice system as a whole would benefit from more judges with first-hand knowledge of this system.

It is a well-established principle that Indigenous laws were not simply displaced by the assertion of Crown sovereignty. With the advent of section 35(1) of the *Charter*,[23] existing Indigenous laws cannot be regulated or infringed by Canada except in accordance with the justification principle outlined in *Sparrow*.[24] Indigenous law and the common or civil law are "vastly dissimilar legal cultures," with Aboriginal law being "neither English nor aboriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities".[25] The need for reconciliation between the two legal systems is obvious in cases relating to Aboriginal title to lands, rights to hunt or fish, membership, and self-government. However, they may also arise in such areas as marriage,[26] adoption,[27] or penal[28] law.

While Aboriginal law may be taught in law school, Indigenous laws are just beginning to be studied, such as at the Akitsiraq law school. It stands to reason that a rich understanding of Indigenous laws derived from experience would be beneficial in making judicial decisions when matters of "intersocietal law" arise. Thus, the CBA urges the federal government to reflect better the recognition of Indigenous law systems in judicial appointments. Further, particular focus should be given to the appointment of Aboriginal judges to appellate courts.[29]

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23 Section 35(1) of the *Canadian Charter of Rights and Freedoms* states that the "existing aboriginal and treaty rights of aboriginal peoples of Canada are hereby recognized and affirmed."

24 [1990] 1 S.C.R. 1075, as cited in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 28.

25 *R. v. Van der Peet*, *supra,* at para. 42, citing the scholarship of Mark Walters and Brian Slattery.

26 *Connolly v. Woolrich (*1867), 11 L.C.J. 197 (C.S. Qué).

27 *Casimel v. Insurance Corp. of British Columbia* [1993] B.C.J. No. 1834 (C.A.).

28 *Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832),* cited by the Court at paragraph 7 of *Van der Peet.*

29 CBA Resolution 05-01-A.

RECOMMENDATIONS:

5. **The CBA recommends that the federal government reflect better the recognition of Indigenous legal systems in judicial appointments.**

6. **The CBA recommends that the Minister of Justice give particular focus to the appointment of Aboriginal judges to appellate courts including the Supreme Court of Canada.**

The ability to make judicial appointments that appropriately reflect diversity starts with a diverse pool of candidates. Those who belong to communities historically under-represented on the bench may not benefit from the informal flow of information about vacancies on the courts, how the appointment system works, and how to apply for a federal judicial appointment. Publicizing vacancies on all federal courts along with information on the qualifications for appointment and how to apply may assist in "democratizing" the process.

7. **The CBA recommends that the Minister of Justice publicize vacancies on courts along with information on the qualifications for a federal judicial appointment and how to apply.**

V. CONCLUSION

Justice thrives when it is administered in an open and transparent fashion, and withers when it operates in secret according to the dictates known only by the few. Especially in an era where judges are commonly confronted with fundamental questions relating to the privacy, security, and equality of Canada's citizens, and how to resolve conflicts between these principles, it is critical that the judicial appointment process is open to public scrutiny, maintains the high quality of judicial appointments, and protects judicial independence, to ensure the legitimacy of such critical decisions.