OFFICE OF THE PRESIDENT
CABINET DU PRÉSIDENT

March 15, 2007

Mr. Art Hanger, M.P.
Chair, Standing Committee on Justice and Human Rights
180 Wellington Street, Room 622
House of Commons
Ottawa, ON K1A 0A6

Dear Sir:

Re: Study on Judicial Appointment Process

The Canadian Bar Association thanks the Standing Committee on Justice and Human Rights for the opportunity to participate in its study regarding the appointment process for federally appointed judges. This study comes after several recent changes to the federal judicial appointment process, including:

- adding a representative of the law enforcement community to each Judicial Advisory Committee (JAC);
- naming the judicial member of each Committee as Chair and removing his or her right to vote except to break a tie;
- removing the ability of JACs to "highly recommend" candidates for judicial appointments; and
- establishing a special JAC for appointments to the Tax Court of Canada.

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. In 1984, the CBA established the McKelvey Committee on The Appointment of Judges in Canada. A key issue before the McKelvey Committee was the extent of political patronage in appointments. The Report issued by the McKelvey Committee[1] was the impetus for the government of the day to create the JACs. As we

1 Report of the Canadian Bar Association Committee on The Appointment of Judges in Canada (Ottawa: The Canadian Bar Association, 1985) [The McKelvey Report]

500 - 865 Carling, Ottawa, Ontario Canada K1S 5S8
Tel/Tél. : (613) 237-2925 Toll free/Sans frais : 1-800-267-8860 Fax/Télécop. : (613) 237-0185
Home Page/Page d'accueil : www.cba.org E-Mail/Courriel : info@cba.org

have observed the operation of these committees, we have advocated further safeguards for depoliticized and merit-based decision-making.[2] In light of our experience with judicial appointment reforms, we wish to specifically comment upon each of the most recent changes.

Political Activity by Judicial Candidates

As a general comment, we wish to make a distinction between our concern about partisanship entering into the judicial appointment process, and judicial candidates being involved in political parties or activities. Involvement in politics should not exclude candidates from consideration for judicial appointments; to the contrary, this is a positive demonstration of commitment to expand one's interests from those of self to those of community and country.[3] However, the political involvement must not be such that it leads to the perception of appointments being made on the basis of partisan connections rather than merit. The CBA thus recommends a two-year "cooling off" period before persons who were 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) may be considered for judicial appointment.

Process for Instituting Recent Changes

We were extremely disappointed that these fundamental changes were made without consultation with the CBA, the judiciary, and other groups interested in the administration of justice. We were informed that there were proposed changes to the composition of the JACs the day before their announcement. When the CBA met with Ministerial staff the next day, we were led to believe that there would be the opportunity for further input. Instead, the changes were announced hours later.

Over the years, we have called upon governments of all political stripes to make improvements to the appointment process. As this would suggest, the CBA does not believe that the existing system was perfect. However, the recent changes have implications for how the public perceives the fairness of the justice system. These implications are ultimately constitutional in nature. It is our view that they should not have been taken without appropriate consultation.

Impact of the Changes

We believe that some of the changes are positive, and with some minor adjustments could improve the proper functioning of the system. For instance, we believe that staggering appointments to JACs could be an improvement. However, the terms of individual members on a given JAC should be staggered, not the terms of entire JACs. Staggering the terms of members in each JAC would ensure continuity in its deliberations.

However, the other changes lead to a perception of partisan considerations being brought into the JACs' deliberations and undermine the purpose behind their existence: ensuring merit-based appointments and maintaining public confidence in the quality of judges. We caution against

---

2 See, for example, the CBA's 1993 document, "Submission to the Minister of Justice on the Federal Appointment Process," the CBA's 2004 submission, "Supreme Court Appointment Process," and the CBA's 2005 submission, "Federal Judicial Appointment Process."

3 The McKelvey Report states, "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…" (at 60).

characterizing these changes as simply the most recent in a continuous updating of the appointment system. The contrary may be seen when viewing them in historical context:

1988 – Judicial Advisory Committees established for each jurisdiction, with membership consisting of one nominee from each of the Chief Justice, Attorney General or Minister of Justice, the CBA and the Law Society in that jurisdiction, and one from the federal Minister of Justice to represent the community interest.[4] Merit was to be central, with broad consultations and community involvement as essential elements.[5]

1991 – Recommendation categories were changed from "qualified" and "unqualified" to "unable to recommend" "recommended" and "highly recommended." The reason for this change was that, "[i]t was felt these categories would better reflect the advisory nature of the Committee process, as well as allow Committees to give additional weight to those candidates they felt were outstanding."[6]

However, this was not the first use of a three-category system for rating candidates. The CBA Committee on the Judiciary, created in 1966 to provide non-partisan advice to the federal government on judicial appointments, used the categories "well qualified," "qualified" or "not qualified."[7] This Committee was replaced in 1988 by the JACs. Therefore, the two-category system was in place for only a short time.

1994 – Following extensive consultations,[8] the government instituted a number of changes to JACs, including two additional members appointed by the Minister, thereby increasing the number of Ministerial appointments to three (or about 40% of members). The Minister of Justice at the time committed not to appoint candidates to the bench unless recommended or highly recommended by the relevant JAC.

1999 – Administrative changes included extending the term of office of JAC members from two to three years. Provincial and territorial court judges applying to be elevated, who previously could be appointed without Committee review, were now subject to non-binding comments.

2005 – An all-party ad hoc advisory committee reviewed two nominations for the Supreme Court of Canada. The ad hoc committee included Members of Parliament, a representative of the Canadian Judicial Council and the Law Society of Upper Canada.

2005 – Guidelines and Code of Ethics for JAC members were established.

These changes had the effect of increasing the influence of merit in the appointment process, and reducing partisanship. The recent changes represent a step backwards in this trend.

---

4 "Highlights of New Judicial Appointment Process," in Minister of Justice and Attorney General of Canada, News Release, "New Process for Selecting Federally-Appointed Judges Announced" (14 April 1988), cited in Millar, *infra* note 6, at 618.

5 Canada, Department of Justice, *A New Judicial Appointments Process* (Ottawa: Minister of Supply and Services Canada, 1988), at *iii*.

6 Andre Millar, "The 'New' Federal Judicial Appointments Process: The First Ten Years" (2000) 38 Alta. Law Rev. 616 at 619.

7 F.L. Morton, "Judicial Appointments in Post-Charter Canada," in Malleson and Russell, eds., *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University of Toronto Press, 2006) at 66.

8 Millar, *supra,* note 6 at 619.

While additional Ministerial appointees were added in 1994, these appointees still did not constitute a majority of JAC members, nor did they represent any particular interest group. The specific addition of a law enforcement representative to the JACs, and changes to ensure a voting majority of JAC members are of a different, and more problematic, nature.

The CBA is concerned about designating representatives from any specific community that could be perceived as having preconceived opinions about judicial appointments. The Advisory Committee's role is to assess the merit of judicial candidates in an impartial manner. Mandating a representative of a particular special interest group on the JACs could lead reasonable people to conclude that candidates are being assessed on criteria related to that group's interests rather than solely on merit. This is particularly so in light of the fact that courts are often called upon to evaluate police behaviour for compliance with constitutional and other legal requirements. Any appearance of lack of objectivity will undermine the JACs' credibility.

Furthermore, a very small percentage of the caseload is in criminal law, where law enforcement personnel have the most familiarity. Less than 5% of the cases in superior courts are criminal cases. The disputes in these courts are civil cases concerning personal injuries, contracts, disputes between family members about estates, child support and custody matters, and others. Law enforcement personnel have no greater expertise in evaluating a candidate's ability in these issues than other community-minded citizens.

While we recognize the importance of having members of the community involved in the JACs, this should not be done with this specific intent of diluting the number of lawyers or the contribution of judges. This misconstrues the contribution of lawyers and judges to the assessment. Lawyers bring knowledge of the pool of candidates from whom judges must be chosen, rather than a bias about the views they should bring to the Bench. Judges also have an important perspective on the qualities required of judges, and the needs of the courts. The three current "at-large" appointments give ample scope to the Minister of Justice to include the perspective of the community.

The combined effect of adding an eighth member to the advisory committees and removing the judge's vote except in the case of a tie appears to signal in a sea-change in how the JACs will operate, from consensus recommendations, to "majority rules." It gives the appearance of attempting to stack the deck in the Minister's favour, thus politicizing the advisory process and creating greater opportunity for patronage appointments. Merit must remain the sole determinant of qualification for judicial office.

Maintaining the "Highly Recommended" Category

The institutional pressure on the Minister of Justice to select from a list of exceptional candidates provided by the JACs is an added check on the influence of partisanship. We hear from those who have served on advisory committees that there may be some value in continuing to distinguish between "recommended" and "highly recommended." That a concept is subject to interpretation is not a reason for its elimination. If the "highly recommended" designation is being interpreted in an unintended or inconsistent manner, then guidelines are the appropriate solution.

In 2005, we advocated that the Minister of Justice institute guidelines for committee members that indicated "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. Utilizing the terms in this manner would result in a shorter list of the best candidates.

Tax Court of Canada

The CBA supports the creation of a separate JAC for appointments to the Tax Court of Canada. As with advisory committees for the superior courts in each jurisdiction, the Minister of Justice should select committee members from nominations by legal organizations with tax expertise. For instance, the CBA could provide qualified committee members from its Taxation Law Section and its Sales and Commodity Tax Section.

Conclusion

Any person in Canada appearing before a federally-appointed judge deserves to have confidence that the judge is qualified and will be impartial between the parties and any government interest in the case. This is a fundamental tenet of our democracy and a constitutional requirement.[9] Accordingly, relations between the executive who appoints judges and the judges themselves must be "depoliticized," meaning that the executive cannot put political pressure upon the judiciary, nor can they be seen to have done so.[10] Where the executive appoints the judiciary and pays their salary, this requires delicate balancing and considered thought on the appropriate process to be followed.

We are of the view that the recent changes to the judicial appointment process "turn back the clock" and inject partisan considerations back into process of judicial appointments. We urge this Committee to report to Parliament that the recent changes to the federal judicial appointment process which do not serve Canada well should be reversed: the addition of law enforcement member to each JAC, the removal of the vote from the judicial member of each JAC, and the elimination of the "highly recommended" category for judicial candidates. Any further changes should be considered only after consultation with your Committee, the judiciary, the CBA, and law societies.

Yours truly,

(original signed by J. Parker MacCarthy)

J. Parker MacCarthy, Q.C.

---

9 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 S.C.R. 3

10 *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 para. 140.