



July 15, 2014

Via email: stephen.harper@parl.gc.ca; mcu@justice.gc.ca

The Right Honourable Stephen Harper, P.C., M.P.
Prime Minister
Langevin Building
80 Wellington Street
Ottawa, ON K1A 0A2

The Honourable Peter MacKay, P.C., Q.C., M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

Dear Prime Minister and Minister:

Re: Appointment of Supreme Court of Canada Justices

I am writing to you to offer the assistance of the Canadian Bar Association with revising the process for appointment of Supreme Court of Canada justices. Appointments to the Court are among the most important any government will make and for that reason we commend you for your efforts to modernize the process, and in particular the practice of permitting Canadians to become familiar with a candidate prior to appointment. As you consider the process to appoint a replacement for Justice LeBel, the Canadian Bar Association has proposed steps to reinforce the confidence of Canadians in the judiciary by further improving the process to appoint judges to the Supreme Court. We believe improvements to the appointment process should focus on demystifying it to meet current expectations about transparency.

Shortcomings of the Existing System

The existing system, though an improvement over its predecessors, falls short of the current expectations of transparency. That, in turn, can undermine the confidence Canadians have in the Court. Four particular shortcomings give rise to our proposal.

First, the perception of a secretive process for “shortlisting” potential candidates by a selection committee of five MPs risks undermining Canadians’ confidence that the best candidates are being appointed. This perception can give rise to concerns about politicization and potential conflicts with judicial independence.

Secondly, while the selection committee’s deliberations and consultations are appropriately done in camera, the criteria by which decisions are made and the process to make them need not be secret.

Since it was introduced into the process, the committee of MPs has operated by unpublicized rules and employed unknown criteria for selecting a short list of three names.

Thirdly, the government is not bound to follow the selection committee's list, although that appears to be the practice.

Finally, a selection committee with a majority of members from the governing party raises concerns about politicization of the process. A key element of Canada's constitutional guarantee of judicial independence is that relations between government and the judiciary are "depoliticized." The important element of depoliticization is that judges, when rendering difficult rulings must free from fear or favour (or the perception of such). This is a delicate balance, given that the executive appoints judges and pays them, and that judges are often called on to decide matters with political ramifications. Including the perspective of government caucus members, along with others can assist in supporting the required balance.

CBA Proposal

The CBA recommends adapting the established system of judicial advisory committees (JACs) for evaluating applicants to the Supreme Court appointment process. In this system, the government would appoint a Special Advisory Committee each time a vacancy occurs on the Supreme Court of Canada, with its members, process and evaluation criteria made public. The Committee structure would be similar to the existing JACs, drawing from the legal community and the public, with representatives of the federal Minister of Justice, the CBA, and the Attorney General, Chief Justice and law society in the jurisdiction(s) from which the candidate would be selected. The Committee structure would differ from the JAC model by the inclusion of four Parliamentarians with at least one representative from each party with official party standing in the House of Commons. This model is similar to the one recommended by the House of Commons Justice Committee in May 2004.¹

The Special Advisory Committee would make recommendations to you. In a manner similar to how the JACs function, its deliberations and recommendations would be confidential. You would undertake not to appoint any candidate not recommended by the Special Advisory Committee.

This proposal:

- Responds to your goal of involving Parliamentarians in the appointment process.
- Reflects the unique nature of the Supreme Court as Canada as court of last resort.
- Adds Parliamentary involvement in the process without compromising the integrity of the current system that has, historically, resulted in excellent appointments and is held out as a model internationally.
- Complements transparency for the criteria and process for SCC appointments, modernizing the process to account for current expectations.

¹ *Improving the Supreme Court of Canada Appointment Process*, 37th Parl. 3d Sess., online: Parliament of Canada, www.parl.gc.ca/content/hoc/Committee/373/JUST/Reports/RP1350880/justrp01/justrp01-e.pdf

In the current practice of an ad hoc parliamentary committee questioning the government's nominee for the Court, we recognize that committee members have been circumspect on the questions asked of candidates. However, the risk remains that ill-conceived or politically motivated questions probing judges' views or background may lead to the perception that they will not neutrally decide future cases. If the practice of convening an ad hoc parliamentary committee continues, those who participate should be different than those on the Special Advisory Committee. This would ensure the confidentiality of the process, and also that there is no motivation on the part of committee members to engage later in a public, political questioning of candidates to support the positions they took in the Special Advisory Committee process.²

Conclusion

The conclusions made in the CBA's 1985 report, *The Appointment of Judges in Canada* (the McKelvey Report) are still as relevant today as ever:

It is our conviction that the public is entitled to a system of selection that will open the doors to more candidates, provide careful and measured consideration of qualifications, and not be subject to partisan influences. Judges must be, and be seen to be, independent. Judges must be regarded as capable and knowledgeable. Finally, judges must be chosen from a variety of backgrounds and be representative of the community. The need for independence is beyond question, and the demands of the Charter have given an additional dimension to such independence.³

I trust this proposal will assist you in developing further improvements to the system of Supreme Court appointments in Canada, for the benefit of all those who live in Canada now and in the future. In that vein, we ask to meet with you soon to discuss the proposal in greater detail, with a view to implementing improvements in time for the appointment of Justice LeBel's replacement.

Yours truly,

(original signed by Fred Headon)

Fred Headon

² Professor Adam Dodek has analyzed the overlap between the members of the current selection committee and the ad hoc parliamentary committee from the perspective of accountability in his recent paper, "Reforming the Supreme Court Appointment Process, 2004-2014: A Ten Year Democratic Audit" (May 2014), online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2439336.

³ Report of the Canadian Bar Association Committee on the Appointment of Judges in Canada, August 20, 1985.