HOUSE OF COMMONS
CANADA

IMPROVING THE SUPREME COURT OF CANADA APPOINTMENTS PROCESS

REPORT OF THE STANDING COMMITTEE ON JUSTICE, HUMAN RIGHTS, PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Derek Lee, M.P.
Chair

May 2004

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STANDING COMMITTEE ON JUSTICE, HUMAN RIGHTS, PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

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THE STANDING COMMITTEE ON JUSTICE, HUMAN RIGHTS, PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

has the honour to present its

FIRST REPORT

Pursuant to Standing Order 108(2), the Committee proceeded to a study on the process by which judges are appointed to the Supreme Court of Canada. After hearing evidence, the Committee agreed to report to the House as follows:

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IMPROVING THE SUPREME COURT OF CANADA APPOINTMENTS PROCESS

INTRODUCTION

The Supreme Court of Canada has been in existence since 1875, when it was established by an Act of Parliament. It became Canada's final appellate court in 1949, when appeals to the Judicial Committee of the Privy Council of the United Kingdom were abolished.

Since its creation, the Supreme Court of Canada has played a central role in deciding upon the distribution of powers in the Canadian federation. The role of the Court has been enhanced since 1982 by the constitutional entrenchment of the *Canadian Charter of Rights and Freedoms*. One of the effects of this development in Canadian constitutional history has been to enhance the role played by courts at all levels in resolving legal issues. This is a function that the courts have always performed in Canada, but the constitutionalization of rights and freedoms has had the effect of augmenting this role.

In the last two decades, the courts have been called upon to address some of the most difficult and complex legal issues, often involving basic choices in values and priorities. As the final court of appeal in Canada, the Supreme Court has been deeply involved in resolving some of these issues. This has led to a vigorous debate about the respective roles played by legislative bodies and the courts in determining legislative and policy approaches and priorities. This debate is all the more important since the courts play a role in influencing legal policy formation, often requiring Parliament and the legislatures to respond to their decisions on constitutional and Charter-based issues.

Many witnesses said that excellent appointments have been made to the Supreme Court of Canada in the last several decades. The work of Canada's highest court is widely respected in Canada and throughout the world. The Committee concurs with this view.

The process, however, by which Justices are appointed to the Court is largely unknown and lacks credibility in the eyes of many. The Committee has been asked to address this issue, and develop proposals to render the appointments process more credible, especially through an appropriate role played by parliamentarians.

The challenge to the Committee has been to develop a new appointments process, while at the same time being respectful of the judicial independence so essential to the continued high esteem in which the Court is held. As participants in the

judicial/legislative collaboration required for effective legal policy development, parliamentarians have a central role to play in the appointments process. This report is based on that premise.

The witnesses (Appendix A) appearing before us and the Briefs we received (Appendix B) suggested a number of approaches that might be taken to allow Parliament to review Supreme Court appointments. These models propose a number of methods for improving the process and for assessing the candidates themselves. Our challenge was to develop proposals for enhancing the parliamentary goal of general oversight while also protecting the integrity of the Court and its ability to attract the most qualified candidates.

WHAT THE COMMITTEE HAS DONE

On May 6, 2003, Motion M-288, proposed by Richard Marceau, M.P., which read: "That the Standing Committee on Justice and Human Rights study the process by which judges are appointed to Courts of Appeal and to the Supreme Court of Canada," was brought before the House. On October 1, 2003, the House gave unanimous consent to adopt this motion. Pursuant to this order of reference, on November 4, 2003 the Committee began its study on judicial appointments. Two meetings of the Committee on this issue were held during the Second Session of the 37th Parliament.

In the Third Session of the 37th Parliament, the newly reconstituted and renamed Committee resumed its study on judicial appointments. On December 12, 2003, the Prime Minister announced that the government would "specifically consult the Standing Committee on Justice and Human Rights on how best to implement prior review of appointments of Supreme Court of Canada judges." This commitment was reaffirmed on February 4, 2004 in the "Action Plan for Democratic Reform". This Action Plan states that the government will consult the appropriate parliamentary committees on how best to implement the prior review of Supreme Court of Canada appointments. On March 16, 2004, the Chair of the Committee received a letter from the Leader of the Government in the House, which referred to the Action Plan and requested that the Committee undertake a review of this issue and report to the House with recommendations as soon as possible. In the meetings held during the Third Session, therefore, the focus of the Committee's work shifted to examining exclusively appointments to the Supreme Court of Canada.

THE LEGAL BACKGROUND

Section 101 of the *Constitution Act, 1867* provides Parliament with the authority to create a "General Court of Appeal for Canada". In 1875, Parliament did, in fact, establish such a court, and it is now governed by the *Supreme Court Act*. Section 4(2) of the Act provides that Justices of the Supreme Court are to be appointed by the Governor in Council by letters patent. Section 5 of the Act indicates that any person may be appointed a Justice of the Supreme Court who is or has been a judge of a Superior Court of a province or a barrister or advocate with at least ten years standing at the Bar of a

province. Section 6 requires that at least three of the Justices of the Supreme Court must come from Québec. By convention, three Justices are appointed from Ontario, two Justices are appointed from the West, and one Justice is appointed from Atlantic Canada. Justices hold office during good behaviour and can only be removed by the Governor General on address of the Senate and House of Commons. The mandatory retirement age from the Supreme Court is seventy-five.

THE CURRENT APPOINTMENTS PROCESS

The Minister of Justice appeared before the Committee on March 30, 2004 to explain publicly for the first time the current process for selecting Supreme Court Justices. In his remarks, he described this process as "not so much secretive as … unknown." In the interests of both transparency and accountability, therefore, he undertook to describe to the Committee the protocol of consultation that is now being used to select members of the Supreme Court. Given that the executive branch of government is responsible for selecting Supreme Court Justices, it seeks to engage in a comprehensive consultation process.

The Minister stated that the consultative process is comprised of two key steps. In the first step, the Minister of Justice identifies potential candidates. Such candidates typically sit on provincial Courts of Appeal, although names can also be drawn from senior members of the Bar or from academia. Any interested person may also put a name forward for consideration. The Minister specifically consults with the following individuals when assembling his or her list of candidates: the Chief Justice of the Supreme Court of Canada and sometimes the puisne judges, the Chief Justice(s) of the court(s) from the province or region with the vacancy, the Attorney(s) General of the province or region, and at least one senior member of the Canadian Bar Association and the law society from the relevant region. The Chief Justice of the Supreme Court of Canada is also consulted about the needs of the Court.

The Minister of Justice must then assess the candidates. The criteria for appointment may be classified under three main themes — professional capacity, personal characteristics, and diversity. Professional capacity encompasses not only proficiency in the law, but also the following considerations:

- Superior analytical and writing skills;
- The ability to listen and maintain an open mind;
- Decisiveness and soundness of judgement;
- The capacity to manage and share a heavy workload in a collaborative context;
- The capacity to manage stress and the pressures of the isolation of the judicial role;

- An awareness of social context;
- Bilingual capacity; and
- The specific legal expertise that may be required for the Supreme Court.

To assist in assessing professional capacity, the Department of Justice compiles jurisprudential profiles of the candidates. These profiles track the candidates' judicial decisions, focussing upon their precedent-setting value as well as the outcome of appeals of their decisions.

The Minister of Justice will also look to a candidate's personal characteristics. These characteristics should include: impeccable personal and professional ethics, honesty, integrity and forthrightness, respect and regard for others, patience, courtesy, tact, humility, impartiality, tolerance, personal sense of responsibility, common sense, punctuality, and reliability. Finally, the Minister of Justice keeps in mind the issue of diversity, as the Court's composition should reflect that of Canadian society as a whole.

The Minister of Justice discusses the candidates with the Prime Minister. There may also have been previous exchanges with the Prime Minister. A preferred candidate is then chosen. The Prime Minister, in turn, recommends a candidate to Cabinet and the appointment proceeds by way of an Order-in-Council.

INTERIM PROPOSALS

The Committee heard from a number of witnesses that Canada has been well served by its Supreme Court, which has an enviable reputation in the international legal community. Yet the Committee reached a consensus that, whatever the quality of judgements produced by the Supreme Court, the process by which Justices are appointed to that body is secretive or, at the very least, unknown to Canadians. This could lead to the perception that appointments may be based upon improper criteria. The Committee agreed that more credibility in the appointments process would be beneficial to the Supreme Court and lend it more legitimacy in the eyes of Canadians.

The pace of the Committee's work has been accelerated by the unexpected resignations of two Justices of the Supreme Court. Justice Arbour and Justice Iacobucci are scheduled to leave the Court in June 2004. In order to have a full bench of nine Justices for the fall sitting, it will be necessary to appoint two new Justices at some point in the summer of 2004 so as to give the new judges sufficient time to prepare for upcoming cases. To accommodate this timetable, it appears that the process for screening and selecting nominees to fill the current vacancies is well under way. This led

the Committee to the conclusion that, if there is insufficient time to put a new long-term process into place, an interim procedure should be established to shed as much light as possible on how the two new Justices were chosen.

The interim process favoured by the Committee for the current vacancies would see the Minister of Justice appear before it in a public session to explain the procedure by which the two appointees for the Supreme Court were selected. At such a meeting, and without revealing the contents of any private deliberations, the Minister would explain to parliamentarians and all Canadians who was consulted in the process of examining candidates, what investigations of the candidates were conducted, and the qualifications of the two appointees. This may involve, for example, an explanation as to what expertise was lost to the Supreme Court with the departure of Justices Arbour and Iacobucci, and how the new Justices fill any needs that may have been created. In the course of such a meeting, the Committee expects that further light will be shed on the appointments process and further understanding of the work of the Supreme Court will result. If these appointments are made at a time when parliamentary committees cannot meet, a mechanism could be developed to allow the Minister of Justice to give these explanations to parliamentarians and all Canadians.

RECOMMENDATION 1

The Committee recommends that the Minister of Justice appear in public before the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness to explain the process by which the current vacancies on the Supreme Court were filled and the qualifications of the two appointees.

When the Minister of Justice appeared before the Committee on March 30, 2004, and explained the process by which Supreme Court Justices are selected, this was the first time that it had been made public. Canadians had their first opportunity to learn who is consulted about Supreme Court appointments and the criteria by which candidates are assessed for their fitness to be a Justice. This furthering of public knowledge can be enhanced by the publication of a document by the Government of Canada setting out the current consultation process.

RECOMMENDATION 2

The Committee recommends that the Government of Canada publish a document setting out the current process by which Supreme Court Justices are appointed.

LONG-TERM PROPOSALS

For the longer-term, the Committee heard from a number of witnesses who cited a need to improve the process by which Justices are appointed to the Supreme Court. Many of them urged the Committee to use caution and take the time necessary to formulate any changes to the current appointments process. In developing its proposals, the Committee has taken this advice seriously. To that end, the proposals contained in this report will require further study.

Some witnesses appearing before us expressed a belief that more provincial input is needed. We also heard a strong desire to maintain judicial independence. In addition, some of our witnesses expressed the wish to maintain confidentiality in the process for two main reasons: to encourage the best candidates to come forward, and to allow for the assessment of candidates to be as frank and fair as possible. Many witnesses made a clear distinction between the transparency of the process and the confidentiality of the deliberations.

The Committee heard from witnesses on the system currently in place to appoint judges to the Federal Court of Canada, the Tax Court of Canada, and the federally appointed judges of the provincial and territorial Superior Courts. Under this process, prospective judges apply directly to the Judicial Appointments Secretariat of the Office of the Commissioner for Federal Judicial Affairs. Each application is vetted by one of the sixteen Advisory Committees on Judicial Appointments, with a minimum of one committee located in every province and territory. The Commissioner for Federal Judicial Affairs said that this appointments system was initially created to provide the Minister of Justice with "broadly based and objective advice about [applicants'] qualifications for appointment".

Every Advisory Committee on Judicial Appointments is composed of seven members, each of whom volunteers his or her time: one representative from the provincial or territorial law society or bar association; one representative from the province or territory's branch of the Canadian Bar Association; one judge nominated by the Chief Justice or other senior judge of the province or territory; a representative of the province or territory's Attorney General or Minister of Justice; and three nominees (or "lay persons") chosen by the federal Minister of Justice. Members serve on the Advisory Committee for a two-year term, which can be renewed only once.

The Advisory Committees conduct extensive assessments of candidates not already on the bench, reviewing the applicants' files, as well as consulting with many members of the legal and non-legal communities. Applicants are assessed against a set of criteria. The Advisory Committees then place each applicant into one of three categories — "recommended", "highly recommended" and "unable to recommend" for appointment. These assessments are confidential and can only be seen by the Minister of Justice, who can use them to make the necessary appointments.

The Committee has concluded that an advisory committee should be established to replace the current process of consultations carried out under the aegis of the Minister of Justice. Such a committee would be formed on an ad hoc basis to fill vacancies on the Supreme Court as they arise. At the beginning of the process, the advisory committee would compile a list of candidates from the relevant province or region. The sources of this list would be varied — the Government of Canada, the provinces, and other sources, which may include applications from interested candidates and nominations. The emphasis at the beginning of the process would be to seek out the most comprehensive possible list of candidates, taking into account a wide variety of views. It is expected that this would produce a pool of highly competent candidates that is reflective of the diversity of the people of Canada.

The work of the advisory committee would then be to reduce this confidential list to a short list of three to five candidates to be forwarded to the Minister of Justice. In preparing a short list, a wide process of consultation would take place, encompassing at least the consultations currently undertaken by the Minister of Justice. Based on our work to date, we would not support the interviewing of candidates but, rather, a process of file review only. Further study of the consultation process is required.

The composition of the advisory committee would strive to reflect a broad spectrum of opinion, while remaining small enough to be a manageable body capable of reaching a consensus on well-qualified candidates. The Committee believes that the advisory committee should be composed of one representative from each of the parties with official standing in the House of Commons, representation from the provinces, members of the judiciary, members of the legal profession, and lay members. Input from the Chief Justice of Canada as to the needs of the Court should be sought. The deliberations of the advisory committee would remain confidential so as to allow for the widest possible range of discussion. The details of the composition of the advisory committee will require further study.

The short list would be forwarded, in confidence, to the Minister of Justice and the final choice will be made. The current constitutional responsibilities would remain in place so that the best candidate would be selected from this confidential list by the Governor in Council and appointed by Order-in-Council. If the Governor in Council did not wish to appoint any of the individuals on the short list, a new short list would be prepared by the advisory committee. Once the appointment to the Court had taken place, the Chair of the advisory committee and/or the Minister of Justice would be invited to appear before the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. This appearance would be in a public session and would serve two main purposes: to make Canadians more aware of the appointments process and constitute an appropriate forum for parliamentary scrutiny.

AT THIS TIME, OUR RECOMMENDATIONS (3 TO 8) FOR A LONG-TERM PROCESS ARE THE FOLLOWING:

RECOMMENDATION 3

The Committee recommends that an advisory committee be established as required to compile and assess lists of candidates for vacancies on the Supreme Court of Canada.

RECOMMENDATION 4

The Committee recommends that the advisory committee be composed of one representative of each of the parties with official standing in the House of Commons, representation from the provinces, members of the judiciary and the legal profession, and lay members.

RECOMMENDATION 5

The Committee recommends that the advisory committee compile lists of candidates from a variety of sources, including the Government of Canada, the provinces, and other appropriate sources.

RECOMMENDATION 6

The Committee recommends that the deliberations of the advisory committee be conducted in private and in confidence to encourage the widest possible spectrum of candidates and open discussion within the advisory committee concerning those candidates.

RECOMMENDATION 7

The Committee recommends that the advisory committee provide the Minister of Justice with a confidential short list of candidates from which a Supreme Court of Canada Justice may be selected.

RECOMMENDATION 8

The Committee recommends that, once an appointment has been made by the Governor in Council from the list provided by the advisory committee, the Chair of the advisory committee and/or the Minister of Justice appear before the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness to explain the process by which the appointee was selected and that person's qualifications.

APPENDIX A
LIST OF WITNESSES

Associations and Individuals	Date	Meeting
2nd SESSION, 37th PARLIAMENT		
House of Commons	04/11/2003	78
Richard Marceau, Charlesbourg—Jacques-Cartier		
As Individual	06/11/2003	79
Edward Ratushny, Professor, Faculty of Law, Common Law Section, University of Ottawa		
3rd SESSION, 37th PARLIAMENT		
As Individuals	23/03/2004	4
Christopher Manfredi, Full Professor, Department of Political Science, McGill University		
Peter Russell, Professor, Political Science, University of Toronto		
Lorraine Weinrib, Professor, Faculty of Law, University of Toronto		
Jacob Ziegel, Professor of Law Emeritus, Faculty of Law, University of Toronto		
Department of Justice	24/03/2004	5
Judith Bellis, General Counsel		
Marc Giroux, Judicial Affairs Advisor		
Barreau du Québec	25/03/2004	6
Carole Brosseau, Lawyer, Research and Legislation Service		
Denis Jacques, Lawyer		
Canadian Bar Association		
William Johnson, President		
Tamra Thomson, Director, Legislation and Law Reform		
Law Society of Upper Canada		
James Caskey, Co-Chair, Standing Committee on Government Relations and Public Affairs		
Julian Porter, Co-Chair, Standing Committee on Government Relations and Public Affairs		

Associations and Individuals	Date	Meeting
Department of Justice	30/03/2004	7
Judith Bellis, General Counsel		
Hon. Irwin Cotler, Minister		
Marc Giroux, Judicial Affairs Advisor		
As Individual	30/03/2004	8
Claire L'Heureux-Dubé, Judge of the Supreme Court of Canada (retired)		
As Individuals	01/04/2004	9
Allan Hutchinson, Professor, Osgoode Hall Law School, York University		
Peter McCormick, Professor and Chair, Department of Political Science, University of Lethbridge		
F.L. Morton, Professor, Department of Political Science, University of Calgary		
Canadian Council of Criminal Defence Lawyers	20/04/2004	10
William Trudell, Chair		
As Individuals		
Kate Malleson, Senior Lecturer in Law, London School of Economics		
Judith Resnik, Arthur Liman Professor of Law, Yale University		
As Individual	27/04/2004	12
Patrick Monahan, Dean, Osgoode Hall Law School, York University		
Office of the Commissioner for Federal Judicial Affairs	28/04/2004	13
David Gourdeau, Commissioner for Federal Judicial Affairs		
Margaret-Rose Jamieson, Judicial Appointments Secretary		

APPENDIX B
LIST OF BRIEFS

B.C. Civil Liberties Association

Barreau du Québec

Canadian Association of Black Lawyers

Canadian Bar Association

Canadian Council of Criminal Defence Lawyers

Federation of Law Society of Canada

Hogg, Peter

Indigenous Bar Association

Law Society of Upper Canada

Monahan, Patrick

Morton, F.L. (Ted)

Nystrom, Hon. Lorne

Office of the Commissioner for Federal Judicial Affairs

Pongray, Michael

Resnik, Judith

Russell, Peter

The Advocates' Society

Wells, Peter E.J.

Ziegel, Jacob S.

A copy of the relevant Minutes of Proceedings (*Meetings Nos. 78 and 79 of the 2nd Session, 37th Parliament, and Meetings Nos. 4 to 16 of the 3rd Session of the 37th Parliament*) is tabled.

Respectfully submitted,

Derek Lee, M.P.
Chair

REFORM OF THE SUPREME COURT OF CANADA APPOINTMENTS PROCESS

DISSENTING REPORT

GARRY BREITKREUZ, MP
CHUCK CADMAN, MP, VICE-CHAIR
PETER MACKAY, MP
KEVIN SORENSON
VIC TOEWS, MP

May 5, 2004

Parliament and the legislatures are no longer the only bodies involved in legal policy making, if they ever were. The courts play a leading role in legal policy formation, often requiring Parliament and the legislatures to respond to their decisions by incorporating their interpretations of the law or responding to them.

Parliament and the courts, especially the Supreme Court of Canada, are sometimes viewed as partners and collaborators in the development of law and legal policy in Canada. Parliamentarians, however, are accountable to Canadians for their participation in this partnership. Supreme Court Justices, however, are not so accountable, at least in terms of being subject to the electoral process.

The Conservative Party of Canada (CPC) does not believe that the eight recommendations made by the Committee in its main report are sufficient. The CPC submits that the process for all future appointments, including the next two Supreme Court Judges, requires a greater degree of transparency. It is for this reason that the CPC makes the following recommendations for all future Supreme Court of Canada appointments.

RECOMMENDATION 1

There must be substantive input from all the provinces and territories into the compilation of a list of suitable Supreme Court of Canada nominees. The input from the provinces and territories at this stage can be confidential and does not need to be made public.

RECOMMENDATION 2

There must be a public review of a short list of the nominees before a parliamentary committee.

RECOMMENDATION 3

There must be Parliamentary ratification of the chosen nominee. The form of ratification must not infringe on the constitutional right of the Governor-in-Council to make the actual appointment.

RECOMMENDATION 4

Amendments to legislation must be made so that the appointment process becomes mandated.

DISSENTING OPINION BY THE BLOC QUÉBÉCOIS

AN END TO UNFETTERED DISCRETION

On October 1, 2003, the House of Commons unanimously passed Motion M-228 sponsored by the member for Charlesbourg—Jacques Cartier, Richard Marceau, which provided "*That the Standing Committee on Justice and Human Rights study the process by which judges are appointed to Courts of Appeal and to the Supreme Court of Canada*". It is noteworthy that, at the start of debate on May 6, 2003, the Liberal Party had opposed it, but then changed its mind.

This about-face resulted from public pressure on the Liberals to increase the transparency of the process of appointing judges to the Supreme Court of Canada and the courts of appeal.

The debate is not new in Canada, but its urgency is growing. Justice must not only be done; it must appear to be done. The current process followed in the appointment of judges is in direct conflict with the principle, and the appearance of justice is accordingly lessened. To some extent, it is up to parliamentarians to promote public confidence in our institutions and in the judicial system. In view of the courts' increased importance today, in part due to their increased functions through the *Canadian Charter on Rights and Freedoms* and the *Charte québécoise des droits et libertés de la personne* alone, and their involvement in such social issues as same sex marriage, native claims, decriminalization of marijuana, etc, any connection between the legal and the political is to be avoided at all cost.

This is a strong argument in favour of reviewing the process of appointing judges and making it more democratic. The process must be objective and free of any hint of political bias.

As Professor Peter Russell said on March 23, 2004, "Canada is the only constitutional democracy in the world in which the leader of government has an unfettered discretion to decide who will sit on the country's highest court."[1]

[1] RUSSELL, Peter, A Parliamentary Approach to Reforming the Process of Filling Vacancies on the Supreme Court of Canada, Brief to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, March 23, 2004, p. 1.

First point of consensus: the existing process must be changed

At present, there is broad and growing consensus that changes are required to the current process. One witness held that “Canada now has an American-style Supreme Court with a British-style appointments system”.[2]

Some MPs were quite surprised by the informality of consultation in the current process. Of course the Minister of Justice does consult, but is not obliged to do so. He also chooses the people he consults. There are no rules, and the current Minister of Justice, Irwin Cotler, elicited some surprise in describing the present process to the Committee when he said that he could not guarantee the process he was describing was followed to the letter!

Second point of consensus: a role for MPs

As judges are appointed permanently until they reach the mandatory retirement age of 75 and can significantly change the legal framework of the country by repealing legislation adopted by Parliament or rendering it inoperative, most witnesses felt that MPs should be formally involved in the appointment examination process. Therefore, what must be determined is not whether parliamentarians should have a role but the scope of their role.

Third point of consensus: a role for the provinces

The witnesses agreed in their observations on the formal role of the provinces in the make-up of Canada’s highest court. The source of this view is the federal government’s frequent appearance of being both judge and jury.

Indeed, in a debate on the division of powers (inevitable in a federal system), the appointment of judges at the discretion of the Prime Minister flies in the face of the principle set out above regarding justice and the appearance of justice. Professor Jacob Ziegel could not have been clearer in this regard: "The Prime Minister is in a position of conflict when he fills vacancies on the Supreme Court. This is because the federal government is the most frequent litigator before the Court and the Prime Minister is the most senior member of the federal government involved in the litigation.[3] That is patently obvious. Who involved in litigation would permit someone appointed by the opposing party alone to rule on the matter?

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[2] MORTON, F.L. (Ted), Judicial Appointments in post-Charter Canada: A System in Transition, Brief to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, April 1, 2004, p. 1.

[3] ZIEGEL, Jacob, Statement by Professor Jacob Ziegel before the House of Commons Standing Committee on Justice on the selection process for appointments to the Supreme Court of Canada, Tuesday, March 23, 2004, p. 2.

A note of discord: a public or private process?

The seemingly main stumbling block in this debate is the relevance of developing the appointment process along entirely public lines. In this regard, the American example comes immediately to mind.

The Senate hearings in connection with the appointment of justices Robert Bork and Clarence Thomas to the U.S. Supreme Court had a very negative impact.

A number of people also feel that public hearings could eliminate high quality candidates who do not want to be subject to such interrogation for personal reasons, naturally, and for basically professional considerations. We can readily imagine the torment of a lawyer in a large firm at the thought that his partners have learned he is considering leaving the practice.

From a different perspective, the public has the right to know more about judges than just their legal qualifications. Because each takes a personal approach to the law, it is logical to assume that certain, more delicate, issues of a social or philosophical nature may be interpreted differently according to the judge's ideological leanings.

Others feel we are entitled to expect persons in the important position of justice of the Supreme Court to justify their thinking or at least defend it publicly. Accordingly, meetings and debate in a well-structured context would be a healthy approach for candidate examination. The context of the questioning and the limits of what is reasonable must therefore be properly defined.

And the solution?

A province (or a region) could submit a list of potential candidates for judgeships from among whom the appointment is to be made. This is a way to avoid unilateral appointments by the federal government.

The Bloc is highly critical of the Liberal MPs' rejection of this new proposal, which is in fact a formal request by the Government of Quebec, recently reiterated by Premier Jean Charest, the head of the most federalist government in Quebec's recent history. He basically restated the position taken by his minister of Canadian intergovernmental affairs, Benoît Pelletier, who was chairing the Comité spécial du Parti libéral du Québec sur l'avenir politique et constitutionnel de la société québécoise, that the provinces could be asked to submit lists of candidates to the Government of Canada from which appointments to the Supreme Court would be made.[4]

[4] Comité spécial du Parti libéral du Québec sur l'avenir politique et constitutionnel de la société québécoise, final report, "Un projet pour le Québec affirmation, autonomie et leadership", October 2001.

The Supreme Court would of course have to maintain its ratio of three justices from Quebec.

Member participation could be arranged with the establishment of an advisory committee to be chaired by the Chief Justice of the Supreme Court in order to evaluate candidates. The committee could include an MP from each of the parties recognized in the House of Commons, a delegate from the Bar of the province concerned (or the Bars of the provinces in the region), the chief justice of the province concerned (or the chief justices of the provinces in the region) and two representatives of the public not part of the legal community.

The committee could thus review the candidates from their files or if necessary in an in camera interview and submit its recommendations to the Prime Minister. Public participation would thus ensure inclusion of a viewpoint from outside the field of law.

The Prime Minister would then choose a candidate from the advisory committee's short list. The chair of this committee and / or the Minister of Justice would report the appointment publicly to the House of Commons Standing Committee on Justice.

Furthermore, as the *Supreme Court of Canada Act* establishes quorum as five judges, we think the two current vacancies that need to be filled should be filled according to the process described above, even though it could mean further delay.

In conclusion

The judicial system and the administration of justice lie at the heart of a democracy. The system is even more vital in a federal system such as Canada, in part because of its Charter. The proposal set out above reflects this fact and would be an appropriate response to the requirements of transparency, rigour, democracy and participation by parliamentarians and the components of the federation — the provinces.

The trend of the political climate is to favour democratization of institutions: it will take a bold means of modernization. It is high time the outdated unfettered discretionary powers of the executive were reined in. The Prime Minister's exclusive power to appoint justices to the Supreme Court and appeal courts is no longer appropriate. We have before us an opportunity to modernize the system; let us act on it.!

NEW DEMOCRATIC PARTY
DISSENTING OPINION ON REFORM
OF THE SUPREME COURT OF CANADA
APPOINTMENTS PROCESS

The NDP dissents on several aspects of the Report of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness on reform of the appointment process to the Supreme Court of Canada. Our dissenting points focus on enhancing the open, transparent and democratic nature of the process, and on clarifying in more detail how the processes, both interim and long-term, will operate.

1. Constitutional Parameters of the debate

The "Legal Background" section of the Committee report omits to mention the constitutional debate that determines the parameters of potential reform. Briefly stated, the arguments in the debate are as follows:

The *Supreme Court Act*, in section 4, states that appointments to the Supreme Court must be made by the Governor-in-Council. The *Supreme Court Act* is not technically part of the Canadian constitution. However, s. 41(*d*) of the *Constitution Act, 1982* states that any amendment to "the composition of the Supreme Court of Canada" requires unanimous consent of the federal and provincial legislatures, while s.42(*d*) states that any amendment to "the Supreme Court of Canada" must be accomplished following the 7/50 formula. This would appear to imply that any substantial changes to the *Supreme Court Act* would require constitutional amendment. However, there is some academic debate on this point — it is not even certain that ss. 41 and 42 of the *Constitution Act, 1982* can apply to the *Supreme Court Act*, as they are supposed to apply exclusively to "the Constitution of Canada", of which the *Supreme Court Act* is not technically a part.

This constitutional question probably cannot be resolved without, ironically enough, a reference to the Supreme Court of Canada. In the absence of this, the safest route to follow is to assume that no change to the *Supreme Court Act* is possible without constitutional amendment. This means that the final decision on appointments must continue to rest with the Governor-in-Council. Thus, suggestions such as binding Parliamentary confirmation hearings or a Parliamentary veto can be presumed to be unconstitutional. This report is written on that assumption, with the caveat that the constitutional question has never been firmly resolved.

2. Appearance of the Minister of Justice before the Justice Committee

We agree that the Minister of Justice should appear before the Justice Committee in order to explain the consultation process and the reasons for his/her choice, both in the case of the "short-term" process to be used for the next two appointments and once the long-term process of the Advisory Committee has been fully implemented.

However, we insist that **the Minister's appearance should take place *before* the actual appointment is made** by the Governor-in-Council, not *after* the candidate has been appointed. The reason for this is that, if ever the committee should find that the Minister has not followed due process or exercised due diligence in making his/her choice, there must be a window for this finding to have an actual effect on the appointment of the candidate in question. If the Minister appears in an *ex post facto* hearing, there is no longer any reasonable possibility of the Committee's finding affecting the appointment, as appointed judges remain in office "during good behaviour". Although we recognize that the authority to appoint Supreme Court judges is constitutionally vested in the Governor-in-Council, so any finding of the committee can only be advisory in nature, it is nevertheless imperative that the Governor-in-Council have the opportunity to accept or reject the Committee's advice, rather than simply receiving this advice after the fact.

By having the Minister of Justice appear before the appointment is made, we would enhance the democratic nature of the appointment process by ensuring that Parliamentary scrutiny could legitimately affect the process when circumstances warrant.

It has been suggested that requiring an *a priori* appearance by the Minister might hamper the appointments process, in the case where at appointment must be made while Parliament is not sitting. It should be noted that this problem might arise if there is a federal election in June 2004. However, if this case should indeed arise, the Prime Minister can simply convene an *ad hoc* committee of Parliamentarians to temporarily fill the Justice Committee's role. The timing of the appointments, not to mention the timing of a federal election, must not be allowed to interfere with the democratic nature of the appointments process that we are establishing.

3. Composition and Functioning of the Advisory Committee

In our opinion, we must be more clear and precise in terms of the composition and functioning of the Advisory Committee that will screen potential candidates to the Supreme Court. Although the report states that "further study is needed" on this point, it is unrealistic to expect this issue to return to the Justice Committee in the near future. It is therefore of paramount importance to outline certain parameters for the committee at this stage.

First, the Parliamentarians who sit on the Advisory Committee must be Members of the House of Commons, and not Senators. The point of having Parliamentarians on this committee is to increase the democratic nature of the appointments process, and this purpose would not be served by having unelected Senators on the Advisory Committee.

Second, the provincial representation on the committee is essential, but we must specify that this representation should come from the region from which the judge will be drawn. To have representatives from each province on the committee would needlessly increase the size of the committee, and would serve no useful purpose.

Thirdly, it should be specified that the Advisory Committee will not operate on the principle of unanimous consent, but on that of majority opinion. To require unanimous consent would be to give a "veto" over candidates to every political party, and indeed, to every member of the committee, which is an undesirable and undemocratic outcome.

4. Review of the Advisory Committee process

The NDP would like to emphasize that the steps being taken right now by the government are not necessarily the final word on the modification of the judicial appointment process in Canada. We believe that the establishment of an Advisory Committee is a necessary, positive and long-overdue modification to the current process. Furthermore, we agree that a more dramatic reform of the process would, at this point, be premature.

We do not want to make any move that will threaten the judges' ability to make independent and impartial decisions, that will make the process vulnerable to political manipulation, or that will go down the road of a U.S.-style political circus, as some would want us to.

However, we feel that it is important to underline that we must carefully monitor the functioning of the system we are currently putting in place in order to make sure that it is achieving the stated goal of making the appointment process more open, democratic, and comprehensible to Canadians. If this is not the case, then we must re-examine the process without delay and proceed by incremental steps towards a still more open, transparent and accessible method of appointment.

For this reason, we insist that the long-term, “Advisory Committee” process should be reviewed by the Justice Committee after it has been used once in the appointment of a Supreme Court Justice. At this point, the Committee can evaluate the functioning of the process and make any necessary modifications, or else design a new process altogether that will better reflect the democratic values that we are seeking to protect.

Ottawa, May 5, 2004
Lorne Nystrom M.P.
NDP Justice critic

MINUTES OF PROCEEDINGS

Tuesday, May 4, 2004
(*Meeting No. 16*)

The Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness met *in camera* at 3:58 p.m. this day, in Room 308 West Block, the Chair, Derek Lee, presiding.

Members of the Committee present: Hon. Sue Barnes, Hon. Yvon Charbonneau, Hon. Paul DeVillers, Hon. Stéphane Dion, Derek Lee, Hon. Lawrence MacAulay, John Maloney, Richard Marceau, Hon. Lorne Nystrom and Paddy Torsney.

In attendance: *Library of Parliament*: Philip Rosen, Principal Analyst; Robin MacKay, Analyst.

Pursuant to Standing Order 108(2), the Committee resumed its study of the process by which judges are appointed to the Supreme Court of Canada.

It was agreed, — That the Committee authorize the printing of dissenting and/or supplementary opinions as appendices to this report, provided that they are not more than seven (7) pages in length and received by the Clerk by electronic mail, in both official languages, no later than 6:00 p.m. on Wednesday, May 5, 2004.

It was agreed, — That the draft report, as amended, be adopted.

It was agreed, — That the report be entitled: Improving the Supreme Court of Canada Appointments Process.

It was agreed, — That the Chair, Clerk and Analysts be authorized to make such grammatical and editorial changes as may be necessary without changing the substance of the report.

It was agreed, — That the Committee print 550 copies of the Report in a bilingual format.

It was agreed, — That the Chair or a designate present the First Report to the House.

It was agreed, — That the Committee commence consideration of Bill C-19 next week.

At 5:19 p.m., the Committee adjourned to the call of the Chair.

Diane Diotte
Clerk of the Committee