



HOUSE OF COMMONS
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CANADA

THE NEW PROCESS FOR JUDICIAL APPOINTMENTS TO THE SUPREME COURT OF CANADA

Report of the Standing Committee on Justice and Human Rights

**Anthony Housefather
Chair**

FEBRUARY 2017

42nd PARLIAMENT, 1st SESSION

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THE STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS

has the honour to present its

NINTH REPORT

Pursuant to its mandate under Standing Order 108(2), the Committee has studied the New Process for the Nomination of Supreme Court Justices and has agreed to report the following:

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THE NEW PROCESS FOR JUDICIAL APPOINTMENTS TO THE SUPREME COURT OF CANADA

INTRODUCTION

On 28 October 2016, Mr. Justice Malcolm Rowe was appointed to the Supreme Court of Canada to fill the vacancy left by the retirement of the Honourable Justice Thomas Cromwell on 1 September 2016. His appointment was the culmination of a new selection process for appointing Supreme Court justices announced by the Prime Minister on 2 August 2016. This new process “was established to promote greater openness, transparency, and accountability.”¹

For the first time, any qualified Canadian lawyer or judge was able to apply for appointment to the highest court of the country. These applications had to be submitted before 24 August 2016 to the Office of the Commissioner for Federal Judicial Affairs Canada,² which acted as the secretariat for the process. An independent advisory board for Supreme Court of Canada Judicial Appointments (the “Advisory Board”) was created to assess the applications and provide the Prime Minister with a shortlist of three to five individuals for consideration.

On 11 August 2016, the Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, appeared before the House of Commons Standing Committee on Justice and Human Rights (the “Committee”) to outline the new process and to hear the Committee’s views on this new approach. During that meeting, she also informed the Committee that she would come back with the Chair of the Advisory Board, the Right Honourable Kim Campbell, when the nominee had been selected by the Prime Minister to explain how the new process unfolded and the reasons why the nominee was chosen. That follow-up meeting was held on 24 October 2016, one week after the nominee was announced by the Prime Minister. During the meeting, the Committee was invited by the Justice Minister to submit any recommendations that it thought would improve the new selection process of Supreme Court justices.

This report responds to that invitation by presenting the Committee’s observations and recommendations with regard to the procedures that should be used to fill vacancies to the Supreme Court of Canada as they arise. These procedures are matters of great importance for this critical institution in Canadian society. As former Minister of Justice Irwin Cotler has written: “the integrity and fairness of the [appointments] process is not

1 Justin Trudeau, Prime Minister of Canada, “[Prime Minister announces nomination of Mr. Justice Malcolm Rowe to the Supreme Court of Canada](#),” News Release, 17 October 2016.

2 The Office of the Commissioner for Federal Judicial Affairs Canada “was established in 1978 to safeguard the independence of the judiciary and to provide federally appointed judges with administrative services independent of the Department of Justice.” For additional information, see the [Office of the Commissioner for Federal Judicial Affairs Canada](#) Website.

unrelated to the excellence and independence of the judiciary.”³ The intention of our recommendations is to refine the process in order to preserve confidence in the highest court of the land, while maintaining the exceptional quality of appointments that have been made so far. Any criticisms in this report are directed at the process itself and are in no way directed at the justices appointed by that process. Overall, the Committee concurs with Minister Wilson-Raybould that “[e]nhancing the credibility of the appointment process will bolster Canadians' confidence in this fundamental institution.”⁴

HISTORY OF THE SUPREME COURT NOMINATIONS PROCESS

From the creation of the Supreme Court of Canada in 1875 until 2004, no part of the process of appointing justices to that court was ever public. It was generally understood that the Minister of Justice would consult with various members of the legal community when an appointment was to be made, but this was all informal and confidential.⁵

This state of affairs began to change in 2003 with the unanimous adoption of a motion in the House of Commons calling for a study on the manner in which judges were appointed to courts of appeal and the Supreme Court of Canada.⁶ The predecessor of this Committee, the Standing Committee on Justice and Human Rights, Public Safety and Emergency Preparedness, then embarked on a review of the appointments processes. In 2004, at the request of Prime Minister Paul Martin, the Committee held additional hearings in order to recommend a more transparent and accountable process for judicial appointments to the Supreme Court.

In its report, tabled in the House of Commons in May 2004, the Committee noted that while excellent appointments had been made to the Supreme Court and that “Canada’s highest court is widely respected in Canada and around the world,” the process by which justices were appointed “is largely unknown and lacks credibility in the eyes of many.”⁷ The appearance of the Minister of Justice before the Committee in March 2004 to set out the professional and personal qualities that were sought in candidates for the Supreme Court and to discuss the consultations that were undertaken was part of the government effort at the time to shed light on the appointments process.

3 Irwin Cotler, “[The Supreme Court Appointment Process: Chronology, Context and Reform](#),” *University of New Brunswick Law Journal*, Volume 58 (2007), 131-146, p. 131.

4 House of Commons, Standing Committee on Justice and Human Rights (JUST), [Evidence](#), 1st Session, 42nd Parliament, 11 August 2016 (Hon. Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada).

5 See Peter W. Hogg, “[Appointment of Justice Marshall Rothstein to the Supreme Court of Canada](#),” *Osgoode Hall Law Journal*, Volume 44, Number 3, (Fall 2006), 527-538, p. 528; Ian Peach, “[Legitimacy on Trial: A Process for Appointing Justices to the Supreme Court of Canada](#)”, the Saskatchewan Institute of Public Policy, Public Policy Paper 30, February 2005.

6 The wording of motion M-288 was “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.” [Journals of the House of Commons, 1 October 2003](#), p. 1077.

7 Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, [Improving the Supreme Court of Canada Appointments Process](#), May 2004, p. 1.

While there is no formal legal role for Parliament in the appointment of Supreme Court justices under either the *Constitution Act, 1867* or the *Supreme Court Act*, the Committee's May 2004 report advocated for a role for parliamentarians in the appointments process. The Committee of the day argued that members of Parliament not only inject an element of democratic accountability to the process, but as law-makers they work in collaboration with the judiciary to develop legal policy. The premise that parliamentarians have an important role to play in the appointments process is one shared by the current members of the Committee.

In 2004, the Committee recommended that an advisory committee be established to compile and assess lists of candidates for vacancies on the Supreme Court. It further recommended 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. Deliberating in private to encourage the widest possible spectrum of candidates and open discussion, the Advisory Committee would provide the Minister of Justice with a confidential shortlist of candidates. Finally, once an appointment had been made, the Committee recommended that the Chair of the Advisory Committee and/or the Minister of Justice appear before the Committee in a public session to explain the process by which the appointee was selected and the reasons why that person was selected. As shall be seen, many of these recommendations have found their way into the new appointments process.

Since the Committee's May 2004 report, there have been numerous changes in the Supreme Court appointments process. In the appointments of justices Rothstein (2006), Karakatsanis and Moldaver (2011), Wagner (2012), and Nadon (2013), an advisory committee helped create a shortlist of candidates. All of these nominees also appeared before an ad hoc committee. This process was not followed in the appointments of justices Cromwell (2008), Gascon and Côté (2014), and Brown (2015). The composition of the Advisory Committee and the ad hoc committee has also varied, although members of Parliament have always had representation on them.

THE NEW PROCESS FOR SELECTING SUPREME COURT JUSTICES

The Committee considers that the Supreme Court appointments process needs to be clear, open and easily understood in order to strengthen Canadians' confidence in Canada's highest court. It was, therefore, pleased with the decision of the government to make publicly available the various steps involved in the new appointments process, information about the statutory requirements and the criteria used to assess potential candidates, the questionnaire to be filled out by applicants as well as the Terms of Reference of the Advisory Board and information about its members. The Committee further welcomes the decision to publish the answers to the questionnaire submitted by the nominee, Mr. Justice Rowe, to allow any person interested to get to know the nominee and his qualifications.

The Committee also appreciated the decision of the Minister of Justice to appear twice before the Committee in public sessions – first to explain the new process and then, accompanied by the Chair of the Advisory Board, to provide details about how the process

unfolded and why Mr. Justice Rowe was selected. The second meeting was helpful in that the Minister and the Chair provided the justifications for selecting Mr. Rowe.

Making all this information available to the public⁸ not only helps avoid the perception that appointments may be based on improper criteria, it also ensures that the process of appointing justices to the Supreme Court can be easily understood by Canadians.

A. Role of the Independent Advisory Board

At the heart of the new process is the creation of an independent advisory board with the mandate to provide to the Prime Minister non-binding, merit-based recommendations on the candidates who should be placed on a shortlist for an appointment to the Supreme Court.

The candidates on the shortlist needed to be qualified, functionally bilingual and reflect a diversity of backgrounds and experiences.⁹ As described in the Qualifications and Assessment Criteria made public:

The criteria for appointment to the Court must reflect both the needs of any court of final appeal, and the particular circumstances, history and context of Canadian society and its legal system. The criteria must facilitate the Court's ability to: resolve disputes between and among all manner of parties, communicate its decisions effectively to the Canadian public, uphold the constitution, and protect the rule of law.

Criteria for assessment may be grouped along two axes, one individual and the other institutional. Individual criteria relate to the skills, experience and qualities of candidates themselves. Particulars of legal training, of non-legal professional experience and of community involvement will vary greatly from individual to individual, but must be assessed to arrive at an evaluation of the candidate's potential for excellence in the judicial function. There are also numerous personal qualities that will bear on whether a candidate has the appropriate judicial temperament. Institutional criteria will overlap to some degree with individual ones. But as the Court's composition shifts over time, particular needs may emerge as more necessary to enable the Court to perform its general and final appellate function in all legal areas.

Part of the selection process will involve determining the ways and degree to which particular candidates embody the skills, experience and qualities that best meet the Court's needs at a particular point in time.¹⁰

8 On 2 August 2016, the Office of the Commissioner for Federal Judicial Affairs Canada launched a [website](#) that provided information about the new process, including instructions on how to apply, qualifications and assessment criteria, frequently asked questions and the Terms of Reference of the Advisory Board.

9 Government of Canada, [Qualifications and Assessment Criteria](#), 2 August 2016.

10 Ibid.

Pursuant to its terms of reference, the Advisory Board consisted of four members nominated by independent professional organizations, namely the Canadian Bar Association, the Federation of Law Societies of Canada, the Canadian Judicial Council, and the Council of Canadian Law Deans and three members nominated by the Minister of Justice, at least two of whom were not advocates or barristers in a province or territory. In addition to the chairperson, the Advisory Board included a former judge, three members of the legal profession and two non-lawyers.

The Advisory Board was tasked with proactively seeking out applications from interested candidates and reviewing candidates who applied through the Office of the Commissioner for Federal Judicial Affairs Canada.

The Advisory Board sent materials to more than 20 organizations in order to encourage qualified individuals to apply.¹¹ When organizations recommended candidates, the Advisory Board sent materials to those individuals saying that their name had been put forward and strongly encouraged them to apply. Anyone interested had from the announcement of the new process on August 2 until August 24 to submit their application.

When she appeared before this committee, the Right Honourable Kim Campbell noted that the Advisory Board reviewed a total of 31 applications. After an initial assessment, it conducted 10 interviews and provided the Prime Minister with a shortlist of five individuals on 23 September 2016. The Advisory Board was required to have at least two individuals from Atlantic Canada on the shortlist.

As noted in the report of the Advisory Board, candidates were not prioritized; nevertheless, the report submitted to the Prime Minister “included a short synopsis detailing the merits of each recommended candidate, as well as the result of their individual assessment on functional bilingualism.”¹²

Members of the Advisory Board for the nomination of Mr. Justice Rowe:

[The Right Honourable Kim Campbell](#) –

Chairperson – former Prime Minister of Canada and Canadian Consul General, and currently the Founding Principal of the Peter Lougheed Leadership College at the University of Alberta;

[Camille Cameron](#) – Member – Dean of the Schulich School of Law at Dalhousie University, and Chair of the Canadian Council of Law Deans;

[Jeff Hirsch](#) – Member – President of the Federation of Law Societies of Canada, and partner with a Winnipeg law firm;

[Stephen Kakfwi](#) – Member – former Premier of the Northwest Territories and former President of the Dene Nation, and currently working to improve the recognition and realities of Aboriginal peoples within Canada;

[Lili-Anna Pereša](#) – Member – President and Executive Director of Centraide of Greater Montréal;

[Richard Jamieson Scott](#) – Member – former Chief Justice of the Manitoba Court of Appeal, and current counsel, arbitrator and mediator in a Winnipeg law firm; and

[Susan Urse](#) – Member – currently a senior partner with a Toronto firm, and Chair of the Canadian component of the African Legal Research Team which provides legal research support to Envisioning Global LGBT Rights.

Source: Appendix A - [Report of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments](#)

11 The complete list of organizations consulted can be found in the [Report of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments](#), 25 November 2016 (made public on 16 December 2016), p. 6.

12 *Ibid.*, p. 9.

The Committee considers that the Advisory Board was a key element in the success of the new appointments process. What made it a success was the fact that members of the Board were qualified and all of them were non-partisan appointees. The fact that a former Prime Minister was appointed as Chair of the Advisory Board gave the process heightened credibility. Another important element of its success was representation from a broad cross-section of the legal profession, as well as non-legal members. The Committee appreciated the composition of the Advisory Board, which encompassed nominations from the government and from outside organizations.

In light of these considerations:

RECOMMENDATION 1

The Committee recommends that the creation of an independent advisory board be made a permanent element of the process for all future appointments to the Supreme Court of Canada. It supports the manner in which the independent advisory board was composed with the majority of its members being appointed by non-governmental legal organizations and including non-lawyer members.

RECOMMENDATION 2

The Committee recommends that the government and the organizations that will be choosing members for future advisory boards take into account the diversity of Canada in making their selections.

B. Consultations

With respect to consultations, Ms. Campbell noted that the Advisory Board met with the Chief Justice of the Supreme Court in August as well as two former Supreme Court justices. Questions discussed were what it means to serve on the Supreme Court, the qualities that help someone to succeed on that Court and the current needs of the Court.¹³ Moreover, the Minister of Justice conducted her own survey:

In terms of the consultations, I consulted with the Chief Justice of Canada, the applicable provincial and territorial attorneys general, members of this committee and the Senate committee on legal and constitutional affairs, the opposition justice critics, and members of Cabinet. I then presented the results of these consultations to the Prime Minister, along with my recommendation.¹⁴

The Minister of Justice discussed the shortlist of candidates with only three members of our committee – Mr. Housefather, Mr. Nicholson, and Mr. Rankin – in their roles as Committee Chair and Opposition Justice Critics respectively. These members

13 JUST, [Evidence](#), 1st Session, 42nd Parliament, 24 October 2016 (Right Hon. Kim Campbell, Chairperson, Independent Advisory Board for Supreme Court of Canada Judicial Appointments).

14 JUST, [Evidence](#), 1st Session, 42nd Parliament, 24 October 2016 (Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada).

signed a non-disclosure agreement prior to being consulted. They were then given a brief period of time to review the shortlist of candidates and give their opinions.

The Committee is of the view that all members of the Committee should have the opportunity to be consulted. Therefore:

RECOMMENDATION 3

The Committee recommends that all members of the House of Commons Standing Committee on Justice and Human Rights, who agree to sign a non-disclosure agreement, be consulted by the Minister of Justice on the shortlist of candidates for appointment to the Supreme Court of Canada. This will allow members of Parliament to fulfil their roles as democratic representatives and law-makers. The Committee also recommends that all the material in the possession of the Advisory Board concerning the candidates be shared with members after signing the non-disclosure agreement and that sufficient time be allocated for members to do their research on the candidates once they are in receipt of such materials (at least two working days), so that they will be in a position to offer meaningful feedback to the Minister of Justice before he or she forwards the shortlist to the Prime Minister.

C. Committee Meeting With The Nominee

On 25 October 2016, members of our committee and of the Standing Senate Committee on Legal and Constitutional Affairs, as well as members from the Bloc Québécois and the Green Party, had the opportunity to take part in a question-and-answer session with the nominee, Justice Malcolm Rowe. This meeting was held at the University of Ottawa and was moderated by a law professor selected by the Prime Minister.

While the Committee appreciated that members of the Committee and others received sufficient notice to prepare questions for the nominee, Mr. Rowe, there were a number of difficulties with this event. Firstly, the time allocated for it was not sufficient to allow all members of the Committee to engage with the nominee. Moreover, when members did have a chance to ask questions, the time was limited to five minutes per questioner. This was often too short a time to allow for a meaningful discussion. A further difficulty with this event was that it was not an official hearing of a committee of Parliament. As such, parliamentary privilege did not apply to protect both the members posing questions and the nominee answering them.

There is a great deal of value that can come from inviting a nominee to appear before a parliamentary committee in a public session. Aside from the nod to transparency that such a hearing symbolizes, there is a public education benefit. Members of the public watching such a hearing will learn more about the nominee and about the workings of the Supreme Court, one of the lynchpins of Canada's democracy. Appearance before a committee of Parliament also serves as a forum for parliamentary scrutiny.

The Committee is of the view that there is little danger that such a hearing will constitute an infringement by the legislature upon the independence of the judiciary. As Peter Hogg wrote following the process to appoint Justice Rothstein in 2006: “the hearing established that Canadian parliamentarians can conduct a civil hearing that poses no danger of politicizing the judiciary or of embarrassing the nominee.”¹⁵

In light of these considerations:

RECOMMENDATION 4

The Committee recommends that all future nominees to the Supreme Court of Canada appear before the House of Commons Standing Committee on Justice and Human Rights at a televised meeting to answer the questions of its members. The Committee has no difficulty inviting additional parliamentarians such as one representative of each non-recognized political party or members of the Standing Senate Committee on Legal and Constitutional Affairs to question the nominee at a committee meeting, provided that sufficient time is then allocated to the nominee’s appearance before the Committee to allow for meaningful exchanges between the nominee and all concerned. This committee hearing should be one in which parliamentary privilege applies. The Committee further recommends that parliamentarians be given at least seven days’ notice to prepare questions for all future nominees. For greater certainty, the Committee wishes to confirm that its meeting would be for the purpose of allowing parliamentarians and Canadians at large to become better acquainted with the nominee and that the Committee members would not vote on the nomination.

D. Respecting the Regional Representation Convention

In terms of regional representation, section 6 of the *Supreme Court Act* requires that at least three of the justices of the Supreme Court come from Quebec. Moreover, by convention, three justices are appointed from Ontario, two from the West and one from Atlantic Canada. Under the new process, while the Terms of Reference for the Advisory Board asked the Board to factor in regional representation in its deliberations, the Government of Canada decided to allow any qualified Canadian lawyer or judge to apply regardless of where they were from even though retiring Justice Cromwell was from Atlantic Canada.

Although the Committee recognizes that the objective of this departure from convention was to ensure that the composition of the Supreme Court reflects the diversity of Canadians and considers diversity on the Bench an important issue, it does not think that this diversity should occur at the expense of regional representation on the Bench.

15 Hogg, p. 531.

With a country as big and diverse as Canada, regional representation is an essential aspect of the Supreme Court.

In light of these considerations:

RECOMMENDATION 5

The Committee recommends that the qualifications and assessment criteria for appointment to the Supreme Court of Canada be amended to include a statement regarding the importance of maintaining representation from each region of Canada in historically proportionate numbers.

E. Timeframe for Future Appointments Processes

As noted by the Advisory Board in its report¹⁶, the time to submit an application in the process that led to the nomination of Justice Rowe was tight. Although a very distinguished individual was appointed as a result of this process, the Committee believes that, barring unforeseen circumstances, a period of at least 90 days should be allocated for potential nominees to submit an application. This minimum period of time would allow applicants sufficient time to fill out a lengthy and complex questionnaire and provide all the information requested. It would also allow sufficient time for the Advisory Board to seek out applications from across the country and reach out to as many groups as possible, including, in particular, groups that represent minorities. The Committee agrees with the Advisory Board that outreach activities are vital “to target a broad spectrum of candidates from various backgrounds.”¹⁷ Outreach activities would also ensure that candidates outside of the customary circles, such as judges of courts of appeal, are considered. Barring unforeseen events, the next anticipated appointments process will be in 2018 when Chief Justice McLachlin retires.

In light of these considerations:

RECOMMENDATION 6

The Committee recommends that a period of at least 90 days be allocated to potential nominees to submit an application for a position on the Supreme Court of Canada and for the Advisory Board to seek out qualified candidates, unless exceptional circumstances mandate faster action.

16 [*Report of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments*](#), 25 November 2016 (made public on 16 December 2016).

17 Ibid.

F. Meeting with the Chair of the Advisory Board and the Minister

Finally, as noted earlier, the Committee appreciated the decision of the Minister of Justice to appear with the Chair of the Advisory Board to provide details about how the process unfolded and why Mr. Justice Rowe was selected. Such meetings are important for parliamentarians and the public in allowing them to gain a greater understanding of both the nominee and the Supreme Court of Canada.

Therefore:

RECOMMENDATION 7

The Committee recommends that for all future nominations the Chair of the Advisory Board and the Minister of Justice appear before the House of Commons Standing Committee on Justice and Human Rights to provide details about how the appointments process unfolded and why the particular nominee was selected.

LIST OF RECOMMENDATIONS

RECOMMENDATION 1

The Committee recommends that the creation of an independent advisory board be made a permanent element of the process for all future appointments to the Supreme Court of Canada. It supports the manner in which the independent advisory board was composed with the majority of its members being appointed by non-governmental legal organizations and including non-lawyer members..... 6

RECOMMENDATION 2

The Committee recommends that the government and the organizations that will be choosing members for future advisory boards take into account the diversity of Canada in making their selections..... 6

RECOMMENDATION 3

The Committee recommends that all members of the House of Commons Standing Committee on Justice and Human Rights, who agree to sign a non-disclosure agreement, be consulted by the Minister of Justice on the shortlist of candidates for appointment to the Supreme Court of Canada. This will allow members of Parliament to fulfil their roles as democratic representatives and law-makers. The Committee also recommends that all the material in the possession of the Advisory Board concerning the candidates be shared with members after signing the non-disclosure agreement and that sufficient time be allocated for members to do their research on the candidates once they are in receipt of such materials (at least two working days), so that they will be in a position to offer meaningful feedback to the Minister of Justice before he or she forwards the shortlist to the Prime Minister..... 7

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The Committee recommends that for all future nominations the Chair of the Advisory Board and the Minister of Justice appear before the House of Commons Standing Committee on Justice and Human Rights to provide details about how the appointments process unfolded and why the particular nominee was selected..... 10

APPENDIX A LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
Department of Justice Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada	2016/08/11	23
Department of Justice Jody Wilson-Raybould, Minister of Justice	2016/10/24	30
Independent Advisory Board for Supreme Court of Canada Judicial Appointments Kim Campbell, Chairperson		

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* ([Meetings Nos. 23, 30, 32, 41 and 45](#)) is tabled.

Respectfully submitted,

Anthony Housefather
Chair

