THE FALSE DICHOTOMY BETWEEN REGIONAL REPRESENTATION AND OTHER FORMS OF DIVERSITY: REIMAGINING A REPRESENTATIVE COURT

A. Wayne MacKay, C.M., Q.C.

The 2016 Ivan C. Rand Memorial Lecture *was given in the immediate wake of the appointment of Justice Malcolm Rowe of Newfoundland and Labrador to the Supreme Court of Canada which allayed many fears concerning the elimination of Atlantic Region representation at the Supreme Court of Canada. Professor Peter H. Russell spoke of the inception of regional representation and the transient reconstruction of the appointment of Supreme Court justices which, in the wake of the new Trudeau approach, inspires further questions of what exactly a Supreme Court justice should be and where regional repre-sentation fits amidst the structure of the judiciary whilst also working towards diversity.*

La Ivan C. Rand Memorial Lecture 2016 *fut prononcée immédiatement après que le Juge Malcolm Rowe de Terre-Neuve-et-Labrador fut nommé à la Cour suprême du Canada. Cette nomination élimina plusieurs inquiétudes entourant la représen-tation de l'Atlantique à la Cour suprême. Le Professeur Peter H. Russell a discuté du rapport entre la représentation régionale et la reconstruction du processus de nomination des juges de la Cour suprême du Premier Ministre Trudeau et les questions soulevées par les changements et les circonstances entourant nos concep-tions du juge idéal pour siéger à la Cour suprême et la place de la représentation régionale au sein de la structure judiciaire tout en travaillant vers la diversité.*

The appointment of Supreme Court Justice Rowe was significant in a multitude of ways. The Ivan C. Rand Memorial Lecture of 2016, delivered by Professor Peter H. Russell, highlighted many procedural changes that have increased transparency in the process of appointing Supreme Court justices.[1] The Trudeau government has made important additions to the process. This was especially apparent in the implementation of the Advisory Board for Supreme Court Appointments ("the Advisory Board"), a nominating body officially dedicated to the processing of

* Professor of Law, Schulich School of Law at Dalhousie University and Yogis and Keddy Chair in Human Rights Law. Dr. MacKay gave the 2014 Rand Lecture at UNB, entitled "Law as an Ally or Enemy in the War on Cyberbullying: Exploring the Contested Terrain of Privacy and Other Legal Concepts in the Age of Technology and Social Media" (2015) 66 UNBLJ 3. The author wishes to acknowledge the excellent research and drafting assistance of Nika Booker-Grandea and Kristen Stallard, third year students at the Schulich School of Law.

[1] Peter H Russell, "Selecting Supreme Court Justices: Is Trudeau's Sunny Way a Better Way?" (2017) 68 UNBLJ 3.

nominations, as well as actively seeking nominees. The formalization of a recognizable body that has a mandate to find candidates is an improvement from the previous process, which involved components such as publicly-broadcasted meetings with the federal legislature and already chosen candidates. It was, at the very least, educational. However, more enriching opportunities have developed and the mystery surrounding the emergence of these nominees has diminished.

The selection process that resulted in the appointment of Justice Rowe evoked a newfound uncertainty within Canadian society about regional representation in the Supreme Court of Canada. There was a concern that the Atlantic provinces would have no representation. It was known that there were Atlantic Region nominees but there was a sense of anxiety that this representation would be removed to focus on other aspects of diversity. The removal of this representation in the Supreme Court would have been very contentious as the Atlantic region has its own challenges and familiarity with those challenges is important. Those who live in the Atlantic region may otherwise lose confidence that their interests are being considered at all.

It is fortunate that Prime Minister Trudeau, after some public uncertainty, appointed a Supreme Court justice from the Atlantic region. It is especially fortunate that Justice Rowe is well-versed in socioeconomic issues and the specific difficulties faced by Aboriginal peoples in the Atlantic Region. In his application, Justice Rowe conveyed two interesting considerations.[2] His application described his experience of watching Newfoundland and Labrador become a more unified part of Canada and more prosperous – a stark contrast to the poor and fractured Newfoundland and Labrador he had seen in his earlier life. He also mentioned that through his previous experience he had become familiar with the challenges faced by the First Nations and Inuit in Labrador. These are two challenges that are unique to Newfoundland and Labrador and would certainly be an asset in the Supreme Court of Canada.

There was a strong movement to bring Aboriginal representation to the Supreme Court by appointing an Aboriginal Justice. Professor Russell stated that: "It would be very difficult to find a well-qualified, bilingual, Aboriginal jurist in Atlantic Canada."[3] Whether or not that is the case, it still brings up a significant issue: not necessarily that of being unable to find an individual with these qualities, but rather that our country needs these three qualities represented and the best compromise would be to find them in one individual. It is problematic that one must be chosen over the other if these ideal elements cannot be found in a single individual. It may seem unlikely to find a qualified candidate that can champion both regional representation and diversity existing in the Atlantic region but that difficulty makes finding a qualified candidate from the region more pressing. Although it was stated by Professor Russell that an individual who meets the stated criteria would be

[2] John Paul Tasker, "Trudeau nominates Newfoundlander Malcolm Rowe to Supreme Court", CBC (17 October 2016), online: <www.cbc.ca/news/politics/trudeau-supreme-court-newfoundlander-1.3808384>.

[3] Russell, *supra* note 1 at 11.

hard to find, it is necessary to at least attempt to seek those individuals and even more important to consider what they represent.

A loss of representation in the Atlantic region in the wake of an abandoned convention because of changing needs for proper representation would also bring up concerns about diversity. The region would additionally face an abandonment of the representation of the even more underrepresented minorities within the region – those who were considered unlikely to be found. The mutual exclusivity of diversity and regional representation is deleterious. To search solely for one or the other fails to address intersectionality. Regional representation is not valuable for the physical or geographical components; it is valuable to bring insight that represents the reality of Canadians.

A lingering question is how long it might take before the Supreme Court sees justices who are familiar with Aboriginal issues and experiences that also have the lived experience. It also brings up the question of whether anyone paid heed to the existence of Aboriginal candidates in the Atlantic region at all. Professor Naiomi Metallic is an exceptional example and a strong candidate for the future. Though Professor Metallic is two years short of meeting the criteria, she is not alone. There are a few impressive individuals who can challenge this perceived dichotomy between regional representation and diversity. Achieving this is especially important given the ever-changing role of the Supreme Court of Canada.

The Supreme Court of Canada continues to be an increasingly powerful institution. Many Canadians are familiar with the recent case of *Carter v Canada (AG)*[4] on physician-assisted death. This was a policy decision affecting Canadians with no less weight than if the legislature had passed it. The difference is that the decision-makers constructed this policy through the administration of justice as opposed to adherence to political convictions. Another distinction is that Supreme Court justices hold power within the governance framework longer than the person who appoints them – that person being the Prime Minister. The leader of the country is ultimately responsible to choose these jurists, who may sit until the age of 75, and, in that sense, that legacy will outlast the Prime Minister's governance. If there is an issue with an appointment, it still has the potential of surviving numerous governments.

If the tactics of the federal government are clearer but the system stays the same, then there is still a barrier to diversity that is very difficult to address. A concrete understanding of what is envisioned in terms of diversity in the Supreme Court and how to best achieve it must be decided. Jennifer Nedelsky's notion of the "enlargement of the mind" lends itself very well to this challenge. An open mind is a mind that can reflect all aspects of society. Nedelsky notes: "To understand judicial impartiality we must ask who judges are, and with whom they imagine themselves to

[4] *Carter v Canada (AG)*, 2015 SCC 5, [2015] 1 SCR 331.

be in conversation as they make their judgments. Whom do they imagine persuading and on whom do they make claims of agreement?"[5]

With Nedelsky's words in mind, the idea becomes that diversity on the bench helps Canadians not only through a representation of their needs, but also by allowing a sense of cohesion to form from different experiences and perspectives within the judiciary. The selection process becomes even more significant because of the potential reframed sense of accountability amongst the justices that preside. With appropriate representation, those who feel represented have at least some sense of security that their general experiences or the trends that surround them will be considered amidst difficult decisions. These appointed justices signify more than one individual providing representation of different pockets of the Canadian population. They also passively inform and shape the cognitive frameworks of other jurists and give rise to an open-mindedness that expands the accommodation of Canadian interests.

Canadians who come before the justices of the Supreme Court are vulnerable and subject to the thought processes of these highly-esteemed decision-makers. These decision-makers may have very different lived experiences. Following Nedelsky's reasoning, the decision, based on the context provided, is affected by a collective understanding amongst the presiding justices. This supports impartiality by ensuring different perspectives are continuously considered. With the power bestowed upon the Supreme Court of Canada, there is a significant responsibility to the Canadian people. If the Supreme Court is the last chance for justice, then there should be the legitimate expectation that this Court will be the closest approximation to a Canadian's best interest balanced against the larger public interest.

The candidates for appointment to the Supreme Court that come to the fore are often lauded for their achievements. They are presented to the Canadian public with the confidence of the government behind them. However, one might ask how large the pool was to begin with and under what circumstances these individuals had been noticed. The Trudeau government has made significant improvements in making these processes known, as was described in Professor Russell's lecture. The appearance of a nominating body, the Advisory Board, has at least removed some concerns about the private nature of the search for candidates that preceded this change.

If it is accepted that the impartiality of Supreme Court justices is an asset rather than a compromise of the standard of neutrality, which has been challenged in cases such as *R v S (RD)*[6] and *Arsenault-Cameron v PEI*,[7] then the qualifications should be seen in light of that. The current process, as modified by the Trudeau

[5] Jennifer Nedelsky, "Embodied Diversity and the Challenges to Law" (1997) 42 McGill LJ 91 at 107.

[6] *R v S (RD)*, [1997] 3 SCR 484, 161 NSR (2d) 241 [*RDS*].

[7] *Arsenault-Cameron v Prince Edward Island*, [2000] 1 SCR 3, 2000 SCC 1 [*Arsenault-Cameron*].

government, emphasizes bilingualism, has acknowledged the necessity for an Aboriginal jurist to be appointed to the Supreme Court and has left regional representation as a question mark. Justice Rowe may be representative of the Atlantic provinces but it remains to be seen whether the next vacancy will follow suit with regional representation, as it has no legal foundation as a convention in the traditional view[8] and there are signs of a shifting landscape.

There have been significant departures from the traditional view that could change the status of regional representation within the Supreme Court of Canada. The constitutional principle of federalism, as explored *Reference re Secession of Quebec*,[9] is worthy of attention. Another consideration is the legacy of the *Reference re Supreme Court Act, ss. 5 and 6*[10] concerning Marc Nadon, as well as the *Reference re Senate Reform*[11] which set forth the necessity of examining historical context and purpose when interpreting the *Constitution Act, 1982*.[12]

Additionally, interpretation of section 41(d) of the *Constitution Act* could determine that the selection process is a part of "the composition of the Supreme Court of Canada".[13] There are available approaches to change the status of the regional representation convention and move it away from being politically vulnerable. Currently, it remains contested and unclear. There are no set rules or regulations for the appointment process of justices of the Supreme Court, except that the Prime Minister is the ultimate authority on appointments. There is also the statutory requirement that there be three justices from Quebec.[14]

Regional representation has been a consistent practice; however there is still an uncertainty on intersectionality. The mutual exclusivity of diversity and regional representation ignores the aspects of diversity that are encompassed within regional representation. For example, Justice Rowe spoke of experiences that expanded his insight into the challenges of poverty. Those surrounding the lives and experiences of those of lower socioeconomic status in the Atlantic region specifically. According to Statistics Canada,[15] surveys in the year 2014 indicate that an average of 15.3 per cent of persons in the Atlantic provinces earned below low income indicators, after tax. This is a statistic based on households across the four Atlantic provinces. This

---

[8] *Reference Re Resolution to amend the Constitution*, [1981] 1 SCR 753, 34 Nfld & PEIR 1.

[9] *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385.

[10] *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433.

[11] *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704.

[12] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[13] *Ibid* at s 41(d).

[14] *Supreme Court Act* RSC 1985, c 5-26, s 6.

[15] Statistics Canada, "Low income statistics by economic family type, Canada, provinces and selected census metropolitan areas (CMAs)", CANSIM Table 206-0042 (Ottawa: Statistics Canada, 2014), online: <www5.statcan.gc.ca/cansim/a21#F8>.

combined average is higher than those of the non-Atlantic provinces. This statistic was rivalled only by Manitoba, which sat at 15 per cent. If regional representation can truly allow for these specific regional difficulties to be considered, then diversity is achieved on some level.[16]

If diversity is a necessary consideration to the point of excluding regional representation, this raises the issue of what is most representative of the Canadian public. Achieving representation is a common goal. The importance of how the Canadian population is represented within the Supreme Court of Canada deserves a frank discussion on what is absent from the appointment process. There was a very real potential that the Supreme Court of Canada appointments process would turn the page on regional representation and seek a different way of ensuring the best-qualified and most representative judiciary. However, the concern of false dichotomies and of allocating more value towards one approach over another is something worthy of reflection.

A jurist that can relate reasonably to groups of people through their own personal experiences is a positive addition to any court. However, the question of what instills the most faith within the Canadian population arises. It is the Canadian people who give rise to the validity and authority of the courts. Confidence is essential. Justice Sopinka once drew a very relevant and useful analogy between judges and banks: "Our justice system is in some respects like the banking system. It only works if people have confidence in it …".[17] If there is a loss of confidence in a bank, the system ceases to function. In the case of the judiciary, when confidence is lost, its standing as a reputable institution in society is challenged.

Reimagining the judicial appointment framework to align it with the needs of the Canadian population is a significant step towards maintaining a relationship of confidence. Diversity has been a significant and pressing consideration; however the development of an appropriate framework leads to questions of implementation. If Canada were to try and have greater representation of its population within its highest Court, then is it time we turned to the lived experience as opposed to the experience of exposure and understanding? There is a case to be made for the power of relatability and the value of shared experience. Is an individual more likely to cast their lot with someone to whom they can relate or someone who can relate to them, or both? None of this is to suggest that overall merit should be eclipsed as the main qualification but only that the above is one component of this.

Having a legal education and proficiency in the application of legal skills remains at the forefront for becoming a justice of the Supreme Court. Professor Russell does note that there is diversity within the current Supreme Court judiciary.

---

[16] I would like to acknowledge that my fellow commentator, Professor John Whyte, raised this issue quite eloquently.

[17] Graham Fraser, "Ethnic roots won't sway him, Sopinka says at swearing-in", *The Globe and Mail* (24 June 1988), ProQuest Historical Newspapers: The Globe and Mail (database accessed through the Dalhousie University Library).

There also is movement towards making a more diversely experienced judiciary. However, the comment by Professor Russell returns: it is very difficult to find someone who is Aboriginal, bilingual and from Atlantic Canada. That speaks to societal challenges that are not irrelevant. Given the extensive diversity within Canada, all groups cannot be represented on a nine-person Supreme Court. Not every experience is the same. It is a lofty and respectable goal to appoint a more diverse judiciary to the Supreme Court of Canada. A determination of what, exactly, the vision for the justices of the Supreme Court should be is vital for a successful selection of the next justice of the Supreme Court when the next opening occurs.

Just as *RDS*[18] and *Arsenault-Cameron*[19] contended with how much a member of the judiciary can use their own experiences, the question must again be posed but with the qualifier of how much value there is in the experiences they are able to bring. This is clearly not quantifiable, nor should it be. As the Trudeau process begins to push towards background and representation, the consideration of how judges should judge becomes infinitely more complex. It is not a deterrent but a challenge to the constructs of what adjudication is and its relationship to where the Canadian people stand. It is an exercise in understanding what breeds confidence. It is a matter of considering relatability and trust in our institutions, including the Supreme Court of Canada.

The greatest issue faced before the appointment of Justice Rowe was the creation of an "either/or" situation for two significant populations. Whether representation can be better approximated as new empty seats arise is a matter of deciding what is needed in a judge, as well as what is required of Canadian governance. There must also be a recognition of the importance of the role of justices of the Supreme Court and how the role of the Supreme Court of Canada has expanded. The weight of the decisions made in the Supreme Court, in conjunction with the movement to a different system of appointing Supreme Court justices, calls for a reimagined approach.

As the appointment process evolves, it is important to look at the core of the institution it is impacting. Obtaining the desired results of being a more representative Court and instilling continued confidence, echoes the *Edwards v Canada (AG)*[20] legacy of the "living tree" approach. When something is of such value to the Canadian population, adaptability and inclusivity are necessary. Meaningful consideration should be given to the criteria for appointing justices of the Supreme Court of Canada. A careful adaptation that is not simply needs-based but also demonstrates open-mindedness and accountability to Canadian society may very well breed confidence in our highest Court. These changes move towards giving Canadians the respect and consideration each Canadian deserves. It is such an effort

[18] *RDS*, *supra* note 6.

[19] *Arsenault-Cameron*, *supra* note 7.

[20] *Edwards v Canada (AG)*, 1929 UKPC 86, [1930] AC 124.

towards more inclusive consideration which builds institutions that reflect what Canadians stand for.