FOREWORD: APPOINTMENT OF SECTION 96 JUDGES

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The genesis of the present method of appointing s. 96 judges was the 1985 Canadian Bar Association Committee on the Appointment of Judges in Canada, of which I was chairman, which was approved by the council of the CBA in 1986.[1] It was the first comprehensive study of the subject.

The committee first identified, for its guidance, the following qualities required of those considered for judicial appointments:

- Personal competence and overall merit.
- High moral character.
- Human qualities: sympathy, generosity, charity, patience.
- Experience in the law.
- Intellectual ability and good judgment.
- Good health and good work habits.
- Bilingualism, if required by the nature of the post.

The CBA committee interviewed all present and former Ministers of Justice, provincial Attorneys General, Chief Justices, and many leaders of the profession, among others, and considered the appointment practices in other countries. It obtained a reasonably complete cross-section of opinion on how judges should be appointed. The objective was to identify weaknesses in the system used at the time, and several recommendations for improvement were made.

In its deliberations, the CBA committee considered the practice in 30 American state courts of electing judges. This idea was rejected out of hand at the first meeting of the committee. Many well-qualified lawyers would shun this process because of a distaste for campaigning, and there is a precariousness in tenure. The electoral process compromises the necessary independence of judges. There was a case in

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

Texas where one of the lawyers made a substantial contribution to the election campaign of a judge before whom the lawyer was appearing; the lawyer won the case. Although this occurred after the committee reported, the experience confirmed that the committee made the correct decision.

The CBA committee also considered the American practice where, at the confirmation stage, nominees are sometimes subjected to intensive grilling by the Senate Judiciary Committee concerning their views on current social and political questions, and possible conflicts of interest. Public senatorial prying into a candidate's private affairs can sometimes amount to a virtual inquisition. Moreover, there is no assurance that a candidate, once appointed, will follow the comments and opinions expressed at the hearing. This practice reduces the number of qualified lawyers because many are not willing to expose themselves to that type of questioning.

The CBA committee made inquiries to determine the extent to which political appointments had entered into the system. It was found that in some provinces political affiliation was a minor factor, in some it was a dominant factor, and in others it was in between. The CBA committee was advised by an American colleague, in a state where advisory committees existed, that the advisory committee system did not eliminate political considerations, but ensured that political appointees were qualified. It should be noted that the fact that a candidate is a supporter of the party in power is not necessarily bad, provided the person appointed is qualified. In one case where a clearly political appointment was made, the Chief Justice said that appointee was one of his best judges.

The CBA committee recommended that the final decision on the appointment of judges must remain with the government, that there should be meaningful consultation between the federal appointing authority and the provincial Attorneys General, as well as Chief Justices and bar organizations. The practice of appointments to the Supreme Court of Canada to be representative of the regions and legal systems of Canada should be continued. There should be no role for Parliament in the selection or appointment of federal judges. It is considered neither necessary or desirable for the legislative branch of government to be involved.

The most important recommendation of the CBA committee was the establishment of advisory committees in each province and territory to advise the Minister of Justice, who would be expected to make appointments from names recommended by the committees. The committees would consider names suggested by the minister and other sources, and would also seek out names of candidates themselves. The objective was to obtain suggestions for candidates from a wide variety of sources. Committees would be limited to recommending three persons qualified to fill each position.

The members of advisory committees for provincial and territorial judges should be the Chief Justice of the province (or a nominee), one person appointed by the federal Minister of Justice, one by the Attorney General of the province or territory, two lawyers—one appointed by the governing body of the legal profession

in the province or territory and one by the Canadian Bar Association branch therein, and two laypersons appointed by a majority vote of the other members of the committee. In the case of appointments to the Supreme Court of Canada, the relevant advisory committee(s) would be the one for the province or those of the provinces in the region from which the appointment is to be made. A separate committee was recommended for appointments to the Federal Court of Canada.

Each member of the advisory committee would consult his/her own group to get a cross-section of opinion as to a candidate's qualifications; the judge would consult with other judges, the lawyers would consult with other lawyers, and the laypersons would consult with other laypersons—particularly their acquaintances or others in their profession, business, or social groups. All such consultations would be confidential.

For appointments to the Supreme Court of Canada, the relevant advisory committee(s) would be the one for the province, or those of the provinces in the region, from which the appointment is to be made.

A separate committee was recommended for the Federal Court of Canada. This committee was similar to the one for the provinces, except that the judicial member would be the Chief Justice of the Federal Court of Canada (or a nominee); one of two lawyers was to be appointed by the Federation of Law Societies, the other by the CBA; and there were three others, at least two of whom were laypeople.

The federal government adopted the advisory committee process recommended by the CBA committee (although they didn't acknowledge that it originated from the CBA, taking all the credit themselves) with some notable flaws:

- Elevations to the post of Chief Justice and elevations from the provincial court to a superior court are not assessed by the committees. (The then Minister of Justice refused to reconsider, saying that it was the responsibility of the minister to determine elevations, not lawyers; my reply was to suggest that it would be better to have input from a cross-section of the public rather than leave it to one person. My argument fell on deaf ears.)

- The lay people on the committees are appointed by the Minister of Justice, not elected by other members of the committees.

- The recommendation regarding appointments to the Supreme Court of Canada was not followed.

- The committees are required to submit a report on all of the persons filing applications, not just three as recommended by the committee.

There were four other changes from those recommended by the CBA committee:

- The committees are expected to report on all applicants in two categories: recommended or unable to recommend. (At one time there was a third category: highly recommended.)

- The proposal of a separate committee for the Federal Court of Canada was not adopted, but the prospective appointees are considered by the advisory committee of that person's province or territory.

- Applications remain on file for two years.

- Because of their larger populations, Ontario now has three regionally based committees and Québec has two. The other provinces/territories have only one.

Recently, some important changes have been made to the advisory committee system:

- A new process for the screening of appointment of judges to the Supreme Court of Canada, as described below.

- A nominee of the law enforcement community has been added to the committee.

- The judicial appointee to the committees becomes chair and is not entitled to vote, except to break a tie.

An important addition made by the government, not covered by the CBA committee's recommendations, was the requirement that a person interested in a judicial appointment file an application form with the Commissioner for Federal Judicial Affairs of the Department of Justice, stating the qualifications which that person believes qualifies him/her for a judicial appointment. That officer passes the application along to the applicable advisory committee. There is nothing wrong with requiring an application, and it has its advantages. It also has disadvantages when there are not a sufficient number of applicants where a linguistic or other balance in the court is required. In one instance in New Brunswick, there was an insufficient number of francophone applicants, and they had to be obtained in order to maintain the linguistic balance of the court. The members of the committee, therefore, had to contact francophone lawyers and encourage them to apply for a judicial appointment. It was moderately successful. The original concept of the CBA committee to actively seek out candidates itself was not followed when the system of applications was inaugurated.

The new process for the appointment of judges to the Supreme Court of Canada recently instituted by the government does not follow the recommendations of the CBA committee. There are two stages to the new process. The first is a committee consisting of MPs from all four parties, a judge, two lawyers, and two laypeople, who are to advise the Minister on the best of five to eight candidates selected by the

Minister of Justice. The committee can add a name, but only if the minister agrees. In the second stage, one of those recommended is selected by the minister to appear before a committee of Parliament. When the candidate appears before that committee, the chairperson is required to disallow politically inspired questions, and those attempting to determine how the applicant would decide questions coming before the court. Based on only one instance, this practice has avoided an American-style questioning of judicial applicants, but the system has the potential to get out of hand and become more like the American experience.

Under the new process, the government of the day totally controls the process of identifying candidates that would get serious consideration.

I believe that questioning by a parliamentary committee is not advisable and that the establishment of a Supreme Court of Canada advisory committee(s), as recommended by the CBA committee, would be adequate. Certainly, the identity of members of the advisory committees, and also the committees in the provinces and territories, should be made public so that the public is aware of who is advising the Minister of Justice. There are potential problems if the use of similar legislative committees is adopted by the provinces and territories; there is a greater likelihood that the system will get out of control.

I also believe it is a misconceived notion to include a nominee of the law enforcement community (presumably the police force) on the advisory committees. All members of advisory committees must have an open mind as to the type of person to be appointed to the bench. This means that persons representing a special interest should not be members of the committees. Members of the law enforcement community represent a special interest—obtaining convictions. This sort of representation has no place on the advisory committees.

Depriving the judicial members of the committees (who act as chairs) of a vote is a step in the wrong direction. The Minister of Justice appoints the nominee of the law enforcement community and three members of the committee, thus giving the minister's appointees a majority with the power to determine who is recommended for the bench—if they all vote together. If the minister is careful to appoint people who are truly independent and will not simply follow the minister's wishes, the committee may function properly. However, the fact that the minister's appointees have a majority changes the dynamics of the committees and could cause a difference in the nature of the discussions; the other members might feel intimidated knowing that their opinions could be ignored. This could become a flaw in the new system.

The office of the Commissioner for Federal Judicial Affairs has recently issued extensive material on the process for federal judicial appointments, including a description of the process, considerations which apply to an application for appointment, guidelines for advisory committee members, a code of ethics for advisory committee members, and a report on the activities of judicial advisory committees in 2004 to 2006, as well as a list of the members of all judicial

appointment advisory committees.[2] The report resulted in the following: from 1 November 2004 to 31 October 2005, there were 1,043 applications received; 138 were highly recommended, 459 were recommended, and 620 were unable to recommend. Only 46 superior court judges were appointed. Obviously, there is only a slim chance that a nominee will be appointed. (These numbers will not add up because of outstanding applications before and after the period surveyed.)

There can be no doubt that the present system of judicial appointments has improved the quality of those appointed to s. 96 courts.

[2] Office of the Commissioner for Federal Judicial Affairs, "Federal Judicial Appointments Process", online: <http://www.fja.gc.ca/fja-cmf/ja-am/index-eng.html>.