

July 22, 2016

VIA EMAIL

The Honourable Jody Wilson-Raybould, P.C., M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

Dear Minister:

RE: Federal Judicial Appointments

The Advocates' Society (the "Society") is a not-for-profit association of over 5,500 lawyers throughout Ontario and the rest of Canada. The mandate of the Society includes, amongst other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates. As courtroom advocates, the Society's members have a keen interest in the effective judicial resolution of legal disputes.

The Society understands that your government is now in the process of revisiting the judicial appointments process for appointments to the Supreme Court of Canada, the Provincial and Territorial Superior Courts and the Provincial and Territorial Courts of Appeal. This is timely in light of the imminent retirement of Justice Cromwell as well as the number of federal judicial vacancies across the country. As of July 1, 2016, there were a total of 41 federal judicial vacancies, 31 of which were at the Provincial and Territorial Superior Court level.¹

The Society believes that a strong, vibrant and independent judiciary is fundamental to our Canadian justice system, and that it is essential to upholding our country's democratic values. As courtroom advocates, the Society's members have a strong interest in ensuring that the process by which judicial appointments are made is beyond reproach. In 2004, the Society struck a Task Force to study and make recommendations with respect to the judicial appointment process generally, and with respect to the appointment of judges to the Supreme Court of Canada in particular (we previously sent letters on these issues on March 24, 2004; April 15, 2004; May 5, 2005; September 9, 2005; November 16, 2005; and January 30, 2015). The Society has monitored the federal judicial appointments process since then and has continued to devote its time to recommending ways to improve the process.

The Society believes that any appointments process should have the following goals:

¹ Website of the Office of the Commissioner for Federal Judicial Affairs Canada.

- Increasing public confidence in the appointments process and the administration of justice through transparency, diversity and inclusiveness;
- Eliminating political partisanship and enhancing judicial independence; and
- Ensuring the highest caliber of candidates are appointed to the courts and ensuring that these candidates are not deterred from seeking appointment to the courts. This should include a consideration of appointments of candidates practising at the bar directly to the Supreme Court of Canada and the Provincial and Territorial Courts of Appeal.

Appointments to the Supreme Court of Canada

As Canada's highest court and the forum in which our country's most important legal issues are ultimately resolved, the Supreme Court of Canada occupies a singularly important role in our legal system. However, in recent years the process by which judges have been appointed to the Supreme Court of Canada has been neither consistent nor readily ascertainable, leaving the appointment process vulnerable to criticism on grounds of lack of transparency, impartiality and representativeness of the diversity of Canada.

Until recently, as you know, the appointment process for justices of the Supreme Court of Canada involved an advisory committee, comprised in whole or in part of Members of Parliament, providing the Minister of Justice with a short list of candidates from which the successful candidate would ultimately be selected. That candidate would then appear before a Parliamentary Committee at a public hearing. The government departed from the Parliamentary hearing process in 2008 for the appointment of Justice Cromwell, citing the urgency of filling an eight-month vacancy and ensuring that the court have a full complement of judges. The government of the day again departed from this process when it appointed Justices Gascon, Côté and Brown.

The Society makes no comment on the merits of any past or recent appointments to the Supreme Court. Our concerns relate solely to process. In order to maintain public confidence in judicial appointments, the Society calls for the adoption of a process for appointments to the Supreme Court of Canada which is:

- a) open and transparent;
- b) applied consistently to all Supreme Court of Canada appointments; and
- c) published in advance of the selection of any candidate for appointment to the Court.

We support a process that provides for input from the Bench and Bar and from representatives of the Provinces from which appointments are intended to be made, with the ultimate goal of selecting the highest caliber of candidates and ensuring the representative composition of the Court in terms of both racial and cultural diversity and gender balance. In furtherance of the goals of diversity and gender balance, we support the publication of statistics with respect to the gender, culture and ethnicity of candidates proposed for consideration by an advisory committee.

Finally, we believe that, in order to promote the values of openness and transparency, as discussed above, it is necessary that the details of the process for appointments to the Supreme Court of Canada be published in advance of the selection of any candidate for appointment to the Court and made available to the public. The process should also be open to the participation of relevant stakeholders. This will have the benefit of educating the public as to the procedures which are followed for Supreme Court appointments as well as increasing public confidence in the independence and impartiality of the judiciary. We do not suggest that the names of all proposed candidates for appointment be made public, however.

Appointments to the Provincial and Territorial Superior Courts and Courts of Appeal

With regard to appointments to the Provincial and Territorial Superior Courts and Courts of Appeal, the Society raises the following concerns with regard to the current appointments process:

- The Society is concerned that the appointment of a representative from the law enforcement community to each Judicial Advisory Committee gives one particular interest group undue influence in the appointment of the judiciary. While law enforcement interests are important in the administration of justice, such interests should neither take precedence, nor be seen to take precedence, over other legitimate interests of other stakeholders in the work of our courts. Any bias, or perceived bias, in favour of any stakeholder or user group has the potential to seriously impair the confidence of Canadian citizens in the essential independence of our judiciary.
- The Society is concerned that the judicial appointee to the Judicial Advisory Committee is designated as a non-voting Chair of the Committee. This, coupled with the appointment of a law enforcement representative, increases the vulnerability of this appointments process to accusations of political interference.
- The Society is concerned that the existence of only two categories of classification for applicants – “recommended for appointment” and “unable to recommend for appointment” – enhances the risk of an appearance of political interference with the judicial appointments. A “highly recommended” category (i.e. a short list system) to further categorize the top applicants would help to alleviate this concern.

An Exemplary Appointments Process: The Ontario Court of Justice

On many previous occasions, the Society has endorsed the appointments process used for justices of the Ontario Court of Justice as one that incorporates the key principles of transparency and openness. In that process:

1. Vacancies are advertised and applicants submit their applications to a Judicial Appointments Advisory Committee (a “JAAC”), an independent committee established under the Ontario *Courts of Justice Act* and comprised of lawyers, judges and lay members.
2. The JAAC prepares a short list of candidates who are interviewed.

3. The JAAC conducts reference checks and makes confidential inquiries with regard to the candidates.
4. A ranked list is then submitted to the Attorney General, who is required to make the appointment from that short list.

This system has been in place since its introduction by Attorney General Ian Scott in 1988. It has received high praise from lawyers and non-lawyers alike as having increased the quality of appointments to the Ontario Court of Justice and curtailing the possibility of political considerations in the appointment process. Many observers have also commented that the short list system has had a positive impact on the appointment of women and minority candidates and the representativeness of the provincial court bench.

The Advocates' Society is of the view that the features of the appointments process for the Ontario Court of Justice, and in particular the advertising of vacancies, the candidate interview and the short list system, should be adopted with respect to all appointments to the Provincial and Territorial Superior Courts and Courts of Appeal and the Supreme Court of Canada. And while the Supreme Court of Canada judicial appointment process will no doubt differ from the appointment process for the lower courts, we urge, at a minimum, that the Government incorporate the ranked list and short list system into its process. Our reasons for this recommendation are as follows:

- The process ensures that the most qualified candidates are chosen and that a high standard of excellence is achieved;
- By reducing the size of the list and requiring that the appointment be made from the list, the appearance of political partisanship is greatly reduced;
- The JAACs which would provide the short list under this proposal are in the best position to identify the strongest candidates for appointment. The JAACs already undertake detailed consultations and could provide a ranking of the candidates without great difficulty.

Ideally, a transparent process would be legislated, but the Society views a published policy as preferable to no communication at all with regard to the process for appointing members of our federal judiciary.

I would be pleased to discuss these views further with you at your convenience.

Yours very truly,



Bradley E. Berg
President

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