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The Advocates' Society

PROMOTING EXCELLENCE IN ADVOCACY

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VIA EMAIL

The Honourable Peter MacKay
Minister of Justice and Attorney General of Canada
Department of Justice
284 Wellington Street
Ottawa, ON K1A 0A8

Dear Minister MacKay:

RE: Appointment of Judges to the Supreme Court of Canada

The Advocates' Society (the "Society") is a not-for-profit association of over 5,000 lawyers throughout Canada. The mandate of the Society includes, amongst other things, making submissions to governments 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 strong interest in ensuring that the process by which judicial appointments are made is beyond reproach. The Society believes that a strong, vibrant and independent judiciary is fundamental to our Canadian justice system. To that end, the process by which judges are selected should be one which increases public confidence in the appointment process, eliminates political partisanship, and ensures diversity, gender balance and the excellence of all appointments.

Nowhere are these goals more important than for 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. It was stressed by the Prime Minister that future appointments would return to the hearing process. However, the government again departed from this process when it appointed Justices Gascon and Côté. Your justification for departing from the previously endorsed process in these cases was that there had been leaks by

the Globe and Mail about the appointment process and the short list of candidates in respect of the failed appointment of Justice Nadon.

The Society submits that the appointment of justices to the Supreme Court of Canada should follow a transparent, impartial and consistently applied process. The purpose of this letter is to provide our recommendation for the adoption of such a process and to highlight certain essential features which we submit should characterize the appointment process.

We wish to be clear in stating that we make 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.

We do not suggest that the names of all proposed candidates for appointment be made public. We do, however, suggest that the details of the process itself be made readily available and ascertainable to the public and that the process be open to the participation of relevant stakeholders.

Regardless of the specific features of the process, the Society believes that the same process should be applied consistently in connection with all appointments to the Supreme Court of Canada.

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 be published in advance of the selection of any candidate for appointment to the Court and made available to the public. 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.

The Society submits that an example of an open, transparent and consistent judicial appointment process can be found in the process used in Ontario for the appointment of judges to the Ontario Court of Justice. In that process, the Ontario Judicial Appointments Advisory Committee, an independent committee made up of lawyers, judges and lay members, prepares a short list of candidates who are interviewed. 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. This process has been endorsed by the Society on many previous occasions.

In 2005, the Society appeared before the Standing Committee on Justice and recommended the adoption of a 'short list' system for all federal judicial appointments including appointments to the Supreme Court of Canada. In those submissions, the Society reviewed and endorsed the process which currently exists in Ontario for the appointment of lawyers to the Ontario Court of Justice and recommended that it be emulated for all federal judicial appointments.

In 2006, the Society again commended Ontario's 'short list' system in a letter to the then Minister of Justice, the Honourable Vic Toews, Q.C. In that letter, the Society reiterated its position that the adoption of a short list system ensures that the most qualified candidates are chosen and that a high standard of excellence is achieved, while reducing the appearance of political partisanship. It also allows for input to be received from stakeholder groups who are in the best position to identify the strongest candidates for appointment, as the short list is developed by the Judicial Appointments Advisory Committee.

In our view, Ontario's 'short list' appointment process is exemplary of the type of open, transparent and consistent process which we believe should be implemented for appointments to the Supreme Court of Canada. The Society therefore wishes to reiterate its previous endorsement of Ontario's short list process and its suggestion that a similar process be implemented for appointments to the Supreme Court of Canada.

I urge you to make the institution of a transparent, open and consistent process for the appointment of judges to the Supreme Court of Canada a priority.

Yours very truly,



Peter J. Lukasiewicz
President