Appointment of Supreme Court Justices

An Unknown But Not A Secret Process

by Hon. Irwin Cotler MP

On February 4, 2004 the federal government reaffirmed its commitment originally made on December 12, 2003 to "specifically consult the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, on how best to implement prior review of appointments of Supreme Court of Canada judges." In March and April 2004, the Committee heard many witnesses on this issue. The Minister of Justice outlined the present method of appointing Justices of the Supreme Court in an appearance before the Committee on March 30, 2004.

I begin by recalling and reaffirming two themes which have characterized your deliberations. First, the review of the appointments process is a task of great importance to our country. For the Supreme Court – as the highest appellate court and final arbiter for the resolution of legal disputes - is not only at the pinnacle of our court system, but our court system is a fundamental pillar of our constitutional democracy.

In other words, our Constitution frames both the distribution of governmental power between the federal government and the provinces – otherwise known as legal federalism "or the powers process" – as well as the limits on the exercise of governmental power – whether federal or provincial – otherwise known as human rights, or the "rights process."

The Supreme Court has the constitutional responsibility of holding governments to account when they trespass these limits either by way of a jurisdictional trespass in the matter of federal-provincial relations, or by way of a rights violation under the *Charter*. It is a responsibility, it should be noted, that Parliament has vested in the Supreme Court; and it is a responsibility that the Supreme Court has discharged with diligence, sensitivity, and fairness.

A second theme that has characterized your deliberations is that of the Supreme Court of Canada as the exemplar of excellence, whose juridical legacy has resonated beyond Canada.

For it is not only Canadians that are proud of our Supreme Court. The Court is respected throughout the country, indeed around the world, as a model of what a vital, modern and independent judicial institution should be. As the representative from the Quebec Bar told you, the quality of Supreme Court judges is, in his words, "impeccable".[1] Professor Weinrib noted in her presentation that Supreme Court decisions are constantly cited by courts in countries as diverse as Israel and South Africa.[2] The Prime Minister himself recently said that we have "excellent Supreme Court judges who are recognized the world over

I turn now to an appreciation of the present appointments process organized around two principles: first, the constitutional framework governing these appointments and second, the comprehensive consultative process which has developed to give expression to – or implement – this constitutional responsibility.

I begin with the constitutional framework. At present, it should be noted, the *Supreme Court Act* vests the consti-

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tutional authority for the appointment of Supreme Court judges with the executive branch of government by way of Order in Council appointment, and the executive remains responsible and accountable for the exercise of this important power. The threshold consideration in this appointments process is to get the best possible candidates and the best possible Court.

Accordingly, to implement this constitutional responsibility, and secure the best candidates, a comprehensive consulting process has been developed. Regrettably, this process is not that well known – indeed, it may be said to be relatively unknown – and this has led some to believe that the process is both secret and partisan.

What I would like to do now, in the interests of both transparency and accountability is to describe the consultative process, or protocol of consultation, that is being used to select members of the Supreme Court. I cannot claim that this consultative process or protocol has always been followed in every particular. I can only undertake to follow it as the protocol by which I will be governed.

The first step in this process is the identification of candidates. Candidates come from the region where the vacancy originated – be it the Atlantic, Ontario, Quebec, the Prairies and the North, and British Columbia regions. This is a matter of convention, except for Quebec where the *Supreme Court Act* establishes a requirement that three of the justices must come from Quebec.

The candidates are drawn from judges of the courts of jurisdictions in the region, particularly the courts of appeal, as well from senior members of the Bar and leading academics in the region. Sometimes, names may be first identified through previous consultations concerning other judicial appointments.

In particular, the identification and assessment of potential candidates is based on consultations with various individuals. As Minister of Justice, I consult with:

- the Chief Justice of Canada and perhaps other members of the Supreme Court of Canada
- the Chief Justices of the courts of the relevant region
- the Attorneys General of the relevant region;
- at least one senior member of the Canadian Bar Association;
- at least one senior member of the Law Society of the relevant region.

I may also consider input from other interested persons, such as academics, and organisations who wish to recommend a candidate for consideration. Anyone is free to recommend candidates and indeed, some will choose to do so, by way of writing to the Minister of Justice for example.

The second step is assessment of the potential candidates. Here, the predominant consideration is merit. In consultation with the Prime Minister, I use the following criteria, divided into three main categories: professional capacity, personal characteristics and diversity.

Under the heading of professional capacity are the following considerations:

- Highest level of proficiency in the law, superior intellectual ability and analytical and written skills;
- Proven ability to listen and to maintain an open mind while hearing all sides of an argument;
- Decisiveness and soundness of judgement;
- Capacity to manage and share consistently heavy workload in a collaborative context;
- Capacity to manage stress and the pressures of the isolation of the judicial role;
- Strong cooperative interpersonal skills;
- Awareness of social context;
- Bilingual capacity; and
- Specific expertise required for the Supreme Court. Expertise can be identified by the Court itself or by others.

Under the heading of personal characteristics are the following items:

- Highest level of personal and professional ethics: honesty; integrity; candour;
- Respect and consideration for others: patience; courtesy; tact; humility; fairness; tolerance; and
- Personal sense of responsibility: common sense; punctuality; reliability.

In terms of diversity it is necessary to address the extent to which the composition of the Court appropriately reflects the diversity of Canadian society.

Those are the criteria. In reviewing the candidates, I may also consider jurisprudential profiles prepared by the Department of Justice. These are intended to provide information about volume of cases written, areas of expertise, the outcome of appeals of the cases and the degree to which they were followed in lower courts.

After the above assessments and consultations are completed, I discuss the candidates with the Prime Minister. There may also have been previous exchanges with the Prime Minister. A preferred candidate is then chosen. The Prime Minister, in turn, recommends a candidate to Cabinet. This concludes the description of the current protocol or consultative process.

The Justice Committee is now engaged in an important review of the role Parliamentarians might play in the appointments process. This review may include both a review of the process of appointments and a review of the proposed nominee recommended by the process.

In terms of the review of the process of appointment, we must bear in mind two factors as set forth above: the constitutional framework which vests authority for the appointment in the executive branch of government; and the consultative process established to implement this constitutional responsibility and through which the candidates are identified and evaluated. We are now adding a parliamentary review to this process.

As for a review of the proposed nominee the question now becomes: what is the form that this parliamentary review might take respecting the vetting of the proposed nominee? And what is the mechanism by which this review might be undertaken? There are a number of options that can be considered.

First, the Committee could undertake its review by hearing representations from the Minister of Justice as to why the nominee was chosen. Second, the Committee could undertake a direct interview of the candidate. Third, the review could be conducted by an independent expert representative committee which would include representatives from Parliament.

There are other issues that may arise apart from the modality of review. First, what might be the appropriate composition of the Committee undertaking the review? Second, should the process be confidential, or should some of the review be public? If the context is a direct interview, what questions might be asked so as not to embarrass the candidate or politicize the process?

In conclusion, may I identify a number of guiding principles that might assist this review, while helping to address some of the above questions. A number of these have already been identified by your previous witnesses.

First, the merit principle. The overriding objective of the appointments process is to ensure that the best of candidates are appointed, based on merit. As the Prime Minister has pointed out, a process that discourages good people from applying is one not worth having.

Also, the Supreme Court bench should, to the extent possible, reflect the diversity of Canadian society. A diverse bench ensures that different and plural perspectives are brought to bear on the resolution of disputes.

Second, the system should preserve the integrity of the Supreme Court and the court system. The judiciary is an institution that is vital for the maintenance of the rule of law and the health of Canada's democracy. It must not be politicized, nor must any damage be done to the reputation of its members.

Third, the system should protect and promote judicial independence. The independence of the judiciary is a cornerstone of our legal system and nothing should be done to undermine or diminish this principle.

Fourth, the system should be more transparent. As I mentioned, the present consultative process – which is comprehensive – is simply not known. In the interests of transparency I have shared with you the protocol describing this consultative process. I trust that the release of this protocol will enhance public confidence in the appointments process and help underscore the excellent quality of appointments to the Court arrived at through this process.

Of course transparency must be considered on a continuum. In addition to the protocol, we are now factoring in a parliamentary review process. It may be suggested that complete transparency can only be achieved by the kind of full public hearings we see in the American process. However the objective of transparency must be weighed against the other guiding principles I have outlined, including the integrity of the institution and the continuing independence and capacity of individual judges.

Fifth, the system should recognize the value of provincial input. Indeed, the present consultative process does provide for important provincial input through the consultation with appropriate provincial Chief Justices, Attorneys General, provincial bar leaders, and other interested provincial bodies that may wish to make recommendations.

Finally, the system should recognize the value of Parliamentary input, as this process seeks to do.

Notes

1. See, Standing Committee on Justice, *Minutes of Proceedings and Evidence*, March 25, 2004.
2. *Ibid.*, March 23, 2004.

Editors Note: For appointments in the near future the Committee recommended that the Minister of Justice appear before the Committee to explain how the current two vacancies on the Supreme Court were filled and the qualifications of the two appointees. For the longer term it recommended establishment of an advisory committee to compile and assess lists of candidates for vacancies. This body would include one representative from each official party in the House plus provincial members, and representatives from the judiciary, the legal profession and lay members. The advisory committee would provide a confidential short list of candidates from which Justices may be selected. All three opposition parties presented dissenting reports objecting to various aspects of the majority report.