



**SUBMISSIONS ON THE CHANGES BY THE MINISTER OF JUSTICE AND ATTORNEY-GENERAL OF
CANADA TO THE FEDERAL JUDICIAL APPOINTMENT PROCESS**

APRIL 17, 2007

The Federation of Law Societies of Canada (the "Federation") is pleased to provide submissions to the House of Commons Standing Committee on Justice and Human Rights for its study on the recent changes to the process by which judges are appointed by the federal government.

The Federation is the coordinating body of the 14 provincial and territorial governing bodies of the legal profession in Canada. Our member law societies are charged with the responsibility of governing Canada's 95,000 lawyers and 3,500 notaries in Quebec in the public interest. An important role of the Federation is to communicate the views of the governing bodies of the legal profession on national issues. The manner in which judges are appointed in Canada, and the confidence of the public in the independence and impartiality of the judges so appointed, are of considerable significance to the administration of justice in Canada.

Judicial Advisory Committees were created in 1988 following extensive consultations with lawyers, judges and members of the public. Occasional changes to the committees have been made in the intervening years, in each case following consultations with the legal community. By contrast, the changes announced by the former Minister of Justice in November 2006 were made without such consultation. The Federation is of the view that input from the legal profession and others is important and hopes that no further changes to the process for assessing judicial candidates will be made without consultation.

We are pleased to provide our comments on the changes to the judicial appointments process that were introduced by the former Minister of Justice, the Honourable Vic Toews. We will first address what we consider to be the principles and goals of the judicial appointments process, and will then comment on the specific changes to the process announced in November 2006.

1. Principles and Goals of the Appointments Process

(a) Merit and Public Confidence in the Appointments Process

The appointment of meritorious candidates for judicial vacancies is required to ensure the continued high calibre of the courts and public confidence in the judicial system. We agree with the criteria that form the basis for assessment of candidates as set out by the Office of the Commissioner for Federal Judicial Affairs and wish to emphasize that these criteria must be foremost in the minds of the members of the committees when assessing candidates. While these criteria are not exhaustive, political factors – particularly whether a candidate is a member of or affiliated with a particular political

party or is sympathetic to the views or objectives of any political party – ought never to be considered by the Judicial Advisory Committees.

To ensure public confidence in the appointment of judges, the public must be satisfied that the appointments are based on candidates' competence and intellectual ability to be a judge. There is no room for any perception of political bias in the appointments process.

(b) Independence of the Judiciary

Responsibility for the appointment of judges to courts constituted under s. 96 of the *Constitution Act* lies with the Governor General and is, as a practical matter, exercised by the Cabinet. Although appointed by the government, there is a constitutional requirement in Canada that judges be independent of the government.

Maintaining the independence of the judiciary is crucial to ensuring continued public confidence in the justice system. The public must be confident that judges will make their decisions based upon their knowledge and interpretation of the evidence and the law, and not on extraneous factors. This has always been important and is even more so today, when the government is one of the litigants to appear most frequently before the courts. If the public – particularly those members who must utilize the courts to resolve disputes with the government – loses confidence that judges are independent of the government, the entire justice system will find itself in a perilous state.

While the decision about whom to appoint as a judge rests with the government, it is vital that candidates are independently assessed on transparent criteria relevant to the role of judges so that there is a pool of meritorious candidates available for appointment. It is important, as well, to ensure that there is no actual or apparent political influence in the establishment, or operations, of the independent assessment body.

(c) Independent Judicial Advisory Committees

The establishment of Judicial Advisory Committees in 1988 was a very important step in developing a clear and independent process for identifying a pool of meritorious candidates who could confidently be recommended to the government for appointment as judges. To safeguard the independence of the committees, their membership was historically constituted in such a way as to ensure that government appointees were not in the majority. Through their legal training and experience and their knowledge of the administration of justice and the courts, appointees from the legal community bring valuable expertise to the assessment process, while the important perspective of the broader public is ensured by the appointment of members from the general community. It is important to note that the Minister of Justice has the unfettered discretion to appoint these community members.

To be effective, the committees must be viewed by the public, the government and the legal profession alike as impartial assessors of the merits of applicants for judicial appointment. Even the appearance of political influence in the operation of these committees must be avoided. Public perception that judges may be appointed because they are likely to agree with certain governmental policies would lead to a diminution of respect for the administration of justice in the country.

2. Comments on the Changes Announced in November 2006

(a) Changing the Composition of the Committees

Minister's Change

The number of members is increased to eight from seven, with the additional appointee to be a representative of the law enforcement community. The judicial representative becomes the chair of the committee and may not vote except where necessary to break a tie.

The designation of a seat on the committee for a representative of the law enforcement community combined with the elimination of the right of the judicial representative to vote except to break a tie is of considerable concern to the Federation. Our concern is two-fold. The representation on the committees of a specific community or interest, in this case, the law enforcement community, may undermine the credibility of the committees as independent bodies concerned only with assessing the merits of candidates for judicial appointment. There may now be a perception that extraneous factors, such as the likelihood of a candidate's judicial decisions corresponding to the views of the specific community, will be taken into account. This concern is made all the more significant by the change in voting structure as it is now possible that the specific community will hold the deciding vote in determining which candidates are qualified to be federally appointed judges.

We recognize that Judicial Advisory Committees do not actually *appoint* judges, but we believe that the assessment of potential candidates for appointment by an independent body adds immeasurably to public confidence in the appointments made by the Minister of Justice. The changes to the composition of the committees have the potential to erode that public confidence. The current Minister of Justice has recognized the importance of merit-based appointments. Appearing before the House of Commons Standing Committee on Justice and Human Rights on February 5th, 2007, the Minister of Justice, the Honourable Robert Nicholson stated:

"I am confident that the 2006 JACs will continue to conduct their examination and assessment of candidates with the same expertise, diligence, and conscience as prior JACs, and will forward recommendations that will permit me to make judicial appointments in a timely fashion, from among candidates of merit and legal excellence."

While we take comfort in the Minister's words and hope that the Judicial Advisory Committees will continue to act honourably and will assess candidates solely on their merits, we remain deeply concerned about the potential for misuse of the judicial appointments process. With the changes to the structure of the committees and the voting process, it is now possible for a combination of the Ministerial appointments and the law enforcement representatives to direct which candidates should be recommended for appointment and which should not. This change has the potential to decrease the public's perception of the independence of the Judicial Advisory Committees.

We understand that the stated objective for adding an eighth member to the committees was to permit the participation of the law enforcement community in the judicial appointments process. This objective could have been achieved under the existing

process. The Minister has unfettered discretion to decide whom to select as the three ministerial appointees to each committee and therefore nothing prevented the Minister from exercising that discretion to include one or more law enforcement representatives on the committees. Such an approach would have detracted less from the perceived independence of the committees or from public confidence that candidates will be recommended for appointment solely because they are meritorious.

Recommendation

The Federation recommends that the decision to add an eighth member nominated by the law enforcement community be reversed.

(b) “Recommended” and “Unable to Recommend” Categories

Minister’s Change

The “highly recommended” designation is eliminated due to a lack of consistency in its use by the committees.

The Federation supports the decision to reduce to two the number of categories into which applicants for judicial positions can be placed. If, however, it is the “highly recommended” category that is eliminated, “recommended” candidates must be more than simply minimally qualified; they must be of the highest calibre. The decision to recommend a candidate for appointment must be based on objective criteria and all candidates must be assessed against a very high standard. The use of objective criteria to assess merit such as those formulated by the Office of the Commissioner for Federal Judicial Affairs will result in greater consistency between committees.

Recommendation

The Federation recommends that the decision to recommend a candidate be based on a very high standard to ensure that recommended candidates are of the highest calibre.

(c) Staggering Terms

Minister’s Change

The terms of half of the Advisory Committees will expire in 2008, while the terms of the other half will expire in 2009 to ensure that the terms of the committees do not all expire at the same time.

The Federation has no disagreement with the decision to stagger the terms of the Judicial Advisory Committees. We suggest, however, that consideration be given to staggering the terms of appointments *within* the committees themselves. This would ensure greater operational continuity within the committees on an ongoing basis.