FOREWORD

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Most Canadians would probably agree that the *Charter of Rights and Freedoms*[1] has altered fundamentally the extent to which the decisions of our country's judges affect their lives. As Chief Justice Beverley McLachlin explained in her article "The Charter: A New Role for the Judiciary?":

> Prior to the *Charter*, the main business of the courts was maintaining the criminal justice system and resolving private disputes. Contract, tort and criminal law, with a smattering of the esoteric by way of trusts or admiralty — these were the staples of the law. Most people passed their lives without going near the courts or perceiving themselves as affected by them in any way.[2]

By providing judicial recourse when the fundamental rights and freedoms of Canadian citizens have been infringed by legislation or government action, the *Charter* has increased our awareness of the role of the judiciary and of the potential impact of decisions made by our courts.

Not surprisingly, this has heightened public awareness of the role of the courts and the judges who are appointed to sit on those courts. Canadians are curious, to say the least, about how their judges are selected and what qualities and characteristics are sought when considering whom to appoint. For this reason, I would like to commend the *Alberta Law Review* for dedicating this edition to a wide-ranging discussion of the issues surrounding the appointment of judges in Canada.

I believe it is important for Canadians to have an understanding of the process for the appointment of members of the judiciary and am pleased to have had the opportunity to contribute these brief remarks as a Foreword to this special edition of the *Alberta Law Review*. I am also pleased that Andre Millar, Appointments Secretary for the Commissioner for Federal Judicial Affairs, has prepared a detailed overview of the workings of the current judicial appointments process, which has been in place for the past ten years.

Of course, when we speak of the appointment of judges from the federal perspective, what is meant is the power of the federal government, pursuant to s. 96 of the *Constitution Act, 1867*,[3] to appoint judges to the trial and appellate courts in the provinces and territories; it should be noted that the administration and maintenance of those courts was conferred upon the provinces.

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

2 Justice B.M. McLachlin (as she then was), "The Charter: A New Role for the Judiciary?" (1991) 29 Alta. L. Rev. 540 at 542.

3 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

The recommendation of appointments to the courts, other than those of chief justices and members of the Supreme Court of Canada, has been an integral part of the responsibilities of the Minister of Justice since Confederation. In 1896, the right to recommend the appointment of chief justices was affirmed as a prerogative of the Prime Minister, pursuant to a Minute of the Privy Council which, as amended in 1935, has been adopted by each succeeding federal ministry.[4] Similarly, all puisne judges of the Supreme Court of Canada are appointed by the Prime Minister.

From 1867 to 1970, judicial appointments were considered on an *ad hoc* basis as vacancies occurred. In filling the vacancy, the Minister of Justice generally relied on his personal knowledge or that of his parliamentary colleagues of the local Bench and Bar.[5] Needless to say, this somewhat anecdotal approach to judicial appointment tended to limit the number and demographic profile of potential candidates and hence, over the years, the question of how the system could be improved was the topic of vigourous debate.

A major proponent of change to the judicial appointment process, since its inception, has been the Canadian Bar Association. In 1930, former Prime Minister R.B. Bennett, also the president of the Canadian Bar Association at the time, argued that judicial appointments should be made only with regard to the "real qualifications for the exalted position they must occupy in the proper administration of our laws."[6]

The first major change in the judicial appointments process came in 1966 with the establishment of the Canadian Bar Association's *National Committee on the Judiciary* with whom, it was agreed, the Minister of Justice would consult prior to making most federal judicial appointments. In the mid-70s, the Minister of Justice created the position of Judicial Affairs Advisor to provide additional assistance in candidate recruitment. While these changes brought about a more broadly-based assessment of potential appointees, the real weakness of the earlier system remained: the initial identification of candidates for ministerial consideration continued to be generated from the top down.

It was not until 1988 that this deficiency was remedied. Following consultations with provincial and territorial attorneys general, the judiciary, the legal profession and interested groups and organizations, a new judicial appointments process was established. The major innovation was that the Minister of Justice was no longer responsible for identifying and screening candidates for judicial office. Rather, the new process provided a means for those wishing to be considered for judicial appointment to make themselves known to the Minister by making formal application to the Commission for Federal Judicial Affairs and the Judicial Advisory Committees.

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4 P.C. 3374, Order-in-Council regarding Prerogatives of the Prime Minister (1935).

5 There were no women who served as Minister of Justice between 1867 and 1970.

6 M.L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at 235.

The office of the Commissioner of Federal Judicial Affairs was created by statute in 1977, as an independent agency responsible for the administration of the salaries, benefits, and programs for the federally-appointed judiciary. In 1988, the Commissioner took on the additional task of providing information to potential candidates and conducting the preliminary screening of all applicants (*i.e.*, verifying the threshold requirements that the applicant is a member in good standing of a provincial or territorial bar, and has no less than 10 years of practice, or no less than 10 years combined as a member of the bar and as a provincial or territorial judge or magistrate). Applicants who pass this preliminary screening are then assessed by the Judicial Advisory Committee in their jurisdiction.

Equally crucial to the success of the new process was the creation of the Judicial Advisory Committees in each of the provinces and territories to assess the applications received from that jurisdiction. The membership of each Judicial Advisory Committee is representative of the Bench, the Bar, and the general public. Three of the members (including two lay members) of the seven-member Judicial Advisory Committee are representatives of the federal Minister of Justice; of the remaining four members, there is one representative each from the judiciary, the provincial or territorial Attorney General, the Canadian Bar Association, and the Law Society of that province or territory.

It is the responsibility of the Judicial Advisory Committee members to review each application and to consider the professional and other qualifications of each candidate in arriving at its assessment. Each Judicial Advisory Committee prepares a report of its assessments of the applicants and forwards it to the Minister of Justice. Since 1988, it has been the practice of Ministers of Justice to appoint only from a list of those individuals who have been recommended for appointment by the Judicial Advisory Committee in a given province or territory.

I believe that all of us benefit from this system of appointment. For the candidates, the current process has improved significantly the accessibility of the judicial appointments process. Detailed information is provided to every candidate as to the process and the criteria used by the advisory committees. No longer are candidates dependent on the Minister's personal knowledge of their interest in, or qualifications for, judicial appointment.

As for the Minister, the establishment of, and reliance on, the Judicial Advisory Committees and their evaluation process has resulted in a pool of well-qualified candidates whose names can be recommended to Cabinet for consideration and appointment.

And ultimately, it is Canadians who benefit from a judiciary that is more representative of the diversity of Canadian society. The new process has contributed, in no small way, to encouraging a higher rate of applications from women and other demographic groups long under-represented on the Bench.

While the Canadian judiciary has always enjoyed a reputation for excellence, it is only by critical analysis and a healthy appetite for constructive change that this status will be maintained. The fact that it is widely recognized that the current system is good does not mean that there will be no criticism of it. Nor does it mean that there is no room for improvement. The challenge for Canadians is to take a good judicial appointments process and make it even better.