



Help Wanted: Judges

peter BOWAL

“A judge is merely a lawyer who has been benched.”

— Charles E. Clark

“A judge should be about sixty, clean shaven, with white hair; china-blue eyes, and suffer from hemorrhoids so that he will have that concerned look.”

— Anonymous

Introduction: The Canadian Judiciary

Judges, although they are not political, comprise part of the government of our society. They interpret and apply legislation, fill in the gaps where there is no legislation (common law), and they operate as a check on all elected government action.

Not surprisingly, therefore, Canadians are fascinated by the role of judges. Judges are not elected, but they are powerful and are entitled to serve until retirement. They exercise their duties in public, but generally they are not well known individuals. They appear to be chosen behind the scenes, until suddenly the appointment is announced. This article lifts the veil of secrecy on how judges are selected in Canada.

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Appointed by Governments after Consultation

As judges increasingly pronounce upon a wider range of issues and disputes in Canadian life, and create legal rules where none exist (sometimes because the legislators decline to act), the concern inevitably voiced is that they may be too judicially *active*. That is particularly true when judges strike down as unconstitutional a highly popular act of democratically elected government.

Along with accusations of judicial activism, detractors frequently call for our judges to be elected like some in the US state judiciaries. At the minimum, they say that we should be able to vet judges before they are appointed, through a form of *advise and consent* process as in the US federal judiciary. In other words, critics of our appointment process argue for public hearings on judicial candidates, if not full, regular electoral campaigns for judicial office.

We know that, for various reasons, political campaigns do *not* produce the most qualified candidates for the office. Electoral politics does not ensure that the best person wins. As for hearings, several of our best judges have said that they would never have submitted themselves to US-style grilling of their beliefs and personal lives. Judges are not supposed to prejudge issues and cases so public hearings may not be much help in getting the best judges. Dragging judges into the political fray also runs counter to the ideal of the independence of judges from government and the political process.

While the Prime Minister and premiers could merely tap their best friends for the bench, judges in Canada *do* undergo meticulous background checks and questioning before appointment. This process of review and consultation, including hearings, is not conducted in public.

Appointment by Application

Most trial judges in Canada apply for the job. There is rarely a Help Wanted advertisement in the newspaper for judges because the selection system invariably maintains a list of approved (*recommended*) candidates to fill vacancies as they arise. Most appellate judgeships are filled by trial judges.

One can apply to be named a federal or provincial judge for the jurisdiction in which one lives. There are two distinct selection processes and one can apply to one or both of them. One can only accept appointment to a federal or provincial court, but once a judge, one can apply for appointment to the other court system. It is rare to jump court systems, but common to move up in the hierarchy of the court system to which one is first appointed.

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lawyers, if they aspire to be appointed a judge, can readily find out how to apply to get on the list.

Qualifications

Today, the only formal qualification to be a judge in Canada, other than one in Citizenship Court (to which this article does *not* apply), is to have first been qualified as a “barrister or advocate” (i.e., a lawyer) for at least ten years in “any province”. This quirky minimum eligibility legislation is not intended to exclude lawyers who do transactional work (solicitors) or who are licensed in one of the three territories. Some provinces require judges to be Canadian citizens.

Informal qualifications include professional competence, experience, and overall merit (primary); a reputation for integrity, fairness, good listening skills, and decisiveness; and social awareness that encompasses public service, openness, and sensitivity to issues of equality. A candidate must be candid in the selection process and any personal concerns that emerge with respect to health, financial difficulties, ongoing litigation, substance dependency, and a criminal record or serious discipline as a lawyer may disqualify one for the job.

Federal Judicial Appointments

Under our Constitution, the federal government does not appoint most of the judges in the country, but it does appoint judges to the most prestigious, superior courts. These include the higher trial courts in each province, the Courts of Appeal, the Federal Court of Canada, and the Tax Court.

The governing federal legislation is the *Judges Act* of 1985. Since this Act is silent on the appointment process for judges, the selection process is administered by the Office of the Commissioner for Federal Judicial Affairs in Ottawa (www.fja.gc.ca). The website contains terms and conditions an applicant should consider, the downloadable booklet *Ethical Principles for Judges* (independence, integrity, diligence, equality, and impartiality), as well as the complete application form.

After the Expression of Interest or Nomination is received and reviewed, the application (*Personal History Form*) stage is comprehensive. In it the applicant has an opportunity to confidentially highlight strengths and explain weaknesses. At least four legal and non-legal references and any number of “professional colleagues who are familiar with your work” are to be named. Authorization must be granted to permit the Commissioner to examine one’s standing with the Law Society.

The next stage is review by the regional Independent Advisory Committee in which the applicant resides. Each of these 16 Committees consists of seven judges, lawyers, and lay citizens appointed by the Law Society, Canadian Bar Association, the Chief Justice of the province, the Attorney General of the province, and the federal Justice Minister. The members of this Advisory Committee are identified on the Commissioner's website. While this Committee process is confidential, apparently extensive consultations in both the legal and non-legal communities are undertaken for each judicial applicant. A Committee assessment is reached and each applicant is placed into one of the following categories: "recommended," "highly recommended," or "unable to recommend" for appointment. Recognizing the advisory nature of this Committee process, these results are given to the federal Minister of Justice who is free to request more information, or a reassessment, and who may make any appointment to the bench. One expects that diversity is a political factor in such appointments that could override, or add to, the formal assessment.

After the Advisory Committee has reported to the Minister, the applicant is notified that this process is complete and a recommendation has been made. The recommendation remains valid for two years, after which time any unappointed applicant can apply for another two-year assessment.

The exact recommendation is unknown to the applicant. The rationale for this is hard to understand. The applicant never knows whether she or he was favourably assessed, but the arduous application cycle may be repeated indefinitely by a candidate who has no practical chance of being appointed. Even a highly recommended applicant does not know the assessment and if not appointed in the first cycle, may assume an unfavourable recommendation. We do not know how many highly qualified applicants drop off the list.

Little is to be gained by not disclosing the recommendation to the applicant. Some very qualified applicants will lose interest or put themselves in a position where they cannot accept the appointment should it later be offered. On the other hand, no-hope applicants may continue to apply.

This Independent Advisory Committee process has been in place one and a half years. Of the 527 recommendations made by Committees, only a minority (44%) were recommended for appointment at all, and less than 12% were "highly recommended." About 16% of "highly recommended" or "recommended" applicants were appointed to judgeships. The statistics are as follows for the period November 1, 2004 to October 31, 2005:

Applications outstanding as of October 31, 2004	269
Applications received during the year	562
Applications outstanding as of October 31, 2005	206
Applicants appointed judges	38
Total number of Advisory Committee meetings	51
Applicants rated "Highly Recommended"	62
Applicants rated "Recommended"	170

Applicants rated “Unable to Recommend”	295
Prov./Terr. judges applying for federal judgeships	54

The Supreme Court of Canada

There are only nine judges on this court, and vacancies – when they occur – are usually known well in advance, by resignation or mandatory retirement at age 75. By tradition, all seats on this Court are tied to a region.

Although the Supreme Court of Canada is part of the federal judiciary and judges are selected by the same federal government, the appointments to this Court are not made in the manner described above for other federal judges.

Canadians generally take a special interest in the composition and work of this court. Since the 1982 *Charter of Rights and Freedoms*, and increasing political concerns of judicial activism, especially where provincial obligations are defined and where judicial ideologies are invoked, calls have been made for more transparency and input into these appointments beyond the constitutional minimum. This separate, public and more political handling of appointments may reflect the rarified importance of this highest, unifying court.

The Martin government made a gesture to transparency in its two Ontario appointments in 2004. The nominees’ qualifications were made public and the Minister of Justice fielded a few gentle questions about them. That government then voluntarily proposed a new system of nomination and selection of judges to the Supreme Court of Canada. These new procedural reforms called for broad consultation, input, a short list of candidates, and modest public hearings, although no questioning of the candidates themselves. However, the government changed before this new approach could be tested.

In the Harper minority government this momentum toward consultation has continued. A federal shortlist of three candidates from the prairie region was disclosed. On February 27, 2006, the nominee for the vacancy, Mr. Justice Marshall Rothstein, faced about two hours of praise and gentle questions from a dozen MP’s in a televised hearing in a House of Commons Committee Room. This was hailed as an historic development. For its top court, Canada is moving toward establishing consultation and transparency of the judicial selection process. The US-style politicization of Supreme Court of Canada appointments may follow with more controversial nominees but there was no evidence of that in the February 2006 experiment. Since nominees are unlikely to answer serious personal and ideological questions, commentators are evenly split as to whether this limited hearing process represents a meaningful advance.

Provincial Judicial Appointments

Provincial court judges are located in most small communities across Canada and over 80% of all cases in some way pass through their courts. Provincial Court is the lowest level of court but it has the largest number of

judges, all of whom are appointed by their provincial government. The selection process for provincial judges varies in each province, and one should check with the Ministry of the Attorney General for details. By way of example, I describe the selection process for provincial court judges in Alberta, which can take several years to complete.

Section 9.1(1) of the *Provincial Court Act*, 2000, merely states that “the Lieutenant Governor in Council (provincial cabinet) may appoint judges.” The Assistant Deputy Minister (Court Services) collects applications, in the form of a Judicial Candidate Information Summary, which asks detailed questions about one’s experience, personal life, and reasons for applying. Access must be granted to investigate criminal records and Law Society standing. The provincial Judicial Council does a preliminary assessment of suitability.

The Judicial Council for appointments consists of representatives of all courts operating in Alberta. This stage of review is to determine if the application should proceed further. Sometimes a candidacy is clearly ill-advised if, for example, one is very young and inexperienced, or if something in the applicant’s background would embarrass the judiciary. The applicant may learn more about the role, and indicate a preference for division in which to be appointed (specialization in the largest cities). Most applicants easily pass this cursory stage of scrutiny, and are invited to a second interview round with the Provincial Court Nominating Committee.

This Committee is composed primarily of representatives of the Alberta public. In addition to representatives of the Law Society, the judiciary, and the Canadian Bar Association, the majority of the membership are lay members from all regions of the province. They review the application and call the references. The majority lay perspective is an overall impressionistic one: “would I like to see this person as one of our judges in the province?” A vote is taken around the table after the interview. If the candidate wins a majority of votes, a favourable, advisory recommendation goes forward to the provincial Attorney General. If not, no reasons are given. An applicant may reapply two years later, at the earliest, when the membership of the Nominating Committee may have changed. One knows whether one is on the list for active consideration by the Attorney General, who can still appoint from outside the list.

Many are Called; Few are Chosen

As governments (or Attorneys General) change, the appointment process may change. Accepted spoils of government include the prerogative to appoint judges to the courts. Sometimes retired or loyal politicians and friends of the governing political party *are* appointed, but more likely the judges will be selected through a rigorous system of checks, reviews, and consultation upon a wide range of applicants for judgeships. This is a system that governments have themselves developed informally and administratively and that they follow voluntarily.

The concern that judicial appointment in Canada is shameless cronyism by

the governing party is not valid, even when government occasionally bypasses its own advisory process. This system generally remains objective and arm's-length from the partisan political process that characterizes elections or public hearings on judges.

Few statistics are published, which contributes to the mystery of the judiciary, but each year there are thousands of completed and ranked applications for a few available appointments in federal and provincial court systems across Canada. A judgeship is a well-paid, high prestige, long-term career, with interesting — if intense — work. A judge is a public figure who, on appointment, loses many freedoms enjoyed in private life, and gains much public scrutiny. Yet, there are many applications and many more qualified applicants than can be appointed to the bench. Professional and personal reputation remain persuasive in getting the appointment, as do diversity objectives, timing, and some good luck.

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