

Appointment of Judges to the Supreme Court of Canada

Introduction

On August 31, 2013, Justice Morris Fish of the Supreme Court of Canada retired, vacating a seat in the country's highest Court. The following article explores the appointment process of judges to the Supreme Court of Canada (SCC). The SCC is the highest court in the country and rules in significant cases that deal with a range of law including constitutional law. As a result of its influence, appointments to the SCC are of great importance. This article explains the appointment process and some of the changes that have been made over time. The first part of this article examines who is responsible for the appointment. Secondly, the article discusses the eligibility and requirements that nominees must meet. Third, the article looks at the changes to the appointment process that include parliamentary involvement. Lastly, the article examines possible future changes to the requirements for appointing SCC judges.

Power to Appoint

Section 96 of the *Constitution Act, 1867* states that the Governor General, the monarch's representative, is responsible for the appointment of the justice.^[1] While the Governor General makes the appointment, there is a convention whereby the Prime Minister recommends the justice who will be appointed. A convention is an informal and unwritten procedural understanding followed by the state. There is nothing written in the Constitution with respect to the Prime Minister recommending the appointment to the Governor General. However, in practice, the Prime Minister makes the final decision on who gets appointed to the SCC. Moreover, the Governor General has never rejected recommendations from the Prime Minister on appointments to the SCC. In addition, there is nothing in the Constitution requiring the Prime Minister to discuss appointments with cabinet, parliament or the provinces.

Eligibility & Requirements

The SCC is comprised of eight junior justices and one Chief Justice. Certain requirements must be met before the Prime Minister can recommend a judge to the SCC. A combination of rules and conventions developed over time require that judges meet geographic requirements and hold certain professional experience. The *Supreme Court Act* states that the SCC must have at least three judges from Quebec in order to assure that the Court can deal with civil law cases from the province.^[2] In addition to the Quebec justices, it has become convention that three justices come from Ontario, two from the West (Alberta, Manitoba, Saskatchewan and British Columbia) and one from Atlantic Canada (Newfoundland and Labrador, Prince Edward Island, New Brunswick and Nova Scotia).

A nominee for the SCC appointment must also have served for ten years as a judge of a superior court or as a member of a provincial or territorial law society to be considered for a position on the SCC.^[3] If chosen, section 99 of the *Constitution Act*^[4] and section 9 of the *Supreme Court Act*^[5] state that judges can hold office on good behaviour until the age of 75. A judge cannot hold other remunerative office or engage in business enterprise when serving on the SCC.^[6]

Changes to the Appointment Process

Over time, there have been changes to the appointment process. These changes came as a response to criticism that the Prime Minister had too much power in the appointment process and that there was no input from Parliament. In 2004, former Prime Minister Paul Martin created a special ad hoc parliamentary committee to review appointments to the SCC.^[7] The committee would then report its findings to Parliament.

In 2006, Prime Minister Stephen Harper announced further changes to the appointment process of SCC justices. The changes came in the form of a directive from the Prime Minister that required nominees to undergo three hours of questioning before an all-party House of Commons committee.^[8] Despite the changes, the ultimate decision still rests with the Prime Minister and the committee cannot veto a nominee.

In the case of Justice Fish's replacement, the Justice Minister, the Prime Minister, the Chief Justice, Quebec's Chief Justice and other legal experts are consulting on a list of candidates that will be given to the committee for review. The committee will then provide an unranked list of candidates back to the Justice Minister and the Prime Minister. This list will be based on the committee's own consultations with potential candidates in addition to reviewing their resumes and past judgments.^[9]

Future Changes?

In 2010, Yvon Godin, a New Democratic Party of Canada Member of Parliament, introduced Bill C232 to make bilingualism a requirement for all SCC Judges. If passed, the bill would require SCC Judges to hear cases in both official languages without an interpreter.^[10] As it currently stands, the *Official Languages Act*^[11] does not require Supreme Court judges to understand proceedings in both English and French without the assistance of an interpreter. However, the Act does require federal court judges to be bilingual.^[12] Besides the proposed change for a bilingualism requirement, there are currently no other anticipated changes for additional requirements to qualify as a candidate to become an SCC justice. For example, there are no requirements with respect to gender, ethnicity, Aboriginal ancestry or background in specific types of law.

Conclusion

The appointment of a Supreme Court of Canada judge to replace Justice Morris Fish is Prime Minister Harper's sixth appointment that uses parliamentary involvement. This shows a willingness, on the part of the Prime Minister, to open up the nomination process by

involving an all-party parliamentary committee. However, the Prime Minister ultimately appoints SCC justices.

[1] *Constitution Act, 1867* (UK), 30 & 31 Vict, c3, reprinted in RSC 1985, App II, No 5, s 96 .

[2] *Supreme Court Act*, RSC 1985, c S-26, s 6 .

[3] *Ibid*, s 5.

[4] *Constitution Act*, *supra* note 1, s 99.

[5] *Supreme Court Act*, *supra* note 3, s 9.

[6] *Ibid*, s 7.

[7] Robin MacKay, "Appointments to the Supreme Court of Canada", *Library of Parliament Research Publications* (22 June 2011).

[8] "The Supreme Court of Canada", CBC News (28 February 2006) online: CBC News.

[9] Meagan Fitzpatrick, "Shelly Glover among MPs advising on Supreme Court pick" CBC News (11 June 2013) online: CBC News.

[10] Bill C-232, *An Act to amend the Supreme Court Act*, 3rd Sess, 40th Parl, 2010 (second reading in the Senate 22 March 2011) <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=4405356&File=24>>.

[11] *Official Languages Act*, RSC 1985, c 31 (4th Supp).

[12] Marie-Ève Hudon and Lucie Lecomte, "Bilingualism of Supreme Court Judges", *Library of Parliament* (2011).