

Supreme Court Appointment Process and the Prime Minister of the Day

Introduction

The decisions of Supreme Court Justices have a significant impact on Canadians, yet there is no formal process legislated for the appointment of these justices.^[1] The *Supreme Court Act*, the governing legislation for the Supreme Court of Canada ("SCC"), states appointments are made by the Governor-in-Council, that is, by the federal cabinet, on the recommendation of the Prime Minister.^[2] This has been interpreted to mean appointments are made by the Prime Minister.^[3] The Prime Minister appears free to recommend justices for appointment however he or she sees fit.^[4] This article will explore the various selection processes used by those in the PM's office in the past 15 years. Specifically, how the process has changed with each new Prime Minister since 2004.

The Ever-Changing Selection Process - Prime Minister's We Have Known

From the creation of the Supreme Court in 1875 until 2004, there was little to no transparency in the selection process for appointment of justices to that bench.^[5] It was generally understood that the federal Minister of Justice ("MOJ") would consult with the Chief Justice of the SCC as well as other members of the Canadian legal profession and make recommendations to the Prime Minister. The Prime Minister would then select the justice for appointment. This was an informal and confidential process.^[6] Lack of transparency in the process was increasingly criticized and therefore, in 2004, Prime Minister Martin promised to create a formalized selection process.^[7]

PM Martin's Selection Process 2003 - 2006

Prime Minister Martin's government introduced a more transparent process for the selection of justices to the Supreme Court of Canada. However, the entire process was not fully developed prior to the need to replace two retiring justices - Justice Iacobucci and Justice Arbour. The government therefore used the existing process to create a short list of nominees and then presented these nominees to an *ad hoc* committee comprised of seven parliamentary members and two non-parliamentary members.^[8] The Minister of Justice ("MOJ"), Irwin Colter, appeared before the committee and answered questions posed to him about the selection process and the qualifications of the nominees. The nominees themselves did not have to appear at this hearing.

With the retirement of Justice Major in 2005, Prime Minister Martin's government was able to implement the more robust process as promised. The process was as follows:

1. The MOJ consulted with the provincial and territorial attorney generals, chief justices and leading members of the legal profession as had been done previously;
2. The MOJ created a short list of five to eight candidates that was sent to an advisory committee composed of members of parliament from each recognized party in the House of Commons, a nominee from the provincial attorney generals, a nominee from the provincial law societies and two prominent Canadians who were neither lawyers nor judges;
3. The committee further refined the short list and returned it to the MOJ with a list of three names for the Minister to select from;[\[9\]](#)
4. The MOJ made a selection from the list and then appeared in before the committee to explain the selection process and qualifications of the person selected.[\[10\]](#)

This new selection process had been put into motion and a short list of three names had been selected. However, Prime Minister Martin's government was defeated in November 2005 and Parliament was dissolved. As a result, no justice was officially chosen using Martin's new process.[\[11\]](#)

PM Harper's Selection Process 2006 - 2016

Prime Minister Harper was immediately tasked with finishing the work Prime Minister Martin's government had started. His government did not make any significant changes to the selection process previously implemented. It did, however, introduce the Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada. This Committee was tasked with questioning the nominee in a televised interview. It was comprised of representatives from each party in the House of Commons and did not have the power to veto the nomination.

Prime Minister Harper appointed eight SCC justices while in office. However, he did not follow the public interview process his government had implemented when appointing Justices Cromwell, Gascon, Brown, Cote and Wagner. It appears the government officially departed from its own process after 2014 when Harper's appointment of Justice Nadon was rejected.[\[12\]](#)

PM Trudeau's Selection Process 2016 - Present

Prime Minister Trudeau's government implemented an entirely new selection process upon his election in 2016. It created an independent and non-partisan Advisory Board to manage the process and recommend "qualified, functionally bilingual candidates who reflect a diversity of backgrounds and experiences for appointment to the Supreme Court of Canada."[\[13\]](#) The Advisory Board is comprised of a retired judge, two lawyers, a legal scholar, and three non-legal members. The process is as follows:

1. The Advisory Board seeks out and encourages qualified candidates to apply, consults with the Chief Justice of the SCC and other key stakeholders as required;[\[14\]](#)
2. The Advisory Board reviews the applications, guided by the qualifications and assessment criteria provided by the Prime Minister;[\[15\]](#)
3. The Advisory Board provides the Prime Minister with non-binding, merit-based recommendations of three to five qualified candidates for consideration;
4. The MOJ consults on this list with the Chief Justice of the Supreme Court, relevant provincial and territorial attorney generals as well as members of the House of Commons Standing Committee on Justice and Human Rights, and the Standing Senate Committee on Legal and Constitutional Affairs;
5. Following these consultations, the MOJ presents recommendations to the Prime Minister who then chooses the appointment.[\[16\]](#)

Today's Take - PM Trudeau's "Québec Process"

With the retirement of Justice Gascon in the fall of 2019, Prime Minister Trudeau is once again given the opportunity to appoint a justice to the SCC. Per section 6 of the *Supreme Court Act*, three of the nine SCC justices must be appointed from Québec. Justice Gascon filled one of these three seats and as such, his replacement must come from Québec.

The Government of Canada and the Province of Québec entered into an agreement to create a new process to be used each time an appointment from Québec is required. This new process, while similar to that of the one used for appointments outside of Québec, is as follows:

1. The Independent Advisory Board for Supreme Court of Canada Judicial Appointments for Québec Seats is formed;
 - a. The composition of the Advisory Board is focused on people from Québec and includes a retired judge from Québec, two lawyers who are members of the Québec Bar, a legal scholar competent in civil law, two members appointed by the federal MOJ and two members appointed by the Québec MOJ;
2. The Advisory Board considers all applications and develops a short list of three to five names;
3. Both the federal MOJ and the Québec MOJ are required to consider the short list and to consult with in the following manner:
 - a. The federal MOJ considers the short list and consults with the

- Chief Justice of Canada, relevant provincial and territorial attorney generals, relevant cabinet ministers, opposition Justice critics and members of both the House of Commons Standing Committee on Justice and Human Rights and the Standing Senate Committee on Legal and Constitutional Affairs;
- b. The Québec MOJ considers the short list and consults with the Chief Justice of Québec and other relevant stakeholders;[\[17\]](#)
4. The Québec MOJ shares the results of the consultations with the Premier of Québec;
 5. Following the consultations, both the federal MOJ and the Premier of Québec provide a recommendation for appointment to the Prime Minister;
 6. The Prime Minister selects the candidate for appointment.[\[18\]](#)

Observations on the New Process

A question arises as to why the Trudeau government would design a new process purely for the selection of Québec justices. It appears from what the Prime Minister has stated, he wants to “follow the tradition of appointing only the most exceptional legal minds to the court, while reflecting Québec’s historic representation on the court and its civil law tradition.”[\[19\]](#) As such, this specific process may have been developed simply based on the fact that three justices must come from Québec. However, the contentious issues raised leading up to the appointment of Justice Gascon leave open the possibility that the Trudeau government’s new process is an attempt to ensure a smooth process with Québec appointees.

Justice Gascon’s appointment to the Supreme Court followed the unsuccessful appointment of Marc Nadon, a retired justice of the Federal Court of Appeal, in early 2014. Nadon’s appointment was challenged because, as a justice of the federal court, he was not a current member of the Québec bench or bar. The challenge resulted in the *Reference re Supreme Court Act, ss 5 and 6* in which the SCC addressed concerns regarding the appointment of Nadon and ultimately clarified his eligibility.[\[20\]](#) Under section 5 of the *Supreme Court Act*, an appointee can be either a current or former member of a provincial superior court or have at least ten years’ standing at a provincial bar.[\[21\]](#) Section 6, as it is worded, requires the appointees selected from Québec are *current* members of the bench or bar.[\[22\]](#) Given the fact Nadon was a retired Federal Court Justice, he did not meet the requirements of section 6 and was therefore ineligible for appointment as a justice from Québec. The decision also highlighted the fact that the *Supreme Court Act* was enacted under the authority of section 101 of the *Constitution*. As such, any attempts to amend the eligibility of appointees requires a full constitutional amendment.

The Trudeau government’s new process raises further questions: what happens if the

federal MOJ and the Premier of Québec recommend different appointees? Will this process result in a politically motivated nominee? What are the implications of allowing one province's political party to have such a significant role in the process? What is clear is this new process gives the province of Québec a direct and significant role in choosing the next Supreme Court Justice, an opportunity that no other province or territory has had to date.

Conclusion

Justices of the SCC make decisions that significantly impact the lives of Canadians. As such, it seems logical that the process used for selecting them be transparent not only to those involved in the selection, but also to Canadians as a whole. We have seen slightly more transparency with each Prime Minister's alterations to the process. Prime Minister Trudeau's government, despite removing the requirement for public interviews introduced by Prime Minister Harper's government, appears to have created the most transparent process yet. Not only are individuals outside the government assisting in the selection, but the criteria being used to select a justice are also publicly available. For the first time since 1875, Canadians know what skills and qualifications are being assessed when choosing a new supreme court justice. However, these processes are not law and there is always the possibility, if not the expectation, that a new Prime Minister and government will once again change the selection process.

[1] Jacob Ziegel, "A New Era in the Selection of Supreme Court Judges?" (2006) 44:3 Osgoode Hall LJ 547 at 550.

[2] *Supreme Court Act*, RSC 1985, c S-26, s 4(2).

[3] *Supra* note 1

[4] When the Prime Minister makes his or her recommendation of a justice, it is understood that this recommendation is an appointment of that justice to the SCC.

[5] House of Commons, Standing Committee on Justice and Human Rights, *The New Process for Judicial Appointments to the Supreme Court of Canada* (February 2007) at 2 (Chair: Anthony Housefather).

[6] Peter W Hogg, "Appointment of Justice Marshall Rothstein to the Supreme Court of Canada" (2006) 44:3 Osgoode Hall LJ 527 at 528-29.

[7] *Supra* note 1 at 552.

[8] *Supra* note 2 at 528.

[9] *Ibid* at 528-29.

[10] *Ibid* at 529.

[11] *Ibid*.

[12] Erin Crandall & Andrea Lawlor, "Courting Controversy: The House of Commons' Ad Hoc Process to Review Supreme Court Candidates" (April 10, 2019), online: <<http://www.revparl.ca/english/issue.asp?param=225&art=1672>>

[13] The Government of Canada, "New process for judicial appointments to the Supreme Court of Canada" (August 2, 2016), online: <<https://pm.gc.ca/eng/news/2016/08/02/new-process-judicial-appointments-supreme-court-canada>>

[14] *Ibid*.

[15] The Office of the Commissioner for Federal Judicial Affairs Canada, "Qualifications and Assessment Criteria" (April 18, 2019), online: <<https://fja-cmf.gc.ca/scc-csc/2019/qualifications-eng.html>>

[16] *Supra* note 11.

[17] The Government of Canada, "Arrangement concerning the appointment process to fill the seat that will be left vacant on the Supreme Court of Canada following the departure of Justice Clément Gascon" (May 15, 2019), online: <<https://pm.gc.ca/eng/news/2019/05/15/arrangement-concerning-appointment-process-fill-seat-will-be-left-vacant-supreme>>

[18] *Ibid*.

[19] Jolson Lim, "Trudeau announces appointment process to fill Supreme Court vacancy", *iPolitics* (April 18, 2019), online: <<https://ipolitics.ca/2019/04/18/trudeau-announces-appointment-process-to-fill-supreme-court-vacancy/>>.

[20] 2014 SCC 21.

[21] *Ibid* at paras 28 - 34.

[22] *Ibid* at para 45.