



November 17, 2006

The Honourable Vic Toews, P.C., Q.C., M.P.
Minister of Justice and Attorney General of Canada
East Memorial Building, 4th Floor
284 Wellington Street
Ottawa, ON K1A 0H9

Dear Minister:

Re: Judicial Appointments

I am writing in response to your letter of November 9, the November 10 meeting between your Judicial Affairs Advisor and the CBA's Chief Executive Officer, and your November 10 announcement relating to the composition and operation of Judicial Advisory Committees.

The CBA has concerns with any steps that move away from a judicial appointment process that is independent, impartial and objective, or that give the impression of doing so. While we can support some of the changes you announced last week, we must conclude that the overall impact is to undermine the purpose of identifying the best candidates and removing partisan influences.

Permit me to address each measure in turn.

Law Enforcement Representative

We have concerns about designated representatives from any specific community that could be perceived as having preconceived opinions about judicial appointments. This is not to say that the law enforcement community would bring a myopic view to the task. The advisory committee's role is to assess the merit of judicial candidates in an impartial manner. Mandating a representative of a particular special interest group on the advisory committee could lead reasonable people to conclude that candidates are being assessed on criteria related to that group's interests rather than solely on merit. Any appearance of lack of objectivity will undermine the committee's credibility.

You have implied that "too many lawyers" on the advisory committees must be balanced by other interests in the justice system. This misconstrues the contribution of lawyers to the assessment, namely knowledge of the pool of candidates from whom judges must be chosen rather than a bias about the views they should bring to the Bench. The three current "at-large" appointments give you ample scope to appoint other perspectives you deem appropriate.



Additional Committee Member and Removal of Judge's Vote

The combined effect of adding an eighth member to the advisory committees and removing the judge's vote except in the case of a tie appears to stack the deck in the Minister's favour, thus politicizing the process and creating greater opportunity for patronage appointments. Merit must remain the sole determinant of qualification for judicial office.

Elimination of the Highly Recommended Assessment

The CBA acknowledges the need for greater consistency in recommendations from the advisory committees. In our view, the meaning of 'recommended' should be clarified to ensure that it is a very high threshold. This will result in a shorter list of the best candidates. We hear from those who have served on advisory committees that there may be some value in continuing to distinguish between 'recommended' and 'highly recommended', i.e. candidates who are so far beyond the threshold as to be truly exceptional.

Staggered Terms

We appreciate the issues surrounding simultaneous expiry dates for each of the advisory committees. However, we believe a better approach would be to stagger the terms within each committee to give greater operational continuity.

Specialized Advisory Committee for Tax Court

The CBA supports the creation of a separate advisory committee for appointments to the Tax Court of Canada. As with advisory committees for the superior courts in each jurisdiction, we believe that you should select committee members from nominations by legal organizations with tax expertise. The CBA is well placed to nominate qualified committee members from its Taxation Law Section and its Sales and Commodity Tax Section.

Process of Reform

Finally, we must register our objection to the manner in which these changes were made. The process by which judges are selected is crucial in ensuring public confidence that the judiciary is of the highest qualification, impartial, and independent of government. While there is room for improvement in any process, changes must not be made lightly or without meaningful consultation. You informed us of the proposed changes only late in the day on November 9. Your letter and meeting with your Judicial Affairs Advisor on the morning of November 10 led us to believe that there was further opportunity for input. This was clearly not the case, as the changes were announced hours later.

In conclusion, we fear that, overall, these changes and the way they were introduced could seriously undermine public confidence in the judicial appointment process. We hope that you will subject the changes to public consultation and debate.

Yours truly,

(original signed by J. Parker MacCarthy)

J. Parker MacCarthy, Q.C.