

Independent body to oversee SCC judicial selection

BY JUDY VAN RHIJN

For Law Times

The Trudeau government has delivered on its election promise to ensure that judicial appointments to the country's highest court are determined with the assistance of an independent body. With applications for the Supreme Court vacancy now in, lawyers are debating whether the new system will deliver the transparency and accountability that everyone is hoping for.

"Being a Supreme Court justice is an incredible responsibility which requires the judge to be not only impartial but to have a huge breadth of knowledge and depth of knowledge," says Robert Karrass, principal at Karrass Law of Toronto. "It will be very interesting the first time the process is in place. It could go very right, but it could also go not so right. I hope it results in a good candidate that embodies everything we want."



Lai-King Hum says a change in the selection process of SCC justices was necessary to make the process transparent.

On Aug. 24, applications closed for the first Supreme Court position for which any qualified Canadian lawyer or judge could apply. The current vacancy, which follows the retirement in September of Justice Thomas Cromwell, has provided the opportunity for a new approach. The seven-member advisory board, announced

in August, has been tasked with "identifying suitable candidates who are jurists of the highest caliber, functionally bilingual, and representative of the diversity of our great country."

The appointment of the advisory board and the makeup of the board has been the first point of interest.

"I'm happy the process is moving out of the political sphere to a more regulated and also transparent method of appointment," says Karrass.

"The advisory board appears to be well balanced."

He recounts that there is a retired judge nominated by the Canadian Judicial Council and two lawyers who were nominated by the Canadian Bar Association and the Federation of Law Societies of Canada. A legal scholar has been nominated by the Council of Canadian Law Deans and three members have been nominated by the Minister of Justice, which include two

non-lawyers.

"It's pretty fair to get the opinion of judges, lawyers, members of the public, legal scholars and involve parties in different associations with different agendas," says Karrass.

Marvin Huberman, a civil litigator and chartered arbitrator practicing in Toronto, supports the creation of the advisory board as long as its function remains advisory.

"My view is that there is a risk that this proposal is making the judicial appointments process too simple," he says. "Transparency, fairness and accountability are praiseworthy objectives, but it's ultimately a bad thing if this committee in essence makes the decision as opposed to a recommendation. That would offend not only the law but tradition and convention as well."

Huberman considers that the prime minister and cabinet, as elected representatives, will make the best decision once they

have appropriate information and recommendations from the best people to get it from.

"If this committee creates an opportunity to get the best people in the land, that's terrific, but they are not an elected body. If you are talking about accountability to the people of Canada, the members of the committee do not have it," he says.

Lai-King Hum, chair of the Roundtable of Diversity Associations, an umbrella organization of 19 legal associations concerned with diversity, states that a change in the selection process was necessary to make the process transparent.

"We looked at former appointments of [former attorney general Peter] MacKay. It was hard to understand where the selection came from, what process was followed and how the choices were made," she says.

Hum is most concerned with what the assessment criteria says about racial diversity. "We recognize that Canada is bijuridical and officially bilingual. We take the position that diversity is equally important to training for two legal systems, two languages. The judicial system is no longer representative of the population."

Omar Ha-Redeye, founder and chair of the Lawyers for Representative Diversity, is leading discussions with the government on the issue.

"Governments come and go, but diversity in Canada is a permanent issue. Diversity itself is an issue of skill and merit. If there is little understanding of the social context of the law, you will not be a very good judge," he says.

Ha-Redeye is calling for every new judge from 2016 to have had some type of experience or contact with racialized groups.

"It is no longer optional. You can do additional training for existing judges, but every new judge must have it," he says.

Regional diversity is also a very hot topic, with the glaring absence of a jurist from the Atlantic provinces following Justice Cromwell's retirement.

Karrass is concerned that considerations such as diversity should not outweigh the legal qualifications of the candidates.

"It represents greater access to justice if different stakeholders in society are represented on the Supreme Court. At the same time, you have to balance it with the need to find the right person based on qualifications. It is absolutely important not to exclude people," says Karrass.

Karrass wants everyone to have an opportunity to put his or her name forward.

"The choice really should be based on merit. What decisions have they written? What opinions do they hold on the law? If it happens to be an all-female Supreme Court or one that isn't as diverse, it's still a less diverse court full of really qualified people," he says.