

the democratic Commitment

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BC Civil Liberties Association

Protecting the freedoms of British Columbians since 1963



SUPREME COURT OF CANADA PHOTO / PHILIPPE LANDREVILLE INC.

BCCLA POSITION PAPER

Judicial Appointments to the Supreme Court of Canada

The following is an excerpt from the BCCLA's new position on Supreme Court of Canada appointments. The complete text can be found at [www.bccla.org/positions/dueprocess/04judicial appointments.htm](http://www.bccla.org/positions/dueprocess/04judicial%20appointments.htm).

Justices Arbour and Iacobucci recently announced that they are retiring from the Supreme Court of Canada, positions that must be filled by summer 2004 for the Court to address its busy fall schedule. This news, coupled with Prime Minister Martin's promise to reform the appointment process as part of his efforts to address the "democratic deficit," and Conservative Party leader Stephen Harper's past criticisms of the Court and court appointments generally, suggests that reform is coming to the appointment process, whether one supports reform or not.

This paper suggests that there are sound and compelling reasons of principle to support reform but that those same principles also indicate that some types of reforms are acceptable while others are not.

I. The Current Process for Appointments to the Supreme Court of Canada

Formally, the legal source for the existence of the Supreme Court of Canada resides in the *Constitution Act, 1867* (formerly known as the *British North America Act*). Under section 101 of this Act, the Parliament of Canada has the legal authority to provide "for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada." Pursu-

ant to this constitutional authority, the federal government has promulgated the *Supreme Court Act*. Under section 4(2) of this legislation, judges are appointed by the Governor in Council (i.e. the Cabinet).

There is some confusion about who actually appoints judges to the Supreme Court of Canada. While formally, it is the entire Cabinet, constitutional scholar Peter Hogg suggests that the Prime Minister is responsible for appointing the Chief Justice of the Supreme Court and will be involved in the selection of "puisne" (i.e. sitting judges) of the Court along with the Minister of Justice. As a matter of law, at least three sitting judges must come
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RENOVATING DEMOCRACY

I recently had a direct confrontation with democracy that reminded me of its enduring attractions and value.

I am not referring to the recent federal election, which cynics will regard as a tough case for defending democracy's virtues. No, I am referring to an apparently tougher case — a hearing before Vancouver City's Board of Variance to add about 50 square feet to our home's upstairs so that a second bathroom could be installed at close range from the family sleeping quarters.

The decision should have been a “no-brainer,” according to our architect. I was warned, however, to bring a book to the hearing, since the Board rarely meets its timetable.

The wheels of democracy did in fact grind slowly the day of the hearing. However, my book was no match for the human dramas on display in front of me, as different appellants made their cases for varying building restrictions on their property. One homeowner wished to design a house on a lot with a steep grade, so that the main living area was in the basement. This would allow his elderly mother to avoid climbing stairs and to have easier street access. The design, however, increased the bulk and height of the house in ways that mightily upset his neighbours. Another family simply wanted to move a side door onto the front of the house so that their kitchen and family room were more functional. We desperately needed another bathroom.

Seen up close, it was easy to see that these were not small things in people's lives. What was particularly impressive, even heartening, was that the process and the decision-makers themselves clearly demonstrated respect for the importance of these matters to all the affected individuals.

The process is exemplary on paper. It requires appellants' submissions in advance, notification of neighbours, opportunities for written and oral submissions, input from city planners, questions from Board members, opportunities for closing remarks, and then a vote by an appointed non-partisan board.

Of course, this is merely process, and it could be undermined easily. But that did not happen. What

impressed me most was that all affected parties had a full opportunity to contribute to the deliberations. No one's time was cut short, and when it came time to vote, everyone had had their say and it certainly appeared that an informed decision was possible.

In our own case, our next door neighbour showed up unexpectedly with his family in tow to complain that our proposal would increase the shade in his back yard and would “wreck” his privacy. We responded that the addition would be below the crest of the roof and so should have virtually no impact on shade. The window on the plan did not directly overlook their house, and in any event would be opaque to ensure our own privacy (it is a bathroom after all...). Decision: unanimous in our favour.

There are two main virtues of democracy evident here. The first one is that it is probably the best mechanism humans have yet devised for making informed, morally sound decisions where there are many interests to assess. Make no mistake, these are moral judgments. There are important competing interests at stake, and they must be heard properly to be assessed fairly and impartially. A decision then requires the best judgment each voter can make based on the available information.

The other advantage is that such a process shows respect for the parties who are affected by the decision. Besides the intrinsic merits of that, it contributes to social stability. My neighbour, as far as I could tell, held no hard feelings. He may even have been persuaded by the arguments. In any event, he knew that he had been treated fairly even if he disagreed with the decision. We are still on speaking terms.

It is easy to be cynical about the partisan democratic bodies that we elect. But we need to be reminded why we have chosen to be governed in this way and to temper cynicism with commitment to improving our democratic institutions where they need improvement. It's good to be reminded of this as we confront some of the more frustrating realities of democracy on its larger stages.



BCCLA president
John Russell

A handwritten signature in blue ink that reads "John Russell". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

JOHN RUSSELL, PRESIDENT

STUDENTS' RIGHTS

Abbotsford School Board “policing” student drug offences

Abbotsford School Board is seeking to establish a new drug policy that would allow searches of lockers by drug detection dogs and create “Drug Free Zones” within a two-block radius of schools.

Although it has yet to be officially approved by the School Board, the Abbotsford trustee who proposed the policy has indicated that locker searches would be “suspicionless.” Drug dogs hired from private security firms would be brought in every three or four weeks to conduct random “sniffs” of school hallways.

The School Board also proposes – incorrectly – that federal Crown Counsel would seek double and triple the normal sentences for those caught trafficking or in possession of narcotics within its “Drug Free Zones.” There is no authorization in the *Criminal Code*, the *Controlled Drug and Substances Act*, or the *Youth Criminal Justice Act* for double and triple penalties for drug offences near schools. Indeed, the *Youth Criminal Justice Act* states that appropriate youth sentencing should seek to rehabilitate the youth and reintegrate him or her into society. The BCCLA has confirmed with Crown Counsel responsible for past prosecutions that they would not agree to seek increased sentences.

The BCCLA has written to both the Abbotsford School Board and to federal Crown Counsel outlining our concerns with

both aspects of this proposal. One issue is the inaccuracy of performance by drug detection dogs. Research conducted on dog sniff search reliability has determined that dog/handler teams with a 98 percent accuracy rate have a correct detection rate of less than 20 percent – that is, 80 percent of alerts would be false. This unreasonable amount of false positives would result in an unreasonable number of innocent students subjected to the indignity of being singled out and searched.

Drug-sniffing dogs would also create a “policing” atmosphere in schools, compromising both students’ privacy rights and their level of comfort within their school environment. The dogs’ presence could be highly distressing to students and staff traumatized by past encounters with canines.

The wish to impose severe penalties for narcotics-related offences exemplifies the failed American “war on drugs” mentality rather than a rehabilitative approach to drug problems among students. Although the BCCLA recognizes that school administrators must establish internal rules and sanctions governing drug abuse, we believe they should act as educators rather than law enforcers. Abbotsford’s proposed drug policy appears to create an unsuitable marriage between schools and the criminal justice system.



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The Democratic Commitment is a publication of the British Columbia Civil Liberties Association. The Association was established in 1962, and is the oldest continuously active civil liberties association in Canada. Its mandate is to preserve, defend, maintain, and extend civil liberties and human rights in British Columbia and across Canada.

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BCCLA Opposes Vancouver School Board/VPD Information Sharing Proposal

The BCCLA issued a strongly worded letter to trustees of the Vancouver School Board urging them to deep-six a proposal between the VSB and the Vancouver Police allowing the police unfettered access to student records. The draft Memorandum of Understanding, ostensibly to promote law enforcement by opening up student files to police, had reached the VSB for their approval without prior knowledge of trustees. The BCCLA pointed out that the MOU was likely illegal under the provisions of the *Freedom of Information and Protection of Privacy Act*. To their credit, VSB trustees killed the project without undertaking a privacy impact assessment required by the Information and Privacy Commissioner. However, the BCCLA remains concerned about current practices, given the draft MOU, and has made an access-to-information request for current policy and practice.

WAR ON TERRORISM

Update on the Arar Inquiry

Represented by Joe Arvay, Q.C., the Association was recently awarded intervenor status into the Arar Inquiry. Mr. Arar is the Canadian of Syrian birth who was extradited by the United States to Syria, via Jordan, where he spent almost a year being subjected to torture. The U.S. had extradited him ostensibly on the basis of his ties to terrorism. Mr. Arar has continually argued his innocence. The Liberal government subsequently ordered an inquiry under Justice Dennis O'Connor, the same Commissioner who led the Walkerton Inquiry, to probe into the actions of Canadian officials.

Unfortunately, Commissioner O'Connor denied the BCCLA standing to participate directly in the Factual Inquiry through participation of counsel in the evidence. He also denied our requests for adequate funding to be able to have counsel attend the hearings.

Disappointed but not deterred, the BCCLA will follow the proceedings closely via TV and transcripts to prepare a final submission based on the evidence. In this task, the BCCLA and Mr. Arvay will be ably assisted by Matt Pollard, a former associate of Mr. Arvay's at the law firm of Arvay Finlay who is now studying international law in England. Critical to the Inquiry will be the degree of public access to evidence over which the government lays claim of confidentiality due to national security.

In a post-September 11 world, the BCCLA views the Arar Inquiry as a critically important development for assessing the actions, policies and laws of the government and their impact on fundamental freedoms. Stay tuned.

i The hearing is being broadcast live on the CPAC channel. Transcripts of testimony at the hearing can be accessed by visiting: <http://www.ararcommission.ca/eng/11e.htm>.



HUMAN RIGHTS

BCCLA Intervenes in Same-Sex Marriage Reference

The BCCLA has been granted intervenor status before the Supreme Court of Canada in the same-sex marriage reference. The BCCLA will argue that the failure to allow same-sex couples to marry is an infringement of the equality provisions of the Charter (section 15). The BCCLA will also argue that the creation of a 'civil union' alternative to marriage for same-sex couples still perpetuates a distinction between same-sex and opposite-sex couples which violates the essential dignity of same-sex couples.

Just as Catholic priests may refuse to marry Protestant couples, government sanctioned same-sex marriages will not compel religious officials to perform marriages of same-sex couples that are contrary to their religious beliefs because church officials are not required to solemnize marriages which their religion does not condone.

In addition to these points, the BCCLA will introduce a novel argument about the use of section 1 of the Charter in cases where section 15 is infringed by a common law rule – as in the case of a prohibition on same sex marriages – rather than by legislation. Under section 1 of the Charter, the government must show that an infringement is demonstrably justifiable in a free and democratic society. We argue that:

“Section 15(1) is only engaged when the impact of a distinction deprives members of a disadvantaged group of the law's protection or benefit in a way which negatively affects their essential human dignity and personhood. When this standard is kept in mind, it follows that an unequal application of the law, in breach of section 15, could never be demonstrably justified in a free and democratic society without legislative authorization. If society would tolerate such discriminatory law at all, it must be enacted by an elected legislative body responding to a pressing concern in a balanced, minimally intru-

sive way. The legislature would then face both judicial review and public scrutiny of its decision.”

Elliott Meyers, Q.C. and Craig Jones, both of Bull Housser Tupper, are ably representing the BCCLA. The hearing is scheduled for fall 2004.

i For the full text of our legal argument to the Court, visit the BCCLA website at: www.bccla.org/legalarguments.html.

PRISONERS' RIGHTS

Practice of Unconstitutional Strip Searches at Vancouver Jail Remedied

In the fall of 2003, the BCCLA initiated a policy complaint to the Vancouver Police Board regarding a mandatory strip search policy at the Vancouver Jail. The BCCLA argued that the mandatory strip searching of all persons in custody at the jail violated section 8 of the Charter. In BCCLA's view, a policy of mandatory strip searches does not conform with the ruling in the Supreme Court of Canada's decision in *R. v. Golden*, which clearly states that strip searching short-term detainees cannot be "routine policy" and that reasonable and probable grounds must be established for each individual strip search.

While the policy complaint was in process, a new law regulating procedures at B.C. correctional centres was passed. Because of the unique circumstances at the Vancouver jail where the jail staffing has been contracted to Corrections, this law will also apply to the Vancouver jail. BCCLA objected to the implication that the new legislation would remedy unconstitutional strip searches.

The new law, while not requiring mandatory strip searches on admission, nevertheless allows for strip searches on admission and specifically excludes the requirement for reasonable and probable grounds to search.

The BCCLA has recently received a response to its initial policy complaint. In the response, the Police Board announced procedural and structural changes designed to bring the strip search policy into compliance with the judicial authorities. The Police Board has informed us that case by case assessments are now being made and a training component provided to all patrol members. The BCCLA continues to work with the Police Board to monitor the implementation plan.

PERSONAL FREEDOMS

BCCLA Opposes "Safe Streets Act" Panhandling Prohibitions

The "Safe Streets Act," a private member's bill recently introduced in the provincial legislature, would prohibit solicitation of all kinds in certain public places, such as near transit stops and parking lots. Clearly intended to be used against panhandlers and not Brownies selling cookies or war veterans offering poppies, the bill is guaranteed to be selectively enforced. The BCCLA opposes the bill on the following grounds

1. it would prohibit activity (simply asking people on the street for money) that should not be prohibited in a free and democratic society;
2. where the bill contains prohibitions that are justifiable, such as the prohibition against soliciting in an "aggressive manner," there are already alternative means to address these problems in other legislation; and
3. there is every reason to believe that the bill would be enforced almost exclusively against the poor.

The BCCLA is concerned that the bill is yet another proposed law that attempts to remove persons who are not decorous from the view of the general public.

The legislature adjourned before the bill was passed into law. The BCCLA will monitor the fall session to see if it is reintroduced.

i To view the BCCLA press release objecting to the legislation, visit: www.bccla.org/pressreleases/04safestreets.org



BCCLA Hosts Marijuana Conference

On May 8, 2004, the BCCLA hosted “Beyond Prohibition: Legal Cannabis in Canada,” a conference devoted to describing what a post-prohibition cannabis environment might look like. By all accounts, the event was an unqualified success. Held at the beautiful Wosk Centre for Dialogue in downtown Vancouver, Beyond Prohibition featured speakers from around the world and encompassed a variety of cannabis-related topics. Moreover, due to the unique structure of the Wosk Centre (a round forum with microphones at each seat), conference attendees were able to dialogue with all participants.



ABOVE: “Beyond Prohibition” conference speakers and attendees. RIGHT: Conference speakers Rielle Capler and Hilary Black of the B.C. Compassion Club Society.



Leading off the conference was Vancouver Mayor Larry Campbell. Mayor Campbell pulled no punches, declaring that cannabis should be legalized and taxed, with revenues from the taxation earmarked for use in the health care system. In taking a position explicitly calling for an end to prohibition, Mayor Campbell further cemented his status as the most progressive big-city mayor in Canada and a true champion of civil liberties.

Next up was Philippe Lucas, founder of the Vancouver Island Compassion Society. Mr. Lucas demonstrated the problems with Health Canada’s medical cannabis program and contrasted the low quality samples of the cannabis grown by Prairie Plant Systems, the government’s sole supplier, with that grown organically by cultivators for the Compassion Society.

Jeffrey Miron, professor of economics at Boston University, then took the podium to discuss the economics of prohibition and the ramifications of legalization. According to Professor Miron,

decriminalization would be a mistake because it preserves the worst of all potential systems. Instead, Professor Miron made the case that legalization, with minimal restrictions, was the only economically plausible option.

Walter McKay, an ex-member of the Vancouver Police Department’s drug squad, then made a presentation that was the most sobering moment of the day, particularly in his description of the dramatic harms associated with drug prohibition. Drawing on his personal experiences, Mr. McKay made a compelling argument that prohibition causes far more harm than it prevents.

After a dialogue session and a short break, the conference resumed with a presentation from Dr. Brian Emerson, a consultant with the BC Ministry of Health Services. Dr. Emerson argued that a criminal law based approach to drug use was a mistake and proposed that we tackle illegal drug use as a public health issue, similar to the way society views the problematic use of legal substances like tobacco and alcohol.

Next up was a pinch-hitter. Unfortunately Steph Sherer, of Americans for Safe Access, was too ill to attend the conference. Instead, Dr. Tod Mikuriya graciously agreed to speak to the California medical model and his personal experiences as a physician attempting to prescribe cannabis to his critically and chronically ill patients.

Concluding the health-based portion of the agenda was the team of Rielle Capler and Hilary Black, both of the British Columbia Compassion Club Society. Ms. Capler and Ms. Black made a detailed presentation of the BCCCS standards for distribution of medical cannabis, and drew a “Roadmap to Compassion” that could act as a template for the non-profit, locally-based distribution of medical grade cannabis.



Dr. Brian Emerson



LEFT: Keith Stroup, Eugene Oscapella and Senator Pierre Claude Nolin. ABOVE: Marc Emery and Walter McKay.



Former BCCLA Policy Director and conference organizer Kirk Tousaw

After lunch, the conference resumed with a presentation by Professor Peter Cohen, of the Centre for Drug Research in Amsterdam. Dr. Cohen drew on the experience of the Netherlands’ quasi-legal cannabis environment, as well as his empirical research comparing usage rates in San Francisco and Amsterdam,

in order to demonstrate that public policy is irrelevant to the issue of levels of cannabis use. Prohibition, it seems, fails to deter cannabis use.

Next up was another duo, Wendy Little and Eric Nash of Island Harvest Certified Organic Cannabis. Island Harvest is the only legal cannabis supplier in Canada that grows fully-certified organic cannabis. Ms. Little and Mr. Nash clearly illustrated that growing cannabis is not intrinsically dangerous. Instead, it becomes dangerous only as a result of prohibition.

The founder of the US-based National Organization for the Reform of Marijuana Laws, Keith

Stroup, was next. Mr. Stroup described US efforts at cannabis reform and discussed the international obligations imposed on countries as a result of various UN treaties. He concluded that legalization was a viable option. Mr. Stroup’s most powerful message, however, was a plea for political involvement and a request that no one vote for an elected official who considered cannabis users to be criminals.

Eugene Oscapella, a founding member of the Canadian Foundation for Drug Policy, completed the panel. Mr. Oscapella made a compelling argument for legalization, rejecting other policy alternatives such as decriminalization or continued use of the criminal law. Mr. Oscapella’s discussion succinctly brought

together many of the various themes explored throughout the day.

Finally, Senator Pierre Claude Nolin delivered the keynote address. Senator Nolin drew on his experience as the Chair of the Special Senate Committee that researched the issue of cannabis policy for eighteen months before delivering its report in 2002, and explained that legalization was the only rational option for cannabis policy. After the keynote speech, the conference attendees were given almost an hour to question the presenters, discuss the various topics and engage in constructive dialogue about cannabis policy in Canada.

The BCCLA would like to thank its generous sponsors for making Beyond Prohibition both possible and a fabulous success. These include the Tides Canada Foundation, Advanced Nutrient Systems and Marc Emery.

i The full presentations are available online, in video, at www.pot-tv.net. Transcripts of certain presentations are available at www.bccla.org/proceedings.htm.

Photos by Rev. Damuzi

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from Quebec (section 6 of the *Supreme Court Act*) and as a matter of convention, three judges originate from Ontario, two from Western Canada and one from the four Atlantic provinces. The only explicit qualification for membership on the Court is that a candidate either must currently sit as a judge of a superior court of a province or have been a member of a law society for at least ten years (section 5).

As part of its deliberations regarding the appointment process in 2004, the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness (“Justice Committee”) heard testimony from Irwin Cotler, the Minister of Justice and Attorney General of Canada, on March 30, 2004, who described the current appointment process.

Mr. Cotler describes two parts to this process: the identification of outstanding candidates and the assessment of identified candidates. The Minister of Justice undertakes both parts of this process by a series of consultations involving the following people:

- Chief Justice of Canada or other sitting members (to discuss needs of the Court)
- Attorney(s) General of province or region
- Chief Justice(s) of province or region and Chief Justice of trial level superior court
- President of Canadian Bar Association and local CBA representatives of province or region
- President(s) of law society of province or region.

Once potential candidates are identified, they are assessed for merit based on specific criteria including:

- *Professional capacity*: superior intellectual ability, analytical and writing skills, proven ability to listen to all sides of an issue and maintain an open mind, decisiveness and soundness of judgment, capacity to manage heavy workload in a collaborative environment, capacity to manage stress and isolation of judicial role, strong cooperative skills, awareness of social context, bilingual capacity, specific expertise required for the Court
- *Personal characteristics*: impeccable personal and professional ethics, honesty, integrity and forthrightness, respect and regard for others, patience, courtesy, tact, humility, impartiality, tolerance, responsibility, common sense, punctuality and reliability

- *Diversity*: “the extent to which the court’s composition adequately reflects the diversity of Canadian society.”

The Department of Justice also considers “jurisprudential profiles” regarding volume of decisions, areas of expertise, outcome of appeals, and the degree to which decisions have been followed by lower courts.

Once this process is complete, the Minister of Justice recommends a nominee to the Prime Minister who, if he agrees, will confirm the appointment.

The strengths of this process are identified primarily through the fact that there is considerable consensus among experts that appointments to the Court, at least over the last thirty years, have been excellent. Expert witnesses to the Justice Committee that recently examined the process have noted that the Supreme Court of Canada, as an institution, is highly regarded in the juridical world community and its judgments are adopted by other courts around the world, notably by the courts of Israel and South Africa.

The obvious weakness of this system may be its lack of transparency and consequently the fact that the formal procedure is unclear even among members of the legal community. Such uncertainty endangers legitimacy and breeds a lack of confidence in the process, if not among “experts” then at least in the general public, a danger to be avoided if the institution of the Supreme Court of Canada is to maintain its high regard in Canada and elsewhere. Critics argue that Canada is the only western liberal democracy with such a closed and discretionary system for high court appointments.

In addition, some experts argue that, if not true in fact, there is at least the problem of a perception of danger that the Court appointments could be politicized when the Prime Minister has ultimate authority to determine appointments with little in the way of formal constraints upon his choice. While no one has criticized past appointments as being purely partisan or political, at least at the Supreme Court of Canada level, with no formal constraints on the process, there is a legitimate concern that judicial independence might be at risk if the Prime Minister appoints only those he sees as friendly to his government and its policy.

While no known politician or expert has argued that certain appointments to the Supreme Court have been politically motivated, the same is not true of

appointments in lower courts, including Courts of Appeal. As you may recall, in September of 2003, Stephen Harper alleged that the Liberal government and the courts had conspired via appointments of judges friendly to rendering judgments to laws prohibiting same-sex marriages as unconstitutional so that the Liberal government could sidestep the political controversy by permitting courts to decide the question:

I think it's a typical hidden agenda of the Liberal party ... They had the courts do it for them, they put the judges in they wanted, then they failed to appeal – failed to fight the case in court ... I think the federal government deliberately lost this case in court and got the change to the law done through the back door.

This allegation was roundly criticized in the media for various reasons, including the fact that Roy McMurtry, the Chief Justice of the Ontario Court of Appeal and one of three judges who ruled unanimously in striking down the common law restriction of marriage to heterosexual couples in *Halpern v. Canada (Attorney General)*, was appointed by Brian Mulroney's Progressive Conservative Party of Canada and had previously been an Attorney General of Ontario in Bill Davis's Conservative government.

Harper continues to make comments that could be construed as challenging the notion of judicial independence, a principle that is discussed later in this paper. In particular, Mr. Harper has stated that he believes that the Supreme Court of Canada would refuse to interfere with federal legislation prohibiting same-sex marriages:

I am confident that if the Parliament expresses its views clearly on this, which is something that Parliament refused to do under the Liberals, then I am quite certain that the Supreme Court will understand that and respect Parliament's competency to deal with such a matter.

Mr. Harper made this statement after being asked whether he would use the notwithstanding clause to override a Court decision endorsing same-sex marriages.

While Mr. Harper may just be playing politics, it is important to note his views on these issues because of

concerns that, however much one might believe that past Court appointments were non-politicized, it demonstrates that there are important political players who might be more motivated to take into account purely political concerns when appointing judges to the Court. The primary point to underscore here is that, under our current system of appointments, there are no formal constraints or procedural safeguards to prevent this from happening. The wisdom of relying on



There is considerable consensus among experts that appointments to the Court, at least over the last thirty years, have been excellent. Expert witnesses to the Justice Committee that recently examined the process have noted that the Supreme Court of Canada, as an institution, is highly regarded in the juridical world community and its judgments are adopted by other courts around the world. SUPREME COURT OF CANADA PHOTO / PHILIPPE LANDREVILLE INC.

the good faith of future Prime Ministers to honour this approach is questionable if one is concerned about ensuring judicial independence.

In addition, it is important to note that a major impetus of the move to reform the Court appointment process, that has certainly now found a warm reception in the conservative right and beyond, has emanated from a group of academics and political commentators who have been very critical of what they call “judicial activism” by the Court. These critics argue that the Supreme Court has, without justification or authority, usurped the supremacy of parliaments (both federal and provincial) by invalidating legislation mostly through the Court's interpretation of the *Charter of Rights and Freedoms* and/or imposed a theory of constitutional review that does not give due credence to the original intent of framers of the *Charter*. As a means of redressing this inappropriate judicial activism and

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ensuring judicial accountability, these critics seek to reform the Court's appointment process to permit a greater degree of Parliamentary scrutiny over the membership of the Court. For reasons articulated in greater degree elsewhere, the B.C. Civil Liberties Association should oppose their concerns about judicial activism and should be wary of the motives for and substance of their recommendations for reform. In brief, their criticisms ought to be rejected as contrary to the fundamental principles of the rule of law and judicial independence; they simply do not adequately reflect the complexity of the institutions and structure of constitutional democracy that now exists in Canada.

It is fair to suggest that many within the Conservative Party of Canada, if not Stephen Harper personally, share these same, invalid concerns with respect to judicial activism. It is reasonable to be concerned that such ideas may wield considerable influence in Ottawa if not in 2004, then at some point in the not too distant future.

As will be discussed later in this paper, these concerns regarding politicization are not meant to argue that a Prime Minister should not have significant influence with respect to the choice of appointments. Rather, the current system is vulnerable to outright politicization with no constraints to guard against such manipulation. Thus, there are strong reasons to support reform to the current process to ensure the integrity of the Court by safeguarding the principles of judicial independence and impartiality, as further discussed below.

II. Principles

Any process for judicial appointments to the Supreme Court of Canada must be guided by an overarching set of principles. Ideally, such principles should be enshrined in law in order to properly guide the appointment process. These principles would provide the framework for three key elements of the process: *who* makes appointments, *how* they are made and on *what* basis they are made.

The following principles will be essential to the appointment process and should act as the foundations upon which one answers the questions of *who*, *how* and *what*.

- Merit
- Democratic Legitimacy
- Judicial Independence and Impartiality

1. Appointments must be based on merit.

Merit must be the overriding reason for appointing a particular individual to the Supreme Court of Canada. Thus, the appointment process must be one that is designed to best assess the merit of potential candidates both in terms of who participates in this process and what considerations are taken into account in the assessment. Of course there will be a variety of factors to consider in making appointments based on merit. The factors the Minister of Justice weighs in considering the merit of a potential candidate – professional capacity, personal characteristics and diversity – are a strong starting point as a check list for a thorough assessment. While there must be a degree of flexibility in designing a process, it would be important to enshrine the principle of merit into a legal requirement so that those responsible for choosing or recommending appropriate candidates for the Court must select and justify their decisions according to merit.

2. Appointments must be made in such a way as to promote the democratic legitimacy of the Court.

An appointment process must be perceived to be legitimate by all Canadians and promote the legitimacy of the Court. To achieve democratic legitimacy, the process must engender public confidence that appointments will be made according to merit and not for partisan political purposes. One of the problems with the current process is that there is the potential, if not real evidence of past practice, for the Prime Minister to make appointments for partisan political reasons.

For the Supreme Court to maintain its legitimacy, there must be general confidence in the appointment process. While there will naturally be criticism of any particular Court decision, at time strong criticism, the source for this criticism should not emanate from an unfair, opaque appointment process that is potentially subject to partisanship. Thus, this process must hold the general confidence of the following segments of the population:

- *The Judiciary*: To attract the most qualified jurists, the process must be one that the judiciary in general holds in high esteem. Members of the Court must believe that they merit their appointments and so must their colleagues at other levels of court whose decisions will be subject to review by the Supreme Court and who must follow Supreme Court precedents. Those who

aspire to membership in the Court must be willing to be subject to the review process for candidates, thus attracting top candidates. The process must be transparent and fair.

This point is important in Canada where the candidate pool for the Court, especially from less populated regions like Atlantic Canada, is going to be relatively small. We want to be careful not to discourage the best candidates by subjecting them to an appointment process that may be overly politicized or potentially risky to their current careers. It is important to remember that the best candidates will have other career options sometimes more attractive than working in Ottawa.

- *Legal Community*: As fellow guardians of the rule of law and as advocates before the Court, lawyers and legal and other academics must also believe that appointments are of the highest quality.
- *Parliamentarians*: The Supreme Court is the ultimate arbiter of legislation passed by elected representatives. Thus, Parliamentarians (both federal and provincial) must also firmly believe that those who will judge their laws merit membership in the Court because of outstanding juristic qualities rather than partisan affiliations or political viewpoints. Provincial input is critical given that the Court rules on federalism disputes between the federal government and provinces.
- *General Public*: The general public must also believe that appointments are made based on merit and not simply to stack the Court to render decisions favourable to a ruling government. To achieve this, some experts have suggested that any system to choose judges for the Supreme Court of Canada should include representatives of the “general public.” While we very much agree that the process must invoke the confidence of the general public, the BCCLA believes that this can be achieved without the inclusion of laypersons in the selection process. It is not clear how one would choose a layperson representative of the “general public.” Furthermore, without some special expertise relevant to the task of selecting the best candidates, a layperson would contribute very little to the process. Instead, we suggest that elected representatives are able to represent the “general public” as they do with other matters of public concern.

One of the principal mechanisms by which democratic legitimacy can be achieved is by ensuring that the process by which members of the Court are chosen is itself legitimate. With increased focus on the current process, the relatively secretive process is an easy target for criticism of political manipulation. By making the process clear to all Canadians, these suspicions, whether valid or unfounded, cannot be substantiated.

Furthermore, by making the process more inclusive, various interests will be able to influence the outcome, adding further legitimacy to the process.

With respect to the issue of transparency, a couple of comments are in order. First, greater transparency will have the additional value of providing a valuable means to educate the general public about the Court, its mandate, its operations and about the people on the Court. Whatever reforms are made to the appointment process, it would be an important advance to codify the process in legislation such as the *Supreme Court Act*.

Second, a note of caution is important. The nature of democratic legitimacy is by necessity going to be different with respect to the appointment of judges to the Supreme Court of Canada than it would be for the election of elected representatives. They are fundamentally different positions with different mandates and responsibilities and so the standards and process for attaining office and accountability for elected representatives will not be applicable to the standards for the appointment of judges. Whereas complete transparency with respect to the election of legislative representatives is paramount to the integrity of that branch of a democratic system, a degree of significant confidentiality in the assessment of candidates will likewise be paramount to the integrity of appointments of the judiciary. Our third principle below provides further explanation of why something less than full transparency is appropriate for Court appointments.

3. The process must be one that preserves the integrity of the Court while promoting judicial independence and impartiality.

Judicial independence and impartiality are fundamental conditions for a true democracy in which the rule of law is an underlying principle. As Chief Justice McLachlin stated in her address sponsored by the B.C. Civil Liberties Association:

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... judges are required by the most fundamental principles of our legal tradition to remain independent and impartial. Judges are not beholden to any particular interest or political party, much less to the Prime Minister who may have appointed them... The suggestion that judges ever disregard their obligation to rule in accordance with the law, that they decide on the basis of their subjective preference, undermines this confidence, and should not be made lightly. The suggestion that judges are pawns in elaborate political games or serve the aims of one side or the other of the political spectrum is equally destructive, and equally false.

Thus, any process for appointments to the Court must ensure that the conditions of judicial independence and impartiality are sustained and protected.

But what do the concepts of independence and impartiality represent and how are they relevant in concrete terms to the Court's appointment process?

By way of background, two decisions of the Supreme Court of Canada provide guidance. In *Valente*, the Court states that the purpose of judicial independence is, among other things, to ensure that courts can fulfill their fundamental responsibility as protectors "of the Constitution and the fundamental values embodied in it — rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important" [at para.14]. The Court distinguishes impartiality from independence:

A judge may be impartial in the sense that he has no preconceived ideas or bias, actual or perceived, without necessarily being independent... Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" as Howland C.J.O. noted, connotes absence of bias, actual or perceived. The word "independent" in s. 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

Fawcett, in *The Application of the European Convention on Human Rights* (1969), p. 156, comment-

ing on the requirement of an "independent and impartial tribunal established by law" in article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, puts the distinction between independence and impartiality as follows:

The often fine distinction between independence and impartiality turns mainly, it seems, on that between the status of the tribunal determinable largely by objective tests and the subjective attitudes of its members, lay or legal. Independence is primarily freedom from control by, or subordination to, the executive power in the State; impartiality is rather absence in the members of the tribunal of personal interest in the issues to be determined by it, or some form of prejudice.

In *Re Remuneration of Judges* (1997), the Court reiterated *Valente's* three core and necessary conditions required for judicial independence: security of tenure (removal only for cause after a judicial inquiry with an opportunity to be heard), financial security (freedom from political interference through economic interference by legislature or executive), and institutional independence (the freedom of judges and courts to administer their judicial responsibilities without interference from the executive or legislative branches of government or political matters).

For the Court in *Re Remuneration of Judges*, the separation of powers between the legislative, executive and judicial branches of government that exists in the Constitution of Canada is critical for ensuring judicial independence and insulating the judiciary from political influence:

What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized. When I say that those relationships are depoliticized, I do not mean to deny that they are political in the sense that court decisions (both constitutional and non-constitutional) often have political implications, and that the statutes which courts adjudicate upon emerge from the political process. What I mean instead is the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts,

that are the subject of political debate, and which do not relate to the proper administration of justice [at para.140, Court’s emphasis].

Thus, these principles both provide fodder for a critique of the current system of Court appointments – the fear that the Prime Minister could use his almost complete discretionary authority for purely partisan and/or political ends – and for guidance for the creation of a new appointment process. In seeking to address at least the appearance of a potential problem with the current system, it will be equally important to create a process that respects the principle of “depoliticization”.

III. Options for Reform

Common among many proposals for reform of the appointment process is that a select group of “experts” and interests would convene to undertake the task of determining, at a minimum, who are the leading candidates or, at its most expansive, who should be chosen as the best candidate. Proposals differ in who should participate on such a committee and, importantly, on whether candidates should be subject to a public hearing.

The BCCLA believes that a formal advisory committee would provide an important, non-partisan *continued on page 14*

Muslim Voices Project

As part of our work to protect fundamental freedoms in the post-9/11 era, the BCCLA has launched a project with community partners to assist members of the Muslim and Arab communities to understand their rights and to reveal their stories about the impact of government actions and policies on their lives.

The first stage of this project is an outreach effort to the Muslim community. To that end, BCCLA officials have been visiting local Mosques during Friday prayers, the traditional gathering time for practicing Muslims, to introduce ourselves, provide information and offer assistance to those who wish to express concerns about mistreatment.

Community leaders from various organizations have met to form a task force to work jointly with the BCCLA. Their effort will be crucial given the community’s relative lack of familiarity with the BCCLA, but also given the barriers to disclosure. Community partners in this project include:

- B.C. Muslim Association
- Pakistan-Canada Association
- Islamic Society of B.C.
- Muslim Women in Da’Wah
- Islamic Information Centre
- BCMA Women’s Council
- Muslim Youth Centre

Project objectives include:

To encourage members of the Muslim community to express themselves with regard to:

(a) concerns about mistreatment by government officials.

(b) the impact of the post-September 11 world on their lives.

- To identify and document barriers to members of the Muslim community revealing their stories, voicing concerns and making complaints.
- To identify and document issues and agencies of concern to the community in respect of their rights and civil liberties.
- To inform members of the community about their rights and procedures for enforcing their rights under the law.
- To create a body of fact based information to inform recommendations about law and policy reform with respect to the review of anti-terrorism legislation, the Arar Inquiry, internal government policy and any other law or policy that impacts the Muslim community.
- To provide assistance and representation to those individuals who wish to make complaints against government officials about allegations of mistreatment.

If you know of anyone who has concerns, please encourage them to contact the BCCLA at 604-687-3013 and ask for Murray Mollard or Micheal Vonn.

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institution to ensure that the appointments are meritorious.

But how would one choose individuals to sit on an advisory committee? Whatever the selection process for members of an advisory committee, this process itself must ensure that members are not picked based on partisan affiliations (other than Parliamentarians) or to pursue partisan agendas. With this caveat in mind, we would support a process in which a variety of interested groups that are non-partisan should be left to choose the best representative to participate on a committee. For example, with respect to the judiciary, the Chief Justice of the provincial Court of Appeal and superior court could directly participate or delegate another judge to represent them. With respect to the legal community, one member from the Canadian Bar Association and local law society(ies) could name representatives. Parliamentarians would be represented by individuals of both the government and official opposition from the federal level and by government representatives at the provincial level.

IV. The Mandate of an Advisory Committee and the Role of the Prime Minister

Should an advisory committee merely provide a short list of top candidates from which the Prime Minister or Executive could choose or should the committee pick the candidate? This question involves fairly complex considerations about democracy and the nature of judicial review at the level of the Supreme Court of Canada.

In considering this question, it is important to acknowledge two important facts. First, the decisions of the Supreme Court of Canada, prior to the *Charter* but even more so after its creation, have an important influence on public policy in Canada. Given the Court's significant public policy role, why shouldn't the government of the day – which is elected to govern based on certain public policy commitments – have considerable influence on who is appointed to the Court?

Second, it is important to acknowledge that judges are unique individuals with unique perspectives about a judge's role and differing theories about judicial interpretation and judicial review. Some judges may be seen as deferential to government, while others more interventionist. Thus, it is possible to have several top candidates who each are highly meritorious based on the criteria that we have discussed earlier in

this paper yet will each bring a different approach to their judgments. Is it appropriate to delegate the choice among equal but different candidates to a committee of un-elected members? On what basis will they make distinctions between candidates of equal but different merit? If the difference between candidates is one of “judicial perspective”, isn't it more appropriate for elected, accountable officials to make this choice than appointed members?

The concern about both these propositions is that it takes us back to the arguments we introduced earlier in this paper about politicization of the appointment process and judiciary. There is a real tension between being careful about not allowing a Prime Minister complete discretion to choose whomever they wish without any constraints or safeguards for fear of outright politicization of the process, on the one hand, and acknowledging on the other that (a) there may be a legitimate role for the Prime Minister in choosing an appointment given the policy role of the Court and (b) there has to be some basis – and some legitimate authority – for distinguishing between otherwise equally meritorious candidates.

The resolution to this tension could be found in distinguishing between the responsibility of a true *advisory* committee and the ultimate decision making responsibility for the Prime Minister, or Executive, with respect to an appointment. The advisory committee's role would thus be to determine the best leading candidates based on merit and to advise the Prime Minister about each candidate's “judicial perspective” (i.e. set of values regarding judicial interpretation). The advisory committee would presumably eliminate those candidates who simply see little or no role for judicial review – the worry expressed earlier in this paper regarding those Court appointment reformists who have little regard for the judicial branch of government. Yet, they would presumably include candidates who, as long as they meet the other merit criteria, are either “activist” or “deferential.”

The advisory committee would work on a consensus based model. All members of the committee would have to agree on the recommendations for a short list submitted to the Prime Minister. Because the advisory committee's mandate will be to provide a short list of five or so top candidates, all of whom meet the minimum but high standards of merit – not to recommend only one individual – consensus should not be difficult to achieve. The advantage of a consensus model is that

it encourages decision makers to take seriously other interests besides their own, including partisan interests if they have any, because they must agree to all candidates on the short list. This is a further way the advisory committee will avoid becoming a partisan tool, thus promoting judicial independence and impartiality.

From this short list, the Prime Minister would then choose the appointment according to his or her own views about the kind of judicial perspective and expertise they wish to see added to the Court.

The advisory committee should also include a chairperson who will have organizational support to act as a secretariat to coordinate the operation of the committee. We believe that the chairperson should be the Clerk of the Privy Council. The Clerk and his staff's role is to provide non-partisan advice to the Prime Minister and Cabinet. The Clerk of the Privy Council is the head of the public service and responsible for smooth transitions between different governments.

V. Public Hearings

In considering more carefully the idea of public hearings, it is not apparent what such hearings would accomplish. An axiom of judicial decision making is that a judge lets a decision she has written speak for itself. Thus, it is not appropriate for parliamentarians to ask potential candidates or a nominee to comment on a particular case. Nor would a nominee answer such questions. Again, a nominee's theory of judicial review should be evident by their past judgments. The only exception would be for candidates who come directly from private practice (Justices Binnie and Sopinka for example) or the academic world (Justice Bastarache), but in each of these cases, such candidates will have likely written or given public speeches on topics of interest to a selection committee. Finally, it will not be appropriate for an MP to ask a nominee's personal values with respect to issues like abortion or the death penalty, nor would a nominee answer such questions. Though a public hearing involving the Minister of Justice and possibly the chair of a selection committee would not create the problems as outlined above, again it is not clear what is to be gained by this type of hearing in substantive terms. In sum, there is little to be gained in substantive terms in determining the best candidate to appoint to the Court through the use of public hearings. At best, they provide a modicum of an appearance of "accountability" with little if any sub-

stantive assistance to choosing the best candidate. At worst, the hearings will provide a very public stage for politicians to play politics with the appointment process, thus undermining judicial independence and impartiality.

VI. Conclusion

The BCCLA supports reform to the Supreme Court of Canada appointment process as a matter of ensuring the integrity of the Court and preserving judicial independence and impartiality. By the same token, the BCCLA opposes parliamentary confirmation hearings as a threat to judicial independence. Instead, the Association recommends the creation of an advisory committee of experts to assess the relative merits of top candidates who would then recommend the best options to the Prime Minister for final selection. The BCCLA believes that a formal advisory committee would provide an important, non-partisan institution to ensure that the appointments are meritorious.

Time for Liberty Campaign

The following law firms and lawyers, champions of civil liberties and corporate good citizens, have made donations as part of our ongoing Time For Liberty pledge campaign this year. The BCCLA will be better able to continue our vital support of civil liberties because of their important commitment.

| | |
|-----------------------------|------------------------------|
| Baker & Corson | Gottschau Law Corp |
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If you would like to join the Time for Liberty campaign, please contact BCCLA Development Officer Tom Sandborn at 604-224-1182 or tos@infinet.net. Corporate donations from businesses outside the legal community are also welcome, of course, as are individual gifts. You can use the handy donor form that comes with this issue of the Democratic Commitment to begin or extend your support for liberty through a donation today. We thank you in advance for your help.

IN MEMORIUM

Remembering BCCLA Board Member John Cox 1932-2004

We are saddened to report that long-time BCCLA Board Member and Executive board member John Cox passed away on May 14th at age 72.

John was a valued member of the board for many years. He came to us in 1985 while working as a media relations officer for the provincial government. He served on our finance committee for many years, and served as Treasurer during a time of substantial financial growth for the organization. He was also a link for the BCCLA to the Unitarian Church.

John was a kind, thoughtful person and was often a welcome moderating influence in board meetings. We will miss him and extend our sympathy to his wife Joan and his family.

UNITED WAY DONATIONS



Don't forget that you can designate the BCCLA as a specific recipient of your United Way donation!

WE'RE MOVING



On or before September 1st, the BC Civil Liberties Association will be moving to:

#550 - 1188 W. Georgia (at Bute) Vancouver B.C. V6E 4A2

Board Update

Michael Feld has joined the BCCLA Board of Directors. Mr. Feld has recently retired from the Department of Philosophy at the University of Manitoba.

The Association also wishes to congratulate long-time BCCLA Board member and past President Philip Bryden on his appointment as the Dean of the Faculty of Law at the University of New Brunswick in Fredericton. Phil has been a professor of law at UBC for the past twenty years. Phil first joined the BCCLA Board in 1985. He was President from 1990-1993. Over his almost twenty years of involvement in the BCCLA, Phil has been one of the Board's most respected and influential Directors. Successive Presidents and Executive Directors regularly turned to him for advice on the most difficult issues. In turn, Phil was always ready to provide what would inevitably be sage direction. He will be missed.

The BCCLA extends its best wishes to Phil Bryden and his family, wife Cindy and sons Colin and David, in their move to Atlantic Canada and we offer our deepest thanks for all his efforts over the years on behalf of the BCCLA and civil liberties.

Staff Update

The Association is pleased to announce that Micheal Vonn has joined the office as the new Policy Director. She replaces Kirk Tousaw who decided to return to Detroit



Policy Director Micheal Vonn Photo: Dominic Schaefer

to continue practicing law. Micheal recently completed articles at union-side labour law firm Victory Square Law Office and has extensive experience in a variety of fields, most notably her work in education and ethics in HIV/AIDS. Ms. Vonn is the former Chair of AIDS Vancouver.

Thanks in part to a grant from Human Resources and Skills Development Canada, the Association is also fortunate to have Sarom Bahk as a summer law student. Ms. Bahk comes highly recommended from the Dean of the Faculty of Law at McGill University in Montreal.

The B.C. Civil Liberties Association wishes to thank the Law Foundation of B.C. for its generous, ongoing support for our core programs.

