

Justice for All

A seat on the Supreme Court of Canada will become available in the new year, offering the Prime Minister a key opportunity to promote reconciliation through the appointment of an Indigenous judge to Canada's highest court.

Canada's Justice Minister has publicly stated that appointing an Aboriginal person to the Supreme Court of Canada warrants serious consideration. The Canadian Bar Association has already adopted a motion calling for representation of Aboriginal people in Canada's courts. This week the CBA will be debating a resolution clarifying that their support includes Supreme Court appointments. The history of Indigenous people in this land and the special place reserved for Indigenous people in our Constitution demand it.

We believe that Canadians should support such an appointment. It would formalize what has already been recognized - that Aboriginal customary law is a distinct and founding body of Canadian law. It would reinforce the importance of including Aboriginal perspectives in understanding, interpreting and applying Aboriginal and Treaty rights, and it would be central to safeguarding the legitimacy of judicial institutions by ensuring Indigenous participation in them.

We acknowledge that there is some resistance to this idea. One of the arguments being advanced is that Justices should be selected first and foremost on the basis of merit. We agree. But to presume that the merit principle automatically excludes an Indigenous Justice does a great disservice to our many excellent Indigenous legal minds. The reality is that there are a number of Indigenous candidates who possess the requisite experience, insight and excellence to serve on Canada's highest court. The appointment of an Indigenous Supreme Court Justice would not imply a lessening of standards, but a raising of them.

Still, some argue that we must not set aside special seats for "minorities" on the Court because such appointments would be "race based". This argument betrays a fundamental misunderstanding about Indigenous peoples, Canadian law and history.

Indigenous peoples are not minorities or special interest groups. We are social and political nations that have a unique and distinct place in Confederation as the First Peoples of this land. As the Supreme Court has acknowledged, our peoples were never conquered and never surrendered sovereignty. "Race" has been used, through mechanisms like the *Indian Act*, to manage Indigenous peoples, primarily with a view to achieving assimilation. This is not how we, as Indigenous peoples, define ourselves.

Canada's Constitution – the basis for Canadian law – acknowledges and enshrines our unique status in section 35 by recognizing and affirming our Aboriginal and Treaty rights. The Constitution embraces the reality that our rights are inherent. They pre-date the Constitution and this country. As such, Indigenous peoples have a special status and unique rights different from other peoples who chose to come to this land.

Appointing an Indigenous Justice would not be a break from legal tradition. It is consistent with the current criteria for Supreme Court appointments. The Canadian legal system has recognized two sources of Canadian law – English common law and French civil law – and the composition of Supreme Court of Canada reflects these two sources of law by guaranteeing that there are three judges from Quebec.

Aboriginal customary law is also recognized in Canadian law. Aboriginal rights are based on Aboriginal customary laws and traditions. As the Supreme Court is the final arbiter of the interpretation of those rights, it must include people grounded in Indigenous traditions in order to fully and completely understand the laws upon which those rights are based.

The Supreme Court of Canada has spoken of the need for reconciliation of Indigenous people and Canadian society. Former Chief Justice Antonio Lamer wrote in the *Delgamuukw* decision seven years ago: “Let us face it, we are all here to stay.” Reconciliation can only happen if the institutions of government not only respect but also reflect the importance of Indigenous peoples in this country’s past, present and future.

Let us be clear. We would not presume or expect an Indigenous Justice to always support Indigenous arguments. It is about promoting an inclusive Rule of Law and enhancing the deliberations that will result in balanced decisions and the appearance of justice for all.

In the end, the decisions of Canada’s courts must be legitimate in the eyes of all people, including Indigenous peoples. Every year, Canadian courts make decisions that have lasting impact on Indigenous peoples. The appointment of Indigenous people at all levels, including the Supreme Court - along with Indigenous participation in the appointment process - will result in a fairer and more legitimate justice system.