INIGENOUS BAR ASSOCIATION/ ASSOCIATION BARREAU AUTHOCHONES

Submissions to the Sub-Committee on the Process of Appointment to the Federal Judiciary

November 2005

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INTRODUCTION

> "The geese migrate because they have responsibilities to fulfil at different times and in different places. Before they fly they gather together and store up energy. I believe strongly that our people are gathering together now, just like the geese getting ready to fly. I am tremendously optimistic that we will soon take on the responsibilities we were meant to carry in the world at large."
>
> – Jim Bourque[1]

The Indigenous Bar Association (IBA) welcomes the opportunity to participate in the review of the process for federally appointed judges. The IBA is a non-profit professional organization of First Nation, Inuit and Métis persons trained in the field of law. Our membership consist of Indigenous lawyers (practicing and non-practicing), judges, law professors, legal consultants and law students.

The IBA plays an active role in promoting the recognition and development of Indigenous law and supporting Indigenous legal practitioners. In our objectives, among other things, the IBA recognizes and respects the spiritual basis of our Indigenous laws, customs and traditions and seeks reform of policies and laws affecting Indigenous people in Canada.

To that end, the IBA is active in promoting and deepening the recognition of Indigenous laws in Canada and in seeking more appointments of Aboriginal jurists to all courts in Canada, including the Supreme Court of Canada. We have expressed deep concern over the current lack of representation of Aboriginal Peoples within the judiciary and further, with the judicial appointment process itself. By way of example of the nominal representation Aboriginal people have on the bench, it is important to state that the first ever Aboriginal jurist to be elevated to an appellate court anywhere in this country transpired in November of 2004.

Canadian courts have and continue to develop jurisprudence known as "Aboriginal law". Meanwhile, the widely held view both empirically and legally is that Aboriginal people

[1] Jim Bourque: a Métis recognized as an Elder in the Northwest Territories and the Yukon in a personal communication to the Commissioners of the *Royal Commission on Aboriginal Peoples,* cited in Looking Forward Looking Back, Vol. 1.

remain excluded and marginalized not only in representation on the bench itself but also in the judicial decision-making process.

In addition, while "Aboriginal law" is opined on by the Court with significant frequency, Indigenous laws, customs and traditions – which should form a cornerstone of the foundation of Canada's legal jurisprudence and pluralism – is excluded.

It is the IBA's position that the time has come for Aboriginal people working in law, as Jim Bourque put it, to "take on the responsibilities we were meant to carry in the world at large". One of the mainstays of responsibility in the area of law is on the bench by contributing to the decision-making and development of jurisprudence in Canada. It is clear that the current process and institutions are not reflective of the role Aboriginal people played in the founding and continued growth of Canada and subsequently in Canada's institutions, such as the Courts.

The IBA is making these submissions with the view that the federal government will make necessary changes to the current federal judicial appointment process that will result in the elevation of more Aboriginal jurists to the bench.

Changes to the Current Process

> "It is the intention of the Indian people that principles of the court process tend to create fundamental problems for Indian people because of differences in culture. There is an overwhelming gulf between the Indian and Anglo-Canadian culture on which the court process is based. The two cultures operate from very separate and different beliefs, myths and history..."
>
> – Delia Opekokew[2]

The current process sees independent judicial advisory committees ("committees"), review applications of prospective judges, each of which they classify in one of three ways – namely 'unable to recommend', 'recommended' or 'highly recommended' – for the Minister of Justice to consider when filling vacancies of federal appointments to superior courts throughout Canada. Such seven-member committees are chaired by a sitting judge and include; a single representative of the Canadian Bar Association; one representative of the

[2] Delia Opekokew, I.P.C., *Conference on Aboriginal Peoples and Justice*, Saskatoon, 1994 at p.202.

relevant provincial or territorial Law Society; one representative of the provincial Attorney General; and three representatives from the Minister of Justice.

While this composition is said to be representative of the bench, the bar, and the public, the reality is that Aboriginal people and our laws our excluded and not represented in the various pools from which the Ministry appoints to these committees. The result is that the Aboriginal bench, bar and public are effectively excluded from these advisory committees and the judicial appointment process altogether.

There is a correlation between the disproportionately low number of Aboriginal judges appointed and the lack of Aboriginal participation in the application process. Absent any mandated representation of the IBA in this process, it is highly doubtful that Aboriginal representation on the bench will increase.

While the committees are mandated to review merit and assess the qualifications of applicants they do so without Aboriginal representation. The IBA is concerned that there is little ability of the committees to determine the experience of any applicant in terms of their ability to understand or access Indigenous laws, customs and traditions.

In particular, we are concerned that Indigenous laws, customs and traditions are not given proper consideration or priority by the federal government when determine who is qualified to sit on the bench. By placing IBA representatives on the committees such a priority is mandated and ensured.

Moreover, with no current reflection of Aboriginal people in the selection process itself, it is an environment that is unlikely to promote confidence or optimism from Aboriginal applicants as to whether they will be recognized in a system that has only marginalized them to date. Indeed, the fact that there is less than two dozen Aboriginal judges in all of Canada stands as evidence enough of the lack of representation and an unreceptive selection process.

RECOMMENDATION:

1. **The IBA recommends that an IBA representative be included in the composition of all independent judicial advisory committees.**

If increasing Aboriginal representation on the bench through the federal appointments process is a serious initiative on the part of the federal government, it is possible to demonstrate such commitment immediately. There are a number of vacancies that currently exist on various independent advisory committees across Canada that should be filled by Aboriginal representation.

RECOMMENDATION:

2. **The IBA recommends that the Minister of Justice immediately fill all existing Ministry of Justice nominee vacancies on independent judicial advisory committee with Aboriginal nominees.**

In terms of committee responsibilities and the selection process itself, there are a few areas that create significant confusion not only for the public but the profession and potential applicants as well.

There are currently three possible ratings to be assigned by the committee for all applicants. There is little publicly available information on the distinction among the three rating categories. Further, the distinction between 'recommended' and 'highly recommended' seems an irrelevant construct. Given the overall high quality of the bench and bar in Canada an applicant should either be fit to sit on the bench or not and out of necessity to promote public confidence in the bench and the rule of law, applicants should be assessed as either 'recommended' or 'unable to recommend'.

RECOMMENDATION:

3. **The IBA recommends that the federal government provide the independent advisory committees with instructions to categorize applicants as either "unable to recommend" or "recommended" (eliminating the "highly recommended" category) and provide clear**

hallmarks to the independent advisory committees when categorizing candidates.

Aboriginal Appointments

Given that Indigenous people were one of the founding partners of confederation – the partner who contributed all of the lands and resources – Indigenous laws also constitute a third regime of law that must be considered when making appointments to the bench.

Moreover, the rights of Aboriginal people have a long tradition of express recognition in the constitutional history of Canada, including sections 25 and 35 of the *Constitution of Canada, 1982*[3].

Such a history of contribution to Canada coupled with long-standing constitutional recognition clearly calls for more than words of encouragement from the federal government but rather full participation of Aboriginal people in all processes for selection of jurists for the bench as well as full participation as equals in all levels of judicial decision-making in all courts.

It was 2004, a full 137 years after confederation before Canada's first Aboriginal judge[4] was elevated to an appellate court in this country. It is both a legal and moral imperative on the part of the federal government that more Aboriginal judges be considered for all courts and in particular are given consideration in all appellate court vacancies – including the Supreme Court of Canada.

Indeed, Minister Cotler recently set out a new strategy to address Aboriginal justice issues, colloquially known as the "7-R's" plan. This plan, among other things, specifically identifies "representation" as one of the 7-R's. Increased representation on the bench and at all levels of court including appellate courts and the Supreme Court of Canada is a sound investment in this plan.

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[3] See Hopkins J., and A. Peeling "Aboriginal Judicial Appointments to the Supreme Court of Canada", April 2004 for a more fulsome discussion on these issues.

[4] Justice Harry Laforme, Mississaugas of New Credit First Nation, was appointed to the Court of Appeal in Ontario in November, 2004.

RECOMMENDATION:

4. **The IBA recommends that the Minister of Justice immediately prioritizes increasing the number of Aboriginal judges in all levels of courts including appellate courts and the Supreme Court of Canada and simultaneously creates an Aboriginal-inclusive appointments process to support this priority.**

In addition to appointments it is imperative to be cognizant of the fact that Aboriginal judges are joining a bench that has historically not reflected them. They will be joining colleagues whom they may have attended law school with, wrote bar examinations with and practiced in the profession with, but there is typically very little intersection between the study, licensing and practice of law and Canada's relationship with Aboriginal people.

It is clear both empirically and anecdotally that Aboriginal law students and practitioners are not part of the mainstream of the profession. One of the collateral impacts on such marginalization is that the mainstream of the profession are typically not well educated about Aboriginal people, our culture, traditions, laws, customs or our history with Canada. Such a reality means that there is sometimes little net value in a qualified Aboriginal candidate applying for the bench if they – upon being elevated to the bench – must then educate their peers on basic values, customs and traditions of Aboriginal people.

RECOMMENDATION

5. **The IBA recommends that the federal government mandate and fully fund a mandatory national training program for all existing and future judges in relation to the legal, social and economic history of Aboriginal people to be developed and delivered in conjunction with the IBA.**

CBA Recommendations

The IBA also supports the submissions made by the Canadian Bar Association in relation to a cooling-off period for politically involved judges; appointing only those candidates who

have been recommended by a committee; more public access to the application and vacancy process; and recognition that 'diversity' matters and informs merit.

CONCLUSION

Frequently whenever change is called for, particularly in relation to any matter dealing with Aboriginal peoples, the alarmists warn that Canada may unravel – when in reality Canada is simply being asked to confront its history. In relation to court appointments in particular there are accusations that Aboriginal lawyers and judges are not qualified or that our inclusion dilutes accepted notions of merit. This is simply not true. Furthermore, the current standards of merit could be higher. Higher with the inclusion of Indigenous laws reflected in Canada's jurisprudence – which would benefit all Canadians not just Aboriginal people.

To be clear: appointments of Aboriginal candidates to all courts in Canada are founded in law, which cannot be disputed by critics.

We call upon the federal government of Canada to uphold this country's constitutional laws by immediately prioritizing the promotion of qualified Aboriginal candidates to the bench at all levels, including the Supreme Court of Canada. Such a priority is necessary to ensure the continued legitimacy of this country's principles of legal pluralism and constitutional integrity.

In conclusion, the IBA cites the *Royal Commission on Aboriginal Peoples* as we did in the opening. This time, however, to be clear that the necessity of increasing Aboriginal representation in Canada's courts is not merely a discrete matter for the IBA but one for all Canadians to consider, we close with a former Chief Justice of the Supreme Court of Canada, who in his own way recognized as Jim Bourque did, that Aboriginal people are gathering strength and are ready to assume our responsibilities in the world at large – including in the courts by participating in Canada's federal judicial appointment process and by sitting on the bench, informing jurisprudence.

> "As an ordinary Canadian I feel deeply that this wonderful country is at a crucial, and very fragile, juncture in its history. One of the major reasons for this fragility is the deep sense of alienation and frustration felt by, I believe,

the vast majority of Canadian Indians, Inuit and Métis. Accordingly, any process of change or reform in Canada – whether constitutional, economic or social – should not proceed, and cannot succeed, without aboriginal issues being an important part of the agenda."

– Right Honourable Brian Dickson[5]

[5] The Right Honourable Brian Dickson, former Chief Justice of the Supreme Court of Canada, *Royal Commission on Aboriginal Peoples,* Looking Forward Looking Back, Vol. 1.

SUMMARY OF RECOMMENDATIONS:

1. **The IBA recommends that an IBA representative be included in the composition of all independent judicial advisory committees.**
2. **The IBA recommends that the Minister of Justice immediately fill all existing Ministry of Justice nominee vacancies on independent judicial advisory committee with Aboriginal nominees.**
3. **The IBA recommends that the federal government provide the independent advisory committees with instructions to categorize applicants as either "unable to recommend" or "recommended" (eliminating the "highly recommended" category) and provide clear hallmarks to the independent advisory committees when categorizing candidates.**
4. **The IBA recommends that the Minister of Justice immediately prioritizes increasing the number of Aboriginal judges in all levels of courts including appellate courts and the Supreme Court of Canada and simultaneously creates an Aboriginal-inclusive appointments process to support this priority.**
5. **The IBA recommends that the federal government mandate and fully fund a mandatory national training program for all existing and future judges in relation to the legal, social and economic history of Aboriginal people to be developed and delivered in conjunction with the IBA.**