Supreme Court of Canada Appointments and Judicial Independence

When Prime Minister Martin placed Supreme Court appointments on his agenda for parliamentary reforms, he likely did not expect that two seats on the court would become vacant so soon. Nevertheless the resignations of two outstanding judges, Justices Arbour and Iacobucci, have created a sense of urgency.

The most prudent response would be not to rush radical reforms to the appointment process before the pending retirements. Nevertheless, even if these two vacancies are filled through the old process, the need for reform should not be denied. Recent developments in the United Kingdom should shake any sense of complacency about our present system.

Attention to the principle of judicial independence can help make the case for reform, but also steer us away from review by way of a parliamentary committee. In his testimony before the parliamentary committee examining the appointment process, my colleague Jacob Ziegel has helpfully introduced the principle of judicial independence into the debate about Supreme Court appointments. Professor Ziegel’s argument is if that principle precludes direct negotiation of salary between judges and the government, it should also preclude the federal government, as a repeat litigator before the Supreme Court, from having the exclusive say about who sits on that court.

No one is suggesting that the Prime Minister or the Minister of Justice has abused their power by appointing judges that would favour the government in litigation before the courts, but the principle of judicial independence is in part designed to prevent any reasonable apprehension of abuse. For the same reason, it would not be advisable for the Minister of Justice or his officials to interview prospective candidates.

A national nominating committee with a mandate to produce a public short list and with wide and balanced representation should dispel any lingering concerns about why a person is included or excluded from consideration. Such a committee could entertain public and written submissions from any
interested person. Such a process would in my view be an improvement upon present forms of informal consultations that have the potential to allow what may be little more than high-powered legal gossip to be sent over the transom from the well connected and the unaccountable. The nominating committee should be diverse and closer in size to the 23-person South African Commission than the proposed five-person commission in the United Kingdom.

The principle of judicial independence counsels against parliamentary hearings in which nominees would appear before a committee to answer questions. It must be remembered that in almost all cases, appointments to the Supreme Court are elevations from lower courts. In Mackeigan v. Hickman, [1989] 2 S.C.R. 796, the Supreme Court was unanimous that requiring judges to explain their decisions would infringe judicial independence. Justice McLachlin explained that “the judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge... To entertain the demand that a judge testify before a civil body, or emanation of the legislature or executive, on how and why he or she made his or her decision would be to strike at the most sacrosanct core of judicial independence.” (ibid., at pp. 830-31).

Attempts to distinguish this case by saying that appearance before a parliamentary committee would be voluntary or that parliamentary privilege trumps judicial independence are not convincing. Nominees who refused to go before a committee or to answer questions about their decisions would risk ratification. Parliamentary privilege should not be an excuse for ignoring a fundamental principle such as judicial independence.

It could be argued that parliamentarians can be relied upon not to question nominees about their judicial decisions. The chair of the committee could rule such questions as out of order. Nevertheless, the damage would already be done. A mere question about a controversial decision such as those relating to gay marriage or the rights and sentencing of the accused could leave the nominee in an impossible position of either defending the decision or appearing to the public to be unwilling to defend his or her record.

Members of Parliament are in at least as much a conflict of interest on judicial appointments as the Prime Minister or the Minister of Justice. They often have a partisan political interest in taking tough measures against crime or in avoiding divisive social issues — interests that can be harmed by the way a judge decides a Charter case. They may also have an interest in an expansive view of Parliament's powers, which can be harmed by the way a judge decides a division of power case. It should not be forgotten that past recommendations for reforms centred on the need for provincial involvement.

This is not to say that our elected representatives should be powerless in the face of a Supreme Court judgment. Far from it. Sections 1 and 33 of the Charter give our elected representatives much power to respond to Supreme Court decisions. Such powers are, however, exercised after independent judges have made their rulings and not before. The judgments speak for themselves, without the judges being asked to explain or justify them before Parliament or the media. Parliamentarians are in turn accountable for their decision to revise, reverse or not alter judicial decisions.

The present system of dialogue between Parliament and the Court respects the unique nature of the independent judiciary while allowing legislators to revise and reverse Charter decisions through ordinary legislation. This is a better process than attempting to guess how a particular nominee will decide cases in the future. The appointment process can be improved, but reform should be guided by respect for the principle of judicial independence.

K.R.