The duty to appoint judges

Second Opinion

By Lorraine Weinrib

The Conservative government has been slow in taking up its responsibility to make appointments to the bench and to federal boards and tribunals.

To date, the government has filled only 10 of 47 judicial vacancies across the country. The National Parole Board and the Immigration and Refugee Board are also very short-staffed. The government seems bent on making significant changes in personnel: it is not renewing the appointments of qualified and experienced appointees, even if they have needed and hard-to-find language skills.

A number of explanations for this development are in play. Is this just a consequence of change in government? It takes time to process applications, especially if the decision is made to set aside those submitted and/or processed during the tenure of the previous government. Delay of this kind has occurred on the occasion of change of government in the past.

Some have speculated that the new government might be thinking about changing the process of appointment. That seems unlikely. It would be difficult to formulate, adopt, and apply a new system quickly enough to avoid serious disturbance to the operation of the judicial and administrative systems.

Furthermore, the changes that the government would entertain might further politicize the process of appointment, a result that would run counter to the longstanding Conservative Party critique, made as a point of principle and not simply sour grapes, that the Liberals were packing the courts and tribunals with their supporters.

The new government has made things difficult for itself by creating an appetite for greater change in the administration of justice in a wide range of areas — the interpretation and application of the Charter, the operation of the criminal justice system, and immigration, for example. At the same time, it knows that it must appoint qualified, non-partisan candidates; or face sharp criticism among those whose votes it must win to secure an electoral majority in the next election.

Less savoury is the possibility that the government is deliberately putting pressure on the judiciary as an expression of its disdain for what it perceives as an excessive liberal bent. Also distasteful is the idea that the government is trying to save money by reducing the number of judges and administrative adjudicators, on the view that the courts and tribunals are overstaffed given their workload.

There are reports that the vacancy level is so high that it has resulted in considerable delay in processing, prioritizing, and scheduling cases. The workload is becoming excessive. This is not simply a regrettable situation: it might have constitutional significance.

The Ashour case made clear that the courts will enforce the right to trial within a reasonable time in the criminal context. Moreover, there are many constitutional principles relating to access to the courts that would come into play if the situation is considered acute.

Recall that the Supreme Court of Canada stipulated the need for administrative structures to protect the independence of the judiciary in respect to judicial salaries. It might also be willing to protect the independence of the judiciary against action, direct or indirect, that undermined its ability to serve its important functions at the trial and appellate levels, in all areas of law, public and private.

At some point, the power to appoint judges may be transformed into a duty. That point may arise when the situation can be seen to undermine life, liberty, or security of the person contrary to the principles of fundamental justice.

This responsibility to provide a functioning judiciary is not the only restraint upon the appointing power. The discretion in issue is not open-ended.

Candidates should not be disqualified because they have advocated socially conservative viewpoints, personally or professionally, in the past — as some critics of recent appointments have contended.

The review of applications for appointment should, however, filter out candidates who have demonstrated (or indicated) that they cannot, or will not, exercise the independence, impartiality, and full range of analytic skills that adjudication requires within our legal system. Demonstrable professional excellence in other respects cannot trump this basic standard for appointment.

Our Constitution is not an option that governments pick up or drop after an election. It mandates respect for the innate human dignity, liberty, and equality of every member of Canadian society. Everyone who comes before a court of law or a public tribunal in Canada is entitled to be treated according to the public values of our Constitution, not the precepts of the personal religious faith of the particular adjudicator who happens to preside.

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