

*The Process of Appointment of Judges
in Some Foreign Countries:
Canada*

10 April 2001

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CONTENTS

Acknowledgements
Executive Summary

Part 1 - Introduction	1
Background	1
Scope	1
Methodology	1
Part 2 - Some Basic Information	2
Federal and Provincial Court Systems	2
Courts, Jurisdictions, and Judges	2
<i>Supreme Court of Canada</i>	2
<i>Federal Court of Canada</i>	3
Methods of Appointment and Qualifications	5
The Administration of Judicial Appointments	6
Selection of Candidates	6
Part 3 - The Process of Appointment of Judges	7
Vacancy	7
Appointment Procedure	8
<i>Selection</i>	8
<i>Consultation and Assessment</i>	9
Recommendation	13
<i>The Chief Justice and Judges of the Supreme Court and the Chief Justice of the Federal Court</i>	13
<i>Judges of the Federal Court</i>	13
Appointment	14
Part 4 - The Role of the Legislature in the Process of Appointment of Judges	15
Part 5 - Arguments Against and for the Current System	16
<i>Arguments against the Current System</i>	16
<i>Arguments for the Current System</i>	17
Appendices	18
References	34

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ACKNOWLEDGEMENTS

We gratefully acknowledge the assistance given to us by many people in this research. More specifically, we wish to thank Mr. Andre S. Millar, Judicial Appointments Secretary of the Office of the Commissioner for Federal Judicial Affairs and Professor Peter H. Russell, Department of Political Science, University of Toronto. We would also like to thank Mr. Joseph Jill Anne and Mr. Till Heyde, Clerk of the Legal and Constitutional Affairs Committee of the Senate of Canada, Mr. John D. V. Hoyles, Executive Director of the Canadian Bar Association, Ms. Janice Hilchie, Deputy Principal Clerk of Table Research Branch, the House of Commons, and Mr. Bruce Gillies, Consul of the Consulate General of Canada.

EXECUTIVE SUMMARY

1. In Canada, the Governor in Council appoints the judges of the Supreme Court of Canada and the Federal Court of Canada by letters patent under the Great Seal.
2. In Canada, the Parliament save the Prime Minister, who is the head of the executive branch, is not involved in the process of appointment of judges of the Supreme Court and the Federal Court. The Parliament has no power either to recommend candidates for such appointments or to review appointments once they are made.
3. The Prime Minister is responsible for making recommendations to the Cabinet of the appointment of the Chief Justice and judges of the Supreme Court and the Chief Justice of the Federal Court. Candidates are selected by the Prime Minister on the basis of investigations and consultations made by the Minister of Justice.
4. The Minister of Justice is responsible for making recommendations to the Cabinet according to the appointment of judges of the Federal Court. Qualified lawyers must apply in writing to the Commissioner for Federal Judicial Affairs for an appointment of judgeship of the Federal Court. Members of the legal community and all other interested persons can nominate eligible person for an appointment of judgeship of the Federal Court.
5. An Advisory Committee on Judicial Appointments is established in each province and territory to assess the qualified lawyer. Each committee consists of seven members of the bench, the bar and the general public. The Committees are asked to assess candidates on the basis of three categories - "recommended", "highly recommended" or "unable to recommend" for appointment. All Committees consultations and proceedings take place on a confidential basis.
6. Judges of the provincial court and superior court of provinces and territories who wish to be considered for an appointment of judgeship of the Federal Court must also apply in writing to the Commissioner for Federal Judicial Affairs. Judges of the provincial court are not assessed but commented by the advisory committees. Judges of the superior court of provinces and territories are not assessed or commented by the advisory committees and are considered for elevation to higher judicial office subject to consultations by the Minister of Justice only.
7. Major criticisms on the process of appointment of judges are: there is no committee to advice the federal government on appointments to the Supreme Court; the Advisory Committee on Judicial Appointments is not a nominating committee and the Committee does not play a screening role with respect to the promotion of existing federal appointed judges; and the selection process of the federal judges is unstructured and lacking in transparency.

THE PROCESS OF APPOINTMENT OF JUDGES IN SOME FOREIGN COUNTRIES: CANADA

PART 1 - INTRODUCTION

1. Background

1.1 On 17 June 2000, the Panel on Administration of Justice and Legal Services requested the Research and Library Services (RLS) Division of the Legislative Council (LegCo) Secretariat to conduct a study on the process of appointment of judges in some foreign countries.

2. Scope

2.1 This research studies the process of appointment of judges in three common law jurisdictions, namely, the United States, the United Kingdom and Canada. This report describes the process of appointment of judges in Canada. Canada is chosen because it is, besides the United Kingdom, another common law jurisdiction country in which the appointment of judges is governed by statute. In this study, only the appointment of judges of the Supreme Court of Canada and the Federal Court of Canada is examined.

2.2 The focus of this research is the process of appointment, the role played by the legislature in the process, and the judicial selection standards.

3. Methodology

3.1 This study involves a combination of information collection, literature review and analysis. Information has been obtained from relevant overseas government organisations, academic and professional institutions.

PART 2 - SOME BASIC INFORMATION

4. Federal and Provincial Court Systems

4.1 The federal court system consists of the Supreme Court of Canada (the Supreme Court), the Federal Court of Canada (the Federal Court), and the Tax Court of Canada.¹ These courts are established under the provision of the Constitution Act 1867. All judges in the federal court system are appointed by the federal government.

4.2 The provincial court system consists of superior courts and provincial courts. Superior courts are the highest level of court in provinces and territories.² Judges of the superior courts are appointed by the federal government.³ Judges of the provincial courts are appointed by the provincial governments.⁴

5. Courts, Jurisdictions, and Judges

Supreme Court of Canada

5.1 The Supreme Court of Canada is the highest court in the Canadian federal court system. It hears appeals from the superior courts of the provinces and territories, as well as from the Appeal Division of the Federal Court. The Supreme Court is also called upon to decide important questions of interpretation concerning the Constitution, and controversial or complicated areas of private and public law. The government can also ask the Supreme Court for its opinion on important legal questions.⁵

¹ In this report, only the Supreme Court and the Federal Court are discussed. The Tax Court is excluded as it has a specialised jurisdiction.

² Superior courts are divided into two levels: a trial level and an appeal level. There may be a single court, generally called a supreme court, with a trial division and an appeal division. Or, the superior court may be divided into two separate courts, with the trial court named the Supreme Court or the Court of Queen's Bench, and the appeal court called the Court of Appeal. Homepage of the Department of Justice, Canada.

³ Under section 96 of the Canadian constitution, the judges of the superior courts of the provinces and territories are appointed by the federal government and they are called as "section 96 judges."

⁴ Provincial courts deal with most criminal offences and, in some provinces, with civil cases involving smaller amounts of money. The provincial court level may also include certain specialised courts, such as youth and family courts. Homepage of the Department of Justice, Canada.

⁵ Homepage of the Department of Justice, Canada.

5.2 The Supreme Court consists of one chief justice and eight puisne judges.⁶ The nine members represent five major regions of the country, and three of the nine judges must come from Quebec, in recognition of its civil law system.⁷

Federal Court of Canada

5.3 The Federal Court of Canada has two divisions, the Appeal Division and the Trial Division.

Appeal Division

5.4 The Appeal Division hears appeals from the Trial Division of the Federal Court and determines questions of law, jurisdiction or practice referred by federal boards, commissions or other tribunals.⁸

5.5 The Appeal Division consists of one chief justice and ten judges.⁹

Trial Division

5.6 The Trial Division has jurisdiction to hear applications for writs in relation to anyone in the Canadian Armed Forces stationed outside Canada, to grant equitable relief against any federal board, commission or other tribunal, to hear matters of copyright, trademark, industrial design and patents of invention, etc.¹⁰

5.7 The Trial Division consists of one associate chief justice and 19 judges.¹¹

⁶ *Supreme Court Act R.S.C. 1985, c. S-26, s.4(1).*

⁷ *Supreme Court Act R.S.C. 1985, c. S-26, s.6.*

⁸ The Court of Appeal also adjudicates appeals under various federal Acts other than the Income Tax Act, the Estate Tax Act and the Canadian Citizenship Act and adjudicates applications to renew and set aside decisions of federal boards, commissions, or other tribunals, only on specific grounds. Gerald L. Gall, *The Canadian Legal System*, Ontario, Carswell: 1995, p.187.

⁹ *Federal Court Act R.S.C. 1985, c. F-7, s.5(1)(a)&(c).*

¹⁰ The Trial Division also has original jurisdiction and, unless otherwise provided, exclusive jurisdiction in claims against the Crown. It has residuary jurisdiction: (a) where no other Canadian court has jurisdiction; and (b) in matters of Federal Court jurisdiction not specifically assigned to the Federal Court, Appeal Division. It shares concurrent jurisdiction with other courts over: (a) bills of exchange and promissory notes; (b) aeronautics; (c) interprovincial works and undertakings; (d) claims by the Crown or Attorneys General; (e) actions against an officer or servant of the Crown for acts or omissions committed in carrying out his duty; and (f) admiralty. It also adjudicates: (a) federal-provincial or interprovincial disputes where legislatures agree; and (b) citizenship appeals. Gerald L. Gall, *The Canadian Legal System*, Ontario, Carswell: 1995, p. 187-188.

¹¹ *Federal Court Act R.S.C. 1985, c. F-7, s.5(1)(b)&(c).*

Table 1 - The Supreme Court and Federal Court of Canada

Courts	Number of Judges	Jurisdictions
Supreme Court of Canada	One Chief Justice and eight puisne judges	It hears appeals from the superior courts of the provinces and territories, as well as from the Appeal Division of the Federal Court. It is also called upon to decide important questions of interpretation concerning the Constitution, and controversial or complicated areas of private and public law. The government can also ask the Supreme Court for its opinion on important legal questions.
Federal Court of Canada		
Appeal Division	One Chief Justice and ten judges	It hears appeals from the Trial Division of the Federal Court and determines questions of law, jurisdiction or practice referred by federal boards, commissions or other tribunals.
Trial Division	One Associate Chief Justice and 19 judges	It has jurisdiction to hear applications for writs in relation to anyone in the Canadian Armed Forces stationed outside Canada, to grant equitable relief against any federal board, commission or other tribunal, to hear matters of copyright, trademark, industrial design and patents of invention, etc.

6. Methods of Appointment and Qualifications

6.1 The Governor in Council appoints the Supreme Court and Federal Court judges by letters patent under the Great Seal.¹²

6.2 The statutory qualification for a candidate of Supreme Court judge is:¹³

- (a) any person who is or has been a judge of a superior court of a province; or
- (b) a barrister or advocate of at least ten years standing at the bar of a province.

6.3 The statutory qualification for a candidate of Federal Court judge is:¹⁴

- (a) any person who is or has been a judge of a superior, county or district court; or
- (b) a barrister or advocate of at least ten years standing at the bar of a province; or
- (c) any person who has, for an aggregate of at least ten years, been a barrister or advocate at the bar of any province; and after becoming a barrister or advocate at the bar of any province, exercised powers and performed duties and functions of a judicial nature on a full-time basis in respect of a position held pursuant to a law of Canada or a province.

¹² *Supreme Court Act R.S.C. 1985, c. S-26, s.4(2) and Federal Court Act R.S.C. 1985, c. F-7, s.5(4).*

¹³ *Supreme Court Act R.S.C. 1985, c. S-26, s.5(5)*

¹⁴ *Federal Court Act R.S.C. 1985, c. F-7, s.5(5)(a)-(c).* According to *Federal Court Act R.S.C. 1985, c. F-7, s.5(6)*, "ten at least of the judges [of the Federal Court] shall be persons who have been judges of the Court of Appeal or of the superior court of the province of Quebec, or have been members of the bar of that Province."

7. The Administration of Judicial Appointments

7.1 The Office of the Commissioner for Federal Judicial Affairs¹⁵ has overall responsibility for the administration of the appointment process on behalf of the Minister of Justice. That responsibility is exercised directly by the Judicial Appointments Secretary or his delegate.

7.2 The Minister of Justice is the head of the Department of Justice Canada and she is also the Attorney General of Canada.

8. Selection of Candidates

8.1 In the document of "Federal Judicial Appointment Process", there is a list of criteria set for selecting candidates for federal judicial appointment. The criteria are divided into four areas (please refer to Appendix III for the details of these criteria):

- (a) Professional Competence and Experience;
- (b) Personal Characteristics;
- (c) Social Awareness; and
- (c) Potential Impediments to Appointment.

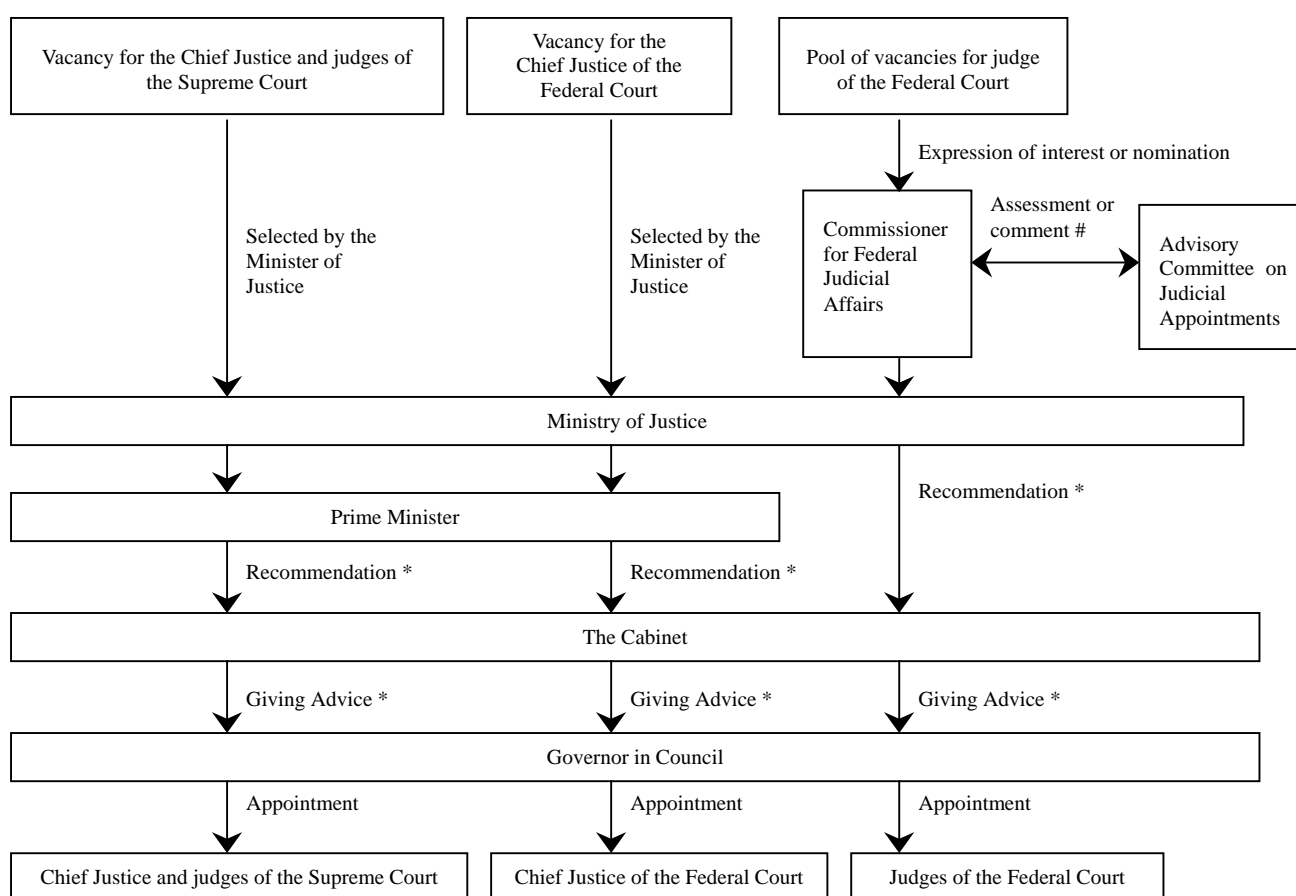
¹⁵ The Office of the Commissioner for Federal Judicial Affairs was created in 1978 to safeguard the independence of the judiciary and to put federally appointed judges at arm's length from the administration of the Department of Justices. Ministry of Justice and Attorney General of Canada, Office of the Commissioner for Federal Judicial Affairs 1999-2000 Estimates.

PART 3 - THE PROCESS OF APPOINTMENT OF JUDGES

9. Vacancy

9.1 The process of appointment of the Chief Justice and judges of the Supreme Court and the Chief Justice and judges of the Federal Court is summarised in Figure 1.

Figure 1 - The Process of Appointment



* The information on whom the Commissioner for Federal Judicial Affairs are made to the Minister of Justice and on whom the Ministry of Justice are made to the Prime Minister, the number of persons recommended by the Minister of Justice and the Prime Minister to the Cabinet, and the number of persons are made by the Cabinet to the Governor in Council, is confidential.

Candidates, who are federally appointed judges [judges of the provincial superior courts], are considered for elevation to higher judicial office subject to consultations by the Minister of Justice. They are not assessed or commented by an advisory committee.

10. Appointment Procedure

Selection

The Chief Justice and Judges of the Supreme Court and the Chief Justice of the Federal Court

10.1 Candidates for the Chief Justice and judges of the Supreme Court and the Chief Justice of the Federal Court are selected by the Prime Minister on the basis of "exhaustive investigations and consultations made both inside and outside the legal community by the Minister of Justice".¹⁶

Judges of the Federal Court

Expression of Interest

10.2 Applicants for appointment of judgeship of the Federal Court may apply in writing on their own initiative to the Commissioner for Federal Judicial Affairs ("Commissioner" hereafter) in a form of "Expression of Interest" at any time. An "Expression of Interest" is valid for two years.

10.3 Upon receiving an "Expression of Interest" from qualified lawyers or judges of the provincial and territorial courts, the Commissioner will request the applicant to complete a "Personal History Form" which provides the basic data for subsequent assessment or comment. All information received on the candidate is kept confidential. A sample of the "Personal History Form" is in Appendix 1.

10.4 Judges of the superior courts of provinces and territories who wish to be considered for the appointment of judgeship of the Federal Court must also apply in writing to the Commissioner for Federal Judicial Affairs. They do not have to complete the "Personal History Form".

Nomination

10.5 Members of the legal community and all other interested persons can nominate eligible persons for an appointment of judgeship of the Federal Court. Nominees will be contacted by the Commissioner to ascertain whether they wish to be considered for a judicial appointment. If the answer is positive, the nominees, according to his background, follow the procedure as described in para. 10.3 or 10.4.

¹⁶ Letter from Andre S. Millar, Judiciary Appointments Secretary, Office of the Commissioner for Federal Judicial Affairs, 8 February, 2001.

Consultation and Assessment

The Chief Justice and Judges of the Supreme Court and the Chief Justice of the Federal Court

10.6 There is no statutory requirement for consultation or public ratification for the appointments of the Chief Justice and judges of the Supreme Court and the Chief Justice of the Federal Court.¹⁷

10.7 In October 1999, the Minister of Justice Anne McLellan was reported to have said that the government regularly sought advice from the provinces on appointments to the Supreme Court and she always consulted with provincial attorneys-general and asked them for a list of names or a name.¹⁸

10.8 According to Professor Peter H. Russell's findings, for appointments to the Supreme Court, the Prime Minister, with the assistance of the Justice of Minister, "will do some informal 'consulting', mostly by telephone or in private meetings, and of course will be exposed to a great deal of lobbying. But as to who is consulted and who lobbies, we can only surmise, as nothing is set down in writing".¹⁹

Judges of the Federal Court

10.9 Candidates, except those candidates who are judges of the superior courts of provinces and territories, who apply for judgeships of the Federal Court of Canada are assessed or commented by an Advisory Committee on Judicial Appointments.²⁰

¹⁷ Justice T. David Marshall, *Judicial Conduct and Accountability*, Carswell, 1995, p.41. As Prof. Russell stated that "very little is known about the process of selecting chief justices or chief judges. At the federal level, ...the appointment of chief justices is a prerogative of the Prime Minister." Peter H. Russell, *The Judiciary in Canada: the Third Branch of Government*, McGraw-Hill Ryerson Limited, 1987, p 141. Professor Peter H. Russell was the chairman of the Judicial Appointments Advisory Committee, Committee of Ontario. He is also the co-author of the article, "Federal Judicial Appointment: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committee," *University of Toronto Law Journal* 4, 5-37, 1991.

¹⁸ Brian Laghi and Kim Lunman, "Justice Minister defends process of nominating Supreme Court judges, Provinces' advice sought in judicial appointments, McLellan says," *The Globe and Mail*, 26 Oct. 2000.

¹⁹ Letter from Professor Peter H. Russell, Department of Political Science, University of Toronto, 17 December 2000.

²⁰ Federal Judicial Appointments Process, June 1999, Minister of Justice and Attorney General of Canada, p. 3.

10.10 Candidates, who are judges of the superior court of provinces and territories, are considered for elevation to higher judicial office subject to consultations by the Minister of Justice. They are not assessed or commented by the Committees.²¹

Advisory Committee on Judicial Appointments

10.11 An Advisory Committee on Judicial Appointments is established in each province and territory. Each Committee consists of the seven members of the bench, the bar and the general public. The Committees are administered under the Judicial Appointments Secretariat which is under the Commissioner for Federal Judicial Affairs.²² Please refer to Appendix II for a summary of the composition of the Advisory Committee on Judicial Appointments.

10.12 Candidates, who are qualified lawyers, are assessed by a regional Advisory Committee on Judicial Appointments established for the judicial district of their practice or occupation, or by the Committee judged most appropriate by the Commissioner.

10.13 Candidates, who are provincial court judges, are not assessed by the Committees, but their files [i.e. Personal History Form] are submitted to the appropriate Committee for comments.²³

Assessment by Advisory Committee on Judicial Appointments

10.14 The Committees are asked to assess candidates on the basis of three categories - "recommended", "highly recommended" or "unable to recommend" for appointment.²⁴ These categories reflect the advisory nature of the committee process, as well as allow Committees to give additional weight to those candidates they consider outstanding.²⁵

²¹ Federal Judicial Appointments Process, June 1999, Minister of Justice and Attorney General of Canada, p. 3.

²² Office of the Commissioner for Federal Judicial Affairs 1999-2000 Estimates.

²³ There are differences between 'assessment' and 'comments' made by the Committee, and the latter means that the Minister of Justice will not ask that the Committee 'Recommend' or be 'Unable to recommend' the judge. The Minister will seek from the Committee only that information concerning the candidate's experience or characteristics which can be readily ascertained without the requirement of extensive consultations and/or investigations. Letter from Andre S. Millar, Judiciary Appointments Secretary, Office of the Commissioner for Federal Judicial Affairs, 8 February, 2001.

²⁴ "Since the establishment of the current process in 1989, no Minister of Justice has recommended a candidate whose assessment was 'unable to recommend', nor has a Minister of Justice recommended a candidate for appointment who was not previously assessed by the advisory committee." Letter from Andre S. Millar, Judiciary Appointments Secretary, Office of the Commissioner for Federal Judicial Affairs, 8 February, 2001.

²⁵ Andre S. Millar, "The 'New' Federal Judicial Appointments Process, The First Ten Year," Alberta Law Review, Vol.38(3), 2000.

10.15 Extensive consultations in both the legal and non legal community are undertaken by the Committee in respect of each lawyer applicant.²⁶ Committee decisions regarding each candidate are normally arrived at through a consensus without recourse to a vote. Where consensus is not possible, a vote is taken. Four members constitute a Committee quorum, although most meetings are attended by all seven members.²⁷

10.16 Following an assessment, the Minister of Justice may seek further information from the Committee on any candidate. On those occasions when a Committee's advice may be contrary to the information received from other sources by the Minister of Justice, the Minister of Justice may ask the Committee concerned for a reassessment.

Confidentiality and Duration of Assessment

10.17 All Committee proceedings and consultations take place on a confidential basis. Guidelines concerning confidentiality and other committee procedures are provided to each Committee member. Committee documents, proceedings and decisions, as well as the names of the candidates themselves, are confidential. Committee assessments are confidential and are communicated to the Minister of Justice only.²⁸

10.18 Qualified lawyer candidates are notified of the date they were assessed by the Committee. They are not provided with the results of the assessment, which are confidential and solely for the Minister's use. Assessments are valid for a period of two years. Candidates who are provincial court judges need not renew their candidature after two years. These candidatures continue to be valid unless withdrawn by the candidate.

²⁶ "Interviews with candidates would normally take place when there is an issue concerning a candidate which cannot be resolved otherwise. This would happen during the Committee's review of the application, and it is rare." Letter from Andre S. Millar, Judiciary Appointments Secretary, Office of the Commissioner for Federal Judicial Affairs, 27 December 2000.

²⁷ Members can also participate by telephone conference where they would otherwise be unable to attend. Andre S. Millar, "The 'New' Federal Judicial Appointments Process, The First Ten Year," *Alberta Law Review*, Vol.38(3), 2000, p.621.

²⁸ Federal Judicial Appointments Process, June 1999, Minister of Justice and Attorney General of Canada.

The Commissioner for Federal Judicial Affairs

10.19 The Commissioner or the Judicial Appointments Secretary²⁹ (or an authorized representative) normally attends every meeting of the Advisory Committee on Judicial Appointments as an ex officio member.³⁰ Committees normally meet six to eight times a year in the larger provinces, one to four times elsewhere.³¹

10.20 All communications between the Minister of Justice and the Committees are effected through the Commissioner or the Appointments Secretary. They assist the Committee chair with the agenda regarding the assessments to be completed at each meeting, with the information required for each assessment and with all services required by the Committee. It is the Commissioner's or the Appointments Secretary's particular responsibility, on behalf of the Minister, to ensure that all assessments are completed expeditiously and thoroughly. Each candidate's assessment must be certified by the Commissioner or the Appointments Secretary prior to submission to the Minister of Justice.³²

Minister of Justice

10.21 Before recommending an appointment to the Cabinet, the Minister of Justice consults with senior members of the judiciary and the bar, and with the appropriate provincial or territorial Attorneys General or Minister of Justice. The Minister of Justice welcomes the advice of interested groups and informed individuals on particular appointments, especially in the furtherance of the government's commitment to gender equality and to representatives on the bench.³³

²⁹ Judicial Appointments Secretary is the head of the Judicial Appointments Secretariat which is under the Commissioner for Federal Judicial Affairs. Office of the Commissioner for Federal Judicial Affairs 1999-2000 Estimates.

³⁰ The Commissioner or the Judicial Appointments Secretary is not one of the seven members of the Advisory Committee on Judicial Appointments. Email from Professor Peter H. Russell, Department of Political Science, University of Toronto, 22 February 2000.

³¹ Andre S. Millar, "The 'New' Federal Judicial Appointments Process, The First Ten Year," *Alberta Law Review*, Vol.38(3), 2000.

³² Federal Judicial Appointments Process, Minister of Justice and Attorney General of Canada, June 1999, p.5.

³³ Ibid.

11. Recommendation

The Chief Justice and Judges of the Supreme Court and the Chief Justice of the Federal Court

11.1 The Prime Minister is responsible for making recommendations to the Cabinet on the appointment of the Chief Justice and judges of the Supreme Court and the Chief Justice of the Federal Court on the basis of investigations and consultations made by the Minister of Justice.³⁴

Judges of the Federal Court

11.2 The Minister of Justice is responsible for making recommendations to the Cabinet on the appointment of judges of the Federal Court on the basis of the assessments or comments by the advisory committee and the consultations with senior members of the judiciary and the bar, and with the appropriate provincial or territorial Attorneys General or Minister of Justice.³⁵

11.3 The number and names of candidates recommended by the Minister of Justice and the Prime Minister to the Cabinet for the appointments of judgeship of the Supreme Court and the Federal Court is known only to the Prime Minister and the Minister of Justice.³⁶

³⁴ Federal Judicial Appointments Process, Minister of Justice and Attorney General of Canada, June 1999, p.1-2 and letter from Andre S. Millar, Judiciary Appointments Secretary, Office of the Commissioner for Federal Judicial Affairs, 8 February, 2001.

³⁵ Federal Judicial Appointments Process, Minister of Justice and Attorney General of Canada, June 1999, p.1-2.

³⁶ To the question of "what is the number of person recommended by the Minister of Justice and the Prime Minister to the Cabinet for the post of judges of the Supreme Court and the Federal Court", the Judiciary Appointments Secretary replied that "[I]t is not likely that more than one or two names are submitted to Cabinet for an appointment to the Supreme Court of Canada." Letter from Andre S. Millar, Judiciary Appointments Secretary, Office of the Commissioner for Federal Judicial Affairs, 8 February, 2001.

12. Appointment

12.1 Judges of the Supreme Court and the Federal Court are made by the Governor in Council³⁷ acting on the advice of the federal Cabinet.

12.2 Constitutional convention requires that the Governor in Council shall comply with advice she receives from the Prime Minister and the Cabinet. The Governor in Council has never refused to appoint someone recommended by the Prime Minister and the Cabinet.³⁸

³⁷ Governor in Council refers to the Prime Minister and his Cabinet ministers (Council) together asking the Governor General (Governor) to take action. By Constitution Act, 1867, the Queen acts, ordinarily through the Governor General, whom she appoints, on the advice of the Prime Minister. Letter from Andre S. Millar, Judiciary Appointments Secretary, Office of the Commissioner for Federal Judicial Affairs, 8 February, 2001 and Homepage of Parliament, Canada.

³⁸ Letter and email from Professor Peter H. Russell, Department of Political Science, University of Toronto, 22 March 2001 and 1 February 2001.

PART 4 - THE ROLE OF THE LEGISLATURE IN THE PROCESS OF APPOINTMENT OF JUDGES

13.1 In Canada, the Parliament is **NOT** involved in the process of appointment of judges of the Supreme Court and the Federal Court of Canada. It has no power either to recommend candidates for such appointments or to review appointments once they are made. There are no confirmation procedures for any judicial appointments in Canada.³⁹

13.2 There is no provision either in legislation or in the Standing Orders whereby the House of Commons or the Senate, or a committee thereof, meets to consider the appointment of judges of the Supreme Court and the Federal Court.⁴⁰ There have been no meetings held on matters related to the appointment of judges of the Supreme Court and the Federal Court of Canada by the House of Commons or the Senate.⁴¹

13.3 Furthermore, the House of Commons or the Senate is not in a position to question the Prime Minister, or the Minister of Justice following a judicial appointment.⁴² No public questions have been received by the Prime Minister or Minister of Justice from the members of the House of Commons or the Senate on matters related to the appointments of judges of the Supreme Court and the Federal Court of Canada.⁴³

³⁹ Letter from Mr. Till Heyde, Clerk of the Committee, the Standing Senate Committee on Legal and Constitutional Affairs, 26 January 2001.

⁴⁰ Letter from Andre S. Millar, Judiciary Appointments Secretary, Office of the Commissioner for Federal Judicial Affairs, 8 February, 2001.

⁴¹ Email from Mr Joseph Jill Anne, Clerk of the Legal and Constitutional Affairs Committee, the Senate of Canada, 6 February, 2001.

⁴² There are however suggestions by some that potential appointees to the Supreme Court should first be reviewed by the House of Commons or the Senate, but successive Canadian governments have not accepted this proposal. Letter from Andre S. Millar, Judiciary Appointments Secretary, Office of the Commissioner for Federal Judicial Affairs, 8 February, 2001.

⁴³ Email from Mr Joseph Jill Anne, Clerk of the Legal and Constitutional Affairs Committee, the Senate of Canada, 6 February, 2001.

PART 5 - ARGUMENTS AGAINST AND FOR THE CURRENT SYSTEM

Arguments against the Current System

14.1 Professor Ziegel, Faculty of Law Emeritus, University of Toronto pointed out that the selection process of the federal judges is "unstructured and lacking in transparency".⁴⁴ Professors Ziegel and Russell stated they have great difficulty in obtaining simple background information on the judicial appointees in Canada.⁴⁵ As another law professor Gerald L. Gall has noted, in Canada, "the process of judicial appointment has always been surrounded with secrecy."⁴⁶

14.2 Professor Friedland in his report prepared for the Canadian Judicial Council criticised that there is no committee to advise the federal government on appointments to the Supreme Court.⁴⁷ On the appointments of the Federal Court judges, the role played by the Advisory Committee on Judicial Appointments is only advisory in nature; it is not a nominating committee.⁴⁸

14.3 The Canadian Bar Association found that "lack of consultation by the Minister of Justice with the Attorneys General and Chief Justices of the various provinces has been a chronic weakness of the selection and appointment systems."⁴⁹ Although the federal government traditionally consults with the provinces over the Supreme Court appointments, the Prime Minister does not have to accept their recommendations.⁵⁰

⁴⁴ Jacob S. Ziegel, "Merit Selection and Democratization of Appointments to the Supreme Court of Canada," *Courts and Legislatures*, Vol. 5, June 1999, p.6.

⁴⁵ Peter H. Russell & Jacob S. Ziegel, "Federal Judicial Appointment: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committee," *University of Toronto Law Journal* 4, 1991, p.18-19.

⁴⁶ Gerald L. Gall, *The Canadian Legal System*, 4th edition, 1995 quoted from Mark C. Miller, "A Comparison of the Judicial Role in the United States and in Canada," *Suffolk Transnational Law Review*, Winter 1998, p.9. Mark C. Miller is an Associate Professor of Government and Director of the Law and Society Program, Clark University.

⁴⁷ Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, report prepared for the Canadian Judicial Council, Canadian Judicial Council, May 1995, p.256-257.

⁴⁸ Peter Russell, *Constitutional Odyssey*, 2nd edition, University of Toronto Press, 1993, p.246; Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, report prepared for the Canadian Judicial Council, Canadian Judicial Council, May 1995, p.256-257 and Justice T. David Marshall, *Judicial Conduct and Accountability*, Carswell, 1995, p.38.

⁴⁹ Peter H. Russell, *The Judiciary in Canada: the Third Branch of Government*, McGraw-Hill Ryerson Limited, 1987, p 121.

⁵⁰ Brian Laghi and Kim Lunman, "Justice Minister defends process of nominating Supreme Court judges," *The Global and Mail*, 26 October 1999.

Arguments for the Current System

14.4 In his report prepared for the Canadian Judicial Council, Professor Friedland stated that the federal system of appointments has shown a marked improvement over the past few decades, such as setting up "Advisory Committee on Judicial Appointments" in every provinces and territories and making refinements of the appointment system in the recent years.⁵¹ Professor Miller, Associate Professor of Government and Director of the Law and Society Program, Clark Univeristy, believed that federally appointed judges are now selected more for their legal merits than for political considerations.⁵²

14.5 Professor Ziegel stated that there may be some merit to the argument that "the present informal system of consultation in the filling of vacancies provides much greater flexibility than would be available in the conversion to a formalised nomination mechanism".⁵³

⁵¹ Comment is extracted from Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, report prepared for the Canadian Judicial Council, Canadian Judicial Council, May 1995, p.254. Changes in process, policy, or procedures were made by the Minister of Justice in 1991, 1994 and 1999. Significant changes included: the two "Qualified", "Not Qualified" designations for Committee assessments were replaced by the following designations: "Highly Recommended," "Recommended," and "Unable to Recommend" for appointment in 1991. All provincial and territorial Committees received two additional members in 1994. In 1999, the term of office for Committee members was extended from two to three years. The period during which Committee assessments are valid was reduced from three to two years. An annual meeting of the Minister with the Chairs of all Committees was also implemented. Information extracted from Andre S. Millar, "The 'New' Federal Judicial Appointments Process, The First Ten Year," *Alberta Law Review*, Vol.38(3), 2000, p.619.

⁵² Professor Mark C. Miller stated that "Since the 1960s, there has been, however, a tradition of peer review and consultation with the Canadian Bar Association on the merits of specific judicial candidates. By tradition, almost all judges in Canada are appointed from the ranks of practising lawyers or legal academics. The Canadian judges whom I interviewed prided themselves on being chosen for their legal merits, and not for their politics." Mark C. Miller, "A Comparison of the Judicial Role in the United States and in Canada," *Suffolk Transnational Law Review*, Winter 1998, p.9. Information of the paper was collected from the author's interviews and meetings with judges, staff who work for the Supreme Court of Canada and various provinces and lawyers in Canada during the summer of 1997.

⁵³ Prof. Ziegel agreed that there may be some merits to this argument, but he did not elaborate this in details. Jacob S. Ziegel, "Merit Selection and Democratisation of Appointments to the Supreme Court of Canada," *Courts and Legislatures*, Vol. 5, June 1999, p.9.

Appendix I

Office of the Commissioner
for Federal Judicial Affairs



Bureau du Commissaire
à la magistrature fédérale

C O N F I D E N T I A L

FEDERAL JUDICIAL APPOINTMENTS

**PERSONAL HISTORY
FORM**

1. Complete the attached **Personal History Form** and **authorization form**. The forms must be dated and signed. Do not write on the back of pages. A recent **photograph** is optional.
2. Provide any additional information which you believe useful. If the space provided in the Personal History Form is not sufficient you may supplement it by attaching numbered sheets. A *curriculum vitae* can also be attached but not as a substitute for completing the form. While not required, letters of recommendation will also be considered by the Committee if provided.
3. Remove this top page and return the completed Personal History Form and other material to:

**Judicial Appointments Secretary
Office of the Commissioner for Federal Judicial Affairs
99 Metcalfe St., 8th Floor
Ottawa, Ontario K1A 1E3
Telephone: (613) 992-9400
Fax: (613) 941-0607**

PLEASE NOTE

The Personal History Form and other material received will be submitted to the appropriate Advisory Committee in your province or territory which will assess your candidature and report its assessment to the Minister of Justice. **Each candidate will be notified of the date of his/her assessment following its completion by the Committee.** Assessments are valid for a period of two years, after which time a candidate may submit a new application for another assessment. **Committee assessments are confidential and are communicated to the Minister only.**

All information will be kept in confidence. The Advisory Committee consults widely, both within and outside the sources provided in this form, and in making enquiries will make every effort to maintain confidentiality. Given its wide consultations the Committee cannot however accept responsibility for any unauthorized disclosure of an applicant's name.

NOTE This form can be completed by use of a P.C. a diskette is available by calling (613) 992-9400

August 2000



Ottawa, Ontario K1A 1E3

C O N F I D E N T I A L

PERSONAL HISTORY FORM

Surname: _____

Given Names: _____

Usual First Name: _____

Date of Birth: _____ Male Female
(D/M/Y)

Business Address: _____
(law firm, etc.)

(number, street, suite)

Use as mailing address

(city, prov./terr., postal code)

(telephone: area code & number) (fax: area code & number)

Residence Address: _____
(number, street, apt.)

Use as mailing address (city, prov./terr., postal code)

(telephone: area code & number) (fax: area code & number)

Have you previously submitted your name for a federal judicial appointment? If so, please give the date and jurisdiction (province or territory) of your prior submission.

No Yes Date: _____ Jurisdiction: _____

Currently member of the Bar of _____ Since: _____
(D/ M/ Y)

Past or present membership in other Bars _____
(dates of membership)

Primary location and Judicial Region of your practice or occupation:

City, town, etc. Judicial Region

CANDIDATE FOR

Select one province or territory only. Except for the territories, you must be a member of the bar of the jurisdiction for which you submit the form. If you wish to be a candidate in more than one province or territory, please submit a separate and complete Personal History Form for each province or territory.

<u>ALBERTA</u>	<input type="checkbox"/>	<u>NUNAVUT</u>	<input type="checkbox"/>
Court of Appeal	<input type="checkbox"/>	Nunavut Court of Justice	<input type="checkbox"/>
Court of Queen's Bench	<input type="checkbox"/>		
<u>BRITISH COLUMBIA</u>	<input type="checkbox"/>	<u>ONTARIO</u>	<input type="checkbox"/>
Court of Appeal	<input type="checkbox"/>	Court of Appeal	<input type="checkbox"/>
Supreme Court	<input type="checkbox"/>	Superior Court of Justice	<input type="checkbox"/>
		Family Court - Superior Court of Justice	<input type="checkbox"/>
<u>MANITOBA</u>	<input type="checkbox"/>	<u>PRINCE EDWARD ISLAND</u>	<input type="checkbox"/>
Court of Appeal	<input type="checkbox"/>	Supreme Court - Appeal	<input type="checkbox"/>
Court of Queen's Bench	<input type="checkbox"/>	Supreme Court - Trial	<input type="checkbox"/>
Court of Queen's Bench - Family	<input type="checkbox"/>		
<u>NEW BRUNSWICK</u>	<input type="checkbox"/>	<u>QUEBEC</u>	<input type="checkbox"/>
Court of Appeal	<input type="checkbox"/>	Court of Appeal	<input type="checkbox"/>
Court of Queen's Bench - Trial	<input type="checkbox"/>	Superior Court	<input type="checkbox"/>
Court of Queen's Bench - Family	<input type="checkbox"/>		
<u>NEWFOUNDLAND</u>	<input type="checkbox"/>	<u>SASKATCHEWAN</u>	<input type="checkbox"/>
Supreme Court - Appeal	<input type="checkbox"/>	Court of Appeal	<input type="checkbox"/>
Supreme Court - Trial	<input type="checkbox"/>	Court of Queen's Bench	<input type="checkbox"/>
		Court of Queen's Bench - Family	<input type="checkbox"/>
<u>NORTHWEST TERRITORIES</u>	<input type="checkbox"/>	<u>YUKON</u>	<input type="checkbox"/>
Supreme Court	<input type="checkbox"/>	Supreme Court	<input type="checkbox"/>
<u>NOVA SCOTIA</u>	<input type="checkbox"/>		
Court of Appeal	<input type="checkbox"/>		
Supreme Court	<input type="checkbox"/>		
Supreme Court (Family Division)	<input type="checkbox"/>		
<u>FEDERAL COURT OF CANADA</u>	<input type="checkbox"/>	<u>TAX COURT OF CANADA</u>	<input type="checkbox"/>
Court of Appeal	<input type="checkbox"/>		
Trial Court	<input type="checkbox"/>		

PLACE OF RESIDENCE

If appointed, I would be willing to reside:

Anywhere in the province or territory

Only in (please be specific) _____

In the National Capital Region (required for candidates for Federal or Tax Court of Canada)

TRAVEL

If appointed, I would be willing to travel within the province or territory or within Canada, as required by the court.

Yes No

Comment: _____

LANGUAGE(S)

	<u>Read</u>		<u>Write</u>		<u>Speak</u>	
	YES	NO	YES	NO	YES	NO
English	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
French	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____ (Other)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Language(s) in which you are competent to hear and conduct a trial:

English French Other _____

EDUCATION Name of institution, years attended, degree/diploma obtained.

Postgraduate: _____

Law School: _____

University: _____

Continuing Education: _____

Academic awards: _____

PERSONAL & OTHER MATTERS (Explain "yes" answers using additional pages if required)

Ever disciplined by a Law Society, or other professional association or regulatory body? Any pending investigative measures or disciplinary actions?

YES NO

Ever convicted of a criminal or other offence by a court or tribunal for which you did not receive a pardon? Are you currently defending a charge for such an offence?

YES NO

Are you insolvent, in financial difficulties or subject to potential financial claims against you, your partners or any business you may have? Have you ever declared bankruptcy or suffered severe financial difficulties? Are you in arrears with taxes owed to a federal, provincial, territorial or municipal government?

YES NO

Are you in default of a family support obligation?

YES NO

Have you had any physical or mental health problems, including alcohol or drug problems, in the last 10 years?

YES NO

Is there anything in your past or present which could reflect negatively on yourself or the judiciary, and which should be disclosed?

YES NO

OPTIONAL

Given the objective of a representative Bench, if applicable you may wish to indicate your status (aboriginal/visible minority/disabled/other). There is no obligation to do so.

REFERENCES AND OTHERS

List a minimum of 4 **references**, both legal and non-legal, and provide the information requested below for each. All listed references must be available to be contacted directly by the Committee, and should be advised by you that their names have been provided to the Committee. The Committee will attempt to contact some but not necessarily all the references listed, in addition to its consultation of other sources.

1. Name: _____ Occupation: _____

Address: _____

Business telephone: _____ Home telephone: _____

2. Name: _____ Occupation: _____

Address: _____

Business telephone: _____ Home telephone: _____

3. Name: _____ Occupation: _____

Address: _____

Business telephone: _____ Home telephone: _____

4. Name: _____ Occupation: _____

Address: _____

Business telephone: _____ Home telephone: _____

5. Name: _____ Occupation: _____

Address: _____

Business telephone: _____ Home telephone: _____

NOTE: Indicate here whether you authorize the Committee to consult your partners or associates in addition to any that may be listed in this form.

YES NO N/A

ATTESTATION AND SIGNATURE

I, _____, attest to the veracity of the information provided in this
(please print)

Personal History Form.

(candidate's signature)

(date)

Appendix II

A Summary of the Composition of the "Advisory Committee on Judicial Appointments"

The first "Advisory Committee on Judicial Appointments" was appointed by the Minister of Justice in October 1988, but did not commence operations until 1989.

Each province or territory has one Advisory Committee on Judicial Appointments; while Ontario has three regionally based Committees and Quebec has two. Each Committee consists of the following seven members of the bench, the bar or the general public:

- a nominee of the provincial or territorial law society;
- a nominee of the provincial or territorial branch of the Canadian Bar Association;
- a judge nominated by the Chief Justice of the province or territory;
- a nominee of the provincial Attorney General or territorial Minister of Justice; and
- three nominees of the federal Minister of Justice.

All Committee members are appointed by the Minister of Justice to serve three year terms, with the possibility of a single renewal. Four of them are appointed after an invitation for names from the appropriate provincial or territorial Law Society, Canadian Bar Association, Chief Justice and Attorney General/Minister of Justice. The Minister, with the assistance of the Commissioner for Federal Judicial Affairs, then selects persons to serve on each Committee who reflect factors appropriate to the jurisdiction, including geography, gender, language and multiculturalism.

Three of the seven members on each Committee have been non-lawyers as representatives of the community at large. Two of them are the nominees of the federal Minister of Justice and the third one is the nominee of the provincial Attorney General or territorial Minister of Justice.

Each Committee elects its own Chair and any Committee member is eligible. The Chair is responsible for ensuring that all required consultations and investigations in respect of each candidate are carried out. These are undertaken in both legal and the non-legal community.⁵⁴

⁵⁴ Andre S. Millar, "The 'New' Federal Judicial Appointments Process, The First Ten Year," *Alberta Law Review*, Vol.38(3), 2000, p.621.

Appendix III

Extracted from "Federal Judicial Appointments Process, June 1999, Minister of Justice and Attorney General of Canada"

CANDIDATES FOR FEDERAL JUDICIAL APPOINTMENT

CRITERIA

Professional Competence and Experience

- proficiency in the law
- well rounded legal experience
- advocacy experience
- commitment to the law
- ability to exercise role conferred by Charter
- standards / reputation
- mature & objective judgement
- work habits
- writing & communication skills
- organizational skills incl. people and time management
- collegiality
- scholarly ability
- achievements & contributions incl. books and articles
- areas of specialization
- non-mainstream legal experience
- bilingualism

Personal Characteristics

- ethical standards
- honesty
- integrity
- fairness
- tolerance
- patience
- common sense
- ability to listen
- ability to make decisions
- consideration for others
- courtesy
- tact
- humility
- reliability
- punctuality

Social Awareness

- sensitivity to gender and racial equality
- appreciation of social issues arising in litigation
- public and community service
- receptivity to ideas

Potential Impediments to Appointment

- drug or alcohol dependency
- civil or criminal actions
- health
- sexual harrassment complaints
- professional complaints and/or disciplinary actions
- financial difficulties
- default of family support obligations

References

1. Andre S. Millar, "The 'New' Federal Judicial Appointments Process, The First Ten Year," *Alberta Law Review*, Vol.38(3), 2000.
2. David A. Stager and Harry W. Arthurs, *Lawyers in Canada*, 1990.
3. Ian Bushnell, "The Federal Court of Canada A History, 1875-1992," *The Osgoode Society*, 1997.
4. Ian Greene, et. al., Law, Courts, and Democracy in Canada, *International Social Science Journal*, 1997.
5. Gerald L. Gall, *The Canadian Legal System*, 4th edition, Carswell, 1995.
6. C. Neal Tate and Panu Sittiwong, Decision Making in the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations, *Journal of Politics*, 1989.
7. Peter H. Russell and Jacob S. Ziegel, Federal Judicial Appointment: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committee, *University of Toronto Law Journal* 4, 5-37, 1991.
8. Paul W. Fox and Graham White, *Canada*, Toronto, McGraw-Hill, 7th ed. Edition, 1991.
9. Peter H. Russell, *The Judiciary in Canada: the Third Branch of Government*, McGraw-Hill Ryerson Limited, 1987.
10. Mark C. Miller, "A Comparison of the Judicial Role in the United States and in Canada," *Suffolk Transnational Law Review*, Winter 1998.
11. Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, report prepared for the Canadian Judicial Council, Canadian Judicial Council, May 1995.
12. Justice T. David Marshall, *Judicial Conduct and Accountability*, Carswell, 1995.

Useful websites

13. Office of the Commissioner for Federal Judicial Affairs, <<http://www.fja.gc.ca/>>
14. Department of Justice, Canada, <<http://canada.justice.gc.ca/>>
15. The Federal Court of Canada, <<http://www.fja.gc.ca/>>
16. Parliament, Canada, <<http://www.parl.gc.ca/>>
17. Access to Justice Network, <<http://www.acjnet.org/>>
18. Canadian Bar Association, <<http://www.cba.org/>>

-----✕-----
Research Paper No.:

Title:

It would greatly help to ensure that Research Papers fulfil their purpose if Members (or their staff) would fill in and return this brief pre-addressed questionnaire. Negative responses can be as useful as positive.

For your purposes, did you find this research paper:

1.	Very useful <input type="checkbox"/>	Fairly useful <input type="checkbox"/>	Not much use <input type="checkbox"/>	Inadequate <input type="checkbox"/>	Any comments? _____ _____ _____ _____
2.	Too long <input type="checkbox"/>	Relatively lengthy <input type="checkbox"/>	A bit short <input type="checkbox"/>	Too short <input type="checkbox"/>	_____ _____ _____
3.	Clear <input type="checkbox"/>	Fairly clear <input type="checkbox"/>	Sometimes unclear <input type="checkbox"/>	Rather unclear <input type="checkbox"/>	_____ _____

Name _____

(Member /Assistant to _____)

Please fold

Ms Eva LIU
Head, Research and Library Services
Research and Library Services Division
Legislative Council Secretariat
5/F, Citibank Tower
3 Garden Road, Central
Hong Kong

Please fold