JUDICIAL SELECTION AND MERIT

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The many facets of judicial independence will be dealt with during this symposium. It is interesting to note, however, that one of these facets, the requirement for an impartial justice system, has continued to dominate the debate concerning judicial independence during this century and that it has always been examined in light of the need to depoliticize the appointment process.

There has been little debate concerning the required qualifications of judges or even the basic skills they should bring to the profession. In an article published in the *Canadian Bar Review* in 1927, R.B. Bennett, who was to become Prime Minister of Canada, talked of the need to establish conditions under which it would be possible to attract to the bench "the best lawyers" in the country. It seemed clear in everyone's mind at the time that this reference was to the most successful litigators and that only a reasonable financial sacrifice would be sufficient to attract them to the bench. The image of a judge was simple. He was white, male, over 50, and relatively affluent.

There is still a strong tendency to concentrate on the appointment process today when discussing the subject of judicial independence. In fact, the discussions which brought about the federal reform of 1988, and amendments thereto in 1991 and 1994, were still concerned primarily with the question of depoliticization of the appointment process. Provincial advisory committees would vet candidates and establish lists of "competent" persons, later "recommended" persons, from which the Cabinet would be required to chose federally appointed judges. But new considerations were soon to surface and create an impact on the criteria to be applied in the selection process. In New Brunswick, for example, Francophones required equitable representations in the judiciary, and especially judges capable of giving direct access to the courts in the language of the minority language group. Women wanted better representation, as did various ethnic minorities. But this is not all. Public scrutiny of judicial decisions brought to light the need for judges showing a better awareness of social, gender, and native issues. Discreetly, the "best lawyers" notion was being questioned; impartiality was now being examined from another perspective. Could judges of the same sex, age, background, class reflect the true value of our complex society? Could they be impartial or would their personal characteristics not create an unintentional bias in the dispensation of justice? On the other hand, some commentators feared that appointing lawyers who openly supported particular causes would produce an even

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*Honourable Justice of the New Brunswick Court of Appeal. These remarks were given as the introduction to the Ivan C. Rand Memorial Symposium held at the University of New Brunswick (Fredericton) 15 March 1996. M. le juge Bastarache a tenu ces remarques introductifs lors du Ivan C. Rand Symposium Commémorative qui a eu lieu à l'Université du Nouveau-Brunswick (Fredericton) le 15 mars 1996.

more undesirable result. Many commentators also wondered about those who embarked upon this new career, especially after the age of fifty; did a number of them not look upon their appointment as a form of semi-retirement?

Au cours des années soixante-dix et quatre-vingt, l'on a beaucoup parlé de réforme en matière d'administration judiciaire. L'on s'est notamment interrogé sur l'opportunité de créer des tribunaux spécialisés pour la famille et les affaires criminelles; on a même proposé la création d'une cour constitutionelle distincte de la Cour Suprême du Canada. De là, le besoin d'un système permettant la nomination à la magistrature de personnes spécialisées dans certains domaines du droit et, par conséquent, la remise en question de l'idée que les meilleurs candidats à la magistrature sont toujours les personnes qui figurent au rang des meilleurs plaideurs.

Le travail des comités aviseurs provinciaux pour les nominations à la magistrature ne semble pas avoir impressionné les critiques du système. Une étude des nominations faites au cours des cinq années qui ont suivi la mise en place du système, effectuée par Peter Russell et Jacob Zeigel, révèle qu'il n'y a aucune différence dans le profil des candidats nommés au cours de cette période avec celui des candidats nommés durant la période précédente. Certains critiques se demandent dès lors comment les comités peuvent fonctionner de manière efficace sans avoir à appliquer des critères précis.

Les audiences sénatoriales concernant la ratification des nominations des juges Thomas et Bork aux États-Unis ont aussi mis en lumière la possibilité de prendre en compte les tendances idéologiques et l'ouverture aux problèmes sociaux dans le processus de sélection des juges. Ceci a semblé particulièrement raisonnable aux yeux des gens qui pensent que les fonctions des juges ont été transformées depuis l'adoption de la *Charte canadienne des droits et libertés* en 1982. Une première mesure proposée pour le Canada consisterait à demander aux comites provinciaux d'interviewer tous les candidats. Une autre suggestion avancée est de rendre ce processus public. Plus le rôle des comités prend de l'envergure, toutefois, plus l'on semble aussi se questionner sur la représentativité des membres des comités, voire sur leurs qualifications pour juger des candidats à la magistrature.

Concerning promotions within the court system, there has been no change. Provincial committees do not evaluate the performance of provincial court judges wanting to be appointed to the Queen's Bench, or that of Queen's Bench judges wanting to be appointed to the Court of Appeal. Should there be a special committee for this, or will the creation of any committee be seen as an encroachment on the independence of judges subject to such evaluations?

This is, in a nutshell, the background for our discussion.