

APPOINTMENT SYSTEMS FOLLOWED IN DIFFERENT COUNTRIES

- A study of best practices -

Talk on 6th February 2010, by Indira Unninar

We have studied a few countries – no means an exhaustive exercise.

The study was conducted through secondary data collection, by a core group at the Campaign for Judicial Accountability & Reform. It was conducted over 3-4 months in the last quarter of 2009.

A few countries have been covered, and this is only a beginning; there will be a more comprehensive exercise before finalizing recommendations for India...

Findings:

What is important is that in each there is:

- an Attempt to have Transparency without compromise of Independence,
- at the same time, there is a Procedure & System in place to ensure Quality.

Broadly speaking, there are 4 methods of appointments of judges:

1. Appointment on the advice of the executive/legislature –
 - a. Britain, Canada, Australia & New Zealand follow the method of appointment on the advice of the executive.
 - b. In the US, at the Federal level, the President appoints judges after confirmation by the Senate
2. Formal training programmes – Recruitment is by competitive exams, e.g in civil law countries in Continental Europe
3. Elections – e.g. in the U.S at the State level, although this is being replaced by the use of judicial appointment commissions, because it tends to be politicized and partisan
4. A judicial appointment commission identifies suitable candidates for appointment

1. The U.S.

Section 2 Art II – The US Constitution reads –

The US Constitution provides that:

The President shall nominate,

and by & with the Advice & Consent of the Senate, shall appoint Judges of the SC. All federal judges are appointed by the President of the US

There are 2 levels of courts – State level & Federal level of Courts. We are talking of the Federal

Within this, you have the District Courts, Circuit Court of Appeals & the Supreme Court; there are 3 levels of federal Courts

1. The process begins with a vacancy

2. Nominations

–The Dept of Justice makes the nominations, supervised and directed by the Attorney General

Within the **Dept of Justice**, there is a designated office, the **Office of Policy Development (OPD)** that has primary responsibility of selection of these nominees.

- **Work very closely with the White House staff – recommends judicial nominations to the President.**

Pre-nomination stage

The Staff of the OPD – talk to different people to collect their information

e.g.

- Interviews the nominees in person re: whether the candidate has any views that might prevent him/her from being **impartial**/following precedents set.

The OPD also asks federal & state judges, prosecutors & defenders, attorneys & support staff about the **candidate's merit & reputation** for the federal bench.

They also **review any articles** written by the candidate, news, writings by or about him/her, financial disclosure statements, physical health.

A **very detailed questionnaire** is sent to the candidate to fill in.

This entire process is the Preliminary evaluation / screening

If the **preliminary evaluation** of the prospective nominee is positive, then it is sent for **further evaluation** to:

1. FBI (Federal Bureau for Investigation)
2. ABA (American Bar Association), an independent NGO

FBI interviews the candidate to check for **veracity/accuracy** of their statements Then the FBI interviews judges, attorneys, neighbours, business and civic leaders, religious and civil rights leaders, doctors.

It also checks for arrests convictions, civil lawsuits.

Tax records.

The FBI's evaluation is a **critical component**.

ABA covers judges and attorneys, law practitioners to evaluate the **candidate's qualifications**, including **temperament**. It then sends informal advice re: rating of the candidate as *“well qualified” “qualified” or “not qualified”*

It is only if the 1. OPD rating is favourable, 2. FBI rating satisfactory & 3. ABA rating positive - that the Attorney General makes that nomination to the President.

To nominate

The White House Counsel's office works closely with the Dept of Justice & Senators in selection.

The Dept of Justice sends

The **formal nomination / letter** from the AG to the President

A memorandum from the Dy AG **re: political clearances** of the candidate, who made the recommendation, etc.

The candidate's **biographical sketch/CV**

The FBI Investigation Report

All other material on the file including the **detailed questionnaire**

3. IF the President approves the nomination, he signs it and sends it to the Senate

The Senate's **advice & consent** are required for **appointment**

4. Each nomination is referred by the **Senate** to the **Senate Judiciary Committee**.

Investigation

The **Senate Committee** is responsible for **consideration of appointments** to judicial positions. It has its own staff which reviews the FBI Investigation Report, FBI Qre & Senate Qre. They contact the home State senator to clear ambiguities - **Investigated**

Confirmation Hearing

Once the nomination is referred to the Senate, it is authorized to hold Confirmation hearings, and take testimony by summoning witnesses and production of documents.

The nominee gives his opening statement followed by questioning time, his testimony, then follow up with support or opposition from other witnesses.

They are public/open to publication by TV/radio

Voting

After the confirmation hearings, the Committee votes. Quorum is 10/18. If the candidate gets a majority vote, it goes to the full Senate.

6. Confirmation of a nomination requires majority vote of the Senate.

If the Committee rejects a nomination, it is returned to the President and effectively lapses/dies.

(It has 18 members. The House of Representatives is not involved, and the Senate acts unicameral here.)

(The President is supplied with – the public executive records of the Senate with a full list of all judicial nominations, confirmations & rejections

7. When the Senate gives its advice & consent, the President signs the **judicial commission** which then **officially appoints the individual**

(8. Senators recommend potential nominees to a vacancy to a district court in his home state. For Supreme Court and circuit courts, the President may need to take recommendations of the Senator for political reasons)

9. Standards of judicial selection include experience, integrity, professional competence, judicial temperament, service to the law, and effective administration of justice (State Judicial Selection Standards – as laid down by the ABA in 2000.)Criticism

Prolonged, with delays & heightened focus on ideology leaves the public feeling that judges are not independent and impartial, but are partisan & governed by ideology

2. New Zealand

Follows the parliamentary system

NZ has a hierarchy of courts – The Privy Council/Supreme Court, followed by the Court of Appeal, then the High Court, then District Courts which include specialist courts such as environment court, etc.

Appointment processes

Appointments to most of the judicial positions described above are made by the Governor-General on the recommendation of the Attorney-General.

(Present exceptions are Environment Court Judges and Community Magistrates.)

(The exceptions are the Chief Justice, whose appointment is made on the recommendation by the Prime Minister.)

With the objective of ensuring **greater transparency** in the process, **advertising for expressions of interest in judicial positions** is carried out at all levels except the Court of Appeal.

(The appointment process for High Court Judges)

Criteria for appointment

A **minimum experience** of a 7 year practice as barrister or solicitor is required

The **suitability of prospective candidates** is assessed in terms of

- clearly **defined, transparent and publicly announced criteria.**

The criteria cover legal ability, qualities of character, personal technical skills and reflection of society.

- *Legal Ability for instance:* Legal ability includes a **sound knowledge of the law and experience of its application.** Quite apart from the actual practice of law, its application may also qualify a person.
-
- (Requisite applied experience is often derived from practice of law before the courts which is experience of direct relevance to being a Judge. But application of legal knowledge in other branches of legal practice, such as in an academic environment, public service or as a member of a legal tribunal may all qualify. At appellate level, legal ability includes the capacity to discern general principles of law and in doing so to weigh competing policies and values. More important than where legal knowledge and experience in application is derived from, is the overall excellence of a person as a lawyer demonstrated in a relevant legal occupation.)
- *Qualities of character:* **Personal qualities of character include personal honesty and integrity, open mindedness and impartiality, courtesy, patience and social sensitivity, good judgement and common sense, the ability to work hard, to listen and concentrate, collegiality, breadth of vision, independence, and acceptance of public scrutiny.**
- *Personal technical skills:* There are certain personal skills that are important, including skills of **effective oral communication with lay people as well as lawyers. The ability to absorb and analyse complex and competing factual and legal material** is necessary. Mental agility, administrative and organisational skills are valuable as is the capacity to be forceful when necessary and to maintain charge and control of a court.

- *Reflection of society*: This is the quality of being a person who is aware of, and **sensitive to, the diversity of modern New Zealand society**. It is very important that the judiciary comprise those with experience of the community of which the court is part and who clearly demonstrate their social awareness. The Report of the Royal Commission on the Courts in 1978 put the point as the need for "**a good knowledge, acquired by experience, of New Zealand life, customs and values**". (p 199).

The steps in the process

The steps in the appointment process for High Court Judges are as follows:

1. **Generation of a databank/list**
2. Expressions of interest are called for **by public advertisement**.
3. While each vacancy is not advertised, general advertisements for High Court Judges appear from time to time.
4. Alternatively, there is a consultation process where various bodies are consulted, and prospective candidates may be **nominated, invited to express their interest and to enter the process**.
3. All prospective candidates are provided with an **Expression of Interest** form for completion.
4. Names of those who meet the statutory criterion for appointment **are held** on a **confidential register** maintained by the Attorney-General's Appointments Unit (the Appointments Unit). Persons expressing interest are advised when their names have been registered.
5. **DATABANK** created
6. **As and when required, the Appointments Unit uses the register to identify all those who have indicated an interest in appointment to the High Court.**
7. Names are reviewed by The Solicitor-General
8. To see at this stage, whether **additional names should be considered and added to the list**, consults the Attorney-General, the President of the Court of Appeal, the Minister of Justice, the Minister of Women's Affairs, the Minister of Māori Affairs, the Chief Justice and the Secretary for Justice.
9. The Solicitor-General seeks **comments** about those on the list from a range of key people and organisations. This is by way of a **consultation process**
10. The **Solicitor-General** asks the **Chief Justice & the President of the Court of Appeal** to give all prospective candidates **a rating**.
11. The outcome of this process is an indication of those considered suitable for **immediate appointment**, those **possibly suitable in two to three years**, and **those in neither category** (the longlist).
12. The **Solicitor-General** presents the longlist to the **Attorney-General**. The Solicitor-General's advice **includes the results of the consultation process**.
13. **The Attorney-General, after such consultation as he or she believes necessary, decides who should be on the shortlist for appointment and who heads it. The shortlist may contain 12 to 15 names.** The Attorney-General may decide to seek an **interview** with, or arrange for an interview by the Solicitor-General of, a person interested in appointment to the High Court.
14. The **Solicitor-General** undertakes **checks on the personal reputation** of those on the **shortlist**.
15. The Solicitor-General **also asks prospective candidates** to complete a **questionnaire** intended to confirm that **there are no matters in their background of a sort that might cause difficulties after appointment**. The response to the questionnaire is signed, along with an undertaking that, if appointed, the prospective candidate will not resume practice before the courts on retirement or earlier termination of his or her appointment.

16. Once the Attorney-General is **satisfied** as to the **suitability** of the preferred candidate, and **willingness** to accept the appointment the Attorney-General **mentions the appointment in Cabinet**, Finally the Attorney tenders formal advice to the Governor-General to make the appointment.

Consultation

A range of groups and people are contacted at various stages in the appointment process.

The Attorney-General regards the knowledge, experience and judgement of the **professional legal community as a very good source of informed opinion** on the **relative merits of prospective candidates**. They are prominent among those consulted accordingly. The intention is to ensure a **sufficiently broad perspective** is obtained as to prospective candidates.

At the nomination stage, the list of parties who may be contacted includes the Chief Justice, the President of the Court of Appeal, the Secretary for Justice, the President of the Law Commission, the New Zealand Bar Association, the President of the New Zealand Law Society and other organisations or groups representative of lawyers who the Attorney-General believes can contribute names of suitable persons. Such groups may include **the Women's Consultative Group** of the New Zealand Law Society, the District Law Societies, the New Zealand Bar Association, the Criminal Bar Association, the Māori Law Society and women lawyers' associations. Nominations may also be sought from the Minister of Justice, the Chair of the Justice and Law Reform Select Committee and the Opposition Spokespersons for the Attorney-General portfolio.

In seeking comment on prospective candidates, the Solicitor-General will consult the Chief Justice, the President of the Court of Appeal, the New Zealand Law Society, the New Zealand Bar Association and others as appropriate.

(Information sought

Persons interested in appointment as a High Court Judge, whether or not currently holding judicial office, are asked to complete an Expression of Interest form and to provide a curriculum vitae. At the shortlisting stage, prospective candidates are also asked to complete a questionnaire.

Expression of Interest form

The Expression of Interest form is a formal document. It seeks a variety of personal and professional information such as a brief description of the person's legal experience, career highlights and any publications. It also seeks the person's consent to the information being conveyed as necessary to those consulted during the appointment process. Information contained in the Expression of Interest form is intended to supplement material in the curriculum vitae. The form is also intended to provide an opportunity to highlight experience which is considered to be of particular relevance to the criteria on which appointments will be made.

Curriculum vitae

Persons interested in appointment are also asked to provide a curriculum vitae so that more detail about their legal career, including a full work history, is available together with any relevant experience outside the law.

Questionnaire

Prospective candidates whom the Attorney-General has selected for a shortlist are asked to complete a separate questionnaire intended to confirm that there are no matters in their background of a sort that might cause difficulties after appointment. They are asked to sign the questionnaire and to undertake that if appointed, they will not resume practice before the courts on retirement or earlier termination of their appointment.

Storage of information: prior to appointment

Details of all prospective candidates who meet the statutory requirement for appointment are placed on the register.

Information is held on the register for five years, unless prospective candidates request otherwise. Prospective candidates can ask for their names to be removed from the register at any time. At regular intervals prospective candidates will be contacted and asked to update their personal information. If there is no response to this request, the relevant records will be removed from the register.

All information is treated confidentially and held securely in the Appointments Unit. Every attempt is made to ensure any data held is complete and correct. In accordance with information privacy principles, the purposes for which the information is collected and used is made clear to prospective candidates at the time the information is collected.

The information held on the register is kept confidential and access is available only to those directly involved in the relevant appointment process. Prospective candidates may request to see the information held about them on the register at any time. However, comments made by other people on the prospective candidate's suitability may not be available, if the comments were subject to an obligation of confidentiality as will often be the case. Information on the register may be available under the Official Information Act 1982 but only if special public interest considerations apply.

Storage of information: after an appointment is made

When an appointment is made, the information on the register is deleted. The appointee's name, date of birth and ethnicity remain but no other details. Such papers as are required for judicial administrative purposes are transferred to the Chief Justice. All other paper records are transferred to the Solicitor-General, who is personally responsible for the safekeeping of the files.

The Attorney-General's Judicial Appointments Unit

The Appointments Unit was set up specifically to handle expressions of interest in judicial appointments with the highest degree of confidentiality and security. The Appointments Unit is attached to the Ministry of Justice, but its records are held separately from those of the Ministry. The Appointments Unit has its own telephone and facsimile numbers and postal address.

The role of the Appointments Unit is to provide administrative assistance throughout the appointments process.

Contact details for the Unit are:

The Judicial Appointments Officer
The Attorney-General's Judicial Appointments Unit
PO Box 280
WELLINGTON)

3. Key Features of the Judicial Appointments Commission in UK

Under the Constitutional Reform Act 2005 the JAC has a responsibility to:

- to select candidates **solely on merit**;
- to select only **people of good character**;
- to have regard to the need to **encourage diversity** in the range of persons available for selection for appointments.

The Judicial Appointments Commission, England has identified the **following qualities and abilities** that are required for judicial office:

1. Intellectual capacity

- High level of expertise in your chosen area or profession
- Ability quickly to absorb and analyse information
- Appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary

2. Personal qualities

- Integrity and independence of mind
- Sound judgement
- Decisiveness
- Objectivity
- Ability and willingness to learn and develop professionally

3. An ability to understand and deal fairly

- **Ability to treat everyone with respect and sensitivity whatever their background**
- **Willingness to listen with patience and courtesy**

4. Authority and communication skills

- **Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved**
- **Ability to inspire respect and confidence**
- **Ability to maintain authority when challenged**

5. Efficiency

- Ability to work at speed and under pressure
- Ability to organise time effectively and produce clear reasoned judgments expeditiously
- Ability to work constructively with others (including leadership and managerial skills where appropriate)

Qualifying tests

Qualifying tests are **written papers**, used to shortlist candidates. They are designed to assess candidates' ability to perform in a judicial role, by analysing case studies, identifying issues and applying the law.

The tests, developed most often by **experienced judges are tailored** to the requirement of the post. They might contain **case studies and/or technical** questions. The preparations of tests are equality checked and the tests are **piloted** before use.

The tests are **marked** by experienced judges and the results are carefully moderated by the Judge markers and the JAC to ensure **consistency in the marking**. Marking and moderation is done in such a way that the marker **cannot identify** the candidate from the answer script.

Candidate Selection Day

If shortlisted, candidates are invited to a selection day, which may consist of a panel interview only or of an interview and role-play. Candidates will be expected to demonstrate the qualities and abilities required.

Interviews: Interview panels consist of three to five panel members including a Chair, a Judicial Member and an Independent Member.

Role-Play: Role-play usually simulates a court or tribunal environment. Candidates are asked to take on the role of Judge and respond to a simulated situation. They enable you to demonstrate whether you have the required qualities and abilities and whether you maintain performance under challenge and pressure.

Sample Qualifying Test Paper

This test is in two parts – Part A and Part B. There are three questions in each part and you should answer all six questions.

The questions in **Part A** are worth a total of **125 marks**. Up to a further 6 marks may be allocated for good points not anticipated in the marking scheme.

The questions in **Part B** are also worth a total of **125 marks**. Up to a further 8 marks may be allocated for good points not anticipated in the marking scheme.

Introduction

As a response to the perceived failure of Anti-Social Behaviour Orders and Injunctions and a perceived difficulty in obtaining convictions for anti-social behaviour, the government has enacted the Community Anti-Social Behaviour Act 2008¹. This legislation has repealed all previous anti-social behaviour legislation and introduced the Community Anti-Social Behaviour Court. The court has both a criminal and a civil jurisdiction. When hearing criminal cases, the criminal standard of proof applies. A Circuit Judge or Recorder sits with six lay assessors, chosen randomly. The assessors are judges of fact. They sit in court during the trial, but may be asked to leave if matters of law concerning evidence arise. The judge is responsible for the conduct of proceedings, giving directions on the law and imposing penalties. When hearing civil cases, the court decides the facts on a balance of probabilities. A Circuit Judge or Recorder sits with two lay representatives, one drawn from an approved body (including the Police, the Local Authority and Registered Social Landlords), the other appointed by the Lord Chief Justice from the community.

¹ This Act is fictional

Part A

The mere fact materials (e.g. law reports) have been provided does not automatically mean that they are relevant.

Question 1 (worth a maximum of 32 marks)

You are presiding over a trial in the Community Anti-Social Behaviour Court. The trial is due to last for five days. There are six lay assessors. The assessors sit on a separate bench at the side of the court. There is no contact between judge and assessors, other than in open court, during the course of the trial. At the end of the trial the assessors will retire on their own to reach their verdicts. The defendant has been charged with committing serious acts of anti-social behaviour – setting fire to the car of the head of the community neighbourhood watch committee and threatening to kill a pensioner who has previously reported his anti-social behaviour to the police. There are statements from neighbours, police officers and forensic scientists. None of the alleged incidents was witnessed by Ms Bains, the local community antisocial behaviour prevention officer, but some of the witness statements were taken by her and witnessed by her. The defendant's defence is that none of the incidents occurred and that the neighbours and the local community antisocial behaviour prevention officer are pursuing "a racist vendetta" because he is white.

Prosecuting counsel of some twenty-five years call, in her opening speech, outlines the case in some detail, describing the alleged incidents and mentioning in passing the role of Ms Bains. At the end of that opening speech, and before the first witness is called, an assessor writes a note which is passed to you by the usher, stating “I am a community anti-social behaviour prevention officer, from a neighbouring, entirely unconnected borough. I know nothing about these incidents. Although I have attended conferences organised by the Community Anti-Social Behaviour Directorate at which Ms Bains has been present, I don’t think I have ever talked to her. I am sure that I can decide this case fairly. I am sure that my knowledge of the way in which community anti-social behaviour prevention officers work and the appalling effect of anti-social behaviour on ordinary law abiding residents will help us all to reach the right decision – but I thought that I ought to let you know.” You read out the note to both advocates.

The apparently inexperienced defence advocate confines his submissions to the following four sentences, “This is unfair. It’s a breach of Article 6. Anyway, you are bound by the House of Lords decision in *Abdroikov* [see materials]. If you don’t discharge this assessor, I’m going straight to the Court of Appeal.” and then sits down. Prosecuting counsel looks slightly dismissively at the young defence advocate and says that she appeared in *Abdroikov* in the House of Lords. She addresses you at length. The key points of what she says can be summarised as follows “You do not need to consider *Abdroikov*. You can ignore it. In *Abdroikov*, their lordships were only concerned with criminal proceedings in the Crown Court. This is not a Crown Court. *Abdroikov* can and should be distinguished.

As you are no doubt well aware, there are no reported authorities on assessors under the Community Anti-Social Behaviour Act 2008, but section 129 [see materials] provides for the random selection of assessors. It is inevitable that community anti-social behaviour prevention officers and police officers will sometimes be selected as assessors. They do not appear in the list in Schedule 15 [see materials] of those disqualified from acting as assessors. This trial should continue with her as an assessor”.

- (a) Can you ignore *Abdroikov*?
- (b) What do you do?
- (c) What do you say in court?

Question 2 (worth a maximum of 16 marks)

After lunch, but before the assessors are brought back into court, the defence advocate stands up and says that he has learnt from the usher that one assessor, whom he identifies by using the description “the one in the back row who uses a walking stick”, has come back from the pub and is drunk – he is swaying and slurring his words. He says that this means his client cannot have a fair trial, that it is a breach of Article 6, and that you must either discharge all of the assessors and start again, or, as you are entitled to do, discharge this particular assessor and continue with five assessors. You recall that, before lunch, this particular assessor, who is scruffily dressed, spent most of the time staring vacantly across court. He did not look at the documents (two maps and a community anti-social behaviour prevention notice) which were handed to the assessors. You ask the usher, who has not sat in your court before, about the assessor and she says, “Obviously I didn’t want to get that close to him, but I think he is drunk.” Counsel for the prosecution says that her approach is completely neutral. “It is entirely a matter for your discretion.”

- (a) What do you do?
- (b) What do you say in court?

Question 3 (worth a maximum of 71 marks)

It is day three of the trial. The prosecution case has been going smoothly. Prosecuting counsel never appears flustered and is always immaculately dressed. The prosecution witnesses have all come up to proof. One of them has referred to a reign of terror on the estate. The only fly in the ointment is the defence advocate. His bands are un-ironed and today he appears not to have shaved. He frequently appears flustered and unprepared. He has made a number of completely hopeless applications to exclude evidence. You have courteously dismissed all of them, giving brief reasons for doing so. On several occasions

you have politely pointed out that it is not appropriate for an advocate to comment on answers given in cross-examination.

The defence advocate is now cross-examining the pensioner. He puts it to her that she had called the defendant “an evil little bastard”. She answers “No, I did not.” Spotting the first inconsistency in the prosecution evidence, the defence advocate says “No, you’re wrong. Ms Bassi, head of the community neighbourhood watch committee, gave evidence yesterday that you did call him ‘an evil little bastard’. How do you explain that?” You turn to the witness and say “That is not a proper question to be put in cross-examination. You do not have to answer it” and turn to the defence advocate and say “Please move on to the next question.” The defence advocate loses his temper, points his finger at you, and says, in a raised voice “No, I will not. You’re biased. You have been from the beginning. You’ve refused all my applications. You agree with everything prosecuting counsel says. You’ve interrupted my cross-examination all the time. I’ve heard gossip in the robing room that you regularly have dinner with the chief inspector who is responsible for policing the estate. You’re biased. You must recuse yourself. I make a formal application that you discharge the assessors, recuse yourself and order a new trial before a fair judge.” [You have in fact never met the chief inspector, let alone had dinner with her.]

Before you can say anything, the defendant stands up and throws his plastic cup of water at the defence advocate, covering him in water. He shouts “It’s not the f***ing judge’s fault. The judge is fair. It’s your fault. You’re f***ing crap. You’re the worst f***ing brief I’ve ever had. I’m going away for five years again, and it’s all your f***ing fault. I want these assessors to be discharged and a new trial with a new f***ing brief.” Before he can shout any more expletives, two security guards grab him and knock him to the floor. Prosecuting counsel turns to the defence advocate and says in a stage whisper, audible to all, “Disgraceful conduct. You and the defendant are as bad as each other. You should both be locked up for contempt of court.”

- (a) What steps would you take and in what order?
- (b) What do you say in court:
 - (i) to the assessors;
 - (ii) to the defendant;
 - (iii) to the defence advocate
 and what other rulings might you make?
- (c) Would your answer be different if you did regularly have dinner with the chief inspector who is responsible for policing the estate? What, if anything, would you say about it?

Part B

Introduction

When hearing civil cases, the court decides the facts on a balance of probabilities. A Circuit Judge or Recorder sits with two lay representatives, one drawn from an approved body (including the Police, the Local Authority and Registered Social Landlords), the other appointed by the Lord Chief Justice from the community. Any person, either individual or corporate can apply to the Court for an order against an individual who is alleged to be indulging in antisocial behaviour. The Court can compel attendance and can order disclosure, witness statements and take any step to further the ‘Court objective’. (see attached extract from the rules)

In civil proceedings the Court can make one of the following orders:

- (a) A **Curfew Order** – requiring the Respondent to remain inside a named property between stipulated hours
- (b) An **Exclusion Order** – excluding the Respondent from a defined area.
- (c) A **Community Recompense Order**, requiring the Respondent to carry out unpaid work in the community for a given number of hours, to be completed within six months.
- (d) A **Contract Order** – requiring the Respondent to enter into a contract of up to two years, with the Court. The terms of which are stipulated by the Court.
- (e) An **Admonishment Order**, whereby the Respondent is simply admonished for his or her behaviour.
- (f) **No order**, if there are sufficient extenuating circumstances. An order can be suspended for a period of two years. You are sitting as a Recorder with two lay assessors

and are asked to make a number of decisions arising out of the attached bundles of papers.

Papers for Question 4:

- Originating Application: New Start Housing Association. P.2
- Response – Susan Peel. P.6
- Response – Robert Peel. P.8

Additional papers for Question 5:

- Notice of Acting. P.2
- Notice of application. P.3
- Statement of Robert Wellesley P.4
- Statement of Jill Cooper. P.7

Papers for Question 6:

Note as to lay representatives and McKenzie Friends.

Question 4 (worth a maximum of 57 marks)

The first hearing is designed to deal with any procedural matters arising out of the papers and to set an orderly timetable for the trial of the case so it can be disposed of in accordance with the paramount objective. You should consider only the bundle of papers for Question 4. What issues arising out of the papers concern you? Please give your reasons.

Question 5 (worth a maximum of 35 marks)

This matter comes before you on 1 July 2008. The First Respondent makes an application in the form found at page 3 of the bundle of papers.

1. Would you require the attendance of William Lamb? Please give reasons for your decision.
2. Would you permit the evidence of Simon Hunt? Please give reasons for your decision.

Question 6 (worth a maximum of 25 marks)

At the final hearing the First Respondent appears unrepresented. A Mr Maguire tells you that she has dismissed her solicitors and he will be speaking on her behalf to preserve her article 6 human rights. He maintains that it is his article 6 right to speak on behalf of Ms Peel. Mr Canning represents the Applicant; Ms. Howard represents the other Respondents. Ms. Peel tries to speak but is hushed by Mr. Maguire who motions her to sit behind him. You ascertain the Mr. Maguire is someone who the First Respondent met by chance and that he is being paid by her to attend the Court. When you speak directly to her, Ms. Peel confidently tells you that she feels too nervous to deal with all the paperwork and that she does not know enough about procedure to feel comfortable conducting her own case. Mr Canning objects, indicating that the First Respondent has had solicitors available to her, if she decides to dispense with the services of those lawyers then she must bear the consequences. In this case that means that she will have to represent herself. Indeed it would not be fanciful to suppose that she has fallen under the influence of the persuasive Mr Maguire and that is why she has dispensed with her solicitors. They submit that he should be asked to sit in the public gallery at the back of the court. Ms Howard is neutral on the issue. What factors would you take into account in deciding whether to permit Mr Maguire to address the Court?

<http://www.judicialappointments.gov.uk/about-jac/about-jac.htm>

The website of the JAC (Judicial Appointments Committee of the UK) speaks of independence and an attempt to take the appointment out of the hands of a sole authority, the Lord Chancellor.

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The Judicial Appointments Commission (JAC) is an independent commission that selects candidates for judicial office in courts and tribunals in England and Wales, and for some tribunals whose jurisdiction extends to Scotland or Northern Ireland.

We select candidates for judicial office on merit, through fair and open competition, from the widest range of eligible candidates.

We were set up in order to maintain and strengthen judicial independence by taking responsibility for selecting candidates for judicial office out of the hands of the Lord Chancellor and making the appointments process clearer and more accountable.

[The Commission](#) In accordance with the CRA, there are fifteen Commissioners, including the Chairman. All are recruited and appointed through open competition with the exception of three judicial members who are selected by the Judges' Council. Membership of the Commission is drawn from the judiciary, the legal profession, tribunals, the magistracy and the public.

The judicial appointments for which the JAC makes selections are set out in Schedule 14 to the CRA.

The Application process

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The Selection process

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About the JAC

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5. Canada

Structure of Canadian Court system: <http://www.scc-csc.gc.ca/court-cour/role/index-eng.asp>

- | | |
|---------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Apex: | <ol style="list-style-type: none"> 1. Supreme Court (the court of last resort) 2. Federal court of appeal, provincial/territorial courts of appeal 3. Federal Court, Tax Court of Canada, and provincial/territorial superior courts of general jurisdiction |
| Bottom: | <ol style="list-style-type: none"> 4. Provincial courts (Traffic division, Small Claims division, Family division, a Criminal division etc.) |

The Judicial Advisory Committee document for Ontario specifies the appointment process for only the Provincial court. **There is a separate and distinct process for federal and provincial appointments**, both beginning with an **application to a judicial advisory committee**.

- a) For provincial appointments, there is one committee (seven lay persons, three judges, and three lawyers); and
- b) For federal appointments there are regional committees (one in each province/territory except Ontario has 3 and Quebec has 2 due to their larger populations), with each committee composed of seven persons with at least one lay person and the balance being lawyers and judges.

Judicial Advisory Committees

These committees have the responsibility of assessing the qualifications for appointment of the lawyers who apply. There is at least one committee in each province and territory; because of their larger population, Ontario has **three regionally based committees** and Quebec **has two**. Candidates are assessed by the regional committee established for the judicial district of their practice or occupation, or by the committee judged most appropriate by the Commissioner. **Each committee consists of eight members representing the bench, the bar, law enforcement associations and 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 or senior judge of the province or territory;
- a nominee of the provincial Attorney General or territorial Minister of Justice;
- a nominee of the law enforcement community; and
- 3 nominees of the federal Minister of Justice representing the general public.

Each nominator is asked by the federal [Minister of Justice](#) to submit a list of names from whom an appointment to the relevant committee can be made. 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. Committee members are appointed by the Minister of Justice to serve a three-year term, with the possibility of a single renewal.

The Minister meets periodically with the Chairs of all the committees for an exchange of views concerning the operation of the process.

Administrative support for the work of the committees, including information sessions and guidelines concerning confidentiality and other committee procedures, is provided by the Judicial Appointments Secretariat of the Office of the Commissioner.

All committee proceedings and consultations take place on a confidential basis.

Canadian Appointment Process for Higher Courts (Superior Court in a province or territory, Federal Court, Federal Court of Appeal, or Tax Court of Canada)

1. Detailed application ([Personal History Form](#) available online) is filled out by qualified candidates as their introduction to each committee and the Attorney General.

*Qualified candidates generally have 10 years at the bar of a province or territory, or a combination of **10 years at the bar and positions of a judicial nature**. Appointments to a provincial superior court are made only from members of the bar of that province, as required by the Constitution Act, 1867

2. Provincial or territorial court judges who wish to be candidates must also complete the **Personal History Form for judges**. These candidates are not assessed by the advisory committees, but their files are submitted to the appropriate committee for comments, which are then provided to the Minister of Justice, including the results of any confidential consultations undertaken by the committee. The names of these candidates are automatically placed on the list of those available for appointment. They must, however, renew their expression of interest every five years failing which, their names will be withdrawn from the list.
3. Candidates are assessed by the regional committee established for the judicial district of their practice or occupation, or by the committee judged most appropriate by the Commissioner. These committee members assess the placation and make discreet/confidential inquires amongst judges, peers (legal and non-legal community), as well as the references indicated on the application. Comments are confidential and provided to the Minister only; they are not binding on the Minister.

Professional competence and overall merit are the primary qualifications, and committee members are provided with [Assessment Criteria](#): professional competence and experience, personal characteristics, and potential impediments to appointment. Committees are encouraged to respect diversity and to give due consideration to all legal experience, including that outside a mainstream legal practice.

Broad consultations by the committees, and community involvement through these consultations, are essential elements of the process.

4. Committee then meets and decides whether to categorize the candidate as “unable to recommend”, “recommend” or “highly recommend”.
5. The candidate is notified of the date they were assessed by the committee, but not of the results of the assessment. The results are kept confidential and solely for the Minister’s use. This decision is valid for two years. **The Attorney General then has a pool from which a candidate may or may not be selected (out of those who have been recommended or highly recommended).**
6. **The Minister of Justice may at his discretion 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, the Minister may ask the committee for a reassessment of the candidate.
7. **The Minister may consult with members of the judiciary and the bar**, with his or her appropriate provincial or territorial counterparts, as well as with members of the public.
8. **By recommendation from the Minister of Justice to the Cabinet, federal judicial appointments are made by the Governor General**
9. **and acting on the advice of the federal Cabinet, and by the Prime Minister with respect to the appointment of Chief Justices and Associate Chief Justices.**
10. The recommendation to Cabinet is made from amongst the names which have been previously reported by the committees to the Minister

Appointment Process to the Supreme Court

1. **Minister of Justice identifies potential candidates.**
 - such candidates typically sit on provincial Courts of Appeal,
 - names can also be drawn from senior members of the Bar or from academia.
 - Any interested person may also put a name forward for consideration

2. **The Minister specifically consults** with the following individuals when assembling his or her list of candidates:
 - a. The Chief Justice of the Supreme Court of Canada and sometimes the puisne judges (judge of the High Court, but not the Chief Justice)
 - b. The Chief Justice (s) of the court(s) from the province or region with the vacancy
 - c. The Attorney(s) General of the province or region
 - d. At least one senior member of the Canadian Bar Association and the law society from the relevant region
 - e. The Chief Justice of the Supreme Court of Canada is also consulted about the needs of the Court

3. **Minister of Justice then assesses the candidates.** Criteria for appointment may be classified under three main themes: i) professional capacity; ii) personal characteristics; and iii) diversity. Professional capacity encompasses not only proficiency in law, but also the following considerations:
 - Superior analytical and writing skills;
 - Ability to listen and maintain an open mind;
 - Decisiveness and soundness of judgement;
 - The capacity to manage and share a heavy workload in a collaborative context;
 - The capacity to manage stress and the pressures of the isolation of the judicial role;
 - An awareness of social context
 - Bilingual capacity; and
 - The specific legal expertise that may be required for the Supreme Court

Professional history: To assist in assessing professional capacity, the Dpt. Of Justice compiles jurisprudential profiles of the candidates. These profiles track the candidates' judicial decisions, focussing upon their precedent-setting value as well as the outcome of appeals of their decisions.

Personal characteristics: impeccable personal and professional ethics, honesty, integrity and forthrightness, respect and regard for others, patience, courtesy, tact, humility, impartiality, tolerance, personal sense of responsibility, common sense, punctuality, and reliability. → Diversity; the Court's composition should reflect that of Canadian society as a whole

4. **The Minister discusses the candidates with the Prime Minister.** A preferred candidate is chosen.
5. **The Prime Minister recommends a candidate to Cabinet** and the appointment proceeds by way of an Order-in-Council.

*In Canada, an Order-in-Council is a notice of an administrative decision issued by the [Governor General of Canada](#). In reality, orders in council originate with the Canadian [federal cabinet](#) and are approved by the Governor General.

Assessment criteria, candidates for Federal Judicial Appointment

The following list of factors, though not exhaustive, is intended to provide a basis for assessing the suitability of candidates for judicial appointment.

Professional Competence & Experience

(While courtroom experience is an asset, it is only one of many factors which may be considered in assessing a candidate's suitability for the role of judge.)

- general proficiency in the law
- intellectual ability
- analytical skills
- ability to listen
- ability to maintain an open mind while hearing all sides of an argument
- ability to make decisions
- capacity to exercise sound judgement
- reputation among professional peers and in the general community
- area(s) of professional specialization, specialized experience or special skills
- ability to manage time and workload without supervision
- capacity to handle heavy workload
- capacity to handle stress and pressures of the isolation of the judicial role
- interpersonal skills - with peers and the general public
- awareness of racial and gender issues
- bilingual ability

Personal Characteristics

- sense of ethics
- patience
- courtesy
- honesty
- common sense
- tact
- integrity
- humility
- punctuality
- fairness
- reliability
- tolerance
- sense of responsibility
- consideration for others

Potential Impediments to Appointment

- Any debilitating physical or mental medical condition, including drug or alcohol dependency, that would be likely to impair the candidate's ability to perform the duties of a judge
- Any past or current disciplinary actions or matters against the candidate
- Any current or past civil or criminal actions involving the candidate
- Financial difficulties including bankruptcy, tax arrears or arrears of child support payments

In Sum

In various systems followed in different countries, there is a method that is clear and that is known to the public; there are criteria and there is a well defined basis for selection of judges to the higher judiciary through their evaluation on both professional and personal criteria.

The plan is to identify the best among these, and then propose them as an alternative mechanism for this country.

It is our hope and dream – and I daresay, it is a dream not far away - that these small steps will help towards the beginning of change. A change to constitute a better working judicial system that improves the justice delivery mechanism in our country.

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