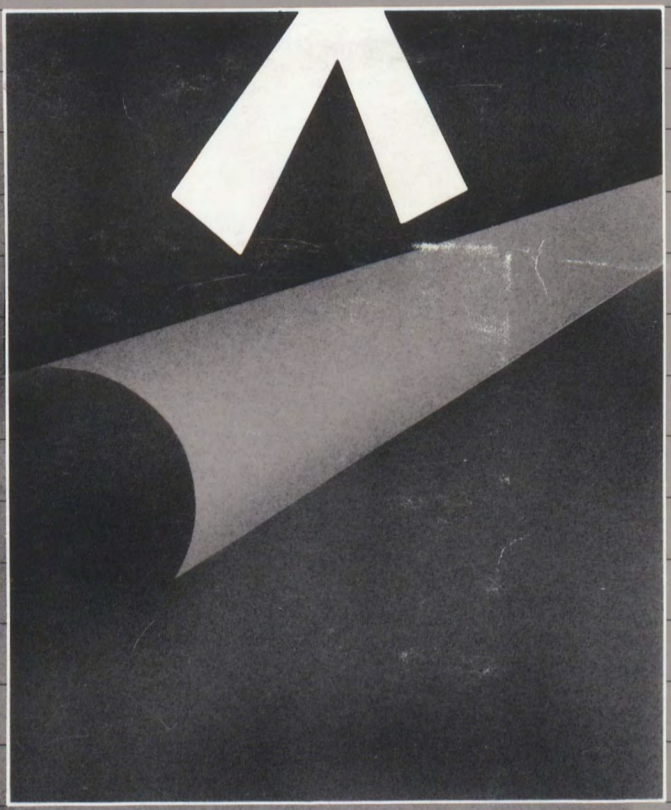
Department of Justice Canada
Ministère de la Justice Canada

A New Judicial Appointments Process



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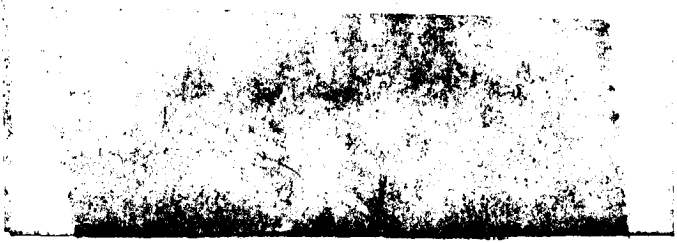

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A New Judicial Appointments Process

Canada

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Minister of Justice
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CANADA

Ministre de la Justice
et Procureur général du Canada

Foreword

This booklet, which is directed both to the legal profession and to the general public, describes a new process for the appointment of judges at the federal level. It is the culmination of more than two years of consultations and enquiries, during which the Government of Canada examined numerous options and appointments models. I am satisfied that the process outlined here represents the best choice for maintaining the goal of a highly competent and professional judiciary.

As Minister of Justice, I have attempted to ensure that merit is the key in selecting candidates for judicial office. The concept of merit is central to the new appointments process. I firmly believe that no government can afford to approach the issue of appointments to the bench without a commitment to selecting the best person available, determined by objective criteria. The stakes for our Canadian society are too high to settle for anything less.

This is why, in September of 1985, a review of the appointments process was requested by the Prime Minister of Canada, The Right Honourable Brian Mulroney. It was his belief that Canadians should be assured that members of the judiciary are drawn from the best of the legal profession. The old system of appointments, while it served our country well, suffered from an air of secretiveness, which led many Canadians to suspect that judges could be selected on grounds other than those of professional competence and overall merit. By putting in place a modern appointments system dedicated to seeking out candidates of merit from all branches of the legal profession, a system in which broad consultation and community involvement are essential elements, we hope to succeed in reinforcing public confidence in the judiciary and the judicial system.

I would be remiss if I did not acknowledge the great debt we all owe to the men and women who currently serve us on the bench. They deserve our deepest gratitude and respect for performing the onerous duties that come with judicial office with dignity, competence and a high degree of professionalism that make the Canadian judiciary second to none. The adoption of a new appointments process should in no way be taken as a criticism, expressed or implied, of any present or former judge.

The decision to seek a judicial appointment is not to be lightly taken. Federally appointed judges in Canada are expected to serve until age sixty-five and to have completed fifteen years in office before they are eligible for retirement. In some cases, particularly where a judge is appointed at a relatively young age, the commitment may be for thirty years or more, as long as or longer than most persons would consider remaining in a single job or occupation. For those who will not be deterred by the conditions of office outlined in this booklet, and its companion publication, I can assure you that there can be no higher service than to the people of Canada.

Ray Hnatyshyn
Minister of Justice and
Attorney General of Canada

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Introduction

Approximately 800 judges are federally appointed in Canada, the majority of whom serve on the provincial superior, district and county courts. There are four judges on the supreme courts of the territories, while 45 (exclusive of supernumerary judges) occupy positions on the three federally constituted courts: the Federal Court, the Tax Court and the Supreme Court of Canada. In any one year, there may be 50 or more appointments as the result of court expansion, judicial transfers and elevations, or the death, election to supernumerary status or retirement of judges in office.

When what is now the *Constitution Act, 1867* was framed, responsibility for the appointment of judges to the provincial superior, district and county courts was given to the Governor General, while the power to create and maintain those courts was conferred upon the provinces.

The appointment of judges by the federal government has been subject to periodic criticism over the years. The chief complaint was that the system was a closed one, that it was cloaked in secrecy, and that the best candidates may not have been considered. Repeated calls were made for the system to be opened up, to permit more voices to be heard and more views to be sought and taken into account in the selection process.

The recommendation of appointments to the judiciary, other than those of chief justices, has been an integral part of the responsibilities of the Minister of Justice since Confederation. In 1896, the right to recommend the appointment of chief justices was affirmed to be a prerogative of the Prime Minister, pursuant to a Minute of the Privy Council which, as amended in 1935, has been adopted by each succeeding federal ministry.

All recommendations, whether made by the Minister of Justice or by the Prime Minister, are addressed to the Governor in Council, as the Governor General is required in this, as in other matters, to act upon the advice of his or her ministers. The ultimate decision on each appointment is a collective one, consistent with the concept of ministerial responsibility.

As the bar and the courts expanded, the informal process formerly adopted for screening appointments to the bench became less satisfactory. More complete information on candidates for judicial office was needed than was readily available to ministers of justice through their own contacts. Some means of objectively and impartially assessing candidates was also required if a high calibre of appointments was to be maintained. In 1966, the Canadian Bar Association proposed the establishment of a committee of eminent lawyers to screen potential appointees on behalf of the Minister of Justice.

The CBA Judicial Appointments Committee has assisted ministers of justice since 1967 in assessing the qualifications of judicial candidates. Initially, the committee's members were provided with the names of specific nominees and a rating was requested within the 48 hours immediately prior to the Minister's taking his recommendations to the Governor in Council. Since September 1984, it has been standard practice to request the assessment of certain persons who have offered themselves as candidates for judicial office or who have been suggested as candidates by others. This permits the Minister of Justice to maintain a bank of qualified persons who have already been screened and are therefore available for appointment at short notice.

The members of the committee, who conduct their deliberations in confidence, draw upon their contacts within the legal profession to make individual determinations of whether a person is qualified or not qualified for judicial office. The national chairperson then collates members' assessments and provides the Minister of Justice with the committee's overall rating.

Since its inception, nearly all candidates for judicial office have been screened prior to appointment by the CBA committee. The advice provided by the committee to successive ministers of justice has been a key element of the appointments process, and one that has contributed in no small degree to the high calibre of the Canadian judiciary.

Another important innovation in the appointments process was the establishment in 1973 of the position of Judicial Affairs Advisor in the office of the Minister of Justice. Specific responsibilities were conferred upon the holder of this position with respect to the identification of candidates for judicial appointments; liaison with chief justices and the offices of provincial attorneys general and territorial ministers of justice on prospective appointments, legislative amendments and the administration of justice; and matters affecting judicial compensation and federal programs for the judiciary. The presence of a person on the Minister's staff able to devote the bulk of his or her time to judicial affairs has broadened the process of consultation on judicial appointments, and has aided immeasurably in the development of a more coordinated and better-informed approach to judicial appointments.

Reform of the Appointments Process

Despite the fact that the appointments system generally worked well, it suffered, as already noted, from a public perception that it was a closed process. The Government has, since 1984, broadened the consultative process to assist in the identification of likely candidates for judicial office, receiving the views of special-interest groups on specific appointments, and regularizing the relationship with chief justices and attorneys general to ensure that their views were fully taken into consideration before an appointment was made.

However, a more complete reform of the selection process appeared to be in order, both to reassure the public that the appointments process was fair, and to ensure the preservation of those reforms that had already been implemented. In September 1985, Prime Minister Mulroney announced, in the context of a major statement on public-sector ethics, that he had asked the Minister of Justice to undertake a complete review of the appointments process, leading to the institution of a new system for the appointment of judges at the federal level.

The review proceeded on the basis of consultations with the attorneys general and ministers of justice of the provinces and territories, the judiciary, the legal profession and interested groups and organizations. To encourage discussion at this stage of the process, the Government enunciated a number of basic principles within which any reformed system might be expected to operate.

First, responsibility for judicial appointments should remain vested in the executive branch of government.

Second, a revised appointments system should respect and preserve the independence of the judiciary.

Third, the primary qualification for appointment to the bench must be merit, defined to include the following considerations: proficiency in the law; a well-rounded legal experience; maturity and objectivity in judgment; evidence of human qualities indicating that the judge would be receptive to and appreciative of social issues arising in litigation; the capacity to exercise the larger policy role conferred upon the judiciary by the *Charter of Rights and Freedoms*. As well, the ideal of public service should be a prime motivation for candidates for judicial office.

Fourth, the judiciary should represent a broad cross-section of Canadian society. To achieve this, the appointment of women and individuals from cultural and ethnic minorities should be encouraged.

Fifth, broad consultation should be undertaken with provincial attorneys general, the bar, the bench and other interested groups, to identify suitable candidates for judicial office, and to better assess the qualifications of prospective appointees.

This statement of principles, with its focus on the concept of merit as the primary criterion for federal judicial appointment, was generally well received. In the extensive consultations and analysis that followed, the main features of a revised appointments system became apparent:

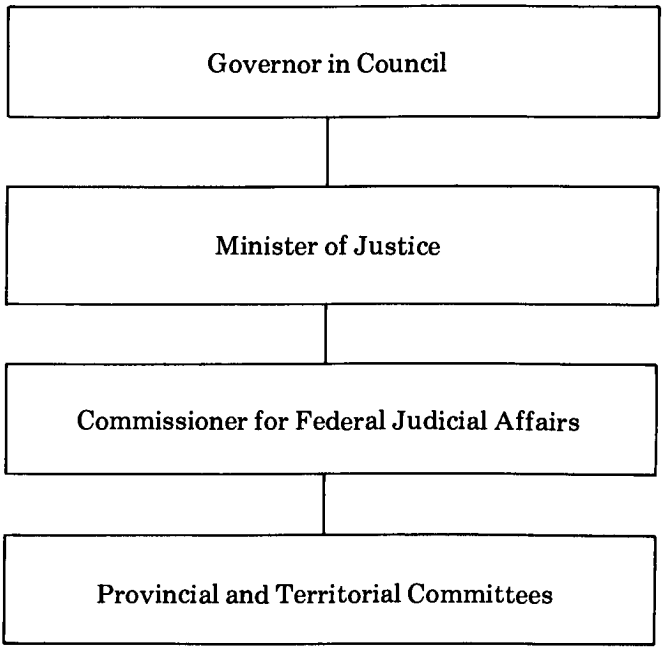
- establishment of an independent committee for the assessment of candidates in each province and territory;
- conferral of the bulk of the recruitment functions to be exercised under the appointments process upon an individual independent of the office of the Minister of Justice;
- continued consultation with provincial attorneys general and territorial justice ministers, and with chief justices.

These are central features of the reformed process now being implemented.

The New Federal Judicial Appointments Process

The revised judicial appointments system is the product of extensive consultation, not only within the legal and judicial communities, but with other interested groups and individuals as well. The model that has been adopted reflects, in many parts, concerns and comments that were expressed in the course of those discussions, although the ultimate decision on all aspects of the new system necessarily rested with the Government.

The new system is best understood in terms of the accompanying diagram.



The Governor in Council

There is no change in the procedure for appointment as it affects the role of the Governor in Council. Judicial appointments will continue to be made by the Governor General on the advice of the Cabinet, and political responsibility for the calibre of appointments will remain with the executive. Vesting the power of appointment in any other body would have required a constitutional amendment, since Section 96 of the *Constitution Act, 1867* requires that the appointment of judges to the provincial superior, district and county courts be made by the Governor General.

The Minister of Justice

As before, the Minister of Justice will recommend candidates to the Governor in Council for appointment as puisne judges of the provincial superior courts, judges of the Federal Court and the Tax Court, and judges and chief judges of the provincial county and district courts. The Prime Minister will recommend candidates for the position of chief justice of the provincial superior courts and of the two federally constituted courts that will be subject to the appointments system.

Although the Minister of Justice will no longer be responsible for identifying and screening candidates for judicial office, he will continue to play the key role in the appointments process, and to bear ultimate responsibility for it. Under the new process, the Minister will select persons for appointment who have been screened by the committees, either in advance of or in contemplation of a specific appointment. On those rare occasions when a committee's advice may be contrary to the information received from other sources by the Government, the Minister will have the right to ask the committee to provide reasons for its assessment, or to reassess a particular candidate. The Minister will also retain the ultimate

right to recommend an appointment regardless of a negative assessment by a committee, although the exercise of this option will be an exceptional occurrence, and will be taken in full knowledge of the accountability of the Government for its appointments.

The Minister now consults, as a matter of course, the chief justice and the attorney general of the province to which the appointment is to be made. This consultation has proved valuable in determining the type of appointment needed by the court and in assessing the qualifications of those chosen for appointment. It will continue as a key element of the appointments process. The Minister will welcome the advice of special-interest groups and informed individuals on particular appointments, especially in the furtherance of the Government's commitment to appoint more women and representatives of Canada's ethnic and cultural minorities to the bench. The work of the committees, the informal contacts with special-interest groups, and the traditional consultations with chief justices and attorneys general should provide the Minister of Justice and, through the Minister, the Government, with the best advice available on the qualifications of candidates for judicial office.

It should be noted that appointments to the Supreme Court of Canada are not subject to the new appointments process. The Meech Lake Accord provides for a constitutionally entrenched means of appointing the judges of that Court, whereby nominees of the provinces acceptable to the Governor General in Council shall be appointed to vacancies on the Court. The Meech Lake Accord covers all new appointments to the Court, but does not affect the Prime Minister's prerogative to appoint the Chief Justice of Canada from among the members of the Court.

The Commissioner for Federal Judicial Affairs

The innovations introduced by the new process begin with a change in the role of the Commissioner for Federal Judicial Affairs. This office was created in 1977 to place the administration of the salaries, benefits and programs for the federally appointed judiciary in the hands of an officer independent of the Department of Justice. Until that time, a special division of the department had been responsible for all matters affecting the judiciary. In view of the fact that the federal Department of Justice is the largest litigator before Canadian courts, concern was expressed over the effect of this relationship upon the independence of the judiciary. Amendments to the *Judges Act* resolved this issue by establishing the position of Commissioner, with the rank and status of a deputy head of a government department, to serve as the deputy of the Minister of Justice in the administration of all federal judicial programs and benefits for which the Minister is responsible by law.

Although it performs numerous other functions, the office of the Commissioner for Federal Judicial Affairs may be described as the personnel office of the federally appointed judiciary. The Commissioner was therefore a logical choice to fulfil some of the recruitment functions formerly exercised within the Minister's personal office by the Judicial Affairs Advisor.

It will be the responsibility of the Commissioner under the new process to solicit and maintain records of all those interested in appointment to a federal judicial position. All applications and nominations for judicial appointments should be sent directly to the Commissioner. Members of the legal community and all other interested persons and organizations are invited to become involved in the appointments process by submitting the names of persons they consider qualified for judicial office,

since it will be important to have the widest possible sources of nominations if all persons of merit are to be identified.

The Commissioner will conduct a preliminary screening of all applicants and nominees to determine whether the technical requirements for federal judicial office are met; that is, that the person is a member in good standing of a provincial or territorial bar and has no less than 10 years in practice, or no less than 10 years combined as a member of the bar and as a provincial or territorial judge or magistrate. The name of each person meeting these requirements will be referred to the appropriate provincial or territorial committee for assessment.

The names of those persons who have been rated as qualified by the committees will be maintained in a data bank by the Commissioner. Any person included in this bank of prospective appointees will be eligible for appointment for a period of two years from the date of the committee's assessment. Upon the expiry of this two-year period, the person concerned will be contacted by the Commissioner to determine if he or she is still interested in a judicial appointment. If so, the appropriate committee will be asked for an updated assessment.

A negative assessment will be available, on request, to the person rated. It will therefore be possible for a candidate to correct or clarify information placed on file, and to comment upon a committee's determination that he or she is not qualified for appointment. The Commissioner will be expected to carry out his or her responsibilities in such a way as to ensure that the system treats all candidates for judicial office fairly and equally.

In addition to compiling the names of prospective appointees and basic personal information that may be of assistance to the committees, the Commissioner will serve as a central secretariat for the appointments system. The Commissioner will be

assisted in the performance of these functions by a small secretariat, which will also be responsible for making travel and other administrative arrangements for members of the committees. It will be separate from the other operations of the Commissioner's office, which will continue to administer post-appointment programs affecting the judiciary.

The Committees

The committees constitute the heart of the new appointments system. A permanent committee will be established in each province and territory, consisting of five members representative of the bench, the bar and the general public, of whom:

- one shall be a nominee of the provincial law society;
- one shall be a nominee of the provincial branch of the Canadian Bar Association;
- one shall be a puisne judge of one of the federally appointed courts, nominated by the Chief Justice;
- one shall be a nominee of the provincial Attorney General or territorial minister of justice; and
- one shall be a nominee of the federal Minister of Justice.

The federal nominee on the committee will be a person, other than a practising lawyer, capable of representing the public interest. It is hoped that the nominee of each of the provincial attorneys general and territorial ministers of justice will be chosen on a similar basis, in view of widespread recognition that the community at large should be heard in determining who is best suited to judicial office.

Membership will be for a two-year term. Members may be renominated upon completion of their term.

The committees will be expected to meet frequently, as required, and in any event, no less than twice a year, to assess candidates for appointment. They will be assisted by the Commissioner for Federal Judicial Affairs who will maintain appropriate records. The Commissioner will submit to the committee the names of all those technically qualified to be considered for appointment, together with whatever biographical or other information has been compiled by the secretariat.

The committee will consider the professional and other qualifications of each candidate in arriving at its assessment. The committees will be empowered to make either of two assessments: "qualified" or "not qualified". They must also be prepared to give reasons for a negative assessment. A person rated not qualified for judicial office will then have the right, on request, to be informed of those reasons, and to submit comments to the Minister. This will provide the disappointed candidate with the opportunity to be made aware of the reasons for a negative committee assessment, and to correct any mistakes of fact that may have affected its judgment.

Only initial appointments will be scrutinized by the committees. Where it is proposed to elevate a sitting judge to higher judicial office, it would be inappropriate for the provincial committee, because of the nature of its composition, to attempt to rate the performance of a judge in office. In such cases, the government will rely mainly upon consultations between the Minister of Justice and the chief justice and the attorney general concerned.

Similarly, where the appointment is one to which the Prime Minister's prerogative applies, a candidate for chief justice will be screened by the committee only if the person to be appointed is not already a member of the federally appointed judiciary. In such a case, the nominee will be screened as a candidate for the court and not for the position of chief justice per se.

As noted previously, an assessment will be valid for a period of two years, following which, if the candidate has expressed continued interest in a judicial appointment, the committee will be asked to review and update the previous rating. A renewed assessment will also be valid for a period of two years.

Appointments to the Tax Court and the Federal Court of Canada

Appointments to the Tax Court and the Federal Court of Canada, while not made on a strictly geographical basis, do attempt to ensure that the regions of the country are appropriately represented. Where an appointment is to be made, candidates will be assessed by the relevant provincial or territorial committee. This will ensure that qualified persons from all parts of the country will be considered for appointment to the federally constituted courts.

The Newly Appointed Judge

Any discussion of the appointments process would be incomplete without reference to its end product, the newly appointed judge. Those considering applying for a judicial appointment should have as much information as possible on the implications of becoming a judge, and should assume the responsibilities of judicial office only if they are fully prepared to accept the significant changes it will bring not just to their own lives, but to those of their families.

To assist those who are interested in appointment to the bench, a companion booklet, entitled Judicial Appointments: Information Guide, is available from the Commissioner for Federal Judicial Affairs, 110 O'Connor Street, 11th Floor, Ottawa, Ontario, K1A 1E3. This booklet describes the range of benefits and programs available to the federally appointed judiciary.

In addition to these practical considerations, there are others that each prospective appointee should know.

The concept of judicial independence is key to our system of justice. The judiciary, individually and collectively, is independent of Parliament, of the executive, and of each other. Subject only to the rules of *stare decisis* — the doctrine that principles of law established by judicial decision are binding upon courts of equal or inferior status in cases similar to those from which such principles were derived — judges are free to interpret the Constitution, the statute law and the common law according to their knowledge and understanding. While training programs are provided to new judges, and continuing education is available, judges are by and large on their own.

The independence of the judiciary both isolates the individual judge from former associations in order to avoid the possibility of conflict of interest, and imposes upon him or her the need to maintain the highest standards in performing the duties and responsibilities of judicial office. It requires that each judge devote himself or herself exclusively to the duties of judicial office, and not engage in any outside business. The range of activities that are available to a practising lawyer is severely curtailed upon appointment to the bench.

At the same time, a long-term commitment is required from each judge: generally, judges cannot retire with a pension, except on medical grounds, unless they have served 15 years in office and have attained age 65. Although most judges are appointed at about the age of 50, it is not unusual for younger men and women, some even in their late thirties, to be appointed to the bench. The options available to those who accept appointment at an early age are limited: either remain on the bench until the statutory requirements for retirement with a pension are met, or leave with only a return of contributions.

Those who accept these conditions of service are accorded by law and by custom a significant role in the life of the country. Members of the judiciary have traditionally been looked upon as role models and have been held in high regard, not only for the office they hold, but for the considerable individual abilities they bring to the bench.

All who aspire to judicial office should be aware that their responsibilities will include not only the fair and just application of the law, but the maintenance of the high reputation of the judiciary itself. Individuals should be prepared to make full disclosure of any matter that would reflect upon their ability to perform the functions of judicial office, or upon the credibility and repute of the judiciary as a whole.

Once appointed, judges are expected to comport themselves in such a way that no criticism attaches to their office. The judge is not permitted to engage in public debate on any of his or her decisions, or to express personal opinions on major social issues, which might lead to an apprehension of bias when such issues come to be adjudicated by the court.

When a judge performs his or her duties in a way that amounts to misconduct in office, or where the personal life of the judge intrudes upon his or her judicial duties, disciplinary action may be taken by the Canadian Judicial Council. The Council is chaired by the Chief Justice of Canada, and is composed of all federally appointed chief justices and chief judges, and the senior judges of the Supreme Courts of Yukon and the Northwest Territories in alternation. Where a complaint of misconduct is made out, the sanctions available to the Council range from a reprimand to a recommendation to the Minister of Justice that the judge be removed from office.

Although mechanisms such as the Council are in place, the primary responsibility rests with each judge to maintain high standards of ethical conduct.

Conclusion

As the judiciary continues to exert a much wider influence over Canadian society, it is important to ensure that the judicial appointments system is capable, and is seen to be capable, of producing judges of undoubted professional quality and merit. It must also be seen to cast its net more broadly than has been possible before, to seek out persons of merit who formerly might have been overlooked by the old system of appointments.

It is also important, given the amount of litigation in which the Government of Canada is involved on a day-to-day basis, that the judiciary should be more clearly seen to be independent of the executive than the present system implies. This is of particular concern given the role of the judiciary in ensuring that the protection of the *Charter of Rights and Freedoms* is extended equally to all the people of Canada.

The chief value of a judicial system lies in its apparent impartiality and even-handedness between litigants, regardless of their status or position. Confidence in the ability of the federally appointed judiciary to dispense justice and equity will undoubtedly be enhanced if the appointment of judges is subject to a broader participation, as provided by the new system.

It is hoped that these reforms will commend themselves to the legal profession and to the Canadian public, for whom they have been devised. The continuing integrity of the process depends as much upon public interest and involvement as upon the integrity and good will of governments.

Anyone wishing to nominate a person as a candidate for judicial office, or interested in serving as a judge, should contact the Commissioner for Federal Judicial Affairs for further information.

Questions or comments on the appointments system described in this booklet should be directed to:

The Minister of Justice
House of Commons
Ottawa K1A 0A6