Judicial Selection: Why Canada Should Not Elect Its Judges

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Abstract

This paper was originally written for Clare McGovern's Political Science 151 course*, Justice and Law*. The assignment asked students to give an opinion on whether or not Canada should elect its judges, including a comparison of two different levels of court. The paper uses APA citation style.

This paper argues against the election of judges in Canada using a review of literature on the subject. It compares the judicial selection process at provincial and federal courts, as well as with judicial election in the United States of America. The conclusions from this paper are that judicial elections violate the principles of the Canadian justice system, and the current nominating process is superior to judicial election.

Recently, controversy surrounding supreme court justices in the United States has caused Canadians to look inwards at how our own judicial system works. This paper will explore how judicial selection works in Canada by comparing selection processes at various levels of court as well as with the selection process in the United States, and by evaluating the merits of different selection processes. Judges are a critical and extremely influential element of Canadian politics, but unlike other members of the legislative branch, judges are not held directly accountable to the general public. This has sparked debate over the years over whether these figures with immense power to shape the Canadian political landscape should be elected to give Canadians greater influence over how the judiciary functions. Canadians should not elect judges at any level because elections would undermine the core values of impartiality and competence that Canadians expect of judges and the judicial system. While elections would give the public more influence over judicial selection, it would also expose judges to political division and corruption

and reshape the judicial branch of government from its traditional neutral role to be in line with the partisan legislative branch.

Canadians are guaranteed under s. 11 (d) of the Charter of Rights and Freedoms the right to a trial by an "independent and impartial tribunal," and judicial independence is one of the most important aspects of how the judicial system functions (Canadian Charter of Rights and Freedoms, 1982). If elections were held for judges, this would violate said charter right as judges would be forced to take stances on issues and give their personal opinions during election campaigns. It would also expose judges to donations and influence from interest groups in order to get funding for elections. In The United States, where judges are elected to their positions, incumbent judges are the most vulnerable group in partisan elections because campaigns are often mounted against them not based off their judicial competence, but off past decisions and opinions on social issues (Baum, 2003). This shows the erosion of judicial independence that accompanies judicial elections which in turn would influence a judge in decision making as the judge would have to consider the impact of their decisions on their election chances and not purely based off facts and arguments like they are under the present Canadian legal system. Voters in the U.S. also are impacted heavily by the financial strength of judge's election campaigns. Judges in the U.S. generally receive most of their funding from interest groups, much like U.S. politicians. These groups give candidates funding for their campaigns based off their "strong stake(s) in court policies" and choose to donate to candidates who "represent their interests" (Baum, 2003). Due to the tendency of judges with greater finances to win elections, judges could be inclined to adjust their policies in order to receive funding from these interest groups, which is further evidence of elections eroding judicial independence and impartiality.

Canadians expect that the judges who oversee their cases are of the utmost qualification and competence. The current nominating committees used in both provincially appointed S. 92 courts and federally appointed S. 101 courts are very effective at ensuring judicial competence using legal experts from various fields to thoroughly examine candidates. This process confirms that only the most qualified individuals are put forward for selection to judicial positions. In S. 92 courts in Ontario, judicial candidates are required to be experienced lawyers to ensure their understanding of the law is excellent. They are also evaluated by the Judicial Appointments Advisory Council, a group of seven ordinary citizens varying in gender, race, and geography, two provincial judges, a member of the Ontario Judicial Council, and three members chosen by law associations in the

province. These qualified evaluators, when paired with strict criteria for candidacy, ensure that only the best candidates are put forward to the attorney general for selection. Similarly, in S. 101 courts, selection is determined through interested parties submitting an application to their desired court, which is then evaluated with similar criteria to S. 92 courts by an independent provincial Judicial Advisory Committee from their home province, before a list of names is given to the Minister of Justice who makes the final decision.

In contrast, these processes to weed out weaker candidates do not occur in the U.S. system because in a judicial election, anyone can run and candidates are evaluated by the general public, who do not generally have sound legal knowledge or experience to properly evaluate candidates. This lack of experience, coupled with a lack of interest, can lead voters "in partisan elections to vote along party lines" because they 'often cannot even name the sitting incumbent" (Shapiro, 2001). These flaws to the election system allow judges that might otherwise fail to meet judicial criteria in an appointment system to attain a position that they are not qualified for, showing the clear advantage of a non-electoral system in ensuring judicial competence.

Judicial elections do have merits when it comes to providing judicial accountability. They ensure judges cannot go unchecked in their exercise of power by subjecting them to periodic votes of confidence from the general public, and lead to the judiciary more closely reflecting popular views on different issues. However, the current system already has the power to hold judges accountable for their actions, and the benefits of reflecting the public's opinions fail to outweigh the drawbacks of holding elections. In the U.S, as long as elections can be held regularly and with opposition parties to the incumbent, "Elections can be said to secure the popular accountability of elected officials" (Dubois, 1986). While these criteria and objectives may be satisfactory for elected politicians, they do nothing to address the unique necessities of competence or independence of judges, and as Dubois concedes, voters have a "low level of specific knowledge and information about judicial candidates and issues" (Dubois, 1986). This shows that voters are unable to evaluate judges based off their competence and ability to be impartial in conducting judicial duties, so elections cannot ensure the quality of judicial candidates in the same way the Canadian system of nomination does. The Canadian system also has strong safeguards to hold judges to account, with federal judges able to be removed based off a joint meeting of parliament, whose members are directly elected by the public, or in the case of provincial judges, government tribunals also have the power to remove judges. Both the federal and

provincial judicial systems allow the public indirect ability to hold judges accountable, as the officials who hold judges accountable are in turn held accountable to the public. The element of accountability associated with judicial elections is already present in the Canadian system, and due to the drawbacks of the electoral system, the Canadian system of nomination is a better way to select judges.

The judiciary's role in the functioning of Canadian government and society is incredibly important and their power to shape law is great, which is why Canada should not have judicial elections. Electing judges eliminates their fundamental aspects of impartiality and independence through having to take partisan stances on issues and taking funding from interest groups. Judicial competence would also be eroded as judicial selection would be reduced from a rigorous vetting and screening process to a partisan popularity contest. Finally, while judicial elections do allow the public to hold judges more directly accountable, there are already substantial measures in place in Canada to limit judicial power and hold judges accountable. While judicial elections are not a purely negative idea, the destruction of core principles of the Canadian judicial system far outweigh the benefits of slightly better accountability.

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