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Supreme Court: Selecting a judge is anything but objective

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There has been lots of speculation about the next individual to join the Supreme Court of Canada. Indigenous? Female? From the Atlantic provinces? Fluent in French? Now that we know the government's choice via its new process is Justice Malcolm Rowe of Newfoundland and Labrador, we should shift our focus. It's worth recognizing that choice as the subjective, political decision by a democratically accountable leader, our Prime Minister.

Choosing a judge is subjective because different reasonable individuals will choose differently. They will certainly do so in different contexts. They may even do so in the same context. Put otherwise, there is no objective way of determining the most qualified individual. For example, even if all agree that a judge should write well, different individuals will evaluate different candidates differently.

In addition, different individuals will identify different qualities as relevant. Even where they agree on the relevant qualities, they will weight them differently.

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Discussion over the past months bears out the point. Some see mastery of both official languages as crucial. Others would trade that in favour of something else, such as the life experience of a background never represented on the court.

In short, no objective markers, such as years of judicial service or number of publications, will point to a single most qualified candidate. A decision maker will have to make a choice.

So much for subjective, but how is the choice political? I don't mean that choosing a judge is political in the partisan sense. It would be abusive to choose a candidate on the basis that she had contributed to the governing party's coffers or otherwise earned a favour.

The choice is political in the sense that it involves establishing priorities, making policy and allocating scarce resources in the public interest. It is appropriate that a prime minister of one political party should make a different choice than her opponent would do. Indeed, voters who put a party into government are entitled to expect that doing so will make a difference in such matters.

Almost 25 years ago, our Prime Minister's father, Pierre Trudeau, made the political choice to name Canada's first female Supreme Court justice, Bertha Wilson. He saw her as the most qualified candidate using his criteria. The legal establishment of the day wouldn't have pegged her. On Monday, his son Justin Trudeau exercised his political judgment.

The democratic accountability is crucial. We can't call sitting judges to account for their decisions. They enjoy security of tenure to protect their independence. What we can do is hold the elected decision maker – here the Prime Minister – to account. We can and should discuss the process and substance of the Prime Minister's choice. We can make sure that it forms part of the record on which voters judge him and his colleagues at the ballot box.

This understanding of judicial appointments corrects a prevalent misunderstanding. Critics have lambasted the process in place until the Trudeau government's new one. It was legitimate to criticize the old secretive process for its lack of transparency. In my view, it wasn't legitimate to criticize the old process for failing to be objective or for not confiding the decision to neutral technocrats in the public service.

Let's hope that Justice Rowe will execute his judicial functions with wisdom, skill and good judgment. Whatever we think of the selection criteria and process that led to the decision, we should appreciate that the government has exposed them to public scrutiny and assumed responsibility for them.

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