

## **Bastarache recommends overhaul of nomination process**

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**The Lawyers Weekly**

**Vol. 30, No. 35  
(January 28, 2011)**

**2011**

The Bastarache commission made sweeping recommendations to address "several weaknesses" in the Quebec judicial selection and appointment process "vulnerable to all manner of interventions and influence" even though it dismissed former Quebec justice minister Marc Bellemare's allegations that he acted under undue pressure by Liberal Party fundraisers, with the consent of Premier Jean Charest, in the appointment of judges.

In his long-awaited report into Bellemare's allegations that there was alleged political interference in the appointment of two judges and the promotion of another, former Supreme Court Justice Michel Bastarache concluded that the facts do not demonstrate that the former minister acted under pressure and that on the balance of probabilities he was not forced to act against his will.

In exonerating Charest, the 290-page report flatly states that the body of "documentary and testimonial evidence does not support" Bellemare's allegations, and that his conduct "in no way demonstrates that he was acting under orders" emanating from third parties.

Bastarache, who attached "heavy evidentiary weight" to notes taken by public servants, deputy ministers and other departmental employees, dismissed a key piece of evidence filed by Bellemare because the cryptic notes he scrawled on a piece of cardboard while watching a hockey game on the day of his resignation did not meet the reliability criteria established by the general rules of evidence. Bastarache also dismissed evidence by the one person who corroborated Bellemare's version of events. Former associate deputy-minister Georges Lalande produced Post-it notes as evidence that he said substantiated Bellemare's story but Bastarache concluded that it too did not satisfy reliability criteria.

"Bellemare made very serious allegations before the Commission regarding the conduct of several individuals, particularly the Premier of Québec," said Bastarache. "In fairness to these individuals, and given the degrees of proof available within the balance of probabilities standard, I conclude that in order to determine whether the allegations are well founded, the Commission must rely on clear

and convincing evidence."

Stéphane Beaulac, a law professor at the Université de Montréal, was surprised that Bastarache applied such rigorous rules of evidence in a commission of inquiry. Inquiries, like the judiciary, are independent, often endowed with wide-ranging investigative powers, convened in the wake of public shock, horror, disillusionment, or skepticism to uncover the "truth," as Supreme Court of Canada Justice Peter Cory put it. Its rules and procedures, however, are far more supple than those governing the courts, with rules of evidence, for instance, allowing for hearsay to be introduced.

"What strikes me as being somewhat surprising, in contrast with the recent history of inquiries, is the standard of proof," said Beaulac, who teaches public international law and statutory interpretation. "The evidence that was required, according to Bastarache, to substantiate the allegations made by the former justice minister is akin to a judicial setting. Inquiries are supposed to have, generally speaking, more relaxed rules of evidence, not to say that you would give value to unreliable evidence. But it's not a court."

But Doug Mitchell, a well-known Montreal commercial litigation lawyer, says that given the serious nature of the allegations made by Bellemare it was appropriate for Bastarache to apply rules of evidence that he was comfortable with before reaching a determination.

"He was being asked to make a finding that will have consequences," said Mitchell, who co-founded Montreal law firm Irving Mitchell Kalichman. "It is [in] some sense a judicial determination; it's not because he's acting as a commissioner and not acting as a judge. But it's very close to a judicial determination. I'm very comfortable with the fact that if you're going to make an allegation of really improper or immoral conduct then the judge, before reaching a conclusion, should be satisfied with a high comfort level with his conclusions."

But while Bastarache concluded that Bellemare's allegations were not supported by "clear and convincing" evidence, he did find several flaws in the judicial selection and appointment process. At present, under the Regulation respecting the procedure for the selection of persons apt for appointment as judges, the Minister of Justice must publish a notice in a newspaper, inviting interested persons to submit their candidacy. An ad hoc selection committee—composed of a judge of the court where there is a vacancy, a lawyer, and a member of the public—assess the experience and personal and intellectual qualities of candidates. After the committee submits its report on candidates it considers "apt for appointment as judges," the minister then recommends an appointment among the shortlist of candidates. The candidates' names, the selection committee's report and the documents attached to a registration are supposed to be confidential.

But according to the Bastarache report, evidence revealed that there are no standards governing the operation of the selection committee. Members of the public who sit on the selection committee are not provided with guidelines nor training, information asked of the candidates has not been standardized, and concerns regarding the confidentiality of the selection committees' reports have been raised.

The process also lacks transparency, and is vulnerable "to all manner" of interventions and influence, particularly by members of the National Assembly, members of political parties and the candidates themselves, added the report.

"The lack of legislative guidance on the duties of members of the executive with respect to judicial appointments contributes to a lack of transparency in the process, potentially rendering it vulnerable to the exercise of undue influence," said the report. "Certainly it gives rise to a perception that such influence is exercised. This is a significant gap that must be corrected."

Heeding recommendations by a panel of four experts commissioned by the Bastarache commission, the report recommends overhauling the judicial appointment system by revamping the judicial selection committee, bolstering disclosure requirements to enhance accountability and transparency, and constraining the discretionary powers of the Minister of Justice by compelling him to select from a short list of candidates.

Among the 46 recommendations, Bastarache proposes the creation of two bodies—a secretariat responsible for the selection and appointment of judges and a standing selection committee responsible for identifying individuals who may be recommended to fill vacancies on the Court of Quebec and the municipal courts. Under the proposal, the standing selection committee would consist of 30 members appointed for three-year terms, and include 12 public representatives, 12 representatives of the judiciary and 6 from the Barreau. For each selection process, the standing selection committee would operate in seven-member panels.

The Bastarache commission also recommends defining criteria for evaluating candidates, developing an assessment grid, and compelling candidates to reveal information regarding their political involvement. Bastarache, though, warns that "it would go against democratic principles to disqualify candidates" solely on the basis of their past political involvement or their allegiance to a particular political party.

Bastarache also says that "to prevent executive discretion from undermining public confidence in the quality and independence of the judiciary," the judicial appointment process must be made as transparent as possible and the executive should provide reasons for its decision to appoint a candidate. Further, the Minister of Justice should be required to recommend one of three candidates whose names appear in the selection committee's report.

The Barreau du Quebec is pleased with the recommendations, given that for the most part it heeds proposals made by the law society in a 42-page report and in testimony before the commission urging the provincial government to revamp the judicial appointment system.

"If there was a surprise in the report, it is its avant-gardism," said Louis Masson, the Barreau's vice-president. "It is in all regards an important step. He did not hesitate to propose important reforms."