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The Appointment of Supreme Court Justice Nicholas Kasirer

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Event Commented On: Nomination of the Honourable Nicholas Kasirer for Appointment to the Supreme Court of Canada

In April of this year, after just 5 years of service, Justice Gascon unexpectedly announced that he will be stepping down from the Supreme Court of Canada (SCC) this September. Justice Gascon was nominated to the SCC by Prime Minister Stephen Harper and appointed on June 9, 2014. Justice Gascon's announcement and subsequent public struggle with mental health early this spring was met with a mixture of support for the Justice and controversy over the perception and treatment of people with mental illness in Canadian society. Particularly, the treatment of Justice Gascon, given his health issues, has spurred speculation regarding whether his decision to step down was of his own initiative or forced upon him (see news reports from the [CBC](#), [The Globe and Mail](#), and [The National Post](#), and [SLAW](#)). More information on the Honorable Justice Gascon can be found [here](#).

Justice Gascon's announcement presented Prime Minister Justin Trudeau with the opportunity to make his third Supreme Court nomination of his tenure as Prime Minister.

Nomination and Appointment Process

The new process for appointing Supreme Court Justices was first used in 2016 in the appointment of the Honourable Justice Rowe (see a post on that appointment [here](#)) and subsequently in 2017's appointment of the Honourable Sheilah Martin (see a post on that appointment [here](#)). The process involves the formation of an independent, non-partisan Advisory Board tasked with identifying functionally bilingual and representative jurists of the highest calibre as candidates. It is important to note that this process is not required by law. More information about the qualifications and assessment criteria for Supreme Court appointments can be found [here](#).

Candidates must [apply](#) by completing a standard questionnaire through the Office of the Commissioner of Federal Judicial Affairs Canada. The Advisory Board's final report will be made public within one month of the new Justice's appointment, per the Board's [Terms of Reference](#). More information on the selection and appointment process for Supreme Court Justices can be found [here](#).

Under the [Supreme Court Act, RSC 1985, c S-26](#) at least three SCC Justices must be appointed from Quebec. As Justice Gascon was one of these representative Justices, his seat will be filled with a nominee from Quebec. The purpose of ensuring representation from Quebec is tied closely to the province's unique (within Canada) civil legal tradition.

On July 10, 2019, Prime Minister Justin Trudeau announced that his nomination for the Supreme Court vacancy is Justice Nicholas Kasirer, currently of the Quebec Court of Appeal. Certain portions of the questionnaire completed by Justice Kasirer have been made public [here](#).

The nomination process includes a question and answer period held before the House of Commons Standing Committee on Justice and Human Rights, the Standing Senate Committee on Legal and Constitutional Affairs, and representatives from major political parties lacking representation from those committees. The intended purpose of the session is to encourage transparency and informed citizenship as well as allow the public to get to know the nominee and the civil, professional, and personal experiences that led them to candidacy. On July 25, 2019, I, among many students from across Canada, had the privilege of attending the session with nominee Nicholas Kasirer, which can be viewed [here](#) and is reviewed in the next section of this post.

Question and Answer Session

The question and answer session held in Ottawa on July 25, 2019 included members from the Standing Committees noted above and representatives from the Bloc Québécois, the Green Party of Canada, and the People's Party of Canada. Each representative was given a strict 5 minutes for questions that included Justice Kasirer's answers. It is important to note that the questioners have no decision-making authority in the appointment process and the nominee cannot answer any legal question that is, or may become, before the courts. The purpose of the session and the restrictions in place are an important reflection of the balancing of principles that must be maintained as part of Canada's constitutional democracy and the rule of law – the law makers make and are equally subject to the law as all Canadian citizens, and the independent judiciary interprets and applies the law in accordance with the law maker's intended purpose and the values of Canadian society.

The moderator, the University of Sherbrooke's Geneviève Cartier, began the session with an acknowledgement of gathering on traditional Algonquin land and a review of the appointment process, including the [assessment criteria](#) released by the Prime Minister in April 2019. These criteria include: a superior knowledge of the civil law tradition; superior analytical skills; ability to resolve complex legal problems in an informed manner and clearly set out the reasons for a decision; an awareness of the social context under which legal disputes arise; irreproachable integrity; and an open mind which allows for fair and impartial decision making.

Justice Kasirer welcomed all to the session and introduced himself. Of note was Justice Kasirer's appointment to the Court of Appeal of Quebec in 2009, and his former work as a well-respected law professor and law faculty dean at McGill University. Justice Kasirer emphasised three particular ideas he wished to convey throughout the session: how committed and passionate he is about the work he does as a judge, especially his commitment to the civil law tradition and its continued importance to Canada; how grateful he is to those he has worked with at McGill University and the Quebec Court of Appeal over the past 30 years; and that the happy family life he experienced in multicultural and bilingual Montreal has irretrievably shaped his work as a jurist.

Justice Kasirer described his understanding of Quebec civil law as a vibrant tradition that exists and expands in dialogue with the common law of the rest of Canada. In this way, civil law is also

open to dialogue with other traditions, such as Indigenous law. The unique pluralistic state of Canadian law organizes dispute resolution, creates legal expectations and obligations in different ways, and ascribes a responsibility on the Supreme Court to recognize that the law cannot be seen through any singular lens. The SCC plays a key role in this dialogue, ensuring that common and civil law traditions flourish. Justice Kasirer went on to describe his overall respect for the importance of diversity in Canada and his interest and prior work in the harmonization of what he sees as four areas of private law: the civil tradition in English, the civil tradition in French, the common law tradition in French and the common law tradition in English.

Much of the session was conducted in the French language. This reflects the new and often emphasised criteria that SCC Justices be functionally bilingual and speaks to the nature of the seat being representative of Quebec and the civil legal tradition.

Questions from party and committee representatives ranged from unapologetic flattery of Justice Kasirer and faith in his ability to take on the role of Supreme Court Justice, to questions (subtle and overt) requiring legal interpretation and positioning not permitted as part of the session, to questions on minority rights and changes needed to current legislation.

Overall, there was a complete absence of challenge to Justice Kasirer's qualifications. A handful of representatives even opted to forgo any actual question in favour of spending their 5 minutes praising the Justice on his past work and claiming their faith in his future work on the Supreme Court. Those who did ask questions, did so, seemingly to this observer, out of furtherance to their own political agenda. Often questions were asked in regard to the adequacy of the law or legal opinion on certain matters at the forefront of media coverage or controversy that, according to clearly established rules, the Justice was unable to comment on. These topics included women's rights and sexual assault myths in the courts, Indigenous rights and legal traditions, the inadequacy of current environmental laws, and language rights of other minorities. Justice Kasirer's patient and succinct answer to these questions was quite simply (to paraphrase): 'you (the legislative representatives) are the law makers, I am a member of the judiciary. I interpret and apply the laws you create and any comment on their adequacy or inadequacy is outside the scope of my role.'

To some other questions, the Justice would walk a fine line by referring to his past experiences, and on several occasions, to his respect for his daughter's activism in the field of feminism and women's rights, rather than formulating a direct answer. Somewhat unexpectedly, Justice Kasirer was often challenged, not on judgements made while on the bench at the Quebec Court of Appeal, but on his legal publications as an academic. His response to these challenges were often lengthier, though not necessarily more substantive. It seemed most representatives expected these "non-answers" and were more interested in espousing on items key to their own political and legislative agendas than on receiving a clear response.

The substance of the question and answer session left this observer with a question as to the point of the session, if used in this way by those able to speak – it seemed to be simply another means of advocating their own priorities rather than truly seeking to understand more about the nominee before them. Reflecting back on the purpose of the session as articulated by Ms. Cartier, however, it does serve as an opportunity for the public to get to know the nominee, see how the nominee responds to challenges of (sometimes improper) questions, and lives up to their obligation to

impartiality, collegiality, and the separation of the branches of government. It also allows the public to view the nominee as they demonstrate the criteria delineated by the Prime Minister (see para 9).

In terms of building confidence in Justice Kasirer's ability to serve on the Supreme Court, the session has seemingly fulfilled its purpose. Justice Kasirer was eloquent in his answers (and non-answers) and his passion for the civil legal tradition and commitment to collegiality was evident throughout the session. He not only has solid bilingual skills but an in-depth understanding of the implications of the application of the law in a bi-lingual pluralistic legal tradition. The session allowed the public, through their representatives, to challenge Justice Kasirer and highlight issues of current concern to Canadians. Though not entrenched in law, this appointment process, including the question and answer session, has been used consistently for the last three appointments without challenge. Whether the process continues in its current form, is a question that can only be answered in time.

The Honourable Nicholas Kasirer was [officially appointed](#) to the Supreme Court of Canada on August 7, 2019 effective September 16, 2019.

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