



EDITOR'S NOTE: This document is subject to editorial revision before its reproduction in final form in the *Federal Courts Reports*.

JUDGES AND COURTS

Related subject: Practice

Appeal from Federal Court judgment (2023 FC 31) dismissing appellants' application challenging process by which judges are appointed under *Constitution Act, 1867*, ss. 96, 101 — Appellants alleged that appointment process is subject to political discretionary control, influence, interference by federal Minister of Justice, Cabinet — Argued before Federal Court that such control, influence, interference undermines institutional independence of judiciary in violation of *Canadian Charter of Rights and Freedoms*, ss. 7, 11(d), 24; of *Constitution Act, 1867*, s. 96 — Appellants submitted that Federal Court made reviewable errors in both its evidentiary rulings, in which it found much of appellants' evidence to be inadmissible, in its treatment of merits of their application — Federal Court struck several paragraphs in two affidavits of one of appellants, as well as several exhibits to those affidavits — Found that these paragraphs, exhibits were either inadmissible hearsay evidence or inadmissible opinion evidence that was not tendered by qualified expert witness — Much of evidence struck by Federal Court consisted of newspaper articles, editorials, opinion pieces published in newspapers or on newspapers' websites — In addition, Federal Court struck letter from Canadian Judicial Council (CJC), 2016 report from International Commission of Jurists of Canada (ICJC), submissions from Canadian Bar Association (CBA) president — Appellants submitted in particular that Federal Court made palpable, overriding errors in finding some of foregoing evidence inadmissible — More particularly, that Federal Court ought to have found that two newspaper articles at issue, letter from CJC, which Federal Court struck as inadmissible hearsay, met twin criteria for admissibility of reliability, necessity; that Federal Court erred in concluding otherwise — Whether Federal Court erred in concluding as it did — There was no error in Federal Court's evidentiary rulings — Newspaper articles are generally inadmissible as hearsay, lack necessary reliability to be admitted as evidence before court — There was no basis for setting aside Federal Court's conclusion regarding inadmissibility of newspaper articles that appellants alleged should have been admitted — While Federal Court mischaracterized exhibit to affidavit as newspaper article when it was letter, such exhibit did in fact include inadmissible hearsay as Federal Court stated — Fact that member of judiciary acknowledged providing names of potential future appointments, as reported in CJC's letter, was hearsay — As for opinion pieces that appeared in newspapers or on websites, they were not factual; to extent they set out factual statements, they were inadmissible hearsay — Portions of report from ICJC that appellants sought to rely on was hearsay to extent it reported on undisclosed surveys completed by ICJC members — There was no evidence from appellants to support reliability or necessity of admission of these hearsay statements — Such opinions were not offered by expert, were not subject to cross-examination — Where relevant, evidence about surveys of public opinion must be presented through duly-qualified expert who can be cross-examined about matters such as survey design, conduct — There was no error in Federal Court's conclusion to disallow opinion pieces, ICJC Report, statement from CBA President — What Federal Court was left with, what was before Federal Court of Appeal here, amounted to pure speculation about possible inappropriate considerations that might come into play in judicial appointment process — Appellants cast their submissions in form of what "could happen" in that process; potential for governing party to use candidates' past political affiliations as important criterion for appointment — However, there was no evidence this occurred — Therefore, Federal Court not erring in dismissing appellants' application — Appeal dismissed.

DEMOCRACY WATCH V. CANADA (ATTORNEY GENERAL) (A-31-23, 2024 FCA 75, Gleason J.A., reasons for judgment dated April 18, 2024, 7 pp.)