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Diversity, Transparency & Inclusion in Canada's Judiciary

Samreen Beg and Lorne Sossin

Introduction

“Of 100 new federally appointed judges 98 are white, Globe finds”.¹ This arresting headline from the *Globe and Mail* in 2012 created waves in the legal community and beyond. While it was known that the Canadian judiciary – particularly federal judicial appointments² – suffered from problems related to diversity and inclusion, the extent of the problem had not been explicitly laid out before. The headline and report that followed not only highlighted the fact that the judiciary was not seeing any progress with respect to representation, but was actually *regressing* from gains that had been made in previous years.

Canada is one of the most culturally, ethnically, religiously and linguistically diverse countries in the world. However, at a time when one in five Canadians identifies as a member of a visible minority (a figure that rises to 50% in Canada's largest cities), the Canadian judiciary has remained remarkably homogenous – or to put it bluntly – overwhelmingly white. While appointments are no longer dependent on finding candidates from an English, Scottish, Irish or French background with Protestant or Catholic roots, the appointments do not reflect the

¹ Kirk Makin, 'Of 100 New Federally Appointed Judges, 98 are White, Globe finds' *The Globe and Mail* (Toronto, 17 April 2012) <<http://www.theglobeandmail.com/news/politics/of-100-new-federally-appointed-judges-98-are-white-globe-finds/article4101504/>> accessed 30 August 2016.

² Canada's judicial system is subject to a Constitutional division of powers set out in the *Constitution Act, 1867* and subsequent statutes relating to the creation of specific courts. Under this scheme, the Federal Cabinet (through the Governor General) appoints members of the Supreme Court of Canada, the Federal Courts, and the “superior” courts of the Provinces and Territories (including trial level and appellate courts). Provincial “inferior” courts which are responsible for less serious criminal matters and regulatory offences set out in provincial statutes are appointed by the provinces.

heterogeneous composition of Canada's society – especially as the cultural and ethnic makeup of the legal profession becomes more reflective of wider society.³

The Canadian judicial appointments process suffers from a number of issues that contribute to the largely homogenous nature of the appointments, but there are two key problems that should be mentioned at the outset. The first is transparency and accountability, particularly in the federal judicial appointments process. Legislation is skeletal with much of the decision-making process left up to administrative processes dictated by politicians. This decision-making is often ad hoc and continuously changing. There is also a dearth of data available to track the kind of candidates that apply for judicial positions and those candidates that are ultimately unsuccessful. Data is essential to figure out whether the problem of low representation in the judiciary is related to a shortage of diverse candidates applying for these positions, lack of policies and procedures ensuring capable candidates from diverse backgrounds are appointed, or whether there is simply a complete disregard of diverse candidates.

The second key problem is that there have been few institutional processes put in place to encourage diverse appointments. The judicial appointment process for the Supreme Court of Canada is the only federal appointment process that has institutionalized diverse appointments – unfortunately this institutionalization has remained wedded to conceptions of regional diversity and representation for the provinces, particularly Quebec. This is not to say that these conceptions of diversity are archaic or no longer important, but they are not the *only* representation issues that exist today – especially at a time when there has never been an Indigenous judge on the Supreme Court of Canada or the number of women judges on the Court is not guaranteed. The lack of institutional processes encouraging diversity for other federal

³ The minimum standard for federal judicial appointment is one year of residency in the province or territory of the appointment (except for the Federal Court) and 10 years of experience at the Bar.

appointments is at odds with an increasingly diverse society where litigants are unlikely to encounter judges that look like them.

The purpose of this paper is to provide a high level overview of some of the issues and stumbling blocks Canada has encountered in building a diverse judiciary. Part 1 of the paper begins by providing a brief overview of the heterogeneous makeup of Canadian society against the homogenous makeup of the judiciary. This will provide a helpful backdrop from which to explore conceptual questions related to the question of why a diverse judiciary matters. Part 2 examines some of the historical questions and milestones in the judiciary related to diversity. Part 3 summarizes the judicial appointments processes and takes a look at Canada's recent history related to judicial appointments and judicial diversity – specifically judicial appointments under Prime Minister Stephen Harper's Conservative government and recent moves by the new Liberal government led by Prime Minister Justin Trudeau. The paper wraps up with our thoughts on reforms that might signal greater commitment to diversity and inclusion as essential elements of an effective and independent judiciary.

Part 1: Canadian Diversity and Conceptual Approaches to Judicial Diversity

“Canada was born of diversity” remarked Canada's Chief Justice Beverly McLachlin to an audience in Edinburgh, Scotland in 2012. “We continue to be a country of immigrants, and all signs suggest that diversity in Canada will only increase in the years to come.”⁴ While this may be true, why should it matter for the purposes of judicial diversity? The idea that the judiciary should reflect society is not an automatic one, and the purpose of this Part is to look at some of

⁴ The Right Honourable Beverly McLachlin, Chief Justice of Canada, ‘Judging: the Challenges of Diversity’ (Judicial Studies Committee Inaugural Annual Lecture, Edinburgh, June 2012) 2.

the conceptual reasons for a reflective judiciary that have been presented by Canadian academics and commentators. Before those conceptual rationales are addressed however, this Part will provide more details on the nature of Canada's increasing diversity and largely homogeneous judiciary.

A) Canadian Heterogeneity vs. Judicial Homogeneity

i. Historical Diversity in Canada and the Canadian "Mosaic"

Canada is largely understood to have had three "founding peoples": the Indigenous peoples, the British and the French. However, for a large part of Canada's history the population was primarily composed of people from British or French descent. The trend of Europe being the largest source of immigrants to Canada began to change in the 1960s with major changes to Canada's immigration policy,⁵ resulting in a noticeable increase in the presence of "visible minorities" in Canada in the 1970s. By the 1980s, declining birth rates coupled with a steady influx of immigrants saw the population of those from British and French ancestry sharply decline.

The results from Statistics Canada's 2011 National Household Survey⁶ illustrate how the immigration trends of the 1970s, 1980s and beyond resulted in a "mosaic" of individuals within Canadian society. Over 20% of the population was foreign-born with more than 200 ethnic origins reported and roughly 19% of the population - or nearly one in five of the Canadian

⁵ Peter S. Li, 'Cultural Diversity in Canada: The Social Construction of Racial Differences' (Department of Justice Canada, 2000) <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rp02_8-dr02_8/rp02_8.pdf> accessed 30 August 2016 3.

⁶ Statistics Canada, *Immigration and Ethnocultural Diversity in Canada* (National Household Survey, 2011) <https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.cfm> accessed 30 August 2016.

population – identifying themselves as a member of a visible minority group. The three largest visible minority groups were South Asian, Chinese and Black, accounting for 61.3% of the visible minority population. Two-thirds of the Canadian population reported that they were affiliated with a Christian religion, Roman Catholics being by far the largest Christian group. The respondents that identified as Muslim represented 3.2% of Canada’s population, followed by Hindu at 1.5%, Sikh at 1.2%, Buddhist at 1.1% and Jewish at 1%. National statistics can sometimes belie local realities – Toronto, Canada’s largest city, for example, now counts over 50% of its population as foreign born.⁷

ii. Judicial Diversity in Canada

The judiciary in Canada has a story largely opposite to the statistics outlined above, especially among appointments by the federal government to “federal courts”.⁸ In May 2016 there were no visible minority or Indigenous judges on the Supreme Court or the Federal Court of Appeal. There were also no visible minority judges on the Federal Court and no Indigenous judges on the Tax Court. Whereas women comprised four of the nine judges on the Supreme Court of Canada, women were very under-represented on other federal courts, though not to the same extent as visible minority and Indigenous judges.

With respect to federally appointed judges to the provincial courts, there was better representation from visible minority, Indigenous and women judges, though still far below the population shares for these groups. Meanwhile, provincially appointed judges on provincial courts appeared to fare better from a diversity perspective, though there was still under-representation among visible minority, Indigenous and women judges.

⁷ Toronto Vital Signs Report 2015 <<http://torontosvitalsigns.ca/#>> Accessed 30 August 2016.

⁸ The Supreme Court of Canada, Federal Court and Tax Court.

While the federal judicial appointments process is currently under review, it has never included any proactive outreach for or institutional valuing of diversity and inclusion. It is not that issues of diversity and inclusion are absent from this process – but there is little evidence that these issues are viewed as priorities, or valued as commensurate with other aspects of judicial qualifications.

B) Why Do We Need Judicial Diversity?

Why is the lack of judicial diversity necessarily a problem? At its core, diversity matters because judicial appointments ought to be a merit based process in a system committed to judicial independence, democracy and the rule of law. Although some may argue that a merit based system is premised on the view that the race, ethnicity or gender of a well-qualified candidate should not matter, the reality is that a person's qualifications are shaped by who they are and what perspectives on society and justice they bring to the bench. A diverse and inclusive judiciary is what enables the judiciary to be both independent and impartial.⁹

Despite these pressing questions and rapidly growing diversity in Canadian society, attention to the question of whether and to what extent the judiciary is reflective of Canadian society is a relatively recent phenomenon of the last decade (with the exception of gender representation which is a longer standing concern – at least since the 1980s). As scrutiny of this question intensifies, a number of rationales for enhancing judicial diversity and inclusion have surfaced. Below, we canvass a selection of these rationales (though our review is far from exhaustive).

⁹ For discussion, see Andrew Griffith, 'Diversity Among Federal and Provincial Judges' (Policy Options, 4 May 2016) <http://policyoptions.irpp.org/2016/05/04/diversity-among-federal-provincial-judges/>.

i. Practical Reasons

“As a law student” Chief Justice McLachlin said in her Edinburgh speech, “I never dreamed that I would be called upon to decide whether a religious Muslim woman may be permitted to wear a Niqab while testifying, or whether same-sex couples should be allowed to marry, or whether children can refuse life-saving medical treatment on religious grounds”.¹⁰ The values, perspectives and experiences of people appearing in courts are increasingly different from those judging them, which can “impact on the ability of the judges to appreciate their circumstances, assess their credibility, and craft appropriate remedies.”¹¹

Although judges are capable of making fair decisions for members of minority communities, for the Chief Justice, the increasing numbers of women on the bench has been instructive in demonstrating how a heterogeneous bench can lead to enhanced judicial decision-making: “My personal experience has led me to the conviction that women on the bench do make a difference. I have seen deliberations take a new turn because of the perspective brought by a woman to an issue involving a woman. And I have seen court culture change...”¹²

According to the Chief Justice, there needs to be a recognition that judges are human beings and that there is a subjective element to judging. What is required for impartial judging is better understood by recognizing subjectivity since judging “is not an exercise of cold reason, uncontaminated by personal views and preconceptions.”¹³

¹⁰ McLachlin (n 4) 4.

¹¹ *ibid* 3-4.

¹² *ibid* 18.

¹³ *ibid* 7.

Other commentators have echoed and expanded on these ideas over the years. The main reason judicial diversity is needed according to these commentators is practical:¹⁴ The more diverse the bench the better the quality of decisions. Rosemary Cairns Way states that one primary reason for having a diverse bench is to increase the range of available perspectives and experiences. This can make decisions more impartial since it does not “unintentionally replicate at a systemic level the perspectives and values of a limited subset of human experience.”¹⁵ Having a diverse bench opens up what has traditionally been a “constrained” set of perspectives, and increases the chances that the experiences of litigants will be understood more accurately since the life experiences of those judging will have been widened.¹⁶ Other commentators have noted that judicial diversity is important because a judge’s background can influence his or her choice and the “particular experiences of a judge can even affect her or his view about the appropriate forum for raising a legal issue.”¹⁷

The importance of a judiciary that reflects Canada’s diverse communities was highlighted in the 1997 Supreme Court of Canada’s judgment *R.D.S. v. The Queen*.¹⁸ The case involved an African-Canadian trial judge who heard a case involving an African-Canadian youth charged with assaulting a police officer. The only two witnesses at trial were the accused and the police officer. The police officer alleged that the youth resisted arrest and became violent with him. The youth alleged that he had been the subject of threats of violence at the hands of the police officer. Because their accounts of the relevant events differed widely, the case focused on credibility.

¹⁴ Rosemary Cairns Way, ‘Deliberate Disregard: Judicial Appointments under the Harper Government’ (2014) 67 S.C.L.R. (2d) 43 <<http://sclr.journals.yorku.ca/index.php/sclr/article/viewFile/39263/35604>> accessed 30 August 2016.

¹⁵ *ibid* 52.

¹⁶ *ibid* 52.

¹⁷ Richard Devlin, Wayne MacKay and Natasha Kim, ‘Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a “Triple P” Judiciary’ (2000) *Alta L Rev* 734, para 39.

¹⁸ [1997] 3 SCR 484.

The trial judge indicated that she had reasonable doubt about the accused's guilt and that the Crown did not discharge its evidentiary burden to prove the accused's guilt beyond a reasonable doubt. In particular, the trial judge stated the following:

The Crown says, well, why would the officer say that events occurred in the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.¹⁹

The case reached the Supreme Court on the issue of whether the comments of the Trial Judge (who was the first African-Canadian woman appointed to the bench in the Province of Nova Scotia) gave rise to a reasonable apprehension of bias.²⁰ Writing for the majority, Justice Cory observed that the "requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes."²¹ He went on to say that

True impartiality...requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.... The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging.²²

The two female members of the Court at that time, Justice McLachlin (as she then was) and Justice L'Heureux Dubé, concurred with Justice Cory, but went even further in their reasons

¹⁹ R.D.S (n 23) [4].

²⁰ Four separate sets of reasons were issued in the case.

²¹ R.D.S (n 23) [119].

²² *ibid* [119].

to condone the comments of the trial judge. They wrote: “An understanding of the context or background essential to judging may be gained from testimony from expert witnesses in order to put the case in context...: A reasonable person far from being troubled by this process, would see it as an important aid to judicial impartiality.”²³

While *R.D.S.* highlights the importance of judges bringing their own experience to bear in their role, the case also reflects ambivalence about certain challenges in operationalizing inclusion. Jennifer Nedelsky has questioned, “if the solution is to have a judiciary that reflects the full diversity of Canadian society, how can any given person be guaranteed a judge who shares her experiences, assumptions and affective starting points?”²⁴ Her answer is that judging needs to encompass an “enlargement of the mind” since “the more views we are able to take into account, the less likely we are to be locked into one perspective...It is the capacity for ‘enlargement of mind’ that makes autonomous, impartial judgment possible.”²⁵

Sonia Lawrence suggests that a truly independent judiciary is dependent on the judicial community as a part of the context informing each individual member’s decision making.²⁶ Lawrence points out that to the extent judges’ dining rooms, libraries and training sessions are homogenous, they do not offer many opportunities to encounter different beliefs, and as a result, “the range of beliefs, experiences, and attitudes is narrower than that found in society as a whole.”²⁷

²³ *ibid* [44-45].

²⁴ Jennifer Nedelsky, ‘Embodied Diversity and the Challenges to Law’ (1997) 42 McGill LJ 91, para 107.

²⁵ *ibid* para 107.

²⁶ Sonia Lawrence ‘Reflections: On Judicial Diversity and Judicial Independence’ in Adam Dodek and Lorne Sossin, (eds) *Judicial Independence in Context* (Irwin Law 2010) 200.

²⁷ *ibid* 201.

The introduction of the Canadian *Charter of Rights and Freedoms* in the *Constitution Act, 1982*, has bolstered the argument that a reflective judiciary is necessary to increase the quality of judicial decisions. The *Charter* has required an increased amount of judicial intervention into subjective areas that touch upon individual liberty, values and policy. Balancing individual rights “against the reasonable limits of a free and democratic society is a value laden process that involves the courts in making public policy and choosing between conflicting interests in society.”²⁸ A judiciary that appropriately reflects Canadian society is necessary because “fair adjudication requires it.”²⁹ With an increase in subjective determinations, it is essential that these determinations reflect the community’s mix of identities and experiences since “fairness in a pluralist society...requires pluralist decision-making.”³⁰ The expectation is that with more diversity, there will be more voices and perspectives that ultimately adjudicate with more empathy, compassion and effectiveness.³¹

ii. Legitimacy of Judicial System

The second broad reason that commentators have given for necessarily having a judiciary reflective of Canadian society is that the legitimacy of the judicial system depends on it. Entry into the judiciary is a “tangible sign of enfranchisement for minority groups...it is also a tangible conduit of social mobility for many groups who confront discrimination, exclusionary requirements or other barriers in society.”³² Conversely, the current institutional nature of the judiciary according to Cairns Way reflects the ongoing existence of systemic discrimination since the appointments process has “disproportionately denied opportunities to Indigenous

²⁸ Devlin (n 17) 16.

²⁹ Lorne Sossin, ‘Should Canada Have a Representative Supreme Court?’ in Nadia Verrelli (ed), *The Democratic Dilemma: Reforming Canada’s Supreme Court* (The Institute of Intergovernmental Relations 2013) 31.

³⁰ *ibid* 31.

³¹ *ibid* 32.

³² *ibid* 33.

peoples, racialized individuals,³³ persons with disabilities, women and other members of equality-seeking groups.”³⁴ It is vital that in a democratic society “with an aversion to discrimination, we should expect the Court to reflect society.”³⁵

According to Canada’s Chief Justice, a diverse bench in a diverse society is necessary for fostering public confidence in the administration of justice.³⁶ Representativeness is about ensuring that the public sees itself reflected in the judiciary as some of those who belong to minority groups may not have complete trust in a system “composed exclusively or predominantly of middle-aged white men in pinstriped trousers.”³⁷ Lack of confidence in the system inevitably leads to questions about whether a court can appropriately reflect the viewpoints and values of a pluralistic society, with these individuals feeling “unwelcome and outnumbered in the courtroom – a space where no one should feel excluded on account of gender or background.”³⁸

Sonia Lawrence expands upon these points by linking diversity on the bench to judicial independence. She states that because the judiciary has strong social connections to powerful identity groups, in an unequal society this “sets the judiciary up as a symbol of social exclusion that may harm the democratic legitimacy of the institution (particularly in the perception of excluded groups).”³⁹ In this sense the judiciary may become another symbol of hierarchy, as well as a symbol of persistent exclusion that fails to attract the confidence of those under-represented

³³ The terms “racialized person” or “racialized group” has been adopted by the Ontario Human Rights Commission over terms such as “racial minority”, “visible minority”, “person of colour” or “non-white”, because the Commission believes it better reflects the recognition that “race is a social construct.” See Ontario Human Rights Commission, *Racial Discrimination, Race and Racism (Fact Sheet)* <<http://www.ohrc.on.ca/en/racial-discrimination-race-and-racism-fact-sheet>>.

³⁴ Cairns Way (n 14) 54.

³⁵ Sossin (n 29) 32.

³⁶ McLachlin (n 4) 20.

³⁷ *ibid* 21.

³⁸ *ibid* 21.

³⁹ Lawrence (n 26) 197.

groups.⁴⁰ Ultimately, a homogenous bench may include “a loss of faith in the ability of the courts to deliver fair and impartial justice...[creating] a clear and important role for diversity on the bench in establishing and maintaining judicial independence.”⁴¹

C) Is Judicial Diversity Necessary?

Is judicial diversity in Canada necessary? Based on the above commentary, the answer would be yes for the reasons outlined. There is growing sentiment that a Canadian judiciary largely drawn from a homogenous elite is problematic. If an independent judiciary is an essential feature of our democracy, attention needs to be paid to the characteristics that make the judiciary independent in practice – not just characteristics that have traditionally been associated with judicial independence. Judicial diversity and representation is more than just a goal in and of itself. It is a way to ensure, in Canada’s increasingly diverse post-*Charter* society, that judges are armed with the appropriate tools to effectively deliberate and make decisions, and that the public’s confidence in the ability of judges to do this is increased.

In other words, “Who the judges are matters to what they do.”⁴²

Part 2: Historical Developments Related to Judicial Diversity

The history of “judicial diversity” in Canada has typically referred to two different conceptions of representation, both of them involving the Supreme Court of Canada. The first is the process of ensuring regional representation on the Supreme Court. The *Supreme Court Act*

⁴⁰ *ibid* 197.

⁴¹ *ibid* 198.

⁴² Cairns *Way* (n 14) 51.

has contained provisions since 1949 requiring there to be three judges on the Supreme Court who have served on Quebec's Court of Appeal, Superior Court, or are "from among the advocates of that province."⁴³ These provisions have led the six other Supreme Court judges to also be selected using a regional representation model (though this is established practice, not stipulated in in the *Supreme Court Act*). Specifically one judge must be selected from British Columbia, one judge from Alberta, Saskatchewan or Manitoba, three judges from Ontario, and one judge from Canada's Atlantic provinces.⁴⁴

The second historical conception of representation involving the Supreme Court was the practice of ensuring that among the regional appointments, specific linguistic and religious denominations were included. For example, for a time there was a practice to have one of the three Quebec judges represent the Anglophone, Protestant community (as opposed to the Francophone, Catholic community), while at least one judge from outside Quebec was a Catholic. The basic characteristics of judges at the time could be summarized as consisting of "middle-aged (or older) white professional males of British or French ethnicity."⁴⁵

While the first historical conception of representation has remained largely intact, the second form of representation began to undergo changes in 1970 with the appointment of Bora Laskin, the first Jewish judge on the Supreme Court of Canada – and the first judge who was not Catholic or Protestant. In 1973, Bora Laskin was appointed as Chief Justice of the Supreme

⁴³ *Supreme Court Act*, RSC 1985, c S 26 s 6. Peter McCormick points out that between 1875 and 1928, there was a requirement for two Quebec judges on a six-judge court, and between 1928 and 1949, there was also a requirement for two Quebec judges on a seven-judge court. Peter McCormick, 'Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada' *Journal of Appellate Practice and Process*, Vol 7, No 1 (Spring 2005).

⁴⁴ The late 1980s and early 1990s witnessed the "Meech Lake Accord" negotiations. The Meech Lake Accord proposed that the federal government be required to appoint Supreme Court judges from lists submitted by the provinces. The Accord was subsequently defeated.

⁴⁵ Peter McCormick (n 42) at 21.

Court of Canada. Since then, attention to the religious origins of the judges has faded, with the number of Jewish judges on the Supreme Court peaking at three between 2006 and 2013. Laskin was also the first judge that did not come from the traditional English/Scottish/Irish/French background. This trend continued in the 1980s and 1990s with the appointment of John Sopinka in 1988 – the first Ukrainian-Canadian named to the Supreme Court, and Frank Iacobucci in 1991 – the first Italian-Canadian appointed to the Court. More recently, the appointment of Andromache Karakatsanis in 2011 was a first for a judge of Greek origin.

A significant barrier for women was overcome with the appointment of Bertha Wilson in 1982, the first ever woman to serve on the Supreme Court of Canada. The appointment of Wilson, heralded in permanent change from the previous era of the Court being an “all-male society”⁴⁶, leading to a steady stream of women judges subsequently being appointed. Currently, four out of nine judges serving on the Supreme Court – including the Chief Justice – are women, a milestone that was originally reached in 2004.

Other levels of courts have slowly seen some “firsts” as well with respect to judicial appointments. In 1969, Maurice Charles became the first black Canadian judge after he was appointed to the Ontario Provincial Court, but it was not until 2012 that a black judge – Michale Tulloch – was appointed to the Ontario Court of Appeal (after being elevated from the Superior Court in 2012). It also took many years for an Indigenous judge to be appointed to an appellate court in Canada (or the Commonwealth), when Harry LaForme was named in 2004 to the Ontario Court of Appeal.⁴⁷

⁴⁶ Paul C. Weiler, *In the Law Resort: A Critical Study of the Supreme Court of Canada* (Carswell, 1974) 18

⁴⁷ Sabrina Lyon and Lorne Sossin, ‘Data and Diversity in the Canadian Justice Community’ (2014) Osgoode Legal Studies Research Paper Series < <http://digitalcommons.osgoode.yorku.ca/olsrps/63/>> at 3-4, subsequently published as “Diversity and Data in the Canadian Justice Community” (2014) 11 *Journal of Law and Equality* 85-13.

Progress has generally been made with federal appointments of women judges since the beginning of the 1980s, when only 3% of federal judicial appointments were women. This percentage rose to 10% by 1990 and 25% by 2002.⁴⁸ In Ontario, the Judicial Appointments Advisory Committee (JAAC) was created in 1989 (which will be discussed more in Part 3), whose “employment equity” mandate saw the percentage of provincially appointed women rise from 3% to 22% between 1989 and 1995.

Despite the “judicial firsts”, there have been serious gaps in appointments of visible minority and Indigenous judges. This is particularly noteworthy considering the fact that Canada has committed itself quite expansively to institutional multiculturalism and has also ensured that protections for “aboriginal and treaty rights of the aboriginal peoples” was enshrined in section 35 of the *Constitution Act, 1982*. Most glaring is the absence of an Indigenous or visible minority judge on the Supreme Court of Canada.

With respect to Indigenous judges in particular, there have been repeated calls from prominent organizations and academics for an Indigenous judge to be named to the Supreme Court. Writing in 2014, Rosemary Cairns Way discussed the under-representation of Indigenous judges among federal judicial appointments generally. She observed that “fifteen years after the Supreme Court of Canada decided in *R. v. Gladue* that the overrepresentation of Aboriginal peoples in the criminal justice system qualified as a “crisis”, the likelihood of an Aboriginal person facing an Aboriginal judge is virtually unchanged. The number of federally appointed Aboriginal judges in Canada hovers at less than 1 per cent.”⁴⁹

⁴⁸ F.L. Morton, ‘Judicial Appointments in Post-Charter Canada: A System in Transition’ in Kate Malleson and Peter H Russell (eds) *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press, 2006) 68.

⁴⁹ Cairns Way (n 14) 54-55.

While Canada's judiciary is certainly not homogenous the way it was a hundred years ago, what is viewed by many today as homogenous is different from the conception of homogeneity present a hundred years ago. The appointment of a judge who was born to Ukrainian parents might have been unheard of at the beginning of the last century, but this type of appointment does not carry the same weight it once did with respect to diversity and representation in the judiciary. What would make the judiciary less homogenous today is the increasing appointment of judges from non-white populations or from non-Christian religious groups. The "judicial firsts" outlined above were certainly important; however the short history of diverse judicial appointments in Canada demonstrates that increasing diversity in the judiciary has not moved fast enough, or kept pace with demographic realities in Canada.

Part 3: Judicial Appointments Processes, Controversy and the Current Debate

Reform of the judicial appointment process and diversity of the judiciary has been an issue for many years under both Conservative and Liberal governments. However, it is doubtful whether a government has received more attacks from the legal community and public at large on its handling of judicial appointments and judicial diversity than the Conservatives led by Stephen Harper between 2006 and 2015. The purpose of this Part is to first summarize the legislative and administrative framework present up to that point, outline some of the issues that appeared during the "Harper years", address the commitments and actions of the Liberal government led by Justin Trudeau, and consider the "way forward" in identifying problems and potential solutions.

A) Constitutional, Legislative and Administrative Standards

The federal and provincial government's appointments processes are governed by separate provisions of the *Constitution Act, 1867*, with each level of government enacting its own legislation and developing administrative processes related to judicial appointments.⁵⁰

i. Constitutional and Legislative Framework

Under section 92(14) of the *Constitution Act, 1867*, each provincial government in Canada is responsible for appointing all judges for its provincial courts. These courts are typically referred to as “lower” courts or courts of first instance for matters related to civil, criminal and family law. Under section 96, the federal government is responsible for appointing judges to the provincial superior courts – which serve as “higher” trial courts and courts of appeal for cases originating out of section 92 provincial courts. Under section 101 of the *Constitution Act, 1867* the federal government is also responsible for appointing judges to federal courts. All judicial appointments are made by the Governor General in Council – in practice the federal cabinet – on the recommendation of the Minister of Justice. The exceptions are appointments of Chief Justices and judges to the Supreme Court of Canada, which are made on the recommendation of the Prime Minister.

Noteworthy legislation that has governed the appointment of judges are the federal *Judges Act* and the *Supreme Court Act*. Although the *Judges Act* sets minimum qualifications for appointment to a section 96 or 101 court (for example, having practiced in a province for a minimum of ten years), it is fairly skeletal with respect to other criteria relating to qualifications

⁵⁰ Unfortunately, at the federal level there has been a huge discrepancy between the lack of commitment to diversity in the appointments process and the federal government's institutional commitment to multiculturalism and diversity. For more on official Canadian multiculturalism see Michael Dewing, *Canadian Multiculturalism* (Library of Parliament, 2009) < <http://www.loppar.gc.ca/content/lop/researchpublications/2009-20-e.pdf> >

or areas of proficiency.⁵¹ The *Supreme Court Act* contains a similar story. As a result, both of these Acts are “perhaps more noteworthy for what they do not include”⁵² since they say “little or nothing about the actual system [of appointments] in place. Frequently, what is in place is the consequence of policy directives or guidelines that are ad hoc and informal.”⁵³

The case can be different at the provincial level. For example, in Ontario the *Courts of Justice Act* formally established in 1995 the Judicial Appointments Advisory Committee (JAAC) – though the program actually began as a pilot project in 1988. According to section 43(8) of the Act, the purpose of the JAAC is to “make recommendations to the Attorney General for the appointment of judges”.

The JAAC receives applications for judicial positions, evaluates candidates, conducts interviews, and provides a ranked list of recommended appointments to the Attorney General, who makes the final selection. The *Courts of Justice Act* states that the Attorney General “shall recommend to the Lieutenant Governor in Council for appointment to fill a judicial vacancy only a candidate who has been recommended for that vacancy by the Committee” and that the “Attorney General may reject the Committee’s recommendations and require it to provide a fresh list.”⁵⁴ The JAAC’s is often cited within Canada and internationally as an example of a transparent, non-partisan appointment process.⁵⁵

B) Administrative Processes

⁵¹ Lorne Sossin, ‘Judicial Appointment, Democratic Aspirations, and the Culture of Accountability’ (2008) 58 *University of New Brunswick Law Journal* 11, 9.

⁵² *ibid* 9.

⁵³ Devlin (n 17) 41.

⁵⁴ *Courts of Justice Act*, ss 43(11) and (12).

⁵⁵ Morton (n 48) 69-70.

Judicial appointments are heavily reliant on administrative processes and at the federal level in particular, have suffered from a lack of accountability and transparency. Changes were made to the federal process in 1988 in order to create a more streamlined application process. The system – which continues to exist today – consists of a vetting process by an advisory committee (“Judicial Advisory Committee” or JAC, at least one in each province or territory) to provide advice on candidates’ qualifications for appointment. This process is administered by the Commissioner of Federal Judicial Affairs, who provides administrative support for each of the advisory committees.

There are issues with this system of appointment. For example, the establishment of the advisory committees and Commissioner’s Office has not necessarily excluded political factors from the judicial appointment process or ensured that a candidate’s political past is not considered.⁵⁶ Furthermore, there is no enforceable remedy if the government breaches the recognized practice of not recommending to Cabinet a candidate not previously recommended by an advisory committee. Practically speaking, the committees typically find a broad range of candidates at least “qualified” which provides “little meaningful constraint on the federal government’s appointment power (and, worse than that, suggests that the committees serve an accountability function that they have neither the authority nor the will to perform).⁵⁷

⁵⁶ Phillip Bryden & Lorne Sossin, “Judges” in Dodek & Hoskins (eds) *Barristers and Solicitors in Practice* (Toronto: Butterworths, 1998) para. 11.32.

⁵⁷ Sossin (n 5150) 11. In addition, the roles of these committees were revised under the Harper Conservatives, so that rather than determining whether candidates were “not recommended,” “recommended,” or “highly recommended,” judicial advisory committees would only determine if candidates were “not recommended” or “recommended.” Those who were deemed to be “recommended” were then passed on to the Minister of Justice who would, in consultation with Cabinet and the local judiciary and Bar, determine the candidates to be appointed, with the final decision being made by the government. The Trudeau Government subsequently reversed these changes and reverted to the prior standard. See S. Fine, “Liberals Overhaul Judicial Appointments Process to Boost Diversity” *The Globe & Mail* (October 20, 2016) at <http://www.theglobeandmail.com/news/national/liberals-to-unveil-new-judicial-appointment-process-undo-changes-made-by-harper/article32454733/>.

Appointments to the Supreme Court of Canada have worked differently. Historically very little was known about appointments to the Supreme Court since much of the process was secretive and took place behind closed doors. More may have been “known about the process for electing a new Pope than about the process for selecting a new Supreme Court justice.”⁵⁸ An attempt at disclosure and changing the process was made between 2004 and 2005 by Minister of Justice, Irwin Cotler, who served under the Liberal government of Prime Minister Paul Martin.

Specifically, Colter revealed a “permanent reform” process where: 1) the Minister would conduct consultations to form a long list of five to eight candidates; 2) an Advisory Committee would provide a list of three names to the Minister after an assessment with a commentary of strengths and weaknesses; 3) The Prime Minister would select a candidate on the recommendation of the Minister; and 4) The Minister would appear before a committee to explain the process and selection.⁵⁹ When Justice John Major of the Supreme Court subsequently announced his retirement, Minister Cotler began implementing this process. However, the Liberal government soon fell and they were unable to complete the appointment.

B) Appointment Processes under Stephen Harper’s Conservatives

Seven of the nine Supreme Court justices sitting on the Court today were named by Stephen Harper during his nine years as Prime Minister.⁶⁰ The government named eight Supreme Court judges in total⁶¹ and over half of the current federal judiciary.⁶² The number of

⁵⁸ Adam M. Dodek, ‘Reforming the Supreme Court Appointment Process 2004-2014: A 10 Year Democratic Audit’ (2014) 67 SCLR (2d) 111-117, 4.

⁵⁹ *ibid* 7.

⁶⁰ From 2006 to 2015.

⁶¹ Justice Rothstein who was named in 2006, retired in 2015.

⁶² Cairns *Way* (n 14) 44.

appointments is noteworthy not only because of the volume of judicial appointments that occurred over the course of nine years, but because of the negative publicity, reaction and controversy that the judicial appointments received during this time.

i. Supreme Court Appointments under Stephen Harper's Conservatives

When the Conservatives won a minority government in 2006, one of the first matters of business was to fill the judicial vacancy on the Supreme Court following the retirement of Justice John Major. Prime Minister Stephen Harper chose Marshall Rothstein from the list of three candidates provided to the previous Liberal government. However, the Conservative government deviated from the Liberal plan by having the future Justice Rothstein appear before an ad hoc parliamentary committee – a first for a Supreme Court justice. Two days after the hearing, the Prime Minister named Justice Rothstein as a Supreme Court judge.⁶³

Two years later, in order to fill a vacancy left by Justice Bastarache, Minister of Justice Rob Nicholson completed consultations and submitted a list of candidates to a selection panel of five MPs who were to provide an unranked list of three candidates. When the selection panel became overtaken by partisan bickering, the Prime Minister bypassed the list and named Thomas Cromwell as a nominee.⁶⁴ Cromwell did not appear at a Parliamentary committee before he was officially appointed because an election was soon triggered followed by a prorogation of Parliament by the Governor General (at the request of the Prime Minister).

In 2011, Prime Minister Harper filled two more vacancies (replacing Justices Ian Binnie and Louise Charron with Michael Moldaver and Andromache Karakatsanis) through the selection panel process used to appoint Justice Cromwell. The process included the involvement

⁶³ For more, see Dodek (n 58), Sossin (n 29), and Sossin (n 51).

⁶⁴ Dodek (n 58) 8.

of a selection panel of MPs and the appearance of the nominees before a parliamentary committee. The same process was followed in 2012 to appoint Richard Wagner.⁶⁵ The government hit a major stumbling block and controversy in 2013 when they named Federal Court Justice Marc Nadon to the Supreme Court to replace Justice Morris Fish. In terms of process, the government followed the same method as the previous appointments. However, Nadon's appointment gave rise to a series of issues. First, Nadon was the first supernumerary judge named to the Supreme Court. (He had already elected to take partial retirement from the Federal Court of Appeal). Second, Justice Nadon was not well known outside of the Federal Court where he served for twenty years, and the legal profession did not view him as a "legal light."⁶⁶ As one prominent Quebec legal academic observed "He was on nobody's short list... or on anybody's long list."⁶⁷ The judgment of Justice Nadon that attracted the most attention was a dissent in *Canada (Prime Minister) v. Khadr*,⁶⁸ in which he sided with the Harper government in a high profile decision involving a Canadian held at Guantanamo Bay.

But the most significant concern was whether Justice Nadon met the criteria to be one of three Quebec judges named to the Supreme Court pursuant to the *Supreme Court Act*. A Federal Court judge had never been named to the Supreme Court as one of the three Quebec judges in

⁶⁵ By replacing Justice Marie Deschamps, the number of women on the Supreme Court dropped from four to three. Justice Deschamps herself subsequently stated "Numbers do count...I was sad that I was not replaced by a woman. We are looked at not just as a model for the courts in Canada, but around the world – and I think it's very important that the Supreme Court of Canada remains a model." See Kirk Makin, 'Supreme Court Needs More Women Departing Judge Says' *Globe and Mail* (Toronto, 2 February 2013)

<<http://www.theglobeandmail.com/news/national/supreme-court-needs-more-women-departing-judge-says/article8149711/>> accessed 30 August 2016. The government appointed Suzanne Côté in 2013, once again bringing the number of women on the Court up to four.

⁶⁶ Sean Fine, 'Supreme Court Rejects Harper Appointee Nadon' *The Globe and Mail* (Toronto, 21 March 2014) <<http://www.theglobeandmail.com/news/politics/marc-nadon-supreme-court-ruling-stephen-harper/article17607585/>> accessed 30 August 2016 .

⁶⁷ T. Hopper "Marc Nadon caught Stephen Harper's attention with dissent Khadr ruling in 2009" *National Post* (21 March 2014) <<http://news.nationalpost.com/news/canada/canadian-politics/marc-nadon-caught-stephen-harpers-attention-with-dissent-khadr-ruling-in-2009>> accessed 30 August 2016.

⁶⁸ 2009 FCA 246.

the past (the relevant section of the *Supreme Court Act* referred to eligible candidates belonging to the Quebec Bar, the Quebec Superior Court or the Quebec Court of Appeal).

Shortly after Nadon was appointed in October 2013, a constitutional challenge was initiated by a Toronto constitutional lawyer, while a separate challenge was launched by the province of Quebec. These actions led the federal government to send a reference to the Supreme Court of Canada regarding Justice Nadon's appointment and the Court's interpretation of the Quebec provisions of the *Supreme Court Act*. In an unprecedented 6-1 decision, the Supreme Court ruled that Nadon's appointment was contrary to the Quebec specific provisions of the *Supreme Court Act*, which ensured that the Court had civil law expertise "and that Quebec's legal traditions and social values are represented on the Court *and* that Quebec's confidence in the Court be maintained."⁶⁹

On May 1, 2014, just as the drama over the Nadon judgment was subsiding, a headline in the Canadian newspaper the *National Post* stated, "Tories incensed with Supreme Court as some allege Chief Justice lobbied against Marc Nadon appointment." John Ivison reported that "senior Conservatives" advised that Chief Justice Beverley McLachlin may have lobbied against Nadon's appointment. Chief Justice McLachlin released a reply statement to the press through her executive legal officer stating that she had wished to ensure that the government was aware of the eligibility issue but at no time did she express opinions regarding that issue. The Prime Minister's Office issued its own follow-up statement, asserting that the Chief Justice initiated the

⁶⁹ See *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21 (the "Nadon Reference") [18] <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13544/index.do>> Accessed 30 August 2016.

call to the Minister of Justice, who advised that “taking a phone call from the Chief Justice would be inadvisable and inappropriate.”⁷⁰

The opposition, legal community and many political observers were stunned by the allegations. The Canadian Bar Association Presidents (past and present) and the Canadian Council of Law Deans condemned the Prime Minister’s conduct directed toward the Chief Justice. Hundreds of lawyers, academics and concerned citizens signed an open letter deploring the Prime Minister’s “baseless insinuation.”⁷¹ University of Manitoba professor Gerald Heckman and other legal academics, brought a complaint to the International Committee of Jurists in Geneva.⁷² Ultimately, neither the Prime Minister nor the Chief Justice backed down. A new Justice was appointed to the Court (Justice Clément Gascon, a well-known appellate judge with no ties to the Government or track record of supporting its priorities) and both the Chief Justice and Prime Minister moved on (albeit with lingering unease) to other priorities.

Later in the year, Montreal lawyer Suzanne Côté was named as Justice Louis LeBel’s replacement after the latter also stepped down from the Supreme Court. In both cases that year, the government chose not to use a parliamentary committee to narrow down the list of candidates

⁷⁰ See ‘Beverly McLachlin, PMO Give Dueling Statements on Nadon Appointment Fight’ CBC (1 May 2012) <<http://www.cbc.ca/news/politics/beverly-mclachlin-pmo-give-duelling-statements-on-nadon-appointment-fight-1.2628563>> accessed online 30 August 2016.

⁷¹ Tonda MacCharles, “Legal Community Demands Stephen Harper Withdraw Criticism of Beverley McLachlin” *Toronto Star* (13 May 2014) <http://www.thestar.com/news/canada/2014/05/13/canadas_legal_community_steps_up_its_demand_that_step_hen_harper_withdraw_criticism_of_chief_justice.html> accessed online 30 August 2016.

⁷² The ICJ responded that the Chief Justice’s conduct was appropriate and that “the criticism [by Harper] was not well-founded, and amounted to an encroachment upon the independence of the judiciary and integrity of the Chief Justice.”

or to hold a parliamentary hearing to question the judge (as had been done previously by the Conservative government), completing a new trend of appointment “by news release”.⁷³

In August 2015, on the eve of the federal election campaign, Stephen Harper announced that Russell Brown would be appointed to the Supreme Court to replace the retiring Justice Rothstein. What troubled commentators and the legal community about the appointment of Justice Brown – in addition to the continued lack of transparency or process – was that he was a “prolific blogger” at the University of Alberta before he was appointed a judge in 2013. During this time, he criticized the Supreme Court of Canada, Justin Trudeau and was a vocal supporter of Stephen Harper. As respected scholar Adam Dodek wrote at the time:

In Canada, we are not used to the appointment of judges who have said much of anything interesting, let alone controversial. While this surely should not disqualify Justice Brown from appointment, it would be reassuring for Canadians to hear directly from him that he will hear each case with an open mind.

What Canadians really need, however, is to hear from the Minister of Justice or from the Prime Minister as to why they chose Justice Brown over many other supremely qualified candidates in Alberta, Manitoba and Saskatchewan. Some have expressed the view that Justice Brown was chosen precisely because he had expressed such strong pro-Conservative and anti-opposition views.⁷⁴

ii. Federal Appointments to other Courts under Stephen Harper

While the Supreme Court appointments and process accompanying it garnered the most headline grabbing attention, there were significant developments made under the Conservative government with respect to other federal appointments. As stated by Cairns Way, “I worry that the (understandable) public and intellectual preoccupation with the Supreme Court has the effect

⁷³ Adam Dodek, ‘Accountability Needed: Why was Justice Russell Brown Appointed to the Top Court?’ *Globe and Mail* (Toronto, 5 August 2015) <<http://www.theglobeandmail.com/opinion/accountability-needed-why-justice-russell-brown/article25836229/>> accessed 30 August 2016.

⁷⁴ *Ibid.*

of distracting from the arguably more significant implications of the government's approach to sections 96 and 101 appointments. Trial judges are the face of justice for ordinary Canadians. And the face they present, as noted above, is noteworthy for its homogeneity."⁷⁵

The *Globe and Mail*'s report from April 2012 found that in the previous three and a half years the Conservative government had appointed 100 new judges in various provinces, but that 98 of these appointments were white.⁷⁶ The report was startling since "the lack of diversity among judges raises searching questions in a country where one in five citizens belongs to a visible minority and where many people can expect to see a bench that does not reflect them."⁷⁷ What made the trends even more concerning was the "opaque nature" of the appointment process and the fact that judges with vast powers of interpretation under the Charter were still being appointed behind closed doors.

Another *Globe and Mail* report found that the appointment of female judges under the Harper Conservatives had "diminished to a trickle."⁷⁸ In 2011, only eight women were appointed to federal judicial positions compared to forty-one men. In addition there were 356 female judges among the total 1,117 federally appointed judges – despite the fact that parity had been within reach when the Conservatives came to power in 2006.⁷⁹ Professor Elizabeth Sheehy, was quoted in the article as saying, "If anything there is a larger pool of brilliant and exceptionally qualified

⁷⁵ Cairns Way (n 14) 47.

⁷⁶ Makin (n 1).

⁷⁷ Ibid.

⁷⁸ Kirk Makin, 'Appointment of Female Judges Slump Under Harper's Tories' *Globe and Mail* (Toronto, 11 November 2011) accessed 30 August 2016 <<http://www.theglobeandmail.com/news/politics/appointments-of-female-judges-slump-under-harpers-tories/article4183464/>> accessed 30 August 2016.

⁷⁹ Ibid.

women lawyers to draw upon since 2005. If the current process of selection cannot deliver anything approaching a representative bench...then it is clear that something is broken.”⁸⁰

iii. Other Controversies

In June 2014, Canada’s Justice Minister, Peter MacKay became embroiled in controversy after an appearance at an Ontario Bar Association session. MacKay was asked at the event what steps the government would take to address the lack of diverse federal judicial appointments, particularly with respect to visible minorities on the bench. According to multiple reports, Minister McKay responded by stating that the dearth of women and visible minorities on the federal courts was the result of people from these groups not applying. He then “went on to say women fear an ‘old boys’ network on the bench would dispatch them on circuit work to hear cases in courthouses across the region – a prospect he described as unappealing for women with children in the home.”⁸¹

MacKay’s comments caused an uproar.⁸² Criticism directed toward MacKay challenged the factual basis for his claim that qualified minority candidates were not applying, since the federal government does not keep statistics relating to the background of candidates.⁸³ MacKay’s claim also led to a response from at least one prominent visible minority lawyer who stated that

⁸⁰ *ibid.* Rosemary Cairns Way subsequently examined judicial appointments under the Harper Conservative government between April 17, 2012 and May 1, 2014 – a total of 107 initial appointments. She found that forty per cent of these were of women, while ninety appeared to be white and only one was confirmed as “racialized” (she was unable to find sufficient identifying information for the other 16): see Cairns Way (n 14).

⁸¹ Tonda MacCharles, ‘Peter MacKay Tries to Explain Lack of Diversity on Federal Courts’ *Toronto Star* (Toronto, 18 June 2014) <https://www.thestar.com/news/canada/2014/06/18/peter_mackay_tries_to_explain_lack_of_diversity_on_federal_courts.html> accessed 30 August 2016.

⁸² *Ibid.*

⁸³ Tonda MacCharles, “Peter MacKay uses Facebook to Rebut ‘Inflammatory’ Media Reports’ *Toronto Star* (23 June 2014) https://www.thestar.com/news/canada/2014/06/23/peter_mackay_uses_facebook_to_rebut_inflammatory_media_reports.html.

she and others she knew of had applied for federal judicial positions without any success.⁸⁴

Further, the idea that women lawyers were hesitant to apply for judicial positions was disputed by commentators who pointed out that judicial positions were actually highly coveted, in contrast to the abysmal appointment rate of aboriginal judges (1%) and visible minority judges (0.5%).⁸⁵

This controversy further highlighted the concern that “ensuring that the judiciary reflects the community it serves...[was] not a priority for this government.”⁸⁶

B) Movement Toward Reform

i. New Government, New Promises, New Processes

On October 21, 2015 Canadians elected a Liberal majority government headed by Justin Trudeau, ending almost a decade of Conservative-led government under Stephen Harper (and reversing the fortunes of the Liberals from the previous election, where they were reduced to third party status). Transparency and inclusion were key planks of the Liberal campaign. On judicial diversity, in particular, the Liberal platform included “restoring dignity to the relationship between the government and the Supreme Court” and ensuring that the process of appointing Supreme Court Justices was “transparent, inclusive, and accountable to all Canadians.”

⁸⁴Tonda MacCharles, “Lawyer Disputes Peter MacKay’s Claim that Women, Visible Minorities Don’t Apply to be Judges” *Toronto Star* (Toronto, 19 June 2014) https://www.thestar.com/news/canada/2014/06/19/lawyer_disputes_peter_mackays_claim_that_women_visible_minorities_dont_apply_to_be_judges.html.

⁸⁵Rosemary Cairns Way, Adam Dodek, Carissima Mathen and Lorne Sossin, ‘Forget MacKay, A Woman’s Place is on the Bench’ *Globe and Mail* (Toronto, 20 June 2014) <<http://www.theglobeandmail.com/opinion/forget-mackay-a-womans-place-is-on-the-bench/article19256607/>> accessed 31 August 2016.

⁸⁶Ibid.

In May 2016, after months of inaction on judicial appointments, stories began to surface that delays in reforming the appointments process for Trial and Appellate Courts⁸⁷ was placing stress on clogged courts and a judiciary already stretched thin (not to mention the Supreme Court, where a vacancy had been created when Justice Thomas Cromwell announced his intent to retire in 2016).⁸⁸ The first set of judicial appointments and promotions were finally made on June 17, 2016 using pre-existing processes. Of fifteen appointments and promotions, ten were of women and two of visible minorities. These initial appointments and promotions were “hardly revolutionary in 2016, but...a welcome change from the trend of the past few years.”⁸⁹ The Liberal Government also has introduced changes to the Judicial Advisory Committee mandate which emphasize a judiciary which reflects the diversity of Canada and for the first time will require training for JAC members on diversity and inclusion, and will ask judicial applicants to self-identify by race, gender identity, Indigenous status and physical disability.⁹⁰

The most dramatic move by the Trudeau government came on August 2, 2016 when the government announced a new process for appointments to the Supreme Court of Canada. Under the new process, candidates can nominate themselves or be nominated by a newly created “Advisory Board”.⁹¹ Although the government retains exclusive discretion to select the justices,

⁸⁷ A. Crawford, “Justice System Can’t Wait for Judicial Appointments Review, say Judges” CBC (7 May 2016) <<http://www.cbc.ca/news/politics/federal-judicial-appointments-delay-1.3568602>> accessed 30 August 2016

⁸⁸ Sean Fine, ‘Supreme Court Vacancy a Chance for Trudeau Government to Reform Appointment Process’ *The Globe and Mail* (22 March 2016) <<http://www.theglobeandmail.com/news/national/supreme-court-justice-thomas-cromwell-to-retire-in-september/article29335652/>> accessed 31 August 2016.

⁸⁹ ‘A Good Start on Making Judges more Diverse: Editorial’ *Toronto Star* (22 June 2016) <<https://www.thestar.com/opinion/editorials/2016/06/22/a-good-start-on-making-judges-more-diverse-editorial.html>> accessed 30 August 2016.

⁹⁰ S. Fine, “Liberals Overhaul Judicial Appointments Process to Boost Diversity” *The Globe and Mail* (October 20, 2016) at <http://www.theglobeandmail.com/news/national/liberals-to-unveil-new-judicial-appointment-process-undo-changes-made-by-harper/article32454733/>

⁹¹ The seven member advisory board includes the following: a retired judge nominated by the Canadian Judicial Council; two lawyers – one nominated by the Canadian Bar Association, the other by the Federation of Law Societies of Canada; a legal scholar nominated by the Council of Canadian Law Deans; three members (including

it must do so on the basis of a short list provided by the Advisory Board. The Board will provide the “nonbinding, merit-based” recommendations of three to five qualified and “functionally bilingual” candidates to the Prime Minister for consideration. The Advisory Board must “seek to support the Government of Canada’s intent to achieve a Supreme Court of Canada that is gender-balanced and reflects the diversity of members of Canadian society.”

Once the Board recommends the short-listed candidates, it must explain how each candidate meets the publicly available criteria. Parliamentarians (through the House of Commons Standing Committee on Justice and Human Rights) will have opportunities to question the Minister of Justice and the Chair of the Advisory Board on the candidate ultimately selected, and get to know the candidate in a session moderated by a legal academic. Interestingly, the Board is not required to recommend candidates from a particular region to replace an outgoing Supreme Court justice who is from that same region, as has been the norm.

Much of the criticism of the new process has focussed on the failure to make this custom of “regionalism” in Supreme Court appointments a requirement.⁹² The Attorney General clarified in relation to the criticism that (at least) the shortlist for the upcoming appointment to replace retiring Justice Thomas Cromwell (from Nova Scotia) would include a potential appointment from the Atlantic region. Given Canada’s Constitutional history, regional representation has a clear logic and a compelling history – whether it captures understandings of what it means for the Court to “reflect” Canada remains to be seen, especially in light of cross-cutting distinctions (urban/rural, north/south) that also define Canadians sense of themselves and what they share.

two non-lawyers) nominated by the Minister of Justice. All members are appointed to renewable terms of six-months. The current Chair of the Advisory Board is former Conservative Prime Minister Kim Campbell.

⁹² See Letter from Canadian Bar Association President Janet M. Fuhrer to the Prime Minister and Minister of Justice (10 August 2016) <<https://www.cba.org/CMSPages/GetFile.aspx?guid=4f90d0ae-813c-47e2-ba27-0b420dea7854>> accessed 30 August 2016.

Additionally, Indigenous representation on the Court might focus less on Provincial and regional boundaries, and more on Treaty territories or ancestral territories of specific First Nations (which, of course, cross provincial and regional boundaries in many cases). For all of these reasons, while regional representation remains significant, it alone cannot answer the questions around what a diverse and inclusive Supreme Court requires.

That said, the Liberal Government's intent to move away from regional representation sparked a threatened lawsuit,⁹³ and a non-binding Parliamentary resolution introduced by the Opposition calling on the Government to "respect the custom of regional representation" which received unanimous approval.⁹⁴ Against the backdrop of the new process and the competing pressures over regional representation, functional bilingualism and diversity, on October 17, 2016, the Prime Minister announced the nomination of Malcolm Rowe, a white, male Justice of the Court of Appeal of Newfoundland and Labrador, to the Supreme Court.⁹⁵ Justice Rowe will become the first person from the Bar of Newfoundland and Labrador (which joined Canada in 1949) to sit on the Supreme Court, and in that sense, represents a historic broadening of the representative reach of the Court. Justice Rowe demonstrated proficiency in both French and English during the friendly Parliamentary hearing held in Ottawa on October 25, 2016.

There are two additional questions related to diversity that need to be addressed. First, the introduction of a nomination process (including self-nomination), together with proactive outreach by an Advisory Committee with a mandate to highlight inclusion, are intended to broaden the pool for Supreme Court appointments. Whether these procedural changes will

⁹³ "Atlantic Canada Lawyers challenge Trudeau on changes to Supreme Court appointment process" CBC (September 19, 2016) at <http://www.cbc.ca/news/politics/atlantic-lawyers-supreme-court-1.3769108>.

⁹⁴ K. Simpson, "MPs unanimously support regional representation for the Supreme Court" CBC (September 27, 2016) at <http://www.cbc.ca/news/politics/mps-vote-in-favour-of-regional-representation-scc-custom-1.3781520>.

⁹⁵ <http://pm.gc.ca/eng/news/2016/10/17/prime-minister-announces-nomination-mr-justice-malcolm-rowe-supreme-court-canada>.

contribute to the diversity of the Court remains to be seen, but from a design perspective, they are linked directly to the stated goal of doing so. Second, the new requirement that candidates for a Supreme Court appointment be “functionally bilingual,” may pose a barrier to other forms of diversity and inclusion in the appointments process.⁹⁶ Following the announcement of the new process, the Indigenous Bar Association called on the Government to revisit the requirement functional bilingualism requirement.⁹⁷ From that perspective, the new process would prioritize a candidate who speaks English and French over a candidate who speaks English and one of Canada’s Indigenous languages, and that a candidate who is bilingual and white should be preferred over one who is unilingual but reflects an ethnic community that is otherwise under-represented on the Court. As Canada evolves, a number of leaders of culturally diverse organizations have noted, so must its notions of diversity and inclusion.⁹⁸

ii. The Way Forward: Identifying Problems and Possible Solutions

Reforms to judicial appointments cannot solely depend on whether a particular government of the day is committed to a diverse judiciary. Canada has seen sharply diverging political discourse on federal judicial appointments between the Harper and Trudeau Governments. Political leadership inevitably shifts according to electoral fortunes. The quality of

⁹⁶ See L. Sossin, “The Supreme Court’s Long Road to Transparency and Inclusion” (August 9, 2016) Policy Options <http://policyoptions.irpp.org/magazines/august-2016/the-supreme-courts-long-road-to-transparency-and-inclusiveness/>.

⁹⁷ ‘Indigenous Bar Association Calls upon the Government of Canada to Reconsider its Requirement of “Functional Bilingualism” As It Applies to Indigenous Candidates for Appointment to the Supreme Court’ <http://nationtalk.ca/story/indigenous-bar-association-calls-upon-the-government-of-canada-to-reconsider-its-requirement-of-functional-bilingualism-as-it-applies-to-indigenous-candidates-for-appointment-to-the> (August 22, 2016).

⁹⁸ See M. Draaisma, “New Supreme Court justice selection process won't lead to diverse bench: Toronto lawyer” (August 3, 2016) CBC at <http://www.cbc.ca/news/canada/toronto/programs/metromorning/supreme-court-justice-selection-process-1.3705638>.

guardianship over the rule of law and the protection of minority rights ought not to change with the partisan winds.

There are a number of issues that need to be addressed in any potential reform – the current Liberal government has addressed some of these in revamping Canada’s Supreme Court appointment process. However, the new system is far from perfect. It is clear that the conversation about what diversity and representation mean in Canada today must continue. While more transparent processes and diverse appointments are certainly welcome, it is essential that certain conceptions of diversity – whether cultural or otherwise – should not be given so much importance that other conceptions are ultimately ignored.

Substantive changes to judicial appointments in Canada may also be required. To take just one example, the notion that the *Supreme Court Act* requires three judges from Quebec but no indigenous judges is not sustainable. Not only has the Indigenous Bar called for such reform,⁹⁹ but reforms involving indigenous judges is also consistent with the federal government’s stated intentions on adopting the Truth and Reconciliation Commission’s Call to Action#42, which commits Canadian governments to “the recognition and implementation of Aboriginal justice systems in a manner consistent with the Treaty and Aboriginal rights of Aboriginal peoples, the Constitution Act, 1982, and the United Nations Declaration on the Rights of Indigenous Peoples, endorsed by Canada in November 2012.”¹⁰⁰

⁹⁹ Indigenous Bar Association, ‘Indigenous Bar Association Appeals to Harper Government to Appoint an Aboriginal Justice to the Supreme Court of Canada’ (19 July 2011)

<<http://indigenousbar.ca/pdf/news%20release.FINAL.jul%2019%202011.pdf>> accessed 30 August 2016.

¹⁰⁰ Truth and Reconciliation Commission, Calls to Action (2015)

<http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf> accessed 30 August 2016.

Furthermore, if inclusion and transparency are the key prongs for reform in Canada (as the Trudeau Government has claimed), then the following specific reforms should follow:

- 1) Engage in a consultative and public process to determine the various aspects of “merit” which should inform judicial appointments, including the professional, social and personal traits and background that candidates bring to the position;
- 2) Collecting and disseminating data on judicial applications (including age, gender, ethnicity/culture, race, language and socio-economic status in addition to educational credentials and professional background);
- 3) Adopt a plan with clear goals and benchmarks on what it means for Canada’s judiciary to reflect Canadian society;
- 4) Proactive recruitment of qualified judicial candidates from historically under-represented communities in the judiciary;
- 5) Development of an appointment commission process with a mandate for inclusion and clear criteria for merit; and
- 6) Enhance and clarify the practice for the Minister of Justice to be accountable to a Parliamentary committee for judicial appointments.

Reforms must correct systemic issues and put transparent processes in place that will outlast a particular party or leader. As set out earlier in this review, valuing diversity in the judiciary includes a fair and inclusive appointment process in addition to a culture of transparency.

Conclusion

Canada's federally appointed judiciary has underperformed with respect to diversity and inclusion, particularly during the recent period of Conservative Governments. Although this situation is poised to change dramatically during the tenure of the current Liberal Government it is clear that Canada has a long way to go in seeing a diverse judiciary that accurately reflects Canada's population and employs appropriate processes to ensure this. What is less clear is how the structural aspects of Canada's judiciary and the appointment process itself will continue to evolve. At the moment, diversity and inclusion flow directly and entirely from the political leadership of a specific government in power at a particular moment.

With respect to the Supreme Court, Chief Justice McLachlin recently suggested that indigenous and other minorities should not be catapulted to the highest court without members of those communities having had the chance to develop experience in the lower courts: the solution to the dearth of diversity at the highest court being increased diversity in the lower courts.¹⁰¹ While increased diversity in the lower courts is extremely important, the idea that there may not be enough capable candidates – particularly indigenous candidates in the lower courts, law faculties and among practicing lawyers – is problematic in ensuring more diverse representation in the short-term.

There are no objective guarantees that Canada's judiciary will come to reflect Canadian society in the future. As a result, entrenching the goal of a reflective judiciary needs to be a shared enterprise across the various branches of government. For example, the judiciary itself

¹⁰¹ Tonda MacCharles 'More Indigenous Judges Needed in Lower Court to Develop Skills for Supreme Court: Beverly McLachlin' *Toronto Star* (10 August 2016) <<https://www.thestar.com/news/canada/2016/08/10/more-indigenous-judges-needed-in-lower-courts-to-develop-skills-for-supreme-court-beverley-mclachlin.html>> accessed 30 August 2016.

needs to reflect further on the role of the appointment process as a condition of the constitutional principle of judicial independence. Parliament must also consider the potential role of diversity and inclusion criteria in the *Supreme Court Act*, *Federal Court Act* and related statutes, and give statutory imprimatur to the judicial advisory committee structure. The Executive should consider how to provide enduring facets to the appointment process that will counter the tendency for each Government to approach appointments according to shifting political priorities. While the Executive must remain meaningfully accountable for judicial appointments, that process must remain free from political interference and partisan considerations. The goal of a diverse and inclusive judiciary is to reflect democratic aspirations and serve as a bulwark protecting the rule of law and the constitutional protection of minorities and the disenfranchised. Canada appears at last to be moving more deliberately in this direction, but has some ways to go before this goal is fully recognized.