

TRUDEAU'S JUDICIAL APPOINTMENTS: GOOD LOOKS WILL ONLY GET YOU SO FAR

Abstract: This article outlines Canada's federal and Supreme Court judicial appointments processes and their current flaws. The appointments processes have been critiqued for lacking transparency and commitment to other democratic norms. Under the Trudeau government, a notable commitment has been made towards increasing diversity in the judiciary. While statistically, diversity has improved, the current system is fraught with a lack of transparency and delays in the appointments process. This has led to serious trial delays, jeopardising public trust in the justice system. It is questionable whether Canada will be able to maintain its commitment to diversity with a federal election looming.

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Introduction

For more than two decades, the issue of judicial appointments in Canada has been an ongoing theme in Devlin's research. In 2000, he co-authored an article entitled 'Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary',¹ where it was argued that the appointment process at the time failed to comply with contemporary democratic norms, and that reforms were necessary to ensure that Canadian judges were impartial, professionally qualified, and proportionally representative. In 2016, Devlin and Dodek, in the introduction to a co-edited collection entitled *Regulating Judges*,² advanced the thesis that the issue of judicial appointments is part of a larger regime for the appropriate regulation of judges and therefore required careful attention to a variety of democratic norms including: independence, transparency, accountability, impartiality, fairness, representativeness, and efficiency. In 2017, Devlin and Dodek, in a follow up paper entitled 'Judicial Appointments: The Achilles Heel of the Canadian Judiciary',³ proposed that while several recent reforms to the system were an improvement, they did not go far enough to give support to the aforementioned norms, and therefore would not succeed in enhancing public confidence in the legal system. Finally, in the same year, in 'Dirty Laundry',⁴ Devlin developed an empirical analysis of judicial appointments, particularly under the Conservative government of Prime Minister Harper. His conclusion was pessimistic:

Independence [was] called into question by the highly political appointments process; accountability [was] located exclusively in the executive processes; transparency [was] negligible; representativeness [was] very much a work in progress; and efficiency [was] questionable.⁵

That paper covered developments up to the year 2015. In that same year, the Liberal Party under Justin Trudeau won the election and subsequently made further reforms to the judicial appointments system.

¹ Richard Devlin, A Wayne MacKay, Natasha Kim, 'Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Toward a "Triple P" Judiciary' (2000) 38 *Alberta Law Review* 734.

² Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar 2016).

³ Richard Devlin and Adam Dodek, 'Judicial Appointments: The Achilles Heel of the Canadian Judiciary' (2017) 20(1) *Legal Ethics* 43.

⁴ Richard Devlin, 'Dirty Laundry: Judicial Appointments in Canada' in Hugh Corder and Jan Van Zyl Smit (eds), *Securing Judicial Independence: The Role of Commissions in Selecting Judges in the Commonwealth* (Cape Town: Siber Ink, 2017).

⁵ *ibid* 35.

Thus, the objectives of this article are twofold. First, we will provide a description of the current process for the appointment of both the Supreme Court of Canada (SCC) and federal/superior court judges. Second, we will develop a critical analysis of the current processes. Our core claim is that, notwithstanding significant progress regarding representation and diversity, deep structural problems remain in the Canadian judicial appointments regime.

The Current Regime for Federally Appointed Judges

There are approximately 2,200 judges in Canada. Speaking generally, these fall into two broad categories: provincially/territorially appointed judges, and federally appointed judges. Provincial and territorial judges, of which there are about 1000, are often called ‘inferior court’ judges, and are appointed by the governments of the 13 provinces and territories that constitute Canada. As there is a multiplicity of differing processes, they will not be addressed in this article.

Federally appointed judges are appointed by the Federal Government, based in Ottawa, but sit in all provinces and territories. They fall into three subcategories: SCC Judges, Federal Court and Federal Court of Appeal Judges (including Tax Court Judges),⁶ and Superior Court Judges for the various provinces and territories. There are approximately 1200 federally appointed judges. All these judicial appointment processes fall under the jurisdiction of the Office of the Commissioner for Federal Judicial Affairs (CFJA).⁷

Supreme Court of Canada Appointments

Last updated in 2023, the appointments process begins with the submission of an extensive online application form which is submitted to the CFJA. This application is supported by a questionnaire, an authorisation form, and a background check consent form. As part of the skills assessment section of the questionnaire, the applicant must also send a total of five publications, legal documents, or decisions.⁸

The qualifications for applying are set out in two sources: the Supreme Court Act 1985⁹ (as amended), and the specified assessment criteria. The Act provides that:

- All Applicants have at least 10 years of experience either as a provincial superior court judge, a barrister or advocate, or a blend of both. This experience can be from currently and formerly held positions.¹⁰
- For the three Quebec seats, applicants must be either a current Quebec Court of Appeal or Superior Court judge, or a member of the Quebec Bar for a minimum of 10 years.¹¹

⁶ The Constitution Act 1867, ss 91 and 92 outline the division of powers for provincial and federal jurisdiction. The Federal Court hears cases that specifically fall under the Federal government’s jurisdiction. Any cases that are appealed from the Tax Court, the Federal Court, or federal tribunals are heard at the Federal Court of Appeal.

⁷ ‘Number of Federally Appointed Judges as of June 1, 2024’ (*Office of the Commissioner for Federal Judicial Affairs Canada*, 3 June 2024) <<https://www.fja.gc.ca/appointments-nominations/judges-juges-eng.aspx>> accessed 26 June 2024.

⁸ ‘How to Apply and Instructions’ (*Office of the Commissioner for Federal Judicial Affairs Canada*, 20 June 2023) <<https://www.fja-cmf.gc.ca/scc-csc/2023/form-formulaire-eng.html>> accessed 25 June 2024.

⁹ *Supreme Court Act*, RSC 1985, c S-26.

¹⁰ *ibid* s 5.

¹¹ *ibid* s 6, see also ‘Qualifications and Assessment Criteria’ (*Office of the Commissioner for Federal Judicial Affairs Canada*, 20 June 2023) <<https://www.fja-cmf.gc.ca/scc-csc/2023/qualifications-eng.html>> accessed 25 June 2024.

- All applicants must be “functionally bilingual” in Canada’s official languages of English and French.¹²

The specified assessment criteria listed on the CFJA website fall into three categories: A) personal skills and experience, B) personal qualities, and C) institutional needs of the court. These criteria were developed by three professors at the University of Ottawa but were designed to be flexible to respond to changing societal needs.

A. Personal Skills and Experience:

1. Demonstrated superior knowledge of the law;
2. Superior analytical skills;
3. Ability to resolve complex legal problems;
4. Awareness of, and ability to synthesize information about, the social context in which legal disputes arise;
5. Clarity of thought, particularly as demonstrated through written expression;
6. Ability to work under significant time pressures requiring diligent review of voluminous materials in any area of law;
7. Commitment to public service.

B. Personal Qualities:

1. Irreproachable personal and professional integrity;
2. Respect and consideration for others;
3. Ability to appreciate a diversity of views, perspectives and life experiences, including those relating to groups historically disadvantaged in Canadian society;
4. Moral courage;
5. Discretion;
6. Open-mindedness.

C. Institutional needs of the court:

1. Ensuring a reasonable balance between public and private law expertise, bearing in mind the historic patterns of distribution between those areas in Supreme Court appeals;
2. Expertise in any specific subject matter that regularly features in appeals and is currently underrepresented on the Court;
3. Ensuring that the members of the Supreme Court are reasonably reflective of the diversity of Canadian society.¹³

The second stage is a review of the applications by an ‘Advisory Board’ which is intended to be ‘independent and non-partisan.’¹⁴ The Advisory Board has eight members:

- A retired judge of a superior court nominated by the Canadian Judicial Council;

¹² *ibid.*

¹³ For elaboration on each criteria, see ‘Qualifications and Assessment Criteria’ (*Office of the Commissioner for Federal Judicial Affairs Canada*, 20 June 2023) <<https://www.fja-cmf.gc.ca/scc-csc/2023/qualifications-eng.html>> accessed 27 June 2024.

¹⁴ ‘The Independent Advisory Board for Supreme Court of Canada Judicial Appointments’ (*Office of the Commissioner for Federal Judicial Affairs Canada*, 20 June 2023) <<https://www.fja-cmf.gc.ca/scc-csc/2023/establishment-creation-eng.html>> accessed 26 June 2024.

- Three lawyers, one nominated by the Canadian Bar Association, one by the Federation of Law Societies of Canada, and one by the Indigenous Bar Association;
- The nomination of a legal scholar by the Council of Canadian Law Deans; and
- Three members nominated by the Minister of Justice, at least two of whom are not lawyers.¹⁵

The Government makes their selection in consideration of gender and diversity balance, and regional balance. Members of the Advisory Board can be appointed for a term of up to five years and can be renewed for subsequent terms. The Advisory Board then prepares a short list of at least three and up to five qualified candidates which is forwarded to the Prime Minister.¹⁶

At the third stage, the Prime Minister may choose a candidate from the shortlist, but has the discretion to ask for other candidates, or choose other candidates. The Prime Minister consults with various stakeholders, including the Chief Justice of the SCC, relevant provincial and territorial Ministers of Justice, relevant Cabinet Ministers, opposition Justice Critics, as well as members of both the House of Commons Standing Committee on Justice and Human Rights and the Standing Senate Committee on Legal and Constitutional Affairs.¹⁷

Once the Prime Minister makes the selection public, ‘the Minister of Justice and the Chairperson of the Advisory Board will then appear before the House of Commons Standing Committee on Justice and Human Rights to explain why the nominee was selected.’¹⁸

Subsequently,

[The] members of the House of Commons Standing Committee on Justice and Human Rights, the Standing Senate Committee on Legal and Constitutional Affairs, and a representative from each party with seats in the House, will be invited to take part in a question and answer period with the eventual nominee. The meeting will be moderated by a law professor and it will provide an opportunity for Parliamentarians and members of the public to get acquainted with the future justice of the Supreme Court of Canada.¹⁹

If the Committee objects, the Prime Minister must review the objection. The Prime Minister is not bound by their objection ‘so as to not fetter the Government’s discretion.’²⁰

Finally, the Advisory Board must produce a report within one month of appointment to show how the decision was made.

The current SCC is reflected below. The Trudeau Government has appointed six of these justices.

¹⁵ *ibid.*

¹⁶ ‘Frequently Asked Questions’ (*Office of the Commissioner for Federal Judicial Affairs Canada*, 20 June 2023) < <https://www.fja-cmf.gc.ca/scc-csc/2023/questions-eng.html> > accessed 25 June 2024.

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ *ibid.*

²⁰ *ibid.*



Pictured is the SCC Bench as of February 2024. Standing in the back, from left to right: Hon Michelle O'Bonsawin, Hon Nicholas Kasirer, Hon Mahmud Jamal, and Hon Mary T Moreau. Seated in the front, from left to right: Hon Malcolm Rowe, Hon Andromache Karakatsanis, Rt Hon Chief Justice Richard Wagner, Hon Suzanne Côté, and Hon Sheilah L. Martin.

Federal Judicial Appointments

Last updated in 2022, the Federal appointments process is similar to that of the SCC justices. An applicant must submit a lengthy application form supported by an authorisation form and a background check consent form. They must provide copies of three publications, legal documents, or decisions.²¹ Additionally, they must provide at least six primary references and an additional secondary list of at least four people who are familiar with their work.²²

The primary qualification is at least 10 years membership of the Bar. In the application, candidates are required to address three issues: A) Professional Competence and Experience, B) Personal Characteristics, and C) Potential Impediments to Appointment.

These criteria are listed on the CFJA website:

A. Professional competence and experience:

²¹ 'Candidates: How to Apply – Questionnaire' (*Office of the Commissioner for Federal Judicial Affairs Canada*, 26 June 2022) <<https://www.fja-cmf.gc.ca/appointments-nominations/forms-formulaires/cq-qc/index-eng.html>> accessed 27 June 2024.

²² 'Judicial Advisory Committees – Guidelines for Judicial Advisory Committee Members' (*Office of the Commissioner for Federal Judicial Affairs Canada*, 6 June 2023) <<https://www.fja-cmf.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html>> accessed 27 June 2024.

- General proficiency in the law;
- Intellectual ability;
- Analytical skills;
- Ability to listen;
- Ability to maintain an open mind while hearing all sides of an argument;
- Ability to make decisions;
- Capacity to exercise sound judgement;
- Reputation among professional peers and in the general community;
- Area(s) of professional specialization, specialized experience or special skills;
- Ability to manage time and workload without supervision;
- Capacity to handle heavy workload;
- Capacity to handle stress and pressures of the isolation of the judicial role;
- Interpersonal skills - with peers and the general public;
- Awareness of racial and gender issues;
- Bilingual ability.

B. Personal characteristics:

- Demonstration of a commitment to public service;
- sensitivity to and understanding of gender, racial equity and aboriginal justice issues;
- An appreciation of social issues;
- Sensitivity to changes in social values;
- Receptiveness to new ideas that are constructive to the public good;
- Sense of ethics;
- Patience;
- Courtesy;
- Honesty;
- Common sense;
- Tact;
- Integrity;
- Humility;
- Punctuality;
- Fairness;
- Empathy;
- Reliability;
- Tolerance;
- Sense of responsibility;
- Consideration for others.

C. Potential impediments to appointment:

- Any debilitating physical or mental medical condition, including drug or alcohol dependency, that would be likely to impair the candidate's ability to perform the duties of a judge;

- Any past or current disciplinary actions or matters against the candidate;
- Any current or past civil or criminal actions involving the candidate;
- Financial difficulties including bankruptcy, tax arrears or arrears of child support payments.²³

Once an application is completed, it goes to the second stage: an assessment by a Judicial Advisory Committee (JAC). There are currently 17 JACs across the country.²⁴ Each JAC has eight members – seven voting and one ex-officio.²⁵ The composition is as follows:

- [One] nominee of the provincial or territorial law society;
- [One] nominee of the provincial or territorial branch of the Canadian Bar Association;
- [One] judge nominated by the Chief Justice of the province or by the senior judge of the territory;
- [One] nominee of the provincial Attorney General or territorial Minister of Justice; and
- [Three] nominees of the Government representing the ‘general public’;
- [One] ex officio non-voting member: Commissioner for Federal Judicial Affairs or Executive Director, Judicial Appointments.²⁶

A member is appointed for a three-year term.²⁷ After reviewing the application, a JAC has three options: highly recommend, recommend, or unable to recommend. This decision is made on the basis of consensus, but if that is not possible, it goes to a vote. This assessment is valid for three years, after which a new questionnaire must be submitted by the applicant.²⁸

The third stage is the decision-making stage. This is the responsibility of the Minister of Justice. The Minister is not bound by the recommendations of the JAC. Normally the Minister will conduct additional inquiries (also known as ‘secret soundings’) before making a decision.

It is not quite as easy to provide a visual of the demographics of the superior court judiciary. However, the CFJA does provide some very helpful statistics. For example, it provides a breakdown of the number of federally appointed judges as of 1 June 2024.

²³ *ibid.*

²⁴ There is one JAC for each province and territory, but Ontario has two extra, and Quebec one extra. There is also one JAC for the Tax Court. For the appointment of Associate judges to the Federal or Tax Courts, the Minister of Justice selects members to a committee who assess (and have the discretion to interview) a shortlist of candidates. Committee members may be representatives of the Federal or Tax Courts, ‘as well as any other person selected by the Minister.’ See ‘Overview of Appointments of Associate Judges of the Federal Court and the Tax Court of Canada’ (*Office of the Commissioner for Federal Judicial Affairs Canada*, 9 April 2024) <<https://www.fja.gc.ca/appointments-nominations/Associate-Judges-Juges-adjointes/index-eng.html>> accessed 26 June 2024.

²⁵ The Tax Court has its own JAC which only consists of six members.

²⁶ ‘Overview of Appointments of Associate Judges of the Federal Court and the Tax Court of Canada’ (*Office of the Commissioner for Federal Judicial Affairs Canada*, 9 April 2024) <<https://www.fja.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html#Composition>> accessed 26 June 2024.

²⁷ They can be renewed for one year at the discretion of the Minister of Justice.

²⁸ ‘Judicial Advisory Committees – Guidelines for Judicial Advisory Committee Members’ (n 22).

Fig. 1: Number of Federally Appointed Judges²⁹

Court	Total Number of Judges in Office	Super-numeraries	Grand Total	Total Number of Women Judges	Number of Current Vacancies
TOTAL	939	255	1194	568	57

It also provides demographic statistics on diversity and bilingual competency in the judiciary in terms of the applicants per year. Thus, for October 2022 to October 2023 it reports:

Fig. 2: Demographic statistics on diversity in the judiciary³⁰

October 29, 2022 – October 27, 2023

	Total	Gender			Diversity						Language Proficiency in both Official Languages						
		Male	Female	Other	Indigenous individual	Racialized individual	Ethnic/Cultural Group or other	Individual with disability	2SLGBTQI+ individual	Woman	Read court materials	Discuss legal matters	Converse with counsel	Understand oral submissions	Write decisions	Conduct hearings	All 6 abilities
Applications Received	410	207	203	0	15	53	84	8	27	203	187	156	150	161	126	131	125
Candidates Assessed	315	160	155	0	9	37	64	6	12	155	149	120	123	126	99	104	98
Candidates Highly Rec. ¹	73	41	32	0	3	8	12	1	3	32	31	23	23	24	20	20	20
Candidates Recommended ¹	68	29	39	0	3	10	12	2	2	39	30	23	24	23	19	19	18
Candidates Unable to Rec. ¹	174	90	84	0	3	19	40	3	7	84	88	74	76	79	60	65	60
Newly Appointed Judges	68	31	37	0	1	9	17	0	4	37	32	28	29	30	27	28	27

Please note that in addition to the 68 newly appointed judges, 19 other judges were appointed or elevated to other courts during the same period; 11 men and 8 women. For example, this would include judges appointed to courts of appeal from the trial level courts. There were therefore 87 appointments during this period.

Finally, the office has compiled the following table for pre-2016 and post 2016 appointments reflecting the reforms designed to enhance greater diversity - i.e., the shift from a Conservative to a Liberal government.

²⁹ ‘Number of Federally Appointed Judges as of June 1, 2024’ (*Office of the Commissioner for Federal Judicial Affairs Canada*, 3 June 2024) <<https://www.fja-cmf.gc.ca/appointments-nominations/judges-juges-eng.aspx>> accessed 27 June 2024.

³⁰ ‘Demographic statistics on diversity in the judiciary’ (*Office of the Commissioner for Federal Judicial Affairs Canada*, 3 June 2024) <<https://www.fja-cmf.gc.ca/appointments-nominations/StatisticsCandidate-StatistiquesCandidat-2023-eng.html>> accessed 27 June 2024.

Fig. 3: Judges currently on the Bench³¹

As of February 1, 2024

	Number of Judges	Indigenous individual	Racialized individual	Ethnic/Cultural Group or other	Individual with Disability	2SLGBTQI+ individual	Woman
Judges appointed before 2016	647	5	16	44	2	1	271
Judges appointed after 2016	533	17	60	80	4	31	281
TOTAL:	1180	22	76	124	6	32	552

There is one further matter. For a number of years, the process included an *ad hoc* release of certain sections of the questionnaire that had been submitted by the newly appointed judge. This seems to have discontinued, with the Minister of Justice currently releasing statements on the appointees with short personal biographies.³²

Assessment

Earlier in the paper we proposed that in order to evaluate a judicial appointments regime, it should be measured against seven norms of good judicial governance: independence, transparency, accountability, impartiality, fairness, representativeness, and efficiency.

First, there can be no doubt that the reforms introduced by the Liberal government have been quite successful in making the Canadian judiciary more representative of the larger Canadian population. This is a very significant achievement.

We have already provided a picture of the current SCC. In terms of demographics, there are five women, one of whom is Indigenous, one man of colour, and three white men. Regional diversity is also important – three are from Quebec, three from Ontario, two from the West, and one from the Atlantic provinces. As far as we are aware, it is one of the most diverse apex courts in the world.

In terms of the approximately 1200 federally appointed judges, based on statistics from the CFJA for the years 2016 to 2023, there has also been a very significant increase in the diversity of the Bench.

³¹ *ibid.*

³² For an outstanding analysis of these responses, see Agathon Fric, 'Popping the Question: What the Questionnaire for Federal Judicial Appointments Reveals about the Pursuit of Justice, Diversity, and the Commitment to Transparency' (2020) 43(1) *Dalhousie Law Journal* 159.

Fig. 4: Diversity identifiers of federal judicial applicants (October 2016 – October 2023)³³

	Total	Gender			Indigenous	Person with Disability	LGBTQ2+	Ethnic, Cultural Group or Other	Racialized Individual
		Men	Women	Other					
Applications Received	(2921)	52% (1517)	48% (1404)	0	4% (104)	2% (62)	5% (155)	20% (582)	12% (341)
Candidates Assessed	(2528)	52% (1320)	48% (1208)	0	3% (87)	2% (58)	5% (134)	20% (504)	11% (287)
Highly Recommended	23% (574)	12% (300)	11% (274)	0	1% (23)	0.3% (9)	1% (36)	4% (90)	3% (69)
Recommended	22% (567)	11% (266)	12% (301)	0	1% (18)	0.3% (7)	1% (28)	4% (103)	2% (62)
Unable to Recommend	55% (1386)	30% (753)	25% (633)	0	2% (47)	2% (42)	3% (70)	12% (311)	6% (156)

*Note: the number of candidates assessed does not align each year with the number of applications received

Fig. 5: Diversity identifiers of federal judicial appointees (October 2016 – October 2023)³⁴

	Total	Gender			Indigenous	Person with Disability	LGBTQ2+	Ethnic, Cultural Group or Other	Racialized Individual
		Men	Women	Other					
Judges Appointed	(496)	45% (222)	55% (274)	0	3% (17)	1% (4)	6% (31)	16% (78)	12% (59)

³³ ‘Demographic statistics on diversity in the judiciary’ (n 30).

³⁴ *ibid.*

Fig. 6: Federal judicial appointee's language proficiency in French and English (October 2016 – October 2023)³⁵

Year	All abilities	Read court materials	Discuss legal matters	Converse with counsel	Understand oral submissions	Write decisions	Conduct hearings	Total
2016-17	32% (24)	46% (34)	35% (26)	34% (25)	38% (28)	-	-	(74)
2017-18	27% (21)	33% (26)	29% (23)	28% (22)	29% (23)	-	-	(79)
2018-19	3% (3)	43% (37)	33% (28)	35% (30)	36% (31)	5% (4)	5% (4)	(86)
2019-20	12% (7)	37% (22)	32% (19)	35% (21)	35% (21)	12% (7)	17% (10)	(60)
2020-21	23% (16)	39% (28)	31% (22)	30% (21)	34% (24)	23% (16)	23% (16)	(71)
2021-22	26% (15)	33% (19)	31% (18)	34% (20)	31% (18)	26% (15)	26% (15)	(58)
2022-23	40% (27)	47% (32)	41% (28)	43% (29)	44% (30)	40% (27)	41% (28)	(68)
Total	23% (113)	40% (198)	33% (164)	34% (168)	35% (175)	14% (69)	15% (73)	(496)

*Note: no statistics were taken from 2016 to October 2018 on ability to write decisions and conduct hearings

Clearly the category entitled 'women' is quite impressive, proportional to the overall population. So too are Indigenous judges, as Indigenous peoples are estimated to be approximately 3% of the Canadian population. There does seem to be a need to improve the number of those who are categorized as 'racialized individual,' 'ethnic, cultural group or other,'³⁶ 'person with disability,' and 'LGBTQ+.' Thus, in terms of representation, Trudeau's appointments appear quite diverse.

On the other hand, there have been also significant concerns expressed about the Trudeau regime for judicial appointments. Here, we will discuss only two. The first problem relates to the efficiency of the current system, most specifically, the delay in appointing judges. While some have complained about the tardiness of the SCC process,³⁷ the problem is more with the appointment of the Superior Court judges. This is not a new problem. As long ago as 2016, at a time when it was estimated that there were 46 vacancies, the then Chief Justice of Canada, Beverley McLachlin, asserted that 'there is something deeply wrong with a hiring scheme that repeatedly proves itself incapable of foreseeing preparing for and filling vacancies as they arise.'³⁸

³⁵ *ibid.*

³⁶ The categories of 'racialized individual' and 'ethnic, cultural group or other' are distinguishable because the former refers to physical characteristics and the latter to religious, spiritual, or cultural affiliation or practice.

³⁷ Cristin Schmitz, 'CBA says it's "unfortunate" top court starting busy fall session shorthanded one judge from West' (*Law360 Canada*, 11 October 2023) < <https://www.law360.ca/ca/articles/1772372?scroll=1&related=1> > accessed 26 June 2024.

³⁸ Remarks of the Right Honourable Beverley McLachlin PC, 'Remarks to the Council of the Canadian Bar Association at the Canadian Legal Conference' (*Supreme Court of Canada*, 23 August 2016) < <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2016-08-11-eng.aspx> > accessed 26 June 2024.

But things have become much worse since then. On 3 May 2023 the current Chief Justice of Canada, Richard Wagner, as chairperson of the Canadian Judicial Council (CJC), wrote in a public letter to the Prime Minister that was unvarnished. He asserted:

The government's inertia regarding vacancies and absence of satisfactory explanations for these delays are disconcerting.

He continued,

[It is] imperative that appointments be made in a timely manner...the current situation is untenable and I am worried that it will create a crisis in our justice system...Access to justice and the health of democratic institutions are at risk.³⁹

Similar concerns have been expressed by the Canadian Bar Association⁴⁰ and Chief Justice Bauman of British Columbia.⁴¹ One media organisation conducted a survey of vacancies from 2019-2023 and found that over that period there were 435 vacancies. In August 2023, there were 86 vacant positions. It also estimated that on average it took 11 months to fill a vacancy.⁴² Despite claims by government officials that 'our appointment process remains open, transparent and merit based,'⁴³ part of the problem is a lack of transparency. Neither the Minister of Justice nor the Commissioner for Federal Affairs has given an adequate explanation for the delays. One reason suggested by the current Minister of Justice, Arif Virani, is that the Liberal government has in fact created 116 new judicial positions.⁴⁴ While this might be a partial explanation, it is not the whole story. Others have suggested a variety of reasons:

- A lack of suitably experienced applicants (this has been particularly suggested in British Columbia);⁴⁵
- Elevations/promotions/transfers of trial-level judges to more senior positions;
- Unanticipated resignations or retirements;
- Inoperative or moribund JACs;
- Delays by JACs in making recommendations;
- Excessively prolonged secret soundings by the Minister and their officials/political staff with perceived stakeholders eg, Chief Justices, law societies, cabinet members, Ministers of Parliament, party organisers;
- Refusal of candidates to accept offers (for example because of location);
- Desire by the government to save money;⁴⁶

³⁹ Daniel Leblanc, 'Chief justice warns Trudeau that judicial vacancies are putting criminal trials at risk' (CBC News, 9 May 2023) <<https://www.cbc.ca/news/politics/supreme-court-wagner-trudeau-judicial-vacancies-1.6836145>> accessed 27 June 2024.

⁴⁰ Letter from The Canadian Bar Association to the Right Honourable Justin Trudeau (24 May 2023).

⁴¹ Cristin Schmitz, 'Ottawa "saves" millions by making tardy judicial appointments; average delay 11 months in 2023' (*Law360 Canada*, 24 August 2023) <<https://www.law360.ca/ca/articles/1763185/ottawa-saves-millions-by-making-tardy-judicial-appointments-average-delay-11-months-in-2023>> accessed 26 June 2024.

⁴² *ibid.*

⁴³ Citing David Taylor in Cristin Schmitz, 'Top judges decry Ottawa's appointment delays; application vetting defunct in BC, Toronto, NS' (*Law360 Canada*, 9 May 2023) <<https://www.law360.ca/ca/articles/1762069?scroll=1&related=1>> accessed 26 June 2024.

⁴⁴ Catharine Tunney, 'Court says Trudeau, justice minister "failed" Canadians by letting judicial vacancies build up' (CBC News, 13 February 2024) <<https://www.cbc.ca/news/politics/judicial-appointments-failure-trudeau-1.7113665#:~:text=Politics-.Court%20says%20Trudeau%20justice%20minister%20failed%20Canadians%20by%20letting,reach%20a%20state%20of%20crisis>> accessed 26 June 2024.

⁴⁵ The suggestion is that judicial salaries of \$360,000 are far below what appropriately qualified lawyers earn in practice.

⁴⁶ Schmitz, 'Ottawa "saves" Millions' (n 40).

- Coordination problems with provincial governments who are constitutionally required to provide office and other support services for federally appointed judges.

While on the one hand it might seem that an approximate 7% vacancy rate is reasonable, many have pointed out a litany of concerns:

- In some provinces the vacancy rate has been as high as 13% or even 15%;⁴⁷
- Cancelled or delayed civil trials causing great harm to litigants;
- Stayed or postponed criminal proceedings, including very serious cases, because the SCC has said in *R v Jordan*⁴⁸ that any person charged with an offence has the right to be tried within a reasonable time;
- Enhanced workload for sitting judges, causing potential burnout and additional resignations.

In fact, things have become so grave that one lawyer, Yavar Hameed, in June 2023, took the unprecedented step of asking the Federal Court to issue a writ of mandamus requiring the Prime Minister and Minister of Justice to fill the 79 current vacancies within 3 months of the order, or within 9 months of when the government became aware that a position was vacant, whichever came first. The government response was not to provide an explanation of the reasons for the delay, but to argue that the Federal Court had no jurisdiction. In February 2024 the Federal Court issued its decision.⁴⁹ It denied the writ of mandamus, but it offered a number of observations and made several crucial findings:

- Adopting a ‘fair and liberal’ interpretive stance, it held that the matter does fall within the jurisdiction of the Federal Court;⁵⁰
- While the courts cannot force the Governor General or Governor in Council to abide by the constitutional convention to fill judicial vacancies, the Constitution Act 1867 and the Federal Courts Act 1985 create a legal requirement for them to ‘assent... to the advice offered’;⁵¹
- Nothing had really improved since Wagner CJ wrote to the Prime Minister more than a year previously;⁵²
- Justice Brown determined ‘the vacancies pose serious and critical challenges to the functioning of our courts, access to justice, timely determination of serious criminal cases and civil actions and other consequences’;⁵³
- Echoing the Chief Justice of Canada, the Justice lamented that ‘the health of our democratic institutions are at risk’;⁵⁴
- They held that government had failed to provide timely justice and are simply ‘treading water’⁵⁵ thereby generating an ‘untenable and appalling crisis’;⁵⁶

⁴⁷ Citing Chief Justice Robert Bauman in Schmitz, ‘Top judges decry’ (n 42), see also Leblanc (n 38).

⁴⁸ *R v Jordan*, 2016 SCC 27.

⁴⁹ *Hameed v Prime Minister*, 2024 FC 242.

⁵⁰ *ibid* [73].

⁵¹ *ibid* [170].

⁵² *ibid* [192].

⁵³ *ibid* [191].

⁵⁴ *ibid* [50].

⁵⁵ *ibid* [6].

⁵⁶ *ibid* [200].

- They highlighted that ‘[The government] offered no justification for their decision to refuse the request to fill these judicial vacancies;’⁵⁷
- The Judge declared that appointments ‘must be made within a reasonable time’⁵⁸ and suggested that an acceptable number of vacancies might be mid-40s;⁵⁹
- Finally, the Judge ‘encourage[ed] the parties, and or the Chief Justice of Canada and or the Canadian Judicial Council to seek further direction and relief from this Court in the event this Court’s “judgment” is not satisfied or [is] in issue.’⁶⁰

In May 2024 the Government filed a notice of appeal with the Federal Court of Appeal. It has advanced several arguments:

- The Federal Court has overstepped its constitutionally limited role and acted without jurisdiction;
- The Federal Court erred by recognising a constitutional convention that does not exist;
- The Federal Court substituted its view of timeliness over that of the Executive;
- The Federal Court erred in treating the letter from the Chief Justice and CJC as expert evidence;⁶¹
- The Federal Court relied on ‘hearsay facts and opinion contained in the letter form the Chief Justice and CJC.’⁶²

Our interpretation of this litigation is that the Trudeau administration is operating at two levels: as a matter of principle, it is trying to delineate the authority of the judiciary and preserve Executive discretion. But at the level of pragmatism, it will do its best to accelerate the number of appointments over the next six to nine months to try to achieve the mid-40s target proposed by the Federal Court. Indeed, in June 2024, one month after filing the appeal, the Minister of Justice wrote to the Chief Justice of Canada, assuring him that judicial appointments were his ‘top priority.’⁶³

Second, and this is our major concern, fundamentally the system has not changed. The advisory boards for SCC appointments and the JACs for superior court appointments remain advisory in nature. The ultimate decision still rests with the executive - the Prime Minister for SCC appointments and the Minister of Justice for superior court appointments. This system means that there are ongoing concerns about the impartiality, transparency, independence, and fairness of the process. One study suggests that a disproportionate number of recent judicial appointees have been former donors to the Liberal Party of Canada.⁶⁴ Indeed, the danger is that the embrace of representativeness is dependent upon the whim of the government in power. Should that government change, so too might the commitment to representativeness. There is an election coming in the next year to eighteen months and at this point it seems the Conservative Party has a good chance of winning, and there is a strong possibility that they will return to the ways of the old Harper administration, which was hostile to

⁵⁷ *ibid* [8].

⁵⁸ *ibid* [126].

⁵⁹ *ibid* [200].

⁶⁰ *ibid* [22].

⁶¹ Notice of Appeal *Hameed v Prime Minister*, 2024 FC 242 (A-100-24, 14 March 2024).

⁶² *ibid* 5.

⁶³ Letter from Minister of Justice Arif Virani to Chief Justice Richard Wagner (30 May 2024) 1.

⁶⁴ Kate Schneider, Christopher Nardi, ‘Trudeau’s law society: Exclusive data analysis reveals Liberals appoint judges who are party donors’ (*Investigative Journalism Foundation*, 9 August 2023) <<https://theijf.org/trudeaus-law-society-exclusive-data-analysis-reveals-how-liberals-appoint-judges-who-donate-to-party>> accessed 26 June 2024.

diversity as a norm. Indeed, the current Conservative government of Ontario has made it clear that it believes it is appropriate to stack the courts with judges who share their ideology.⁶⁵ Thus the good-looking diversity of Trudeau's appointments might be temporary.

Conclusion

Canada certainly has a competent and well-respected judiciary, both nationally and internationally. However, when measured against the good governance norms of independence, accountability, impartiality, transparency, representativeness, fairness, and efficiency, the current appointments processes manifest some significant deficiencies. Over the last several years, the Trudeau government had the opportunity to reform the process, and it has made some significant progress especially regarding the norm of representativeness. But it has lacked the courage to abandon its ultimate authority to appoint. And this leaves us concerned. If the Liberals lose the next election and the Conservatives win, there is a very strong chance we will return to a system where the majority of appointments will be white cisgender men with a right-wing ideological orientation.

⁶⁵ Jacques Gallant, "I am going to make sure we have like-minded judges," Doug Ford doubles down amid Ontario court outcry' (*Toronto Star*, 27 February 2024) <https://www.thestar.com/politics/provincial/i-am-going-to-make-sure-we-have-like-minded-judges-doug-ford-doubles-down/article_11957aa8-d4b7-11ee-a4e5-03b6529e6fd5.html > accessed 26 June 2024.