International Commission of Jurists Canada
Commission Internationale de Juristes Canada

Interim Report: The Canadian Federal Judicial Appointments Process and Opportunities for Reform

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ICJ Canada was established in 1958 as a national section of the International Commission of Jurists, with the following objectives:

- to promote the rule of law and the right to a fair trial, and to ensure judicial independence;
- to expose and denounce violations of justice and freedom; and
- to ensure that the fundamental freedoms of discussion of public affairs, freedom of association, and freedom of assembly and of elections are not violated.

To this day, ICJ Canada continues the great ICJ mission of promoting international human rights, judicial independence, and the rule of law throughout the world. ICJ Canada is an independent, non-governmental, non-partisan organization, and a registered Canadian charity. Its members come from all levels of the Canadian legal profession.

The ICJ provides legal expertise at both the international and national levels to ensure that developments in international law adhere to human rights principles, and to ensure that international standards are implemented nationally. The Canadian section of ICJ supports the activities of ICJ Geneva; participates in ICJ missions; carries out research initiatives; organizes educational events and training activities; and, through the Tarnopolsky award, honours individuals who have made significant contributions to human rights.

ICJ Canada's commitment to its mandate has been steadfast since its creation.

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Interim Report: The Canadian Federal Judicial Appointments Process and Opportunities for Reform

I. OVERVIEW

ICJ Canada is currently completing a national project examining Canada's federal and provincial judicial appointments processes in order to address criticisms that have emerged regarding the processes, and to suggest reforms. The project has two aspects. First, ICJ Canada seeks to examine and critique the current Canadian process for judicial appointments. That process presently occurs largely outside of the public domain and is completed in private and confidential settings. The non-legislated and discretionary rules governing the process are in many ways non-transparent, uncertain and subject to legitimate criticism. Second, ICJ Canada seeks to survey current international norms and national processes from amongst leading rule-of-law jurisdictions around the world to identify best practices for adoption in Canada. ICJ Canada intends to publish its full findings and recommendations in 2017. This initial report will focus primarily on the first part of the project – the examination and critique of the current judicial appointments process.

Commencing in the fall of 2015, ICJ Canada began gathering information from provincial jurisdictions across Canada on the federal and provincial judicial appointments

processes by providing questionnaires to lawyers in five jurisdictions – Ontario, Quebec, British Columbia, Nova Scotia and Alberta. 20 lawyers across Canada have been involved in this information-gathering process and have been reaching out to other members of their respective legal communities. This Interim Report sets out the findings drawn from the responses ICJ Canada received with respect to the federal judicial appointments process. The Interim Report provides several recommendations to address areas that evidently require reform to further advance the principles of judicial impartiality and independence and to promote greater diversity in the judiciary, ensuring it is representative of the communities it serves.

This project coincides with an important change in the federal government's policy stance on judicial appointments, and its expression of interest in reforming the appointment of section 96 judges.[1] Recently, the federal government took certain steps to reform the appointments process for the Supreme Court of Canada. ICJ Canada supports the general orientation of these reforms.[2]

The significance of a national discussion about how we appoint judges and whether we can improve that process cannot be understated. It is without question that Canada is a global leader in upholding democratic and constitutional principles and human rights and freedoms. However, it is clear from the initial findings highlighted in this report, which focuses on the federal judicial appointments' experience, that the process can be reformed in several ways to advance the following objectives (i) ensuring that our judiciary is representative of the population it serves; (ii) ensuring that the committees who nominate appointees are qualified,

[1] Sean Fine, "Federally appointed courts grow restive as Ottawa slow to fill vacancies", *The Globe and Mail*, 11 April 2016, online: <http://www.theglobeandmail.com/news/national/federally-appointed-courts-grow-restive-as-ottawa-slow-to-fill-vacancies/article29603615/>.
[2] Errol Mendes, "New advisory panel needs to dig deep for diversity on Canada's top court", *The Globe and Mail*, 3 August 2016, online: <http://www.theglobeandmail.com/opinion/new-advisory-panel-needs-to-dig-deep-for-diversity-on-canadas-top-court/article31235065/>.

non-partisan and accountable; (iii) promoting greater transparency in the process for selecting judges, without sacrificing the important privacy safeguards that are in place to protect the identity of applicants; and (iv) ensuring that the courts are able to function at full capacity, without unnecessary shortages, which have an obvious impact on access to justice.

ICJ Canada is a non-profit organization committed to promoting and protecting the rule of law, judicial independence and human rights. Its depth of experience in these subject areas and its membership make it well positioned to make a meaningful contribution on the subject of Canada's federal judicial appointments process. ICJ Canada welcomes the opportunity to participate in any consultation process the federal government undertakes to address the judicial appointments process in Canada and contribute its expertise in this area.

II. FINDINGS

a. Eligibility

The eligibility criteria for federal judges are set out in several constitutional and legislative sources. Those criteria establish a baseline threshold for an applicant to qualify for consideration. Beyond that, the criteria that may be considered in the selection of candidates are publicly expressed in a non-exhaustive list published by the Office of the Commissioner for Federal Judicial Affairs Canada ("OCFJA"), which has the overall responsibility for the administration of the appointments process on behalf of the Minister of Justice. How those criteria are applied and whether any other criteria factor into the assessment of candidates is not publicly available information.

Section 96 of the *Constitution Act, 1867* provides that the Governor General shall appoint the judges of the Superior, District and County Courts in each province, except those of the Courts of Probates in Nova Scotia and New Brunswick.[3] Under sections 97 and 98, judges in a given province must be from the bar of that province.[4] Appointments to the superior courts of the three territories are open to all persons who meet the qualifications for appointment within their own province or territory.[5]

Other formal criteria for superior court judges are set out in the federal *Judges Act*,[6] which provides that in order for a candidate to be eligible, they must be a barrister or advocate of at least ten years standing at the bar of any province or have, for an aggregate of at least ten years, been a barrister or advocate at the bar of any province and exercised powers and performed duties and functions of a judicial nature on a full-time basis in respect of a position held pursuant to a law of Canada or a province.[7]

Requirements for appointments to the Federal Court and the Federal Court of Appeal are set out in section 5.3 of the *Federal Courts Act*.[8] Requirements for appointments to the Tax Court of Canada are laid out in subsection 4(3) of the *Tax Court of Canada Act*.[9] The Federal Courts and the Tax Court each provide for basic eligibility requirements of either having served as a superior court justice, having been a barrister or advocate at a bar of any province for at least ten years or having for an aggregate of ten years been a barrister or advocate at the bar of any

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[3] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 96 [*Constitution Act, 1867*].
[4] *Ibid*, ss. 97-98. See the recent analysis of s. 98 in *Renvoi sur l'article 98 de la Loi constitutionnelle de 1867 (Dans l'affaire du)*, 2014 QCCA 2365; aff'd *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 22.
[5] Office of the Commissioner for Federal Judicial Affairs Canada, "Process for an Application for Appointment" (22 April 2014), online: <http://www.fja-cmf.gc.ca/appointments-nominations/process-regime-eng.html>.
[6] R.S.C., 1985, c. J-1.
[7] *Ibid*, s. 3.
[8] R.S.C., 1985, c. F-7.
[9] R.S.C., 1985, c. T-2.

province and exercised powers and performed duties and functions of a judicial nature on a full-time basis in respect of a position held pursuant to a law of Canada or a province.

Lastly, any person may be appointed a judge to the Supreme Court of Canada who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.[10] Section 6 of the *Supreme Court Act* requires that at least three of the judges be appointed from among the judges of the Court of Appeal or of the Superior Court of the province of Quebec or from among the advocates of that province.[11] The Prime Minister of Canada recently announced that the application process for the Supreme Court of Canada will be opened up so that any Canadian lawyer or judge who fits the criteria can apply through the OCFJA.[12]

In addition, the OCFJA has published a non-exhaustive list of factors that the judicial advisory committees ("Committees"), who recommend candidates as further detailed below, are invited to use to assess each candidate's suitability for judicial appointment. Those factors are divided into two general categories – personal characteristics and professional competence and experience. There is also a list of potential impediments to appointment.[13]

Notably, the criteria set out are not provided for in any legislative or constitutional source. It is only the above-noted threshold criteria that definitively frame the applicant pool. It

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[10] *Supreme Court Act*, R.S.C. 1985, c. S-26, ss. 5-5.1.
[11] *Ibid*, s. 6. Note that s. 6.1 of the *Supreme Court Act*, which provided that for greater certainty, for the purpose of s. 6, a judge is from among the advocates of Quebec if, at any time, they were an advocate of at least 10 years standing at the bar of that province was declared *ultra vires* Parliament in *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21.
[12] Justin Trudeau, "Why Canada has a new way to choose Supreme Court judges", 2 August 2016, *The Globe and Mail*, online: <http://www.theglobeandmail.com/opinion/why-canada-has-a-new-way-to-choose-supreme-court-judges/article31220275/>.
[13] Office of the Commissioner for Federal Judicial Affairs Canada, "Assessment criteria, candidates for Federal Judicial Appointment" (31 December 2008), online: <http://www.fja-cmf.gc.ca/appointments-nominations/assessment-evaluation-eng.html>.

is unclear what the relative importance is of the various factors set out by the Commissioner, beyond the Office's express statement that "[p]rofessional competence and overall merit are the primary qualifications".[14] Whether each and every factor is considered or whether a candidate's failure to exhibit a particular criterion will (or should) disqualify them from consideration is unclear to members of the public.

Despite being a non-exhaustive list, it is significant that diversity is not expressly listed as a factor. There are certain provincial/geographic requirements governing judicial appointments,[15] but it is difficult to accept that this qualifies as a consideration for diversity. What appears to satisfy the "diversity" criterion is the listed factor "awareness of racial and gender issues."[16] Committees are "encouraged" to respect diversity and to give due consideration to all legal experience, including that outside a mainstream legal practice.[17]

b. Judicial Appointment Committees

The Governor General appoints federal judges.[18] Committees play an important role in creating a "recommended" pool from which the Governor General selects appointees.

Each province and territory has a Committee (exceptionally, Quebec has two Committees and Ontario has three) that assesses the qualifications of judicial candidates. Each Committee is

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[14] *Ibid*.
[15] *Federal Courts Act*, s. 5.4; *Tax Court of Canada Act*, s. 4(4); *Supreme Court Act*, s. 6. See also Supreme Court of Canada, "Frequently Asked Questions (FAQ)" (1 April 2015), online: <http://www.scc-csc.ca/contact/faq/qa-qr-eng.aspx>: "Traditionally, the federal government appoints three Judges from Ontario, two from the West, and one from Atlantic Canada."
[16] Office of the Commissioner for Federal Judicial Affairs Canada, "Assessment criteria, candidates for Federal Judicial Appointment" (31 December 2008), online: <http://www.fja-cmf.gc.ca/appointments-nominations/assessment-evaluation-eng.html>.
[17] Office of the Commissioner for Federal Judicial Affairs Canada, "Process for an Application for Appointment" (22 April 2014), online: <http://www.fja-cmf.gc.ca/appointments-nominations/process-regime-eng.html>.
[18] *Constitution Act, 1867*, s. 96; *Tax Court of Canada Act*, s. 4(2); *Federal Courts Act*, s. 5.2; *Supreme Court Act*, s. 4(2).

composed of eight members that represent the bench, the bar, law enforcement associations and the general public. The composition of each Committee is made up as follows:

- a nominee of the provincial or territorial law society;
- a nominee of the provincial or territorial branch of the Canadian Bar Association;
- a judge nominated by the Chief Justice of the province or by the senior judge of the territory;
- a nominee of the provincial Attorney General or territorial Minister of Justice;
- a nominee of the law enforcement community; and
- three nominees of the federal Minister of Justice representing the general public.

Each above-noted nominator is asked by the Minister of Justice to submit a list of names from whom an appointment to the Committee can be made. The Minister then selects persons to serve on each Committee. In selecting members, the Minister of Justice considers factors appropriate to the jurisdiction, including geography, gender, language and multiculturalism.[19] There are no statutory requirements governing this selection of Committee members. Committee members are appointed to serve a three-year term, with the possibility of a single renewal.

Former Prime Minister Stephen Harper's Conservative government made several reforms to the Committees: (i) adding a representative of the law enforcement community to the list of nominated appointments; (ii) limiting the voting power of the judicial chair to breaking ties; and (iii) replacing the threefold categorization of "not recommended", "recommended" and "highly recommended" to "not recommended" and "recommended". Those reforms caused a great deal

[19] Office of the Commissioner for Federal Judicial Affairs Canada, "Process for an Application for Appointment" (22 April 2014), online: <http://www.fja-cmf.gc.ca/appointments-nominations/process-regime-eng.html>.

of public comment and criticism.[20] This was a reform noted and criticized in the responses to the questionnaires, in particular the inclusion of a law enforcement presence on the Committee.

It does not appear that there is any formal training provided to Committee members, other than in the past, several meetings would be held between the newly appointed chair of the Committee and the Minister of Justice and the Commissioner of Federal Judicial Affairs to discuss the process. To the extent that there is any training, it seems likely that it is minimal given the various different ways that Committees may undertake the consultation process. However, the OCFJA's website offers some advice to Committee members on the appropriate manner by which to approach persons for consultation.[21]

All Committee proceedings and consultations take place on a confidential basis. It is publicly known that Committees are to undertake consultations in regard to each applicant (or nominee)[22] with the communities they practice within. Certain guidelines govern this process which could include speaking to at least four of the six references before making an assessment, but the Committees enjoy a great deal of discretion in how they conduct this process.[23] It is noteworthy that there is no requirement to hold an in-person interview with a candidate. One response to ICJ Canada's questionnaire reported that no in-person interviews were conducted in

[20] Rainer Knopff, "The Politics of Reforming Judicial Appointments" (2008) 58 UNBLJ 44. See also Sean Fine, "Stephen Harper's courts: How the judiciary has been remade", 24 July 2015, The Globe and Mail, online: <http://www.theglobeandmail.com/news/politics/stephen-harpers-courts-how-the-judiciary-has-been-remade/article25661306/>.

[21] Office of the Commissioner for Federal Judicial Affairs Canada "Guidelines for Advisory Committee members" (Dec. 2006), online: <http://www.fja-cmf.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html>.

[22] Members of the legal community and all other interested persons and organizations are invited to nominate persons they consider qualified for judicial office. Nominees will be contacted by the Commissioner to ascertain whether they wish to be considered for a judicial appointment. Office of the Commissioner for Federal Judicial Affairs Canada, "Process for an Application for Appointment" (22 April 2014), online: <http://www.fja-cmf.gc.ca/appointments-nominations/process-regime-eng.html>.

[23] Office of the Commissioner for Federal Judicial Affairs Canada "Guidelines for Advisory Committee members" (Dec. 2006), online: < http://www.fja-cmf.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html>.

their respective province. This respondent suggested that in-person interviews would be beneficial in assessing a candidate's qualifications. Another respondent indicated that it is a routine practice in their jurisdiction to interview applicants.

Ultimately, regardless of the process of consultation undertaken, the Committee will designate a candidate as "recommended" or "unable to recommend". We have learned that with some Committees receiving as many as 100 applications a year, Committees have to deal with a huge backlog of applications, resulting in the Committee only devoting 20 to 30 minutes to each application in the meeting of members. If the meetings involve new members, progress would be slowed by the lack of familiarity with the vague criteria; with time, members would become more familiar with the process and the criteria. This makes it necessary to have membership on the Committees staggered so that experience and perspectives from retiring members are preserved as new members come on board.

In some responses to ICJ Canada's questionnaire, there was the expressed perception that judicial appointments were political, in the sense that political affiliations and an applicant's views on such matters as criminal justice policy, as an example, were important. This obviously results from a lack of transparency in the consultation process – a screening process described by some responses as a "back room" process. Political influence in the final selection by the government is most likely to arise in choosing among those who have been recommended. This makes it important to bring back the "highly recommended" category to limit the potential for political discretion in the final selection by the government.

Another significant criticism raised in one of the responses to ICJ Canada's questionnaire was the Committee's failure to sufficiently take into account the expertise of candidates in order

to ensure the judiciary had a variety of expertise, i.e. ensuring that there are judicial appointments drawn from different practice areas. While this may not be a problem for some Committees, it has been for others.

It is a convention for the Minister of Justice to recommend appointments from the Committees' recommendations.[24] The Minister of Justice will make a recommendation to the Cabinet, which in turn advises the Governor General. The recommendation for the appointment of Chief Justices and Associate Chief Justices is made by the Prime Minister of Canada to Cabinet.[25]

It seems that further consultations (beyond the recommendation of the Committees) may be made at the discretion of the Executive:[26]

> Before recommending an appointment to Cabinet, the Minister may consult with members of the judiciary and the bar, with his or her appropriate provincial or territorial counterparts, as well as with members of the public. With respect to provincial and territorial court judges who apply for appointment to a superior court, the Minister may consult with that candidate's current Chief Judge as well as with the Chief Justice of the court for which the candidate is being considered. The Minister also welcomes the advice of any group or individuals on the considerations which should be taken into account when filling current vacancies.

Such consultation is not mandatory, and if it is conducted, it is private and informal and therefore reinforces the perspective of a "back room" process that could involve consultations with party insiders and regional Ministers in the cabinet.

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[24] Peter McCormick, "Selecting Trial Court Judges: A Comparison of Contemporary Practices", Study commissioned by the Commission of Inquiry into the Appointment Process for Judges in Quebec (1 September 2010) at p. 64.
[25] Office of the Commissioner for Federal Judicial Affairs Canada, "Process for an Application for Appointment" (22 April 2014), online: <http://www.fja-cmf.gc.ca/appointments-nominations/process-regime-eng.html>.
[26] *Ibid*.

The OCFJA's website indicates there is a high number of vacancies on various Committees across Canada, although this information appears to be outdated.[27] If this figure remains accurate, it is difficult to understand how these Committees are able to properly dispose of their mandate. If the OCFJA is primarily limited to material support and Committees are not staggered, the most important initial selection of judicial candidates again could contribute to the perspective of a "back room" process, especially if some of the Committee members appointed by the government are party insiders.

The Prime Minister of Canada Justin Trudeau recently unveiled a new appointments process for Supreme Court of Canada candidates.[28] This process is particularly noteworthy as Prime Minister Trudeau has stated the nomination process will be overseen by an independent judicial advisory committee. The composition of the committee will comprise of four members designated by the Canadian Judicial Council, the Canadian Bar Association, the Federation of Law Societies, the Council of Canadian Law Deans and three members comprising of prominent Canadians, at least two of whom will be from outside the legal community, appointed by the Minister of Justice. The committee will be chaired by former Prime Minister Kim Campbell. Prime Minister Trudeau further stated in his announcement that whenever one of the three Quebec seats is to be filled, the composition of the advisory committee will be "adjusted to account for Quebec's unique legal tradition".

What is also noteworthy about this new process is the increased level of transparency as to how the committee will conduct itself. The process of selection, including the assessment

[27] Office of the Commissioner for Federal Judicial Affairs Canada, "Members by Province or Territory" (22 April 2014), online: <http://www.fja-cmf.gc.ca/appointments-nominations/committees-comites/members-membres/index-eng.html>.
[28] Justin Trudeau, "Why Canada has a new way to choose Supreme Court judges", 2 August 2016, *The Globe and Mail*, online: <http://www.theglobeandmail.com/opinion/why-canada-has-a-new-way-to-choose-supreme-court-judges/article31220275/>.

criteria, the questionnaire that all applicants must answer, and certain answers provided to the questionnaire by the Prime Minister's eventual nominee, will all be made public. Whether the publication of this information occurs before or after the assessment is undertaken is unclear.

It was also exceptional to note that in Prime Minister Trudeau's announcement, he endorsed a statement made by the Chief Justice of Canada in 2012 that "If we are to fully meet the challenges of judging in a diverse society, we must work toward a bench that better mirrors the people it judges."[29] This quote was derived from a speech delivered by the Chief Justice at the Judicial Studies Committee Inaugural Annual Lecture in Edinburgh, Scotland, where she addressed the challenges of judging in a diverse society. The Chief Justice identified three response to meet those challenges in her speech: (1) an informed approach to judicial impartiality; (2) an understanding of social context; and (3) a Bench that reflects the diversity of the population. With respect to the latter response, her comments remain relevant today:

> Let me begin by noting that the Canadian judiciary— at least from the perspective of gender and ethnicity — is not a particularly diverse group. I suspect that much the same could be said of here in Scotland. A majority of Canadian judges — about 68% — are men. While Canadian judges belong to various religions and linguistic groups, we are very largely Caucasian. We have made progress — to have women as a third of our judges and holding four of nine places on the Supreme Court of Canada is no mean accomplishment. But we could do better. The same applies to social minorities. If we are to fully meet the challenges of judging in a diverse society, we must work toward a bench that better mirrors the people it judges.
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> Diversity within the judiciary is important for <u>two reasons</u>. First, like understanding social context, diversity on the bench is a useful way to bring different and important points of view and perspectives to judging. Second, a

[29] "Judging: the Challenges of Diversity", Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, Judicial Studies Committee Inaugural Annual Lecture, Edinburgh, Scotland, June 2012, online: <http://www.scotland-judiciary.org.uk/Upload/Documents/JSCInauguralLectureJune2012.pdf> at p. 17.

> diverse bench that reflects the society it serves enhances public confidence in the justice system. [Emphasis in original]

c. Promotions and Vacancies

There is no information available with respect to how judicial promotions are conducted, and the criteria that guide promotions from superior to appellate courts. While the relevant Chief Justice of the Court to which the candidate is considered for promotion is consulted, such consultation does not always take place.

Likewise, it does not appear that there is any anticipatory mechanism in place to address judicial vacancies, despite the fact that there is a mandatory retirement age for federally appointed judges of 75.[30] Vacancies do not appear to be advertised, beyond the federal government's statistical list of vacancies in each jurisdiction on the OCFJA website.

There is a process for retiring judges to notify government of their pending retirement, since there is paper work involved in obtaining pensions or applying for supernumerary status which each take time, prior to any opening becoming available. However, despite such notice, action is slow and vacancies are only filled months after the position is actually vacated. The same seems to be true at the Supreme Court of Canada level, indicating that there is insufficient priority given to filling judicial vacancies.

d. Measuring the Composition of our Judiciary

An official breakdown in terms of race or ethnicity, regional or linguistic background or sexual orientation of the judiciary is not available. Judicial appointment statistics, if they exist,

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[30] *Constitution Act, 1867*, s. 99(2); *Federal Courts Act*, s. 8(2); *Tax Court of Canada Act*, s. 7(2); *Supreme Court Act*, s. 9(2).

are not published. However, the website of the OCFJA maintains a record of the total number of judges in office and the total number of female judges in each province.[31] This list presently identifies 44 judicial vacancies across Canada. The total number of judges across Canada is 1123, of which 264 are supernumeraries. Of that number, 407 are women. OCFJA appears to no longer publish statistics on the number of applicants and their gender and the percentage of those recommended. Previously published statistics were critical to understanding what percentage did not make the initial cut and this vital statistic was circulated to the relevant stakeholders, including federal and provincial Ministers, relevant Chief Justices and Law Societies. The keeping and transmission of these statistics must be restored to show what is happing in perceived "back room" processes.

III. RECOMMENDATIONS

As a general comment, the federal judicial appointments process has minimal legislative structure and is conducted largely behind closed doors, leaving it open to possible inappropriate pressures, or at least the perception thereof. The Committees have a great deal of discretion as to how to fulfill their function, making it impossible to know what process was followed with respect to any given candidate. The Minister of Justice also exercises great discretion in appointing judges, and is not required to accept the recommendations from the Committees.

From our initial findings, ICJ Canada makes the following recommendations for reform of the federal judicial appointments process:

[31] Office of the Commissioner for Federal Judicial Affairs Canada, "Number of Federally Appointed Judges as of August 1, 2016" (5 August 2016), online: <http://www.fja-cmf.gc.ca/appointments-nominations/judges-juges-eng.aspx>.

a. Diversity

ICJ Canada believes that a judiciary reflective of the diverse backgrounds of the Canadian population is an essential part of the rule of law and the administration of justice. A diverse judiciary is one reflective of the composition of Canadians in terms of race, ethnicity, language, gender, sexuality and professional background.

In this regard, ICJ Canada takes the position that a key reform for the Canadian judicial appointments process is to require that diversity be an express factor the Committees must consider in assessing a candidate.

To achieve that, the Committees must perform extensive outreach activities, going into every part of our legal institutions to seek out the most competent and meritorious of such representatives of the missing diversity on the courts. Instead of focusing on individual candidacies, the Committees ought to be thinking about the broader judiciary and how we can shape its composition to better reflect the communities it serves.

The selection of judicial candidates has been overly focused on the individual applicant, as opposed to the broader composition of the judiciary. The judiciary should be comprised of diverse experiences, both personally and professionally. Maintaining greater statistics on the judiciary might enhance the Committees' level of knowledge of their provincial bench and assist with shaping their consultation efforts.

Further, ICJ Canada believes that to create a diverse judiciary, there must also be sufficient diversity on the Committees assessing those judges. In this way, ICJ Canada believes that the composition of the Committees must also be diverse. ICJ Canada also recommends that

the federal government rescind the requirement that a law enforcement representative serve as a member of the Committees.

ICJ Canada would also strongly recommend that the Minister of Justice's Office working with the Committees to develop outreach procedures that could encourage candidates from under-represented groups to apply for judicial appointments.

b. Addressing Vacancies Proactively

The large number of vacancies in the judiciary across Canada creates an unnecessary burden on the resources of the courts. Requiring that the Committees maintain a list of forthcoming judicial retirements and candidates for selection in the event of judicial retirement would be a simple way to address judicial vacancies quickly and in an anticipatory manner. Given that the federal government is willing to have individuals nominate themselves for Supreme Court of Canada vacancies, it may be appropriate for individuals to also nominate themselves for appointments to superior court vacancies. That can only happen if such vacancies are advertised. This could also help speed up the filling of vacancies. If such an open process is implemented, there will be a need for adequate human and financial capital to manage the large number of vacancies that could exist every year.

c. Making the Process More Transparent

The appointments process requires a balance between the privacy interests of applicants (we want to encourage qualified candidates to apply) and the need for accountability in the conduct of the Committees. One possible option is to lessen the Committee's level of discretion in the manner by which they conduct their consultation. Publishing some of the non-confidential

information arising out of the consultation, if a candidate is ultimately appointed, could increase the level of transparency in the process. Publishing further information about how the Committees apply the non-legislative criteria in their deliberations would also enhance the transparency of the process. Consideration should also be given to interviews of shortlisted candidates if consideration is to be given to restoring the "recommended" and "highly recommended" categories so that final determinations are made on who is recommended for one or the other category. Consideration should also be given to requiring that the Minister should justify to the public or a Parliamentary Committee why any preference has been given to anyone in the recommended category over those in the "highly recommended" category without disclosing confidential information of chosen candidates.

d. Publishing Criteria for Judicial Promotions

Criteria for judicial promotions to appellate level courts ought to be published. The process by which these criteria are applied should also be publicly declared. The existence of consultations beyond those connected with the Committees for such judicial promotions should be made public and where appropriate with whom such consultations have taken place.

e. Possible reforms of the OCFJA

Given that Committee member's terms are limited to a specific period of time, there is a need for the OCFJA to keep records and statistics on the work of the Committees, including time taken in consultations and making recommendations and statistics in terms of gender and diversity. Consideration should be given to making appropriate records and statistics public.

The OCFJA should also be strengthened to be able to provide an oversight function to the Committees to ensure they are performing according to the mandate given to them in a non-partisan manner and where necessary to be able to receive any information that could interfere with the non-partisan functions of any of the Committees and advise the Minister of Justice on any remedial actions that may be necessary. Consideration should also be given to the OCFJA developing mandatory training for all members of the Committees. Committees should publish annual reports.

The OCFJA should also have the ability to publicize where vacancies on the Committees exist so that there is some level of pressure on the government to fill them as soon as possible so that they can expedite the selection of candidates to fill judicial vacancies.

If these reforms to the OCFJA are established, it could move the functions of the present Office in the direction of an independent federal judicial appointments commission, which exist in other best practices jurisdictions. It is in the best interest of the legitimacy and independence of our judicial system that the OCFJA be not only renewed but be well resourced and become independent of the Office of the Minister of Justice.

Proposed Recommendations

1) All judges who are anticipating retirement should be encouraged to give timely notice (e.g. one year) so as to allow for an effective and efficient judicial appointments process.

2) Specifically tailored criteria for judicial positions should be developed as appropriate.

3) All vacancies should be advertised in a timely fashion.

4) All candidates must complete a comprehensive application form, whose content should include demonstrated evidence of a commitment to equality and diversity.

5) The size and composition of each Committee should be enlarged and diversified to make the process more inclusive. Given the heavy workload, consideration should be given to providing adequate compensation to members, staggering membership and conducting performance reviews of members for the purposes of renewal or termination. The Minister's role in selecting members of the Committees should be scrutinised by the OCFJA to ensure that it is not limited to party insiders.

6) The three categories of "not recommended", "recommended" and "highly recommended" should be restored.

7) The Committees should rank all candidates in the highly recommended pool where possible given the need for different types of judicial expertise.

8) The Minister of Justice must justify to the public and/or a Parliamentary Committee why a lower ranked candidate may have been selected over a higher ranked candidate in the highly recommended pool, or why a candidate in the recommended pool is selected over the candidates in the highly recommended pool.

9) If a sitting judge is seeking promotion or elevation s/he should also be subject to the Committee process and the involvement of the relevant Chief Justice of the relevant Court of Appeal.

10) Each Committee should complete an annual report that provides both a quantitative and qualitative account of its activities.

11) The OCFJA should receive enhanced resources so that it can more effectively and transparently fulfill its functions. This would include *inter alia* an improved website, comprehensive training for Committee members and the publication of annual reports.

12) The judicial appointments process should be given a statutory basis, as appropriate. The selection criteria can be kept outside the statutory framework as they will change depending on the needs of the judicial system and societal evolution. They should be set by the Governor-in-Council rather than the Minister of Justice alone.