

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

**DEPARTMENT OF JUSTICE CONSULTATION ON THE
PROCESS FOR SUPERIOR COURT JUDICIAL
APPOINTMENTS**

Federation of Law Societies of Canada Submission

Ottawa, September 9, 2016

The Federation of Law Societies of Canada (“the Federation”) appreciates the opportunity to provide input into the Federal government’s review of the superior court appointments process.

The Federation of Law Societies of Canada

The Federation is the national coordinating body of Canada’s 14 law societies, which are mandated by provincial and territorial statutes to regulate the country’s 117,000 lawyers, Quebec’s 4,500 notaries and Ontario’s nearly 8,000 licensed paralegals in the public interest. The Federation promotes the development of national standards, encourages the harmonization of law society rules and procedures, and undertakes national initiatives as directed by its members, among other activities. The Federation also speaks out on issues critical to safeguarding the public’s right to an independent legal profession, the protection of solicitor-client privilege and other issues relating to the administration of justice and the rule of law.

An important role of the Federation is to communicate the views of the governing bodies of the legal profession on national issues. The Federation submitted its views on the federal judicial appointments process in response to the government’s 2006 reforms. Many of the views and comments presented in that submission (“the 2007 submission”) are still relevant today. We stated at that time that the manner in which judges are appointed in Canada, and the confidence of the public in the independence and impartiality of the judges so appointed, are of vital importance to the administration of justice in Canada. The Federation maintains that viewpoint and has a continued interest in assisting the government in its deliberations to ensure that any changes to the judicial appointments process respect fundamental principles and goals that maintain the high caliber of the courts and enhance the public’s confidence in the judicial system.

Submission Overview

The Judicial Advisory Committees (“JACs”) play a vital role in the process of appointing judges to the courts that are under federal jurisdiction. The Federation submits that the appointment process would be enhanced through the adoption of the following recommendations:

1. Remove the designated law enforcement nominee position on JACs.
2. Reverse the decision to limit the voting rights of the judicial nominee.
3. Enshrine and define the role of JACs and their relationship to the Minister of Justice in legislation or regulations.
4. Clarify how JAC assessments are carried out and make that information available to the public.
5. Fill the vacancies on all JACs immediately.
6. Stagger the terms of the members on each JAC to ensure that the appointments do not all expire at the same time.
7. Include diversity in the criteria to be considered in assessing judicial candidates.
8. Advertise judicial vacancies when they occur.
9. Proactively promote applications from diverse candidates, including equality seeking groups, First Nations, Métis and Inuit, and language minorities.



10. Ensure that the membership of each JAC includes a diversity of perspectives, backgrounds and experiences.

The Need for Strong, Independent Judicial Advisory Committees

As the Office of the Commissioner for Federal Judicial Affairs Canada (“OCFJAC”) website states, JACs constitute “the heart” of the appointments process. In the Federation’s 2007 submissions we noted that the establishment of the JACs in 1988 “was a very important step in developing a clear and independent process for identifying a pool of meritorious candidates who could confidently be recommended to the government for appointment as judges”. We support the continued use of JACs to further the important goals of transparency, accountability, public confidence and diversity in the appointments process and, by extension, the judiciary.

Inherent in this statement is the understanding that no actual or perceived political influence should exist in either the appointment process or the assessments. Despite the use of the JACs, the interim report of the International Commission of Jurists Canada (“ICJC”), released in August 2016, notes that it is still perceived perception that judicial appointments are political. The ICJC attributes this perception to a lack of transparency in the appointment process. The Federation agrees that transparency in the assessment and appointment process is critical to public confidence in judicial appointments. The Federation maintains that there are changes to the process that could be made that would enhance the transparency, accountability and impartiality of the appointment process.

Recommendations for Reform

Judicial Advisory Committee Composition

In 2006, the Minister of Justice increased to eight the members of the JACs, adding a representative from the law enforcement community. In addition, the government made the judicial appointee the chair of the JAC and limited his or her voting powers to resolving instances of a tie. The Federation expressed deep concerns with these changes in our 2007 submission. These concerns remain relevant today. The Federation recommends that the decision to add an eighth member nominated by the law enforcement community be reversed and the former voting structure restored.

At the core of the Federation’s concern is the potential that the presence of a representative from the law enforcement community will erode the public’s confidence in the judicial appointment process. Including such a representative on the committee may undermine confidence in the independence of the JAC and raise doubt or skepticism about the Minister’s appointments, particularly if there is a perception that a candidate was selected because they favoured the law enforcement community’s interests. The change in voting rights amplified this concern as it increased the potential for the law enforcement community to hold a deciding vote in who is recommended for appointment and who is not.

We also recommend that the government reverse the decision to limit the voting rights of the judicial nominee. The judicial representatives bring an important perspective to the assessment process that ought not to be marginalized. As we expressed in 2007, even more importantly, the change in voting structure makes it possible for a specific community to hold a deciding vote on which candidates will be recommended, potentially leading to a perception that JACs are not truly independent bodies.

Recommendation 1

Remove the designated law enforcement nominee position on JACs.

Recommendation 2

Reverse the decision to limit the voting rights of the judicial nominee.

Role of Judicial Advisory Committees

The role and importance of the JACs cannot be overstated. The government’s characterization of JACs as the “heart” of the appointment process is apt given their role in assessing the qualifications and suitability of candidates and guiding the Minister in her decision-making. However, despite being the “heart” of the appointment process, the role of the JACs is not enshrined in legislation and there is currently no legislative requirement that governs the selection of committee members, their responsibilities or their training. Although the OCFJAC provides guidelines for the assessment process, a lack of legislative or regulatory authority for the JACs may leave the process vulnerable to political manipulation, potentially undermining public confidence in the appointment process. Several provinces have tried to minimize this risk by enshrining the role of similar committees in legislation. For example, in Ontario the Judicial Appointments Advisory Committee’s function is defined at ss. 43(8) of the *Courts of Justice Act*¹ as making “recommendations to the Attorney General for the appointment of provincial judges”. The Attorney General’s recommendations for appointment to the Lieutenant Governor in Council (“LGIC”) must be based only on those candidates that have been recommended by the committee.² Similarly, in British Columbia the LGIC may only appoint judges of the court “on the recommendation of the [judicial] council.”³ The function of the British Columbia judicial council is clearly outlined at s. 22 of the Act. While the issue of political vulnerability may still be present in the provincial/territorial appointment processes, enshrining the role(s) of JACs, their composition, their relationship to the Minister, and perhaps even their terms of appointment would be an important step in increasing the transparency, and therefore trust, in the process.

¹ R.S.O. 1990, c. C. 43

² *Ibid*, at s. 43(11)

³ *Provincial Court Act*, R.S.B.C. 1996, C. 379

Recommendation 3

Enshrine and define the role of JACs as well as their relationship to the Minister of Justice in legislation or regulations.

Increasing Transparency

Currently there is little guidance on how the JACs are to apply the criteria for assessing candidates that have been specified by the OCFJAC. JACs enjoy a great deal of discretion in conducting assessments and while this discretion is important to the independence of the assessment process, the Federation submits that this needs to be balanced against the need for increased transparency in the process. In our view there would be benefit in providing greater clarity into how candidates are evaluated and the considerations that go into those evaluations. The OCFJAC should develop and make public guidelines that explore the relative weight to be given to different criteria to assist JAC members in fulfilling their mandate.

Recommendation 4

Clarify how JAC assessments are carried out and make that information available to the public.

Terms of Judicial Advisory Committee Members and Current Vacancies

According to the OCFJAC website, ten of the sixteen JACs have been vacant since April 2014. Of the remaining six, three have a number of vacancies. These vacancies on the JACs raise significant concerns, particularly in light of the high number of judicial vacancies in the courts across the country. Many cite judicial shortages as a contributing factor to court delays and the ongoing access to justice crisis in Canada. Chief Justice Beverley McLachlin was recently reported in the Toronto Star as saying “the perpetual crisis of judicial vacancies in Canada is an avoidable problem that needs to be tackled and solved.”⁴

We urge the government to move immediately to fill the vacancies on the JACs. The Federation also reasserts our 2007 position that the terms of the members of individual JACs should be staggered to ensure greater operational continuity within the committees on an ongoing basis and better assist the JACs in fulfilling their mandates.

Recommendation 5

Fill the vacancies on all JACs immediately.

⁴ Opinion, “Ottawa must fill court vacancies to ensure timely justice: Editorial”, The Toronto Star, August 15, 2016, online: <https://www.thestar.com/opinion/editorials/2016/08/15/ottawa-must-fill-court-vacancies-to-ensure-timely-justice-editorial.html>

Recommendation 6

Stagger the terms of the members on each JAC to ensure that the appointments do not all expire at the same time.

Increasing Diversity

It is the Federation's position that the federal judiciary should reflect the diverse values, perspectives and communities present in Canadian society. A more diverse judiciary would not only support and further the government's goals, it would also ensure the public sees itself reflected in the administration of justice. A judiciary that is reflective of the diversity of Canadian society would bolster the public's confidence in the system and its ability to operate in the public's best interests.

The federal government has publicly committed to increasing diversity in appointments in the Supreme Court appointment process. The rationale for this approach is equally applicable to all levels of judicial appointment as highlighted by the following remarks by Chief Justice McLachlin:

In addition to the basic qualities that every individual judge and court must possess, appointments to the bench should reflect the diversity of the society they are called upon to judge. This is important to ensure that different perspectives are brought to the task of judging, and to maintain the confidence of all Canadians in the justice system.⁵

The Chief Justice also recognized that the process of achieving diversity, while laudable, is complicated. In an interview with the Toronto Star she noted that the judiciary has made considerable achievements in attaining gender diversity on the bench (35 per cent of seats are now occupied by women). However, she also acknowledged that "the difficulty we have with racial minorities, indigenous people is that we're just beginning this process of getting the judges in place on the trial benches and so on."⁶

In our view, diversity should be expressly identified as a factor to be considered by the JACs in their assessment of potential judicial candidates. The Federation also submits that to attract applications from diverse candidates, including equality-seeking groups, First Nations, Métis and Inuit, and language minorities, greater efforts need to be made in ensuring opportunities for judicial appointments are made known and available to the legal community.

⁵ Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada at the Empire Club of Canada, Toronto, Ontario, June 3, 2016, Supreme Court of Canada online: <http://www.scc-csc.ca/court-cour/judges-juges/spe-dis/bm-2016-06-03-eng.aspx>

⁶ Tonda MacCharles, "More indigenous judges needed in lower courts to develop skills for Supreme Court: Beverley McLachlin", The Toronto Star, August 10, 2016, online: <https://www.thestar.com/new/canada/2016/08/10/more-indigenous-judges-needed-in-lower-courts-to-develop-skills-for-supreme-court-beverley-mclachlin.html>.

It is our further submission that it is important to reflect the diversity of Canadian society in the JACs that are charged with assessing future judicial candidates. Not only would this ensure that members of the public see themselves represented in the judicial appointment process, it would ensure that the assessment of candidates is informed by a variety of perspectives and experiences.

a) Including Diversity in Judicial Candidate Appointment Criteria

Currently the eligibility criteria for federal judges are set out in various constitutional and legislative sources. Specifically, to be considered for a superior court appointment a candidate must be a member of the bar in any province,⁷ and must have either ten years standing at the bar, or an aggregate of ten years as a barrister exercising powers and performing duties of a judicial nature on a full-time basis in respect of a position held pursuant to a law of Canada or a province.⁸

Aside from these legislative requirements, the government processes for appointing judges, and the criteria used in the evaluation of their suitability, are found in government policy. The OCFJAC website states that the appointment process is comprised of extensive consultations in both the legal and non-legal community and that “professional competence and overall merit are the primary qualifications.”⁹ While the Federation agrees with the overall guidelines provided to JACs, we submit that they do not go far enough to guarantee diversity amongst judicial candidates. The Federation recommends that diversity be expressly included in the selection criteria.

Recommendation 7

Include diversity in the criteria to be considered in assessing judicial candidates.

b) Recruitment Practices Should Encourage Diversity

Currently, qualified lawyers and persons holding provincial or territorial judicial office who are interested in being appointed to a superior court bench may apply to the Commissioner for Federal Judicial Affairs Canada. In the submission of the Federation attracting a greater diversity of candidates requires a more proactive approach including advertising vacancies in the relevant jurisdictions in a more deliberate way, proactively promoting applications from candidates representing a diversity of backgrounds, and expressly encouraging applications

⁷ *Constitution Acts 1867 to 1982*, s. 97

⁸ *Judges Act*, s. 3

⁹ <http://www.fja-cmf.gc.ca/appointments-nominations/process-regime-eng.html>

from members of equity-seeking groups. The government may wish to look to the individual provincial models for guidance on how this change could work at the federal level.¹⁰

Recommendation 8

Advertise judicial vacancies when they occur.

Recommendation 9

Proactively promote applications from diverse candidates, including equality-seeking groups, First Nations, Métis and Inuit, and language minorities.

c) Diversity on Judicial Advisory Committees

The Federation submits that another important step in ensuring greater diversity in the judiciary would be to ensure that the JACs represent the diversity found in Canadian society. Increasing the diversity of JAC members would ensure that a diverse range of perspectives, backgrounds and experiences informs the assessment process.

Recommendation 10

Ensure that the membership of each JAC includes a diversity of perspectives, backgrounds and experiences.

Conclusion

The Federation views the JACs as an essential component of the judicial appointments process. In our submission, however, their role could be enhanced to increase the transparency of the process, recognize the importance of diversity in both the judiciary and the appointments process, and assist in preserving public confidence in the judicial appointments process. Our specific recommendations are intended to further those goals.

¹⁰For example, see Ontario's *Courts of Justice Act*, at ss. 43(9).