

News

Changes urged for 'outdated' selection process

Advisory panels face backlog of candidates

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OTTAWA

Half of the committees that vet candidates for federal trial and appeal courts across Canada were defunct this month, offering the Liberals an opportunity to devise a new judicial appointment process that is less partisan, and both more merit-based and transparent, experts say.

According to the Office of the Commissioner for Federal Judicial Affairs, eight of the 17 judicial appointment advisory committees (JACs) charged with vetting hundreds of applications for federal judgeships in Quebec, most of Ontario (including greater Toronto) and all four Atlantic provinces have been moribund since Oct. 31—although at press time the justice minister was expected to make appointments to the committees “shortly.” (Four months after the election, no judges had yet been appointed by the Liberals.)

Four other advisory committees—in Saskatchewan and Yukon, for example—are also limping along with several missing members. This is adding to a growing backlog of applications for the sought-after judicial posts that offer \$308,600 per annum (for puisne judges), security of tenure to age 75, and fully indexed, defined-benefit pensions.

University of Dalhousie Schulich School of Law professor Richard Devlin argues that the new government should not continue with the current judicial appointment process, pioneered by the Conservatives in 1989, which many lawyers have complained for years still produces too many partisan appointees who are not the best of the candidates, while producing too few female, racialized and indigenous judges.

“I would like them to establish a consultation process over the next year or so in which they would come up with a revamped judicial appointments process, and they should look to international norms, and they should look to developments in other parallel jurisdictions, to make the process (a) more transparent, (b) more inclusive and representative of the larger Canadian community...[in order] ultimately to generate a greater perception of the independence and impartiality of the Canadian judiciary, and thereby enhance public confidence in our judiciary,” says Devlin, the Canadian representative on an international committee of legal experts that this month published the “Cape Town Principles” to guide the appointment of judges.



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Adam Dodek

University of Ottawa

In the meantime Devlin urges the government to “resist the temptation” (often succumbed to by previous governments of both political stripes) to dole out a number of judgeships as political plums. “I don’t think you can ever completely depoliticize this process, nor should we,” he advises. “But the question is how do we allow for legitimate channels of political participation, as opposed to clandestine?”



eight-person committees (others are nominated by the judiciary, the provincial/territorial attorney general, the law society, the CBA and police) are impressed with the importance of appointing judges more representative of the diversity in Canada.

Wilson-Raybould’s mandate letter from Prime Minister Justin Trudeau stipulates “you are expected to do your part to fulfil our government’s commitment to

that is fair and transparent. The current process is outdated, opaque and subject to political manipulation...The real issue is a need to overhaul the entire process to bring Canada in line with 21st century Canadian and international values.”

Dodek suggested by email the Cape Town Principles provide “a good model for moving forward.”

Among other recommendations, the Cape Town Principles

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Mark Kok

Judicial advisory committee

Devlin suggests Justice Minister Jody Wilson-Raybould can add daylight immediately to the shadowy judicial appointment process by instructing the commissioner for Federal Judicial Affairs to publicly disclose the demographics of applicants for the federal bench, including the number of women, visible minorities and indigenous jurists and how many of these are rejected. The same plea was made, without success, in 2014 by the Canadian Bar Association to the previous Conservative government, which appointed mostly older white males. (As of Feb. 1, women made up 35 per cent of Canada’s 1,138 federal judges).

Devlin says the justice minister can also ensure that the three members of the advisory committees who represent her on the

transparent, merit-based appointments, to help ensure gender parity and that indigenous Canadians and minority groups are better reflected in positions of leadership.” The prime minister also instructs the justice minister to “ensure that the process of appointing Supreme Court justices is transparent, inclusive and accountable to Canadians.”

Those marching orders should apply as well to the federal trial courts and courts of appeal, argues University of Ottawa law professor Adam Dodek.

“Reform of the appointment process for lower courts is a far more pressing public policy issue than reform of the Supreme Court appointment process,” he explains. “Canadians deserve a judicial appointment process

advocate the creation of independent commissions responsible for selecting judges (or in some cases that create short lists from which the executive chooses). The commissions’ members are to be drawn from the judiciary and from a range of other institutional, professional and lay backgrounds, “in proportions which safeguard against unjustified dominance of the commission by the executive or by members of Parliament or representatives of political parties,” the principles recommend. “It is desirable that the membership of the commission should be appropriately diverse in terms of race, gender, professional and life experience, and other relevant considerations in the context of a particular society.”

Marc Giroux, deputy commis-

sioner for Federal Judicial Affairs, said by e-mail “we expect the minister to provide shortly for appointments to JACs whose terms have expired. There has typically been a delay between the expiry of JACs’ terms and the appointment of new members.”

Giroux declined to disclose the size of the pool of approved judicial candidates available for appointment to the bench in various regions. “The pool of candidates varies from one province and territory to another,” he said. “It remains sufficient to select candidates for judicial appointment.”

It is a separate question, however, whether the Liberals will find to their liking most, some, or any, of the jurists approved by the Conservative-appointed judicial advisory committees, which include a number of Conservative partisans. (The Department of Justice had not responded to queries by press time.)

Lawyer Mark Kok of Clifton Kok in Ayr, Ont., said that, in his experience, political partisanship has not come into play at the judicial advisory committee on which he serves. Kok was appointed last year to a three-year term on the committee for south and western Ontario by Wilson-Raybould’s Conservative predecessor, Peter MacKay. Kok is a director of the Conservative Party’s Electoral District Association for the Kitchener South-Hespeler District and a director of the provincial Progressive Conservative Party’s Electoral District Association for Kitchener Centre. At least one of the other two lawyers MacKay appointed to represent him on the judicial advisory committee is also a Conservative.

While the Liberals have asked some Conservative appointees on other federal bodies, including the Immigration and Refugee Board and the Canadian Human Rights Tribunal, to step down, Kok said he would be “severely disappointed” if Conservative members of the advisory committees were asked to resign from their unpaid posts.

“I would like to think that I was appointed because I’m a good person to serve in that role,” he said. “It would surprise me if I was asked to step down. I wouldn’t really understand it because it certainly isn’t a partisan position...Our political affiliations, if any, shouldn’t play a role, and it’s made very clear to us that someone who wants to be considered for judicial appointment, their political affiliation, if any, is not relevant.”