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Ottawa sticks with new process to fill Supreme Court vacancies

Allowing applications from across country maintains top court's 'regional character,' justice minister says

CRISTIN SCHMITZ
OTTAWA

Despite some pushback from the organized bar, the federal government says it is sticking with a new process for choosing Supreme Court judges that recently gave lawyers a rare glimpse into the mind of its first nominee, Justice Malcolm Rowe.

At the Commons Justice Committee Oct. 24, Justice Minister Jody Wilson-Raybould said she was very pleased with the reforms that culminated in her government's choice of the 63-year-old Newfoundland and Labrador Court of Appeal judge.

"Further refinements" are possible, but the government intends to use the new process for future Supreme Court appointments, including the vacancy expected in 2018 when the Chief Justice of Canada, Beverley McLachlin, reaches mandatory retirement, she said.

"We believe our selection process is in keeping with the values of Canadians today and that it will… support a modern Supreme Court of Canada that is reflective of, and responsive to, those values," Wilson-Raybould said of her government's expressed willingness to depart from the constitutional convention of regional representation on the top court in order to appoint the first indigenous or racialized jurist to that bench.

Despite objections from various groups, Justice Minister Jody Wilson-Raybould, left, with former prime minister Kim Campbell at the Commons Justice Committee in Ottawa Oct. 24, was pleased with the new Supreme Court selection process. ROY GROGAN FOR THE LAWYERS WEEKLY

"Applications were invited from anywhere in the country to support our goal of ensuring that our highest court moves towards a better and fuller reflection of the diversity of Canadians," Wilson-Raybould explained. "This was also to ensure that the most outstanding jurists in the country, regardless of where they live, have the opportunity to be considered for vacancies as they

Rowe, Page 27

Grit reforms on judgeships not 'enough'

CRISTIN SCHMITZ
OTTAWA

The federal government's judicial appointment reforms leave the door open to business as usual in the hiring of federal judges below the Supreme Court of Canada, say critics who want Ottawa to end the long federal tradition of using judicial appointments as patronage plums.

As Justice Minister Jody Wilson-Raybould announced 24 long-awaited appointments to the country's superior courts Oct. 20, she also unveiled changes that the Canadian Bar Association (CBA) and the NDP welcomed for bringing some diversity and transparency to what has been a shadowy backroom process for appointing mostly white and male judges.

At the same time, Justin Trudeau's Liberals left intact their government's near-unfettered discretion to use judgeships as political rewards, while rejecting recommendations by the CBA, among others, who have long called for the creation of independent, non-partisan nominating bodies that can create ranked short lists of the best candidates for judicial office, from which the government appoints (as occurs for Ontario's provincial

Rankin, Page 11

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News

Rankin: Government must move 'expeditiously'

Continued from page 1

court bench, for example).

The reformed process leaves the government free to appoint its own friends and supporters over the heads of better-qualified jurists, notwithstanding the Liberals' election pledge to implement "a government-wide, open and merit-based appointments process" that "will ensure gender parity and that more indigenous peoples and minority groups are reflected in positions of leadership."

"Concerns about sticky fingers remain," said Dalhousie University Schulich School of Law professor Richard Devlin, a director of the International Commission of Jurists — Canada (ICJ-Canada), and chair of the Canadian Association for Legal Ethics.

"Yes there are some improvements here," Devlin said of the reforms. "But they fall far short of the 'Cape Town Principles' and do not go far enough to enhance the transparency, representativeness and independence of the appointments process," he said by e-mail.

The "Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges" were rolled out this year as part of an international research project by Devlin and scholars from Kenya, Malaysia, Nigeria, South Africa and the U.K., in collaboration with the British Institute of International and Comparative Law. They aim to give practical guidance to legislators and others by identifying ways in which processes for the selection and appointment of judges can strengthen the independence of the judiciary and the rule of law.

The Cape Town principles recommend the creation of independent commissions for selecting judges (or in some cases that create short lists from which the executive chooses). The commissions' members should be diverse in terms of race, general, professional and life experience, and 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," they recommend.

The CBA itself has pressed for decades for political patronage to be eliminated from appointments to federal judgeships. And the ICJ-Canada recommended earlier this year that consideration should be given to requiring a justice minister to publicly justify, perhaps to a Parliamentary committee, why her or his government chooses to appoint a jurist in the "recommended" category over those in the "highly recommended" category (without disclosing confidential information of chosen candidates).

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>
> **Richard Devlin**
> Dalhousie University

CBA president René Basque applauded many of the government's changes, including its reinstatement of the "highly recommended" category for judicial candidates (abolished by the previous Conservative government), which is meant to denote truly exceptional candidates (the other categories are "recommended" and "unable to recommend).

"While the reintroduction of the 'highly recommended' category is an important first step, we urge the government to affirm — publicly and in writing — that it will appoint to the bench only people recommended by a JAC [judicial advisory committee] on the basis of identified merit criteria," Basque told *The Lawyers Weekly*.

He welcomed the government's commitment to collect and publish demographic data on who applies for the bench and who is appointed — which may be key to understanding why the numbers of female, racialized and indigenous judges still do not reflect their numbers in society or the profession.

"We look forward to working with the minister [of justice] to achieve our shared goal of increasing diversity on the bench," Basque said by e-mail.

In a controversial change to the judicial appointment process made without consultation with the bench or bar in 2006, the previous Conservative government added a representative of police to the JACs, while removing the vote of the judicial chair — effectively giving that government a majority vote in rating judicial candidates.

The Liberal reforms reverse this, with the new seven-member JACs to comprise one nominee each from the applicable provincial or territorial law society, the CBA, the bench and the provincial or territorial attorney general. "We…welcome rebalancing of the voting process on the JACs so that the majority of the votes no longer reside in the minister's control," Basque said.

The government announced it has disbanded the seven Conservative-appointed JACs still in operation — most have been defunct for a year — and will reconstitute them "to be more representative of the diversity of Canada." To that end, the government's own three representatives "to represent the general public" on the JACs can apply to do so via an online application form. The deadline for all applications and nominations is 5 p.m. EST Nov. 17.

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> **René Basque**
> Canadian Bar Association

The government said JACs will be required to take into account, as one of their considerations, the government's goal to have a judiciary reflective of the diversity of Canadian society. The JACs' members will be assisted in doing so by receiving training on diversity, unconscious bias, and the assessment of merit — in line with a recommendation earlier this year from the ICJ-Canada which studied opportunities for reform in the federal judicial appointment process.

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>
> **Murray Rankin**
> NDP Justice critic

"We welcome these long overdue reforms," NDP Justice critic Murray Rankin told *The Lawyers Weekly*. "I think everyone knew the existing system wasn't working, and wasn't transparent, so giving people a window into the process and the criteria should, I hope, boost public confidence," he said. "The committee will be made more diverse and will have a new mandate to increase the diversity of the judiciary — which is welcome news since the committees have historically been male-dominated — three-quarters [of the members] in 2014."

In the wake of the controversy involving Federal Court Justice Robin Camp — whose handling of a sexual assault case in provincial court, sparked public calls for his removal this year — the government has announced provincial court judges will now have to apply for the federal bench, and be vetted by the JACs (provincial court judges were formerly presumed to be qualified for promotion).

The government also said lawyers in the pool of candidates approved by the Conservative-appointed JACs must re-apply, using the Liberals' new questionnaires, "to ensure that the reconstituted JACs are assessing all candidates based on the same information fields provided by applicants. The new questionnaire elicits more detailed information from candidates regarding their background, experience and bilingual capacity.

Rankin said "this is a concern because, despite the recent round of appointments, there are still twice as many judicial vacancies today as when this government took office…so the government has to ensure it moves expeditiously to fill these vacancies under the new process….After the selection and training [of JACs members] we may not see the first [judicial] appointments until the new year, which could be problematic."

Valerie Gervais, spokeswoman for Wilson-Raybould, said the JACs will be trained and reconstituted before 2017 and the government anticipates making judicial appointments "as soon as possible" after that.

"The minister of Justice is confident that the new, non-partisan and independent judicial appointment process will result in exceptional candidates being appointed to the bench," Gervais said by e-mail. "In making her reforms to the judicial appointment process, the minister of Justice not only implemented all of the changes recommended by such entities as the Canadian Judicial Council, she implemented further democratizing measures by opening up the positions of the public representatives" on the JACs. "What is more, applicants [for the bench] must now present substantive evidence of their excellence as jurists under the new robust process….The robust applications will ensure that the only the most meritorious individuals are appointed."

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