

The Judicial Appointment Process in Canada

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The Appointment of Judges in Canada

Judges play a critical role in Canadian life. They are the judicial branch of government and are independent from the legislative and executive branches of government. Judges are to consider, interpret and apply the laws of Canada to the facts of the case before the court.

Canada has an adversarial justice system where legal disputes are contested between the various parties who are provided with the opportunity to lead evidence and make legal arguments. Judges then assess and consider the evidence and the legal arguments provided to them. They are expected to reach an independent and impartial assessment of the facts and consider how the law then applies to those facts.

The “independent and impartial assessment” aspect of the Canadian judiciary is considered fundamental. The process for the appointment of judges in Canada is structured to minimize any opportunity for the appointment of judges based on partisan views or patronage. It is expected that Canadian judges will all be of high ethical standards and able to apply the law fairly and equitably to the matters that come before them.

Who Appoints Judges in Canada

Canada is a federal parliamentary constitutional monarchy. Hence, Canada is a federal state with a national federal government, 10 provincial governments and three territorial governments. Canada has a constitution that was adopted in 1867, a Charter of Rights and Freedoms adopted in 1982 and Charles III of England is the nominal head of government.

The federal, provincial and territorial governments were provided with various powers pursuant to the *Constitution Act, 1867*. The federal government’s powers include the exclusive lawmaking power over criminal law and criminal procedure. The provincial governments’ powers include the exclusive power over the administration of justice in each province. This separation of powers has meant that Canada has one criminal code, pronounced by the federal government, applicable across the country, while non-criminal code disputes are determined pursuant to the court rules and unique procedures of each province. All of the provinces and territories, with the exception of Quebec, are common law jurisdictions. Quebec, with its French heritage, is a civil law jurisdiction.

The federal government appoints the judges of the Supreme Court of Canada, the Federal Court, the Federal Court of Appeal and the Federal Tax Court of Canada. The Supreme Court of Canada was founded in 1875. Notably it did not become Canada’s ultimate court until 1933, for criminal appeals, and 1949 for civil appeals. Prior to that time, an appeal was available from a Supreme Court of Canada decision to the Judicial Committee of the Privy Council in Britain.

The federal government is also provided the authority, pursuant to section 96 of the *Constitution Act, 1867*, to appoint judges to the higher court of the provinces and territories. These are the judges that sit in the provincial and territorial superior trial courts and the courts of appeal. As each province has the authority over the administration of justice in that province the superior trial courts have different names and different procedural rules. For example, in British Columbia, the superior trial court is the Supreme Court of British Columbia. In other provinces, such as Alberta

and Saskatchewan, the superior trial court is the Court of King's Bench. In Ontario, it is the Superior Court of Justice.

Provincial governments appoint judges of their provincial court. These are considered the lower trial courts, and they deal with some criminal matters, breaches of provincial regulatory statutes and civil matters under a particular dollar amount (for example, in British Columbia civil claims of up to C\$35,000).

The Appointment of Federal Judges

Appointment to the Supreme Court of Canada

The Supreme Court of Canada is Canada's highest court. It is made up of nine justices appointed by the Prime Minister of Canada. Three of the judges must have been judges of the superior courts of Quebec or a member of the Bar of Quebec, three are appointed from Ontario, two from the four western provinces and one from the Atlantic provinces.¹

Judicial candidates for Supreme Court of Canada vacancies are assessed by an independent and non-partisan advisory board tasked with assessing applications and providing a shortlist of candidates to the Prime Minister.² The independent advisory board members include representatives of the judiciary, the legal profession, academia and the general public.³ The federal Minister of Justice appoints three members representing the general public, any of whom may apply pursuant to an open application process. The independent board member selection process is to be attentive to "gender balance, diversity [including linguistic diversity], and regional balance."⁴ The federal government's goal is to ensure that "diverse perspectives are brought to bear on the ultimate goal of identifying the best candidates."⁵

Traditionally, the criteria for appointment to the Supreme Court of Canada has included:

1. The ability to resolve difficult legal issues with wisdom, fairness and compassion;
2. The energy and discipline to diligently study materials;
3. The ability to retain an open mind until the judge has considered all of the material;
4. Patience and Courtesy;

¹ The current members of the Supreme Court of Canada are Chief Justice Richard Wagner (Quebec), Justice Andromache Karakatsanis (Ontario), Justice Suzanne Côté (Quebec), Justice Malcom Rowe (Newfoundland and Labrador, Atlantic Canada), Justice Sheilah Martin (Alberta, Western Canada), Justice Nicholas Kasirer (Quebec), Justice Mahmud Jamal (Ontario), Justice Michelle O'Bonsawin (Ontario – an Abenaki member of the Odanak First Nation) and Justice Mary Moreau (Alberta, Western Canada).

² Rosemary Carins Way "Reforming Judicial Appointments: Change and Challenge", 68 U.N.B.L.J 18 (2017) at 23 [Way, "Reforming Judicial Appointments"].

³ Prime Minister of Canada, Justin Trudeau, "Prime Minister announces new Supreme Court of Canada judicial appointments process" (2 August 2016), online: <<https://www.pm.gc.ca/en/news/news-releases/2016/08/02/prime-minister-announces-new-supreme-court-canada-judicial>>.

⁴ Office of the Commissioner for Federal Judicial Affairs Canada, "Qualifications and Assessment Criteria" (last modified 20 June 2023), online: <www.fja-cmf.gc.ca/scc-csc/index-eng.html>.

⁵ *Ibid.*

5. The ability to write well-written and well-reasoned opinions; and
6. The ability to work cooperatively with their eight colleagues.⁶

In addition, the independent advisory board is now instructed to ensure that each candidate is “functionally bilingual” and to support the federal government’s goal to achieve “a gender-balanced Supreme Court of Canada that also reflects the diversity of members of Canadian society, including Indigenous peoples, persons with disabilities, and members of linguistic, ethnic, and other minority communities including those whose members’ gender identity or sexual orientation differs from that of the majority.”⁷

The independent advisory board can consider candidates who have expressed interest in appointment to the Supreme Court of Canada as well as any other candidate whom the independent advisory board believes is qualified and otherwise meets the criteria for appointment. The advisory board is also empowered to consult with the Chief Justice and any other stakeholder as they see fit. Once the advisory board has considered the candidates, it provides the Prime Minister with no less than three and no more than five candidates for appointment. The Prime Minister then considers the recommended candidates and makes the appointment to the Supreme Court of Canada.

We have had a recent example of how an independent advisory board works in practice. Upon the 2022 retirement of The Honourable Michael Moldaver from the Supreme Court of Canada, an independent advisory board was appointed to find a replacement. Justice Moldaver was appointed from the province of Ontario, and in recognition of the custom of regional representation, the process was opened to qualified candidates from Ontario.

The members of the Independent Advisory Board were required to include:

- Three members, at least two of whom are not advocates or barristers in a province or territory, nominated by the Minister of Justice;
- A practising member in good standing of the bar of a province or territory, nominated by the Canadian Bar Association;
- A practising member in good standing of the bar of a province or territory, nominated by the Federation of Law Societies of Canada;
- A practising member in good standing of the bar of a province or territory nominated by the Indigenous Bar Association;
- A retired superior court judge, nominated by the Canadian Judicial Council; and
- A legal scholar, nominated by the Council of Canadian Law Deans.

⁶ Peter W. Hogg, “Appointment of Justice Marshall Rothstein to the Supreme Court of Canada” (2006) 44:3 Osgoode Hall LJ 527 at 538.

⁷ Independent Advisory Board for Supreme Court of Canada Judicial Appointments, “Report on the 2022 Process” (22 September 2022), online (PDF):<<https://fja-cmf.gc.ca/scc-csc/2022/pdf/IABSCCJA-SCC-Judicial-Appointments-Report-on-2022-Process.pdf>>.

The appointed members of the Independent Advisory Board and their nominators were:

- The Honourable H. Wade MacLauchlan, Chairperson, former lawyer and renowned legal scholar, and the 32nd Premier of Prince Edward Island — Nominated by the Minister of Justice;
- Paulette Senior, Member, President and CEO of the Canadian Women’s Foundation — Nominated by the Minister of Justice (non-lawyer);
- Konrad Sioui, Member, Former Grand Chief of the Huron-Wendat Nation — Nominated by the Minister of Justice (non-lawyer);
- Charlene Theodore, Member, Chief Inclusion Officer at McCarthy Tétrault — Nominated by the Canadian Bar Association;
- Jacqueline Horvat, Member, Law Society of Ontario Bencher, founding partner of the law firm Spark Law — Nominated by the Federation of Law Societies of Canada;
- The Honourable Louise Charron, Member, Former Supreme Court of Canada Justice (2004 to 2011) — Nominated by the Canadian Judicial Council;
- Richard Jochelson, Member, Dean of Law at the Faculty of Law of the University of Manitoba — Nominated by the Council of Canadian Law Deans; and
- David Nahwegahbow, Member, Founding partner of the law firm Nahwegahbow Corbiere — Nominated by the Indigenous Bar Association.⁸

That Independent Advisory Board consulted with the Chief Justice of the Supreme Court of Canada. Given that the process was meant to evaluate candidates from the Province of Ontario, input was also sought from the Chief Justices of the Ontario Court of Appeal, the Superior Court of Justice, the Ontario Court of Justice, as well as the Federal Court of Appeal and the Federal Court. In addition, the Independent Advisory Committee consulted with a number of interested organizations including the Canadian Judicial Council, The Federation of Law Societies of Canada, The Canadian Bar Association and the Canadian Superior Courts Judges Association. A full list of the organizations consulted is set out in Schedule “A.”

The Appointment of Other Federal Court Judges

Independent judicial advisory committees are established in every province and territory to assess the qualifications of applicants for judicial appointments to the Federal Court and the provincial superior courts. Most provinces and territories have one judicial advisory committee. However, because of their larger populations, Ontario has three committees and Quebec has two. Each committee is made up of seven members representing the bench, the bar and the general public, including one ex-officio non-voting member representing the Commissioner for Federal Judicial Affairs Canada. The members are appointed by the Federal Minister of Justice from a list of

⁸ Independent Advisory Board for Supreme Court of Canada Judicial Appointments, “Report on the 2022 Process” (22 September 2022), online (PDF):<<https://fja-cmf.gc.ca/scc-csc/2022/pdf/IABSCCJA-SCC-Judicial-Appointments-Report-on-2022-Process.pdf>>.

potential candidates presented by the Chief Justice of the province or territory, the Canadian Bar Association, and the provincial or territorial Attorney General.

For example, the members of the Federal Judicial Advisory Committee for British Columbia and their nominating body is:

- The Honourable David C. Harris — Nominee of the Chief Justice of British Columbia;
- Mary Louise Mandell, K.C. — Nominee of the Law Society of British Columbia;
- Amy A. Mortimore, K.C. — Nominee of the Canadian Bar Association;
- Paula M. Donnachie — Nominee of the Minister of Justice and Attorney General of British Columbia;
- John H. O’Fee, K.C. — Nominee of the Canadian Minister of Justice;
- James Sullivan, K.C. — Nominee of the Canadian Minister of Justice; and
- Jeevyn Dhaliwal, K.C. — Nominee of the Canadian Minister of Justice.

The Judicial Advisory Committee for the Tax Court of Canada is made up of five members: the nominee of the Chief Justice of the Tax Court of Canada and nominees of the federal government appointed to reflect Canada’s linguistic and geographical diversity. There must be one member from each of Atlantic Canada, Quebec, Ontario and Western Canada.

The members of the Judicial Advisory Committee for the Tax Court of Canada and their provincial affiliation is:

- The Honourable Henry A. Visser — Nominee of the Chief Justice of Tax Court;
- Jehad Haymour — Alberta (Western Canada);
- Natalie J. Woodbury — Nova Scotia (Atlantic Canada);
- Dominic C. Belley — Quebec; and
- Alexandra K. Brown — Ontario.

The Judicial Advisory Committees undertake an extensive investigation in both the legal and non-legal community with each applicant. This assessment is conducted through background checks, the review of application material, including examples of their written work, and interviews with references and others who know the applicant.

When assessing the candidate’s suitability for the role of a judge, the judicial advisory committee must consider a number of factors including:

Professional Competence and Experience

- 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

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

Potential Impediments to Appointment

- Any debilitating physical or mental medical condition, including drug or alcohol dependency, that would likely 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 payments⁹

Once the members of the judicial advisory committee have considered the candidates and completed the reference consultations, it meets and considers every candidate for the judiciary. During that meeting, a consensus decision is made on each candidate as to whether they are a “Highly Recommended”, “Recommended” or “Not Recommended.” These recommendations are then set out in a Report to the Minister of Justice. The Report is confidential and is not available to the candidates. If a member of the judicial advisory committee disagrees with the consensus decision, their position can be noted in the Report to the Minister of Justice. The Minister of Justice then considers the information in the Report when recommending appointments of Superior Court and Federal Court Justices.

The Appointment of Judges by the Provincial and Territorial Governments

The appointment process by provincial and territorial governments largely mirrors the process set out by the federal government. Each province establishes a judicial advisory committee for screening potential candidates. In most provinces these are arms’ length committees that provide a short list of recommendations. The criteria considered by these judicial advisory committees

⁹ Office of the Commissioner for Federal Judicial Affairs Canada, “JUDICIAL ADVISORY COMMITTEES - Guidelines for Judicial Advisory Committee Members” (October 2016), online:<<https://www.fja.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html#Assessments>>.

are consistent with that used for the screening of Federal Court Judges. For example, in British Columbia, the following criteria are taken into consideration for judicial appointments:

1. At least 10 years in the practice of law (those with less legal practice experience are considered if they have a range of related experience);
2. Superb legal reputation and a professional record review from the Law Society of British Columbia;
3. Experience in mediation or alternative dispute resolution;
4. Respect in the community;
5. Good health;
6. Appreciation of and experience with diversity; and
7. Willingness to travel and to sit in all subject areas.¹⁰

The Challenge of Diversifying the Canadian Judiciary

The lack of diversity of the Canadian Judiciary has been a significant concern. In the past few decades, there has been “the emergence of a remarkable professional and intellectual consensus on the importance of a judicial appointments process which takes account of diversity.”¹¹ Calls for diversity came from throughout the legal profession, including Supreme Court of Canada Chief Justice Beverley McLachlin (as she then was), who stated the need for “a bench that better mirrors the people it judges”¹² to the Canadian Bar Association which called for greater diversity on the bench observing that “the low number of women and members of racialized and other minority groups appointed to the federal courts does not reflect the gender balance or diversity of the Canadian population.”¹³ In particular, it was recognized that there was an urgent need for the appointment of more Indigenous judges to improve the legitimacy of the criminal justice system for Indigenous peoples.

This acknowledgment of the need to increase diversity on the Canadian court bench has led to a historic level of diversity in the makeup of the Canadian judiciary. For the first time in Canadian history, the Chief Justice of the Ontario Court of Appeal is a visible minority, the Chief Justice of British Columbia is Indigenous, and the Supreme Court of Canada bench has a majority of female members and has Indigenous representation. While the Canadian judiciary still does not perfectly mirror the people whom it judges, significant steps have been taken to increase the diversity of the Canadian judiciary.

¹⁰ Provincial Court of British Columbia, “Criteria and Competencies for Appointment” (last modified March 2023), online (PDF): <<https://www.provincialcourt.bc.ca/downloads/applications/Criteria%20for%20appt%20judge.pdf>>.

¹¹ Way, “Reforming Judicial Appointments”, *supra* at 20.

¹² “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.

¹³ Canadian Bar Association, Resolution 13-04-A, “Equality in Judicial Appointments” (17 August 2013), online:<<https://www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2013/Equality-in-Judicial-Appointments/13-04-A-ct.pdf>>.

Conclusion

The appointment of judges in Canada involves a transparent consultative process that seeks to ensure that the judiciary is made up of leading legal practitioners from a diverse background reflective of modern Canadian society. The various judicial advisory committees that consider candidates for judicial appointment play an important role in incorporating a broad spectrum of perspectives on the composition of Canada's judiciary. All levels of government strive to ensure that professionalism, rather than partisanship, is the basis for each appointment in order to enhance the trust that Canadians have in their judiciary.

Schedule “A”

The full list of organizations consulted by the Independent Advisory Board when considering the appointment of a new Supreme Court Judge in 2022 is as follows:¹⁴

- Canadian Judicial Council
- Federation of Law Societies of Canada
- Canadian Bar Association
- Council of Canadian Law Deans
- Canadian Superior Courts Judges Association
- Canadian Association of Provincial Court Judges
- Canadian Council of Chief Judges
- Indigenous Bar Association
- Roundtable of Diversity Associations (RODA), whose participating organizations include:
 - Arab Canadian Lawyers Association
 - Association of Chinese Canadian Lawyers of Ontario
 - Canadian Association of Black Lawyers
 - Canadian Association of South Asian Lawyers
 - Canadian Hispanic Bar Association
 - Canadian Italian Advocates Organization
 - Canadian Muslim Lawyers Association
 - Federation of Asian Canadian Lawyers
 - Hellenic Canadian Lawyers Association
 - Iranian Canadian Legal Professionals
 - Korean Canadian Lawyers Association
 - Macedonian Canadian Lawyers Association

¹⁴ Independent Advisory Board for Supreme Court of Canada Judicial Appointments, “Report on the 2022 Process” (22 September 2022), online (PDF):<<https://fja-cmf.gc.ca/scc-csc/2022/pdf/IABSCCJA-SCC-Judicial-Appointments-Report-on-2022-Process.pdf>>.

- OBA Equality Committee
- South Asian Bar Association
- Toronto Lawyers Association
- Women's Law Association of Ontario
- Ukrainian-Canadian Bar Association
- Association of Justice Counsel
- Avocats sans frontières Canada
- Black Females Lawyer Network
- Canadian Association of Crown Counsel
- Canadian Association of Refugee Lawyers
- Canadian Council of Criminal Defence Lawyers
- Canadian Criminal Lawyers Association
- Canadian Environmental Law Association
- Canadian Prison Law Association
- EcoJustice
- Family Lawyers' Association
- Fédération des associations de juristes d'expression française de common law inc.
- Federation of Ontario Law Associations
- Law Society of Ontario
- Lawyers for Representative Diversity
- Legal Leaders for Diversity
- Ontario Bar Association
- Pro Bono Canada
- The Advocates' Society
- Women's Legal Education and Action Fund
- Association of Ontario Judges

- Ontario Superior Court Judges Association
- Canadian Bar Association — Equality Committee
- Association des juristes d'expression française de l'Ontario