

Answer to Questionnaire 2023 – Fourth Study Commission

Response of Canada

The judicial workplace and the intersection with judicial independence

1. Appointment to judicial office

A. Please describe the process by which a person is appointed to judicial office in lower courts, intermediate courts and superior courts pointing out any relevant differences between appointment in criminal civil or appellate courts.

The current federal judicial appointments process has been in place since 1988. It applies to the appointment of judges of the Superior Courts of every province and territory, the Courts of appeal, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada.

As stipulated by the Judges Act (LRC (1985) ch. J-1), all candidates who have been lawyers for at least 10 years and pursuant holding provincial and territorial judicial office who wish to be considered for appointment as a federal judge must complete an extensive questionnaire, an authorization form which allows the executive director of the Commissioner Office to obtain a statement of applicant's current and past standing with the law societies in which he or she holds or have held membership and allowing the verification of backgrounds.

The questionnaires are analysed by an independent judicial advisory committee formed by members representing the Bench, the Bar and the general public. This independent committee has the responsibility of assessing the qualifications for appointment of the lawyers, and provincial and territorial judges who apply by consultations in the community.

Federal judicial appointments are made by the Governor General acting on the advice of the Federal Cabinet. A recommendation for appointment is made to the Cabinet by the Minister of Justice with respect to the appointment of puisne judges, and by the Prime Minister with respect to the appointment of Chief Justices and Associates Chief Justices.

The recommendations to Cabinet are made from a list of candidates which have been previously recommended by the independent advisory committee to the Minister.

The process by which a person is appointed to Judicial Office is the same for criminal, civil or Appellate Courts.

The questionnaires filed by the candidates will become public following an appointment.

A specific process was put in place for the appointment of judges of the Supreme Court of Canada who are chosen upon a recommendation from the Prime Minister of Canada from a list of candidates recommended by an independent advisory committee.

- B. If applicable, please identify whether political influences of any description bear upon in any way the appointment of a particular person to judicial office.**

No political influence should exert pressure for the appointment of judges to the Court.

- C. Is ethnic or gender diversity in any way relevant to appointment to judicial office, and if so, please describe why and in what respect each may be relevant.**

Government expressed his desire to have a judiciary composed of members representative of the population. In this context, ethnic diversity and gender diversity are factors that will be considered. The questionnaire itself gives the opportunity to candidates to state their personal situation and their sensibility to diversity.

One of the questions that the candidates must answer in the questionnaire reads as follows:

How has your experience provided you with insight into the variety and diversity of Canadians and their unique perspectives?

Statistics relating to candidates and appointments to the judiciary are public. These statistics reveal the number of candidates who submitted an application and the number of those who were appointed from the aboriginal community, a visible minority, an ethnic or cultural group, persons with a disability or members of the LGBTQ2 community.

- D. Describe whether and if so in what way the process of appointment to judicial office is independent of government.**

Although the final decision of an appointment rests with the government, it must choose a candidate from among those recommended by an independent advisory committee following a highly confidential process.

2. PROMOTION WITHIN THE JUDICIARY

- A. Does scope exist for promotion within the judiciary and if so, please describe how and in what circumstances a magistrate or judge may be promoted.**

As mentioned above, candidates, including judges of all jurisdictions, must complete an extensive questionnaire expressing their interest for an appointment to a Court of Appeal or the Supreme Court of Canada. It is also the case for an appointment of a sitting federal judge to a higher federal court.

It should be noted that with the exception of Supreme Court Judges, Chief Judges and Associate Chiefs Judges of each Court, the financial conditions for all the other federally appointed judges are identical. The government refused a request of a financial differential for the Appellate judges, pointing out that despite the differences in their roles, the work performed by each Court is equally important:

The roles of trial and appellate judges are different in nature, but not in importance. Judges of courts of appeal make final decisions on questions of law, subject to appeal to the Supreme Court of Canada. Trial judges have the primary role in determining questions of fact, and while their

determinations of law are subject to appeal, in the vast majority of cases they are not appealed. Trial judges have a much greater role in interacting directly with litigants, including non-represented litigants and have the difficult task of assessing the credibility of witnesses...

There is a hierarchy of judicial decisions and courts but the responsibilities of individual judges, whether trial or appellate, are equivalent in terms of their obligation to fairly, impartially and independently decide each case...

The government is of the view that the work of judges of the trial courts is, and should be perceived by the public to be, of equal importance to that of appellate court judges.

*(Honourable Rob Nicholson, Justice Minister of Canada,
October 2012)*

B. Top what event is political affiliation or political partisanship relevant to promotion within the judiciary.

It would be unacceptable for political affiliation or partisanship to affect promotions within the judiciary.

C. Describe the transparency involved in the process of promotion within the judiciary.

As previously mentioned, to be appointed to the Courts of Appeal, candidates must express their interest to the Justice Minister who will make a recommendation for the appointment after approval of the Cabinet to the Governor General. For an appointment to the Supreme Court of Canada, a specific process is applicable which allows the Prime Minister of Canada, upon approbation by the Council of Ministers, to ask the Governor General to appoint a candidate recommended by an independent advisory committee.

3. WORKLOAD WITHIN THE JUDICIARY

A. In broad terms, what are the requirements for magistrates and judges in relation to the number of sitting days per year or other measurement of judicial workload requirements?

A number of sitting days is generally fixed by the authorities of the Court. When a case is settled, the judge could be called to hear another case on the same day or at a later date. As all hearings are recorded, Court authorities are able to monitor the number of days on which cases are heard.

B. If a judge is encountering trouble keeping up with the workload, describe the regime that applies by which:

(i) that judge's workload is allocated to other judges:

In the Province of Quebec, the judgment on the merits in first instance must be delivered within 6 months after the matter is taken under advisement in civil cases and

2 months in child custody or child support matters. These delays may be extended, as they are indicative, not mandatory.

It is important that each judge be disciplined in carrying out his or her workload. Exceptionally, circumstances may arise so a judge will not be able to render his judgments in due time. In such a case, the judge must consult his Chief Justice so they can find a solution that will allow him or her to deliver judgments as quick as possible.

(ii) the overloaded judge can recover from workload arrears and from any other disabling factor that led to overload:

It is up to the Chief Justice to find, with the overworked judge, the best way to allow him or her to meet his or her workload and dead lines.

(iii) there are mechanisms to address judicial delinquency:

If a judge has personal problems affecting his or her capacity to deliver a judgment in the delays, a service providing help is available within the Court.

C. Are judges expected or required to assist other judges who may be adversely affected from overload so as to ensure that the business of the court is discharged in a timely manner.

When sitting, judges are expected to work as a team and help each other. Otherwise, there is no specific rule requiring judges to assist other judges having an overload in their deliberations.

In the Province of Quebec, a provision of the Code of Civil Procedure allows the Chief Justice to assign a case already heard by an overburdened judge to another judge for judgment.

4. REMOVAL FROM JUDICIAL OFFICE

A. Does a regime currently exist in your country pursuant to which a sitting judge may be removed from office. If so, please describe any such regime, giving all relevant details including:

(i) who decides that the judge is to be removed from office:

The rule is that the appointment of a judge is irremovable. Members of the judiciary hold office during good behavior.

The Parliament has the authority to remove a judge from office after a recommendation of the Canadian Judiciary Council following a hearing panel.

The Judges Act was modified on June 22, 2023 to change the judicial conduct review process to make it more efficient.

- (ii) does the judge have a right of audience on any such motion or otherwise possess a right to be heard against the removal and is there an appeal process if removed:**

The judge who is the subject of a complaint that is before a hearing panel has the right to be heard, to cross-examine witnesses and to adduce evidence, in person or by counsel.

The judge who is the subject of a complaint that is before a hearing panel is to be provided with a copy of the statement of allegations prepared by the presenting counsel and given reasonable notice of the subject matter and the date, time and place of the hearings.

- (iii) what are the grounds for seeking the removal of a sitting judge:**

The removal from office of a judge is justified only if, for any of the following reasons, the judge's continuation in office would undermine public confidence in the impartiality, integrity or independence of the judge or of their office to such an extent that it would render the judge incapable of executing the functions of judicial office:

- a) infirmity;*
- b) misconduct;*
- c) failure in the due execution of judicial office;*
- d) the judge is in a position that a reasonable, fair-minded and informed observer would consider to be incompatible with the due execution of judicial office.*

- (iv) what is the relationship between violation of the ethics code/principles and removal:**

There is no Code of ethics as such. On the other hand, "Ethical principles for judges" were adopted by the Canadian Judicial Council. It is an ethical frame of reference to which all judges should aspire.

- (v) describe the transparency in the process:**

If a complaint against a judge is serious enough to warrant removal from office, a hearing panel will be formed to decide on the complaint.

- B. If removed from office, describe the adverse consequences that may affect the removed judge including:**

- (a) financial (especially pension) consequences:**

If a judge is removed from office, he or she will nevertheless retain his or her accrued pension rights in accordance with the applicable rules.

- (b) future employment consequences following removal:**

There must be extremely serious grounds for removal. Under the circumstances, it goes without saying that impeachment will have a major impact on his employment opportunities, particularly in the justice sector.

(c) social consequences including loss of title or civic decorations:

In the event of dismissal, the social consequences are enormous due to the publicity surrounding it.

(d) disciplinary steps that may be taken against the removed judge:

Dismissal is the ultimate disciplinary measure that can be imposed on a judge.