

**INTERNATIONAL ASSOCIATION OF JUDGES
WASHINGTON, D.C. NOVEMBER 2012**

**STUDY COMMISSION NO. 1
JUDICIAL SPECIALIZATION QUESTIONNAIRE**

RESPONSE: CANADA

1. In your country, do you have

- a) specialized courts dealing with certain types of cases**
- b) specialized judges for certain types of cases working in the general courts**

Please describe the different types of specialized courts of judges.

The responses to this questionnaire will focus on the specialization of courts and judges at the provincial and territorial superior court level. Specifically the Alberta Court of Queen's Bench and the Ontario Superior Court of Justice will be used for comparison.

There has been a move towards specialization at the provincial court level, as seen with the creation of Domestic Violence or Drug Treatment courts. Yet at the superior court level, the amount of specialization of courts and judges varies from province to province. While Alberta has not been quick to embrace specialization, it is quite extensive in Ontario.

The provincial and territorial superior courts, such as the Alberta Court of Queen's Bench, have inherent jurisdiction. This means they can hear any case in any area, except those that are specifically limited to another level, such as the Court of Appeal, or specifically excluded by statute. In particular, their jurisdiction is limited by two specialized courts: the Federal Court and the Tax Court. The Federal Court of Canada, a trial-level court, deals solely with matters specified in federal statutes and has civil jurisdiction. The Tax Court of Canada primarily hears disputes between the federal government and taxpayers and only has jurisdiction under the *Tax Court of Canada Act*.

One of the only specialized courts at the provincial superior level is the Unified Family Court. This model partially exists in Ontario but has not been adopted in Alberta. Provinces such as Prince Edward Island and New Brunswick have fully implemented this form of specialization. The unified family court allows all aspects of family law from both provincial and federal statutes to be dealt with in a single court with specialized superior court judges.

In Ontario (and similarly in Saskatchewan, Manitoba, Nova Scotia and Newfoundland), the Family Court, a branch of the Superior Court of Justice, has exclusive jurisdiction over all family law matters in certain locations. In the more remote areas where there is no Family Court, the General Division of the Superior Court of Justice has concurrent jurisdiction to deal with the family law matters that are not governed by provincial law. Currently, the Family Court serves

about 40 percent of Ontario's population and has been continually expanding. Where a Family Court exists, the judges are assigned exclusively to that court and have expertise in the area of family law.

While Alberta does not have a unified family court with specialized judges, there are specialized family proceedings that any judge can be assigned to. For example, there is a daily "Family Law Chambers" courtroom reserved for family law matters only.

Another specialized court in Ontario is the Divisional Court, which is an appellate court at the provincial superior court level. Judges of the Divisional Court hear appeals from Small Claims Court judgments, Masters' orders, Superior Court final orders for amounts under \$50,000, Superior Court interlocutory orders and appeals relating to judicial review of decisions of administrative tribunals. There are usually three judges sitting, one who is exclusively assigned to the Divisional Court and two who rotate through other areas, known as "roving" judges. In Alberta, there is no separate court designated to hear such matters. Appeals from Small Claims Court judgments, Masters' orders, and many applications for judicial review of or appeal from administrative tribunals are heard by a single judge of the Court of Queen's Bench of Alberta.

At the Ontario Superior Court of Justice, the degree of judicial specialization is extensive. If a judge is not part of the Family Court or Divisional Court, they are assigned to either the Criminal or Civil List. Within the Criminal List there are two teams: the long trial and short trial teams. More experienced judges who are experts in criminal law are assigned to the long trial team in order to maximize the use of court resources. The Civil List is divided into the Family Law Team and the Commercial Team, and assignments to each are based on expertise. Each team also has a leader who is appointed by the Regional Senior Justice, based on an application and an expression of interest. Almost all of the judges will work exclusively in the area to which they are assigned. A few "roving" judges will be given work from both the Criminal and Civil Lists. There are also three judges who are designated to certify class actions.

In contrast, at the Alberta Court of Queen's Bench, generally any judge can be assigned to any type of case, irrespective of their legal background. Work tends to be distributed according to time and availability, as opposed to preference or area of expertise. Still, there are some examples of judicial specialization. In the past, there was a small specialized group of judges in Edmonton who were assigned to work exclusively on interim matrimonial relief cases. However this only lasted about five years. Currently, there is a specialized group of judges assigned in both Edmonton and Calgary to the "Commercial Practice Group" to hear commercial matters. Judges with a strong corporate background and/or interest in corporate litigation volunteer to become part of the group and deal specifically with commercial cases. Yet these judges are still assigned to files in other areas of law.

2. Have there been arguments presented IN FAVOUR OF increased specialization of judges/courts in your country?

If the answer is affirmative, please state these arguments.

While we provide no opinion on the arguments in favour of increased specialization, here are some of the arguments that have been expressed:

- It makes sense to give complex legal issues to the judges who have a background and expertise in that field;
- Concentrated treatment of similar cases improves the quality and timeliness of the judicial process;
- Judges enhance the level of their expertise by dealing with a constant stream of similar cases, which in turn improves the efficiency, consistency and predictability of judgments;
- Administrative efficiency: specialization decreases the potential for services that are fragmented and sometimes overlapping;
- Improves the court backlog and lessens wait times;
- Creates uniformity between cases and limits variance across the province;
- It can be an effective response where there is a need to alleviate the General Division dealing with too high a volume of cases in the same area. For example, the Divisional Court in Ontario was in part created because of the large number of judicial review files that came before the Superior Court;
- Specialization makes navigating the court process easier and more transparent for self-represented litigants, as they can deal with all of their related matters in the same court. For example, the unified family courts that exist handle all family matters, as opposed to some being heard at the provincial level and others at the superior level;
- In the long run money can be saved and reinvested to provide more services by creating a more efficient process, and redeploying judges to other areas. For example, with the creation of unified family courts, there is no longer a need for provincial court family division judges;
- Implementing specialized courts effectively means a *new* court is created. This allows for innovation in terms of moving towards a more user-friendly, client-focused system that can offer new and improved services, such as more mediation and simplified procedures.

3. Have there been arguments presented AGAINST increased specialization of judges/courts in your country?

If the answer is affirmative, please state these arguments.

While we provide no opinion on the arguments against increased specialization, here are some of the arguments that have been expressed:

- Specialization of the judiciary places judges in niches which leads to burnout. Burnout has been a complaint of judges from the unified family courts;
- It eliminates the potential for judges from unrelated backgrounds to provide different perspectives;
- Creating more specialized courts is only effective if the need exists in terms of volume. For example, the Alberta Court of Queen's Bench does not need a Divisional Court to hear judicial reviews, in comparison to the Ontario Superior Court of Justice which could no longer handle the file load;
- Increased specialization results in administrative changes which are costly, at least in the short-term. Both federal and provincial governments must be on board for the creation of a new unified court of superior jurisdiction;
- The creation of specialized courts, such as a unified family court, may limit access to justice due to fewer court locations. Making specialized courts available to everyone within a reasonable time and distance might be a challenge, especially in a huge province such as Alberta. However, some of these concerns can be alleviated through technology, the use of circuit courts, and the use of the superior court general division where no specialized court exists;
- Staff shortage: it may be difficult to find enough judges interested in being specialized, or alternatively enough judges who have an adequate level of expertise in the area;
- It could lead to an increased use of superior court judges in more administrative capacities;
- Potential jurisdiction problems between levels of court. For example, a unified family court takes some jurisdiction away from the provincial court level and gives it to the superior court level;
- Despite efficiency arguments, specialized courts may lead to longer hearings given a higher degree of scrutiny. Specialization might also encourage more self-represented litigants, which may create greater delays;
- There are concerns about disparity in services provided between rural and urban locations;
- Creating specialized courts may result in the imposition of higher filing fees, which may decrease access.

4. How is specialization in the judiciary obtained:

- a) by recruiting specialized persons to become a specialized judge**
- b) by specialized training before/during office**
- c) by “on the job” training by colleagues**
- d) other means, please describe how.**

In general, specialization in the judiciary is obtained a) by recruiting specialized persons to become a specialized judge. In other words, judges with an expertise or background in the area are appointed to the specialized group or court. Usually the expertise and training is acquired during their career in legal practice, or alternatively after years of working on many files in the same area while on the bench.

Unlike in the EU, there are no schools to become judges. The sole requirements are to complete law school, pass the Bar, and practice as a lawyer for no less than ten years. In law school, students are taught in all areas of law with many required courses and no specific specialization (although in upper years they can focus on a certain area by enrolling in classes of their choice). Across Canada the same standards exist for lawyers being appointed to the bench. In general, becoming a judge in Canada at the superior court level is interest- and merit-based. There are no specialization requirements or training to become part of the judiciary. The judges who form our judiciary in Canada come from a broad array of backgrounds; from academia to corporate solicitors to criminal litigators, and so on.

However, once appointed to the bench, there are opportunities to take advantage of specialized experiences, and the amount of specialization varies from province to province. For example, in provinces such as Prince Edward Island that have created a unified family court, the judges are first appointed to the general division of the superior court. The judges who have a background in family law - either because of their previous legal career or by working on a lot of family files as a judge - are then appointed to the Unified Family Court and become more specialized with time. In Ontario, lawyers who are already experts in the area of family law are appointed directly to the Family Court.

There are multiple specialized experiences a judge can take advantage of, including teaching a university law school course, or becoming part of a specialized team such as the Commercial Practice Group at the Court of Queen’s Bench in Alberta. There are also many conferences and meetings in which judges can take part. One of the best forms of training for judges comes from their open-door policy, which encourages learning from colleagues. The National Judicial Institute is considered to be the primary educator for the Canadian judiciary, and is an excellent resource for providing judges with educational opportunities. This includes in-person or online courses and seminars, conferences and meetings, as well as a library of electronic “Bench Books” exclusively available to the judiciary, which facilitates the circulation of opinions and memos amongst judges.

5. Career:

- a) Does a specialized judge remain in the same position during the judge’s**

(lifetime?) career or is that judge's appointment only for a certain period, after which the judge is automatically appointed to another specialization/court?

b) Can the judge move to another court/specialized function at his/her own demand?

The period of time a specialized judge remains in the same position varies. In Ontario, judicial appointments to the Family Court tend to be for life. At the Ontario Divisional Court, one judge is appointed permanently and two other "roving" judges rotate with others from the General Division. At the Ontario Superior Court of Justice, in order to gain exposure in unfamiliar areas of law, the judges are initially appointed to the Criminal Team if their background is in Civil or Corporate law and to the Civil Team if they practiced criminal law. At this stage, the judges have no choice in their placement. Following their first year on the bench, the judges spend the remainder of their judicial career on the team which they have a background in. While there is some movement based on need and interest, usually the judges continue in their respective areas of expertise.

Given that there is so little judicial specialization in Alberta, the process of becoming a part of or being removed from a specialized group is very informal. Since involvement in a specialized area, such as the Commercial Practice Group, is voluntary and based on interest and expertise, a judge's ability to work with a specialized group simply depends on if the request is made, if there is room, and on their individual workload. A judge always has the option to move out of that area.

6. In your view, could specialization have an impact on the independence of a judge or the judiciary? If so, in what way?

There is no clear answer to this question as it depends on a number of factors. Some research indicates that courts operate most effectively where the judges are given a variety of assignments. Work with greater depth and breadth increases job satisfaction and improves job performance, which includes judicial independence. Some argue that the more specialized a judge becomes, the more difficult it can become to make decisions without preconceived notions. Moreover, the risk to judicial independence is not specialization *per se*, but *overspecialization*, which some argue may hinder professional development, narrow focus, and turn attention away from the larger context.

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