

INTERNATIONAL ASSOCIATION OF JUDGES' ANNUAL MEETING
TEL AVIV, SEPTEMBER 2022

ASIAN, NORTH AMERICAN AND OCEANIAN
REGIONAL GROUP EDUCATION SESSION

**DIVERSITY IN THE FEDERAL JUDICIARY –
Canada's response to Judge Allyson Duncan (ret.)'s Report**

August 31, 2022

By: *The Honourable Kristine Eidsvik, Q.C.,*
retired Justice of the Court of Queen's Bench of Alberta, and
The Honourable Mr. Justice William Goodridge,
Court of Appeal of Newfoundland and Labrador

We have been asked to provide a Canadian response to the excellent paper on Diversity in the Federal Judiciary, as submitted by Judge Duncan (ret.), of the United States of America. Judge Duncan discussed the diversity issue from three perspectives: 1. What is its status? 2. Why does it matter and 3. What can be done? For ease of discussion, we shall follow this same format.

1. Diversity on the bench's status in Canada?

Background

The Canadian judiciary is composed of federally appointed judges (also known as s.96 judges of the *Constitution Act, 1867*) and provincially appointed ones. Like Judge Duncan's paper, we shall focus on federally appointed judges. These include judges of the superior court trial level, courts of appeal for each province (who also sit on appeals from certain Territories), and the Supreme Court of Canada. In total, there are approximately 1200 of such judges.

All federal judges are appointed by the Governor General in Council (i.e. the federal cabinet) on the recommendation of the Minister of Justice (except for Chief Justices and the 9 members of our Supreme Court which are made on the recommendation of the Prime Minister). The appointments are informed by a vetting process conducted by one of 17 independent judicial advisory committees. There is an application process for judicial candidates with the only legislative requirement for most courts (the Supreme Court being the exception which we will return to) being that they must have 10 years of legal experience. In practice, most appointees have at least 20 years of such experience. Federal judges are appointed for "life" – which now means to age 75 (with a life annuity to follow until death).

Numbers

To discuss numbers and “diversity” on the Bench, we believe that it is important to discuss what we mean by “diversity” when we discuss the Bench’s composition. Historically, Canada’s judiciary was not diverse: it was composed of mainly older white males of British or French descent.

In the last several decades however, as noted by Dean Lorne Sossin (now of the Court of Appeal of Ontario) in his stirring working paper “*Should Canada Have a Representative Supreme Court?*” (2009, Institute of Intergovernmental Relations School of Public Policy, e-copy available at <https://ssrn.com/abstract=1911319>) at p.2: “Canada has been transformed from a society with predominantly European roots into one that embraces many cultures and traditions.” He pointed out that one Canadian in nine is a member of a visible minority and that there are more than ninety different ethnic groups in the Toronto metropolitan area alone.

In the past, the overarching priority for the appointment to the Supreme Court of Canada was *regional* diversity. According to the *Supreme Court Act*, three judges must come from Quebec. By tradition, three come from Ontario, one from Atlantic Canada, one from the Midwest and one from British Columbia. This regional diversity, *de facto* lead to some linguistic diversity (between English and French). More recently, the policy of the federal government has been to appoint only bilingual judges to the Supreme Court.

Gender diversity has been a priority of the federal government for many decades now, although, it is only in the last few years that parity in that regard is coming close. For instance, 40 years ago, there was one female Court of Appeal Judge (of 14) and two female Court of Queen’s Bench judges of 55 in Alberta. Today in Alberta there is a 50/50 gender balance based on the total number of judges for both Courts.

The first female Supreme Court of Canada judge, Justice Bertha Wilson, was appointed in 1982. Four of nine Supreme Court judges were women by 2004 (which dipped temporarily to three of nine last year). Importantly, 57% of the appointments between 2016 and 2021 were women – upping the overall ratio of judges to 44% women and 56% men.

Visible minority diversity, or racial diversity as discussed in Judge Duncan’s paper, was not at the forefront of government priorities for many years. Nor was a minority ethnic and cultural group, indigenous, or sexual orientation membership prioritized as a diversity issue for a variety of reasons.

Sossin's paper of 2009 noted that only two judges on the Supreme Court were not of British or French descent (Justice Sopinka who was of Ukrainian descent and Justice Iacobucci who was of Italian descent), and there had only been four Jewish appointments (the others were Christian presumably). He noted that although some diversity of the Court had been enhanced by 2009, the Supreme Court at that point remained "distinctively and remarkably homogeneous". Over the last 12 years, diversity in judicial appointments has improved significantly, both at the Supreme Court level and overall.

Justice Lynne Leitch, of the Ontario Superior Court discussed in her paper "*Strengthening Judicial Integrity through Inclusiveness and Diversity: A Canadian Perspective*" (e-copy at <https://www.unodc.org/dohadeclaration/en/news/2021/12>) the fact that in 2015 one of the election pledges of the new Canadian Government was to implement a transparent and accountable selection process that identified outstanding judicial candidates who reflected Canada's diversity and a gender balance. This election pledge was implemented by diversifying the judicial advisory committees, requiring the committee members to take diversity training, and collecting more detailed nominee and appointment data.

The application form for the federal judiciary, that we discussed above, was amended to include a self-identification section (voluntarily completed), that asked if the candidate was: "Indigenous", a "Visible Minority", from an "Ethnic/Cultural Group or other", had a "Disability", was from the "LGBTQ2" community, or a "Woman" (obviously one could be from many of these groups at once). The government has tracked the numbers of applications and appointments from this group since 2016 when the new application was released (see the Office of the Commissioner for Federal Judicial Affairs website at www.fja.gc.ca for these statistics).

In sum, of the 370 appointments made over the last 5 years, excluding women (which was discussed above), 144 (or 39%) identified themselves as a member of one of the groups that the Canadian Government considers "diverse".

Not included in these statistics are the last two historic appointments to our Supreme Court of Canada: Justice Mahmood Jamal, the first visible minority appointed last July, and Justice Michelle O'Bonsowin, the first Indigenous appointment just a few weeks ago.

The statistics of the breakdown of "diverse" judges on the Canadian Federal Bench presently, beyond the gender divide, are not available on the Commissioner's site. However, as late as 2020 the Canadian Bar Association was continuing to call on the Federal Government to appoint more black, indigenous and people of colour to the federal benches. A press release made on

September 14, 2020, suggested that in 2019 only 8% of federal appointees identified as visible minorities. Clearly, Canada has some way to go, however, diversity on the bench is improving.

2. Why does it matter?

There is little to no disagreement in Canada that a diverse bench is important, and perhaps essential if we are to maintain the public's trust. As Justice Shirzad Ahmed pointed out in his Keynote Address to the Conference of Canadian Association of Refugee Lawyers in April, 2021, "*Racial Diversity on the Bench*" (e-copy available at www.fct-cf.gc.ca/en/pages/media/speeches), the notion that diversity is important is "commonplace" in Canada. He noted that "The need for diversity on the bench is also recognised institutionally throughout the legal system, including by the Federal Court in its 2020-2025 Strategic Plan, as well as statements of Chief Justice Wagner of the Supreme Court, Prime Minister Justin Trudeau, and the Department of Justice."

Justice Leitch put it well: "Diverse judiciaries produce better justice." She elaborated that this was because firstly, diversity enhances judicial thinking and perspective, secondly, it strengthens the judicial system and thirdly, it inspires and maintains public confidence in the judiciary.

She concluded that the notion that a focus on diversity risks compromising judicial excellence is an outdated idea of merit. Indeed, in our view, it is quite the opposite, namely, that a focus on diversity *enhances* judicial excellence.

In short, we agree with the position set out in Judge Duncan's paper that diversity on the federal bench is critical.

3. What can be done?

Judge Duncan's paper outlines some of the "pipeline" issues that hinder the improvement of a diverse bench. These included law school admissions, law school loan forgiveness (cost issue) and judicial clerkship availability.

The academic and cost hurdles for admission to law school in Canada are similar to those in the USA, although this cost hurdle is slightly lower in Canada by comparison. There is no indication in Canada that attending the "right law school" improves one's prospects for appointment to the bench. That is perhaps a phenomenon more unique to the USA.

The Canadian Bar Association has been much more vocal about the need to diversify the bench, and law firms have indirectly promoted this objective. For example, some Canadian law firms are hiring lawyers who devote their full time to equity, diversity and inclusion (see for instance an article by Shareen Samuels, the Head of equity diversity, and inclusion at Gowling WLG Canada LLP and her recent article on *“Using Real Data to Effect meaningful Change”* – Canadian Lawyer Magazine, August, 2022).

Other suggestions about ‘what can be done’ have been made by speakers at many recent Canadian seminars on the subject, and include:

1. Asking the judiciary to encourage strong “diverse” lawyers to apply to the bench. The notion of a “tap on the shoulder” has been repeated many times by those members on the bench who were encouraged by other judges. Indeed, our most recent Indigenous appointee at the Supreme Court, Justice O’Bonsowin, mentioned that the encouragement she received from another judge motivated her to apply to the bench (and again later to the Supreme Court).
2. The need for lawyers to lobby the federal government to prioritize diversity in appointments. As mentioned, this is now an institutional concern of the Canadian Bar Association.
3. Improving accessibility in courthouses to accommodate those with mobility challenges should be prioritized according to the Chief Justice of the Ontario Court of Appeal, Justice Strathy. One might think that this would be an issue only in older courthouses – but that is not the case. The relatively new courthouse opened in 2007 in Calgary had to be retrofitted to allow two of our wheelchair bound judges access the dias.
4. Encouraging cultural competence education at the law school, bar and bench levels so that the need for diverse appointments continues to be encouraged. As mentioned, this training was implemented for the judicial appointment committee, and it has now become part of the ethical duties of the bar and bench.

Conclusion

We believe that the discussion about the need for diversity on our benches is an important one. It is necessary so that the bench is strengthened by the variety of backgrounds and points of view that emanate from such members, which in turns leads to better justice, and more widespread trust in the judicial system from those it serves. The recognition of this need has exponentially grown in Canada over the last 10 years – but it requires vigilance and continued effort to continue to improve – we are not there yet.

Respectfully,

The Hon. K.M. Eidsvik, Q.C. and The Hon. Mr. Justice William Goodridge