REFORMING JUDICIAL APPOINTMENTS: CHANGE AND CHALLENGE

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Introduction

The Ivan C. Rand Memorial Lecture Series has a history of topicality.[1] On October 20, 2016, Professor Peter H. Russell delivered the 23rd lecture,[2] a thoughtful analysis of the reformed Supreme Court of Canada selection process announced by Prime Minister Trudeau in August 2016. I was delighted to participate as a member of the discussant panel. Three days before the lecture, the Prime Minister announced the nomination of Justice Malcolm Rowe to fill the seat vacated by the Honourable Justice Thomas Cromwell. The nomination provided concrete fodder for the lecture and discussion, particularly with respect to two issues which garnered public attention in the lead-up: the requirement of functional bilingualism, and the immediate fate of the convention of regional representation. The icing on the cake came on the day of the lecture, when the federal government announced substantial changes to the federal judicial appointment process. These changes were intended, in their words, to "increase the openness, transparency, accountability, and diversity of Canada's judiciary."[3] It was hard not to wonder if the lecture planners had access to insider knowledge.

In his 2008 Rand lecture, "Judicial Appointments, Democratic Aspirations, and the Culture of Accountability",[4] Professor Lorne Sossin noted the historic complacency which has surrounded judicial appointment in Canada. For many, a tradition of judicial excellence meant that "fixing judicial appointment truly is a solution in search of a problem."[5] In his lecture, Professor Sossin challenged this

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[1] Recent iterations of the lecture have addressed Indigenous rights and cyberbullying. See John Borrows, "Unextinguished: Rights and the Indian Act" (2016) 67 UNBLJ 3, and A Wayne MacKay, "Law as an Ally or Enemy in the War on Cyberbullying: Exploring the Contested Terrain of Privacy and Other Legal Concepts in the Age of Technology and Social Media" (2015) 66 UNBLJ 3.

[2] Peter H Russell, "Selecting Supreme Court Justices: Is Trudeau's Sunny Way a Better Way?" (2017) 69 UNBLJ 3.

[3] See online: <news.gc.ca/web/article-en.do?nid=1140619>. The government also appointed twenty-four new judges. Judicial appointments are announced via the Department of Justice website, online: <www.justice.gc.ca/eng/news-nouv/ja-nj.asp?action=tdetail&tid=4>. Details of the last five years of appointments are available. Information about the appointments process is found on the website of the Office of the Commissioner for Federal Judicial Affairs, online: <www.fja-cmf.gc.ca/home-accueil/index-eng.html>.

[4] (2008) 58 UNBLJ 11.

[5] *Ibid* at 12.

view, arguing that the system of appointment was both "inconsistent with the independence of the judiciary" and out-of-step with contemporary political norms of transparency and accountability. [6] The timing of his critique was not a coincidence. In 2006, Prime Minister Stephen Harper entered office with a promise to bring transparency and accountability to judicial appointments. In this, he was capitalizing on reforms to the Supreme Court process initiated by the previous liberal government,[7] as well as reforms to the section 96 process introduced by Prime Minister Mulroney in 1988. Prime Minister Harper's commitment to reforming Supreme Court appointments was inconsistent and ultimately ad hoc,[8] but he did make relatively dramatic shifts in both the composition and powers of the Judicial Advisory Committees (JACs) which screened section 96 appointments.[9] These changes were controversial and were subjected to sustained critique by the legal academy, the legal profession, policy makers and even the judiciary.[10] The debate appears to have catalyzed the far-reaching reforms to judicial appointments announced by the Trudeau government in August and October of 2016. There is no doubt that the politicization of judicial appointment has not ended with the defeat of the Harper government.[11] Rather, the politics have shifted. The question now is whether the current reforms are cut from the same (but differently patterned) cloth, or whether they are in fact more consistent with our democratic aspirations and constitutional commitments. In my view, the answer to this will depend on the nature of the constraints these reforms impose on the mostly unfettered executive prerogative to appoint judges. Do they, in theory and in practice, tend to enhance the constitutional guarantees of judicial independence and impartiality? This is a big question, and one which cannot be answered this early. My present aim is far more modest; I intend to offer a preliminary assessment of the ways in which the current reforms are informed by and consistent with a commitment to judicial diversity.[12]

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[6] *Ibid.*

[7] See Professor Russell's discussion of this history in this volume. For a comprehensive analysis see Adam Dodek, "Reforming the Supreme Court Appointment Process, 2004-2014: A Ten Year Democratic Audit" (2014) 67 SCLR (2d) 111, online: <digitalcommons.osgoode.yorku.ca/sclr/vol67/iss1/4/>.

[8] *Ibid.*

[9] See my discussion of these changes in Rosemary Cairns Way, "Deliberate Disregard: Judicial Appointments under the Harper Government" (2014) SCLR (2d) 43 at 55–59, online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1284&context=sclr>.

[10] See e.g. Carissima Mathen, "Choices and Controversy: Judicial Appointments in Canada" (2008) 58 UNBLJ 52; Sossin, *supra* note 4. Even the Canadian Judicial Council participated in the debate; see Canadian Judicial Council, News Release, "Judicial Appointments: Perspective from the Canadian Judicial Council" (20 February 2007), online: <https://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_2007_en.asp>.

[11] For a fascinating range of views on the impact of the Harper government on the politics of judicial appointments, see "Stephen Harper and the Judiciary", *Policy Options*, online: <policyoptions.irpp.org/magazines/october-2015/stephen-harper-and-the-judiciary/>.

[12] The language we use is important, and the language of diversity carries political and ideological baggage. The work of Professor Sonia Lawrence is especially instructive here. She suggests that representation may be a more useful term which "more squarely confronts the ways in which a homogenous — or otherwise non-representative — bench threatens impartiality, by calling attention to the disparity between the judges and the judged." See Sonia Lawrence, "Reflections: On Judicial Diversity

There is no doubt that they are a far cry from the "deliberate disregard of diversity"[13] displayed by the former government.

There are three parts to my discussion. First, I explain why diversity matters to judging. Second, I consider how diversity ideals inform the new Supreme Court of Canada appointment process, and examine the conflicting challenges presented by a commitment to diversity measured on axes of region, language and identity. Third, I briefly examine the ways in which the section 96 reforms reflect the same public commitment to diversity.

Why Diversity Matters

The last decades have seen the emergence of a remarkable professional and intellectual consensus on the importance of a judicial appointments process which takes account of diversity. In 2012, Chief Justice Beverley McLachlin publicly recognized the need for "a bench that better mirrors the people it judges."[14] In August of 2013, the CBA reiterated its long-standing call for increased diversity on the bench, pointing out 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 in the Canadian population."[15] The urgent need for Aboriginal judges has been highlighted by the CBA and the Indigenous Bar Association,[16] and the fact that this need persists at a time when there is a judicially acknowledged crisis of criminal justice legitimacy for aboriginal peoples[17] makes it especially urgent.

Until October of 2016, the calls for change had little apparent impact on the federal appointments process. Canada's federal judiciary remains overwhelmingly white and male, at the same time as Canadian society grows increasingly diverse.

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and Judicial Independence" in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 193 at 207. I agree. Nevertheless, diversity is the language currently chosen by the governments.

[13] *Supra* note 9.

[14] The Right Honourable Beverley McLachlin, "Judging: the Challenges of Diversity" (Remarks delivered at the Judicial Studies Committee Inaugural Annual Lecture, Edinburgh, Scotland, 7 June 2012), online: <www.scotland-judiciary.org.uk/Upload/Documents/JSCInauguralLectureJune2012.pdf>.

[15] 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>.

[16] Canadian Bar Association, Resolution 05-01-A, "Recognition of Legal Pluralism in Judicial Appointments" (13 August 2005), online: <https://www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2005/Recognition-of-Legal-Pluralism-in-Judicial-Appoint/05-01-A.pdf>; James C Hopkins & Albert C Peeling, "Aboriginal Judicial Appointments to the Supreme Court of Canada" (April 2004), online: <www.indigenousbar.ca/pdf/Aboriginal%20Appointment%20to%20the%20Supreme%20Court%20Final.pdf>.

[17] *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385; *R v Ipeelee* 2012 SCC 13, [2012] 1 SCR 433.

The number of women on the federal bench has crept upwards at a glacial pace.[18] As of April 30, 2016, only 35% of the federal bench was female. Statistics on indigeneity and race are even more troubling. In a five-year study of federal appointments, from 2009-14, I concluded that Aboriginal judges were being appointed to superior courts at a rate of barely more than 1%, while visible minority judges were appointed at a rate of half that.[19] Meanwhile, almost 20% of Canadians are members of visible minority communities. In large urban centres like Toronto and Vancouver, visible minorities account for almost 50% of the population.[20] Aboriginal peoples make up 4% of the Canadian population, and the population is growing.[21] There is clear evidence that the demographics of the legal profession are changing, although the profession is not as diverse as the general population.[22] Nevertheless a substantial pool of exceptionally talented women, aboriginal, and visible minority lawyers are qualified for appointment.

Why does diversity matter? The significance of diversity to judging depends on a claim about who judges are – products of lived experience – and what judges do – apply the law and exercise discretion. Even the Chief Justice has acknowledged that "a variety of subjective influences — our beliefs about the world and about human nature, our emotions, and our sense of justice — are inescapably part of judicial decision-making."[23] The more diverse the bench, the better the

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[18] Kirk Makin, "Appointments of female judges slump under Harper's Tories" *The Globe and Mail* (11 November 2011), online: <www.theglobeandmail.com/news/politics/appointments-of-female-judges-slump-under-harpers-tories/article4183464/ >; Rosemary Cairns Way et al, "Forget MacKay, A Woman's Place is on the Bench", Op-Ed, *The Globe and Mail*, online: <www.theglobeandmail.com/opinion/forget-mackay-a-womans-place-is-on-the-bench/article19256607/ >.

[19] *Supra* note 10 at 61–64. See also, Rosemary Cairns Way, "Words are not Enough", *Policy Options* (5 October 2015), online: <policyoptions.irpp.org/magazines/october-2015/stephen-harper-and-the-judiciary/judicialdiversity/>.

[20] Statistics Canada, *Immigration and Ethnocultural Diversity in Canada*, Catalogue No 99-010-X, online: <12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/2011001/tbl/tbl2-eng.cfm>.

[21] Statistics Canada, *Aboriginal Peoples in Canada: First Nations People, Métis and Inuit*, Catalogue No 99-011-X, online: <12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm#bx6>.

[22] Michael Ornstein, *Racialization and Gender of Lawyers in Ontario* (Toronto: The Law Society of Upper Canada, 2010). The report concludes: "The legal profession in Ontario is changing dramatically. The number of lawyers who are women, Aboriginal and members of a visible minority continues to grow, transforming the face of a profession that until the early 1970s was primarily White and male. … Leading the transformation is an extraordinary increase in the percentage and number of women lawyers. Accounting for just 5 percent of Ontario lawyers in 1971, growth in the number of women lawyers has continued unabated for 35 years. In 2006 women accounted for nearly 60 percent of the youngest lawyers and 38 percent of all lawyers in Ontario. … In the last decade, gains in the representation of women are attributable largely to increased numbers of racialized women. Racialized women account for no less than 16 percent of all lawyers under 30, compared to just 5 percent of lawyers 30 and older; racialized men account for 7 percent of lawyers under 30, compared to 6 percent of lawyers 30 and older. The percentage of Ontario lawyers who were Aboriginal was unchanged between 1981 and 2001, but increased from 0.6 to 1.0 percent between 2001 and 2006." In December of 2016, the Law Society of Upper Canada approved the Challenges Faced by Racialized Licensees Challenges Working Group's final report, with 13 recommendations to address issues of systemic racism in the legal professions. Copies of the report and the recommendations are available online: <https://www.lsuc.on.ca/racialized-licensees/>.

[23] *Supra* note 16.

quality of judgment. Increasing the range of perspectives and experiences among the judiciary will increase the likelihood of truly impartial judgment – judgment that does not unintentionally replicate the perspectives and values of a limited subset of human experience. A diverse bench increases the judiciary's capacity to be both individually and structurally (institutionally) impartial.[24] It also provides a public guarantee that appointments are animated by the constitutional norm of antidiscrimination. A homogenous bench suggests an appointments process which disproportionately denies opportunities to indigenous peoples, racialized individuals, women, and other members of equality-seeking groups. This is not a claim about intention. Rather it is a claim that executive discretion constrained only by an uncritical allegiance to merit has the potential to reinforce an unrepresentative status quo, while at the same time resisting substantive change. In the absence of transparency, the only way to assess the process is to observe the results. And when the results are an unrepresentative bench, the public has a right to worry that the institution charged with the delivery of impartial justice and the protection of the rule of law may be institutionally incapable of delivering on these promises. Justice, in a diverse society, is more likely to be both done and seen to be done, when the institution dispensing justice reflects that diversity.

Diversity Objectives and the New Supreme Court Process

When asked why his cabinet had equal numbers of men and women, Prime Minister Trudeau famously responded, "Because it's 2015!" The Prime Minister has delivered a remarkably consistent message on the importance of equality and diversity since being elected. Ministerial mandate letters were made publicly available in November 2015.[25] The mandate letters committed the government at large to "transparent, merit-based appointments" which would help ensure gender parity, and a better reflection of "Indigenous Canadians and minority groups in positions of leadership."[26] The Minister of Justice's mandate letter made specific reference to the appointment of Supreme Court Justices, and on August 2, 2016, the government followed through on its promise by announcing a thoroughly revamped appointment process,[27] which it used for the subsequent appointment of Justice Malcolm Rowe.[28]

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[24] The importance of structural impartiality is examined by Sherrilyn A Ifill, "Racial Diversity on the Bench: Beyond Role Models and Public Confidence" (2000) 57 Wash & Lee L Rev 405 at 411.

[25] All of the letters are available online: <pm.gc.ca/eng/mandate-letters>.

[26] Each letter includes this commitment.

[27] Online: <pm.gc.ca/eng/news/2016/08/02/prime-minister-announces-new-supreme-court-canada-judicial-appointments-process>.

[28] Online: <pm.gc.ca/eng/news/2016/10/17/prime-minister-announces-nomination-mr-justice-malcolm-rowe-supreme-court-canada>.

Where, and how, do diversity ideals figure in this new process?[29] As Professor Russell has explained, the centerpiece is the creation of an independent and non-partisan advisory board tasked with assessing applications and providing a short-list of candidates to the Prime Minister.[30] The seven members of the Advisory Board represent the judiciary, the legal profession, the academy, and the public. The Minister of Justice nominates three public members, at least two of whom are from outside the legal community. The government describes the Board member selection process as attentive to "gender balance, diversity (including linguistic diversity), and regional balance," and biographies of the Board members, who continue to serve for up to five years (renewable), demonstrably reflect these values. The purpose of diversifying the Board is to ensure that "diverse perspectives are brought to bear on the ultimate goal of identifying the best candidates." The Board is required to make recommendations to the Prime Minister of no less than three and no more than five candidates, each of whom is "functionally bilingual" and who otherwise meets the criteria for appointment. In addition to receiving applications, the Board is specifically empowered to "actively seek out qualified candidates" and to consult with the Chief Justice of Canada and other key stakeholders as they see fit. The Board is specifically tasked with supporting the government's intent 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." The Board is required to provide an assessment of how each recommended candidate meets the requirements of the *Supreme Court Act*[31] and the extent to which they meet the established criteria, along with any additional reasons in support of their candidacy.

In addition, the Board is obligated to issue a public report on its activities within one month of an appointment. On November 25th 2016 the Advisory Board report was made public.[32] Virtually unprecedented, the report is the most transparent and descriptive commentary on the appointment of a justice to the Supreme Court of Canada ever willingly provided to the Canadian public.[33] It describes the assessment

[29] The new process is thoroughly explained on the website of the Office of the Commissioner for Federal Judicial Affairs, online: <www.fja-cmf.gc.ca/scc-csc/index-eng.html>.

[30] The Terms of Reference of the Advisory Board provide that the short-list does not bind the Prime Minister. The short list does not bind the Prime Minister (1). The Prime Minister may ask the Advisory Board to provide the names of additional qualified candidates (7). The Government has indicated that its intention is to nominate an individual from the shortlist. See "Frequently Asked Questions", online: <www.fja-cmf.gc.ca/scc-csc/questions-eng.html>.

[31] *Supreme Court Act*, RSC 1985, c S-26, ss 5–6.

[32] The report is available online: <www.fja-cmf.gc.ca/scc-csc/Report-Independent-Advisory-Board-for-the-Supreme-Court-of-Canada-Judicial-Appointments-(November2016)_en.pdf>.

[33] A non-authorized, and politically embarrassing description of the selection process which lead to the ultimately unsuccessful nomination of Justice Marc Nadon was published by the Globe and Mail on May 14, 2014. See Sean Fine, "The secret short list that provoked the rift between Chief Justice and the PMO", *The Globe and Mail* (23 May 2014), online: <www.theglobeandmail.com/news/politics/the-secret-short-list-that-caused-a-rift-between-chief-justice-and-pmo/article18823392/?page=all>.

process adopted by the Board, the consultations and outreach initiatives undertaken by the Board, the organizations consulted (including the Indigenous Bar Association and a roundtable of seventeen legal organizations devoted to diversity), the process of individual candidate assessment, and a description of the applicant pool, measured by province, and self-described diversity characteristics. Thirty-one applications were received by the Board: thirteen were women, twenty-four were Anglophone, three self-identified as visible minority, four were indigenous, two had a disability, and two were members of the LGBTQ2 community. Ten applicants were short-listed and invited to an interview. The Report concludes with some timing related recommendations, and notes the particular importance of outreach to "target a broad spectrum of candidates from a variety of backgrounds."

If the Advisory Board is the centerpiece of the new process, the statement of qualifications and criteria for appointment, prepared by Professors Adam Dodek, Charles-Maxime Panaccio and Carissima Mathen, members of the Public Law Group at the University of Ottawa, are the backbone. The criteria reflect the role of the Supreme Court in a mature constitutional democracy, and are functionally linked to the Court's core functions: resolving disputes between a wide range of parties, communicating effectively with the public, upholding the constitution and protecting the rule of law. Broadly divided into three areas, personal skills and experience, personal qualities, and the institutional needs of the court, the criteria are, in the words of Professor Russell, the "most thorough" statement ever prepared on the personal and professional qualities expected of a Supreme Court justice.[34] Three criteria relate directly to the diversity rationale. The first is the capacity to be aware of, and synthesize information about the social context in which legal disputes arise, as well as a sensitivity to changes in social values which relate to the cases before the Court. The second is an ability to appreciate a diversity of views, perspectives and life experiences, including those relating to groups historically disadvantaged in Canadian society. The commentary accompanying this criteria recognizes that judges invariably "draw on common sense and experience," that the judicial perspective must be "neither too narrow nor resistant to change", and must include the "capacity to empathize with persons who come from backgrounds that are very different from one's own." Finally, the criteria note that, at an institutional level, the Supreme Court must reasonably reflect the diversity of Canadian society, a diversity which is not yet "fully reflected in its institutions." A reasonably reflective Court will benefit from a "range of viewpoints and perspectives" and promote "public confidence in the administration of justice as well as in the appointment process."[35]

These thoughtful criteria are made operational by a detailed questionnaire which foregrounds diversity. Candidates are offered an option to self-identify, which is explicitly linked to the government's diversity objectives. In addition to the usual materials related to education, professional and employment history, legal experience and expertise, and legal skills, the questionnaire requires candidates to write five

[34] Russell, *supra* note 2.

[35] The qualifications and assessment criteria for the new appointment process are described online: <www.fja-cmf.gc.ca/scc-csc/qualifications-eng.html>.

short essays exploring their understanding of the judicial role. The questions invite candidates to identify their most significant contribution to the law and pursuit of justice, to describe the ways in which their experiences have offered them insight into the variety and diversity of Canadian experiences, to describe the role of a judge in a constitutional democracy, to identify the audience for the decisions they will render, and finally to describe the qualities, skills and experiences that will equip them for the judicial role. The questionnaire offers applicants, as well as the Advisory Board, and, one presumes, the members of the executive, a unique opportunity to consider the qualities, experiences, obligations and public responsibilities which inhere in the judicial role. Both the process of application itself, as well as the obligation to complete a questionnaire which will become public upon appointment are entirely novel aspects of the new process responsive to the ideals of transparency and accountability in ways which were previously unimaginable.[36]

In short, all of the materials made public as part of the new appointment process are explicitly informed by a commitment to diversity functionally linked to judicial excellence and public trust. They inspire legitimate confidence that appointments to the Supreme Court will be more transparent, inclusive, and consistent with our democratic aspirations than ever before. Of course, this confidence relies on the willingness of the Prime Minister to stand by his public position, a confidence sorely tested by the previous government. And it will require political courage, as the public debate surrounding the Rowe appointment suggests.

Two questions dominated public discussion of the new process. The first was the fate of the convention of regional representation. The second, perhaps less controversial, was the requirement of functional bilingualism. Both questions demonstrate how challenging it can be to take account of diversity, especially when embodied in only nine individuals.[37] I share the view of many that the requirement of functional bilingualism may well require governments to make difficult trade-offs between bilingualism, excellence, and other forms of diversity. I also worry, as Frances Wooley has argued, that there may be an inherent elitism in the bilingualism requirement,[38] although I acknowledge that, by definition the pool of potential candidates for the Supreme Court is unavoidably and necessarily, elite. The Minister of Justice, when asked, suggested that those who contemplate an eventual application to sit on the Supreme Court should achieve functional bilingualism as soon as possible.[39] This suggestion fails to take into account the ways in which opportunities

[36] Justice Rowe's completed questionnaire, redacted only for privacy, is available online: <www.fja-cmf.gc.ca/scc-csc/nominee-candidat-eng.html>. It is a fascinating read.

[37] But see *contra* Michel Doucet, "Le biliguisme: une exigence raisonnable et essentielle pour la nomination des juges à la Cour supreme du Canada" (2017) 68 UNBLJ 30, and the powerful arguments made by Sébastian Grammond & Mark Power, "Should Supreme Court Judges be Required to be Bilingual?" (2011) Institute of Intergovernmental Relations, School of Policy Studies, Queen's University, SC Working Paper 2011–02, online: <www.capitaldocumentation.ca/documents/SCC.pdf>.

[38] Frances Woolley, "A Supreme Folly" (20 October 2016), *ABlawg: The University of Calgary Faculty of Law* Blog (blog), online: <ablawg.ca/2016/10/20/a-supreme-folly/>.

to learn a second language are unequally distributed, and on whom this task will disproportionately fall. Professor Russell has identified the particular challenges of the bilingualism requirement for Aboriginal peoples, and suggests that fluency in an Aboriginal language should be a sufficient equivalent. I disagree. It would be a cruel irony if the unlawful and heartbreaking loss of aboriginal languages occasioned by the residential schools tragedy ended up disqualifying a unilingual Indigenous candidate for the Supreme Court of Canada.[40] I think there is a powerful substantive equality claim, at the least, that functional bilingualism should not be required for Indigenous candidates. The bilingualism requirement, like any other kind of job qualification, has potentially discriminatory adverse impacts which merit concern and respect. Interestingly, the government made functional bilingualism non-negotiable, but was, as I discuss below, prepared to abandon the convention of regional representation. This suggests an ordering of the criteria essential to judicial excellence. The political price of that ordering was made apparent in the lead-up to the nomination.

The convention of regional representation required the appointment of a judge from the Atlantic region to replace Nova Scotia's Thomas Cromwell. It was clear from the outset that the government was prepared to contemplate ignoring the convention. The explicit reason for doing so was an unwillingness to limit the search for "outstanding individuals," a search which the Minister claimed, at the hearing into the nomination, was consistent with "the values of Canadians today, [which] supports a modern Supreme Court of Canada that is reflective of and responsive to those values."[41] The problem, for a government overtly and publicly committed to diversity and to reconciliation with Indigenous peoples, was that their apparent desire to appoint the first Indigenous, or visible minority judge to the Supreme Court of Canada would be made appreciably more difficult if they were limited to Atlantic Canadian candidates. In fact, to be accurate, those goals would be difficult to meet in most parts of the country, given the current demographics of the Canadian judiciary. The government's refusal to pre-emptively limit applications triggered a court challenge in Atlantic Canada,[42] and an unanticipated resolution in the House of

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[39] At the special Justice and Human Rights Committee hearing examining the process by which Justice Rowe was appointed, Minister Wilson-Raybould encouraged "all of those individuals out there that meet the statutory requirements ... to brush up on their French if they are wanting to apply to be the next Supreme Court justice." See "Functionally bilingual requirement here to stay, says Wilson-Raybould", *CBC News* (24 October 2016), online: <www.cbc.ca/news/politics/rowe-campbell-wilson-raybould-supreme-court-1.3819210>.

[40] Kristy Kirkup, "Top court's bilingual rule a barrier to indigenous judges: Sinclair, Bellegarde", *The Globe and Mail* (22 September 2016), online: <www.theglobeandmail.com/news/national/supreme-courts-bilingual-requirement-unfair-sinclair-bellegarde/article32011596/>.

[41] Minister Wilson-Raybould as quoted by Sean Fine, "Liberals stick to countrywide Supreme Court selection process", *The Globe and Mail* (24 October 24 2016), online: <www.theglobeandmail.com/news/national/liberals-stick-to-countrywide-supreme-court-selection-process/article32506870/>.

[42] Peter Zimonjic, "Atlantic Canada lawyers challenge Trudeau on changes to Supreme Court appointment process", *CBC News* (19 September 2016), online: <www.cbc.ca/news/politics/atlantic-lawyers-supreme-court-1.3769108>.

Commons which urged the government to abide by the regional convention.[43] The resolution was unanimously supported by all 270 members of the House, effectively thwarting any desire the government had to look outside Atlantic Canada, and eventually leading to the appointment of Justice Malcolm Rowe.

I have no doubt that Mr. Justice Rowe will be an outstanding Supreme Court judge, who will make an important contribution, not only because of his qualifications as a jurist and public servant, but because of the particular perspective he will bring as a resident of Newfoundland and Labrador. I do worry, however, that the politics of regional diversity has wrongly stymied the justice of the need for racialized Canadians to see themselves represented on the Court, and, perhaps even more importantly, the legitimate claim of Indigenous people. In my view, the necessity of Indigenous representation on the Supreme Court implicates institutional legitimacy. Reconciliation requires the appointment of an Indigenous jurist to the Court because Indigenous legal systems are a legitimate part of an increasingly tri-jural Canada. They must be honoured, implemented, and acknowledged as part of a national process of reconciliation. The Prime Minister's ministerial mandate letters said as much, providing: "[n]o relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership."[44] That renewed relationship requires an indigenous presence on our highest court. In my view, we need to look closely and critically at the convention of regional representation. Are the diversity values served by regional representation truly critical to institutional impartiality? Or, are they more political (historic) than legal? Should that matter? And, in what circumstances do we need to recognize that previously unacknowledged (or suppressed, or colonized) perspectives may be more functionally significant to the evolution of Canadian law than regionalism? The impending retirement of Chief Justice McLachlin will present the current government with another opportunity to appoint a Supreme Court jurist, and many hope that the government will respond with the historic appointment that is institutionally required. However, the political nature of the decision makes delay risky. If 2016 has taught us anything, it is that there is no such thing as certainty in politics.

Diversity and the Federal Judiciary

The government's commitment to judicial diversity in federal appointments was apparent even before it began making formal changes to selection processes in August of 2016. In June 2016, the government announced fifteen section 96 appointments which clearly demonstrated a deliberate shift in priorities. This was confirmed by the Minister's public acknowledgement that "our judicial system is

[43] Kate Simpson, "MPs unanimously support regional representation for Supreme Court", *CBC News* (27 September 2016), online: <www.cbc.ca/news/politics/mps-vote-in-favour-of-regional-representation-scc-custom-1.3781520>.

[44] Online: <pm.gc.ca/eng/mandate-letters>.

more effective, when our judges reflect Canada's diversity,"[45] and her promise that the entire section 96 process was under review. More than half of this group of appointees were women, one was indigenous, one was Asian-Canadian and one was a prominent member of the LGBTQ community. The second batch of judicial appointments was made commensurate with the announced reforms to the federal appointment process on October 20, 2016.[46] Twenty-four judges were appointed and, once again, the group was historically diverse, including two indigenous jurists, one racialized person, and equal numbers of women and men. The government indicated that, going forward, all appointments would be made pursuant to the reforms. As of this writing, no further appointments have been made.

The cornerstone of the section 96 reforms are changes intended to "strengthen the role of Judicial Advisory Committees"[47] (JACs). The government has reversed the changes made in 2006 by: 1) restoring the right of judicial members on the JACs to vote; 2) removing the representative of law enforcement; and 3) re-instating the highly recommended category. Each JAC will consist of seven volunteer members representing the bench, the bar, and the general public and include: one nominee of the provincial or territorial law society, one nominee of the provincial or territorial branch of the CBA, one judge nominated by Chief Justice of the province; one nominee of the provincial Attorney General and three nominees of the federal government explicitly described as representing the 'general public.' Committee members are selected by the federal government from either a list of three nominees provided by the relevant nominating authority, or, for the public representatives, through a new, application-based process. Diversity aspirations are threaded throughout.[48] Members of the JACs are selected "with a view to achieving a gender-balanced Committee that also reflects the diversity of members of each jurisdiction, 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." Along with their assessment of professional competence and overall merit, Committee members are overtly charged with attempting to create a candidate pool which is similarly reflective of the jurisdiction. The criteria for appointment seem largely unchanged, but the completely revamped questionnaire is the same as the one completed by applicants for the Supreme Court of Canada. The option to self-identify is intended, presumably, to allow the government to fulfil its promise of collecting and publishing "statistics and demographic information on both applicants for and appointments to judicial office to measure whether Canada is meeting its diversity

[45] Department of Justice Canada, News Release, "The Government of Canada announces judicial appointments in the province of British Columbia" (17 June 2016), online: <news.gc.ca/web/article-en.do?nid=1086329>.

[46] Department of Justice Canada, News Release, "Government of Canada announces judicial appointments and reforms the appointments process to increase openness and transparency" (20 October 2016), online: <news.gc.ca/web/article-en.do?nid=1140619>.

[47] *Ibid.*

[48] An overview of the new process is found online: <www.fja-cmf.gc.ca/appointments-nominations/index-eng.html>.

goals."[49] I was unable to find any other materials relevant to this commitment online. I assume that the committees, with the assistance of the Commissioner for Federal Judicial Affairs, will be required to produce a regular report, similar to the one produced by the Supreme Court Advisory Board, although this remains to be seen. Similarly, it is unclear whether the questionnaires completed by successful judicial applicants will be made public, as was Justice Rowe's. There is no doubt that the publication of these forms, which ask candidates to reflect on a series of thought-provoking questions about the role of the judiciary in Canada's legal system, will provide fascinating material for future research, in addition to playing an important role in transparency, accountability and public education about the legal system.

Conclusion

In an editorial published on the day of Justice Rowe's nomination to the Supreme Court, the Globe and Mail hailed the nomination as a triumph of "qualifications" over "identity politics."[50] This is a familiar, but simplistic and counter-productive analysis of the complex compromises required by a commitment to diversity on a nine-member court. Judicial appointment in Canada has always been and remains political in a manner consistent with Canadian political traditions. Professor Sossin has suggested that the inevitable political preferences shaping selection processes should not be "the only or primary ones for appointment."[51] I agree. The reforms to judicial appointment put in place in 2016 have the potential to replace pure partisanship with politics of a different sort, politics rooted in legal and constitutional norms … not identity politics, but constitutional politics. In my view, a commitment to diversity which is explicitly linked to the constitutional value of impartiality, and an appointment process which is increasingly transparent and infused with lay participation will augment the judiciary's capacity to operate as independent guarantors of the rule of law. It remains to be seen whether the government can sustain the political will to live up to the public promise of these reforms. I, for one, am cautiously optimistic.

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[49] For a comprehensive discussion of the importance of data collection see Lorne Sossin and Sabrina Lyon, "Diversity and Data in the Canadian Legal Community" (2014) 11 JL & Equality 85.

[50] "Ignoring identity politics, Trudeau makes a Supreme choice", Editorial, *The Globe and Mail* (17 October 2016), online: <www.theglobeandmail.com/opinion/editorials/ignoring-identity-politics-trudeau-makes-a-supreme-choice/article32401085/>.

[51] Lorne Sossin, "Seeing Through Judicial Appointments" Policy Options (5 October 2016); *supra* note 11.