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Erin Crandall*

A Reflection of Canadian Society? An Analysis of Federal Appointments to Provincial Superior Courts by the Liberal Government of Justin Trudeau

Recent reforms to Canada's system of federal judicial appointments have sought to make the process more transparent and better able to produce a bench reflective of the society it serves. This paper reviews these reforms and using judicial appointment data (2016–2020), considers whether the Liberal government has met these objectives. The relationship between official bilingualism and representation on the bench is also considered. The paper finds that "diversity" on Canada's federally appointed provincial courts remains unbalanced. While women have made up the majority of appointments since the Trudeau Liberals formed government in 2015, other equity-deserving groups, like people of colour and people with disabilities, have been appointed in numbers below their proportion of the Canadian population. Additionally, an analysis of the official language skillsets of judicial appointees offers tentative evidence that there may be challenges to fostering a judicial branch that is both representative and officially bilingual.

Les récentes réformes du système canadien de nomination des juges fédéraux ont cherché à rendre le processus plus transparent et mieux à même de produire une magistrature fidèle à la société. Dans cet article, nous passons en revue ces réformes et, à l'aide des données sur les nominations judiciaires (2016–2020), nous examinons si le gouvernement libéral a atteint ces objectifs. La relation entre le bilinguisme officiel et la représentation au sein de la magistrature est également examinée. Dans l'article, nous constatons que la « diversité » parmi les juges provinciaux nommés par le gouvernement fédéral du Canada reste déséquilibrée. Si les femmes constituent la majorité des nominations depuis que les libéraux de Trudeau ont formé le gouvernement en 2015, d'autres groupes méritant l'équité, comme les personnes de couleur et les personnes handicapées, ont été nommées en nombre inférieur à leur proportion dans la population canadienne. De plus, une analyse des compétences en matière de langues officielles des personnes nommées à la magistrature indique qu'il peut être difficile de favoriser une branche judiciaire à la fois représentative et officiellement bilingue.

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Introduction

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Introduction

In October 2016, the Liberal government of Prime Minister Justin Trudeau announced reforms to the federal judicial appointment process. Many of the changes reversed reforms brought in by the previous Conservative government that some had viewed as an effort to tilt the scales towards a more conservative bench.¹ Beyond these changes, the Judicial Advisory Committees (JACs), which are tasked with assessing applications for superior and federal court judgeships across Canada, were given a new mandate to identify “outstanding jurists from a wide range of backgrounds and practice areas, with a view to having a judiciary that reflects the diversity of Canadian society.”² To accompany this mandate, the Office of the Commissioner for Federal Judicial Affairs (CFJA) was tasked with collecting and publishing statistical information on judicial applicants and appointees, including on measures of diversity and official language proficiency. These data were collected from a new questionnaire required for all judicial applicants.

Beginning in 2017, the government undertook an additional initiative to promote transparency in its appointment process by publishing excerpts from judicial appointees’ questionnaires. A novel addition to the process, the excerpts provided a personal response describing an appointee’s background, legal accomplishments, insights into their understanding of the role of the judicial branch in Canadian society, and how their appointment might contribute to “ensuring that Canadians are able to look at the justices

1. Sean Fine, “Stephen Harper’s Courts: How the Judiciary Has Been Remade” *The Globe and Mail* (24 July 2015), online: <www.theglobeandmail.com/news/politics/stephen-harpers-courts-how-the-judiciary-has-been-remade/article25661306/> [perma.cc/CR7C-GEBL].

2. Department of Justice Canada, News Release, “Reforms to the Superior Courts Judicial Appointments Process” (20 October 2016), online: <www.canada.ca/en/departement-justice/news/2016/10/reforms-superior-courts-judicial-appointments-process.html> [perma.cc/YD3-8R7E].

appointed to the bench and see their faces and life experiences reflected there.”³ The questionnaire excerpts offered an added layer of transparency into the evaluation process of the JACs and potentially an understanding of a judicial appointee’s own views on their qualifications, background, and experiences. However, the publication of excerpts has been sporadic, especially since 2018. Despite these limitations, the reforms implemented in 2016 have still produced the most detailed body of public data on the composition of federal judicial applicants and appointees to date.

These changes to the judicial appointment system have occurred at a time when the Liberal government has also prioritized official bilingualism on the Supreme Court of Canada. This has included a commitment by the government to appoint judges only if they are functionally bilingual, and introducing bills, which seek to amend the *Official Languages Act* to require all proceedings conducted at the Supreme Court to be heard by its judges in either French or English without the aid of an interpreter.⁴ Concerns have been raised as to whether these changes may disproportionately impede the appointment of judges from equity-deserving groups.⁵ As a multi-juridical country made up of common law, civil law, and Indigenous law, the absence of Indigenous representation on the Supreme Court for its entire history is especially alarming.⁶ These concerns reveal a potential tension in the government’s stated objective of fostering a more representative judicial branch. Data to support these concerns, however, have so far been scarce.

3. Office of the Commissioner for Federal Judicial Affairs Canada, *Questionnaire for Federal Judicial Appointments* (Ottawa:CFJA, 2021) at 24, online: <www.fja-cmf.gc.ca/appointments-nominations/forms-formulaires/cq-cq/index-eng.html> [perma.cc/2TK4-5S7D].

4. Since June 2021, the Liberal government has introduced two bills to change official language requirements for Supreme Court appointees. Bill C-32 died on the order paper when Parliament was dissolved in August 2021. A similar bill (C-13) was introduced in March 2022 and, as of June 2022, has passed second reading in the House of Commons. See also, “Liberals Table Bill to Protect French in Sweeping Update to Official Languages Act,” *Canadian Press* (15 June 2021), online: <www.ctvnews.ca/politics/liberals-table-bill-to-protect-french-in-sweeping-update-to-official-languages-act-1.5471189> [perma.cc/6MMF-BV2V].

5. Olivia Stefanovich, “Bilingualism Requirement for SCC Justices Creates ‘Needless Barrier’ for Indigenous Candidates, Critics Say,” *CBC News* (31 March 2021), online: <www.cbc.ca/news/politics/supreme-court-proposed-official-languages-reform-1.5969707?cmp=rss> [perma.cc/9WZE-GGXQ]; Tonda MacCharles, “Diversity Is on a Collision Course with Bilingualism at Canada’s Top Court,” *Toronto Star* (6 March 2021), online: <www.thestar.com/politics/federal/2021/03/06/search-for-next-supreme-court-judge-sets-bilingualism-on-a-collision-course-with-diversity.html> [perma.cc/WTX4-JV75].

6. Brooks Arcand-Paul, “Indigenous Laws Are a Critical Part of Canada’s Legal Landscape,” *Canadian Bar Association National Magazine* (21 June 2021), online: <www.nationalmagazine.ca/en-ca/articles/law/rule-of-law/2021/indigenous-laws-a-critical-part-of-canada-s-legal> [perma.cc/34PD-WZ73].

This paper looks to leverage the judicial appointment data produced from 2016–2020 to (1) consider how the Liberal government has performed in meeting its objective of fostering a judicial branch reflective of the population it serves, and (2) explore the relationship between official bilingualism and representation on the bench. It proceeds as follows. The first section addresses why representation on the bench is a critical issue and the complexities of understanding the multiple and overlapping barriers that may affect the appointment of judges from groups who have been marginalized by the existing structures and practices of Canadian society. The second section describes the judicial appointment process for superior courts in Canada and the reforms implemented by the Trudeau Liberal government in 2016. The third section outlines the data used in this paper’s analysis of appointments to provincial superior courts with particular attention paid to the judicial appointment questionnaire. The fourth section presents the findings.

How has the Trudeau Liberal government performed in its stated goal of appointing members to the judiciary that reflect Canadian society? This paper finds that “diversity” on Canada’s federally appointed provincial courts remains unbalanced. While women have made up the majority of appointments since the Trudeau Liberals formed government, other equity-deserving groups, like people of colour and people with disabilities, have been appointed in numbers well below their proportion of the Canadian population. These findings suggest that more needs to be done at the recruitment, assessment, and appointment stages of the selection process if these courts are ever to come close to reflecting the society they serve. Second, an analysis of the official language skillsets of judicial appointees shows that most appointees to federally appointed superior courts are unilingual English speakers. While official bilingualism requirements appear unlikely to pose a significant barrier for appointment to provincial and territorial superior courts, this paper finds tentative evidence that judges from equity-deserving groups are less likely to have competency in French, which points to the challenges of fostering a judicial branch that is both representative and officially bilingual.

I. *Judicial diversity as...*

Though not uncontested, it is now generally well accepted by governments, judges, and the legal field at large that the judiciary in Canada should reflect the society it serves. The reasons why such representation is needed are still important to address. First, representation on the bench is tied to the perceived legitimacy of the judicial branch, with a representative court being one that the public is more likely to support and have confidence

in. Comparative research, particularly from the United States, has found evidence supporting the public confidence position,⁷ though there is also evidence that not everyone is supportive of a representative bench. A recent US study found that men may be less supportive of gender diversity on the courts, suggesting that in practice public perceptions of judicial diversity can be mixed.⁸

A second reason, though arguably a more fraught one, focuses on difference and how diversity on the bench will foster different perspectives on the law and possibly yield different judicial decisions. Research investigating the difference argument has yielded mixed results,⁹ with scholars finding some differences for certain types of cases and not others.¹⁰ While research investigating diversity and judicial behaviour has yielded mixed results, it is also worth noting the challenges of understanding and measuring difference amongst judges. It may be the case that large N quantitative studies are not well suited for capturing the kinds of effects a judge's unique experiences and identity may bring to their work.

In Canada, where systemic racism has long been identified as a feature that permeates the justice system, better representation on the courts has been seen as one way to help address this problem. In fact, the Marshall Commission, which investigated how systemic racism contributed to the wrongful murder conviction of Donald Marshall Jr., a Mi'kmaw man,

7. Thomas E Fossati & James W Meeker, "Evaluations of Institutional Legitimacy and Court System Fairness: A Study of Gender Differences" (1997) 25:2 J Crim Justice 141, DOI: <10.1016/S0047-2352(96)00057-8>; Alex Badas & Katelyn E Stauffer, "Someone like Me: Descriptive Representation and Support for Supreme Court Nominees" (2018) 71:1 Political Research Q 127, DOI: <10.1177/1065912917724006>; Amy H Liu & Vanessa A Baird, "Linguistic Recognition as a Source of Confidence in the Justice System" (2012) 45:10 Comparative Political Studies 1203, DOI: <10.1177/0010414011434294>.

8. Claire Lee, Rorie Solberg & Eric N Waltenburg, "See Jane Judge: Descriptive Representation and Diffuse Support for a State Supreme Court" (2021) Politics, Groups, & Identities 1, DOI: <10.1080/21565503.2020.1864651>. See also Nancy Scherer & Brett Curry, "Does Descriptive Race Representation Enhance Institutional Legitimacy? The Case of the US Courts" (2010) 72:1 J Politics 90; Yoshikuni Ono & Michael A Zilis, "Do Americans Perceive Diverse Judges as Inherently Biased?" (2021) Politics, Groups, & Identities 1, DOI: <10.1080/21565503.2021.1960867>.

9. For Canada, see Lori Hausegger, Troy Riddell & Matthew Hennigar, "Does Patronage Matter? Connecting Influences on Judicial Appointments with Judicial Decision Making" (2013) 46:3 Can J Political Studies 665, DOI: <10.1017/S0008423913000681>; Susan W Johnson & Rebecca A Reid, "Speaking Up: Women and Dissenting Behavior in the Supreme Court of Canada" (2020) 41:3 Justice System J 191, DOI: <10.1080/0098261X.2020.1768185>; Songer et al, *Law, Ideology, and Collegiality: Judicial Behaviour in the Supreme Court of Canada* (Montreal: McGill-Queen's University Press, 2012); Donald R Songer, Miroslava Radieva & Rebecca Reid, "Gender Diversity in the Intermediate Appellate Courts of Canada" (2016) 37:1 Justice System J 4, DOI: <10.1080/0098261X.2015.1083816>; Susan W Johnson & Ali S Masood, "Trailblazer Women in the Supreme Court of Canada" [2021] Politics, Groups, & Identities 1, DOI: <10.1080/21565503.2021.1946098>.

10. For a review of US literature, see Allison P Harris & Maya Sen, "Bias and Judging" (2019) 22:1 Annual Rev Political Science 241, DOI: <10.1146/annurev-polisci-051617-090650>.

recommended over thirty years ago that “Governments consider the needs of visible minorities by appointing qualified visible minority judges and administrative board members whenever possible.”¹¹ As the experience of Marshall Jr. shows, there are cases when the experiences and insights born from a judge’s identity have likely mattered, though for judges who are Black, Indigenous, or other identities that are underrepresented on the bench, this has sometimes been complicated by the charge that such difference may somehow amount to bias. In the same province of Nova Scotia where Donald Marshall Jr. was wrongly convicted by a white judge, we have the experience of Justice Corrine Sparks, the first Black woman to be appointed to a Canadian court. In *R v S (RD)*, the Supreme Court was asked to determine whether Judge Sparks had crossed the line into bias when as a Nova Scotia Youth Court judge she commented on police officers misleading the court and overreacting when dealing with people of colour as part of her ruling that dealt with the arrest of a Black youth. While in their concurring majority opinion, Justices L’Heureux-Dubé and McLachlin noted that Judge Sparks’ comments “reflect[ed] an entirely appropriate recognition of the facts in evidence in this case and of the context within which this case arose—a context known to Judge Sparks and to any well-informed member of the community,”¹² the reasoning offered by others on the court followed a formalist, colour-blind approach to the analysis of bias.¹³ While the matter is a complex one, one lesson from *R v S (RD)* may be that in Canada diversity on the bench is desired so long as it does not result in judges expressing views that fall too outside of legal and societal norms.

Even if the Canadian population was supportive of a homogenous bench and even if that homogenous bench performed its job just as ably as a diverse one, two points that are highly contestable, there remains the critical issue of equity. Simply put, the systematic exclusion of certain groups from a profession, especially one that is intended to serve the public, is discriminatory and, as noted by Sally Kenney, raises important questions of legitimacy irrespective of whether changes in judicial selection results in observable changes in how a court performs.¹⁴ Whether or not one finds the difference argument compelling, the fact remains that

11. Royal Commission on the Donald Marshall, Jr., Prosecution, *Digest of Findings and Recommendations* (Nova Scotia: Lieutenant Governor in Council, 1989) at 26.

12. *R v S (RD)*, [1997] 3 SCR 484 at para 30, 151 DLR (4th) 193.

13. Sherene Razack, “R.D.S. v. Her Majesty the Queen: A Case About Home” (1998) 9:3 Const Forum Const 59 at 60, DOI: <10.21991/C9G66N>.

14. Sally J Kenney, “Towards a Less Essentialist, More Intersectional, and Institutional Approach to Gender and Judging” (2019) 34:3 Conn J Intl L 398 at 406, online: <cjil.law.uconn.edu/wp-content/uploads/sites/2746/2022/04/Volume-34-Issue-3.pdf> [perma.cc/8WM3-QLRH].

arguments framed in terms of legitimacy, public confidence, and fairness, make the objective of a representative bench a compelling and normatively desirable one.

Holding diversity on the courts as a desired outcome has naturally prompted questions of how such diversity can be achieved. Globally, research has found that changes to a country's constitution¹⁵ and international norms¹⁶ can contribute to the selection of women judges. The impact of different systems of judicial selection for promoting judicial diversity is less clear,¹⁷ though in Canada there is some evidence that processes that limit the influence of partisan connections in the selection process can increase the number of women appointed to the bench.¹⁸

Studies of diversity on the courts have not always been especially diverse in their focus. There is now a fairly developed body of literature that analyzes the representation of women judges on courts both in Canada and comparatively, but the appointment of other equity-deserving groups has received less attention.¹⁹ In response, there is increasingly a push to think about representation on the bench through an intersectional

15. Arrington et al, "Constitutional Reform and the Gender Diversification of Peak Courts" (2021) 115:3 *American Political Science Rev* 1, DOI: <10.1017/S0003055421000071>.

16. Escobar-Lemmon et al, "Breaking the Judicial Glass Ceiling: The Appointment of Women to High Courts Worldwide" (2021) 83:2 *J Polit* 662, DOI: <10.1086/710017>.

17. See *ibid*; Nancy B Arrington, "Group Selection and Opportunities for Gender Diversity in the Judiciary" (2020) 56:2 *Representation* 149, DOI: <10.1080/00344893.2020.1730427>; Sally J Kenney, "Which Judicial Selection Systems Generate the Most Women Judges? Lessons from the United States" in Ulrike Schultz & Gisela Shaw, eds, *Gender and Judging* (Oxford, UK: Hart, 2013) 461, DOI: <10.1086/710017>.

18. Erin Crandall & Andrea Lawlor, "The Politics of Judicial Appointment: Do Party Connections Impede the Appointment of Women to Canada's Federally Appointed Courts?" (2017) 50:3 *Can J Political Science/R Can science politique* 823, DOI: <10.1017/S0008423917000014>; Erin Crandall, "Does the System of Judicial Appointment Matter? Exploring Women's Representation on Ontario's Courts" (2014) 26:2 *CJWL* 185, DOI: <10.3138/cjwl.26.2.01>.

19. Though for Canada, see Rosemary Cairns Way, "Deliberate Disregard: Judicial Appointments Under the Harper Government" (2014) Ottawa Faculty of Law Working Paper No 2014-08, DOI: <10.2139/ssrn.2456792>; Andrew Griffith, "Diversity Among Federal and Provincial Judges," *Policy Options* (4 May 2016), online: <policyoptions.irpp.org/2016/05/04/diversity-among-federal-provincial-judges/> [perma.cc/4JNT-C77D]; Audrey Kobayashi, "Do Minority Women Make a Difference" (1998) 10:1 *CJWL* 199; Avner Levin & Asher Alkoby, "Shouldn't the Bench Be a Mirror? The Diversity of the Canadian Judiciary" (2019) 26:1 *Intl J Legal Profession* 69, DOI: <10.1080/09695958.2018.1489818>.

lens.²⁰ Building on the foundational work of Kimberlé Crenshaw,²¹ an intersectional approach requires us to think critically about how diversity in the judiciary can be realized when there are multiple and overlapping processes of marginalization in operation. It is incumbent on researchers to recognize that treating dimensions of a judge's identity as separate categories is insufficient for understanding judicial diversity. As noted by Kang et al., "[a]n intersectional approach to studying diversity and inclusion in the judiciary must consider the multidimensional production of privilege and discrimination."²²

The application of these critical insights to a quantitative study of judicial appointments is challenging. Ultimately, this paper provides insights into descriptive categories of "diversity," which falls short of what is needed for a robust engagement in intersectional analysis. As Tammy Findlay and others have rightly pointed out, a critical analysis of a government's approach to "diversity" is made even more fraught when it is the government that gets to decide which identities are prioritized and taken into account.²³ In this instance, the demographic data collected on judicial applicants and appointees have been constructed and distributed by the government itself. There are significant empirical and theoretical limitations to the analysis offered here. Nonetheless, it also seems necessary to have information about the descriptive representation of judicial appointees in order to support the needed conversations around how the Government of Canada's judicial selection system may be working (or not) to address the multiple and overlapping processes of marginalization that have contributed to the underrepresentation of different groups on the courts. Thus, while this paper should not be considered as an application of intersectional theory, it is informed by and intended to support its goals.

20. Suzanne Dovi & Francy Luna, "Women 'Doing' the Judiciary: Rethinking the Justice Argument for Descriptive Representation" (2020) 8:4 Politics, Groups, & Identities 790, DOI: <10.1080/21565503.2020.1789882>; Kang et al, "Diverse and Inclusive High Courts: A Global and Intersectional Perspective" (2020) 8:4 Politics, Groups, & Identities 812, DOI: <10.1080/21565503.2020.1782948>; Jennet Kirkpatrick, Miki Caul Kittilson & Valerie Hoekstra, "Diversity in the Judiciary: How Diversity Matters for Democratic Inclusion, Representation, and Inequalities" (2020) 8:4 Politics, Groups, & Identities 786, DOI: <10.1080/21565503.2020.1782953>; Kenney, *supra* note 14.

21. Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics]" (1989) 1989:1 U Chicago Legal F 139, online: <chicagounbound.uchicago.edu/uclf/vol1989/iss1/8> [perma.cc/847P-2STW].

22. *Supra* note 20 at 818.

23. Tammy Findlay, "Intersectionalities of Opportunism: Justin Trudeau and the Politics of 'Diversity'" (2022) 60 Int J Can Studies 40, DOI: <10.3138/ijcs.60.x.40>.

II. *Liberal government reforms to the judicial selection process*

How are judges appointed in Canada? While the processes followed by the provinces, territories, and federal government to fill their respective courts vary in detail, they are all executive appointment systems with final authority vested with the governor in council. In practice, this power to appoint is exercised by the minister of justice in consultation with the prime minister/premier and other members of the political executive. Since 1988, the federal appointment process for provincial and territorial superior courts has included review committees, called Judicial Appointment Committees (JACs), which are tasked with commenting on the qualifications of those applying for judicial posts. Every province and territory has at least one JAC. The function of the JACs is largely a negative one; they are able to eliminate candidates assessed to be unqualified for judicial office, but have no role in making the final selection. While a government is technically not bound to select from the pool of recommended applicants, this is the norm. It is important to note, however, that this still leaves a large pool of candidates from which a government has the discretion to choose.²⁴

The majority of the changes brought in by the Liberals in 2016 focused on the JACs. Since the JACs' creation, the ranking system used by the committees has been modified three times. Originally, applicants were assessed as either "qualified" or "unqualified." Beginning in 1991, the committees began rating applicants on a three-point scale: "unable to recommend," "recommended," or "highly recommended." In 2006, the Conservative government of Stephen Harper returned the rating system to the two-point scale, and with the reforms implemented by the Trudeau government in 2016, it was changed once again to the three-point scale. Other changes introduced in 2016 included: reorganizing the size and composition of provincial and territorial JACs, notably by removing a representative of the law enforcement community and restoring voting rights to judicial members; providing all JAC members with training on diversity, unconscious bias, and assessment of merit; and creating an open application process for the JAC seats reserved for the general public in order to promote diversity on the committees themselves.²⁵ As already noted, the JACs were also given a new mandate to identify "outstanding jurists from a wide range of backgrounds and practice areas, with a view to having a judiciary that reflects the diversity of Canadian society,"²⁶ and to support this mandate, the CFJA was assigned the task of collecting and

24. See Table 2 at 16, below.

25. Department of Justice Canada, *supra* note 2.

26. *Ibid.*

publishing statistical information on judicial applicants and appointees, including on measures of diversity and language proficiency. Together the changes were presented by the government as making “the judicial appointments process more open, transparent, and accountable for future appointments, resulting in a judiciary that is more reflective of Canada’s diversity.”²⁷

III. *Data and methodology*

This paper’s analysis relies on two data sources: (1) the statistics on judicial applicants and appointees published annually by the CFJA, and (2) the judicial appointment announcements published by the Department of Justice.

Since 2016, the CFJA has published annual statistics, which are summarized in tables on its website. From October 2016 to October 2020, the CFJA received 1966 applications for judicial positions, which resulted in 299 appointments. The statistics include information on judicial applicants’ and appointees’ gender, proficiency in French and English, and demographic identifiers related to diversity, including whether an applicant is Indigenous, a visible minority, LGBTQ, disabled, or from an “ethnic/cultural group or other.” The data in these tables were compiled by the author for analysis. These statistics on judicial applicants and appointees are derived from the questionnaire for federal judicial appointments, which all applicants have been required to complete since October 2016. Judicial applicants have the choice to self-identify if they are a member of a listed group for the purpose of facilitating the government’s efforts “to support the achievement of gender balance and a reflection of the diversity of the members of Canadian society on the Superior and Federal Courts.”²⁸ Because applicants are not required to fill in the diversity section of the questionnaire, the CFJA data is unlikely to be exhaustive. The questions regarding language proficiency are mandatory and can therefore be considered complete.

While these summary statistics provided by the CFJA are informative and a notable step forward in terms of transparency in the federal judicial selection process, they cannot be disaggregated. To supplement this data, individual judicial appointments were compiled and coded using the judicial

27. 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: <www.canada.ca/en/departement-justice/news/2016/10/government-canada-announces-judicial-appointments-reforms-appointments-process-increase-openness-transparency.html> [perma.cc/9AHX-LZ2M].

28. *Supra* note 3 at 3.

appointment announcements published by the Department of Justice and, when provided, excerpts from the judicial applicants' questionnaires. Importantly, judicial appointees had the choice to publish questionnaire excerpts with their appointment announcement. In practice, this means that most judicial announcements are not accompanied by questionnaire excerpts. In fact, the practice of publishing questionnaire excerpts appears to occur for a relatively small portion of appointments. From 2017 to 2018, about 22 per cent of Department of Justice announcements for judicial appointees were accompanied by excerpts from the applicants' questionnaires. If elevations and transfers are excluded then this number rises slightly to 25 per cent of judicial appointees. During this time, it was common for appointment announcements that did not contain questionnaire excerpts to note that "Excerpts from Justice [Name's] judicial application will be available shortly." However, as of June 2022, these excerpts do not appear to be available on the Department of Justice's website and it seems unlikely at this point that they will be posted. In total, of the 364 judicial appointments made between 21 October 2016 and 31 December 2020, the Department of Justice published excerpts from the appointee's questionnaire for only 42 judicial appointments (12 per cent).

While a useful data-gathering tool, it is also worth acknowledging the limitations of these judicial questionnaires for gaining a greater understanding of judges' views and experiences related to representation in law. For example, an analysis of the first 16 questionnaire excerpts found that while applicants generally demonstrated considerable insight into the judicial role in Canada, many used "the questionnaire less as a platform to demonstrate free thought and more as a test to prove their fealty to traditional assumptions about the court's role in society."²⁹ This is arguably an unsurprising finding given that the applicants' answers cannot be understood apart from the structure in which they were produced, which in this instance was a job application.³⁰

Despite the relatively small number of appointment announcements that were accompanied by questionnaire excerpts, it was not uncommon for the announcement to share some details regarding a judicial appointee's personal identity and/or language proficiency. While all

29. Agathon Fric, "Popping the Question: What the Questionnaire for Federal Judicial Appointments Reveals About the Pursuit of Justice, Diversity, and the Commitment to Transparency" (2020) 43:1 Dal LJ 159 at 168, online: <digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=2134&context=dlj> [perma.cc/XH5A-SL49].

30. Lisa Webley, "Qualitative Approaches to Empirical Legal Research" in Peter Cane & Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010) 926 at 939.

judicial appointment announcements reviewed for this analysis shared a standard format that included biographical data, like education, professional experience, community involvement, and family, there was clearly some individualization that was most likely crafted by the judicial appointee. For example, some emphasized their strong professional and personal commitments to a particular group, like the LGBTQ community. One judge's biography noted that he was childhood friends with Freddie Mercury of the rock band Queen, which although very cool, seems unlikely to be a standard item of information included in judicial appointment announcements.³¹ From 2016 to 2020, there were 60 judicial appointments that did not include questionnaire excerpts, but did include some demographic data or description of language proficiency in the Department of Justice's appointment announcement. When this is combined with the appointment announcements that included questionnaire excerpts, a total of 102 judicial appointment announcements³² contained some demographic and/or language proficiency information, or about 33 per cent of the judicial appointments made between October 21, 2016 and December 31, 2020.

All questionnaire excerpts included information on language proficiency, which was coded. The questionnaire originally asked four questions on language proficiency, but two additional questions were added in November 2017.³³ Mentions of bilingualism in judicial appointment announcements were also coded, but this method of data collection is not expected to provide a representative sample given that there were no instances of an appointment announcement identifying a judge as unilingual when, of course, most of the appointees were. In order to simplify and standardize the coding of language proficiency across the years of analysis (2016–2020), language proficiency of appointees was coded as: (1) fully bilingual, (2) only English, (3) only French, (4) English, and some French, and (5) French, and some English. Appointees were only coded as fully bilingual if they stated they were able to function in both French and English to all language proficiency questions, or if they were identified as bilingual in the judicial announcement. Because prior to November 2017 there were two fewer questions, it is likely that some appointees who were coded as fully bilingual before this date may not

31. Department of Justice Canada, "Government of Canada Announces Judicial Appointment in the Province of Newfoundland and Labrador" (20 October 2017), online: <www.canada.ca/en/departement-justice/news/2017/10/government_of_canadaannouncesjudicialappointmentintheprovinceofnl.html> [perma.cc/RN2W-3WWG].

32. This number drops to 93 judicial appointees if elevations and transfers are excluded.

33. See Table 1 at 12–13, below.

meet all the language proficiency criteria as they are now assessed. Given the relatively small number of judges coded as fully bilingual, however, this is not anticipated to have a significant impact on our understanding of official bilingualism on Canada’s federally appointed courts.

Table 1: Published Sections of Questionnaire for Judicial Appointment

Part		Question
5	Language	<ul style="list-style-type: none">• Without further training, are you able to read and understand court materials in French and English?• Without further training, are you able to discuss legal matters with your colleagues in French and English?• Without further training, are you able to converse with counsel in court in French and English?• Without further training, are you able to understand oral submission in court in French and English?• Without further training, are you able to write decisions in both French and English?*• Without further training, are you able to conduct hearings in both French and English?*
6	Education	Name of Institutions, Years Attended, Degree/ Diploma and Year Obtained
7	Professional and Employment History	Please include a chronology of work experiece, starting with the most recent and showing employers’ names and dates of employment. For legal work, indicate areas of work or specialization with years and, if applicable, indicate if they have changed.
11	The Role of the Judiciary in Canada’s Legal System	<ol style="list-style-type: none">1. What would you regard as your most significant contribution to the law and the pursuit of justice in Canada?2. How has your experience provided you with insight into the vbariety and diversity of Canadians and their unique perspectives?3. Describe the appropriate role of a judge in a constitutional democracy.4. Who is the audience for decisions rendered by the court(s) to which you are applying?5. Please describe the personal qualities, professional skills and abilities, and life experience that you believe will eqip you for the role of judge.6. Given the goal of ensuring that Canadians are able to look at the justices appointed to the bench and see their faces and life experience refelected there, you may, if you choose, provide information about yourself that you feel would assist in this objective.

Note: The other parts of the questionnaire are: 1. Personal Information; 2. Candidate For [province or territory]; 3. References, 4. Statutory – Personal Information; 8. Legal Experience and Expertise; 9. Personal Suitability and Integrity; 10. Health and Wellness; 12. Declarations and Signature.

* These two questions on language proficiency were added to the questionnaire in November 2017.

Coding the demographic identifiers related to diversity from the questionnaire excerpts and judicial appointment announcements is a more complicated process. Unlike the questions for language proficiency, which were always published as part of the questionnaire excerpts, the answers to the optional self-identification on diversity were not. However, part 11 of the questionnaire, “The Role of the Judiciary in Canada’s Legal System,” was included in the published questionnaire excerpts and contains a number of questions that offer the opportunity to comment on diversity and identity should an applicant so choose.³⁴ One question, in particular, is especially relevant for our purposes: “Given the goal of ensuring that Canadians are able to look at the justices appointed to the bench and see their faces and life experience reflected there, you may, if you choose, provide information about yourself that you feel would assist in this objective.” Like with the optional self-identification section of the questionnaire, an applicant is not required to self-identify for this question (or any question), but it seems reasonable to anticipate that many applicants who choose to self-identify will also choose to comment on their identity or relationship to diversity for this question. Similarly, a judicial appointee may choose to discuss features of their identity in their judicial appointment announcement.

Using the same demographic measures set out in the questionnaire and published by the CFJA, each judicial announcement and questionnaire excerpt was reviewed and coded. Coding was completed for all provincial superior court appointments made by the Trudeau Liberal government from the date they formed government in 2015 to 31 December 2020. The Liberals made no judicial appointments in 2015 so appointment data begin in 2016. In total, 397 appointments to provincial superior courts were coded. When elevations and transfers are removed, this number is 322. It was possible to code for the gender of all judicial appointees, but information on the other diversity measures was not available for all appointees and a comparison to the statistics published by CFJA confirms that some data is missing.

IV. *Findings*

The comparatively high number of women judges appointed since the Liberals formed government in 2015 is arguably one of the topics around the selection process that has attracted the most public attention.³⁵ Women made up more than 50 per cent of appointments every year between

34. See Table 1 at 12-13, above.

35. Kathleen Harris, “The Changing Face of Canada’s Judiciary: More Women, More Diversity,” *CBC News* (5 May 2019), online: < www.cbc.ca/news/politics/judiciary-diversity-appointments-1.5074102 > [perma.cc/JZ7Z-S77N].

2016-2020 and 57 per cent of all judicial appointments during this five-year period.³⁶ This stands in sharp contrast to the record of the previous government of Conservative Prime Minister Stephen Harper (2006–2015), which appointed women to about 33 per cent of open judicial posts.³⁷ At the time, the Harper government received considerable criticism for the overrepresentation of white cisgender men amongst its appointees.³⁸ The defence, when one was offered, was that women and other equity-deserving groups were not applying for federal judgeships. Because demographic data on judicial applicants were not being collected and published at the time, there was no easy way to refute this claim, except to point out that publicly available data on judicial applicants to provincial courts, like in British Columbia and Ontario, suggested that a supply issue was unlikely the root cause of the lack of women judges amongst the Harper government's appointments and that women's comparatively weaker political connections to the Conservative Party may have been a more compelling explanation.³⁹

The collection and publication of demographic data for both applicants and appointees to federally appointed courts are therefore significant developments that help us to better understand at which points during the process (application, assessment, or appointment stage) different groups may face challenges that are hindering the government's stated objective of creating a judicial branch reflective of the society it serves. Table 2 provides a breakdown of the demographic identifiers collected and published by the CFJA from October 2016 to October 2020. Over this period, men made up about 53 per cent of all applicants. While women made up a smaller number of the applicants, they were more likely to be assessed as either "highly recommended" or "recommended" (38 per cent versus 35 per cent) and men more likely to be assessed as "unable to recommend" (49 per cent versus 43 per cent). Thus, while women made up a slightly smaller pool of the total applicants, they were more likely than men to be recommended and forwarded to the minister of justice

36. See Table 2 at 16, below.

37. Erin Crandall, "Judicial Diversity and the Harper Government," *Policy Options* (5 October 2015), online: <policyoptions.irpp.org/magazines/october-2015/stephen-harper-and-the-judiciary/judicial-diversity-and-the-harper-government/>[perma.cc/T7UG-HR6J].

38. Kirk Makin, "Appointments of Female Judges Slump Under Harper's Tories," *The Globe and Mail* (11 November 2011), online: <www.theglobeandmail.com/news/politics/> [perma.cc/Ry3A-NTRC]; Aaron Wherry, "Forget Peter MacKay's Mother's Day Note, Here Is the Real Issue: How Many Women Are Being Appointed to the Courts?," *Maclean's* (27 June 2014), online: <www.macleans.ca/politics/never-mind-peter-mackays-mothers-day-note-here-is-the-real-issue/> [perma.cc/H5AX-WUAV].

39. Crandall, *supra* note 18 at 195, 203-204; Crandall & Lawlor, *supra* note 18 at 832.

for consideration. The difference between the number of women who applied versus those who were appointed also suggests that the Trudeau government prioritized the appointment of women judges, which has been identified as an important contributor for creating a more representative bench.⁴⁰ No applicants self-identified as having a gender identity other than a man or woman.

**Table 2: Diversity Identifiers of Judicial Applicants and Appointees
(October 2016 – October 2020)**

Appointed	Women	Men	Other Gender Identity	LGBTQ2	Indigenous	Visible Minority	Disabled	Ethnic, Cultural Group or Other	Total
Applications Received	47% (921)	53% (1045)	0% (0)	5% (108)	4% (73)	10% (200)	2% (43)	19% (372)	(1966)
Assessed - Highly Rec. and Rec.	38% (354)	35% (370)	0% (0)	42% (45)	33% (24)	39% (78)	16% (7)	33% (124)	37% (724)
Assessed – Unable Recommend	43% (394)	49% (508)	0% (0)	40% (43)	45% (33)	46% (92)	70% (30)	53% (197)	46% (902)
Appointed	57% (169)	43% (130)	0% (0)	5% (16)	3% (10)	10% (30)	1% (3)	16% (48)	15% (299)

Thanks to past research and data provided by the CFJA, the approximate gender representation on Canada’s courts was already known prior to the publication of the CFJA’s statistics. Other information about the diversity of judges, however, has been more difficult to document, but what is known suggests that Black, Indigenous, and people of colour are vastly underrepresented in judicial posts relative to their proportion of the Canadian population.⁴¹ The CFJA data therefore provide important and novel information on the recruitment and appointment of judges from groups that have been historically underrepresented on the bench. Before considering the other demographic statistics that fall within the government’s diversity measures of judicial applicants and appointees, it is important to note again that the data published by the CFJA comes from voluntary self-identification and so may not capture the diversity of the entire applicant pool. Moreover, the accuracy of Canadian population estimates, which we can compare with the CFJA data, may be better for some groups than others. These aggregated statistics from CFJA also do not reflect the fact that some applicants will belong to multiple groups and therefore cannot tell us how the intersectional nature of these identities may affect a person’s experiences through university, law school, and a legal career that will eventually position them to apply for a judgeship.⁴²

40. Crandall, *supra* note 18 at 195; Sally J Kenney, *Gender & Justice: Why Women in the Judiciary Really Matter* (New York: Routledge, 2013).

41. Cairns Way, *supra* note 19; Griffith *supra* note 19; Levin & Alkoby *supra* note 19.

42. Nelson et al, “Perceiving Discrimination: Race, Gender, and Sexual Orientation in the Legal Workplace” (2019) 44:4 Law & Soc Inquiry 1051, DOI: <10.1017/lsi.2019.4>; Sonia Lawrence &

The relationship with the law for some potential applicants from equity-deserving groups is made even more complicated by the fact that Canadian law and the legal system have historically been used as tools of violence and suppression against them. In other words, these statistics are important because they can help us to identify if more work needs to be done in terms of encouraging potential applicants to apply for judicial positions or whether there may be problems at the assessment and/or appointment stages of the process, but they cannot tell us why a person may choose to not self-identify or not apply to a judicial position in the first place. These statistics provide a needed but insufficient measure for understanding representation on the bench.

Table 2 shows that about 10 per cent of judicial applicants between 2016 and 2020 self-identified as a visible minority.⁴³ This is mirrored in the percentage of applicants who were eventually appointed to the bench. By comparison, it is estimated that about 22 per cent of Canada's population are visible minorities.⁴⁴ In Ontario, which is the province with the highest percentage of visible minorities at 29 per cent, data collected by the Law Society of Ontario in 2018 found that about 22.5 per cent of lawyers in the province were people of colour.⁴⁵ These numbers vary widely by province. For example, in Nova Scotia, where visible minorities make up about 6.5 per cent of the population,⁴⁶ 5.8 per cent of members of the provincial law society self-identify as people of colour.⁴⁷ Altogether, the CFJA data on

Signa Daum Shanks, "Indigenous Lawyers in Canada: Identity, Professionalization, Law" (2015) 38:2 Dal LJ 3503, online: <digitalcommons.schulichlaw.dal.ca/dlj/vol38/iss2/8/> [perma.cc/8MZG-9DKQ]; Blanck et al, "Diversity and Inclusion in the American Legal Profession: First Phase Findings from a National Study of Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+" (2020) 23:1 UDC L Rev 23, online: <digitalcommons.law.udc.edu/udclr/vol23/iss1/3/> [perma.cc/4HCC-4F4P].

43. Tavia Grant & Denise Balkissoon, "'Visible Minority': Is it Time for Canada to Scrap the Term?," *The Globe and Mail* (6 February 2019), online: <www.theglobeandmail.com/canada/article-visible-minority-term-statscan/> [perma.cc/2RBY-N4CX] (visible minority is the term used by the Government of Canada to describe people, other than Indigenous persons, who are non-Caucasian in race or non-white in colour. This term has been criticized for being discriminatory and inaccurate due to population shifts). The terms person of colour or racialized person are now considered more appropriate. In this paper, the term person of colour is used unless directly referencing government statistics that use the term visible minority.

44. Statistics Canada, *Immigration and Ethnocultural Diversity Statistics* (Ottawa: Statistics Canada, 2022) <www.statcan.gc.ca/eng/subjects-start/immigration_and_ethnocultural_diversity> [perma.cc/24KN-MDQE].

45. "Statistical Snapshot of Lawyers in Ontario" (25 March 2020) at 3, online (pdf): *Law Society of Ontario* <lawsocietyontario.azureedge.net/media/lso/media/lawyers/practice-supports-resources/equity-supports-resources/snapshot-lawyerseng-pdf.pdf> [perma.cc/VK3F-KBAZ].

46. "Census Profile, 2016 Census: Nova Scotia [Province] and Canada [Country] (table)" (29 November 2017), online: *Statistics Canada* <www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/index.cfm?Lang=E> [perma.cc/BXA6-TQS3].

47. "Statistical Snapshot: Fall/Winter-2021/2022" (last visited 1 June 2022), online (pdf): *Nova*

judicial applicants and appointees show that people of colour continue to be significantly underrepresented on courts.

The percentage of applications from Indigenous peoples (4 per cent) comes closer to their estimated proportion of the population (4.9 per cent).⁴⁸ Like with people of colour, information on the number of Indigenous peoples who have ten years at the bar of a province or territory and are therefore qualified to apply for judicial positions is limited; however, data from the Law Society of Ontario identified about 1.4 per cent of lawyers in the province as Indigenous, compared to about 2.9 per cent of the provincial population.⁴⁹ In Manitoba, where about 18 per cent of the population is Indigenous, the Law Society of Manitoba reported in 2021 that about 5 per cent of its members self-identified as Indigenous.⁵⁰ Thus, while the percentage of applicants is slightly smaller than the national population, it may be reflective of the pool of potential Indigenous applicants. Unlike for women applicants, however, where the percentage of appointments went up in comparison to the percentage of applicants, the percentage of Indigenous applicants appointed to judgeships was slightly below that of the pool of applicants at 3 per cent. This is likely a result of the lower number of Indigenous applicants assessed as recommended or highly recommended by the JACs (33 per cent versus 37 per cent overall average). These numbers suggest that the current assessment and appointment processes for superior courts may need review to determine if unique barriers to appointment exist for Indigenous applicants.

About 5 per cent of applicants self-identified as LGBTQ, which is mirrored in the percentage of these applicants who were appointed to the bench. There are differing estimates of the size of the LGBTQ community in Canada. A 2017 survey estimated that approximately 13 per cent of the Canadian population belongs to the LGBTQ community,⁵¹ while Statistics Canada's estimate of the LGBTQ community is considerably lower at

Scotia Barristers' Society <nsbs.org/wp-content/uploads/2022/02/2021-Statistical-Snapshot.pdf> [perma.cc/5ME5-4B4Y].

48. "Focus on Geography Series, 2016 Census" (last modified 18 April 2019), online: *Statistics Canada* < www12.statcan.gc.ca/census-recensement/2016/as-sa/fogs-spg/Facts-CAN-eng.cfm?Lang=Eng&GK=CAN&GC=01&TOPIC=9> [perma.cc/7MDS-SDQH].

49. *Supra* note 45 at 3.

50. "Annual Report 2021" (last visited 1 June 2022) at 18, online (pdf): *Law Society of Manitoba* <lawsociety.mb.ca/wp-content/uploads/2021/06/2021-Annual-Report.pdf> [perma.cc/RD29-ERLZ].

51. Foundation Jasmin Roy, "According to 'LGBT Realities,' the First PanCanadian Survey on LGBT Communities Conducted by CROP for the Benefit of the Foundation Jasmin Roy, 13% of the Canadian Population Belongs to the LGBT Community," *Cision* (9 August 2017), online: <www.newswire.ca/news-releases/according-to-lgbt-realities-the-first-pancanadian-survey-on-lgbt-communities-conducted-by-crop-for-the-benefit-of-the-foundation-jasmin-roy-13-of-the-canadian-population-belongs-to-the-lgbt-community-639432223.html> [perma.cc/ZW3D-HWME].

4.24 per cent.⁵² It is also worth noting that the term LGBTQ, in addition to not being the only accepted initialism for this community, encompasses a diversity of identities and within this 5 per cent some are likely better represented amongst judicial appointees than others.

The questionnaire offers the choice for judicial applicants to self-identify as being part of an “ethnic/cultural group or other.” Considering that all people can in theory belong to one or more ethnic/cultural group and, moreover, it is not clear what “other” is intended to refer to, a comparative national population estimate would not be especially helpful. That said, 19 per cent of applicants self-identified as belonging to an “ethnic/cultural group or other” and 16 per cent from this group of applicants were appointed.

The smallest number of applications came from those who self-identified as disabled. At only 2 per cent of applications, this is far below the estimated 14 per cent of the population that report having a disability.⁵³ By comparison, the Law Society of Ontario identified about 4.5 per cent of its lawyers in 2018 as having a disability.⁵⁴ Beyond the relatively small number of applicants who self-identified as disabled, the progression of this group through the appointment process raises a number of possible concerns. Only 16 per cent of these applicants were assessed as “highly recommended” or “recommended” by the JACs (compared to an overall average of 37 per cent) and only three candidates (1 per cent of applicants) were ultimately appointed. This is a notably low success rate and is sharply contrasted with the success rate of women judges who made up 47 per cent of applicants, but 57 per cent of those appointed. It suggests that more needs to be done to ensure that applicants who are disabled are not facing unique barriers within the judicial selection process.

52. “Sexual Minority People Almost Three Times More Likely to Experience Violent Victimization than Heterosexual People” (last modified 9 September 2020), online: *Statistics Canada* <www150.statcan.gc.ca/n1/daily-quotidien/200909/dq200909a-eng.htm> [perma.cc/ZR2L-6HVJ].

53. “A Profile of Persons with Disabilities Among Canadians Aged 15 years or Older, 2012” (last modified 15 February 2017), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/89-654-x/89-654-x2015001-eng.htm> [perma.cc/Y9CX-8A98].

54. *Supra* note 45 at 8.

Table 3: Diversity Identifiers of Judicial Appointees from Questionnaire Excerpts and Judicial Announcements (2017–2020)

Year	Women	Men	Other Gender Identity	LGBTQ2	Indigenous	Visible Minority	Disabled	Ethnic, cultural Group or Other	Total
2017	42	39	0	2	1	7	0	13	81
2018	47	29	0	3	2	6	0	10	80
2019	33	28	0	0	2	3	0	4	61
2020	46	28	0	6	5	5	0	12	75
Total	168	124	0	11	10	21	0	39	292

Note: Appointment announcements that include questionnaire excerpts did not begin until 2017, which is why 2016 is excluded.

The second dataset of individual judicial appointments provides some additional insight into the demographics of these judges.⁵⁵ While the data set of individual appointments collected for this paper does not perfectly align with the CFJA summary statistics because CFJA data is published yearly (October to October) and this second dataset follows the calendar year, there is considerable overlap. It should be noted that judges who self-identified on their questionnaire were more likely to publish excerpts from the questionnaire or self-identify in their judicial announcement. About 70 per cent of LGBTQ and visible minority judicial appointees published a questionnaire excerpt or self-identified in their judicial announcement, while this number increased to about 80 per cent for appointees from the “ethnic/cultural group or other,” and all ten Indigenous judges self-identified. The three judicial appointees who self-identified as disabled did not include this information in their judicial announcement. With the exception of appointees who are disabled, it appears that there is a strong willingness amongst new judges who self-identified in the questionnaire to also self-identify publicly.

V. *Language proficiency*

A comparative analysis of judicial appointment announcements and CFJA data on language proficiency offers a number of interesting insights. First, Table 4 shows that over time fewer unilingual English judicial appointees chose to publish excerpts from their judicial questionnaires. You would not expect a judicial announcement to highlight a judge’s lack of language proficiency so this is arguably an unsurprising finding. The addition of two more questions on language proficiency on the judicial questionnaire (on ability to write decisions and conduct hearings in both official languages) also clearly had an effect on the likelihood of appointees meeting all language skillset criteria. The period between 2016–2017 is the only one

55. See Table 3, above.

where these two questions were not asked and it is also the period that had the highest percentage of judicial appointees (32 per cent) who affirmed they had the requisite skillsets in both languages. By comparison, there were very few appointees who identified as meeting all the language skillsets in 2018–2019 (3 per cent) and 2019–2020 (12 per cent).⁵⁶ Despite the fact that between October 2018 and October 2020, only ten appointees were identified by the CFJA as meeting all the language skillsets, the judicial appointment announcements by the department of justice during this period highlighted the bilingualism of a comparatively large number of judges. Between 2019–2020, 16 judicial appointees were identified as having proficiency in both official languages. Clearly some of these appointees did not meet all the language skillsets set out in the questionnaire, but their proficiency in both official languages was highlighted. This underlines how the meaning of bilingualism in the context of a judge’s work can easily become unclear if standardized skillset criteria are not used.

Table 4: Judicial Appointees’ Language Proficiency Identified from Questionnaire Excerpts and Judicial Announcements (2017–2020)

Year	Bilingual	English only	French only	English, some French	French, some English	No information	Total
2017	7	8	0	6	0	60	81
2018	6	19	0	1	1	49	76
2019	7	0	0	0	0	54	61
2020	9	0	0	1	0	64	74
Total	29	27	0	8	1	227	292

Note: Appointment announcements that include questionnaire excerpts did not begin until 2017, which is why 2016 is excluded. Excludes judicial elevations and transfers.

Table 5: Federal Judicial Appointees’ Language Proficiency in French and English

Year	All abilities	Read court materials	Discuss legal matters	Converse with counsel	Understand oral submissions	Total
2016–17	32% (24)	46% (34)	35% (26)	34% (25)	38% (28)	(74)
2017–18	27% (21)	33% (26)	29% (23)	28% (22)	29% (23)	(79)
2018–19	3% (3)	43% (37)	33% (28)	35% (30)	36% (31)	(86)
2019–20	12% (7)	37% (22)	32% (19)	35% (21)	35% (21)	(60)
Total	18% (55)	40% (119)	32% (96)	33% (98)	34% (103)	(299)

Note: The annual statistics on judicial applicants and appointees published annually by the CFJA capture appointments from October to October (e.g. October 2016 to October 2017).

56. See Table 5 above.

As would be expected, there are clear differences between provinces in terms of the appointment of judges with proficiency in both French and English. Table 6 compares the language proficiency skills identified from the questionnaire excerpts and judicial appointment announcements between Ontario, Quebec, and New Brunswick, which have the largest proportions of French speakers in Canada, and the other provinces. Of the 29 judges identified as bilingual, 21 (72 per cent) were appointed to courts in Ontario, Quebec, and New Brunswick. The six judges from these provinces who were identified as unilingual English speakers all came from Ontario. The remaining 22 unilingual English-speaking judges (79 per cent) were appointed to courts in the other provinces. Notably, no judges were identified as unilingual French speakers.

Table 6: Provincial Comparison - Federal Judicial Appointees' Language Proficiency Identified from Questionnaire Excerpts and Judicial Announcements (2017–2020)

	Bilingual	English only	French only	English, some French	French, some English	No information	Total
ON, QC, NB	21	6	0	4	1	127	159
Other provinces	8	22	0	4	0	101	133
Total	29	28	0	8	1	228	292

The Trudeau Liberal government's commitment to appoint only bilingual justices to the Supreme Court has raised concerns that this may disproportionately impede the appointment of judges from equity-deserving groups, particularly potential applicants who are Indigenous.⁵⁷ While it is not required that judicial appointees to provincial and territorial superior courts be able to work in both French and English, an adequate number is necessary. The *Official Languages Act* requires that all federal courts, including the provincial superior courts reviewed here, have judges capable of conducting proceedings without the assistance of an interpreter in both official languages.⁵⁸ Given the need to have (an undefined number) of judges who can conduct court proceedings in both French and English, this concern that language skills may impede the appointment of equity-deserving groups may seemingly be carried over to superior court appointments, though certainly to a lesser extent.

It is worth noting that data from Statistics Canada suggest that language barriers are not necessarily greater amongst groups underrepresented on Canada's courts. The proportion of the French–English bilingual

57. Stefanovich, *supra* note 5.

58. *Supra* note 4.

population is higher among visible minorities (11 per cent) and First Nations, Inuit, and Métis peoples (10.5 per cent) than among the Anglophone population outside of Quebec (6.8 per cent).⁵⁹ Nonetheless, this may not be reflected in the population applying for judicial positions. A review of the appointments, which included questionnaire excerpts, may be helpful for understanding if official bilingualism may act as a structural barrier to the judiciary for equity-deserving groups. It is important to note that the number of appointments that included questionnaire excerpts is relatively small (42) and the number of applicants who self-identified on the diversity section of the application is even smaller (22). However, because the questionnaire excerpts all included data on applicants' language, it may nonetheless offer a representative sample. Only two Indigenous appointees published questionnaire excerpts and neither indicated having French language skills. Of the six appointees who self-identified as visible minorities, five indicated that they had no French language skills and one indicated that they had some French skills. One of the 14 appointees who self-identified as belonging to an "ethnic/cultural group or other" and published questionnaire excerpts, 11 indicated that they had no French language skills, while three indicated that they had some French language skills. Thus, within this group, 86 per cent indicated that they were unilingual English speakers, which is a significantly higher proportion compared to the total population of judicial appointees who were selected during this period.⁶⁰ This suggests that judicial applicants from equity-deserving groups may be less likely to have proficiency in both official languages, which in turn supports the argument that official language requirements for Supreme Court judges may be in tension with the objective of a more representative bench (as measured along non-linguistic lines). Admittedly, this type of analysis risks framing inclusion and respect for both official languages as mutually exclusive, which has been rightly critiqued as an oversimplification of the issue.⁶¹ Nonetheless, it appears a challenge that will need to be addressed.

59. "Aboriginal Peoples and Language" (last modified 25 July 2018), online: *Statistics Canada* <www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-X2011003_1-eng.cfm> [perma.cc/8JNW-KQG5]; Canada, "Bilingual Visible Minorities: Bilingualism Levels and First Official Language" (last modified 15 August 2011), online: *Office of the Commissioner of Official Languages* <www.clo-ocol.gc.ca/html/levels_taux_e.php> [perma.cc/4PCS-NABT]; *Statistics on Official Languages in Canada* (last modified 26 November 2019), online: *Government of Canada* <www.canada.ca/en/canadian-heritage/services/official-languages-bilingualism/publications/statistics.html> [perma.cc/S8CR-NH82].

60. See Table 5 at 22, above.

61. François Larocque & Stéphanie Chouinard, "Bilingualism and Diversity: The Supreme Court Can—and Should—Have Both," *The Conversation* (2 June 2021), online: <theconversation.com/bilingualism-and-diversity-the-supreme-court-can-and-should-have-both-161859> [perma.cc/

Conclusion

How has the Trudeau Liberal government performed in its stated goal of appointing members to the judiciary that reflect the population it serves? Given the lack of comparable data on judicial applicants and appointees prior to 2016, a pre-/post-analysis is not possible. Nonetheless, the sizable increase in the number of women judges compared to the Conservative Harper years suggests that at least on this measure progress is indeed being made. The fact that women judges have been appointed to the courts in such high numbers, however, also underlines how achieving representation and inclusion in the judiciary needs to address the complex ways that privilege and discrimination are produced in Canada's justice system. These numbers suggest that the kind of systemic barriers facing women who are seeking a judicial career are different from other groups who have historically been underrepresented on Canada's courts. As leaders in legal and political communities in Canada have pointed out, change continues to be slow for many and at its current rate, federally appointed courts will not reflect the diversity of Canadian society any time in the near future.⁶² The data reviewed in this paper confirms this need for additional action. Indigenous, Black, other people of colour, and people with disabilities continue to be appointed in small numbers. For Indigenous and disabled applicants, in particular, who were less likely to be recommended by the JACs, a review of how assessments are conducted may be needed in order to identify if unique barriers are impeding these groups' paths through the appointment process.⁶³ The federal government appears to have at least acknowledged these calls to action and in September 2020 held a virtual forum with lawyers to encourage members from historically underrepresented groups to consider applying for judicial appointment.⁶⁴ While such efforts to

X3Q8-WHAP]; Raymond Théberge, "Inclusion and Respect for Both Official Languages are Not Mutually Exclusive," Letter to the Editor, *Toronto Star* (1 June 2021), online: <www.thestar.com/opinion/letters_to_the_editors/2021/05/31/inclusion-and-respect-for-both-offical-languages-are-not-mutually-exclusive.html> [perma.cc/WVG3-BGJP].

62. Elizabeth Raymer, "CBA Joins National Call for Diversity in Judicial Appointments," *Canadian Lawyer Magazine* (17 September 2020), online: <www.canadianlawyermag.com/news/general/cba-joins-national-call-for-diversity-in-judicial-appointments/333408> [perma.cc/V9F4-B667].

63. Doug Beazley, "What Are We Looking for in Our Judges?," *The Canadian Bar Association National Magazine* (5 October 2021), online: <www.nationalmagazine.ca/en-ca/articles/law/judiciary/2021/what-are-we-looking-for-in-our-judges> [perma.cc/J8BT-ED76].

64. Department of Justice Canada, News Release, "Minister of Justice Hosts Virtual Forum on Diversity on the Bench" (17 September 2020), online: <www.canada.ca/en/departement-justice/news/2020/09/minister-of-justice-hosts-virtual-forum-on-diversity-on-the-bench.html> [perma.cc/4GRL-5F4Q].

encourage potential applicants to apply can be successful,⁶⁵ progress will ultimately be revealed by the appointments made to the bench.

This paper also explored the relationship between official bilingualism and representation on the bench. Since forming government in 2015, the Trudeau Liberal government has committed to appointing judges to the Supreme Court who are functional in both French and English, which has triggered a debate as to whether official language requirements may impede the appointment of judicial applicants from underrepresented groups. For provincial and territorial superior courts, language requirements appear unlikely to pose a significant barrier. While superior courts must be capable of offering court proceedings in both official languages, unlike the Liberal government's approach to the Supreme Court, there is no requirement that a judicial appointee must be proficient in both French and English. Indeed, the CFJA data confirm that most appointees to federally appointed superior courts are unilingual English speakers. Nonetheless, this paper's analysis of the judicial appointees who published questionnaire indicates that appointees from equity-deserving groups were less likely to meet the language skillset criteria for both French and English. While this relatively small pool of data should be interpreted with caution, it does suggest that judges from equity-deserving groups are more likely to be unilingual English speakers, which in turn supports the contention that French/English language requirements may pose a barrier for some potential applicants to the Supreme Court.⁶⁶

This paper has not touched on another critique that has followed the Liberal government since its reforms to the judicial appointment system in 2016, the continued influence of partisan connections.⁶⁷ Past research has shown that federal judicial appointees are more likely to have donated money or have other connections to the political party in government than opposition parties, suggesting that political ties may advantage

65. Crandall, *supra* note 18 at 198.

66. For additional analysis, see Jean-Christophe Bédard-Rubin & Tiago Rubin, "The Elusive Quest for French on the Bench: Bilingualism Scores for Canadian Supreme Court Justices, 1985–2013" (2022) CJLS 1, DOI: <10.1017/cls.2022.7>.

67. Daniel Leblanc, "One of Justice Minister David Lametti's Donors Gets a Judicial Appointment," *CBC News* (19 November 2020), online: <www.cbc.ca/news/politics/lametti-judicial-appointment-philippe-belanger-1.5805729?_vzf=medium%3Dsharebar> [perma.cc/74HG-MCGJ]; Daniel Leblanc & Tom Cardoso, "PMO Vets Potential Judges with Private Liberal Database," *The Globe and Mail* (24 April 2019), online: <www.theglobeandmail.com/politics/article-pmo-vets-potential-judges-with-liberal-database/> [perma.cc/8LGZ-3JFV]; Brian Platt, "Past Liberal Donors Still Favoured for Judicial Appointments Under Trudeau, Tories Allege with New Data," *National Post* (11 December 2020), online: <nationalpost.com/news/politics/past-liberal-donors-still-favoured-for-judicial-appointments-under-trudeau-tories-allege-with-new-data> [perma.cc/S88V-QMWY].

certain judicial applicants over others.⁶⁸ Research on gender and political donations has found that about two thirds of donors to Canadian federal candidates and parties are men and that women are considerably less likely to donate to the Conservative Party,⁶⁹ helping to explain the drop in appointments of women judges during the Harper Conservatives' time in power. Ethnic minorities have also been found to be less likely on average to donate than other Canadians.⁷⁰ Partisan connection therefore presents another possible barrier to fostering a more representative bench. Future research exploring this relationship would contribute to a more developed understanding of how both the institutional and political features of the judicial appointment process may be working to foster or impede a judicial branch representative of the population it serves.

68. Crandall & Lawlor, *supra* note 18; Troy Riddell, Lori Hausegger & Matthew Hennigar, "Federal Judicial Appointments: A Look at Patronage in Federal Appointments since 1988" (2008) 58:1 UTLJ 39, DOI: <10.3138/utlj.58.1.39>; Hausegger, Riddell, & Hennigar, *supra* note 9.

69. Erin Tolley, Randy Besco & Semra Sevi, "Who Controls the Purse Strings?: A Longitudinal Study of Gender and Donations in Canadian Politics" (2022) 18:1 Politics & Gender 244 at 256, 259-260, DOI: <10.1017/S1743923X20000276>.

70. Randy Besco & Erin Tolley, "Ethnic Group Differences in Donations to Electoral Candidates" (2020) 48:5 J Ethnic & Migration Studies 1072 at 1088, DOI: <10.1080/1369183X.2020.1804339>.