



September 26, 2018

Via email: mcu@justice.gc.ca

The Honourable Jody Wilson-Raybould, P.C., M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

Dear Minister Wilson-Raybould:

Re: Federal judicial appointments – application package

I am writing on behalf of the Canadian Bar Association's Judicial Issues Subcommittee (the CBA Subcommittee), whose mandate is to address policy issues relating to judicial appointments, compensation, discipline and independence. The CBA Subcommittee has reviewed the new judicial application package and takes this opportunity to raise questions and offer suggestions for improvement.

Background

In 2016, the federal judicial appointments process was updated and a new application package developed as part of an initiative to improve transparency and increase diversity on the bench. This was welcome news. The CBA has long advocated for a "system of selection that will open the doors to more candidates, provide careful and measured consideration of qualifications, and not be subject to partisan influences."¹ In 2013, the CBA called for greater transparency in the appointments process, including the publication of statistics on candidates, and for judicial appointments that reflect the diverse nature of the Canadian population.

All candidates were required to complete the new application package, including those whose applications were in process or who had previously applied and remained on candidate lists. The former application package consisted of an 11-page personal history form, background check form and authorization and release form. The new package is a 25-page questionnaire with additional background check and authorization and release forms. What is "new" in the questionnaire includes:

- More guidance for completion of the optional self-identification on diversity. Candidates are invited to provide information about their identity as Indigenous, Visible Minority, Ethnic/Cultural Group, Disabilities, LBGTQ2 and Woman. Previously this was an open-ended question.

¹ *The Appointment of Judges in Canada*, The Canadian Bar Foundation (Ottawa: 1985), chapter 7.

- A requirement for more – and more varied – references. Candidates must provide six primary references (legal and non-legal) and a secondary reference list (it is highly recommended that at least four are opposing counsel, people who the candidate has supervised, and judges/masters). Previously, the form simply asked for four references. The form also offers an option to authorize contacting law partners or close business associates not listed as references.
- More direction about the information required to complete the section on professional and employment history, now called “Legal Experience and Expertise”.
- A written skills assessment which includes submission of five legal documents (decisions, factums, etc.) showing ability to resolve complex legal problems and writing skills, together with a synopsis for each and reason for selection of the document.
- Five 750-1000 word essays on questions related to the role of the judiciary in Canada’s legal system.

Response to the New Application Package

The CBA supports the government’s objectives in renewing the application questionnaire. Nonetheless, in the year following use of the new application package, the CBA Subcommittee received comments that the package was overwhelming and could deter potential candidates from applying. This is difficult for us to assess. Historical data on the number of applications for federal judicial appointment is not published. The Office of the Commissioner for Federal Judicial Affairs (OCFJA) reported 997 applications received in the year following the introduction of the new application package.² Of these, 441 (44%) applications were assessed.³ Information was not given about the 556 (56%) of applications not assessed, although the OCFJA advises that assessments are conducted only after a complete application package has been received and verification made that the candidate meets threshold constitutional and statutory criteria for an appointment.

We know from the available statistics that the percentage of applications assessed is relatively consistent across gender and diversity categories, with the exception of Indigenous candidates, where the rate of applications that proceed to assessment drops to 30.5%. We do not know what information is given to candidates whose applications are not assessed. Some feedback to those individuals and the legal profession more broadly would be beneficial.

The CBA Subcommittee appreciates that the judicial application package serves multiple objectives. It provides the information required to assess the eligibility and suitability of candidates for judicial appointment. It contributes to a process meant to ensure judicial vacancies are filled expeditiously. It demonstrates to the public the competencies, experience and characteristics required of candidates, which maintains confidence in the process and in the judiciary. It informs aspiring lawyers about the skills and personal qualifications required for appointment and the pathways to achievement.

Whether the new application package achieves its intended objectives is best determined through quantitative and qualitative research involving actual and potential candidates, individuals responsible for the assessment of candidates, and the public. Justice Canada has significant research capacity that we encourage be applied to these questions.

² October 21, 2016 to October 27, 2017. Presumably, this includes candidates who applied before October 20, 2016 and were required to re-apply using the new application package.

³ [Statistics](#) regarding Judicial Applicants and Appointees (October 21, 2016 – October 27, 2017)

Questions and Suggestions for Improvement

The CBA Subcommittee has reviewed the application package, albeit without the benefit of the kind of research mentioned above that would aid in understanding its effects. We did identify some questions and areas in which the questionnaire could be improved.

In an employment context, application questions about age, place of birth, gender, disability and pardoned offences are prohibited by human rights legislation as measures to prevent discrimination in recruitment. Yet questions like these have been embedded in the questionnaire for the federal judicial appointment for some time. The CBA Subcommittee appreciates that judicial office is not “employment” but we found it constructive to ask whether and how a long-established human rights framework to prevent discrimination in employment could contribute to the judicial application package. Where prohibited questions are genuinely required for employment (a bona fide occupational qualification), exemptions or refined recruitment processes are permitted under human rights legislation. On balance, we concluded that there is merit to applying a human rights values and principles perspective to the application package to ensure that the necessary (and only the necessary) information is requested, that it is gathered at the appropriate time in the process, and by the appropriate authority.

For example, question 10.1 asks, “Do you currently have, or have you had in the last ten years, any serious physical or mental health problems?” The CBA Subcommittee is aware of the physical and mental rigours of judicial work and appreciates that assessment of the candidate’s capacity to undertake that work is essential. However, the question does not indicate why ten years of information is required or directly link the requirement to the current ability to perform the duties of a judge. The Assessment Criteria for Judicial Advisory Committees includes, as potential impediments to the appointment, “any debilitating physical or mental medical condition, including drug or alcohol dependency, that would be likely to impair the candidate’s ability to perform the duties of a judge.” This is the language of the previous questionnaire. Given the deeply personal nature of the question, we encourage a review of the wording to ensure it is both effective and the least intrusive means of providing necessary information.

There is no guidance in the questionnaire for candidates with disabilities to address the issue of accommodation, where needed. It would be unfortunate if they felt required to make disclosures in the context of a question which addresses “serious physical or mental health problems.” We suggest this is an area that could benefit from clarification.

Part 7 of the application asks candidates, under the heading “Community and Civic Activities”, to list all organizations of which they are a member and any offices held with dates. Some have interpreted this question as requiring disclosure of all current and past affiliations, although the CBA Subcommittee interprets the question as presenting the opportunity to list affiliations and involvement that support the application. This could be clarified, particularly as some individuals are unclear whether the question requires disclosure of political affiliations. The Guidelines for Judicial Advisory Committee members checking references states that discussions “must not address a person’s political views or political affiliations (except to the degree that they indicate a candidate’s capacity for social involvement).” This adds to the confusion and we encourage further guidance in the application questionnaire to avoid fueling perceptions about partisan influence.

We also query how the application process can be designed to encourage candidates who meet particular needs of the courts (e.g. for unique or specialized practice experience), help address geographic disparities (urban/rural, North/South) or other areas of community representation.

Conclusion

The CBA Subcommittee encourages a review of the judicial application package to ensure that questions are clear for candidates, aligned with appropriate assessment criteria, and respectful of human rights values and principles.

The CBA Subcommittee agrees that the questionnaire is lengthy, but appreciates that candidates for senior positions in any setting are expected to put significant effort into the application process. Increased transparency about the current process through published statistics, published portions of applications by successful candidates, and outreach to the legal profession will contribute to improved understanding of the potential pathways to the judiciary and the requirements of the application process.

We would welcome the opportunity to further discuss these issues with you.

Sincerely,

(original letter signed by Tina Head for John Stefaniuk)

John Stefaniuk
Chair, CBA Judicial Issues Subcommittee

c.c. Marc Giroux, Commissioner for Federal Judicial Affairs
Laura Berger, Policy and Appointments Advisor, Office of the Minister, Justice Canada
François Giroux, Judicial Affairs Advisor, Office of the Minister, Justice Canada
Stephen Zaluski, General Counsel and Director, Judicial Affairs Section, Justice Canada