

September 14, 2020

Hon. David Lametti, PC, MP
Minister of Justice and Attorney-General of Canada
House of Commons
Ottawa, ON K1A 0A6

Dear Minister Lametti,

Re: Appointment of BIPOC judges to Canada's federal courts

We are members of the legal community that represent and/or support clients in Canada's federal courts. We are writing to urge you to take immediate action by appointing Black, Indigenous and People of Colour (BIPOC) judges to the federal courts and amending the criteria for their appointment to ensure the experiences of BIPOC applicants are valued.

It is undeniable that the current racial composition of our federal courts does not reflect the diversity of Canada. Just last month, Supreme Court Chief Justice Richard Wagner highlighted the importance of racial representation on the bench in stating, "All Canadians should be able to see themselves reflected in their justice system. Justice should not make a person feel like an outsider or an 'other' when they confront it."¹ The legacy of centuries of institutional racism has led to a dominantly white federal bench making decisions governing the actions and behaviors of BIPOC communities, without ever having experienced the prejudices and racial biases faced by these communities.

In the Federal Court's current roster of 35 judges and 9 supernumeraries, there are only two BIPOC judges. This is especially troubling given that 63% of the Federal Court's docket deals with immigration, refugee and Indigenous cases, areas in which almost all applicants are BIPOC.² The Federal Court of Appeal and the Supreme Court of Canada, despite commitments to racial inclusion, continue to be all white benches. Simply put, persons seeking remedies in the federal judicial system still do not see themselves reflected in the courts. This must change.

Addressing the lack of judicial diversity has been a priority for this Government since its first election in 2015. The Prime Minister reaffirmed this priority in his 2019 mandate letter to you as Attorney General and Minister of Justice, calling on you to continue the Government's "commitment to transparent, merit-based appointments, to help ensure that people of all gender identities, Indigenous Peoples, racialized people, persons with disabilities and minority groups are reflected in positions of leadership." We recognize this commitment, as well as the 2016 overhaul of the judicial appointments system and the numerous town halls that you and your counterparts have held with community organizations. Despite these efforts, little has changed. Of all new federal judicial appointments since 2016, only three percent self-identify as Indigenous and eight percent identify as visible minorities. In fact, the number of minorities appointed to the bench has dropped two years in a row.³

¹ Harris, Kathleen, "Supreme Court's chief justice calls for more diversity in Canada's legal system," CBC News, , <https://www.cbc.ca/news/politics/supreme-court-wagner-racism-courts-1.5617681>.

² Federal Court Statistics. (March 31, 2020) <https://www.fct-cf.gc.ca/en/pages//about-the-court/reports-and-statistics/statistics-march-31-2020#cont>

³ Stefanovich, Olivia, "Federal Court justice says judicial diversity targets need 'aggressive' timelines," CBC News, June 30, 2020, <https://www.cbc.ca/news/politics/stefanovich-diversity-justice-system-1.5625586>.

To be meaningful, the Government's commitment to diversity must produce results. Concrete and direct action is needed, and is long overdue. As the Parliamentary Black Caucus recently observed, "This is not a time for further discussion—the Afro-Canadian community has spoken for many years and is no longer interested in continued consultation or study. Extensive reports and serious proposals already exist. What is needed is the implementation of these proposals and the dedication of adequate financial resources to do so effectively."⁴

We recommend that the following immediate actions be taken:

1. Fill the six current vacancies on the Federal Court of Canada with BIPOC judges

As of today, the Federal Court has six vacancies. Filling these vacancies with BIPOC judges would make large strides to remedy the effects of over a century of institutional racism, and would be in keeping with diversity of representation for the Canadian judiciary

Filling the vacancies in this manner is easy given the numerous qualified BIPOC candidates who have already been screened. Last year alone, there were 13 Indigenous and visible minority applicants who were "Highly Recommended" by Judicial Advisory Committees. A further 4 were "Recommended". Nonetheless, out of 86 new judges appointed in 2019, only two were Indigenous persons and only four were from visible minority groups.⁵

Special consideration should be given to female BIPOC candidates, as their appointments would address the lack of parity on both gender and race on the Court. Female BIPOC individuals face unique and overlapping disadvantages, giving critical insight into systemic issues that are affected by both race and gender. The Federal Court currently has no female BIPOC judges.

Ensuring diversity of representation is not a new concept for the Canadian judiciary. The *Supreme Court Act* has since 1949 ensured regional representation through provisions requiring three justices to be from Quebec; it is also established practice that the six other justices are selected to ensure regional representation. The 2016 changes to the judicial appointment process were also intended to increase diversity, with a particular focus on moving towards gender parity. In the same way that this Government has made a commitment to regional, linguistic, and gender diversity, it must take concrete action to fulfill its commitment to racial diversity on the bench. We ask that the Government demonstrate its commitment to diversity and work towards greater racial representation on the bench, beginning with the current six vacancies on the Federal Court.

2. Revise the assessment criteria for judicial appointments to recognize systemic barriers that prevent the appointment of BIPOC judges and institute an overarching commitment to appoint BIPOC judges in an effort to overcome the effects of centuries of institutional racism.

⁴ Statement by the Parliamentary Black Caucus. (June 16, 2020) <https://assets.documentcloud.org/documents/6949654/BPC-Statement-Bilingual.pdf>

⁵ Office of the Commissioner for Federal Judicial Affairs Canada, "Statistics regarding Judicial Appointments and Appointees," <https://www.fja.gc.ca/appointments-nominations/StatisticsCandidate-StatistiquesCandidat-2019-eng.html>

Meaningful, long-term change to the composition of Canada's federal judiciary requires amendments to the assessment criteria for appointment. In particular: (i) a recognition of barriers that disproportionately impact BIPOC applicants and (ii) the addition of criteria to actively promote the nomination and appointment of diverse candidates in an effort to reverse centuries of institutional racism.

The bilingualism requirement has been cited by many as presenting an obstacle to the appointment of BIPOC justices to the Supreme Court. In critiquing the requirement, Lorne Sossin writes "It assumes (without justification) that a candidate who speak English and French should be preferred over a candidate who speaks English and one of Canada's Indigenous languages, and that a candidate who is bilingual and white should be preferred over one who is unilingual but reflects an ethnic community that is otherwise under represented on the Court."⁶ While bilingualism is not a mandatory requirement for appointment to the Federal Court of Federal Court of Appeal, it is currently highlighted (along with courtroom experience) among the "Professional Competence and Experience" assessment criteria. Yet, BIPOC individuals are underrepresented among those who are functionally bilingual in Canada's two official languages.⁷ In this manner, assessing bilingual ability on a par with other criteria creates a systemic barrier to the appointment of BIPOC judges.

Notably, the very purpose of the bilingual requirement was to ensure that Franco-Canadian issues were decided upon by people with a French lived experience, and that French values and perspective were incorporated into the fabric of our judiciary. This same purpose demands that BIPOC judges are appointed to the federal bench at a meaningful rate. A rigid bilingualism requirement cannot justify a barrier to BIPOC judicial applicants nor should it impoverish the quality of the bench by excluding the lived experiences and perspective of BIPOC Canadians.

A further problem is that the Judicial Advisory Committees are currently charged with creating a pool of candidates that is "gender-balanced and reflective of the diversity of each jurisdiction." However, without concrete guidance as to how to Advisory Committees might achieve such diversity in the pool of applicants they recommend, there is little hope for change. The paucity of BIPOC appointments in the last four years is evidence that more direct guidance is needed.

Recognizing the value of racially representative justice, we recommend that

- a) The assessment criteria be amended to include an overarching goal which specifically recognizes the impact of institutional racism on the judiciary and prioritizes applicants from BIPOC communities until such a point that racial parity to population is achieved on the bench.
- b) That membership in a BIPOC community be added to the list of characteristics to be considered in assessing candidates. This characteristic should be evaluated on a par with bilingualism in assessing a candidate's application.

⁶ Lorne Sossin. "The Supreme Court's long road to transparency and inclusiveness" (August 9, 2016) Policy Options.

⁷ Beg, Samreen and Lorne Sossin. "Diversity, Transparency & Inclusion in Canada's Judiciary." (December 2016). Debating Judicial Appointments in an Age of Diversity.

Appointing BIPOC judges goes to the very core of our judicial system. As former Chief Justice Beverley McLachlin stated: “If we are to fully meet the challenges of judging in a diverse society, we must work toward a bench that better mirrors the people it judges... The reality, to which I earlier alluded, is that many people, particularly women and visible minorities, may have less than complete trust in a system composed exclusively or predominantly of middle-aged white men in pinstriped trousers. They will question whether such a court can reflect the various viewpoints and values of an increasingly pluralistic society.”⁸ These types of questions are now being asked with increased frequency. We call on the Government to answer them by acting on the recommendations set out in this letter to ensure the continued legitimacy of the federal judiciary. Every day of inaction is a continuation of a historical pattern of racial marginalization and results in further decisions being made that fail to recognize the lived experiences of BIPOC communities.

Yours Sincerely,

[Signatory organizations below]

cc: Rt. Honourable Chief Justice Richard Wagner, PC, Supreme Court of Canada
Hon. Chief Justice Marc Noël, Federal Court of Appeal
Hon. Chief Justice Paul Crampton, Federal Court
Marc A. Giroux, Commissioner for Federal Judicial Affairs

On behalf of 36 bar associations and legal organizations from across Canada:

Bar associations:

Arab Canadian Lawyers Association

Canadian Association of Black Lawyers

Canadian Association of Muslim Lawyers

Canadian Hispanic Bar Association

Federation of Asian Canadian Lawyers

Indigenous Bar Association

Federation of Asian Canadian Lawyers (British Columbia) Society

South Asian Bar Association of Toronto (Ontario)

⁸ Chief Justice Beverley McLachlin “Judging the Challenges of Diversity” (June 2012). Judicial Studies Committee Inaugural Annual Lecture, Edinburgh

Legal organizations:

Canadian Association of Refugee Lawyers

Canadian Environmental Law Association

Canadian Prison Law Association

EcoJustice

Junior Immigration and Refugee Lawyers Network

Association des avocats carcéralistes progressistes (Québec)

Association des avocats et avocates en droit carcéral du Québec (Québec)

Association des juristes progressistes / Association of progressive jurists (Québec)

Refugee Lawyers Association (Ontario)

Speciality clinics:

Black Legal Action Center (Ontario)

Centre for Spanish Speaking Peoples (Ontario)

Chinese & Southeast Asian Legal Clinic (Ontario)

HIV/AIDS Legal Clinic of Ontario (Ontario)

Indigenous Community Legal Clinic (British Columbia)

Just Solutions Legal Clinic (Québec)

Migrant Workers Centre (British Columbia)

Queen's Prison Law Clinic (Ontario)

South Asian Legal Clinic of Ontario (Ontario)

South Asian Legal Clinic of BC (British Columbia)

Community Clinics:

Clinique juridique de Saint-Michel / Saint-Michel Legal Clinic (Quebec) (Montréal)

Clinique juridique du Mile-End / Mile-End Legal Clinic (Montréal)

Durham Community Legal Clinic (Greater Toronto Area)

Hamilton Community Legal Clinic (Hamilton)

Legal Clinic of Guelph and Wellington County (Guelph)

Neighbourhood Legal Services (Toronto)

Niagara Community Legal Clinic (Niagara Falls)

Parkdale Community Legal Clinic (Toronto)

West Toronto Community Legal Services (Toronto)
