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Popping the Question: What the Questionnaire for Federal Judicial Appointments Reveals about the Pursuit of Justice, Diversity, and the Commitment to Transparency

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Since 2017, the Canadian government has published excerpts from questionnaires that prospective judges completed as part of the judicial selection process, subjecting newly appointed superior and federal court judges to a degree of scrutiny that is unprecedented in Canadian history. Using this novel source material, this article explores what a sample of 16 judges' questionnaires do and do not say about the individuals behind the robes. This review suggests that those appointed to the bench in 2017 generally demonstrate insight into the judicial role in Canada. However, some provide only superficial responses, others parrot back normative values that the government has already prescribed, and many offer substantially similar answers. This suggests, first, that not all successful applications or, for that matter, applicants are created equal and, second, that applicants use the questionnaire less as an opportunity to demonstrate free thought and more as a test to prove their fealty to dominant assumptions about the court's role in society. The questionnaire therefore misses an opportunity to show that diversity on the bench is more than skin-deep. Meanwhile, recent trends show that the government has lagged behind on its commitment to make judges' applications public. The article concludes that if the government is serious about introducing greater transparency and accountability to the judicial selection process, then it should revise the questionnaire to elicit more meaningful responses from applicants and table legislation to codify the government's political promise to publish appointees' views on the role of the judiciary in Canadian society.

Depuis 2017, le gouvernement canadien publie des extraits des questionnaires remplis par les juges potentiels dans le cadre du processus de sélection judiciaire, soumettant ainsi les juges des cours supérieures et fédérales nouvellement nommés à un degré d'examen sans précédent dans l'histoire du Canada. En utilisant ce nouveau matériel de base, le présent article explore ce qu'un échantillon de 16 questionnaires de juges disent et ne disent pas à propos des individus portant la toge. Cet examen suggère que les personnes nommées à la magistrature en 2017 font généralement preuve d'une bonne connaissance du rôle judiciaire au Canada. Cependant, certains ne donnent que des réponses superficielles, d'autres reprennent les valeurs normatives que le gouvernement a déjà prescrites, et beaucoup offrent des réponses substantiellement similaires. Cela suggère, premièrement, que toutes les candidatures retenues ou, d'ailleurs, les candidats eux-mêmes ne sont pas créés égaux et, deuxièmement, que les candidats utilisent le questionnaire moins comme une occasion de démontrer leur libre pensée et plus comme un test pour prouver leur fidélité aux hypothèses dominantes sur le rôle de la cour dans la société. Le questionnaire manque donc une occasion de montrer que la diversité sur le banc est plus que superficielle. Entre-temps, les tendances récentes montrent que le gouvernement a pris du retard dans son engagement à rendre publiques les requêtes des juges. L'article conclut que si le gouvernement souhaite sérieusement introduire plus de transparence et de responsabilité dans le processus de sélection des juges, il devrait alors réviser le questionnaire pour obtenir des réponses plus significatives de la part des candidats et déposer un projet de loi pour codifier la promesse politique du gouvernement de publier les opinions des personnes nommées sur le rôle du pouvoir judiciaire dans la société canadienne.

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Introduction

On 27 April 2007, Kristine Eidsvik reached what might be described as the pinnacle of her career. Eidsvik, then a no-nonsense litigator in her late forties, had made a career out of being "first"—the first woman to become an associate at the law firm founded by former Alberta premier John Brownlee and, later, the first woman to become a partner at a prominent Calgary firm.[1] On this day, Eidsvik became the Government of Canada's latest appointee to Alberta's superior trial court, the Court of Queen's Bench.[2] Five months earlier, the newly christened Harper government had implemented reforms to the regional Judicial Advisory Committees that, since 1988, have been responsible for evaluating applications and recommending nominees for federally appointed courts to the Minister of Justice. Most notably, after November 2006, Committees could no longer "highly recommend" candidates, as had been the practice in previous decades; instead, they could only "recommend" or "not recommend" a candidate, raising questions about whether this would permit ideology to eclipse merit in the Minister's final analysis.[3]

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1. Lerina Koornhof, "Alumni Profile: The Honourable Kristine Eidsvik" *University of Alberta* (5 April 2017), online: <web.archive.org/web/20170425080757/https://www.ualberta.ca/law/news/main-news/2017/april/the-honourable-kristine-eidsvik> [perma.cc/MK59-Y6TL].
2. Canada, Department of Justice, News Release, "Alberta Judicial Appointments Announced" (27 April 2007), online: <webarchive.bac-lac.gc.ca:8080/wayback/20071116045906/http://canada.justice.gc.ca/en/news/ja/2007/doc_32008.html> [perma.cc/DWH2-45GS].
3. Rosemary Cairns Way, "Deliberate Disregard: Judicial Appointments under the Harper Government" (2014) 67 SCLR (2d) 43 at 56. See also Canada, Department of Justice, News Release,

In 2018, eleven years after her appointment, Justice Eidsvik was still making news, but for all the wrong reasons. Eidsvik was describing one of her experiences conducting a judicial dispute resolution[4] to a classroom of law students when she admitted that she felt uncomfortable being in a room "full of big dark people." She reportedly said she "was used to being in her 'ivory tower' where [she is] normally 'removed from the riff raff.'"[5] Within 24 hours, she had apologized to the students, saying she "felt sick" by what she had said and that "as soon as it came out of [her] mouth, [she] recognized [the comments were] not appropriate and could be construed as insensitive to racial minorities."[6] To her credit, Eidsvik completed a course on cultural competence on her own initiative and, in April 2018, the body tasked with disciplining judicial misconduct, the Canadian Judicial Council, dismissed four complaints against her, concluding that "this [was] an isolated incident and it is not necessary to take further action."[7]

Justice Eidsvik might have been joking, but her "ivory tower" metaphor is an apt depiction of superior courts across Canada, whose judges are overwhelmingly old, *white* men. If federally appointed judges were characters in *Guess Who?*—the children's board game in which players ask each other yes-or-no questions to whittle down a field of possible suspects—then one would be hard-pressed to find many physical features to distinguish between them. *Is your judge black?* Guess again. From 2009 to 2012, 98 out of the 100 judges appointed by the federal government were white. The remaining two were Métis.[8] *Is your judge a woman?* Probably not.[9] In 2014, then-Justice Minister Peter MacKay

"Minister Toews Pleased to Announce Changes to Judicial Advisory Committees" (10 November 2006), online: <www.canada.ca/en/news/archive/2006/11/minister-toews-pleased-announce-changes-judicial-advisory-committees.html> [perma.cc/82Y4-723M].

4. Judicial dispute resolution is an alternative dispute resolution mechanism that can be binding or non-binding. It offers litigants a chance to have their dispute resolved by a sitting judge in a closed boardroom without the trappings of an ordinary trial and strict rules of evidence.

5. Meghan Grant & Lucie Edwardson, "Calgary judge apologizes to law students for comments 'insensitive to racial minorities,'" *CBC News* (5 January 2018), online: <www.cbc.ca/news/canada/calgary/judge-university-calgary-law-students-comments-kristine-eidsvik-apology-1.4474760> [perma.cc/SW4D-EX7M].

6. *Ibid*.

7. Canadian Judicial Council, News Release, "Canadian Judicial Council completes its review of complaints against the Honourable Kristine Eidsvik" (10 April 2018), online: <cjc-ccm.ca/en/news/canadian-judicial-council-completes-its-review-complaints-against-honourable-kristine-eidsvik> [perma.cc/XYY4-3L5M].

8. Kirk Makin, "Of 100 new federally appointed judges 98 are white, Globe finds," *The Globe and Mail* (17 April 2012), online: <www.theglobeandmail.com/news/politics/of-100-new-federally-appointed-judges-98-are-white-globe-finds/article4101504> [perma.cc/N3MX-2HL6].

9. From 2007 to 2017, 64 per cent of all federal judicial appointees were male: Office of the Commissioner for Federal Judicial Affairs Canada, *Judges Appointed between 2007 and 2017, by gender* (27 October 2017), online: <www.fja.gc.ca/appointments-nominations/AppointedByGender-

explained that women "aren't applying" because they would rather stay at home with their children than travel the judicial circuit.[10] His comments were roundly criticized.[11] *Does your justice have white hair?* Most likely. As applicants need to have practised law for at least ten years to be eligible for appointment,[12] most judges are late in their careers by the time they join the bench. In addition, one in four federally appointed judges have elected supernumerary status, a kind of semi-retirement, which means they are between 65 and 75 years old.[13] The total number of judges over 65 is even higher, as not all will have accumulated the requisite years of service to be eligible for supernumerary status and not all would elect that status, even if they could do so.

In this way, Justice Eidsvik is something of a contradiction. On one hand, she is among the minority of federally appointed judges who are women. On the other hand, her "injudicious"[14] comments bear the unmistakable mark of a person who belongs to the dominant social group. As one student noted, "what was shocking was the ease at which [her comment] came…it was almost like she was ignorant to the fact it was offensive."[15] Without a record of her application to become a judge or the reasons for her selection, it is impossible to say whether the government would have appointed Justice Eidsvik but for its changes to the selection process in 2006. But one thing is clear: her comments demonstrate the harm that can occur when judges do not or, by virtue of their privilege, cannot empathize with the communities they serve.

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eng.html> [perma.cc/36L9-UETW].

10. Tonda MacCharles, "Peter MacKay tries to explain lack of diversity on federal courts," *The Toronto Star* (18 June 2014), online: <www.thestar.com/news/canada/2014/06/18/peter_mackay_tries_to_explain_lack_of_diversity_on_federal_courts.html> [perma.cc/FFV5-JD2J].

11. See e.g. Tonda MacCharles, "Lawyer disputes Peter MacKay's claim that women, visible minorities don't apply to be judges," *The Toronto Star* (19 June 2014), online: <www.thestar.com/news/canada/2014/06/19/lawyer_disputes_peter_mackays_claim_that_women_visible_minorities_dont_apply_to_be_judges.html> [perma.cc/E25C-TSY8]; Breese Davies, "Lack of women, minority judges not due to baby-making," *The Toronto Star* (24 June 2014), online: <www.thestar.com/opinion/commentary/2014/06/24/lack_of_women_minority_judges_not_due_to_babymaking.html> [perma.cc/8T2M-CBMH].

12. See Office of the Commissioner for Federal Judicial Affairs Canada, *Guidelines for Judicial Advisory Committee Members* (October 2016) at Appendix A, online: <www.fja.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html> [perma.cc/8HGR-ZWKR] [JAC Guidelines].

13. See Office of the Commissioner for Federal Judicial Affairs Canada, *Number of Federally Appointed Judges in Canada* (3 September 2019), online: <www.fja.gc.ca/appointments-nominations/judges-juges-eng.aspx> [perma.cc/RV9W-F5E9]. For supernumerary status eligibility, see Canadian Superior Courts Judges Association, *Supernumerary and Retired Judges*, online: <www.cscja.ca/about-us/constitution/supernumerary-and-retired-judges> [perma.cc/6LUG-95DN].

14. Canadian Judicial Council, *supra* note 7.

15. Grant & Edwardson, *supra* note 5.

Fortunately, there are signs of improvement. In 2015, Justin Trudeau's Liberals successfully campaigned on a *New Plan for a Strong Middle Class*, including a platform to promote "Fair and Open Government." That meant, among other things, a pledge to "make the Supreme Court appointment process more transparent"[16] and to "build a government as diverse as Canada" by adopting "a new government-wide appointment process that is open and based on merit."[17] This new ethos would extend beyond the top court to all federal judicial appointees, including judges of the Federal Court and the superior courts of the provinces. As Trudeau's theory went, "[o]ur country is stronger, and our government more effective, when decision-makers reflect Canada's diversity."[18]

This logic is a common refrain among judicial selection reformers. Although the ways in which judges are chosen vary around the world, many agree that a diverse bench is preferable to a homogenous one.[19] But in what sense(s) is Canada diverse and how can or should governments seek to replicate this diversity among their ranks, if at all? If diversity in the judiciary means racial diversity, as it often does, then one might argue that diversity is inessential to a well-functioning justice system—that, beyond playing some vague representative function, it is little more than window dressing on the cold application of law. Indeed, some reject the notion that courts can or should play a representative role at all, representation being a function traditionally reserved for legislatures.[20]

However, whether or not one believes that courts have a moral or institutional obligation to visibly reflect the communities that they serve,

16. Liberal Party of Canada, "Real Change: A New Plan for a Strong Middle Class" (2015) at 30, online (pdf): <www.liberal.ca/wp-content/uploads/2015/10/New-plan-for-a-strong-middle-class.pdf> [perma.cc/A43H-E529].

17. *Ibid* at 34.

18. *Ibid*.

19. For a Canadian perspective, see Samreen Beg & Lorne Sossin, "Diversity, Transparency and Inclusion in Canada's Judiciary" in Graham Gee & Erika Rackley, eds, *Debating Judicial Appointments in an Age of Diversity* (London: Routledge, 2017) at 118-141. For a view from across the pond, see Lady Hale of Richmond, "How Diverse Are Judges?" in Jeremy Cooper, ed, *Being a Judge in the Modern World* (New York: Oxford UP, 2017) 183 at 184-185. Baroness Hale of Richmond, President of the Supreme Court of the United Kingdom and the first woman appointed to that court, offers four rationales for increasing diversity on the bench: boost the judiciary's democratic legitimacy, manifest the equality that courts purport to uphold, avoid wasting talent, and achieve a difference in outcomes.

20. See e.g. Sophie Turenne, "Fair Reflection of Society in Judicial Systems" in Sophie Turenne, ed, *Fair Reflection of Society in Judicial Systems: A Comparative Perspective* (Heidelberg: Springer International, 2015) at 1. Turenne argues that speaking of a court's "representativeness" conflicts with notions of judicial independence and impartiality. Turenne prefers to speak of racial diversity on the bench as only one among many possible procedural and institutional reforms designed to enhance the court's reflection of society, which is an independently worthy goal. Cf Lorne Sossin, "Should Canada Have a Representative Supreme Court?" in Nadia Verrelli, ed, *The Democratic Dilemma: Reforming Canada's Supreme Court* (Toronto: McGill–Queen's UP, 2013) at 27.

there are also pragmatic reasons to do so. First, as natural scientists have recognized, that which is more diverse tends to be more resilient and, to that extent, more sustainable.[21] The same may be said of social institutions, including courts, whose legitimacy depends not only on the constitution, but also on the public's confidence in them and on respect for the rule of law. These latter conditions are strongest when people feel that the justice system is of, for, and by them. In 2020, in a country as diverse as Canada, where 22.3 per cent of citizens are visible minorities,[22] a predominantly "male, pale, and frail"[23] judiciary simply will not do. Second, there is "growing empirical evidence" that judges from diverse groups judge differently, sometimes producing substantively different—and, diversity advocates would argue, *better*—outcomes than their white, male colleagues.[24]

Yet, quite apart from challenging whether the Trudeau government's faith in diversity is preferable to its alternative, there is the question of whether and how states can meaningfully achieve diversity among their courts. Recent changes in Canada's judicial appointments process offer a unique case study to evaluate the extent to which this avowed commitment to diversity is manifested in the opinions and personality traits of recent appointees. On 20 October 2016, the Minister of Justice, Jody Wilson-Raybould, announced a new process to "increase the openness, transparency, accountability, and diversity of Canada's judiciary."[25] The Minister made three notable changes, all targeting the Judicial Advisory Committees. Wilson-Raybould "reconstituted committees [to] better reflect the diversity of our great country[;] revised committee mandates to increase the independence of their processes; and [adopted] an open selection process for the three members of each committee who represent the general public…."[26] In short, the government had undone

21. See e.g. Paul Leslie & J Terrence McCabe, "Response Diversity and Resilience in Social-Ecological Systems" (2013) 54:2 Current Anthropology 114.

22. See Statistics Canada, *Immigration and Ethnocultural Diversity Highlight Tables (Census Program Data Products, 2016)*, online: <www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/imm/Table.cfm?Lang=E&T=41&Geo=00&SP=1&vismin=2&age=1&sex=1> [perma.cc/SB7J-AGA2].

23. I owe this phrase to a 2007 Carleton University lecture delivered by Peter Griffiths, who was then Associate Chief Justice of the Ontario Court of Justice.

24. Rosemary Hunter, "More than Just a Different Face? Judicial Diversity and Decision-making" (2015) 68 Curr Legal Probs 119 at 124, 129.

25. Canada, Department of Justice, 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/department-justice/news/2016/10/government-canada-announces-judicial-appointments-reforms-appointments-process-increase-openness-transparency.html> [perma.cc/78A3-NRF2].

26. *Ibid.*

the controversial changes ushered in by the Harper government in 2006: gone was the police representative on the committee, back was the "highly recommended" category, and new was the emphasis on selecting women and visible minorities for the committees in the hope that their own diversity would trickle down to their non-binding recommendations for judicial appointment.[27]

A fourth change escaped mainstream attention: after October 2016, certain parts of a successful application for federal judicial appointment would be released to the public.[28] Since then, the government has published excerpts from questionnaires that prospective judges completed as part of the selection process, subjecting newly appointed superior and federal court judges to a degree of scrutiny that is unprecedented in Canadian history. As the Department of Justice describes it, "[t]he questionnaires are used by the Judicial Advisory Committees across Canada to review candidates and submit a list of 'highly recommended' and 'recommended' candidates for consideration by the Minister of Justice. Candidates are advised that part of their questionnaire could be made available to the public, should they be appointed to the bench."[29] So far, the government has released data from Parts 5, 6, 7, and 11 of the questionnaire, which cover a judge's language, education, work history, and views on the role of the judiciary in Canada's legal system, respectively. By 31 December 2017, the government had appointed 89 judges whose applications it has published or has promised to publish "shortly."[30] This number includes appointments in each of the ten provinces, as well as appointments to the Federal Court and Federal Court of Appeal. It excludes prothonotaries; nominees to the Supreme Court of Canada, who follow a distinct selection

27. A January 2017 press release announcing that the government had reconstituted Judicial Advisory Committees in several provinces emphasized that women made up "a strong majority of the new JACs and minority groups have unprecedented representation": Canada, Department of Justice, News Release, "Minister of Justice announces Judicial Advisory Committee appointments" (19 January 2017), online: <www.canada.ca/en/department-justice/news/2017/01/minister-justice-announces-judicial-advisory-committee-appointments.html> [perma.cc/EV42-YWU5].

28. Canada, Department of Justice, *Questionnaire for Federal Judicial Appointments* (4 August 2017), online (pdf): <www.fja-cmf.gc.ca/appointments-nominations/forms-formulaires/cq-qc/pdf/Questionnaire-for-Federal-Judicial-Appointments-Aug-04-2017.pdf> [perma.cc/5CLZ-UEL9] [*Questionnaire*].

29. See e.g. Canada, Department of Justice, *The Honourable Justice David M. Paciocco's Questionnaire* (7 April 2017), online: <www.canada.ca/en/department-justice/news/2017/04/the_honourable_justicedavidmpacioccosquestionnaire.html> [perma.cc/878C-8225] [*Paciocco's Questionnaire*].

30. See e.g. Canada, Department of Justice, News Release, "Government of Canada announces judicial appointment in the province of Quebec" (19 December 2017), online: <www.canada.ca/en/department-justice/news/2017/12/government_of_canadaannouncesjudicialappointmentintheprovinceofq.html> [perma.cc/AQZ2-7EB2].

process; deputy judges to the territories; and judges who already held federal judicial office when they were elevated to the Court of Appeal, reallocated to the superior court in their province, or promoted to Chief Justice.[31] Table 1 shows the distribution of federally appointed judges in the first year after the Minister's reforms took effect.

Table 1: Federal Judicial Appointments by Jurisdiction from 20 October 2016 to 31 December 2017[32]

Jurisdiction	Number of first-time federal judicial appointees *(excludes promotions and demotions of existing federal appointees)*
Ontario	30
Quebec	16
British Columbia	14
Alberta	9
Federal	6
Newfoundland and Labrador	5
Nova Scotia	3
Prince Edward Island	3
Manitoba	1
New Brunswick	1
Saskatchewan	1
TOTAL	**89**

Of the government's 89 appointments made under the new process in 2017, 16 have questionnaires that are presently available to the public, as listed in Table 2. This study uses the information in Part 11 of these questionnaires to produce a qualitative analysis of judges' views on the role of the judiciary, operating on the premise that there is public value in getting to know the people behind the decisions that help to regulate our lives. Who we empower to settle disputes among us tells us something about who we are as a society. And to the extent that these answers represent

31. There is one exception: see footnote in Appendix A.
32. See Appendix A for a full list of appointees by date, name, and jurisdiction. The Minister announced the new process in 2016, but she did not appoint anyone under it until 2017.

their authors' actual opinions, they become self-fulfilling prophecies after an applicant's appointment to the bench. Thus, studying judges' job applications offers a rare window into these decision-makers' psyches.

Table 2: Judges appointed by the Federal Government in 2017 whose questionnaires are publicly accessible as of 1 January 2020 (by date of appointment)

Date	Jurisdiction	Appointee	Court Level
3/9	PEI	Clements, Tracey L. (Q.C.)	Trial
3/24	AB	deWit, William T. (Q.C.)	Trial
3/24	AB	Hollins, Michele H. (Q.C.)	Trial
3/24	AB	Khullar, Ritu (Q.C.)	Trial
3/24	AB	Slawinsky, The Honourable Marilyn	Trial
3/24	QC	Moore, Benoît	Trial
4/7	ON	Paciocco, The Honourable David M.	Appellate
4/7	ON	Swartz, Deborah	Trial
4/12	BC	Mayer, Andrew Phillip Avtar	Trial
4/12	ON	Bell, Robyn M. Ryan	Trial
4/12	ON	Nakatsuru, The Honourable Shaun S.	Trial
5/12	BC	Riley, W. Paul (Q.C.)	Trial
6/14	BC	Milman, Warren B.	Trial
6/23	BC	Brundrett, Michael J.	Trial
6/23	Federal	Pentney, William F.	Trial
6/23	ON	Gomery, Sally A.	Trial

One could argue this is a useless endeavour that reads too much into judges' answers, which cannot be understood apart from the practical requirements for which they were created.[33] In other words, the questionnaires might say more about what applicants think the government wants to hear—what they think will get them appointed—than what the

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

applicants themselves believe. Their content could be described as either style or substance. But if it is all style, then one might ask what the government expects to achieve by publishing judges' responses, why the government would ask questions that elicit superficial answers or, if the questions are serious, then why the government would appoint people who do not demonstrate substantial insight into the role of Canadian courts. In each of these cases, public confidence in the judicial branch of government is undermined. On the other hand, if the content of these questionnaires is substantive, then they represent a cache of information that might tell Canadians something about their judiciary that is troubling or reassuring. In view of the Judicial Advisory Committees' secrecy, the only way to know is to dissect the answers that the committees themselves relied upon in making their recommendations for appointment.

An initial review of the available questionnaires suggests that many of their authors do demonstrate insight into the judicial role in Canada. However, some provide only superficial responses, others parrot back normative values that the government has already prescribed, and many offer substantially similar answers. This suggests, first, that not all successful applications or, for that matter, applicants are created equal and, second, that applicants use 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. This is not surprising in view of the judiciary's history as a primarily reactive and conservative institution,[34] but it means that the questions miss an opportunity to show that diversity on the bench runs deeper than the eye can see. Thus, the questionnaire should be revised to elicit more meaningful responses from prospective appointees if the government is serious about its commitment to greater transparency and accountability in the appointment of federal and superior court judges.

I. *Scope and methodology*

This article is about whether judges' applications convey "a deep understanding of the judicial role in Canada," as the government suggests they should.[35] It is *not* about the visible elements of diversity, except to the extent that they implicate or suggest differences in the way judges view the role of the judiciary. The goal is not to tally the number of women

34. This is a function of the court's after-the-fact adjudication of disputes and the common-law principle of *stare decisis*, which preserves the status quo and fosters restraint. See e.g. Stephen R Perry, "Judicial Obligation, Precedent and the Common Law" (1987) 7:2 Oxford J Leg Stud 215 at 248.

35. See *Questionnaire*, *supra* note 28, Part 11.

or to count the number of ethnicities represented on the bench.[36] Instead, this study considers the degree to which judges appointed by the Liberal government in 2017 exhibit philosophical or ideological diversity. It does this by looking at a sample of 16 judges' answers to two of six questions on the role of the judiciary in Canada's legal system contained in Part 11 of the Questionnaire for Federal Judicial Appointments. Therefore, the completed questionnaires of these seven women and nine men figure prominently in the analysis.

This study is exploratory, inductive, and qualitative. It is not meant to be exhaustive or to unearth every trend one might derive from these questionnaires, which are data-rich and difficult to assimilate. Rather than measure the frequency with which certain concepts arise in the text of judicial applications, which would have limited utility in a sample this size, this project seeks to build an understanding of the *range* of answers judges have given by observing the presence or absence of certain substantive themes and stylistic devices to arrive at conclusions about what is true of the sample, even if it is not 100 per cent representative of the larger population that the Liberal government has appointed to federal and superior courts in Canada.[37] In doing so, the hope is that this reveals something about how these particular judges relate to notions of justice and interact with the Judicial Advisory Committees that evaluate their applications. The point is not to suggest that the competence and abilities of judges are static, or that an application is the only or best way to predict a candidate's likelihood of a long, successful, and influential tenure on the bench. However, the Questionnaire is one of the primary tools the government uses to gauge an applicant's suitability for the judicial role and, in that sense, it is no trivial matter. The intention is to *start* the discussion about the value and possible consequences of publishing judges' applications—not to preempt it. In addition, this project is limited insofar as there could be errors in the government's publication of the data that skews or misrepresents what judges intended when they answered the questionnaire. As written media, the questionnaires do not enable the reader to seek clarification

36. This work, which is important in its own right, is starting to be done by the Office of the Commissioner for Federal Judicial Affairs. Since 2017, it has published statistics on the number of judicial applicants and appointees who self-identify as members of various gender, racial, Indigenous, disability, linguistic, and sexual minority groups: see Office of the Commissioner for Federal Judicial Affairs Canada, *Statistics regarding Judicial Applicants and Appointees (October 21, 2016–October 27, 2017)*, online: <www.fja.gc.ca/appointments-nominations/StatisticsCandidate-StatistiquesCandidat-2017-eng.html> [perma.cc/YR8F-FJ4T].

37. Webley, *supra* note 33 at 927. Nor can this essay's observations generalize to all 1,216 federally appointed judges in office as of 3 September 2019: see *Number of Federally Appointed Judges in Canada*, *supra* note 13.

or elaboration, as the Judicial Advisory Committees who screened the applications might have done[38] and, in any event, such follow-up could be construed as violating an applicant's ethical duty to avoid commenting on issues that he may come to adjudicate now that he is in office.[39]

Part II begins by exploring what the questionnaires do or do not suggest about the judges that the government has appointed. Part III introduces an important caveat on the government's commitment to transparency—namely, the significant turnaround time to release judges' applications to the public after their appointments. That section asks and then answers what might explain the delay and what this means for the government's reform agenda. Finally, Part IV concludes by suggesting ways that the Questionnaire for Federal Judicial Appointments could be improved.

II. *The Questionnaire for Federal Judicial Appointments*

Lawyers and judges who are interested in becoming a federal or superior court judge apply by downloading an application form styled the "Questionnaire for Federal Judicial Appointments" from the Office of the Commissioner for Federal Judicial Affairs' website. The Questionnaire, which was last revised on 27 October 2017, is available in English and French. It instructs candidates on how to complete the application and where to mail it. The 25-page Questionnaire is divided into 12 parts.[40] Part 11, titled "The Role of the Judiciary in Canada's Legal System," states:

> The Government of Canada seeks to appoint judges with a deep understanding of the judicial role in Canada. In order to provide a more complete basis for evaluation, candidates are asked to offer their insight into broader issues concerning the judiciary and Canada's legal system.

38. The Questionnaire is a big part of the application, but it is not the only or even the most important part. Along with the Questionnaire, applicants must submit a background check consent form, a form authorizing one's provincial law society to release information to the government, and five legal writing samples. As noteworthy as what the written part of the application contains is what it does not. For instance, the Questionnaire discloses that the "Judicial Advisory Committee consults widely, both within *and outside the sources provided in this Questionnaire*, and in making enquiries will make every effort to maintain confidentiality" [emphasis added]. Thus, the Questionnaire is only the tip of the iceberg of what a Judicial Advisory Committee may consider in evaluating a candidate's fit for the judicial role. Judicial Advisory Committees are known to solicit information directly from references listed in Part 3, including opposing counsel and sitting judges, to develop a more candid assessment of the applicant's credentials: see JAC Guidelines, *supra* note 12.

39. See e.g. Office of the Commissioner for Federal Judicial Affairs Canada, "Ethical, Change of Lifestyle and Other Considerations" in *Guide for Candidates*, online: <www.fja.gc.ca/appointments-nominations/guideCandidates-eng.html> [perma.cc/U9XB-JJ6R].

40. These cover different personal information about one's demographics, language proficiency, legal and non-legal work experience, education, awards, community involvement, notable cases, publications, presentations, character issues, disciplinary history, and health: see *Questionnaire, supra* note 28.

> For each of the following questions, please provide answers of between 750 and 1000 words.
>
> 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 variety 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 the 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 equip you for the role of a 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 experiences reflected there, you may, if you choose, provide information about yourself that you feel would assist in this objective.[41]

In keeping with this article's exploratory purpose, it focuses on Questions 1 and 2, making only general references to Questions 3 to 6. Before turning to examine the substance of applicants' answers, it is worth making a few general observations, given the novelty of the source material.

1. *The rules were made to be broken*

First, answers to Part 11 are sometimes as notable for what they do not say as for what they do. For example, although the government requested that candidates provide answers of between 750 and 1000 words each, the applicants in this study often ignored that instruction altogether. As Table 3 shows, only 36 of the 80 answers studied (45 per cent) fell within or above the specified word range. More than half (55 per cent) of all answers fell below the required response length. All but two of the 16 questionnaires studied had one or more answers that fell below the required 750-word minimum. Question 4 on the audience for judicial decisions was the most under-answered (11 answers below range), followed by Questions 2 and 3 on diversity and the appropriate role of a judge, respectively (9 answers each), Question 1 on one's contributions to the law (8 answers), and Question 5 on the applicant's personal qualities (7 answers). On average, respondents wrote the least about a court's audience and the most about their personal qualities, professional skills, and abilities.

41. *Ibid* at 19-24 [emphasis in original].

Table 3: Word Counts of Appointees' Answers to Questions in Part 11 of the Questionnaire for Federal Judicial Appointments[42]

	PART 11 – QUESTIONS ON THE ROLE OF THE JUDICIARY IN CANADA'S LEGAL SYSTEM					
APPOINTEE (IN ORDER OF APPOINTMENT)	**1**	**2**	**3**	**4**	**5**	**6†**
Tracey L. Clements, Q.C.	304	206	123	79	476	163
William T. deWit, Q.C.	690	582	904	880	794	222
Michele H. Hollins, Q.C.	568	536	355	236	407	350
Ritu Khullar, Q.C.	759	519	447	338	616	620
The Hon. Marilyn Slawinsky	783	722	517	871	936	375
Benoît Moore	836	801	819	748	918	368
The Hon. David M. Paciocco	1171	827	1013	1136	1078	314
Deborah Swartz	767	856	539	183	635	557
Andrew Phillip Avtar Mayer	737	673	666	707	926	352
Robyn M. Ryan Bell	821	799	734	735	742	136
The Hon. Shaun S. Nakatsuru	621	611	610	668	601	665
W. Paul Riley, Q.C.	502	387	774	725	1066	89
Warren B. Milman	836	815	913	767	948	-
Michael J. Brundrett	702	754	895	796	819	11
William F. Pentney	382	519	772	457	997	379
Sally A. Gomery	871	823	749	524	713	583
MEAN AVERAGE	709	652	677	616	792	324

†OPTIONAL IN RANGE ABOVE RANGE BELOW RANGE

Significantly, Part 11 is the only part of the Questionnaire with a specified word range. It was open to the government to place no limits on length or to specify only an upper limit, as is often the case with standard forms. That it chose not to, combined with the form's signal that the government "seeks to appoint judges with a *deep* understanding of the judicial role in Canada," implies that the length of an applicant's response was meant to be treated as a proxy for the depth of his or her answer. That assumption might not always be accurate, but neither is it

42. All word counts are from the English-language version of the questionnaires except for Quebec appointee Benoît Moore, whose numbers are from the French questionnaire: see Canada, Department of Justice, *The Honourable Justice Benoît Moore's Questionnaire* (31 March 2017), online: <www.canada.ca/en/department-justice/news/2017/03/the_honourable_justicebenoitmooresquestionnaire.html> [perma.cc/X76N-TWTZ] [*Moore's Questionnaire*]. It is possible that these word counts reflect abridged versions of the applicant's answers; however, one may assume they are the original answers, as the published questionnaires do not indicate that they have been revised. Still, some editing has probably occurred because it is unlikely all the applicants drafted their answers as bulleted points, which is how they appear online.

unreasonable. For example, Justice Clements used her first chance to show the government that she has a deep understanding of the appropriate role of a judge in a constitutional democracy by providing the shortest, and most glib, of all the answers to Question 3:

> I have chosen to provide a somewhat "philosophical" answer. There is a strong argument to be made that a judge in a constitutional democracy is the legal and moral compass of society. This is a heavy, heavy burden. A judge really is both the gatekeeper and the caretaker of a constitutional democracy. He or she is the paramount "check and balance" in our system. The eight [sic] and burden of those roles is not lost to me. I [sic] does seem to me that our system really must constantly strive to strike the balance of upholding and respective [sic] the rule of law (which forms the very foundation of our system and our society) but also recognizing the many, many challenges and obstacles that many face.[43]

Contrast her 123-word answer with a small excerpt from Justice Riley's longer, 774-word response to the same question:

> In a constitutional democracy, democratically elected legislatures have the mandate and authority to enact legislation for the benefit of their constituents, but only within the limits set out in the constitution. The role of the judiciary in a constitutional democracy is to uphold and enforce these constitutional limits. In other words, judges are called upon to ensure that legislation and executive actions of the government do not exceed the limits set out in the constitution. Two particular areas in which courts are most commonly required to perform this function are (i) by adjudicating upon the division of legislative powers between the federal and provincial governments ("Division of Powers"), and (ii) by protecting and enforcing individual rights under the *Canadian Charter of Rights and Freedoms* (the "*Charter*").
>
> […][44]

In fewer words, this excerpt from Justice Riley's answer manages to touch upon three dimensions of Canada's judiciary that Justice Clements' does not—at least not explicitly: the court's role in reviewing legislation for compliance with the constitution, the possibility for conflict between federal and provincial laws, and the superiority of individual rights vis-à-vis Parliament.

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43. Canada, Department of Justice, *The Honourable Justice Tracey L. Clements' Questionnaire* (9 March 2017), online: <www.canada.ca/en/department-justice/news/2017/03/the_honourable_justicetraceylclementsquestionnaire.html> [perma.cc/599C-PP8K].

44. Canada, Department of Justice, *The Honourable W. Paul Riley's Questionnaire* (1 November 2017), online: <www.canada.ca/en/department-justice/news/2017/11/the_honourable_wpaulrileysquestionnaire.html> [perma.cc/BNX6-VSBC] [*Riley's Questionnaire*].

The point of this exercise is not to suggest that Justice Clements' answer is normatively wrong and Justice Riley's is correct. Nor is it to criticize Justice Clements as a person, to imply that she could not be a fair and impartial arbiter, or to suggest that Justice Riley knows something that she does not. However, it is fair to say that, in relative terms, her answer is not as sophisticated as Justice Riley's and, in absolute terms, her answer is deficient because it fell below the requested word range, while his did not. In most spheres, including the law, concision is an underrated virtue, but a concise answer is not necessarily a complete one. Question 3 alone, which implicates normative theories of constitutionalism, democracy, and institutional design, could justifiably be the subject of a 3,000-word essay. If the purpose of the Questionnaire is to demonstrate a *deep* understanding, then surely completeness at the risk of verbosity is preferable to brevity at the risk of appearing ignorant.

This observation has three implications. First, given that most applicants fail to answer consistently within the specified word range, it is questionable whether those applicants demonstrate a deep understanding of the subject matter. Second, one might doubt the suitability of an applicant for judicial office who disregards formal rules as basic as "provide answers of between 750 and 1000 words." If they cannot or will not do that before their appointment, then what rules will they not follow or what reasons will they not disclose when they make decisions on the bench? Third, if Judicial Advisory Committees and the Minister are willing to overlook this indiscretion, as they have shown by appointing judges who provide less than full answers, then how much value do they ascribe to these questions and their answers? Clearly, short, superficial answers are no bar to judicial appointment.

On the other hand, one could argue that the minimum word requirement is unnecessary at best and counterproductive at worst. For example, Justice Slawinsky's application is eloquent, thoughtful, and thorough in well under 750 words:

> The appropriate role of a judge in a constitutional democracy is a complex and multifaceted one. It is complex because the role contains a core of important responsibilities that include resolving disputes, interpreting and enforcing the law, and upholding and ensuring constitutional rights and freedoms for the benefit and protection of all citizens.
>
> It is multifaceted, because layered over this core of responsibilities are the obligations and expectations placed on a judge regarding the manner in which she carries out those responsibilities. This includes the obligations of a judge to be impartial, objective, independent, and fair, and the expectations that a judge should at all times be empathetic,

> compassionate, unbiased and open-minded. Ultimately, I believe that this complex and multifaceted role can be reduced to a single word: courageous.
>
> […][45]

Answers like this prove that it *is* possible to convey deep insight into the judicial role without exceeding 750 words. No reasonably informed person who reads Justice Slawinsky's application could deny that, whatever the questionnaire's instructions, she has a refined understanding of what it means to be a judge.[46] Moreover, the minimum word count seems to have induced some applicants to repeat themselves, rather than offer genuinely new insights. For example, more than once, Justice deWit provided short answers, followed by discursive essays "to comply with the request that I answer in 750–1000 words."[47] Ironically, even when he purported to comply with the range in Question 1, his answer still fell short.[48] Similarly, Justice Gomery spent two-thirds of her 871-word response to Question 1, which asks applicants to describe their most significant contribution to the law and the pursuit of justice in Canada, by listing accomplishments that were *not* her most significant.[49] Although this proves that not all answers or applicants are created equally, it also suggests that it may not be appropriate to impose the same 750-word minimum on every question. A minimum word count might make sense when one asks a broad question on the role of a judge, but not when one asks a narrow question about a single individual's past achievements.

2. *Judicial federalism invites cross-province comparisons*

One might object to the above analysis because it relies in part on comparing judges appointed on opposite sides of the country, whose applications and answers would have been vetted by separate Judicial Advisory Committees with distinct memberships. Certainly, local culture and talent will vary, as will assessments of what counts as a "good" answer. Lawyers seeking appointment in Canada's smallest province, Prince Edward Island (e.g.

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45. Canada, Department of Justice, *The Honourable Justice Marilyn Slawinsky's Questionnaire* (31 March 2017), online: <www.canada.ca/en/department-justice/news/2017/03/the_honourable_justicemarilynslawinskysquestionnaire0.html> [perma.cc/KX6Z-XR2G] [*Slawinsky's Questionnaire*].
46. Her 18 months of experience as a Provincial Court judge doubtless aided her understanding.
47. Canada, Department of Justice, *The Honourable Justice William T. deWit's Questionnaire* (31 March 2017) at Questions 1 and 4, online: <www.canada.ca/en/department-justice/news/2017/03/the_honourable_justicewilliamtdewitsquestionnaire0.html> [perma.cc/G4S3-ESU6] [*deWit's Questionnaire*].
48. See Table 3.
49. See Canada, Department of Justice, *The Honourable Sally A. Gomery's Questionnaire* (3 November 2017), online: <www.canada.ca/en/department-justice/news/2017/11/the_honourable_sallyagomerysquestionnaire.html> [perma.cc/R6PC-LNJU] [*Gomery's Questionnaire*].

Clements), whose practising Bar is less than two per cent the size of British Columbia's,[50] do not compete with those in British Columbia (e.g. Riley). This might explain the difference in the quality of Justice Clements and Justice Riley's answers, but it does not excuse it. To suggest that Islanders should have lower expectations of their judges because of the province's size disrespects the people of Prince Edward Island, who are morally entitled to access the same quality of justice as anywhere else in Canada. It also offends principles of federalism. For instance, the superior trial courts to which Clements and Riley were appointed represent a unique brand of judicial federalism. These courts are "superior" in the sense that they possess inherent jurisdiction to hear almost any legal matter, a power they inherited from the common law courts of the United Kingdom before Confederation. While section 92(14) of the *Constitution Act, 1867* preserved provincial power to administer and reorganize the superior courts, section 96 assigned the power to appoint "Judges of the Superior…Courts in each Province" to the Governor General, acting on the advice of Cabinet.[51] This was a centralizing feature of the new Dominion's constitution, designed to install judges who would be sympathetic to the federal government's policies and thereby insulated from "local politics or prejudice."[52] Although the federal judicial appointments process has become more responsive to provincial interests over time—for instance, by inviting representatives from the local chapter of the Canadian Bar Association and the law society to sit on the Judicial Advisory Committees—the federal Cabinet retains wide latitude in selecting candidates. If the Minister of Justice is truly committed to making appointments based on merit, then it is both reasonable and morally right that the Minister of Justice would use this distinct authority to assess the quality of applicants for judicial office in one part of the country by reference to applicants in another. Taking such an approach is not contrary to federalism, but a vindication of it.

Of course, this analysis ignores that the Judicial Advisory Committee might have recommended Justice Clements in part because of the government's new emphasis on diversity. As a Queen's Counsel and partner at a leading regional law firm, Clements would have been widely considered a leader in the profession at the time of her appointment. Her gender would not have been the only or even the main trait to qualify her

50. See Federation of Law Societies of Canada, "Membership: Statistical Report of the Federation of Law Societies of Canada" (2016), online (pdf): <flsc.ca/wp-content/uploads/2018/04/Statistics-2016-FINAL.pdf> [perma.cc/AFX2-23LK].

51. *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, reprinted in RSC 1985, App II, No 5, s 96.

52. Lori Hausegger, Matthew Hennigar & Troy Riddell, *Canadian Courts: Law, Politics, and Process*, 2nd ed (Don Mills, Ont: Oxford UP, 2015) at 147-148.

for the bench, but it would not have hurt her either. This is not to argue that diversity jeopardizes appointments based on merit, as some in the media have suggested.[53] Rather, the point is that if one accepts Justice Clements was as qualified a candidate as any, then one should have reasonably expected her to *demonstrate* her substantive insight into the role of the court at the very moment she applied to join its ranks. So far as her questionnaire can attest, she did not do this, which says as much about her as it does the Judicial Advisory Committees and the Minister's lenient attitude toward shortcomings in the Questionnaire for Federal Judicial Appointments.[54]

3. *It pays to be humble (but it pays more to know your audience)*

Federally appointed judges receive a handsome sum for their labour. As of 1 April 2019, a trial or appellate court justice earned a base salary of $329,900 annually. Chief and Associate Chief Justices earned an extra $31,800.[55] Unlike in many civil law countries, where judges are career bureaucrats, becoming a superior or federal court judge in Canada is among the highest professional honours a lawyer can achieve. It takes guts and some measure of egotism for a person to think, first, that he is objectively capable of serving as a judge; second, that he deserves to be appointed next to the hundreds of other contenders who apply each year; and, third, that he is not only legally but morally qualified to pass judgment on others in society.

On that basis, one might expect judicial applicants to exhibit an ingrained sense of superiority in their applications. In fact, the reverse is true. Most of the questionnaires in this study demonstrate humility on the part of the successful applicant before appointment. For instance, Justice Slawinsky attributed her good fortune in life, compared with those she met as a Provincial Court judge in criminal court, to "luck."[56] Justice Milman cited his "privilege" as imposing a responsibility to give

53. See Sean Fine, "Liberals not always appointing 'highly recommended' judges," *The Globe and Mail* (30 October 2017), online: <www.theglobeandmail.com/news/politics/liberal-government-not-always-appointing-top-recommendedjudges/article36766108> [perma.cc/GEQ9-SWSZ]. Cf Anna Wong, "Dismantling the Roadblocks to Judicial Diversity," *Slaw* (21 February 2017), online: <www.slaw.ca/2017/02/21/dismantling-the-roadblocks-to-judicial-diversity> [perma.cc/AX2F-CGMK].

54. Despite my criticism of Justice Clements' answers to the questionnaire, the Prime Minister tapped her to be Chief Justice of the Supreme Court of Prince Edward Island less than eight months after her initial appointment: see Canada, Office of the Prime Minister, News Release, "Prime Minister announces appointment of new Chief Justice of the Supreme Court of Prince Edward Island" (27 October 2017), online: <pm.gc.ca/eng/news/2017/10/27/prime-minister-announces-appointment-new-chief-justice-supreme-court-prince-edward> [perma.cc/8U9W-4ZUP].

55. *Guide for Candidates*, *supra* note 39 at "Remuneration."

56. *Slawinsky's Questionnaire*, *supra* note 45.

back to the community.[57] Justice Hollins insisted that she is "just one person," emphasizing the important contributions that all actors make to the legal system, including legal assistants.[58] Justice Nakatsuru struggled to answer the first question, saying "it is not in who I am to trumpet my accomplishments" and that he wanted to be known as someone who "tried his best."[59] Justice Khullar doubted whether she had made any "significant" contribution to law or justice, despite having successfully intervened at the Supreme Court of Canada on behalf of clients in many cases, including *Vriend v Alberta*, which held that the omission of sexual orientation from provincial human rights legislation violated the *Charter of Rights and Freedom*'s equality guarantee.[60] The majority even adopted part of her analysis in its decision.[61] By the same token, Justice Paciocco, a prolific legal scholar whose writing transformed the law of evidence in Canada, tempered praise for his influence: "Initially [my] proposals were met with reluctance. They all now describe the current law. I am not taking credit for that. Together, many jurists arrived at the same conclusions."[62] Whether explicitly or implicitly, each of these examples demonstrates a tendency of applicants in the sample to downplay their accomplishments or attribute them to external and systemic forces beyond their control. This is not altogether surprising, given anecdotal evidence that lawyers display high rates of impostor syndrome.[63] It may also reflect what intelligence and maturity have shown them to be true: that one is the product of her cumulative experiences and is shaped and helped by those with whom she interacts. However, given lawyers' privileged educational and socioeconomic backgrounds, it is not obvious that humility would figure as palpably in the questionnaires of would-be judges as it does.

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57. Canada, Department of Justice, *The Honourable Warren B. Milman's Questionnaire* (3 November 2017), online: <www.canada.ca/en/department-justice/news/2017/11/the_honourable_warrenbmilmansquestionnaire.html> [perma.cc/TQ4F-YRSG] [*Milman's Questionnaire*].
58. Canada, Department of Justice, *The Honourable Justice Michele H. Hollins's Questionnaire* (31 March 2017), online: <www.canada.ca/en/department-justice/news/2017/03/the_honourable_justicemichelehhollinssquestionnaire.html> [perma.cc/GG96-DPAK] [*Hollins's Questionnaire*].
59. Canada, Department of Justice, *The Honourable Justice Shaun S. Nakatsuru's Questionnaire* (11 May 2017), online: <www.canada.ca/en/department-justice/news/2017/05/the_honourable_justiceshaunsnakatsurusquestionnaire.html> [perma.cc/JS4X-XWMF] [*Nakatsuru's Questionnaire*].
60. Canada, Department of Justice, *The Honourable Justice Ritu Khullar's Questionnaire* (19 April 2017), online: <www.canada.ca/en/department-justice/news/2017/03/the_honourable_justiceritukhullarsquestionnaire0.html> [perma.cc/7JAP-P6VS] [*Khullar's Questionnaire*].
61. See *Vriend v Alberta*, [1998] 1 SCR 493 at para 157, 212 AR 237 (SCC).
62. *Paciocco's Questionnaire*, *supra* note 29.
63. See e.g. Mark Herrmann, "Impostor Syndrome: They'll Figure Out That You're Not Really That Smart," *Above the Law* (1 May 2017), online: <abovethelaw.com/2017/05/impostor-syndrome-theyll-figure-out-that-youre-not-really-that-smart> [perma.cc/U2LG-WBVX].

One cannot explain this exceptionally high incidence of humility in the questionnaires without accounting for the possibility that applicants deliberately emphasize the normative traits that the government expects in their nominees. For instance, the Office of the Commissioner for Federal Judicial Affairs publishes the guidelines it gives to Judicial Advisory Committee members online. They contain a list of 20 "personal characteristics," that the government desires in a judge, including—yes—"humility." Others include patience, honesty, common sense, tact, integrity, empathy, and sensitivity to changing social values.[64] One might have come up with a similar list of traits on his own, but the fact that the government discloses its interests so plainly makes the judges' tendency to refer to these characteristics and the government's decision to publish their applications as a gesture toward transparency less meaningful. This is not to suggest that the applicants who evoke humility do so disingenuously, but the fact that they do so in a context where the trait is preset as normatively valuable by the government casts a shadow on the significance of an applicant's decision to highlight her humility at all. Put differently, if an applicant had to answer the questionnaire without a hint from the government about what it was looking for, then how she chose to use her limited space—what she chose to talk about or not—would disclose more about her character than the existing application can. That does not mean the questionnaire would exist in a vacuum. Applicants could still resort to the considerable literature on what distinguishes good judging from bad.[65] But this would at least do more to distinguish between judges who formed an independent conclusion on judicial virtues and those that merely appealed to what the government had pre-ordained. In this way, releasing judges' applications is not as meaningful of a step toward judicial accountability as the government would lead one to believe because the answers predictably, albeit imperfectly, mirror the assessment criteria that were already made public.

4. *How law and justice develop: practice, principle, and recognition*

While the questionnaires are not as meaningful as they could be, neither are they meaningless. Question 1 asked applicants what they would regard as their "most significant contribution to the law and the pursuit of justice in Canada." It is fair to ask what discussing one's accomplishments as a lawyer has to do with the role of the judiciary. The connection is

64. JAC Guidelines, *supra* note 12 at Appendix A.

65. See e.g. Jonathan Soeharno, *The Integrity of the Judge: A Philosophical Inquiry* (Cornwall: Ashgate Publishing, 2009). Or, for a different take on the traits of a virtuous judge, see Ronald KL Collins & David M Skover, *The Judge: 26 Machiavellian Lessons* (New York: Oxford UP, 2017).

not immediately obvious. However, what applicants see as their most significant contributions to the law and the pursuit of justice reveals two things about how they imagine the role of the judiciary. First, it gives an idea of how (i.e. by what means) they believe the law and justice are advanced and, second, it hints at what they view as the ends or objects of justice. As a result, their answers anticipate the kinds of arguments or litigants to which they may be more or less sympathetic in court.

Answers in the study sample vary in accordance with the unique work and life experiences of the individual applicants, but they all fall into roughly one of three categories: *practice-based*, *principle-based*, and *recognition-based* contributions to the law and justice. Although most applicants listed multiple contributions that they made, many singled out one as their "*most* significant," responding to the question prompt. Table 4 attempts to classify each applicant's most significant contribution, based on signals in the applicant's own language, as one of three types. Where applicants did not distinguish between the relative significance of one or more of their contributions, their categorization reflects the dominant theme of their answers.

Table 4: Judicial Applicants' Most Significant Contributions to the Law and Justice by Dominant Type

Practice-based	Principle-based	Recognition-based
Clements	deWit	Moore
Hollins	Slawinsky	Paciocco
Khullar	Nakatsuru	Milman
Swartz	Gomery	Mayer
Bell		Brundrett
		Riley
		Pentney

Practice-based contributions were second-most commonly cited by applicants in the study sample. Applicants express their practice-based contributions in different ways, but they all reflect a belief that the law and justice are most significantly advanced through the day-to-day practice of law, no matter how small the client or how big the retainer. In this sense, these answers treat the ordinary as extraordinary and, in some cases, cut the truly extraordinary down to size. In all cases, they emphasize and exalt the practitioner's problem-solving skills and client service, regardless of whether the lawyer earns professional recognition and praise for his work. For example, Justice Swartz confronts and lionizes her own averageness as a sole family law practitioner in Ontario:

> My most significant contribution to the law and the pursuit of justice in Canada occurs in my daily interaction with members of the public, those who are interacting with the justice system. There is not one isolated thing that I have done. I have not argued at the Supreme Court. I have not appealed to the Court of Appeal. I have not made the front page as counsel in a notorious case. I help people with difficult problems.[66]

But not all applicants who subscribe to the school of practice-based contributions are so confident. Some feel a need to defend their answer, sensing that it might not be significant enough to win the approval of the Minister or the Judicial Advisory Committee. For instance, Justice Hollins admitted that she second-guessed her response:

> My most significant contribution to the law and the pursuit of justice in Canada is doing my job. That was my immediate answer on first seeing this question, followed by days of deliberation, certain that something more inspirational was expected. However, the more thought I have given to this question, the more certain I am of my original answer.
>
> My job could be described as fairly limited in scope; I do a variety of civil and commercial litigation with a focus on employment law. My clients include mid[-] to large-size companies but are far more often small companies and individuals, primarily employees. Whoever or whatever they are, they have a problem or a question about their legal rights and obligations arising from a particular set of circumstances in which they have found themselves. Their particular facts may be similar but are always, inevitably, unique.[67]

Unlike Swartz, Hollins had no shortage of professional achievements that she could have cited as her most significant contribution, including her tenure as national president of the Canadian Bar Association. That she chose not to reflects the formative influence of her experience in legal practice and the relatively equal moral value she places on all of her clients, who she treats as ends in themselves, echoing the best traditions of Kant. Justice Khullar would approve, having reduced her own most significant contribution to being a lawyer who "shows up."[68] In other words, for her and other practice-based contributors like her, the content and the consequences of a lawyer's representation are less important to advancing the law and justice than the act of representation itself. According to this view, the fact that Justice Khullar participated in the case establishing a

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66. Canada, Department of Justice, *The Honourable Justice Deborah Swartz's Questionnaire* (7 April 2017), online: <www.canada.ca/en/department-justice/news/2017/04/the_honourable_justicedeborahswartzsquestionnaire.html> [perma.cc/U89E-LCGF] [*Swartz's Questionnaire*].
67. *Hollins's Questionnaire*, *supra* note 58.
68. *Khullar's Questionnaire*, *supra* note 60.

constitutional right to strike[69] is as significant to the advancement of law and justice as one of Justice Swartz's routine child custody hearings. The public might doubt that assessment, but the appointment of applicants who emphasized their practice-based contributions suggests that the Minister and the Judicial Advisory Committees share this respect for the virtues of daily practice.

To be fair, practice-, principle-, and recognition-based contributions are not mutually exclusive. "Doing the job" of a lawyer *well* necessarily requires acting with principle. The questionnaire of Justice deWit, a former criminal defence lawyer, shows how applicants straddled the line between a practice- and principle-based contribution. For instance, he says:

> …my most significant contribution to the law and the pursuit of justice in Canada is to uphold the principles of our system on a daily basis for the past 20 years. […] I believe that…I have been a positive asset to the administration of justice by working hard to uphold the rule of law and the laws of the land, and that this is my greatest contribution to the law and the pursuit of justice.[70]

This answer demonstrates the link between principle and practice. Although deWit's response places a greater emphasis on the laws, norms, and principles of the legal system, it was through his legal practice and teaching that he achieved that end. But whereas the practice-based contributors see cases and clients as ends in themselves, the principle-based contributor sees them as serving a greater good. Justice Nakatsuru typifies this attitude among the applicants. For example, he writes, "My most significant contribution to the law and the pursuit of justice is not a single case I tried or appealed, a decision that I wrote, or a legal ability I may possess. Stripped to its essence, I believe it is my ardent passion to do what I can to remedy injustice whenever and wherever I see it."[71] In this way, principle-based contributions hold out the adherence to one or more moral principles—in Nakatsuru's case, remedying injustice by "eschew[ing] more lucrative areas of practice" to fight for individual rights—as the most important vehicle for propelling the interests of law and justice forward. For Justice Gomery, that means not simply serving clients but assuming a leadership role and doing what will have "the most impact on the greatest number of people."[72]

69. *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245.
70. *deWit's Questionnaire*, *supra* note 47.
71. *Nakatsuru's Questionnaire*, *supra* note 59.
72. *Gomery's Questionnaire*, *supra* note 49.

By contrast, recognition-based contributions to law and justice differ from both practice- and principle-based contributions in that they attribute the greatest significance to one or more of a lawyer's specific accomplishments. These include particular cases tried, clients represented, or jobs performed that have earned them praise from their family, friends, peers, or other influential people. For example, Justice Mayer said his most significant contribution to the law and the pursuit of justice was the role he played as the lead negotiator for the Prince Rupert Port Authority, reaching and then implementing impact and benefits agreements with five of the six Tsimshian First Nations in British Columbia.[73] Similarly, Justice Brundrett cited his work as a Crown prosecutor on one case that was affirmed by the Supreme Court of Canada, *R v Knott*,[74] as his greatest contribution. He used Question 1 to describe the state of the law both before and after that case, the effect of which was to increase a judge's flexibility to sentence a repeat offender to probation instead of incarceration.[75] By pointing to a particular praiseworthy accomplishment, as opposed to a general practice or principle, these applicants appeal to the Minister and Judicial Advisory Committees' own privilege. Although three of the seven members on each committee may be members of the public, the other four are representatives of elite organizations: the law society, the Canadian Bar Association, a province's Court of Appeal, and the provincial Attorney General.[76] As a result, the Minister and the Judicial Advisory Committees are likely to find candidates who have already achieved honours or elite status (i.e. people like them) more relatable and arguably better suited to the judicial role than those who have not. Recognition-based contributions also highlight the undeniable connection between the pursuit of justice and the need to persuade other actors in society—usually governments, judges, and other elites—to adopt one's vision of the Good. Without recognition, one's idea of the Good can have only a limited effect on the law, which might explain why recognition-based contributions were popular among judicial applicants in this study.

The practice, principle, and recognition distinction latent in these applicants' questionnaires repeats and reinforces conventional beliefs

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73. Canada, Department of Justice, *The Honourable Andrew P. Mayer's Questionnaire* (3 November 2017), online: <www.canada.ca/en/department-justice/news/2017/11/the_honourable_andrewpmayersquestionnaire.html> [perma.cc/E9YV-G8FL] [*Mayer's Questionnaire*].

74. *R v Knott*, 2010 BCCA 386, 291 BCAC 236, aff'd 2012 SCC 42, [2012] 2 SCR 470.

75. See Canada, Department of Justice, *The Honourable Michael J. Brundrett's Questionnaire* (3 November 2017), online: <www.canada.ca/en/department-justice/news/2017/11/the_honourable_michaeljbrundrettsquestionnaire.html> [perma.cc/LFE8-F8NG].

76. JAC Guidelines, *supra* note 12 at "Composition."

about the proper role of a judge in Canadian society. Just as *stare decisis* compels judges to follow principles set by higher courts, the primacy of statute over the common law usually requires judges to enforce rules enacted by democratically elected legislators. In this context, where judges often take their cues from someone else, it is logical that aspiring judges would tend to over-emphasize those of their contributions based on practice and external recognition. Law students are routinely taught that the "Good Judge" in a common law system is one who follows precedent, who knows his place in the system, who defers to Parliament as appropriate, who avoids developing the common law more than incrementally, and whose decisions are upheld on appeal. When he does these things, the Good Judge earns the respect of his equally conservative colleagues on the bench and the recognition of higher courts. Whether he applies constitutional, statutory, or common law norms, superior and federal court judges are rarely called upon to establish new principles and, even when they are, they can almost always be derived by reference to higher, subsisting morals.[77] As such, most of the applicants in this study's sample merely did what Good Judges are expected to do: they extolled the virtues of practice, following professional norms and legal rules prescribed by law societies and governments, and they pointed to specific times when others recognized them for a job well done.

The problem with this pattern is that it betrays the essential importance of principle to judicial selection and decision-making. For instance, Allan Hutchinson argues that it is "misleading and inaccurate" to describe judges as umpires who apply fixed legal rules to new facts. By picking which rule to apply, defining what it means, and interpreting how it is applied, judges are inevitably entangled in a political and contestable exercise: "law is politics by other means."[78] Put differently, embracing the role of the Good Judge is as much a political act as flouting its precepts. So, it makes sense that the Minister and Judicial Advisory Committees should enquire into an applicant's political ideology to help inform the judicial selection process. This ideological investigation does not politicize the judiciary because the judiciary is already inescapably political.[79] Viewed through this lens, the Trudeau government's commitment to appointing diverse candidates itself

77. I use "morals" in the political sense, as synonymous with normative principles, ends, or goods.
78. Allan Hutchinson, "Looking for the Good Judge: Merit and Ideology" in Nadia Verrelli, ed, *The Democratic Dilemma: Reforming Canada's Supreme Court* (Toronto: McGill–Queen's UP, 2013) 99 at 103, 107. See also Lorne Sossin, "Judicial Appointment, Democratic Aspiration and the Culture of Accountability" (2008) 58 UNB LJ 11 at 13; Douglas E Edlin, *Common Law Judging: Subjectivity, Impartiality and the Making of Law* (Ann Arbor: U Mich Press, 2016) at 110.
79. Hutchinson, *supra* note 78 at 109.

represents a progressive liberal ideology about the kinds of attributes that are or are not relevant to good judging and to boosting public confidence in the judiciary. For example, if there were a positive relationship between the visual representativeness (e.g. gender and racial composition) of the judiciary and public confidence among those under-represented groups in society, then one would expect public confidence in the justice system to be highest among whites and lowest among visible minorities. However, that is not the case. According to Statistics Canada, public confidence in the courts was highest among visible minorities and immigrants in 2013, with 74 per cent of them reporting confidence in the justice system, compared to just 56 points for non-immigrants. Public confidence was also higher among women than men.[80] This does not suggest that diversity is an unworthy goal. Rather, it suggests that, as a goal, it is directed to some political end or vision of a just society. Applicants who cited principle-based contributions as their most significant gave the government some sense of *their* vision for a just society. The fact that many others did not demonstrates the risks inherent in role morality and leaves something to be desired in the design of the questionnaire if it is to be more than a tokenistic exercise in accountability.

5. *Diversity is good (and vague)*

Question 2 asks applicants to describe how their experience has provided them with "insight into the variety and diversity of Canadians and their unique perspectives." Questions 1 and 2 are similar in that they each posit an unqualified good. In Question 1, it is justice. In Question 2, it is diversity. Just as Question 1 left justice undefined and open to the applicant's definition, Question 2 does not define what the government means by "diversity." As a result, the answers reflect a broad range of perspectives, both on what dimensions of Canada's diversity are relevant to the judicial role and how one comes to develop an appreciation of that diversity. Yet, again, there are recurring themes. For example, Justices Bell and Clements gave examples of their formal education in diversity and cultural competence. Justices deWit, Slawinsky, Milman, and Nakatsuru wrote about the diversity of their clients (rich and poor, English-speaking and not, etc.) and how this has given them a better appreciation of the different life experiences people have faced. Meanwhile, Justices Hollins and Pentney emphasized the diversity of other lawyers and stakeholders

80. Adam Cotter, "Public Confidence in Canadian Institutions" (7 December 2015) at 5, online (pdf): *Statistics Canada* <www.statcan.gc.ca/pub/89-652-x/89-652-x2015007-eng.pdf> [perma.cc/YUR3-B5VG]. Where public confidence falls short is among Indigenous Peoples: 15 per cent fewer Indigenous Peoples had confidence in the justice system than non-Indigenous Peoples.

with whom they have worked.[81] Still others like Justice Brundrett, a former Crown prosecutor in Vancouver's downtown eastside, a neighbourhood notorious for its crime, drugs, and poverty, pointed to the economic, social, racial, and linguistic diversity of their opposing parties and witnesses.[82] Few pointed to their own membership in a minority group, but of those who did, most are white men: Justice deWit spoke about being a foreign-speaking immigrant from Holland, Justice Milman noted his Jewish identity, and Justice Paciocco said he was sometimes treated "differently" growing up in an Italian Canadian family. Of the three visible minorities in the sample—Justices Khullar, Mayer, and Nakatsuru—only two spoke of their difference as an asset. Justice Khullar, a native-born Canadian of East Indian heritage, did not mention it at all in Question 2 and brought it up in the optional Question 6 only to dismiss it: "[M]y parents raised us to be 'Canadian; full stop'. That is how I view myself."[83]

Travel was the most popular way applicants in the sample acquired some or all of their ideas on diversity.[84] Justice Bell recounted her experience living and working in regions across Canada, including the Yukon Territory. In a somewhat bizarre aside, she expressed her regret at not having visited the Northwest Territories and Nunavut, vowing to visit both "next summer."[85] Comments like these are problematic for two reasons. First, they risk treating diversity as a checklist of places to go and people to meet, trivializing the depth of experience that the judicial role requires. Second, the emphasis that applicants in this study place on travel is a reminder that even the poorest among them come from relatively privileged means. Many of the people they will be judging could not afford to travel as extensively as they have, and, in that sense, one might ask whether these judges are as diverse as the government would have one believe.

Then again, many of the applicants' answers demonstrate that one need not belong to a socioeconomic minority to know the importance

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81. Canada, Department of Justice, *The Honourable Justice William F. Pentney's Questionnaire* (7 December 2018), online: <www.canada.ca/en/department-justice/news/2018/12/the-honourablewilliam-f-pentneysquestionnaire.html> [perma.cc/WSA8-56V7] [*Pentney's Questionnaire*].

82. See also *Paciocco's Questionnaire*, *supra* note 29, and *Riley's Questionnaire*, *supra* note 44.

83. *Khullar's Questionnaire*, *supra* note 60.

84. See e.g. *Moore's Questionnaire, supra* note 42; *deWit's Questionnaire, supra* note 47; *Milman's Questionnaire, supra* note 57; *Hollins's Questionnaire, supra* note 58; *Nakatsuru's Questionnaire, supra* note 59; *Swartz's Questionnaire, supra* note 66; *Mayer's Questionnaire, supra* note 73; *Pentney's Questionnaire, supra* note 81; *Bell's Questionnaire, infra* note 85.

85. Canada, Department of Justice, *The Honourable Justice Robyn M. Ryan Bell's Questionnaire* (5 May 2017), online: <www.canada.ca/en/department-justice/news/2017/05/the_honourable_justicerobynmryanbellsquestionnaire.html> [perma.cc/FY33-VRKW] [*Bell's Questionnaire*].

of diverse perspectives. Justice Paciocco described his own insight into Canadians' diversity as follows:

> If you want to see diversity, go to a provincial courthouse. […] Being a provincial court judge is an immersion in the world of poverty, homelessness and mental illness. In Ottawa, it is a veritable baptism in the challenges faced by Aboriginals, most pervasively, Inuit people plagued by alcoholism and displacement, often stranded far from the north after having come here for medical reasons. I see these people in their worst moments, sometimes shackled, but always bowed and humiliated and hurting. Often sick, always in need. It is impossible not to be affected by this. One would have to be blind not to see the diversity of our communities, and heartless not to crave solutions to inequality and excessive use of the criminal law. And one would have to be obtuse to believe we are all equally responsible for who we are, or to fail to recognize that justice means different things to different people—that the power of the law has to be wielded differently, for different people.[86]

One would have to be mindless not to recognize that these words demonstrate insight into the judicial role. Justice Paciocco powerfully conveys empathy toward Indigenous peoples and a certain conviction that the situation they find themselves in is morally indefensible. Examples like this are poignant proof that releasing the questionnaires of federal appointees can in fact boost the confidence in the judiciary of those who read them.

Yet, consistent with the theme that not all answers are created equally, a few applicants made bald assertions that do nothing to demonstrate insight or to improve public confidence. For example, in her otherwise unimpeachable application, Justice Slawinsky claims that she has "no biases of which [she] is aware."[87] Justice deWit similarly suggests he is "open minded and not prejudiced towards anyone based on race, culture, sexual orientation or gender."[88] The problem with these statements is that all humans, including judges, have biases and prejudices. That an applicant is not aware of them makes them more, not less, pernicious. By listing four grounds on which he claims no prejudice, deWit invites the reader to imagine all the other grounds on which he might consciously or unconsciously be prejudiced. Thus, so long as these questionnaires continue to be released, applicants should take greater care to avoid unfortunate remarks that could lead to public embarrassment or misunderstanding. The misadventures of Justice Eidsvik make this much plain.

86. *Paciocco's Questionnaire*, *supra* note 29.
87. *Slawinsky's Questionnaire*, *supra* note 45.
88. *deWit's Questionnaire*, *supra* note 47.

The net result of the responses to Question 2 is to give the reader confidence that the appointees in the sample generally value diverse perspectives. However, the appointees are decidedly non-diverse in their shared celebration of diversity. This lack of ideological diversity is to be expected for four reasons. First, as discussed, applicants will appeal to the government's political values to curry favour with the decision-makers responsible for their appointment. Second, the Minister and the Judicial Advisory Committees will generally prefer to appoint judges who share the government's political values than those who do not. Third, a lawyer's training inculcates applicants with certain values and views that reinforce existing institutional arrangements, producing professionals with relatively homogenous worldviews.[89] Fourth, the concept of diversity is so vague as to be virtually unassailable. It can mean whatever the applicant wants it to mean. For example, Sonia Lawrence ridicules a "diverse" bench as unworkable, preferring to endorse the idea of a bench that reflects the community it serves.[90] The answers to the Questionnaire for Federal Judicial Appointments go to prove Lawrence's intuition: even though 13 of the 16 judges in this study fit the mould of the "white judge," and seven are white *men*, no charitable interpretation of their questionnaires could lead one to conclude that they lack diversity. On the contrary, their responses demonstrate a diversity of life experience and encounters with perspectives unlike their own, both when one views their questionnaires in comparison and in isolation. Therefore, ironically, the fiercest argument against the need for more *visible* diversity on the bench could come from the Liberal government's own publication of appointees' answers to the Questionnaire.

6. *A reasonable apprehension of "bees"?*

Lastly, publishing successful judges' applications raises a serious question about whether their comments could create a reasonable apprehension of bias and thereby undermine judicial independence. For instance, Justice Swartz described how an excursion to Nicaragua to take a beekeeping course exposed her to diverse perspectives:

> As a farmer and beekeeper from so far away, it was uplifting and empowering to engage with a group of people so focused on developing a community unaffected by geography, gender or ethnicity and connected by our common passion. Our group was a global community. We spoke three different languages, came from many different countries, were

89. Sonia Lawrence, "Reflections on Diversity and Judicial Independence" in Adam M Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) at 202.
90. *Ibid*.

> different genders and were aged from 18 to 60. Many questions were asked about Canada's system of government and justice. *Questions about the challenges faced by our First Nations people and why Canada has been slow to open and maintain effective dialogue, in particular around environmental and land rights, were difficult to explain. Our lack of clean drinking water in First Nations communities was something that I discussed with great shame and no reasonable explanation.*[91]

Justice Swartz's comments are in line with the Liberal government's diversity paradigm, but they also reveal an unfavourable assessment of Canada's treatment of Indigenous peoples. With a growing population of First Nations and decades of legal developments since the formal recognition of Aboriginal rights in section 35 of the *Charter*, it is not inconceivable that Justice Swartz could one day find herself adjudicating a rights claim between First Nations and the government, or by a group asking the court to read a right to a healthy environment into the *Charter*.[92] The ability to search for details about a judge's life on websites like Google has lowered the cost for litigants to find potentially damaging information that they can use to shop for judges.[93] Now, with the advent of posting judicial applications online, the government contributes to the trove of publicly available data about members of the bench, which could come back to bite them. In such cases, it is fair to ask whether exposing comments like these to public view could create a reasonable apprehension of bias in the right case and, if so, whether posting judges' applications online today is not worth the risk of undermining judicial independence tomorrow.

This is a live concern, but it is overstated. Even accepting that Justice Swartz has an actual bias in favour of Aboriginal or environmental rights claimants (and it is not clear she does), that does not automatically disqualify her from hearing a case involving such subjects. As Justice Cory held in *R v S (RD)*,[94] writing for the majority on this point:

> The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial
>
> > does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no

91. *Swartz's Questionnaire*, *supra* note 66 [emphasis added].
92. See e.g. Kimberly Shearon & Margot Venton, "The Right to a Healthy Environment: Canada's Time to Act" (2015), online (pdf): *Ecojustice* <ecojustice.ca/wp-content/uploads/2015/04/Right_to_a_healthy_environment_FINAL.pdf> [perma.cc/F679-AR97].
93. Karen Eltis, *Courts, Litigants and the Digital Age: Law, Ethics and Practice* (Toronto: Irwin Law, 2012) at 75.
94. *R v S (RD)*, [1997] 3 SCR 484, 161 NSR (2d) 241 (SCC).

> human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
>
> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.[95]

In that case, the court held that a black judge was entitled to take her own life experience into account in concluding that a white police officer probably overreacted in his aggressive treatment of a black teen. That she did so would not have led "an informed person, viewing the matter realistically and practically—and having thought the matter through—" to conclude the judge would not decide fairly.[96] Thus, the burden to establish a reasonable apprehension of bias is high.[97] The mere fact that Justice Swartz is sympathetic to the plight of Indigenous peoples does not necessarily preclude her from fairly adjudicating a case involving Aboriginal claims. It is always possible to imagine a hypothetical scenario in which comments in one context could take on new meaning in another. But, now that the government has set a precedent for releasing them, blocking the publication of judicial appointees' questionnaires would do more to undermine public confidence in the judiciary today than would some speculative allegation of bias in the future.

III. *On transparency and priorities*

Whatever the utility of publishing the applications of federally appointed judges, the government's delay in releasing the excerpts to the public raises doubt about the strength if not the sincerity of the government's commitment to accountability and transparency in judicial selection. In his 2015 mandate letter to the Minister of Justice, Jody Wilson-Raybould, Trudeau characterized openness as a top priority for his government:

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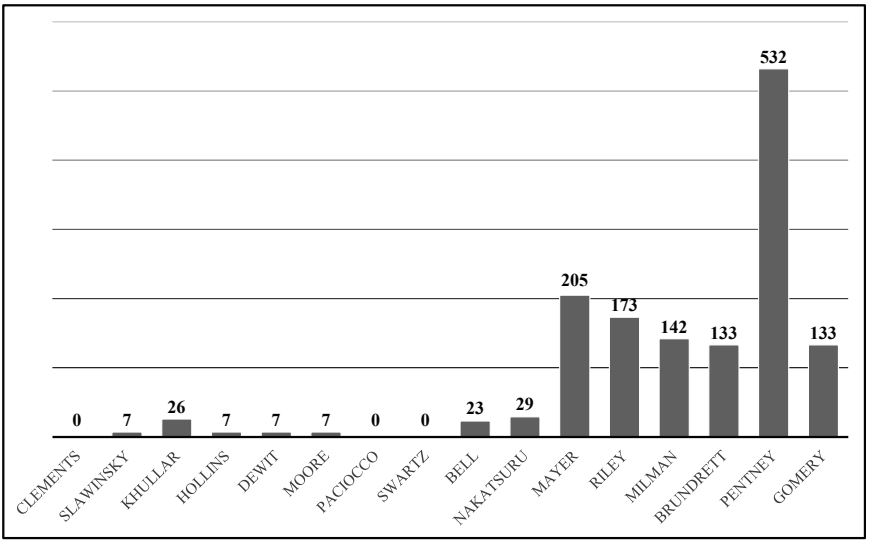
95. *Ibid* at para 119.
96. *Ibid* at para 111.
97. See also *Yukon Francophone School Board, Education Area #23 v Yukon (AG)*, 2015 SCC 25 at paras 26, 30-34, 55, 61, [2015] 2 SCR 282.

> It is time to shine more light on government to ensure it remains focused on the people it serves. Government and its information should be open by default. If we want Canadians to trust their government, we need a government that trusts Canadians. It is important that we acknowledge mistakes when we make them. Canadians do not expect us to be perfect—they expect us to be honest, open, and sincere in our efforts to serve the public interest.
>
> […]
>
> You are expected to do your part to fulfill our government's commitment to transparent, merit-based appointments, to help ensure gender parity and that Indigenous Canadians and minority groups are better reflected in positions of leadership.[98]

That Trudeau published this letter at all—a first for any prime minister—seemed to signal a genuine willingness to govern differently than his predecessors. Yet, despite repeated promises by the government that excerpts from each judicial application "will be available shortly," the vast majority remain unpublished. The government undertook to publish excerpts for 89 of its 100 judicial appointments in 2017, but as of 1 January 2020, it still had not published excerpts for 73 of them.

Figure 1: Length of delay between a judge's appointment to the bench and publication of his or her questionnaire (in number of days)



98. Letter from Justin Trudeau to Minister of Justice Jody Wilson-Raybould (2 November 2015), online: Office of the Prime Minister <pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter> [perma.cc/F4EY-X8WR] [Mandate Letter].

What is worse is that the time between a candidate's appointment and the release of his application has increased drastically with successive nominations. Figure 1 illustrates the number of days it took the government to publish a judge's application for the 16 justices appointed in 2017 whose questionnaires are available, in order of their appointment. Note how the first ten questionnaires were all released within one month of their respondents' appointments. Three were released on the same day and another four were published within one week. By contrast, the six applications published most recently were delayed by 4 to 18 months each. As of 1 January 2020, British Columbia Court of Appeal Justice John Hunter had the longest outstanding questionnaire; he was appointed 994 days earlier on 12 April 2017. Applications for the last judges named to the bench in 2017, a spate of eight appointed on 19 December, were 743 days past due. Given the government's interest in administrative expediency and the dire need to fill judicial vacancies in many parts of the country,[99] it might be unreasonable to expect applications to be released concurrently with all candidates' appointments; however, it is disingenuous for the government to say they will be released "shortly" when that has not been its practice in any meaningful sense. "Shortly" is vague, but it is not empty. A few months could be short; surely, two-and-a-half years is not. It is no accident that the first ten applications released by the government belong to 10 of the first 12 judges to be appointed under the Liberals' new process.[100] This suggests that the government was eager to burnish its transparency credentials early on by putting its promise to publish judicial applications into practice; but, having already proven its readiness to release this information in principle, which no previous government had ever bothered to do, the government apparently does not see the need to follow its own precedent—at least, not with any sense of urgency. And therein lies the rub: because the obligation to release this information is political, rather than legal, the government may drag its feet with impunity, unless the obligation to disclose judicial applications is codified in statute.

Using access to information legislation is one option to hasten the records' release, but it has not proven to be effective. For example, the Department of Justice found that "no records exist[ed]"[101] in response to

99. See e.g. Monique Scotti, "Alberta judicial appointments 'imminent' amid renewed calls to action," *Global News* (3 April 2018), online: <globalnews.ca/news/4120154/alberta-judicial-appointments-imminent-after-renewed-calls-to-action> [perma.cc/JF8N-SXGC]. Adding to the urgency was the prospect that hundreds of stale criminal charges would be stayed following the Supreme Court of Canada's decision in *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631, which set presumptive deadlines for the right to be tried within a reasonable time under section 11(b) of the *Charter*.

100. See Appendix A.

101. Letter from Francine Farley, Coordinator, Access to Information and Privacy Division,

a 13 October 2017 request that it disclose questionnaires "for all judges appointed by the federal government [in 2017] to the Federal Court, Federal Court of Appeal, all Superior Courts and Courts of Appeal of the provinces" under the *Access to Information Act*.[102] This seemed to be a bizarre answer, given that the Department's letter dated 8 November 2017 came only five days after it had posted questionnaires for Justices Brundrett, Gomery, Mayer, and Milman on 3 November, as indicated by the timestamp on those pages of the Department's website. However, a subsequent investigation by the Office of the Information Commissioner of Canada[103] clarified that the Department offers only policy analysis when changes are proposed to the appointment process and "does *not* play a direct role in the federal judicial appointment process," which is coordinated by the Minister of Justice and the Commissioner for Federal Judicial Affairs.[104] Conveniently, neither the Minister's nor the Commissioner's office is directly subject to the *Access to Information Act*.[105]

The Commissioner's office might be immune to disclosure requirements, but the Minister's office is not. In *Canada (Information Commissioner) v Canada (Minister of National Defence)*,[106] an eight-member majority of the Supreme Court held that, although a cabinet minister's office is not "part" of the Department she manages, one may summon records *physically* held in her office if they are *legally* "under the control" of the Department.[107] To suggest otherwise would effectively turn the minister's office into a "black hole" for sheltering sensitive records.[108] Accordingly, courts will apply a two-step test to determine whether a record is under a department's control:

- first, does the record relate to a "departmental matter"; and
- second, could a senior department official reasonably expect to obtain a copy of the record upon request?

The second step is an objective test that must consider all relevant factors, including "the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government

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Department of Justice Canada to Agathon Fric (8 November 2017).

102. *Access to Information Act*, RSC 1985, c A-1, s 4(1).

103. I filed Complaint #3217-01953 with the Commissioner on 4 January 2018 under the *Access to Information Act*, *supra* note 102, s 31.

104. Letter from Normand Sirois, Investigator, Office of the Information Commissioner of Canada to Agathon Fric (27 March 2018) [emphasis in original].

105. See *Access to Information Act*, *supra* note 102, s 3, "government institution," (a) and Schedule I; *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 at para 43, [2011] 2 SCR 306 [*National Defence*].

106. *National Defence*, *supra* note 105.

107. *Ibid* at paras 28, 43.

108. *Ibid* at para 52.

institution and the record holder."[109] The Court emphasized that there is no presumption that records in a minister's office are inaccessible.[110] It follows that political records are not exempt from disclosure *per se*, but the majority seemed to accept that political records will often fall outside the control of the department because ministers' offices are not "government institutions" under the *Act*.[111] Indeed, the fact a document was created by exempt (i.e. political) staff in a minister's office and possessed solely by them seems to have been dispositive of the issue in that case.[112]

More recently, in *Yeager v Canada (Minister of Public Safety)*,[113] the Federal Court rejected a researcher's bid to obtain papers on which the Minister of Public Safety relied in appointing members to an independent review panel of Correctional Service Canada (CSC). Yeager's mistake was to request the information from the Department of Public Safety, which had no control over CSC's records relating to the independent panel. The Court reasoned that "[w]hile *National Defence* was concerned with whether a government institution has control of a record in a Minister's office, the same logic applies in determining whether a government institution has control of a record in the possession of another government institution."[114] In other words, the mere fact that a minister is responsible for more than one government institution does not mean that the records of one are under the control of the other. A similar analysis would likely apply to the present case. The completed judicial questionnaires are not created from scratch by political staff, but the selection of judges is a fundamentally political exercise centred in the Minister's office. It is not an activity that relates to the kind of legal or policy work that one would normally think of as being a "departmental matter." This interpretation is bolstered by the fact that the appointment process flows through the Office of the Commissioner for Federal Judicial Affairs, a separate, purpose-built body that Parliament opted not to include within the *Access to Information Act*'s scope.

One could argue that the questionnaires relate to a departmental matter because the applications are posted on the Department's website, rather than the Commissioner's. But even if one could pass the first step of the control test, it is doubtful that a senior department official could reasonably expect to obtain a copy of an unpublished judicial questionnaire from the Minister or the Commissioner upon request, particularly as they are

109. *Ibid* at para 56.
110. *Ibid* at para 57.
111. *Ibid* at para 58.
112. See *ibid* at paras 60-63.
113. *Yeager v Canada (Minister of Public Safety)*, 2017 FC 330, 279 ACWS (3d) 228.
114. *Ibid* at paras 59, 61.

under no legal obligation to make that information public. As a result, it is unlikely that the *Access to Information Act* compels the government to follow through on a prior commitment to publish the applications of federal judges.

Still, one should not have to beg or complain to access the judges' applications after the government has undertaken to release them. In addition to reforming the judicial appointments process, Trudeau instructed the Minister to:

> [w]ork with the President of the Treasury Board to enhance the openness of government, including supporting his review of the *Access to Information Act* to ensure…that the Act applies appropriately to the Prime Minister's and *Ministers' Offices*, as well as *administrative institutions that support…the courts*.[115]

There are good reasons why it might not be "appropriate" to grant wholesale access to information in Ministers' Offices or the Office of the Commissioner for Federal Judicial Affairs. Ministers are reasonably entitled to a zone of privacy in which they can conduct the difficult and stressful business of managing the country's affairs without fear of constant scrutiny. However, if the government is as committed to accountability and transparency in judicial appointments as it claims to be, then there is no reason why judges' applications should not be subject to the *Act*'s right of access, which already contains provisions to safeguard judges' most sensitive personal information.

According to the Minister's office, the problem is not a question of commitment but of law and resources.[116] David Taylor, Director of Communications in the Office of the Minister of Justice and Attorney General, cites two reasons for the delay. First, he says, the *Privacy Act*[117] and the application form require the government to obtain the jurist's consent before it may publish his questionnaire. Second, after the judge has consented to his application's release, staff must redact personal information, convert file formats, and translate the questionnaires. Taylor says this "labour-intensive and time-consuming" work is performed by

115. Mandate Letter, *supra* note 98 [emphasis added].
116. Requests that the Commissioner for Federal Judicial Affairs, Marc Giroux, voluntarily disclose what the government had already publicly undertaken to publish were first ignored and then redirected to the Minister's office: Letter from Agathon Fric to Marc Giroux (18 November 2017); Letter from Natalie Duranleau, Executive Assistant to the Commissioner for Federal Judicial Affairs to Agathon Fric (23 January 2018).
117. *Privacy Act*, RSC 1985, c P-21.

only two people in the Minister's office who do not receive administrative support from the Department of Justice.[118]

Neither explanation offers a compelling reason to delay disclosure. First, while it is true that the application form indicates "[t]he nominee will be asked to consent to the release of any personal information…prior to its release," the form also declares the government's intention to make that information public: "if a candidate is chosen, [then]…it is intended that *at that time* the personal information, including information on diversity, and information contained in PARTS 6 and 7 of this Questionnaire is to be disclosed to the public."[119] Given the application's express wording and the emphasis this government has placed on opening the selection process to scrutiny, one could argue that the publication of a judge's questionnaire should be construed as a condition of appointment. This construction is supported by the government's use of the words "at that time," which implies that the government intended the information should be released once a candidate is selected. In this sense, it was unnecessary for the government to include the line promising to ask for the nominee's consent. Having given clear notice to prospective applicants of the government's intention to publish the questionnaire if their application succeeded, it is hard to imagine how a judge who accepts the appointment could then reasonably withhold consent. But even assuming that consent could not be implied, the consent issue is a red herring. By Taylor's own admission, as of 25 October 2017, no judge had objected to the publication of his application.[120] Insisting on the nominees' consent at a later stage might have been a way to induce applicants to answer the questionnaire candidly or to encourage people to apply who otherwise might not have if they knew their personal information had to be published. These are valid concerns. But, on one hand, it is doubtful that this qualification would change an applicant's answers so significantly as to warrant the limitation and, on the other, it raises questions about the wisdom of appointing a judge who does not share the government's commitment to accountability.

Moreover, it is not clear that the *Privacy Act* requires the Minister's office to obtain the judges' consent after the fact. For example, subsection 8(1) prohibits a government institution from disclosing personal information without the subject's consent. However, subsection 8(2) establishes a list of exceptions to the rule:

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118. Cristin Schmitz, "Liberals fail to deliver on pledge to publish excerpts 'shortly' from applications for bench," *The Lawyer's Daily* (25 October 2017), online: <www.thelawyersdaily.ca/articles/4993> [perma.cc/2RT5-MNXK].
119. *Questionnaire, supra* note 28 [emphasis added].
120. Schmitz, *supra* note 118.

> Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed
>
> (a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;
>
> (b) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;
>
> […]

The Liberals' reformed Questionnaire serves dual purposes—one administrative and specific, the other democratic and general. First, it serves an immediate need to help Judicial Advisory Committees and the Minister of Justice make recommendations for appointment. Second, it enables scrutiny of a candidate's suitability for judicial office by the Committees, the Minister, and Canadians more broadly. Although one could circumvent the *Privacy Act*'s protections by defining the purpose of the data collection at increasing levels of generality, it is not such a stretch to suggest that publishing judges' applications online to promote judicial accountability is "the purpose for which the information was obtained or…a use consistent with that purpose," especially given the government's express words on the form. Alternatively, section 8(2)(b) gives the governing Liberals another way to make good on their transparency promise—that is, to pass legislation requiring the government to release the applications of successful candidates, notwithstanding the individual's consent.

Taylor's pragmatic concerns are likewise exaggerated. If consent is not the big issue that he makes it out to be, then he would have one believe that redaction, formatting, and translation account for the delay. Certainly, judges will have answered the questionnaire in only one of the two official languages. Since all federal government information must be published in English and French, staff would need to translate the answers. However, staff managed to format, translate, and publish 10 of the 16 available questionnaires within one month of those judges' appointments, which suggests that something other than formatting and translation is to blame for the 24- to 34-month delays facing the 73 outstanding questionnaires. If staff are spending that time liaising with judges to redact personal information or augment their initial answers, then it raises the question as to how committed the government can be to transparency in judicial appointments if it is singly or together with recent appointees cherry-picking what parts of their answers get disclosed. Rather than remain a mystery, judges' profiles would then represent carefully curated and thus self-serving images of the Liberals' appointments. There is no evidence

that this is the case, but the idea is not as wild as it sounds. For instance, no rules prohibit the government from modifying the questionnaires; such modifications would explain the increasingly long delays; and, when asked, Taylor did not answer whether judges may change their questionnaires before publication.[121]

Acknowledging the delay, Taylor offered assurances in 2018 that the Minister would seek "additional help from the Department of Justice to speed up the posting of the applications online."[122] However, as the foregoing discussion makes clear, the Minister's office has a legal interest in *not* requesting the Department's help so as to avoid embarrassing or premature disclosure under the *Access to Information Act*. On that basis, it seems unlikely the Minister ever sought additional help to pick up the slack. Indeed, starting on 22 June 2018, scarcely 18 months after it had begun the practice, the government quietly stopped promising to publish the judicial applications of its new appointees—"shortly" or at all.[123] Of the 33 it did promise to release in 2018, 20 (61 per cent) had still not been published as of 1 January 2020.[124] Excerpts were available for only one out of every three appointees from 2018 and zero appointees from 2019.[125] Notably, this change in practice coincided with Wilson-Raybould's exit from the Department of Justice on 14 January 2019.[126] News releases announcing appointments have since tended to include more detailed biographies of the appointees, but they lack the same quality or quantity of information offered by the raw answers to the Questionnaire.

What this ultimately means is that releasing excerpts from the Liberals' judicial applications is not a priority, despite the government's rhetoric to the contrary. In Taylor's words: "our priority in supporting the Minister is

121. *Ibid*.

122. Letter from David Taylor, Director of Communications in the Office of the Minister of Justice and Attorney General to Agathon Fric (9 February 2018).

123. See e.g. Canada, Department of Justice, News Release, "Government of Canada announces judicial appointment in the province of New Brunswick" (22 June 2018), online: <www.canada.ca/en/department-justice/news/2018/06/government-of-canada-announces-judicial-appointment-in-the-province-of-new-brunswick1.html> [perma.cc/9PUD-SXBF]. Despite the formal reversal, Taylor insisted the Department would continue to publish judges' applications, which it did for 15 individuals appointed after 22 June 2018: Cristin Schmitz, "Trudeau government breaks promise to disclose info on new federal judges 'shortly,'" *The Lawyer's Daily* (5 July 2018), online: <www.thelawyersdaily.ca/articles/6882> [perma.cc/J9EM-JBDG].

124. See Appendix B.

125. See e.g. Canada, Department of Justice, News Release, "Government of Canada announces judicial appointment in the province of Quebec" (31 January 2019), online: <www.canada.ca/en/department-justice/news/2019/01/government-of-canada-announces-judicial-appointment-in-the-province-of-quebec.html> [perma.cc/3E5Y-LGYH].

126. Peter Zimonjic, "After being removed as justice minister, Wilson-Raybould defends her performance," *CBC News* (14 January 2019), online: <www.cbc.ca/news/politics/wilson-raybould-justice-veterans-1.4977782> [perma.cc/C2N5-WAE7].

in making exceptional judicial appointments, which she has done. The team is making its best efforts to clear the backlog of applications."[127] Although making the appointments should rightly take priority over publishing their applications, Taylor's defence of this lackadaisical approach invites one of three charges:

i. the questionnaires do not offer much substance, so the value of publishing them is illusory;
ii. the questionnaires are politically beneficial but the Minister has neglected her undertaking to release them "shortly"; or
iii. the questionnaires are politically damaging and the Minister has deliberately sought to suppress them.

That the questionnaires might be of limited value is no excuse to renege on the government's original promise to release them. The government loses credibility on the transparency issue when it permits delay to overshadow its pledge to open government. The message is clear: appoint first and worry about transparency later, if at all. These are not the "sunny ways" that Trudeau promised on the night of his election[128] but politics as usual. If the current Minister, David Lametti, cared about his government's commitment, then he would hire additional help. He would insist that judges' questionnaires be displayed prominently on the Department's website and not buried in a press release. Put simply, he would do things differently. Trudeau's reforms toward openness will have been for naught if he is ousted from office before establishing a new norm of judicial accountability through the publication of federal judges' questionnaires. Therefore, the government's delay in releasing the excerpts undermines the Liberals' transparency project. This suggests that there is room for improvement.

Recommendations and conclusion

Answers to the Questionnaire for Federal Judicial Appointments disclose various interests, themes, and emotions. Although applicants express their views of judging and justice in different ways, drawing on their own unique anecdotes and experiences, their answers frequently exhibit insight into the judicial role in Canada.

Of course, there are exceptions to every rule. As discussed, some candidates did not bother to comply with the government's requested word range, providing short and superficial answers to otherwise compelling

127. Letter from David Taylor, *supra* note 122.
128. Justin Trudeau, "For the Record: A Full Transcript of Justin Trudeau's Speech," *Maclean's* (20 October 2015), online: <www.macleans.ca/politics/ottawa/justin-trudeau-for-the-record-we-beat-fear-with-hope> [perma.cc/ZSB2-558Y].

questions. Many simply followed the government's own rubric to reverse-engineer answers based on stipulated assessment criteria. Ultimately, most offered responses based on common assumptions of what "Good Judges" are supposed to do. Together, these observations suggest that some candidates were better qualified for judicial appointment based on their written answers than others. This does not mean the others were *unqualified*—only that their applications were demonstrably weaker in relative terms. This signifies that, as currently constituted, the Questionnaire mostly serves as a test of conventional judicial attitudes and government politics than as an inventory of genuinely free ideas. To that extent, its utility as a meaningful tool for judicial accountability is suspect.

But not all hope is lost. If the federal government takes its commitment to transparency and accountability in judicial appointments seriously—and it should—then there are specific, measurable steps it could take immediately to improve the quality and significance of applicants' answers:

a. *Eliminate (minimum) word counts.* Applying for federal judicial office is a serious undertaking. It should not be taken lightly. Although a longer answer will not always be superior to a shorter one, removing word counts will give applicants an early opportunity to demonstrate good judgment in gauging the level of depth that a particular question warrants. If the government retains word counts—for instance, to promote equity between applications—then the Commissioner for Federal Judicial Affairs should request applicants who do not comply with the rule to resubmit their questionnaires.

b. *Ask at least one value-based question to probe a candidate's political (not partisan) ideology.* Because the Minister's judicial appointments are inescapably political, ideology is a proper consideration in selecting nominees for the bench. When applicants say they support values like diversity, one should have confidence that they mean it. Including a question designed to tease out an applicant's normative value preferences, rather than the government's, will improve the quality of information available to Judicial Advisory Committees and the Minister. To avoid the risk that the applicant will uncritically adopt the government's position, any such question should not be one that is readily identifiable with the political Left or Right. Instead, it should let applicants express a value preference on an issue that defies traditional partisan divides. For instance, the Questionnaire might ask: should Canada ban the exchange of cryptocurrencies (such

as Bitcoin)? Should governments develop artificial intelligence programs to defend litigants who cannot afford a lawyer? Or, is it more important for children to learn obedience or creativity?[129] Such questions would reveal something about a judge's beliefs without providing an obvious cue or creating an expectation about the "appropriate" answer. They also have two added benefits. First, they show how the applicant might approach a novel problem on the bench, including the number, nature, quality, and diversity of authorities upon which the applicant relies. Second, they compel the applicant to educate herself and then speak intelligently on a subject about which she may not have prior knowledge. As most federally appointed judges serve on a bench of generalists who are expected to settle a wide range of disputes—civil and criminal, private and public—it is fitting that they should answer such questions, no matter how esoteric they may seem.

c. *Pass legislation to codify the government's commitment to disclosure.* A statute codifying the Department of Justice's promise to release successful applicants' questionnaires would obviate the need for individual consent, prevent future backlogs, and make it clear that consent to disclose the questionnaire is a condition of federal judicial appointment. To avoid a constitutional challenge, the statute should make it clear that the Act does not alter the Governor General's prerogative to appoint any person to the judiciary. A statute of this nature would be analogous to Canada's fixed election date law.[130] Legislation would have the added benefit of binding future governments to this practice, of imposing legal time limits for disclosing the information, and of normalizing the application process as a whole.

d. *Improve the online visibility and accessibility of the questionnaires*. The Department of Justice should abandon technical transparency and embrace enthusiastic compliance. That means not only releasing the questionnaires promptly, but also promoting them on the Department's website as an educational resource. Answers should be assembled in one place and featured prominently instead of hyperlinked from an old press release.

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129. These questions represent future controversies that are not popularly associated with a particular political party. See Table S2, Supplementary Materials in Michael Macy et al, "Opinion Cascades and the Unpredictability of Partisan Polarization" (2019) 5:8 Sci Adv eaax0754.

130. *An Act to amend the Canada Elections Act*, SC 2007, c 10.

Some will argue that the observations in this article harm the reputations of the judges mentioned in it. They will suggest that this essay undermines public confidence in the judiciary. However, this criticism is unfounded for three reasons. First, it overestimates the probable impact of one law review article on the public's confidence in the judiciary. Second, it ignores the diamonds in the rough—the gems that should give us all confidence in the decision-makers whom we have empowered to regulate human affairs. Third, it denies the government's agency in choosing to publish this content and the judges' own role in consenting to its release. In a democratic society, citizens expect their institutions to be transparent and accountable to them. Publishing judicial applications is an expression of those values. If this article does real harm, then it is more an indictment of the government's decision to publish these questionnaires than it is a comment on the wisdom of dissecting them.

This raises a second objection, which is that this article might frighten the government away from its transparency initiative altogether or discourage applicants for judicial office from being candid in their answers. This too is a misleading objection for two reasons. First, as the analysis above illustrates, the government has already shown itself to be less than committed to its transparency promise. Second, if a study such as this undermines the quality of judicial applicants or their applications, then the blame lies squarely at the government's feet. Surely, the government did not undertake to publish judges' answers thoughtlessly. The Minister of Justice must have concluded that more confidence would come from their publication than from their concealment. That was a judgment call the Minister was entitled to make. If she was wrong about it, then she bears responsibility for that decision. It was reasonably foreseeable that a novel treatment of these questionnaires would attract public comment. If the Minister failed to anticipate that, then she was reckless as to whether their publication might limit their utility in the hiring process.

The Questionnaire for Federal Judicial Appointments is a gift that keeps on giving. Judicial diversity, independence, impartiality, and politics—the Questionnaire implicates them all and makes it possible to understand the relationship between the judge and the judged in ways that were unimaginable less than two years ago. This study has only scratched the surface of possible inquiries. The sheer volume of new material makes it ripe for analysis. Examining the answers to Questions 3 to 6 and comparing the answers of judicial appointees in 2017 with those in 2018 are the next logical steps. Before judges' applications became public, one had to guess who comprised Canada's judiciary. The beauty of publishing responses to the Questionnaire is that, finally, Canadians can stop to guess

and begin to know. At last, they can interrogate their confidence in the people they empower to settle disputes among them and in the processes by which they put them there. But they cannot play this game alone. For that, they will need a government willing to finish what it started. Only then can Canadians win.

APPENDIX A

All federal judges appointed from 1 January to 31 December 2017 whose application questionnaires the Department of Justice has publicly undertaken to publish in part

Listed in order of appointment:

Date	Jurisdiction	Appointee	Court Level	Excerpt Released
3/9	PEI	Clements, Tracey L. (Q.C.)	Trial	3/9/2017
3/24	AB	deWit, William T. (Q.C.)	Trial	3/31/2017
3/24	AB	Hollins, Michele H. (Q.C.)	Trial	3/31/2017
3/24	AB	Khullar, Ritu (Q.C.)	Trial	4/19/2017
3/24	AB	Slawinsky, The Honourable Marilyn	Trial	3/31/2017
3/24	QC	Moore, Benoît	Trial	3/31/2017
4/7	ON	Paciocco, The Honourable David M.	Appellate	4/7/2017
4/7	ON	Swartz, Deborah	Trial	4/7/2017
4/12	BC	Hunter, John James Lyon	Appellate	
4/12	BC	Mayer, Andrew Phillip Avtar	Trial	11/3/2017
4/12	ON	Bell, Robyn M. Ryan	Trial	5/5/2017
4/12	ON	Nakatsuru, The Honourable Shaun S.	Trial	5/11/2017
5/4	QC	Bachand, Frédéric	Trial	
5/4	QC	Baudouin, Christine	Trial	
5/4	QC	Rogers, Karen M.	Trial	
5/4	QC	Royer, Daniel	Trial	
5/12	AB	Kubik, Johnna C.	Trial	
5/12	BC	Riley, W. Paul (Q.C.)	Trial	11/1/2017
5/12	NL	Chaytor, Sandra R. (Q.C.)	Trial	
5/12	NL	Knickle, Frances J. (Q.C.)	Trial	
5/19	ON	Audet, Julie	Trial	
5/19	ON	Desormeau, Hélène C.	Trial	
5/19	ON	Favreau, Lise G.	Trial	
5/19	ON	Monahan, Patrick J.	Trial	
5/19	ON	O'Bonsawin, Michelle	Trial	
5/19	ON	Shaw, M.J. Lucille	Trial	
5/19	ON	Williams, Heather J.	Trial	
6/9	BC	Branch, Ward K. (Q.C.)	Trial	
6/9	Federal	Lafrenière, Roger R.	Trial	

Date	Jurisdiction	Appointee	Court Level	Excerpt Released
6/9	NL	O'Brien, Francis P.	Appellate	
6/9	ON	Hurley, Patrick	Trial	
6/9	QC	Quach, Aline U.K.	Trial	
6/14	BC	Forth, Carla L. (Q.C.)	Trial	
6/14	BC	Iyer, Nitya (Q.C.)	Trial	
6/14	BC	Milman, Warren B.	Trial	11/3/2017
6/14	BC	Tammen, Michael (Q.C.)	Trial	
6/14	ON	de Sa, Chris	Trial	
6/23	AB	Ashcroft, Janice R. (Q.C.)	Trial	
6/23	BC	Brundrett, Michael J.	Trial	11/3/2017
6/23	BC	Marchand, The Honourable Leonard (Jr.)	Trial	
6/23	BC	Shergill, Palbinder Kaur (Q.C.)	Trial	
6/23	Federal	Laskin, John B.	Appellate	
6/23	Federal	Pentney, William F. (Q.C.)	Trial	12/7/2018
6/23	ON	Gomery, Sally A.	Trial	11/3/2017
6/23	ON	Koehnen, Markus	Trial	
6/23	ON	Petersen, Cynthia	Trial	
6/23	ON	Schreck, The Honourable P. Andras	Trial	
6/23	ON	Summers, Darlene L.	Trial	
6/23	QC	Kalichman, Peter	Trial	
6/23	QC	Vincent, Marie-France	Trial	
7/18	NS	Brothers, Christa	Trial	
7/18	NS	Derrick, The Honourable Anne	Appellate	
7/18	NS	Murray, Cindy	Trial	
7/18	ON	Fairburn, The Honourable J. Michal	Appellate[131]	
7/18	ON	McArthur, The Honourable Heather	Trial	
7/18	ON	Sanfilippo, Andrew A.	Trial	

131. Madam Justice Fairburn is notable because the government pledged to release her application even though she was already a sitting trial judge at the time of her elevation to the Ontario Court of Appeal. The government likely erred in undertaking to produce her application—e.g. the result of copying and pasting an old news release—given that the announcements of such promotions do not generally refer to the existence of an application. See e.g. the news release announcing the appointment of Justice Claudine Roy to the Quebec Court of Appeal: Canada, Department of Justice, News Release, "Government of Canada announces judicial appointments in the province of Quebec" (17 August 2017), online: <www.canada.ca/en/department-justice/news/2017/08/government_of_canadaannouncesjudicialappointmentsintheprovinceof.html> [perma.cc/3B25-8BZW].

Date	Jurisdiction	Appointee	Court Level	Excerpt Released
7/18	ON	Speyer, Jocelyn	Trial	
7/18	QC	Gagnon, Marie-Paule	Trial	
7/18	QC	Longpré, Mario	Trial	
8/17	BC	Winteringham, Janet (Q.C.)	Trial	
8/17	ON	Harris, David E.	Trial	
8/17	QC	Moore, Gregory	Trial	
9/15	Federal	Ahmed, Shirzad S.	Trial	
9/29	AB	Mandziuk, Steven N. (Q.C.)	Trial	
9/29	BC	E. David Crossin, Q.C.	Trial	
9/29	ON	Dietrich, Bernadette	Trial	
10/20	NB	Daigle, Chantal N.	Trial	
10/20	NL	Khaladkar, Vikas	Trial	
10/20	ON	Bawden, Peter G.	Trial	
10/20	ON	MacPherson, George A.	Trial	
10/20	QC	Dadour, François	Trial	
10/27	ON	Kurz, The Honourable Marvin	Trial	
10/27	PEI	Gormley, James W. (Q.C.)	Trial	
10/27	PEI	MacPherson, Terri A. (Q.C.)	Trial	
10/27	QC	Lachance, The Honourable Myriam	Trial	
11/9	Federal	Grammond, Sébastien	Trial	
11/9	NL	MacDonald, Alexander (Q.C.)	Trial	
11/29	Federal	Favel, Paul (Q.C.)	Trial	
11/29	QC	Breton, Isabelle	Trial	
11/29	QC	Thibault, The Honourable Carl	Trial	
11/29	SK	Leurer, Robert (Q.C.)	Trial	
12/19	AB	Dunlop, Grant S. (Q.C.)	Trial	
12/19	AB	Lema, Michael J.	Trial	
12/19	BC	Marzari, Francesca	Trial	
12/19	MB	Abel, Scott D.	Trial	
12/19	ON	Copeland, The Honourable Jill M.	Trial	
12/19	ON	London-Weinstein, Anne	Trial	
12/19	ON	McArthur, The Honourable Michael D.	Trial	
12/19	QC	Brodeur, Johanne (Ad.E.)	Trial	

APPENDIX B

All federal judges appointed from 1 January to 21 June 2018 whose application questionnaires the Department of Justice has publicly undertaken to publish in part[132]

Listed in order of appointment:

Date	Jurisdiction	Appointee	Court Level	Excerpt Released
1/19	ON	Nishikawa, Sandra	Trial	
1/19	QC	Nolin, Pascale	Trial	
1/19	BC	Basran, Jasvinder S. (Bill)	Trial	3/26/2019
2/7	BC	MacDonald, Diane	Trial	3/25/2019
2/22	SK	MacMillan-Brown, Heather (Q.C.)	Trial	
2/22	SK	McCreary, Meghan (Q.C.)	Trial	
2/22	ON	Leef, Karen D.M.	Trial	
2/22	AB	Burns, Marta E.	Trial	
2/22	BC	Norell, Barbara J. (Q.C.)	Trial	4/13/2018
2/22	BC	Baker, Wendy (Q.C.)	Trial	1/25/2019
2/22	BC	Matthews, Sharon (Q.C.)	Trial	3/26/2019
2/26	Federal	Walker, Elizabeth	Trial	
2/26	Federal	Norris, John	Trial	
3/15	YT	Campbell, Edith M.	Trial	
4/4	QC	Platts, David E.	Trial	
4/4	QC	Frappier, Jérôme	Trial	
4/4	MB	Champagne, R. Kenneth	Trial	11/23/2018
4/4	AB	Ho, L. Bernette	Trial	12/13/2018
4/12	AB	Bobb, Gaylene	Trial	
5/1	AB	Labrenz, David (Q.C.)	Trial	6/8/2018
5/4	AB	Neilson, James T. (Q.C.)	Trial	
5/4	AB	Dilts, Nancy (Q.C.)	Trial	7/11/2018
5/4	AB	Kirker, Anne (Q.C.)	Trial	11/13/2018
5/4	AB	Fagnan, Jane A.	Trial	
5/4	AB	Grosse, April D.	Trial	7/11/2018

132. This list excludes Thomas J. Crabtree who was appointed to the British Columbia Supreme Court on 4 May 2018. Although the government had pledged to release the questionnaires of those it appointed before 22 June 2018, the press release announcing Justice Crabtree's appointment, last modified on 29 August 2018, makes no such promise.

Date	Jurisdiction	Appointee	Court Level	Excerpt Released
5/11	SK	Zerr, Krista L.[133]	Trial	
5/24	ON	Champagne, Nathalie	Trial	
5/24	ON	MacEachern, Pamela	Trial	
5/24	ON	Nieckarz, Tracey J.	Trial	
6/7	Tax Court	Monaghan, K.A. Siobhan	Trial	
6/7	Tax Court	Wong, Susan	Trial	8/1/2018
6/15	NB	Robichaud, Ivan (Q.C.)	Trial	
6/15	BC	Gomery, Geoffrey B. (Q.C.)[134]	Trial	2/6/2019

133. The press release announcing Justice Zerr's appointment purports to disclose her questionnaire; however, the link is broken. A search of the Department's website yields no results.
134. The link to Justice Geoffrey Gomery's questionnaire is broken, but it is accessible by searching the Department's website.