Trudeau left with few options to replace Russell Brown on Supreme Court

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Sean Fine

TORONTO - Fewer than a dozen strong candidates to succeed Russell Brown on the Supreme Court of Canada are available to Prime Minister Justin Trudeau because of his bilingualism requirement, combined with the politics of regionalism.

And some strong potential candidates, who might have enhanced the top court's diversity, including an Indigenous judge on British Columbia's top court, may not be able to pass the federal government's proficiency test in French.

Mr. Trudeau has an opportunity to make his sixth pick to the country's most powerful court, thus shaping Canadian law beyond his years as Prime Minister. The selection is expected by late summer, before the court begins hearing cases in the fall.

The opportunity arose when Mr. Brown, a strong conservative voice on the court, resigned two weeks ago, after the Canadian Judicial Council informed him of its decision to order a public inquiry into allegations he drunkenly harassed women at an Arizona hotel in January. Mr. Brown denies the allegations.

Mr. Trudeau describes himself as pro-Charter of Rights and Freedoms and an advocate of greater ethnic and racial diversity on the Supreme Court.

His picks have included Mahmud Jamal, the court's first member of a racialized minority; Michelle O'Bonsawin, its first Indigenous member, for whom he took the rare step of reaching down to a trial court; and Malcolm Rowe, the first from Newfoundland and Labrador. (Justice Rowe was the only bilingual judge on that province's appeal court, and is today the least pro-Charter judge on the Supreme Court, an analysis by The Globe and Mail found).

As in his previous appointments, Mr. Trudeau finds himself hemmed in by competing imperatives - including one he implemented in 2016, requiring candidates to be functionally bilingual in French and English. There is no room for those who promise to become bilingual once appointed.

"It restricts the number of candidates, there's no doubt about it," said Gerard Kennedy, a law professor at the University of Manitoba, stressing that he was not giving an opinion on the bilingualism policy itself.

By tradition, two of the nine Supreme Court judges are from the West.

Mr. Brown was from the West - specifically Alberta, where he had been a law professor and judge. So his successor must also be from the West. Mr. Trudeau also includes the North, which has never had a judge on the Supreme Court, as an option.

Alberta has had more than its share of appointments to the top court - four of the past five from the West, including Justice Sheilah Martin, a 2017 Trudeau appointee. Saskatchewan, by contrast, has not had an appointment since 1962, when Emmett Hall joined the court, serving until 1973.

"It's been a long time," said Senator Brent Cotter, a former law dean at the University of Saskatchewan. He would like candidates from the province to receive "meaningful consideration."
Federal Court Justice Paul Favel, who is Indigenous, is a strong judge from Saskatoon. He hears cases in English but is currently enrolled in French-language training, the Federal Court confirmed. Saskatchewan’s appeal court has no full-time judges who are functionally bilingual, a court spokeswoman said.

The main criterion for a Supreme Court judge, Mr. Cotter said, is "legal imagination" to project how their decisions will affect the country into the future.

Most judges named to the Supreme Court of Canada have come from an appeal court. In B.C., four of the appeal-court judges have heard cases in French, which come rarely, court spokesman Bruce Cohen told The Globe.

But of those four, three are semi-retired.

Candidates in B.C. who fit the desired age range (early sixties and younger) and have the legal chops include Justice Joyce DeWitt-Van Oosten, Justice Gregory Fitch and Justice Len Marchand, according to interviews with senior legal observers in the province and elsewhere in the West. The Globe is not identifying the observers so they could speak freely about individuals they might appear in front of.

Mr. Cohen said he could not confirm whether these judges could hear a case in French.

Justice DeWitt-Van Oosten would give women their first majority on the Supreme Court. She is steeped in criminal law, as a former prosecutor and former assistant deputy attorney-general for the B.C. prosecution service. The Liberals appointed her to the appeal court in 2019.

Justice Marchand is a member of the Okanagan Indian Band, and his story is an intriguing one. His father, Leonard Sr., was named by Mr. Trudeau’s father, Pierre, as the first Indigenous federal cabinet member. The Liberals appointed Justice Marchand to the appeal court two years ago.

A complicating factor is that the appeal court’s Chief Justice, Robert Bauman, is soon to retire, and potential candidates might prefer that post to pulling up stakes and moving to Ottawa.

"You really do have to pack up your entire life to move," Prof. Kennedy said. "And a lot of people may have children at high school, they may have grandchildren, and they are disinclined to move to Ottawa at this stage of their life."

In Manitoba, three appellate judges are able to hear cases in French, a court spokeswoman said. One of those is the province’s Chief Justice, Marianne Rivoalen, who just took up that post on June 1. Chief Justice Glenn Joyal of the province’s Court of King’s Bench speaks French as his first language but was passed over for the appeal-court leadership post.

There are also less-traditional jurists, such as Aimée Craft, a law professor at the University of Ottawa, who is Indigenous, bilingual and from Manitoba.

If Mr. Trudeau turns his eyes to Alberta, Chief Justice Mary Moreau of the Court of King’s Bench is considered a strong bilingual option. He might also choose from among Chief Justice Ritu Khullar, whom he named to that post in November, or two bilingual women who joined the appeal court in the spring, Justice April Grosse and Justice Jane Fagnan.

The first stage of the appointment process is screening by a non-partisan panel, which presents a short list to Mr. Trudeau. Candidates must apply - though the panel can reach out and invite individuals to apply - and the applications close on July 21.

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