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DIVERSITY GAP ON THE BENCH

Do you see yourself reflected in the Canadian judiciary?
For many in our increasingly diverse society and profession, the
answer is “no”.

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There is a glaring gap of diversity among our judges. According to a 2012 study by Ryerson University's Diversity Institute, only 2.3 percent of federally appointed judges (i.e., on provincial superior and appellate courts) are people of colour. A similar survey conducted by *The Globe and Mail* revealed that only a small handful of judicial appointments by the federal government since 2009 were from equity-seeking communities. There is no visible minority representation on the Supreme Court of Canada. While Ontario has fared somewhat better in that 10.9 percent of the provincial government's appointees are visible minorities, this is nonetheless out of step with the diversity of a province where, as of 2006, visible minorities accounted for 22.8 percent of the population.

Federal judicial appointments are made by the Governor General in Council. Qualified lawyers and persons holding provincial or territorial judicial office who wish to be considered for appointment as a judge of a provincial or territorial superior court, or of the Federal Court of Appeal, the Federal Court or Tax Court of Canada, must apply to the Commissioner for Federal Judicial Affairs Canada. Substantive review of applications is conducted by provincial and territorial judicial advisory committees, comprised of representatives of the bench, the bar, law enforcement associations, and the general public. Extensive consultations in both the legal and non-legal community are undertaken by the committees, which assess candidates on the basis of two categories - "recommended" or "unable to recommend" for appointment. Committees are "encouraged" to respect diversity and to give due consideration to all legal experience, including that outside a mainstream legal practice. A candidate who is "recommended" remains on the list of those available for judicial appointment for 2 years.

In contrast, all appointments to the Ontario Court of Justice are made from a short list of ranked candidates recommended by the Judicial Appointments Advisory Committee (JAAC) with respect to specific vacancies. The 13-member JAAC, established under the *Courts of Justice Act*, uses a number of criteria in assessing applicants: professional excellence, community awareness, personal characteristics, and demographics. The last criterion allows the JAAC to take into account the current under-representation of women, persons with disabilities, and minorities, although professional excellence remains the paramount consideration. 312 judges have been appointed under the JAAC process since its inception in 1989 -- of those, 36.2% are women, 7.4% are visible minority, and 1.6% are First Nations.

The CBA and OBA take the issue of diversity on the judiciary very seriously. For the past several years, it has been a topic of conversation between the president of the CBA and the federal Minister of Justice at their annual in-person meeting, with successive presidents advocating for a great diversity of judicial appointments. At the April 2013 meeting of the OBA's Council, the Equality Committee convened a panel of experts, including the Chair of Ontario's JAAC, to discuss these issues and recommend strategies and actions that the OBA could take to achieve greater progress at the provincial level. At the 2013 Annual Meeting in Saskatoon, the CBA debated a resolution urging the Minister of Justice to, *inter alia*, make appointments to Judicial Advisory Committees that reflect the diverse nature of the Canadian population (including gender, ethnicity and minority status), which should then, in turn, submit qualified candidates for judicial appointments that reflect the diverse nature of the Canadian population. We hope that, as of the publication of this article, the CBA will have passed this resolution and used its significant voice on the national stage to advance these important goals.

Some have argued that ethnicity, gender, and other protected characteristics are irrelevant considerations in the appointment process since judges are supposed to be "objective" and "impartial". However, objectivity and impartiality must be understood in a more nuanced way: they do not equate to being devoid of values and experiences. Taking diversity into consideration is not incompatible with a merit-based system of judicial selection. Indeed, we expressly seek to appoint candidates who not only have demonstrated professional excellence and legal expertise, but are also



involved in their communities, thereby obtaining an understanding of the social context in which legal disputes arise. Experiences mould perspectives and people of different backgrounds are likely to have different experiences. As Lady Hale of the UK Supreme Court once mused, a minority perspective can be thought of as a genuine occupational qualification. Greater diversity on the judiciary will entail a richer range of perspectives available to evaluate the merits of the case and shape the progressive development of the law.

The late Justice Bertha Wilson's remarks on whether gender makes a difference is equally apposite to other dimensions of diversity: "if women lawyers and women judges [and people of all colours and backgrounds] through their differing perspectives on life can bring a new humanity to bear on the decision-making process, perhaps they will make a difference." In our view, a judiciary that more accurately represents and reflects the diverse population that it serves is a *sine qua non* of fostering access to justice and the rule of law in Canada.

Resources

Learn more about the OBA Equality Committee at oba.org/equality

Read the Ryerson Diversity Institute Report - **Improving Representation in the Judiciary: A Diversity Strategy, 2012**

Read *The Globe and Mail's* article, *Minority lawyers demand diversity among appointed judges*



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