

Speaker's Corner: Why judicial diversity matters

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This past December's round of judicial appointments by Justice Minister Peter MacKay has put the issue of judicial diversity squarely back in the spotlight.

The latest appointments follow a trend of predominantly white male appointments that reflect neither the diversity of the population served nor that of the legal profession. Canada has the highest proportion of immigrants among the G8 countries. In 2011, visible minorities made up 19.1 per cent of the Canadian population, a number that rises to one in four among Ontarians.

The number of visible minority lawyers has been on the rise as well: 17 per cent of lawyers in Ontario are visible minorities, up from 9.2 per cent in 2001.

Our diverse makeup is hardly evident, however, from the demographics of federal judicial appointees. Between April 2012 and May 2014, only one of 107 new judges appointed by the federal government was from a visible minority group, according to a study by Prof. Rosemary Cairns Way. Gender statistics are similarly dismal.

Women comprise approximately one-third of the bench even as they comprise 51 per cent of the overall population and 41 per cent of lawyers practising in Ontario.

There is much to gain from having a judiciary that reflects society in all its diversity. Diversity on the bench enhances judicial impartiality as well as public confidence in the administration of justice.

It is a truism that impartiality is essential to a well-functioning judiciary. While people don't typically speak of diversity in the same breath as impartiality, there is a link between them. Impartiality does not imply pure objectivity for we have long dispensed with the notion that judges are able to completely discount their life experiences, sympathies, and values when exercising their judicial function. As former Supreme Court justice Peter Cory observed in [R. v. S. \(R.D.\)](#), "good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear."

Chief Justice Beverley McLachlin also spoke of the issue in 2012: "Understanding impartiality begins with the recognition that judges are human beings. . . . They arrive at the bench shaped by their experiences and by the perspectives of the communities from which they come. As human beings, they cannot help but to bring these 'leanings of the mind' to the act of judging."

Having a diverse bench, then, enhances impartiality because it means there will be more varied experiences and perspectives from which to draw on in interpreting and applying the law. Women and visible minorities, by virtue of their historical marginality, have a unique frame of reference as outsiders within that renders them suitably positioned to appreciate the assumptions and stereotypes underpinning many legal doctrines and engender previously overlooked interpretations, analyses, and approaches.

A bench that reflects society is pivotal to fostering public confidence in the ability of the courts to make sound, responsive decisions. For the public to perceive our court system as impartial and accessible, the judiciary must reflect the diverse population affected by its decisions. Our conscious attitudes towards gender and race may not match hidden biases that steer our reasoning and behaviour as demonstrated by implicit-association test results. For example, many of us would say that the races are equal, yet at the same time exhibit a pro-white pattern of unconscious associations by, for example, associating positive words with whites and negative ones with blacks.

On some level, we have been aware all along that there are hidden biases at work. It explains why people like to see a bench that includes people like them who can appreciate their lived realities and listen with connection. It also underpins the constitutional right to trial by a jury of one's peers chosen from a representative jury roll.

In order to devise concrete, evidence-based ways to improve diversity, we need to have a firm grasp of the current state of affairs: Why are certain groups underrepresented on federally appointed courts?

There has been a sustained chorus for better tracking of data and access to the demographic information of applicants for judicial appointments as well as those named to the bench. With transparency comes accountability and an ability to measure progress. Britain has been publishing judicial diversity statistics annually just as British Columbia releases information on applicants to the provincial court.

A holistic approach to moving towards a more diverse judiciary will entail an open selection process rid of political patronage as well as co-ordinated efforts to promote diversity at all levels of the legal profession and ensure that lawyers from all backgrounds recognize, early on, judicial office as an attainable career goal.

Under the current federal selection process, eight-member regional judicial advisory committees review written applications. The federal minister of justice nominates three of the eight committee members, something that potentially colours the screening process with a political tint. The committees don't interview candidates. Instead, they undertake consultations with the legal community and the community at large and designate each applicant as either "recommended" or "unable to recommend." The federal minister of justice chooses from among the candidates on the recommended list to put forward to the federal cabinet, which is where political considerations can come into play.

Political patronage, real or perceived, discourages meritorious candidates of all backgrounds from applying to be judges as they may view the endeavour a lost cause if they lack political connections. A merit-based, procedurally fair, and transparent appointment process will go a long way in strengthening people's faith in the system. To minimize political discretion, the recommendations submitted by each committee should involve a ranked short list of perhaps three to five candidates for a judicial opening with any departure by the minister justified by reference to specific selection criteria. Moreover, the committees should interview the candidates

under consideration for the short list.

It is essential that high-quality, experienced candidates from all backgrounds seek judicial careers. Given that appointments typically involve senior practitioners at the height of their professional success, it is reasonable to assume that more women and visible minorities will join the bench as more of them hold senior positions.

For all the difference that a representative judiciary makes, it is high time that we make diversity on the bench a priority rather than an afterthought.

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