

3-2011

Diversity in the Law: Arguments and Perspectives Special Issue: Diversity in the Law: Preface

Follow this and additional works at: <https://commons.allard.ubc.ca/ubclawreview>

Recommended Citation

(2011) "Diversity in the Law: Arguments and Perspectives Special Issue: Diversity in the Law: Preface,"
UBC Law Review: Vol. 44: Iss. 1, Article 2.

Available at: <https://commons.allard.ubc.ca/ubclawreview/vol44/iss1/2>

This Article is brought to you for free and open access by the Journal and Peer-Reviewed Series at Allard Research Commons. It has been accepted for inclusion in UBC Law Review by an authorized editor of Allard Research Commons. For more information, please contact petrovic@allard.ubc.ca, elim.wong@ubc.ca.

PREFACE

DIVERSITY IN THE LAW: ARGUMENTS AND PERSPECTIVES

DANA F. HOOKER[†]

Embracing diversity. Committing to diversity. Engaging diversity. This *mot du jour* has, to say the least, moved to the fore of legal and business discourse in recent years. Legal and mainstream media,¹ corporate Canada (including the legal substratum thereof), political players, and legal scholars have all identified diversity as a key component to the overall social cohesiveness and functioning of our nation. Statistics Canada predicts that approximately 60 per cent of Toronto's and Vancouver's populations will be comprised of visible minorities by 2031.² Combined with an inevitable shift in demographics as baby boomers begin to exit the workforce, it seems obvious that diversity (a recognition of the actual makeup of Canadian society) should be at the

[†] BSc, LLB, LLM; Associate, Fraser Milner Casgrain LLP.

¹ See e.g. Virginia Galt, "Diversity Works!" [*Canadian Bar*] *National* 19:2 (March 2010) 11; Marzena Czarnecka, "Diversity Matters" *Lexpert* (February 2010) 48; Chris Archison, "Building a healthier work force" *The Globe and Mail* (23 March 2010) E3; Rasha Mourtada, "I haven't compromised who I am or what I am" *The Globe and Mail* (23 March 2010) E6; Diane Jermyn, "The invisible minority" *The Globe and Mail* (23 March 2010) E2; Jennifer Stewart, "Utility taps the power of non-profit agencies" *The Globe and Mail* (23 March 2010) E4; Jeff Gray "With moms jumping ship, law firms change course" *The Globe and Mail* (23 March 2010) E1; Tara Perkins, "The one to beat" *The Globe and Mail* (23 March 2010) E1.

² See Statistics Canada, "Highlights: Ethnocultural diversity in census metropolitan areas" (9 March 2010), online: Statistics Canada <<http://www.statcan.gc.ca/pub/91-551-x/2010001/hl-fs-eng.htm>>.

top of the list for our governments, educational institutions, corporate players, and—the particular focus of this special issue of the *UBC Law Review*—our legal institutions.

However, a whole-hearted commitment to diversity has been slow in the making, especially considering that the *Canadian Charter of Rights and Freedoms* and policy of multiculturalism (which *The Economist* has described as a replacement of “the previous policy of assimilation with one of acceptance of diversity”³) were entrenched in the 1980s,⁴ and that human rights protection and methods of redress have been gaining in sophistication and profile in at least the past two decades. Our legal institutions in particular have traditionally been a poor reflection of the broader makeup of Canadian society. For example, in its 1999 report on *Racial Equality in the Canadian Legal Profession*,⁵ the Canadian Bar Association Working Group on Racial Equality in the Legal Profession identified the barriers to racialized persons in their entrance to and utilization of the legal profession. These barriers were identified as not only the historical blights, such as the fact that former Chief Justice of the Supreme Court of Canada Bora Laskin could not obtain an articling position because of his Jewish heritage and the fact that Canadians of Chinese and Japanese descent were prohibited from becoming members of the Law Society of British Columbia until 1947 and 1948 respectively,⁶ but also the systemic biases inherent to the legal system, including those inherent to legal education, admission to the profession, progression in the profession, and even to the delivery of services to members of the community. Much to

³ “One nation or many? Multiculturalism in Canada” *The Economist* 381 (18 November 2006) 58.

⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; see e.g. *Canadian Multiculturalism Act*, RSC 1985, c 24 (4th Supp) (assented to 21 July 1988).

⁵ Canadian Bar Association, Working Group on Racial Equality in the Legal Profession, *Racial Equality in the Canadian Legal Profession* (February 1999) (Chairs: Joanne St Lewis & Benjamin Trevino), online: <<http://www.cba.org/cba/pubs/pdf/raciaequality.pdf>> [*Racial Equality*].

⁶ *Ibid* at 3.

the surprise of the writer, all of these barriers were identified as still existing in the mid-to-late 1990s.

Furthermore, more recently, the Law Society of British Columbia has prepared *The Business Case for Retaining and Advancing Women Lawyers in Private Practice*,⁷ in which it identified that, although women have been entering the legal profession in British Columbia in numbers equal to or greater than men for some time, the number of women in private practice, or practicing at all, is significantly less, as is the number of women in equity partnership (about 16 per cent) or partnership at all (about 20 per cent) in large- and medium-sized law firms.⁸

It is this lack of mirroring in our legal institutions which has arguably alienated many individuals from the justice system. This is made no more evident than in the words of my own paternal grandfather upon my entrance to the profession: “I’d imagine that you work with a lot of older white men.” Given the importance of our nation’s legal framework and functioning to the lives of its citizens, a perception of the system tasked with implementing at least of one of our three pillars of constitutional order as being out of step with the realities of our citizenship cannot continue:

The comfortable course of complacency is not a path for long-term prosperity. It is the dead-end route of inevitable decline. Yet the fear of fundamental change is always a powerful presence, where going back or doing nothing seem to be viable alternatives. Simply doing more of the same with more funding is not a path to progress. In a world that is changing faster than at any time in human history, it is a dangerous deception.

The status quo is not an option. Three waves of enormous and irrevocable power are sweeping across our social landscape. The western world is rapidly aging, knowledge and technology are driving new global economies, and the Asia-Pacific is now the world’s front door to growth and opportunity. These forces are transforming our planet. They demand us to rethink the assump-

⁷ Law Society of British Columbia, Retention of Women in Law Task Force, *The Business Case For Retaining and Advancing Women Lawyers in Private Practice* (July 2009) (Chair: Kathryn Berge), online: <http://www.lawsociety.bc.ca/publications_forms/report-committees/docs/Retaining-women-business-case.pdf>.

⁸ *Ibid* at 4.

tions of the last century and to change with the times to maintain and improve our quality of life.⁹

So, change is in the air. Diversity, as noted, is moving to the fore. The realities of Canadian life are being identified and acknowledged and various stakeholders are working through the many challenges associated with what is truly a paradigm shift. Diversity is being hailed as both the means and the end.

However, and importantly, all of this begs a fundamental question: What do we mean by “diversity”? When an organization or institution makes a commitment to diversity, what exactly are they committing to? Who are they committing to? One of the ironies of the diversity movement is that it is, in and of itself, diverse. Diversity is an amorphous concept, and its content—as well as the justification for championing this cause—can change depending on the proponent.

At risk of overusing the word, this “diversity in diversity” is the backbone of this special issue of the *UBC Law Review*. In order to fully understand the content of this initiative, and therefore its potential, there is a need to give a voice to the different lenses through which diversity can be viewed. The arguments in favour of diversity are many and varied, and this special issue aims to introduce the reader, in one forum, to at least some of the facets of the diversity movement in hopes of precipitating further discourse and debate.

For example, to some, embracing diversity is about acknowledging the “business case.” According to the Law Society of British Columbia, “[t]he business case outlines how increasing diversity makes good business sense, beyond moral arguments that diversity is an important social goal or is ‘the right thing to do.’”¹⁰ Not only does this encapsulate the benefits a diverse workforce can bring in terms of talent to an organization (as pithily put by Roasha Mourtada: “Imagine walking into a grocery store and allowing your-

⁹ British Columbia, Legislative Assembly, *Hansard*, 38th Parl, 2d Sess (14 February 2006) at 2225 (Lieutenant Governor Iona Campagnolo, speech from the throne).

¹⁰ Law Society of British Columbia, *Report of The Retention of Women in Law Task Force* (30 June 2009) at 4 (Chair: Kathryn Berge), online: <http://www.lawsociety.bc.ca/publications_forms/report-committees/docs/Retention-of-womenTF.pdf>.

self only to buy items made in Canada”¹¹), but it also addresses the positive reputational impact of actually embracing and facilitating a diverse employee base¹² (as made apparent by the US-based *Minority Law Journal* “Diversity Scorecard” which ranks American law firms based on the visible minorities in their workplaces, and which, more recently, has published data on the number of gay, lesbian, and disabled lawyers working in the American legal environment¹³) as well as organizations’ improved ability to service members of the public.¹⁴

In her paper, “A Dividend of Diversity: The Impact of Diversity on Organizational Decision Making,” Beth Bilson discusses the social science behind diversity—namely, the suggestion that more diversity in the makeup of groups tasked with decision making and problem solving in organizations strengthens those processes and leads to more effective performance. In “The Call to Diversify the Legal Profession,” Jennifer Chow discusses “A Call to Action Canada” and the way by which those served by organizations (and the legal profession in particular) can drive fundamental change within those organizations. In addition, Lisa Vogt writes about the evolution of the legal environment, and the ability of women to “stay the course” and continue to be active members of the profession in “Gender Diversity: Preparing for the New Legal Environment.”

To others, the case for diversity is less about the fact that it makes good

¹¹ Rasha Mourtada, “Enriching the talent pool” *The Globe and Mail* (8 April 2010) B6.

¹² See e.g. European Foundation for the Improvement of Living and Working Conditions, *Occupational Promotion of Migrant Workers* (Dublin: European Working Conditions Observatory, 2009) at 26–27, online: <<http://www.eurofound.europa.eu/docs/ewco/tn0807038s/tn0807038s.pdf>>.

¹³ “Diversity Scorecard 2010” *Minority Law Journal* (1 March 2010), online: <<http://www.minoritylawjournal.com>>.

¹⁴ See e.g. Perkins, *supra* note 1. With respect to diversity initiatives at RBC, chief executive officer Gordon Nixon is quoted as stating:

There’s a great opportunity to ensure that the makeup of our employee base reflects the country. That gives us a better ability to provide service and have a cultural understanding of our customers, to serve them in different languages and ways. Particularly in the urban centres, we’ve worked very hard to ensure that our business reflects the communities we serve. And from a business perspective, it’s been a win-win.

business sense (although that is clearly acknowledged), but more about a moral obligation to do the right thing. For example, president and CEO of Toronto's Mount Sinai Hospital, Joseph Mapa, when questioned on the genesis of Mount Sinai's diversity initiatives stated:

... it was natural for our organization to move forward. There are benefits to being inclusive and respecting diversity, like reputational, cultural in terms of staff morale, [and] strategic governmental, because government embraces this as well. Those are all by-products of doing the right thing. Because I'm in the business of strategy that's a nice plus, but the genesis of this was not strategic.¹⁵

J Charlotte Ensminger alludes to this acknowledgement of diversity in the course of serving society generally in her paper, "Accessing Justice: The Legal Profession's Role in Serving the Public's Diverse Legal Needs." And further, Carman J Overholt discusses how an incorporation of diversity principles into private practice forms an integral part of a lawyer's professionalism and duty to the profession and society at large in his paper, "Diversity and Professionalism in the Practice of Law." Finally, Karen L Whonnock introduces us to alternative streams of accessing justice in her paper, "A Tale of Two Courts: The New Westminster First Nations Court and the Colville Tribal Court," in which she discusses the use and utility of non-European-based models of justice delivery.

Despite the differing rationales for embracing diversity, however, there are a number of issues regarding how diversity is implemented in our legal institutions that the legal sphere, as a whole, needs to grapple with. For example, in her paper, "Cultural Factors in the Law," Lana KL Li discusses how civil redress can be, and in some cases has been, impacted by the cultural background of the parties and how the courts, while remaining steadfast to *Charter* values, have been in recent years less reluctant to wade into how culture and religion form the unique circumstances of a particular plaintiff or defendant. Similarly, in "A Delicate Balance: The Challenges Faced by Our Democratic Institutions in Reconciling the Competing Rights and Interests of a Diverse Population," Heather M MacNaughton and Jessica Connell

¹⁵ Atchison, *supra* note 1.

wade into the extremely difficult, sensitive, and timely issue of balancing Canada's commitment to the cultural mosaic with the rights and interests of many stakeholders.

Diversity is clearly an important and timely issue in Canadian society generally and in the legal system in particular. However, although, as discussed, this concept is now getting due attention, many diversity advocates are aware of the difficulty with articulating the precise interest they represent and others caution that it is not yet time to rest on our laurels—complacency is a danger that we, as a society, cannot afford. In “The Direct Voice in Legal Discussions on Equality,” Bruce MacDougall shares his thoughts on the role of “voice” in diversity discourse, and the difficulties inherent in advocating for communities that are, in and of themselves, diverse and representative of a broad range of interests. In “Spaces and Challenges: Feminism in Legal Academia,” Susan B Boyd argues that, despite what may appear to be a critical mass of women in the law school environment, there is still very much a place for the insights of feminism in legal curricula and process. And, finally, in “Context, Choice, and Rights: *PHS Community Services Society v Canada (Attorney General)*,” Margot Young identifies the litigation associated with Vancouver's safe injection site as being part of a larger campaign to make Vancouver more responsive to and reflective of the needs of its diverse citizenry and, moreover, discusses how this litigation reflects what are both the connections and disconnections between legal and social activism.

The papers and authors in this special issue represent but a small subset of the larger discourse and stakeholders in the diversity movement. This being said, we are hopeful that the thoughts and insights in the following pages provide the reader with an understanding of the importance of addressing and working with diversity, as well as providing a platform for further discussion and debate. As stated by Joanne St Lewis:¹⁶

It is not necessarily the role or responsibility of the legal profession to arbitrate or define what are highly complex social issues which transcend its narrow sphere. However, we should not pose in studied aloofness from the debate by refusing to reflect upon how our values as lawyers directly affect the

¹⁶ Co-chair of the Canadian Bar Association Working Group on Racial Equality in the Legal Profession.

realization of equality in Canadian society. Responsible leadership in the legal profession requires an informed engagement with contemporary social issues¹⁷

Fraser Milner Casgrain LLP is pleased to have collaborated with the UBC Law Review Society for the production of this special issue of the *UBC Law Review*, and is grateful for the assistance of each and every participating author in giving definition to a laudable, yet at times blurry, concept. Special thanks to the Law Foundation of British Columbia are also in order, without whose financial support this initiative would not have been possible.

¹⁷ Joanne St Lewis, "Virtual Justice: Systemic Racism and the Canadian Legal Profession" in *Racial Equality*, *supra* note 5 at 59.