2014

Data and Diversity in the Canadian Justice Community

Sabrina Lyon

Lorne Sossin

Osgoode Hall Law School of York University, lsossin@osgoode.yorku.ca

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/olsrps>

Recommended Citation

Lyon, Sabrina and Sossin, Lorne, "Data and Diversity in the Canadian Justice Community" (2014). *Osgoode Legal Studies Research Paper Series*. 63.

<http://digitalcommons.osgoode.yorku.ca/olsrps/63>

This Article is brought to you for free and open access by the Research Papers, Working Papers, Conference Papers at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Legal Studies Research Paper Series by an authorized administrator of Osgoode Digital Commons.

OSGOODE

OSGOODE HALL LAW SCHOOL
YORK UNIVERSITY

OSGOODE HALL LAW SCHOOL

LEGAL STUDIES RESEARCH PAPER SERIES

Research Paper No. 12/2014

Vol. 10, No. 5 (2014)

Data & Diversity in the Canadian Justice Community

Working Paper

Sabrina Lyon

Lorne Sossin

Editors:

Peer Zumbansen (Osgoode Hall Law School, Toronto; Canada Research Chair in Transnational Economic Governance and Legal Theory – Editor in Chief)

Stephen Ji (Osgoode Hall Law School, Toronto – Production Editor)

Comparative Research in
Law & Political Economy

Data & Diversity in the Canadian Justice Community

Working Paper

Sabrina Lyon and Lorne Sossin

Abstract:

This study explores the importance of quantitative and qualitative data in the development of more inclusive policies of recruitment and appointment in the justice community. Since at least the Abella Equality in Employment Royal Commission Report in 1984, the link between obtaining and analyzing data on recruitment and achieving greater inclusion has been well-documented and oft-repeated. The authors focus on the apparent resistance on the part of governments (in the case of judicial appointments) and private as well as public legal employers (in the case of legal recruitment) to keep, track and publish demographic data on who seeks these opportunities and who is selected for them. While the rhetoric around diversity and inclusion is now pretty much universally in favour of a judicial and legal community that reflects the society and communities they serve, opinions continue to differ sharply on the means of achieving this goal. Many view the focus on numbers and data alone as myopic, and as likely to obscure as reveal the reality of diversity in the judiciary and legal profession. Others are simply worried about efforts to manipulate such data, the impact of ranking, identifying “good” and “bad” firms and organizations in simplistic ways, and so forth. In other words, some fear the focus on data may in fact undermine the goal of a more inclusive justice community. The authors disagree. The authors’ view is that, while better practices with respect to collecting and publishing data on diversity will not in and of themselves make the justice community more inclusive, these data represent a necessary first step. The authors also explore blending quantitative and qualitative data together to provide a basis for a better understanding of the progress towards a more inclusive justice community in Canada.

Keywords:

diversity, judicial appointment, legal profession, demographic data

Author(s):

Sabrina Lyon

JD Candidate, Class of 2015

Osgoode Hall Law School

York University, Toronto

E: sabrinaklyon@gmail.com

Lorne Sossin

Dean & Professor

Osgoode Hall Law School

York University, Toronto

E: lsossin@osgoode.yorku.ca

Data & Diversity in the Canadian Justice Community

Sabrina Lyon¹ & Lorne Sossin²

Draft January 21, 2014

This study explores the importance of quantitative and qualitative data in the development of more inclusive policies of recruitment and appointment in the justice community. Since at least the Abella Equality in Employment Royal Commission Report in 1984, the link between obtaining and analyzing data on recruitment and achieving greater inclusion has been well-documented and oft-repeated.³ We focus on the apparent resistance on the part of governments (in the case of judicial appointments) and private as well as public legal employers (in the case of legal recruitment) to keep, track and publish demographic data on who seeks these opportunities and who is selected for them. While the rhetoric around diversity and inclusion is now pretty much universally in favour of a judicial and legal community that reflects the society and communities they serve, opinions continue to differ sharply on the means of achieving this goal. Many view the focus on numbers and data alone as myopic, and as likely to obscure as reveal the reality of diversity in the judiciary and legal profession. Others are simply worried about efforts to manipulate such data, the impact of ranking, identifying “good” and “bad” firms and organizations in simplistic ways, and so forth. In other words, some fear the focus on data may in fact undermine the goal of a more inclusive justice community. We disagree. Our view is that, while better practices with respect to collecting and publishing data on diversity will not in and of themselves make the justice community more inclusive, it is difficult if not impossible to see how the justice community could become more inclusive without meaningful and reliable data.

A series of initiatives have been launched to change realities on the ground with respect to diversity in the justice community. With respect to the legal profession, this study draws from Canadian initiatives like Legal Leaders for Diversity,⁴ A Call to Action Canada,⁵ and others attempting to see firms and other legal employers disclose information about who is applying, who is being hired, and what steps they are taking to ensure their workplaces reflect the broader community. The study will build upon this momentum and other attempts to make the empirical case for the need for more inclusive

¹ Osgoode JD 2015.

² Dean & Professor, Osgoode Hall Law School. We are grateful for many comments received from academic colleagues and legal community members who share an interest in the subject-matter, and whose candour and constructive criticism has enhanced this study.

³ R. Abella, *Equality in Employment: A Royal Commission Report* (Canada: Supply and Services, 1984). While this study is focused on the issue of recruitment, we recognize demographic data on retention and advancement within legal organizations is equally important in demonstrating a commitment to diversity and inclusion.

⁴ See <http://legalleadersfordiversity.com>.

⁵ See <http://www.acalltoactioncanada.com>.

and proactive policies in Canada.⁶

With respect to the judicial appointment process, this study builds on critiques of the lack of transparency in Canada's judicial appointment process,⁷ as well as critiques that Canada's judiciary fails to reflect the diversity of Canadian society.⁸ More specifically, we take as our point of departure the controversy generated by Kirk Makin's 2012 *Globe and Mail* piece, 'Of 100 new federally appointed judges 98 are white',⁹ which sparked a nationwide debate.¹⁰

The study will also look to the experience of various Canadian jurisdictions, as well as other common law jurisdictions (the U.S. and U.K., in particular) to highlight the vital importance of evidence based policies - and to explore how demographic data could be collected and disseminated in the Canadian context.

Building on interviews,¹¹ a review of ongoing policy initiatives, and a comparative analysis, the study concludes that generating rigorous and meaningful data, both quantitative and qualitative, would advance a culture of inclusion and accountability in the Canadian justice community. The concerns that data may lead to unintended or unwelcome effects need to be taken seriously, but do not individually or cumulatively justify the status quo.

The study is divided into four sections. The first section reviews the federal and provincial judicial appointment processes with respect to the collection and reporting of

⁶ Michael Ornstein, *Racialization and Gender of Lawyers in Ontario* (Toronto: The Law Society of Upper Canada, 2010) [Ornstein]; Aaron Dhir, "Towards a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity" (2010) 35 *Queen's Law Journal* 569; F M Kay, C Masuch & P Curry, *Diversity and Change: The Contemporary Legal Profession in Ontario* (Toronto: The Law Society of Upper Canada, 2004).

⁷ See F L Morton, "Judicial Appointments in Post-Charter Canada: A System in Transition" in Kate Malleson & Peter H Russell, eds, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University of Toronto Press, 2006) 56; Jacob Ziegal, *Merit Selection and Democratization of Appointments to the Supreme Court of Canada* (Montreal: Institute for Research on Public Policy, 1999); Peter McCormick, *Selecting Trial Court Judges: A Comparison of Contemporary Practices* (Quebec: Commission of Inquiry into the Appointment Process for Judges in Quebec, 2010) at 57; Nadia Verelli, "Reforming the SCC: Rethinking Legitimacy and the Appointment Process" in Nadia Verelli, ed, *The Democratic Dilemma: Reforming Canada's Supreme Court* (Kingston: The Institute of Intergovernmental Relations, 2013) 113.

⁸ Sonia Lawrence, "Reflections: On Judicial Diversity and Judicial Independence" in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 193; Lorne Sossin, "Should Canada Have a Representative Supreme Court?" in Nadia Verelli, ed, *The Democratic Dilemma: Reforming Canada's Supreme Court* (Kingston: The Institute of Intergovernmental Relations, 2013) at 27 [

⁹ Kirk Makin, "Of 100 new federally appointed judges 98 are white, Globe finds", *The Globe and Mail* (17 April 2012) online: The Globe and Mail <www.theglobeandmail.com>.

¹⁰ See Kirk Makin, "Minority lawyers demand diversity among appointed judges", *The Globe and Mail* (8 May 2012) online: The Globe and Mail <www.theglobeandmail.com>; Lorne Sossin, "Open Letter on Transparency and Diversity in Judicial Appointment" (21 November 2012) (blog post), online: Dean Sossin's Blog <deansblog.osgoode.yorku.ca>.

¹¹ We are grateful to the many individuals and organizations that shared their ideas, insights and experiences in the preparation of this study. References to their comments have been coded to ensure their anonymity.

data about who applies for judicial positions and who is selected. The second section canvasses the recruitment and hiring data in the legal profession, including recent reports and reviews specifically directed to the issue of diversity and inclusion. The third section explores alternative models and “best practices” for the kinds of data which can be generated and the link between these data and policy initiatives aimed at removing barriers and fostering inclusion. This will include a consideration of initiatives in peer jurisdictions. Finally, in the fourth section, we advance an argument for a change in policy both with respect to the judicial appointment process and the recruitment and hiring process in the legal profession. In each case, we believe the collection and publication of appropriate quantitative and qualitative data will lead to necessary policy change.

Part One: Diversity & the Judicial Appointment Process

Judges in Canada are no longer simply selected behind closed doors. While serious gaps in transparency remain with the appointment process both provincially and federally, all judicial appointments (save for the Supreme Court of Canada) are filled by application.¹² The applications are vetted by some form of advisory committee. This process allows for data to be kept both on who is applying and, of course, with respect to the demographic background of those appointed. In other words, if data are not kept or published on who is applying or being appointed as judges in Canada, it is because appointing governments (and government bodies) choose not to do so, not because the numbers are unknowable or the process so opaque that it could not be done.

We argue that the choice not to keep or track such data is directly linked to the failure of Canada’s judiciary to reflect Canada’s rich demographic diversity. Put bluntly, what we count counts, and to this point, diversity has neither counted nor been counted. That is perhaps not quite fair. Diversity has counted, and been counted, but of a different kind. Geographic diversity, for example, is embedded in the fabric of the *Constitution Act, 1867* itself, which requires federally appointed superior court judges (s.96 judges) be resident in the province where they are appointed. Similarly, the *Supreme Court Act*’s requirement that three Supreme Court justices be from Quebec represents another approach to diversity (bilingualism, bijuralism, etc). That said, the Canadian judiciary throughout much of its history has been remarkably homogenous (white and male), and this in turn has been a product of active discrimination against other groups of qualified lawyers, not mere chance.¹³ Bertha Wilson was the first woman appointed to the Ontario Court of Appeal in 1975, and the first appointed to the Supreme Court in 1982, while Justice Harry LaForme’s appointment to the Ontario Court of Appeal in 2004 was the first appointment of an aboriginal person to any appellate court in Canada (or, indeed, the

¹² For discussion on appointment process, see Lorne Sossin, “Judicial Appointment, Democratic Aspiration and the Culture of Accountability” (2008) 58 *University of New Brunswick Law Journal* 11. With respect to the Supreme Court in particular, see Sossin, *supra* note 8.

¹³ Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press, 2005); Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2002).

Commonwealth). Maurice Charles became the first black Canadian judge in 1969 when he was appointed to the Ontario Provincial Court, and Michael Tulloch became the first black Ontario Court of Appeal justice with his elevation from the Superior Court in 2012. There still has yet to be a visible minority or aboriginal person appointed to the Supreme Court of Canada.¹⁴

What we know is that the Canadian judiciary is overwhelmingly white at a time when Canadian society is more diverse than ever before.¹⁵ We do not know whether non-white lawyers are underrepresented among the pool of judicial applicants, or whether non-white lawyers are applying but not being appointed. Without accurate data it is not possible to design proactive outreach to address any gaps in the applicant pool. Without disclosure, public confidence in the fairness of the appointment process may erode.

With data comes evidenced based analysis, and with such analysis, expectations for change will grow. It is not that change is impossible without data, but that knowledge about a gap or problem tends to give rise to the search for solutions.

While virtually all leaders in the political and legal communities express support for enhancing the diversity of the judiciary, not all do so for the same reason. The puzzle of a representative judiciary is that many want a diverse bench because more varied experience will enhance judicial decision-making, and yet many worry about a representative judiciary precisely because it may mean judges will decide based on their identity or community affiliation rather than based on the facts and law before them.

This anxiety about a representative – or reflective – judiciary was captured most vividly in the Supreme Court’s decision in *R.D.S. v. The Queen*.¹⁶ In that case, the trial judge (who was African-Canadian) was hearing a case involving an African-Canadian youth who was charged with assaulting a police officer. The only two witnesses at trial were the accused himself and the police officer. The police alleged that the youth had resisted arrest and become violent with him. The youth alleged that he had been the subject of threats of violence at the hands of the police officer. Their accounts of the relevant events differed widely and the case turned on credibility. The trial judge indicated that she had a reasonable doubt about the accused’s guilt even without accepting the evidence of the accused with respect to the conduct of the police officer. She concluded that the Crown had not discharged its evidentiary burden to prove all the

¹⁴ See “Canadian Association of Law Teachers Panel on Supreme Court Appointments”, online: Canadian Association of Law Teachers <http://www.acpd-calt.org/wp-content/uploads/2010/12/SupremeCourt_panel.pdf>.

¹⁵ According to Statistics Canada, visible minorities made up 42.9% of Toronto’s population in 2006 – see “Canada’s Ethnocultural Mosaic, 2006 Census: Canada’s major census metropolitan areas” *Statistics Canada*, online: <<http://www12.statcan.gc.ca/census-recensement/2006/as-sa/97-562/p21-eng.cfm>>, whereas DiverseCity report 3 indicates that visible minorities make up only 8.3% of judges in the GTA – see Cukier et al, *DiverseCity Counts 3: A Snapshot of Diverse Leadership in the GTA* (Toronto: Diversity Institute, 2011) at 26, online: DiverseCity Toronto <<http://diversecitytoronto.ca/wp-content/uploads/CountsReport3-full.pdf>>.

¹⁶ *R v S (R.D.)*, [1997] 3 SCR 484 [*R.D.S.*].

elements of the offence beyond a reasonable doubt. The trial judge elaborated on her findings with the following comments:

The Crown says, well, why would the officer say that events occurred in the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.¹⁷

The case reached the Supreme Court on the question of whether these comments gave rise to a reasonable apprehension of bias—a divided Court issued four separate sets of reasons. Writing for the majority judgment on this issue, Cory J. observed:

The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes...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. [Canadian Judicial Council, Commentaries on Judicial Conduct (1991), at p. 12.] It is obvious that 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. *The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging.* See for example the discussion by The Honourable Maryka Omatsu, "The Fiction of Judicial Impartiality" (1997), C.J.W.L. 1. See also Devlin, *supra*, at pp. 408-409.¹⁸ (Emphasis added.)

In the context of this case, Cory J. held that the comments by the trial judge were "unfortunate", "worrisome" and "come very close to the line" but when considered in light of the submissions and evidence in the case, did not in his view give rise to a reasonable apprehension of bias.¹⁹

Three judges of the Court dissented and found the comments did create a reasonable apprehension of bias, as it suggested factors not in evidence influenced the trial judge's determination of credibility. The two female judges of the nine member

¹⁷ *Ibid* at para 4.

¹⁸ *Ibid* at para 119.

¹⁹ *Ibid* at para 152.

court, Justice McLachlin (as she then was) and Justice L'Heureux-Dubé, concurred with Cory J. in the result, but would have gone even further in condoning the comments of the trial judge, asserting, "An understanding of the context or background essential to judging may be gained from testimony from expert witnesses in order to put the case in context... : A reasonable person far from being troubled by this process, would see it as an important aid to judicial impartiality."²⁰

The *R.D.S.* approach illustrates the supposed dichotomy between objective merit and subjective background and identity. While we know a judge's background, whether from a diverse group or not, plays a role in informing a judge's assessment of credibility, we do not want judges to express this reliance in their reasons for fear to do so would create a reasonable apprehension of bias, or worse, the general impression that a different kind of justice may be found in a courtroom in St. Johns than in Victoria.

What *R.D.S.* and its debate about the nature of bias disclose is the difficult balance required in decision-making settings between identity and merit. Traditionally, these concepts are seen in tension with one another. On this conventional view, to the extent we privilege identity and seek courts that are representative, merit matters less; and, to the extent merit is the sole driver of appointments, identity matters less. Need these concepts be oppositional? Might a candidate's life experience, perspective and background be elements of merit? As Lizzie Barnes observes:

There is no doubt that reconfiguring our understandings of merit is as difficult as that of complicating notions of identity. But without a shift in this regard, the transformative capacity of any step will be limited. If we do not believe the diverse ways of living produce diverse skills and abilities, we are never going to entrust important decision-making power to groups composed of people from a diversity of backgrounds.²¹

Sonia Lawrence has gone further and suggested a judiciary that reflects the society it serves is a pre-requisite for a fair, impartial and independent judiciary.²² It is against this backdrop of the tension between objective merit and subjective identity that data plays a central role. While judges are not defined by their racial, ethnic, religious or geographic background, neither is their background irrelevant to their decision-making or to public confidence in the judiciary more generally. Put simply a judiciary that is not itself inclusive and diverse cannot adequately do justice to the needs of an inclusive and diverse society.

Moreover, inclusion must be more than a rhetorical commitment – governments who purport to support the goal and are in a position to achieve it must be accountable for the steps taken to do so. For such accountability to be possible (never mind effective), reliable demographic data on applications to the judiciary and the appointments process is

²⁰ *Ibid* at paras 44-45.

²¹ L. Barnes, "Public Appointments and Representativeness" [2002] Public Law at 606 at 613.

²² Sonia Lawrence, "Reflections: On Judicial Diversity and Judicial Independence" in Adam Dodek & Lorne Sossin eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 193 at 196.

essential. As we discuss below, a similar analysis applies in the context of recruitment and hiring in the legal profession.

Part Two: Recruitment and Hiring in the Legal Profession

There are approximately 83,700 lawyers in Canada,²³ over 40,000 of whom are licensed in Ontario²⁴ (on which this analysis focuses). While we have relatively good data on the demographic make-up of the bar (at least in Ontario), we know far less about who is working where and how they got there.²⁵ This gap in data again is not because the information is complex or difficult to find. Rather, we know so little about who is hired where because those responsible for recruitment choose not to count or not to publish these data. This fact raises an important puzzle. Why not? It is not that every employer's hiring statistics will suggest they lack a commitment to diversity and inclusion. Indeed, it does not take a statistician to determine that 49% of employers will be "above average" in this regard. Rather, there is a deeper aversion to data, and one not shared in other jurisdictions. We believe this is a puzzle worth better understanding.

It is tempting to see this puzzle as simply an extension of systemic racism and exclusionary policies which characterize the history of the legal profession. It was not that long ago that Jews, women and immigrants all faced well-documented barriers to securing an articling position or a first permanent position in Ontario's legal profession. However, formal exclusionary policies are largely absent today. In fact, one would be hard pressed to identify any medium or large sized law firm in Ontario that does not assert a commitment to diversity and inclusion. So the aversion to collecting and publishing demographic data is all the more puzzling.

Broad consultations with an array of professionals from the legal community (professors, career development officers, minority bar associations, student recruitment professionals, government officials, practitioners and selected members of the Law Society of Upper Canada) has led to the following insight regarding diversity in the legal profession and the importance of data in the development of more inclusive policies of recruitment and appointments.²⁶

²³ Federation of Law Societies of Canada, *2010 Statistical Report* (Ottawa: FLSC, 2010), online: <http://www.flsc.ca/_documents/2010-Statistical-Report.pdf>.

²⁴ The Law Society of Upper Canada, *Frequently Asked Questions*, online: The Law Society of Upper Canada <<http://www.lsuc.on.ca>>.

²⁵ We do know, however, that 13.6% of self-identifying members of the LGBT group and 15% of the visible minorities were unable to find articling positions in 2011 – see Law Society of Upper Canada, 2011, *Articling Task Force Consultation Report* [online] Toronto: Law Society of Upper Canada. Available from: <http://www.lsuc.on.ca/articling-task-force-consultation-report/> [Accessed 15 Sept 2013] at appendix 5, 6. "If the inability of 10% of articling-seeking students to find a position is indeed a crisis, then the inability of 15% of the visible-minority group to find a position should be viewed as a dire crisis." (Avner Levin & Asher Alkoby, "Barriers to the Profession: Inaction in Ontario, Canada and its Consequences" (2013) 3.3 *Oñati Socio-Legal Series* 580 at 583).

²⁶ For the purposes of maintaining anonymity, attribution to the following sources of the commentary will be coded.

Is demographic data important to the creation of a reflective legal community?

Across the legal profession, the collection of data on diversity demographics has been described as fundamentally important to the development of more inclusive policies of recruitment and appointments in the legal community.²⁷ The broad support received for initiatives like the collection of demographic statistics in the Law Society of Upper Canada's Member's Annual Report (MARs) is indicative of the sentiment expressed by members of the legal community when questioned about the importance of demographic data.²⁸ This "empirical turn" has been enhanced by the search for evidence-based benchmarks in other areas of importance to the justice community, such as legal needs.²⁹

Despite this overwhelming support, many legal employers surprisingly opt to gauge diversity solely by qualitative benchmarks (for example, the presence of pro bono services and the culture of inclusion) rather than looking at numbers. While qualitative measures of diversity cannot be overlooked, when an organization is comprised of very few diverse members, a firm-wide survey on inclusion will likely lead to misleading results.³⁰ Qualified and supplemented by quantitative data, the picture becomes much clearer.

Many large to medium sized firms have created committees, departments or have designated equity officers responsible for recommending and pursuing initiatives that promote diversity. In spite of these efforts, studies like Michael Ornstein's *"Racialization and Gender of Lawyers in Ontario"* and the 2011 DiverseCity report on leadership reveal that the lack of diversity in Canada's legal profession remains an embarrassing ordeal. Why have committees been unsuccessful at achieving the outcomes of their projected mandates? The practical reality, according to members of a minority bar association, is that the pursuit of business and employer awards conceives a system where the creation of diversity initiatives becomes the goal rather than diversity itself. With no data to confirm or refute whether initiatives have actually been successful at improving diversity, ineffective policies stay under the radar. Even firms with legitimate commitments to diversity will be ineffective at achieving their goals if there is no connection to outcome.³¹ Thus, diversity statistics are essential to measuring progress and the effectiveness of policies aimed at increasing diverse recruitment and appointments.

What kind of data is important?

If the purpose of collecting demographic data is to improve diverse representation within the legal community and to make the legal profession more inclusive, it is important that the information garnered from the numbers highlights specific pitfalls,

²⁷ Participant (P)1; P2; P3; P4; P5; P6; P7; P13; P15; P17.

²⁸ P5, P13.

²⁹ Report of the Civil Legal Needs Project, *Listening to Ontarians* (Toronto: The Ontario Civil Legal Needs Project Steering Committee, 2010), online: <http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf>.

³⁰ P13.

³¹ P13.

thereby enabling the formation of an appropriately focused strategy.³² Members of a minority bar association are of the opinion that the questions on the MARs report “only scratch the surface”.³³ Questions that gauge diversity by the extent of client carriage, involvement on important committees,³⁴ heading a subgroup, and life span in these roles can be far more telling of an employer’s commitment to diversity than demographic data by career-level (articling student, associate, partner, etc.).³⁵ Members of the legal community also echo the sentiment of scholarly works that cite socioeconomic status as an important diversity measurement, as it ensures that the legal profession not only appears diverse, but that it is embedded with diverse *experiences* as well.³⁶

While a demographic profile can provide important insight into diverse representation, numbers alone can be misleading³⁷ in at least two respects. First, demographic data on diverse representation can undervalue real progression in diversity; for instance, when a firm has made true commitments and outstanding progression through policies aimed at improving the culture of inclusion, but where diverse representation in numbers is low. On the other hand, numbers can also have the effect of overstating progression on diversity. Take as an example a case where a firm’s numbers seemingly indicate retention (i.e. showing a consistent level of representation of a diverse group from year-to-year), when, in fact, the members that comprise the group have changed from one year to the next, or when the members of the group have not experienced a particularly inclusive environment.³⁸ Qualitative inquiries, then, can provide the appropriate contextual framing for quantitative data and allow further insight into the lived experience of diverse members. Thus, a complete picture of diversity involves the collection of both qualitative indicators and quantitative data beyond simple group identification.

Why have Canadian legal employers been so resistant to collecting and releasing demographic data?

When members of the legal community were asked why they think legal employers have been resistant to collect, keep and release demographic data, the overwhelming response was “because the numbers are bad” and the implications dire.³⁹ As a result of the economic climate, the legal profession has become increasingly competitive. Aside from sheer embarrassment, data comparing diverse representation

³² P13.

³³ P13.

³⁴ With the management committee being more important than the social committee, for instance.

³⁵ P13.

³⁶ P3; Louise Ashley & Laura Empson, “Differentiation and Discrimination: Understanding Social Class and Social Exclusion in Leading Law Firms” (2013) 66:2 Human Relations 219 [Ashley]; Frank Walwyn highlighted the importance of diverse experience at the OBA Judicial Diversity Panel at the OBA Council Meeting on April 5, 2013.

³⁷ P2; P13.

³⁸ P13.

³⁹ P1; P2; P4; P5; P7; P13; P15; P17.

across employers could have severe business implications.⁴⁰ Clients, especially those South of the border, but also increasingly Canadian corporations, consider a firm's standing on diversity in the decision to assign business.⁴¹ At present, only a small minority of firms collect demographic data⁴² and so many cite pro bono initiatives and the policies of diversity committees as indicative of their commitment to diversity.⁴³ The introduction of the demographic data for which this paper calls, however, will allow for a more direct comparison of diversity between firms and will ultimately lead firms that rank poorly to lose business to their closest competitors.⁴⁴ The business implication, then, is both the reason for resistance to data and the consequence that will motivate employers to work harder at fostering a representative legal profession.

Accountability has been cited as another major factor for the resistance to collect and report demographic data.⁴⁵ Data collection that reveals, for instance, a discrepancy between the diversity of the applicant pool and those being hired, forces employers to acknowledge that discrimination exists and, once aware, renders employers accountable. In other words, employers may fear that the information data reveals has the potential to expose them to legal liability if the appropriate steps are not taken to improve representativeness.⁴⁶ Again, accountability, then, explains both the resistance to data and the role data can play as a catalyst for change.

A less pessimistic explanation offered by a career development staff member is the potential that data could make matters worse. According to that account, publishing statistics that highlight a firm's poor standing could discourage diverse students from seeking employment there, thereby reducing the diversity of the firm's applicant pool and exacerbating their diversity dilemma.⁴⁷ However, due to the difficult job market that new lawyers face, a firm that campaigns its renewed commitment to increasing its diverse membership would likely have little problem attracting talented members from diverse communities.

A minority bar association also cited privacy concerns as a possible reason for resistance to data collection. This highlights the importance of defining the uses of collected information and ensuring privacy and confidentiality.⁴⁸

While the implications of revealing poor standing may be of real concern to legal employers, they do not provide justifications for not releasing data. Quite the contrary, if legal employers are not living up to the standards that are expected of the legal community, they *should* face the consequences that come as a result. The same, if not more severe, implications exist for legal employers in the U.S., but nonetheless, the U.S.

⁴⁰ P5; P13.

⁴¹ P5; P13.

⁴² P2.

⁴³ P13.

⁴⁴ P4; P5.

⁴⁵ P2; P13; P15.

⁴⁶ P2, P15.

⁴⁷ P7.

⁴⁸ P19.

branch of the National Association for Law Placement (NALP) and other state initiatives operate systems of demographic reporting that hold legal employers accountable for their diversity statistics. Employers that wish to escape the consequences of an unrepresentative organization will invest more into creating a space that is truly inclusive and reflective of the diverse members that make up their society.

Demographic reporting: Why the difference between the U.S. and Canadian experience?

Why has demographic reporting become so commonplace in the U.S. legal community while the Canadian legal profession is still in the preliminary phases of breaking down the resistance? Many of the people consulted cite the deep history of civil rights and employment equity in the U.S. and a passive Canadian culture as the main reasons for the gap.⁴⁹ In the U.S., racism and sexism were at one time, and in many places still are, overt; this led to an aggressive approach to combating discrimination, which has called for quantitative proof of diverse representation.⁵⁰ The U.S. Equal Employment Opportunity Commission (EEOC), established in 1965, has long required large U.S. employers to collect and report demographic information directly to the EEOC. As a result, when the NALP Directory of Legal Employers requested demographic information from law firms in 1980, few law firms faced procedural difficulties obliging since gathering that information was already deeply ingrained into most employers' human resources processes and procedures.⁵¹ The less explicit and more systemic nature of racism and sexism in Canada, on the other hand, masked the severity of people's biases, leading to a culture that contests mandatory reporting requirements under the misguided belief that it is unnecessary.⁵² Consider for instance the backlash that resulted from both the *CN v. Canada* ("Action Travail") decision in 1987⁵³ and the NDP's enactment of the *Employment Equity Act* in 1993 (which was repealed under the Conservative government in 1995).⁵⁴ Despite what Canadians may believe, studies reveal that many Canadian professions fare poorly when it comes to diversity.

There are other characteristics that likely account for Canada's less aggressive approach to diversity. Unlike the U.S., the history of diversity in Canada is relatively

⁴⁹ P1; P2; P5.

⁵⁰ P2.

⁵¹ P6.

⁵² P5.

⁵³ P5.

⁵⁴ P5; *Employment Equity Act*, 1993, SO 1993 c 35 as repealed by *Job Quotas Repeal Act*, 1995, SO 1995 c 4, s 1(1). Opponents of the *Employment Equity Act* argued that the Act was a "quota system" that favoured unqualified applicants and produced an atmosphere of reverse discrimination - see Abigail B Bakan & Audrey Kobayashi, "Backlash Against Employment Equity: The British Columbia Experience" (2004) 29:1 *Atlantis* 61 at 66; Abigail B Bakan & Audrey Kobayashi, *Ontario: Lessons of the Rise and Fall of Employment Equity Legislation from the Perspective of Rights Advocacy* (Toronto: Canadian Race Relations Foundation, 2003) at 4; online: <<http://www.crr.ca/divers-files/en/pub/rep/ePubRepEmplEquitCase1.pdf>>; Abigail B Bakan & Audrey Kobayashi, "Affirmative Action and Employment Equity: Policy, Ideology and Backlash in Canadian Context" (2007) 79 *Studies in Political Economy* 145. Additionally, many lawyers are even resentful of LSUC reporting (P17).

new, with most of Canada's diverse population comprised of first generation immigrants.⁵⁵ Additionally, the treatment of our indigenous population continues to provide huge obstacles to their mobilization efforts.⁵⁶ Furthermore, Canada's diversity is concentrated in urban centres (particularly Toronto, Montreal and Vancouver), which not only means that the push for diversity initiatives is non-existent in many places in the country, but also that the diversity initiatives that are occurring are separated geographically and are less effective as a result. These factors also likely contribute to the Canada's weak movement and less aggressive approach to diversity.

Who/what body is best suited to lead the effort in calling for the collection and dissemination of demographic data?

As regulator of the profession, many people consulted project the Law Society of Upper Canada ("Law Society") as the most appropriate body to lead the effort in calling for the collection and dissemination of demographic data.⁵⁷ Though data collection was a topic of the 2012 NALP Canadian Section Meeting, NALP Canada has not achieved the near exhaustive membership that its U.S. counterpart has. Thus, there are concerns that a NALP-led strategy may allow many firms to escape the call for data.⁵⁸ When a minority bar-led initiative was raised, two main concerns were expressed. First, legal employers would be suspicious of the motivations behind their call for data and would resist. Second, minority bar associations, mostly volunteer organizations, lack the resources, administrative staff and expertise needed to analyze the data.⁵⁹ However, minority bar associations could play a consultative and advocacy role, helping to formulate the appropriate questions and lobbying the community to support the initiative.⁶⁰ Thus, regulators appear to be the preferred body based not only on their mandates as regulators of the legal profession, but also their ability to reach all legal employers and their access to resources.

Though regulators may be the most suitable body to lead the effort (because of the array of tools at their disposal), there is uncertainty surrounding whether regulators can mandate the collection of demographic data. While some are of the opinion that law societies can mandate the initiative and force legal employers to provide demographic data on the composition of their firms,⁶¹ it has been noted that regulators predominantly

⁵⁵ P1; "Nearly 6,264,800 people identified themselves as a member of a visible minority group...Of these visible minorities, ... 65.1% were born outside the country and came to Canada to live as immigrants" - see Statistics Canada, *Immigration and Ethnocultural Diversity in Canada: National Household Survey, 2011* (Ottawa: StatCan, 2011) at 4, online: Statistics Canada <<http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.cfm>>.

⁵⁶ P1.

⁵⁷ P2; P7; P13; see also Avner Levin & Asher Alkoby, "Barriers to the Profession: Inaction in Ontario, Canada and its Consequences" (2013) 3.3 *Oñati Socio-Legal Series* 580 at 590.

⁵⁸ P7.

⁵⁹ P13.

⁶⁰ P13.

⁶¹ P7; P13.

regulate individual lawyers and not legal employers.⁶² The practices of regulators across Canada differ, however, most exercising very minimal regulation over LLPs (for example, conducting financial audits)⁶³ and only some taking on a larger regulatory role.⁶⁴ In “Regulating Law Firms in Canada”, Adam Dodek observes that although the Law Society of Upper Canada and other regulators do not at present have the jurisdiction to regulate many aspects of law firms, legislation like those enacted in Quebec, Nova Scotia, Alberta and most recently in British Columbia could broaden their mandate.⁶⁵ The sense of some legal professionals, however, is that Ontario’s legal profession simply is not ready for that change⁶⁶ and, moreover, are of the belief that the voluntary participation of legal employers is far preferable to the regulated collection of the type of information for which this study calls.⁶⁷

The aforementioned resistance and backlash to mandatory reporting requirements makes voluntary and/or incentivized disclosure of demographic statistics an important avenue to consider. The Justicia Project was cited as an example of how 55 medium to large law firms voluntarily signed written commitments to track gender demographics.⁶⁸ Pressure from clients is widely cited as the least contentious way to compel legal employers to release demographic data.⁶⁹ In fact, the competition for business (and for the best graduating law students) has been an integral driver behind firms’ current commitments to diversity.⁷⁰ As mentioned, corporations have increasingly begun to consider firms’ diverse profiles when making decisions on representation. While Canadian firms initially resisted questions on diversity, the risk of losing business quickly motivated firms to get diversity committees and initiatives in gear.⁷¹ To date, however, only a few law firms have gone as far as collecting demographic data.⁷² Canadian governments at all levels are also well-positioned to drive change, both as the largest procurers of legal services, and as one of the largest clients of private firms. Governments can be strict in tying procurement to firms who meet a certain standard or, as is often the case today, simply indicate that it will prefer such firms in its procurement decisions.⁷³

⁶² P5; P15. Nonetheless, Levin and Alkoby highlight that the “LSUC has a legislated duty “to act so as to facilitate access to justice for the people of Ontario”— see Avner Levin & Asher Alkoby, “Barriers to the Profession: Inaction in Ontario, Canada and its Consequences” (2013) 3.3 *Oñati Socio-Legal Series* 580 at 590.

⁶³ LSUC is in the minimal group - see Adam M Dodek, “Regulating Law Firms in Canada” (2012) 90:2 *Canadian Bar Review* 383.

⁶⁴ Regulators in Quebec, Nova Scotia, Alberta and BC take on a larger regulatory role - see Dodek, *supra* note 63.

⁶⁵ Dodek, *supra* note 63.

⁶⁶ P2, P5, P15.

⁶⁷ P5; P13; P15.

⁶⁸ P5.

⁶⁹ P1; P2; P5; P13.

⁷⁰ P1; P2; P5; P13.

⁷¹ P13.

⁷² Note that the data collected is for internal use and not published.

⁷³ This seems to be more in line with the Section 26(1) of the *Ontario Human Rights Code* than the current practice. According to those consulted, the Ontario government asks a vague question on diversity but it is more of a standard procedure with no real teeth (P13; P15); Also note Nova Scotia’s *Policy on Employment Equity for Crown Law Agents* requires firms who perform legal work with the government (under certain conditions) to submit annual reports on the representation of designated group members – online:

The preference for participatory/incentivized disclosure of demographic data highlights the important role that initiatives like Legal Leaders for Diversity (LLD) and A Call to Action Canada (ACTAC) can play in making the legal community more reflective of Canadian society. Largely inspired by the success of A Call to Action in the U.S., ACTAC was established in 2009 with a similar mission. The initiative called on its corporate counsel signatories to not only “look for opportunities to direct work to firms which are controlled by, or have a substantial number of, partners who are women or minorities”, but also to “*end or limit ... relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse*” (emphasis added).⁷⁴ The initiative was the first of its kind launched in Canada and added to the diversity discourse an innovative means to improve diverse representation in the Canadian legal profession. LLD launched with 40 general counsel signatories in May 2011. The group’s mission statement encourages its signing members to incorporate and promote diversity within their own legal departments, in seeking the services of law firms, and throughout the business community more generally. Additionally, LLD provides a list of 17 best practices that members can implement in their offices. LLD membership has since grown to 65 corporations and has evolved to pursue initiatives that target non-corporate organizations and law schools.⁷⁵ As a result of initiatives like ACTAC, LLD and similar initiatives in the U.S., Canadian law firms are increasingly being asked to demonstrate their commitments to diversity. The extent to which these commitments play a role in procurement decisions is unknown but the practice does appear to have a positive effect on diversity initiatives among Canadian law firms.⁷⁶

One of these resulting initiatives is the newly formed Law Firm Diversity and Inclusion Network (LFDIN). Encouraged by LLD, sixteen law firms joined forces in May 2013 to form a network aimed at promoting diversity and encouraging a culture of inclusion not only within firms, but in the broader legal profession as well. Still in its initial stages, the group has primarily served as a forum for sharing best practices. It is hard to judge now whether practice sharing will lead to the change envisioned by the network’s mandate and whether LFDIN’s current approach will evolve to incorporate more defined and measurable initiatives. LFDIN’s formation, however, does highlight how important the topic of diversity is becoming in the legal profession and signals that the characteristic resistance to accounting for measurable improvements in diversity is

<http://nsbs.org/sites/default/files/ftp/EQ120407_EmployEquityPolicy.pdf>; Canada’s Department of Justice only requires that private sector law practitioners that wish to secure government business confirm their willingness “foster diversity by promoting strategies and actions that effectively recognize, accept and utilize law practitioners and employees of all employment equity groups”, online:

<<http://www.justice.gc.ca/eng/abt-apd/la-man/aboutus-aproposdenous.html>>.

⁷⁴ A Call to Action Canada, *Mission Statement*, online: <<http://www.acalltoactioncanada.com>>.

⁷⁵ Legal Leaders for Diversity, *Initiatives*, online: <<http://legalleadersfordiversity.com/programs/>>.

⁷⁶ P4. The literature on demand-side diversity initiatives highlights the importance of market-based incentives – see Joanne P Braithwaite, “The Strategic Use of Demand-side Diversity Pressure in the Solicitors’ Profession” (2010) *Journal of Law and Society* 37(2), 442; Douglas E Brayley & Eric S. Nguyen, “Good Business: A Market Based Argument for Law Firm Diversity” (2009) 34 *Journal of the Legal Profession* 1; David B Wilkins, “From ‘Separate in Inherently Unequal’ to ‘Diversity is Good for Business’: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar” (2004) 117 *Harvard Law Review* 1548.

beginning to lose grounds.⁷⁷ Nonetheless, it is important to note that concepts of diversity driven by the “business case” while failing to acknowledge that diversity is an equality and justice pursuit may continue to fall short of achieving the true objectives of fostering diversity and inclusivity.⁷⁸

Bigger picture: what needs to be done to get us where we need to be in terms of diverse representation?

When asked to speak freely about the bigger picture, that is, what it would take to bring the Canadian legal profession to an acceptable standard of diversity, the opinions of those with whom we spoke were broad and multi-faceted. A consistent theme, however, was that universities and law schools play an integral role as the source of the “pipeline” for legal recruitment.

The failure of law schools in Canada to collect and/or publish demographic data is even more puzzling than the status quo with employers. Law schools are typically institutions committed to inclusive values. Further, law schools in Canada collect or have access to a range of data about their students, from geographic origin to how many have prior graduate degrees, and the gender make-up of the student-body.⁷⁹ Demographic data on racial and ethnic origin, sexual orientation and whether law students live with a disability, however, are rarer. In 2012, Osgoode Hall Law School administered the first mandatory survey of its entering class (in prior years, a survey was administered on a voluntary basis with approximately 1/3 of the class choosing to complete it).⁸⁰

Such data are essential in determining not just overall benchmarks (such as the number of a graduating class that is not white), but also pinpointing where additional outreach or efforts might be justified. For example, certain racialized groups (East and South Asians, for instance) appear to be entering the profession at an appreciable rate, but others (Blacks and Portuguese students, for example) have not had the same success.⁸¹ Academic institutions should be broadening their enrollment criteria and supporting their diverse students in an effort not only to ensure academic success, but also to prepare students for success in the legal profession and for surmounting the barriers they may confront.⁸² This involves mentoring students and exposing them to corporate culture and mainstream values.⁸³ Better data from legal employers could play a key role in ensuring students both have full information on choices they might make in the recruitment

⁷⁷ A participant was also of the opinion that firms seem more open to collecting statistics now than ever before, but remain resistant to publishing the results (P7).

⁷⁸ P19.

⁷⁹ For example, see the profile on each entering class at Queen’s University Faculty of Law at <http://law.queensu.ca/prospectiveStudents/admissionInformation/firstYearClassProfile.html>.

⁸⁰ The survey was made mandatory by requiring students to complete the survey before they could receive an assignment number to hand in their first legal research and writing assignment; see Osgoode Hall Law School, *Diversity and Inclusion*, online: <<http://www.osgoode.yorku.ca/about/diversity-inclusion>>.

⁸¹ P2.

⁸² P2.

⁸³ P2.

process but also raise the profile of diversity and inclusion as core values of the profession. While the “culture change” in this regard must start with law schools, that should not be the end point.

Legal employers can no longer rely on the “trickle-up” approach to diversity;⁸⁴ in the case of women, it did not prove successful.⁸⁵ Legal employers should adopt a holistic approach to hiring, moving beyond the transcript to consider the challenges an applicant may have overcome and the diversity of their experiences.⁸⁶ Employers are not being asked to lower the bar, but instead to recognize that talent manifests itself in a variety of forms and is often dependent on opportunity.⁸⁷ A number of those consulted have even suggested the use of quotas despite resistance to the practice.⁸⁸ Nonetheless, it is not solely about numbers; it is likely also about culture. The legal profession must continuously address conscious and unconscious biases, improve cultural competence and ameliorate discomfort with difference.⁸⁹ The numbers, however, must be at the forefront; each player must recognize the role they play in the problem in order for them to get involved building a solution.

Part Three: The Search for Alternative Models

In both areas of judicial appointments and the regulation of legal employment, the status quo in Canada with respect to data collection and dissemination appears generally at odds with a culture committed to valuing diversity and inclusion, though we have also acknowledged some important exceptions. In this part, we explore best practices in the Canadian context and alternatives to the status quo in Canada from peer jurisdictions.

Best Practices: Judicial Demographic Data and Disclosure

Across most common law jurisdictions, the judicial selection process has been one of the most closeted procedures. However, with the rise of judicial review and politically sensitive judicial decisions, there has been a call for not only more transparency and accountability, but also for a more reflective bench. For the most part, Canadian judicial selection procedures fail in both respects. In a 2010 study commissioned by the Commission of Inquiry into the Appointment Process for Judges in Quebec, Peter McCormick revealed how little information is available on selection processes across the country.⁹⁰ Additionally, in the *Globe & Mail* study penned by Kirk Makin, it was found that 98 of the 100 federal judges appointed in the last three years

⁸⁴ P15; “Trickle up” approach refers to the notion that when more diverse people are admitted to law school, they will organically make their way through the ranks of the legal profession. In other words, the responsibility rests on law schools and not legal employers.

⁸⁵ P1.

⁸⁶ P2.

⁸⁷ P13.

⁸⁸ P1; P2; P13.

⁸⁹ P2, P13.

⁹⁰ McCormick, *supra* note 8.

were white.⁹¹ This part of the paper will look to the United Kingdom and the United States for exemplary practices of demographic data collection and disclosure.

The United Kingdom has pursued an ambitious program of demographic data collection and dissemination for most of its judicial posts. The Judicial Appointments Commission (JAC), created by the U.K.'s 2005 constitutional reforms, is the independent body that recommends candidates for judicial office in courts and tribunals in England and Wales and some tribunals that preside over Scotland and Northern Ireland.⁹² As a part of its diversity strategy, the JAC commits to monitoring diversity through all stages of the selection process (eligible candidates, applications, shortlist, recommendations). The JAC tracks progression by gender, ethnic background (white, BAME⁹³, or other), professional background, disability status, and age and publishes official statistics on its website twice a year. The practice of collecting demographic data was not solely a result of the U.K.'s constitutional reforms; in fact, statistics dating as far back as 1998 can be found on the Department of Constitutional Affairs Archives website.⁹⁴ Using the data collected, JAC is able to report on the performance of women and diverse candidates in its annual report.⁹⁵ The data has also provided the public with the information necessary to critically assess the lack of diversity of its judicial posts and call for change.⁹⁶ Aside from absent data on LGBT status, the U.K. JAC has one of the best judicial demographic data collection and publishing practices in the common law world. Nonetheless, there are other noteworthy programs pursued in the United States.

There are multiple sources for data on the composition of the bench in any given state. Beginning in May 2004, the American Bar Association's Standing Committee on Judicial Independence (SCJI) began compiling demographic data for its National Database on Judicial Diversity in State Courts. On this database one can find statistics on the number of African American, Asian Pacific Islander, Hispanic American, Native American and "other" judges that sit on a state's general jurisdiction courts, appellate courts and court of last resort.⁹⁷ The American Judicature Society (AJS), a group aiming to "secure and promote an independent and qualified judiciary and fair system of justice",

⁹¹ *Supra* note 9.

⁹² Note the JAC does not nominate candidates for the UK Supreme Court.

⁹³ BAME stands for Black, Asian, Minority Ethnic.

⁹⁴ Department of Constitutional Affairs, *Annual Reports*, online: <<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/dept/depstrat.htm#part3>>.

⁹⁵ Judicial Appointments Commission, *Annual Reports and Accounts 2012/13: Modernising Judicial Selection* (London: JAC, 2013) at 15, online: <http://jac.judiciary.gov.uk/static/documents/Annual_Report_2012-2013.pdf>.

⁹⁶ See for example Owen Bowcott, "UK's most senior female judge calls for more diversity at the top", *The Guardian* (21 February 2013) online: [The Guardian](http://www.theguardian.com/law/2013/feb/21/lady-hale-speech-judicial-diversity) <<http://www.theguardian.com/law/2013/feb/21/lady-hale-speech-judicial-diversity>>; Owen Bowcott, "Diverse judiciary more than 50 years away, says supreme court justice", *The Guardian* (15 November 2012) online: [The Guardian](http://www.theguardian.com/law/2012/nov/15/diverse-judiciary-50-years-away) <<http://www.theguardian.com/law/2012/nov/15/diverse-judiciary-50-years-away>>; Samir Jeraj & Heather McRobie, "Diversity in the British judiciary: on the backburner too long", *Open Democracy* (23 July 2012) online: <<http://www.opendemocracy.net/ourkingdom/samir-jeraj-heather-mcrobie/diversity-in-british-judiciary-on-backburner-for-too-long>>; "Peers recommend more diverse judiciary", *BBC News* (28 March 2012) online: <<http://www.bbc.co.uk/news/uk-17532347>>.

⁹⁷ Standing Committee on Judicial Independence, *National Database on Judicial Diversity in State Courts*, online: American Bar Association <<http://apps.americanbar.org/abanet/jd/display/national.cfm>>.

publishes similar data.⁹⁸ Missing from both databases is information on judicial applicants and demographics beyond ethnic/race identification (such as disability and LGBT status). For some states, these databases are the only sources of public information on judicial diversity, while other states offer similar or a more comprehensive set of data.

In the case of California, transformation of the law beginning in 2007 has led to a more detailed look into the results of the judicial appointments process. California law requires the Administrative Office of the Courts to collect and publish demographic data related to the gender, race, ethnicity, sexual orientation and gender identity of judges in the California Supreme Court, Courts of Appeal and trial courts.⁹⁹ These reports can be found under the 'Reports & Publications' page of the Judicial Branch of California website.¹⁰⁰ The law also requires the State Bar of California, which appoints members to the Judicial Nominees Evaluation Commission (JNE), to collect and publish the same demographic information for judicial applicants; this information can be found on the JNE section of the State Bar of California website.¹⁰¹ Bringing the data full circle, the Governor of California is also obliged to release demographic data on his/her appointments.¹⁰² Although separate platforms make a detailed analysis of the progression of diversity somewhat more tedious, an analysis can nonetheless be made. As noted in a 2010 piece published by the Brennan Centre for Justice, the same cannot be said for many other states (and the same cannot be said for Canada):

Currently, many of the states we studied did not keep rigorous data on judicial applicants. Keeping a record of the racial and gender makeup of the applicant pool and how candidates advanced through the nomination process will make it much easier for Commissions to track their own progress on issues of diversity.¹⁰³

While there is no source of a comprehensive set of data on both judicial applicants and appointees to any bench in Canada, four judicial nomination bodies provide limited insight into the process. The Ontario Judicial Appointments Advisory Committee (JAAC) has been the most forthcoming with respect to demographic data. In each of JAAC's annual reports, the commission publishes data on the number of women, francophones, First Nations, Visible Minorities, and Persons with Disabilities that have been appointed

⁹⁸ American Judicature Society, *Diversity of the Bench*, online: American Judicature Society <http://www.judicialselection.us/judicial_selection/bench_diversity/index.cfm?state=>. Note that the AJS obtains some of its race/ethnicity data from the ABA and all of its gender figures for trial courts were derived from The American Bench's "Judges of the Nation Gender Ratio Summary," 20th ed (2010).

⁹⁹ Ca Gov Code § 12011.5(n) (2007).

¹⁰⁰ Judicial Council of California, *Demographic Data*, online: California Judicial Branch <<http://www.courts.ca.gov/13418.htm>>.

¹⁰¹ The State Bar of California, *Commission on Judicial Nominees Evaluation – Statewide Demographics Reports*, online: The State Bar of California <<http://www.calbar.ca.gov/AboutUs/JNEDemographicsReports.aspx>>.

¹⁰² For the Governor's latest release, see Office of Governor Edmund G Brown Jr, *Governor Brown Releases 2012 Judicial Appointments Data*, online: State of California <<http://gov.ca.gov/news.php?id=17939>>.

¹⁰³ Ciara Torres-Spelliscy, Monique Chase & Emma Greenman, *Improving Judicial Diversity* (New York: Brennan Centre for Justice, 2010) at 3.

to the bench since 1998. Additionally, JAAC provides data on the number of applications submitted by women in the same time period; no data is released on the number of applicants from the other diverse categories. The British Columbia Judicial Council tracks and publishes in its annual report the size of the female applicant pool and how female candidates advance through the nomination process, but does not provide data on any other diverse group.¹⁰⁴ The Cour du Québec website provides a general statement about the gender ratio of the bench; its 2012 Public Report, for example, shares that at the end of 2012 there were 106 female and 162 male judges.¹⁰⁵ Even the Office of the Commissioner for Federal Judicial Affairs limits demographic reporting to the number of women currently sitting on the bench.¹⁰⁶ All other Canadian justice departments and nomination committees/councils are silent about the demographic composition of their benches.

Best Practice: Law Firm Demographic Collection and Disclosure

While we are not aware of any Canadian law firms that are publishing a full set of demographic data, a minority of firms are collecting such data, and more are beginning to open their minds to collection. Luckily, there are a number of sources Canadian law firms can look to for guidance on how they may model their own demographic data collection programs. As a deeply enshrined part of their civil history, the U.S. provides numerous models of demographic data collection. The U.S. branch of the National Association for Law Placement (NALP), for instance, maintains a directory of legal employers, which contains both demographic statistics and qualitative information regarding diversity and inclusion. Likewise, there are a number of other initiatives in the U.S. that aim to highlight the legal professions' standing on diversity. While Canadians have historically been resistant to demographic data collection and reporting, there has nonetheless been an increase in attempts to learn more about the composition of the legal community in the last five years.

In contrast to the Canadian branch of NALP, the NALP U.S. directory contains extensive information on the demographic profile of law firms across the country. In order to be listed in the NALP Directory of Legal Employers, the organization must complete a questionnaire that includes a section on demographics.¹⁰⁷ NALP U.S. publishes data related to the gender, race, disability status and sexual orientation of a firm's legal employees including partners, associates, and summer associates. Additionally, firms are asked to provide information on how diversity and inclusion

¹⁰⁴ Judicial Council of British Columbia, *Annual Report* (Vancouver: Judicial Council of British Columbia, 2012) online: Provincial Court of British Columbia
<<http://www.provincialcourt.bc.ca/downloads/JudicialCouncil/Judicial%20Council%20Annual%20Report%202012.pdf>>.

¹⁰⁵ Court of Québec, *Public Report* (Québec City: Court of Québec, 2013) online: Court of Quebec
<http://www.tribunaux.qc.ca/mjq_en/c-quebec/Communiqués/RapPublic2012En_vAbr.pdf>.

¹⁰⁶ Office of the Commissioner for Federal Judicial Affairs, *Number of judges on the bench as of January 1, 2014*, online: <<http://www.fja-cmf.gc.ca/appointments-nominations/judges-juges-eng.html>>.

¹⁰⁷ To see the 2008-2009 version of NALP Law Firm Question visit
http://www.nalp.org/uploads/939_lawfirmnalpforminstructio.pdf.

factor in their recruitment methods and are also able to showcase their pro bono commitments. Through this information, NALP is able to publish regular reports on the state of diversity in the legal profession¹⁰⁸ and issues a *Diversity Best Practices Guide* for legal employers wishing to foster more inclusive law offices through the use of policies that have proven effective.¹⁰⁹ While NALP Canada asks firms about their diversity and pro bono initiatives, it does not collect demographic information outside of gender data. In addition, the membership of NALP Canada is not nearly as exhaustive of Canadian legal employers as NALP U.S. is of U.S. legal employers. Thus, there is a portion of legal employers that escape reporting any information at all and as a result, NALP Canada has not been a source for best practices or reports on the state of the legal profession as has its U.S. counterpart.

Despite, the U.S. NALP's success in collecting and publishing demographic information, there are at least two additional types of information that would make their diversity profiles more complete. First, insight into the demographic composition of the applicant pool would allow for more fruitful analysis and informed recommendations on how to improve the diversity dilemma. An applicant pool lacking diversity, for instance, may indicate the need for more diverse admissions in law schools, increased mentoring programs, and/or targeted outreach on the part of law firms. On the other hand, a diverse applicant pool may indicate the need for law firms to evaluate recruitment policies and procedures. Some anxiety exists around whether the collection of applicant demographics contravenes human rights legislation.¹¹⁰ While Lorraine Dyke, in the CBA sponsored *Measuring Diversity Guide*, warns that some human rights commissions across Canada have issued guidelines that recommend employers "refrain from asking questions related to prohibited grounds during the hiring process unless they relate to 'bona fide occupational requirements'",¹¹¹ the Ontario Human Rights Code and Guide do not specifically address the issue. According to the Ontario Human Rights Commission, demographic data may be collected so long as it abides by the following rules:

Any data collected [must be] done in a way that follows accepted data collection techniques, privacy and other applicable legislation, and is collected for a purpose that is consistent with the Code, such as to: monitor and evaluate discrimination, identify and remove systemic barriers, lessen or prevent disadvantage and/or promote substantive equality.¹¹²

Pursuant to the *Employment Equity Act*, federally regulated Canadian banks, under similar constraints by the *Canadian Human Rights Act*, legally ask job applicants to

¹⁰⁸ See National Association for Law Placement, *Diversity & Demographics*, online: NALP <<http://www.nalp.org/diversity2>>.

¹⁰⁹ See National Association for Law Placement, *Diversity Best Practices Guides*, online: NALP <<http://www.nalp.org/diversitybestpracticesguides>>.

¹¹⁰ P15.

¹¹¹ Lorraine Dyke, *Measuring Diversity in Law Firms: A Critical Tool for Achieving High Performance* (Ottawa: Canadian Bar Association, 2012) at 35.

¹¹² Ontario Human Rights Commission, *Count me in! - Collecting human rights based data*, (Toronto: Government of Ontario, 2010) at 9.

voluntarily self-identify for purposes related to ameliorating discrimination and improving diversity in employment.¹¹³ Diversity in the legal community would likewise benefit from insight into the success of diverse applicants.

In addition to numerical data on the applicant pool, qualitative information beyond recruitment initiatives is also an important component of measuring diversity. While a legal employer may be committed to increasing the number of diverse hires, the internal climate of the organization may not be supportive of differing lifestyles, cultural backgrounds and perspectives. Qualitative data can reveal the lived experiences of underrepresented groups and enable employers to create environments that support the engagement of their diverse talent. Fiona M. Kay alluded to the importance of measuring qualitative in addition to quantitative data in describing the difference between two reports on the representation of women in the legal profession:

[E]arlier data were also largely descriptive, detailing demographic characteristics of the population but missing important information about the context of work, including issues regarding quality of life, balance between career and family, experiences of discrimination, and measures of job satisfaction...The [later] study provided a detailed overview of gender differences in incomes, work experiences and responsibilities, levels of job satisfaction, and discrimination in law practice. It also documented challenges involved in the often difficult balance between career and family, and motives underlying departures from the practice of law. A number of policy initiatives flowed directly from this report.¹¹⁴

There has been a movement in the social sciences that has attempted to go beyond traditional forms of quantitative research and expand to methodologies that include subjective accounts.¹¹⁵ Some studies have explored qualitative factors, like developmental practices, organizational culture and content of communication, that are important indicators of diversity in law firms.¹¹⁶ Relatedly, social class has also been

¹¹³ For example, RBC provides the following explanation when inviting applicants to voluntarily self-identify on job application forms: “Diversity for Growth and Innovation is one of RBC’s core values and we are committed to employing a diverse workforce and meeting all government compliance requirements in the countries in which we operate. We provide equal opportunity to employment for all qualified candidates, regardless of gender, visible minority, age, Aboriginal status, sexual orientation or disability. The information requested in the following questionnaire is collected to help RBC administer its Diversity programs. This questionnaire is voluntary, and your participation is appreciated. Neither your responses to the questionnaire, nor refusal to complete the questionnaire, will impact the employment decision. We thank you in advance, should you decide to complete this questionnaire.”

¹¹⁴ F M Kay, C Masuch & P Curry, *Turning Points and Transitions: Women’s Careers in the Legal Profession: A Longitudinal Survey of Ontario Lawyers 1990 – 2002* (Toronto: The Law Society of Upper Canada, 2004) at 2-3.

¹¹⁵ Carl F Auerback & Louise B Silverstein, *Qualitative Data: An Introduction to Coding and Analysis*. (New York: New York University Press, 2003).

¹¹⁶ See Fiona M Kay & Elizabeth H Gorman, “Developmental Practices, Organizational Culture, and Minority Representation in Organizational Leadership: The Case of Partners in Large U.S. Firms” (2012) 639 *American Academy of Political & Social Science* 91; Jean E Wallace & Fiona M Kay, “Tokenism, Organizational Segregation, and Coworker Relations in Law Firms” (2012) 59:3 *Social Problems* 389.

increasingly cited as a telling diversity measurement.¹¹⁷ This project similarly calls for the collection of a set of descriptive information beyond the traditional forms of demographic data. An initiative that is able to both provide a comprehensive demographic profile of an organization as well as track themes in the lived experience of diverse lawyers will create a more detailed picture of the obstacles they face and allow for informed policies with measurable results.

The Dallas Diversity Task Force's *Law Firm Diversity Report* is noteworthy for its use of both quantitative and qualitative diversity data. This Task Force is comprised of the Dallas Asian American Bar Association, the Hispanic Bar Association, and the J.L. Turner Legal Association (Dallas' African American bar association), which have collaborated since 2006 to measure and present the racial and ethnic diversity of the 20 largest law firms in Dallas, Texas. Using the "Dallas Formula"¹¹⁸, the Task Force employs both qualitative and quantitative data to rank the participating firms. The Composite Scores are composed of a representation score and a score that measures firms' recruitment efforts compared to recruitment efforts at other surveyed firms. The Efforts Checklist Scores employ qualitative information to rank firms by the extent of their diversity initiatives (i.e. efforts to recruit, retain and promote minority lawyers). Because most Canadian law firms have similarly low numbers of diverse lawyers, the blending of both quantitative and qualitative factors, as is done in this report's analysis, is desirable. Nonetheless, not all aspects of this report are entirely applicable to the Canadian context.

Likely due to the composition of the Task Force, the Dallas Diversity Report does not collect information on a number of diverse categories that would be integral in Canada. The Report collects statistics on the representation of Blacks, Asians, Hispanics, Native-Americans, "Other" Races, and Bi- or Multi-Racial lawyer. A Canadian version of this report might aim to expand categories to include LGBT and disability status. Additionally, a report led by minority bar associations may not be feasible in Canada. As referenced in the previous section, Canadian minority bar associations likely lack the expertise and the resources to lead such an effort.

While there is no Canadian parallel to the two initiatives mentioned above, Canadian law societies have been leading the way when it comes to the regular collection of demographic data. The Law Society of Upper Canada, in particular, took its first look at the demographic composition of the profession with its 1996 Member's Information Form, the predecessor to the Member's Annual Report ("MAR"). In 1996, it asked members to voluntarily identify their race, religion, disability status, and sexual orientation.¹¹⁹ However, the question was withdrawn in the following year's form.¹²⁰

¹¹⁷ See Ornstein, *supra* note 6 at 36; Ashley, *supra* note 36; Frank Walwyn highlighted the importance of diverse experience at the OBA Judicial Diversity Panel at the OBA Council Meeting on April 5, 2013.

¹¹⁸ For design features see Dallas Diversity Task Force, *Law Firm Diversity Report* (Dallas: Dallas Diversity Task Force, 2012) at 12, online: Dallas Hispanic Bar <<http://www.dallashispanicbar.com/v1-website/2012DDTFReport.pdf>>.

¹¹⁹ The Law Society of Upper Canada, *Report to Convocation – Equity and Aboriginal Issues Committee* (28 May 2009) at 6, online: LSUC http://www.lsuc.on.ca/media/convmay09_eaic.pdf.

¹²⁰ For reasons see *ibid* at para 6.

With encouragement from the Ontario Bar Association, the Canadian Association of Black Lawyers and the Law Society's Equity Advisory Group, the Equity and Aboriginal Issues Committee successfully proposed to have a voluntary self-identification question re-introduced in the 2009 MAR, which was made a mandatory question in 2013.¹²¹ Additionally, the CBA has commenced its "Count Yourself In" program, which also asks all members to self-identify on their annual membership renewals.¹²² As pointed out in the May 28, 2009 Law Society Report to Convocation, however, CBA membership does not exhaust all Canadian legal professionals and thus, demographic data collected by the CBA will not be as comprehensive as that collected by provincial law societies like the Law Society of Upper Canada.¹²³ The Law Society, then, is a valued professional body not only because it has taken the lead on the collection of demographic data, but also because it is well positioned to gather such information as the regulator of the profession.

A prime example of the strength of a regulator lead on diversity initiatives is found in the Justicia Project. On November 17, 2008, the Law Society launched a pilot project that called for law firms to commit to programs increasing the retention and advancement of women. At the time this report is being written, there are 58 law firms committed to implementing several policies and programs, including the tracking of gender demographics. To date, the Project has developed at least two resources for participating firms specifically on the topic of gender data collection – the *Gender Data Collection – Guide for Law Firms* and a *Gender Data Collection Template*.¹²⁴ It is important to note, however, that absent from Justicia is a level of accountability; Justicia programs and policies are solely for the internal purposes of law firms with no requirement to report results publicly or to the Law Society.

No matter what body is charged with the task of increasing diversity in Canadian law firms, the effort must surpass the models currently being pursued by the Law Society. Demographic data collection through the MAR is integral as it monitors the diversity of the entire legal profession and can serve as a benchmark for organizations wishing to compare their diversity with that of the profession. Nonetheless, the legal community cannot rely on these figures if an increase in diversity in Canadian law firms is the goal. A program that collects diversity data without attribution to specific legal employers lacks the accountability necessary for appropriate and measured reforms. Additionally, both the MAR and information arising from the Justicia Project are largely used for internal purposes; that is, the Law Society uses MAR data to help guide Law Society

¹²¹ Licensees are required to provide answers to the self-identification questions. However, licensees are provided the option of ticking the box "I do not wish to answer this question" for each self-identification question. Note the Nova Scotia Barrister's Society introduced a self-identification question in 2007, the Barreau du Québec in 2008, and the Law Society of British Columbia asked Aboriginals to self-identify in 2008 – see *supra* note 119 at 11-12. Law society equity advisors across the country (BC, Alberta, Saskatchewan, Manitoba, Quebec and Nova Scotia) are currently in talks to develop a common self-identification question for lawyer annual reports (P25).

¹²² See The Canadian Bar Association, *Equality Committee – Issues and Projects*, online: CBA <<http://www.cba.org/CBA/Equity/main/issues.aspx>>.

¹²³ *Supra* note 119 at para 50.

¹²⁴ The Law Society of Upper Canada, *Retention of Women in Private Practice – Status Report* (Spring 2012) at 6, online: LSUC <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147489485>>.

policies and programs with no obligation to report to the public¹²⁵ and participating law firms adopt Justicia policies and programs with no obligation to report to the Law Society or any other external body.¹²⁶ If any change is to occur in the near future, programs and policies that aim to increase the representation of diverse lawyers at all career levels ought not be kept under an internal veil. Minority lawyers, LGBT lawyers and lawyers with disabilities face strong resistance and bias (whether conscious or unconscious) to entry and advancement in the legal profession. Legal employers across Canada should be held accountable for their recruitment practices and diversity initiatives. As such, demographic data on the applicant pool and composition of firms, in addition to other qualitative diversity indicators, ought to be made public.

Part Four: The Way Forward

In light of the analysis above, the way forward, we believe, is coming into focus. Below, based on some of the best practices we have explored, we examine concrete proposals for change both within the system of judicial appointments and the system of legal recruiting.

The Way Forward for Judicial Appointments

With respect to the judicial appointment process, we conclude aggregate data on judicial appointments should be kept by the Commissioner for Judicial Affairs or provincial equivalents. The data should also be published, whether in the form of an annual report or as part of on-going reporting. As discussed above, a model in this regard is the U.K. Judicial Appointments Commission. This conclusion also builds on the strides already made in some Canadian jurisdictions such as Ontario's Judicial Appointments Advisory Committee (JAAC).

In addition to the Government data, it is important that third parties also play a role in analyzing the data and providing oversight on the process. In the U.K., for example, the think tank CentreForum sponsored a study in 2012 by two independent researchers, Chris Paterson and Alan Paterson, entitled *Guarding the Guardians: Toward an Independent, Accountable and Diverse Senior Judiciary*.¹²⁷ Paterson and Paterson use data from the U.K. Judicial Appointments Commission, to conclude that the current system for senior judicial appointments is not “fit for purpose.” The *Guardians Report* offers wide-ranging and ambitious suggestions for reform, including a diminished role for the senior judiciary in the appointment process (on the theory that a homogenous bench should not be permitted to reproduce itself). The *Guardians Report* asserts that a diverse senior judiciary is not simply desirable as a social or political goal but represents a

¹²⁵ Although they have provided snapshots of demographic composition of the legal profession in 2009 and 2010.

¹²⁶ P15.

¹²⁷ Alan Paterson & Chris Paterson, *Guarding the Guardians? Towards an Independent, Accountable and Diverse Senior Judiciary* (London: CentreForum, 2012), online: CentreForum <<http://www.centreforum.org/assets/pubs/guarding-the-guardians.pdf>>.

fundamental constitutional principle. This principle flows from the imperative to ensure public confidence in the judiciary and the fairness of the administration of justice. Additionally, the Report observes that the substantive quality of justice depends on a senior judiciary capable of understanding and responding to the needs of a diverse society. The *Guardians Report* recommends a broader judicial appointment commission, with balanced input from judges, politicians and “lay” members. Ironically, perhaps, the Report looks to Canada as a model for post-appointment hearings designed to “introduce” newly appointed judges rather than confirm them as in U.S. Senate hearings.

The combination of comprehensive Government data on judicial appointments and rigorous third party analysis could provide for the evidence necessary to develop targeted policies and outreach, based on a clear commitment to an inclusive and reflective judiciary.

The Way Forward for the Legal Profession

As for law firms, a number of different parties can and *should* be involved in the data collection and dissemination process. While there are legitimate calls for such data to be collected on a mandatory basis by provincial and territorial law societies, we think there are important reasons why a more collaborative solution is appropriate.

As was the case for Justicia in Ontario, while the initiative would rise or fall on the buy-in of firms and legal employers, it was essential that the Law Society of Upper Canada as the regulator served as a catalyst for the project. We believe law societies should play a similar role with “Data & Diversity” projects across Canadian jurisdictions. Law firms should not only be encouraged and incented to participate (voluntarily), but the Law Society should also publicly disseminate which employers are so doing, and which are declining to participate. The pressure of such public disclosure, the advocacy of third party NGOs from diverse cultural communities, the visibility of participation among clients and law schools (not to mention peer firms and organizations) would lead, we believe, to near universal take-up.

The main objective of these “Data & Diversity” projects would be the collection and dissemination of diversity-related statistics and information, including but not limited to demographic data on applicants for positions and those hired. The projects, however, cannot involve just quantifying hiring results. As discussed above, it is equally important that qualitative data are sought which both put the quantitative data in context and broaden the analysis of root causes, current dynamics and potential future reform. For example, if data shows that a particular sector of law is attracting a lesser (or greater) proportion of diverse applicants, it is important to understand *why* in order to either build on existing success, or address existing gaps. Similarly, it may be that proactive and progressive firms end up with poorer quantitative outcomes. It would be inappropriate to evaluate a firm’s performance in relation to fostering an inclusive professional environment based on numbers alone.

While we believe it is both desirable and necessary for the regulator to serve as a catalyst for Data and Diversity projects, the success of these initiatives will depend on the buy-in of private firms, public organizations and in-house legal offices. Networks such as the newly formed Law Firm Diversity & Inclusion Network, can serve as a tipping point for such engagement and to be a forum for sharing innovative policies and best practices.

Finally, as in the context of judicial appointments, Data and Diversity projects also hinge on the involvement of third party bodies such as law schools, government organizations, University institutes, think tanks and bar associations that are willing and able to commit the resources necessary to analyze, evaluate, and support such projects.

While legal employers must participate in order to make possible the collection and dissemination of law firms' demographic data, collaborations between third party organizations (and, potentially, law societies) are best situated to engage in the analysis, evaluation and qualitative side of the Data and Diversity initiative. This is so for a number of reasons, including:

- Independence: To ensure accurate results, the ideal third party organization should have minimal ties to the organization, be impartial to the results, and take an objective approach to the collection process;
- Uniformity & Comparability: A third party could formulate a single set of survey questions, and other qualitative measures, which would allow firms' standing on diversity to be easily comparable;
- Adherence & Timeliness: A third party could better coordinate the distribution and receipt of surveys under specific rules and timelines;
- Expertise: The ideal third party would have the data expertise necessary to both analyze the data and produce reports on the state of diversity in the legal profession; and
- Platform of Dissemination: A third party could create and maintain a single platform (similar to NALP U.S.) where diversity information on any legal employer is readily available to the public.

While the Law Society often employs consultants and academics for research and reports, the need for an ongoing collection and dissemination program makes the use of an institutionalized body desirable. There are several examples in the Ontario context which have demonstrated the potential of third parties in this regard.

On the tails of DiverseCity Counts 3, a report on diversity in the legal sector, the DiverseCity group is an example of a third party option. Not only is its Vision and Mission statement in-line with this Data & Diversity initiative,¹²⁸ but it also has the capacity (the staff, steering committee, funders and champions) that would be critical to the Project's success. While organizations such as DiverseCity reflect the kind of

¹²⁸ For vision and mission statement see DiverseCity, *Vision and mission*, online: DiverseCity <<http://diversecitytoronto.ca/about-diversecity/vision-and-mission/>>.

expertise on data collection and analysis which would be central to this kind of initiative, it does not characteristically engage in an evaluative comparison of particular employers or organizations. So, while its report features important quantitative benchmarks (for example, the proportion of leadership positions in law held by members of diverse communities was 6.8% compared to a pool of lawyers from these communities which constituted 14.4% of all lawyers), it has not yet focused on qualitative as well as quantitative outcomes in order to explain which organizations are succeeding, which are not, and why.¹²⁹

NALP U.S. has been collecting demographic data through annual surveys, which in turn has enabled third parties to engage in evaluative analysis. Such analysis, when widely disseminated, has the potential to spur competition among firms who are keen to demonstrate their leadership. As an example, a spot on the Yale Law School's Top Ten Family Friendly Firms is coveted by law firms across the country.¹³⁰ In the case of Stanford Law School Firm "Report Cards," diversity based on the NALP data was one of five factors assessed.¹³¹ It follows that the Canadian branch of NALP could build on the U.S. experience and play a similar role in making evaluations and "report cards" possible by collecting and disseminating demographic data relating to law firm recruitment. On the positive side, embarking on this project could carve out a greater leadership role for NALP Canada in the diversity context than is currently the case. Outside of provincial law societies, there are no bodies solely dedicated to undertaking continuous research on the state of the Canadian legal profession as is pursued by the American Bar Association and NALP U.S. NALP Canada, then, could grow to fill that void and take on a bigger research role. An unsettled aspect of using NALP as the third party participant, however, is its lack of comprehensive membership of Canadian legal employers. NALP Canada lists only 82 Ontario law firms and there are 25 Ontario law firms signed on to Justicia that are not members of NALP Canada.¹³² Additionally, since NALP membership is neither mandatory nor a deeply ingrained system, the request of demographic data has the potential to lead current members to withdraw and non-members to resist membership. Furthermore, the Canadian section is not endowed with the same level of administrative capacity (infrastructure, full-time staff, etc.) as its U.S. counterpart.

Finally, a third party organization could engage in a more refined blend of quantitative and qualitative assessment, to produce a comprehensive "index" of diversity and inclusion. The Canadian Institute for Diversity and Inclusion,¹³³ for example, has been discussing the development of an "Inclusion Index" which weighs different factors

¹²⁹ See DiverseCity, *DiverseCity Counts*, online: DiverseCity <<http://diversecitytoronto.ca/research-and-tools/diversity-in-leadership-2/>>.

¹³⁰ See Yale Law School, *2013 Top Ten Friendly Firms*, online: Yale Law School <<http://www.law.yale.edu/stuorgs/topten.htm>>.

¹³¹ See Michael Rappaport, "Stanford law students issue law firm report cards" *The Lawyers Weekly* (9 May 2008) online: The Lawyers Weekly <<http://www.lawyersweekly.ca/index.php?section=article&articleid=679>>.

¹³² See The Law Society of Upper Canada, *Justicia Project*, online: LSUC <http://www.lsuc.on.ca/justicia_project/>. Note we defined medium to large sized law firms as those with over 25 lawyers.

¹³³ See <http://www.cidi-icdi.ca>.

which would be assigned a specific pre-determined weight. For example, having a posted diversity policy, an equity officer, an inclusive recruitment outreach strategy, or a mentorship program, might all give an employer a higher rating on such an index. As would, of course, demonstrated improvements in the recruitment, retention, promotion and recognition of lawyers from diverse communities, among other quantitative factors such as the proportion of an employer's lawyers/staff who are diverse and the proportion of the pool hired that are diverse (for example, through the articling process). Such indexes could publish the results of all participating firms and organizations, or could just publish a leading group of firms and organizations scoring in the highest quintile. This approach is modeled on other kinds of indexes that have been used both as an accountability measure and as a catalyst to spur on achieving performance goals, such as the Human Rights Campaign.¹³⁴

In June 2013, Pride at Work Canada successfully launched an LGBT Inclusion Index aiming to recognize good workplace practices and “to raise the bar on LGBT workplace inclusion in Canada.”¹³⁵ Modeled after indexes such as the Stonewall Workplace Equality Index (U.K.) and the aforementioned Human Rights Campaign (U.S.), the LGBT Inclusion Index weighs an employer's standing on LGBT inclusion using a combination of both qualitative and quantitative factors in eight areas of good practice, including Demographic Data Collection, Policy and Procedure, and Executive Sponsorship.¹³⁶ Though the initiative could benefit from some form of public reporting, the confidential scores are used to establish industry benchmarks and to provide recommendations to employers aiming to improve their standing. Though measured improvements will only be seen after multiple years of testing, Pride at Work's efforts were well received by its partners (which include law firms) and there are plans to extend the Index to non-partners in upcoming years.

Similar to the indexes described above, we believe third party participation is vital to the sustainability and success of a commitment to inclusion, and that a blended “index” of quantitative and qualitative factors best responds to the need for outcomes to matter (how many diverse lawyers a firm or organization is able to recruit relative to the available pool of candidates) and the need for inputs to matter (a firm or organizations policies, participation in proactive recruitment, establishing an inclusive firm culture, etc). Third party studies and academic research could also play an important and necessary role in assessing the impact of other initiatives that aim to promote diversity and inclusion, such as the LLD and A Call to Action initiatives outlined above. Such assessments could provide an evidentiary basis to determine which policies, networks and strategies in fact produce the most effective and enduring outcomes.

¹³⁴ See Human Rights Campaign, *Corporate Equality Index Criteria*, online: <<http://www.hrc.org/resources/entry/2012-Corporate-Equality-Index-Criteria>>.

¹³⁵ Pride at Work Canada, *Pride at work Canada to launch LGBT inclusion index*, online: <<http://prideatwork.ca/2013/04/08/pride-at-work-canada-to-launch-lgbt-inclusion-index/>>.

¹³⁶ “Launch of the LGBT Inclusion Index” (29 May 2013) (webinar), online: Pride at Work Canada <<http://prideatwork.ca/get-involved/index/>>.

While the third parties referred to above all have mandates which make them likely to be motivated to advance goals of inclusion, other bodies may be important partners in any concerted effort to advance the goals discussed in this paper. These organizations include (but would not be limited to) the Canadian Bar Association (and provincial counterparts), the Advocates Society, the Toronto Lawyer's Association (which already sponsors the Roundtable of Diverse Organizations (RODA)). Organizations with a mandate to represent or support particular diverse communities (for example, the Canadian Association of Black Lawyers, the Federation of Asian Canadian Lawyers, and the South Asian Bar Association, among others) also have an especially important role to play. To this point, we have discussed diversity as if all communities face the same challenges, and that simply tracking and publishing data will assist all in the same fashion. While reliable data represents a point of departure, diverse legal communities themselves will often know best how to analyze these data and determine the policies and initiatives most likely to address gaps or barriers where they exist.

The way forward cannot only involve lawyers and legal organizations alone but must include as well the legal education community – as gatekeeping institutions for the profession (both lawyers and ultimately judges). Law schools are the hub of diverse talent and thus should play a role in educating students on the benefits of pursuing a career in an organization that is truly respectful and supportive of diverse members of the legal community. Unless Canadian law schools reflect the diversity of Canadian society and appropriately prepare diverse students with the preliminary education necessary to succeed,¹³⁷ it is unrealistic to expect legal employers or ultimately the judiciary to do so.

Additionally, the law school experience prepares students for particular career paths, shapes their expectations, and signals to those students whether they are “insiders” or “outsiders”. Law schools are where prospective lawyers first encounter most legal employers and where a firm or organization's culture, approach and reputation will be formed. Canadian law schools and student organizations can use the information derived from the Data & Diversity projects to recognize/promote legal employers that are succeeding at fostering diversity in their offices. This type of engagement will support diverse students in their quest to be successful legal professionals, encourage law firms to participate in the Data & Diversity Project, and motivate employers to improve their diversity standing in an attempt to attract the best talent.

This last aspect of the Data and Diversity project is arguably the most important – the process of collecting and disseminating qualitative and quantitative data is not just an end in itself (to promote transparency, accountability, profile, etc.) but a means to developing responsive and effective policies. While the range of these policies lies outside the scope of this study, a range of innovations are already in place to build on – from mentorship programs, to career orientation and outreach, to equity and inclusion officers within firms and organizations, to media and public information campaigns.

As in the case of the judicial appointments process, being attentive to the issue of data is, in our view, a prerequisite to taking diversity seriously as a fundamental goal of

¹³⁷ See for instance Faisal Bhabha, “Towards a Pedagogy of Diversity in Legal Education” (unpublished).

the administration of justice. In other words, if one accepts that only a legal profession and judiciary that reflect the community it serves can be and be perceived to be fair, then the evident gap both in the profession and the judiciary is a mischief that cannot be ignored. Moreover, any policies or initiatives designed to address this mischief cannot be developed in the dark. Data makes progressive change both more likely to garner broad support and more likely to result in meaningful change.