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Deliberate Disregard: Judicial Appointments under the Harper Government

Rosemary Cairns Way[*]

> In a democratic society it is unacceptable for an unelected institution that wields the power of the judiciary to be drawn from a narrow and homogenous group that reflects neither the diversity of society nor that of the legal profession as a whole. Failure to appoint well-qualified candidates from diverse backgrounds to judicial office represents exclusion from participation in power.[1]
>
> — The Report of the Advisory Panel on Judicial Diversity 2010, Judiciary of England and Wales

> If we are to fully meet the challenges of judging in a diverse society, we must work toward a bench that better mirrors the people it judges.[2]
>
> — The Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada

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[1] Available online: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/advisory-panel-judicial-diversity-2010.pdf>. The Advisory Panel was established in 2009. It reflected concern at high levels of the judicial and political establishment that, "despite efforts over many years, significant progress on judicial diversity has not been made. … [T]erms of reference for the Panel were ...: To identify the barriers to progress on judicial diversity and to make recommendations to the Lord Chancellor on how to make speedier and sustained progress to a more diverse judiciary at every level and in all courts in England and Wales." See the Report, at 13.

[2] "Judging: the Challenges of Diversity", Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, Judicial Studies Committee Inaugural Annual Lecture, Edinburgh, Scotland, June 2012, online: <http://www.scotland-judiciary.org.uk/Upload/Documents/JSCInauguralLectureJune2012.pdf>, at 17.

I. INTRODUCTION

The power to appoint judges is the power to shape the delivery of justice. It is also the power to control the character of a fundamental institution in a constitutional democracy — an independent and impartial judiciary. Since their election as a minority in 2006, the Harper government has named six of the nine members of the Supreme Court of Canada, and more than half of the sitting federal judiciary.[3] The nomination of Supreme Court justices has attracted increasing public attention in recent years. The public interest in the personal and professional qualities of Supreme Court nominees reflects increasing acceptance of the claim that judicial identity makes a difference to judging, an idea most famously expressed by Justice Bertha Wilson in her public reflection on women judges.[4] Of course, the nomination of Marc Nadon generated an utterly unique constitutional response relating to his qualifications as a Quebec appointment.[5] But, to a lesser extent, it also triggered a public discussion of his personal qualifications for a seat on the Supreme Court. Columnist Jeffrey Simpson argued that the Supreme Court deserved better.[6] Even normally cautious members of the academy queried the merits of the appointment, with Professor Jamie Cameron describing it as one that "unquestionably weakens the court".[7] In 2012, Justice Richard Wagner's elevation sparked a similar public discussion, this time of the gender split on the Court. Retiring Justice Marie Deschamps openly mused on the importance of that gender balance, and, diplomatically, regretted the appointment of a man.

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[3] As of May 1, 2014 there were 1,121 federal judges in Canada (a number which includes 262 supernumeraries). See the website of the Office of the Commissioner for Federal Judicial Affairs [hereinafter "OCFJA"]: <http://www.fja.gc.ca>. In February 2014, a spokesperson for Justice Minister Peter MacKay stated that the government had made more than 600 judicial appointments since coming to power in 2006. See "4.4 million in budget for 6 new judges", Legal Feeds, the blog of Canadian Lawyer magazine, online: <http://www.canadianlawyermag.com/legalfeeds/1936/4-4-million-in-budget-for-six-new-judges.html>.

[4] Bertha Wilson, "Will Women Judges Really Make a Difference?" (Paper presented at the Fourth Annual Barbara Betcherman Memorial Lecture, February 8, 1990) (1990) 28(3) Osgoode Hall L.J. 507.

[5] *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, 2014 SCC 21 (S.C.C.).

[6] Jeffrey Simpson, "The Supreme Court deserves better" *The Globe and Mail*, October 26, 2013, online: <http://www.theglobeandmail.com/globe-debate/the-supreme-court-deserves-better/article15027360/>.

[7] Professor Jamie Cameron quoted in Sean Fine, "What Justice Nadon's appointment says about the Supreme Court's future" *The Globe and Mail*, January 3, 2014, online: <http://www.theglobeandmail.com/news/national/what-justice-nadons-appointment-says-about-the-supreme-courts-future/article16192045/?page=all>.

"Numbers do count," she said, and continued: "I was sad that I was not replaced by a woman. We are looked at not just as a model for the courts in Canada, but around the world — and I think it's very important that the Supreme Court of Canada remains a model."[8]

There is a remarkable consensus in both academic and professional commentary about the need to change our appointments process.[9] The Canadian Bar Association ("CBA") has been engaged in relatively continuous advocacy on the topic since 1986, when the McKelvey Committee made 27 recommendations on the process in its Report on the *Appointment of Judges in Canada.*[10] Most recently, in August 2013, the CBA took a public stance on the lack of diversity in the federal judiciary, pointing out that "the low number of women and members of racialized and other minority groups appointed to the federal courts does not reflect the gender balance or diversity in the Canadian population".[11] In January 2014, the Law Society of British Columbia unanimously committed itself to be "pro-active in selecting a more diverse list of lawyers as the Law

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[8] As quoted in Kirk Makin, "Supreme Court needs more women, departing judge says", *The Globe and Mail*, February 2, 2013, online: <http://www.theglobeandmail.com/news/national/supreme-court-needs-more-women-departing-judge-says/article8149711/>.

[9] See, for example, Richard Devlin, A. Wayne MacKay & Natasha Kim, "Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a 'Triple P' Judiciary" (2000) 38 Alta. L. Rev. 734 [hereinafter "Devlin *et al*."]; Lorne Sossin, "Judicial Appointment, Democratic Aspirations, and the Culture of Accountability" (2008) 58 U.N.B.L.J. 11, at 29-30 [hereinafter "Sossin, 'Accountability'"]; F.C. DeCoste, "Political Corruption, Judicial Selection and the Rule of Law" (2000) 38 Alta. L. Rev. 654; K.D. Ewing, "A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary" (2000) 38 Alta. L. Rev. 708; Peter McCormick, *Selecting Trial Court Judges: A Comparison of Contemporary Practices* (Quebec: Commission of Inquiry into the Appointment Process for Judges in Quebec, 2010), online: <cenpj.gouv.qc.ca> [hereinafter "McCormick"]; Canadian Bar Association, "Federal Judicial Appointment Process", online: <https://www.cba.org/CBA/submissions/pdf/05-43-eng.pdf>; Canadian Bar Association, "Federal Judicial Appointments Process", online: <http://www.cba.org/cba/advocacy/pdf/judicial-appointment.pdf>; Canadian Association of Law Teachers, "Canadian Association of Law Teachers Panel on Supreme Court Appointments", online: <http://www.acpd-calt.org/wp-content/uploads/2010/12/SupremeCourt_panel.pdf> [hereinafter "CALT Report"].

[10] The CBA approved the Report and its Recommendations in 1986. CBA Resolution 86-08-M.

[11] CBA Resolution 13-04-A, *Equality in Judicial Appointments*, approved August 18, 2013. The Resolution was followed up with a letter to the Minister of Justice which included the following:

> I would like to continue our discussion about ensuring that judicial appointments reflect the diversity of the Canadian population. Since we first spoke on this subject last August, appointments have not significantly increased the diversity of the Bench.
>
> Different factors may be at play. These candidates may be less likely to apply. Or perhaps they apply, but they aren't 'known' by the Judicial Advisory Committee members, so they're less likely to be recommended. We simply don't have enough information to know.
>
> For that reason, I urge you to make the appointment process more transparent.

Letter from the President of the Canadian Bar Association, Fred Headon, online: <http://www.cba.org/CBA/submissions/pdf/14-13-eng.pdf>.

Society's candidates for appointment to the Federal Judicial Advisory Committee".[12] The resolution was adopted in response to worrying appointment trends identified by the Law Society's Equity Committee which noted that all of the members of Judicial Appointments Advisory Committee in British Columbia were male, and that appointments to the federal courts were also disproportionately male.[13] The urgent need for Aboriginal judges has been pointed out by the CBA and the Indigenous Bar Association, both of whom are on record with regard to the need for Aboriginal appointments, and the particular need for an Aboriginal judge on the Supreme Court of Canada.[14] These calls for change have elicited little substantive political response. In fact, they appear to have been ignored.[15] Recent federal appointees appear to be, inasmuch as it is possible to discern from publicly available information,[16] almost

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[12] Minutes of the January meeting, online: <http://www.lawsociety.bc.ca/docs/about/agendas/2014-02-28_agenda.pdf>.

[13] See Donna Martinson, Q.C., "Diversity on the Bench", Remarks delivered at a Meeting of the Benchers of the Law Society of British Columbia, July 12, 2013, on file with the author. See, as well "Judicial Diversity: It's the Fair Thing to Do", online: <http://media.wix.com/ugd/abf371_7039bfd16fc44a1f87f9a34bd96138b2.pdf>. It should be noted that the pattern of predominantly male appointments in British Columbia appeared to change in June 2013. Since that date the federal government has named more women than men directly from the profession to the bench in British Columbia (five women and four men as of May 1, 2014).

[14] CBA Resolution 05-01-A, "Recognition of Legal Pluralism in Judicial Appointments", August 2005; James C. Hopkins & Albert C. Peeling, "Aboriginal Judicial Appointments to the Supreme Court of Canada", April 2004, IBA website, online: <http://www.indigenousbar.ca/pdf/Aboriginal%20Appointment%20to%20the%20Supreme%20Court%20Final.pdf>; CALT Report, *supra*, note 9.

[15] See, however, Minister MacKay's remarks made during a "Dialogue with the CBA" at the August 2013 meeting, reported by Beverly Spencer in the National Magazine of the CBA. Responding to the resolution on Equality in Judicial Appointments, MacKay said that there is "already a lot of statistical data" and that "the more pressing issue is to ensure that 'we have fully functioning judicial advisory committees with greater gender balance.' His priorities also include more public education to encourage more women and diverse candidates to apply to expand the pool of applicants." See online: <http://www.nationalmagazine.ca/Blog/August-2013/CBA-dialogue-with-the-Minister-of-Justice.aspx?feed=blogs>.

[16] The OCFJA website, *supra*, note 3, provides information about the number of federal judges in Canada, organized by court and province. The website lists, for each court, the total number of judges in office, the number of supernumeraries, the number of women judges and the number of vacancies. The federal Department of Justice issues a news release each time a new federal judge is appointed. See judicial appointments, online: <http://www.justice.gc.ca/eng/news-nouv/index.asp?tid=4>. The boilerplate quality of those descriptions is discussed *infra*. As of May 1, 2014, releases were available from 2010 to 2014. Readers wishing more information are directed to the Library and Archives Canada website, which has judicial appointments archived from 1999 to 2007: <http://www.collectionscanada.gc.ca/webarchives/20071116180043/canada.justice.gc.ca/en/news/archives.asp>.

Information about the yearly number of applications for federal judicial appointment, the number of recommended files, the number of not recommended files, the number of appointments,

uniformly white. The appointment of women continues to lag behind the appointment of men and the range of professional experience in recent appointees is both limited and at least partially skewed in a manner which reflects the government's criminal justice agenda. The Nadon fiasco provides an opportune moment to revisit the issue of judicial representativeness. I worry that the (understandable) public and intellectual preoccupation with the Supreme Court has the effect of distracting from the arguably more significant implications of the government's approach to sections 96 and 101 appointments.[17] Trial judges are the face of justice for ordinary Canadians. And the face they present is remarkably homogenous.

Like many legal academics, I was asked to comment on the nomination of Justice Nadon very soon after it was announced. It was made clear to me that the interviewer was interested in whether the appointment should have gone to a woman. I decided to raise larger questions about Prime Minister Harper's record of judicial appointments nationwide, since I knew that there was great concern about his government's failure to continue to appoint women at a rate which would move the bench toward parity in the near future.[18] My preparation not only confirmed that concern, but also alerted me to alarming statistics compiled by *The Globe and Mail* and published as part of a 30th anniversary focus

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and the number of outstanding files are available in the form of annual reports from the Judicial Advisory Committees on the OCFJA website: <http://www.fja.gc.ca/appointments-nominations/committees-comites/reports-rapports/index-eng.html>. Reports are available from 2004-2005 through 2012-2013. The reports provide only statistical information. These websites provide the sum total of officially provided, publicly available information about the demographics of the judiciary, both institutionally and individually. This extreme paucity of information creates a huge disincentive for thoughtful commentary on the representativeness of the institution on virtually any axis of information (except gender, legal training and professional experience). Researchers are left to seek out information from other publicly accessible, and not always reliable, sources. For a thoughtful discussion of data and diversity in this context, see Sabrina Lyon & Lorne Sossin, "Data and Diversity in the Canadian Justice Community" (Draft version on file with the author) [hereinafter "Data and Diversity"].

[17] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. The judges of these courts are appointed by the Governor-in-Council, on the recommendation of the Minister of Justice. For a compendious discussion of the current processes for appointment of trial judges in the provincial courts, as well as federal trial court judges, see McCormick, *supra*, note 9, at 18-41 and 62-66.

[18] Kirk Makin, "Appointments of female judges slump under Harper's Tories" *The Globe and Mail*, November 11, 2011, online: <http://www.theglobeandmail.com/news/politics/ appointments-of-female-judges-slump-under-harpers-tories/article4183464/> [hereinafter "Makin, 'Slump'"].

on the *Canadian Charter of Rights and Freedoms*.[19] The article surveyed the 100 federal judicial appointments made to provincial superior courts before April 17, 2012 (approximately 3.5 years of appointments). Ninety-eight of those appointees were white.[20]

It is within this context that I decided to scrutinize federal appointments made subsequent to April 2012. I hope that naming and quantifying the federal government's failure to attend to diversity might galvanize the development of legal and political strategies with the objective of provoking change. While I have no doubt that the individual men and women appointed to the federal bench are, in good faith, working to deliver justice to Canadians, I am nevertheless of the view that individual good faith is an insufficient palliative to institutional inadequacy. This essay begins with an examination of the principal academic arguments supporting the claim that Canadians are entitled to a representative bench. After explaining the current federal appointments process, I examine patterns in three identity characteristics of recent appointees (gender, racialization and professional experience). These patterns suggest, at the least, a failure to pay attention to, and at the most, a deliberate disregard of diversity which is, in my view, inconsistent with constitutional anti-discrimination norms, as well as with both the written and unwritten constitutional guarantee of an independent and impartial judiciary.[21]

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[19] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

[20] Kirk Makin, "Of 100 new federally appointed judges, 98 are white, Globe finds" *The Globe and Mail*, April 17, 2012, online: <http://www.theglobeandmail.com/news/politics/of-100-new-federally-appointed-judges-98-are-white-globe-finds/article4101504/> [hereinafter "Makin, 'New federally appointed judges'"]. The article specifically excluded appointments made to the Territorial Superior Courts, stating that according to figures compiled by *The Globe and Mail*, the exceptions were two Métis judges appointed in British Columbia and Nova Scotia, and that only in the territories, where three Aboriginal judges had been appointed since 2009, did the federal appointment process better reflect the community. The decision to exclude territorial appointments is not explained. I suspect that it relates to the statistical distortion which would result from including statistics relating to three very small territorial courts. These courts serve 0.3 per cent of the Canadian population (or approximately 110,000 people). See Statistics Canada, Population shares by province and territory, online: <http://www.statcan.gc.ca/daily-quotidien/130926/longdesc-cg130926a003-eng.htm>. Although the text of the article is clear, the caption is misleading. There are six federally appointed judges in Yukon and the Northwest Territories, and six in Nunavut. The Nunavut Court of Justice was created as a single-level trial court on April 1, 1999, as a result of the Nunavut Land Claims Agreement. It is Canada's first, and only, single-level court. There were three Aboriginal judges appointed to territorial superior courts between 2009 and March 2012. There were no appointments made to territorial superior courts during the period of my study.

[21] This is not a conceptually novel claim. What has changed, in my view, is the context. The pattern of recent appointments suggests that representativeness is an irrelevant factor in federal

II. WHY CANADIANS ARE ENTITLED TO A REPRESENTATIVE JUDICIARY

In her sophisticated discussion of the links between diversity and judicial independence, Professor Sonia Lawrence concludes that "what evidence we have suggests that we are far from even the illusion of sufficiency in terms of female, native or minority representation, and there is little reason to assume that we will get there any time soon".[22] More than four years after the publication of her analysis, there is no evidence to suggest that anything with respect to federal appointments has changed.[23]

I should begin by acknowledging the complexity of the issue. Important questions include how diversity should be measured, what

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appointments, even at the level of rhetoric. That this deliberate disregard is occurring at a time of dynamic population change, and at a time when there is a judicially acknowledged crisis of criminal justice legitimacy for Aboriginal peoples, makes it more urgent than abstract. See, for discussions of diversity on the bench: Sonia Lawrence, "Reflections: On Judicial Diversity and Judicial Independence" [hereinafter "Lawrence"] in Adam Dodek & Lorne Sossin, eds. *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 193; National Association of Women and the Law, *Creating Diversity on the Bench: Submissions to the Department of Justice on Revising the Federal Judicial Appointment Process* (Ottawa: NAWL, 1993); Sherrilyn A Ifill, "Judging the Judges: Racial Diversity, Impartiality, and Representation on State Trial Courts" (1997) 39 B.C.L. Rev. 95 [hereinafter "Judging the Judges"]; Sherrilyn A. Ifill, "Racial Diversity on the Bench: Beyond Role Models and Public Confidence" (2000) 57 Wash. & Lee L. Rev. 404 [hereinafter "Ifill, 'Beyond Role Models'"]; The Honourable Maryka Omatsu, "The Fiction of Judicial Impartiality" (1997) 9 C.J.W.L. 1 [hereinafter "Omatsu"]; Devlin *et al*, *supra*, note 9; Sossin, "Accountability", *supra*, note 9; Lorne Sossin, "Should Canada Have a Representative Supreme Court?" in N. Virrelli, ed., *The Democratic Dilemma: Reforming Canada's Supreme Court* (Montreal: McGill-Queens University Press, 2013) 27; Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice* (Toronto: OLRC, 1991), in particular, Isabel Grant & Lynn Smith, "Gender Representation in the Canadian Judiciary", at 57, Errol Mendes, "Promoting Heterogeneity of the Judicial Mind: Minority and Gender Representation in the Canadian Judiciary", at 94, and Jeremy Webber, "The Adjudication of Contested Social Values: Implications of Attitudinal Bias for the Appointment of Judges", at 27; B. Wilson, "Methods of Appointment and Pluralism" in D. Magnusson & D. Soberman, eds., *Canadian Constitutional Dilemmas Revisited* (Kingston: Centre for Public Policy, 1997) 154; Dame Brenda Hale, "Equality and the Judiciary: Why Should We Want More Women Judges?" (Autumn 2001) Public Law 489.

[22] Lawrence, *id*., at 213.

[23] In some provinces, significant progress has been made. See, for example, the information about Ontario contained in "Improving Representation in the Judiciary: A Diversity Strategy", The Diversity Institute, Ryerson University, online: <http://www.ryerson.ca/content/dam/diversity/resources/Powerpoint%20-%20Improving%20Representation%20in%20the%20Judiciary%20-%20June%2027.pdf>, and the report by McCormick, *supra*, note 9. My decision to focus on federal appointments is not intended to suggest that provincial appointment processes are not equally implicated in questions of diversity. Nor is it intended to suggest that the appointment of federal judges merits more scrutiny than the appointment of their provincial counterparts.

aspects of identity matter, why they matter, and what the representativeness goal means for conceptions of judging. I agree with Lawrence, who suggests that representation (or reflection) may be a more useful concept than diversity. She argues that "A representative bench aims to mirror the identity characteristics of the population it judges", and that "representation more squarely confronts the ways in which a homogenous — or otherwise non-representative — bench threatens impartiality, by calling attention to the disparity between the judges and the judged".[24] Lawrence is careful not to reject the idea of diversity. She recognizes that the "problem" with diversity may be a problem with how diversity language and objectives have been used in social, legal and political discourse. This point is made forcefully by Professor Eli Wald, who argues that "diversity discourse is stuck in a state of counterproductive disarray"[25] which is linked, in the United States in particular, to utilitarian justifications of affirmative action. Wald argues that legal actors and institutions have a "non-utilitarian duty to pursue substantive diversity" which is a "fundamental, normative imperative" for the legal profession.[26] I agree. In this essay, I should be understood as referring to a substantive conception of diversity/ reflection/representativeness which aims for meaningful (rather than token) participation, which has the potential to be disruptive and/or transformative.[27] Whether the formal norms of judging can in fact incorporate difference is a question I leave for another day.[28]

I acknowledge as well the complexity of the questions related to representation, measurement, perspective and intersectionality which a fully realized commitment to substantive diversity would require.[29] Unfortunately, we are nowhere near the point where that level of rigour is required. My objectives are much more modest. I agree with Lorne

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[24] Lawrence, *supra*, note 21, at 207.

[25] Eli Wald, "A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why" (2011) 24 Geo. J. Legal Ethics 1078.

[26] *Id.*, at 1082, 1141.

[27] See Erika Radley, "Judicial diversity, the woman judge and fairy tale endings" (2007) 27 L.S. 74, at 94 [hereinafter "Radley"]. She writes: "Diversity requires the usual to be transformed by the remarkable, and the extraordinary to become the norm."

[28] See Lawrence, *supra*, note 21, at 211, and Erika Radley, *id.*

[29] See Lawrence, *id.*, at 209. Lawrence writes: "We must decide how perfect a reflection of society is required. This forms the dividing line between mere diversity and representativeness. Should the group of visible minorities be broken down into various sub-groups in order to provide a more accurate measure of whether or not there is 'reflection'? What about those 'in the intersections'?"; Devlin *et al.*, *supra*, note 9, at 792-94 and 809-11; Ifill, "Beyond Role Models", *supra*, note 21, at 468-71.

Sossin and others, that the current appointments process is "out-of-step" with our "political and legal culture" and particularly with our core democratic values of judicial independence and accountability.[30] As a result, both the process of appointments and the judiciary which the process has put in place suffer from a "democratic deficit"[31] which threatens their legitimacy.

Two primary arguments support the call for increased judicial diversity, one pragmatic and one normative. Both rest on a conception of what judges do and on how they do it. The arguments depend on the claim that judges are a product of their human experiences and that the values and assumptions which have been shaped by those experiences are thoroughly embedded. The exercise of judging is infused with choice, and requires the virtually continuous exercise of discretion. Judging is about much more than the mechanistic application of predetermined and predictable rules. Chief Justice McLachlin explained it this way:

> ... Like everyone else, judges possess preferences, convictions and — yes — prejudices. Judges are not social or political eunuchs. They arrive at the bench shaped by their experiences and by the perspectives of the communities from which they come. As human beings, they cannot help but to bring these 'leanings of the mind' to the act of judging. In short, judging is not an exercise of cold reason, uncontaminated by personal views and preconceptions. … In the end, it is clear that a variety of subjective influences — our beliefs about the world and about human nature, our emotions, and our sense of justice — are inescapably part of judicial decision-making.[32]

In other words, who the judges are matters to what they do.[33]

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[30] Sossin, "Accountability", *supra*, note 9, at 12-13.

[31] Devlin, *et al*., *supra*, note 9.

[32] The Honourable Chief Justice Beverley McLachlin, *supra*, note 2, at 7, 8. The Chief Justice has spoken often on this conception of judging. See, *e.g.*, The Honourable Justice Beverley McLachlin (as she then was), "Judicial Neutrality and Equality" (Paper presented to the Aspects of Equality – Rendering Justice Conference, November 1995) [unpublished, on file with the author]; "The Judicial Vision: From Partiality to Impartiality" (Paper presented to Nova Scotia Judicial Education Seminar, June 1998) [unpublished, on file with the author]; The Honourable Chief Justice Beverley McLachlin, "Judging in a Democratic State" (Sixth Templeton Lecture of Democracy, University of Manitoba, June 3, 2004) [unpublished, on file with the author]; "Judicial Power and Democracy" (2000) 12 Sing. Acc. L.J. 311.

[33] Many scholars have interrogated these claims about the nature of judgment. A particularly helpful entry point into the literature is Jennifer Nedelsky, "Embodied Diversity and Challenges to Law" (1997) 42 McGill L.J. 91. See as well, Omatsu, *supra*, note 21; Devlin, *et al*., *supra*, note 9, at 737-58; B. Wilson, *supra*, note 4. For a case exploring these issues see *R. v. S. (R.D.)*, [1997] S.C.J. No. 84, [1997] 3 S.C.R. 484 (S.C.C.).

The first argument in support of judicial diversity is utilitarian. Put simply, the argument is that the more diverse the bench, the better the quality of judgment. Increasing the range of perspectives and experiences on the bench increases the likelihood of judgment which is truly impartial, which does not unintentionally replicate at a systemic level the perspectives and values of a limited subset of human experience. The power of this claim does not depend on essentializing the perspectives of any particular community. Rather, as others have argued: "[S]o long as identity is not presumed to be proxy for truth or authenticity … the real issue is proportional access to the channels of judicial decision-making so as to open up what has been an excessively constrained set of perspectives."[34] Or, put another way, "widening the pool of life experiences of judges will increase the chances that the experiences of litigants will be accurately understood, and lower the chances of mistaken assumptions leading to sub-optimal results".[35] American scholar Sherrilyn Ifill argues:

> Racial diversity on the bench encourages judicial impartiality, by ensuring that a single set of values or views do not dominate judicial decision-making. … [T]he impartial judge mandate … requires both the impartiality of *individual* judges and *structural* impartiality on the bench. Courts achieve structural impartiality when judicial decision-making includes a cross-section of perspectives and values from the community.[36]

We know that who participates makes a difference. This knowledge often translates into a claim that diversity of perspective is especially valuable at the appellate level. Indeed, most recently, Justice Marie Deschamps adverted to the ways in which the presence of women in significant numbers affected the decision-making process at the Supreme Court, noting that:

> We [women judges] do not hold our cards. We all had offices one beside another, which also helped. We kept our doors open. When we see someone sitting in the office of another now, it is an attraction, a magnet to participate in the conversation. It is really a different court.[37]

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[34] Devlin, *et al*., *id.*, at 793.

[35] The Honourable Lynn Smith, "Speaking Notes: Diversity on the Bench", July 12, 2013 (on file with the author) [hereinafter "Smith"]. And, see "Judicial Diversity", online: <http:// lawcourts center. camp7.org/Resources/Documents/Law%20Courts%20Center%20Briefly!%20February%202014.pdf>.

[36] Ifill, "Beyond Role Models", *supra*, note 21, at 411 (emphasis in original).

[37] As quoted in Kirk Makin, "Supreme Court needs more women, departing judge says", *supra*, note 8. Justice Deschamps also noted how the Court has embraced e-mail, saying: "It's very much more intimate. They are from a judge to a judge. What I have seen and lived is this

The self-evident truth of that claim does not diminish the significance of a diverse and representative bench for the trial judge. While trial judges deliberate and act alone, they also form an intellectual and social community, whose bonds are intensified by the social isolation often required by judicial role. It is important not to underestimate the significance of the "coffee room" or, more formally, of the increasingly professionalized expectation that Canadian judges will participate in ongoing continuing education.[38] Both of these contexts are enriched by diversity. This point has been brought home to me repeatedly by women judges who describe the shift in conversational culture in the coffee room, and the concomitant expansion of "permissible" points of view that tends to follow upon an educational exposure to diversity. In addition, the "Ethical Principles for Judges" reflect a commitment at the highest levels of the Canadian judiciary to understand and promote equality.[39] The Honourable Lynn Smith, in a recent presentation to the Law Society of British Columbia, remarked that Principles 5 (Equality) and 6 (Impartiality):

> strongly endorse the concept that judges must be impartial in the sense that they must understand the community in which they live, and avoid the mistake of confusing their own singular experience with the universal experience of humankind. That duty rests on every individual judge, whatever the judge's gender or cultural background. I think that there is a corresponding duty on the judiciary as an institution, and that the judiciary would be better able to carry out that duty if its composition more accurately reflected the composition of the community as a whole.[40]

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transformation into a court that talks. We say what we think about the case. We don't just write it and circulate it."

[38] See Rosemary Cairns Way, "Contradictory or Complementary: Reconciling Judicial Independence with Judicial Social Context Education" in Adam Dodek & Lorne Sossin, eds., *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 220; Rosemary Cairns Way & T. Brettel Dawson, "Taking a Stand on Equality: Bertha Wilson and the Evolution of Judicial Education in Canada" in Kim Brooks, ed., *Justice Bertha Wilson: One Woman's Difference* (Vancouver: U.B.C. Press, 2009) 278; Rosemary Cairns Way, "Reconceptualizing Professional Responsibility: Incorporating Equality" (Spring 2002) 25 Dal. L.J. 27.

[39] Canadian Judicial Council, "Ethical Principles for Judges", online: <https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf>.

[40] Smith, *supra*, note 35. Ethical Principle 5 provides: "Judges should conduct themselves and proceedings before them so as to assure equality according to law. Judges should carry out their duties with appropriate consideration for all persons (for example, parties, witnesses, court personnel and judicial colleagues) without discrimination. Judges should strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background,

The normative argument in favour of diversity reflects the constitutional and democratic values which undergird the legal system, including the norm of anti-discrimination and the commitment to an independent and impartial judiciary. The claim here is that the unrepresentative character of the judiciary demonstrates that the appointments process has disproportionately denied opportunities to Indigenous peoples, racialized individuals, persons with disabilities, women and other members of equality-seeking groups.[41] In other words, the institutional character of the bench reflects the ongoing existence of systemic discrimination. A standard response identifies the "pool problem" as primarily to blame, suggesting that the lack of representativeness reflects the nature of the pool of potential applicants, and anticipating that demographic shifts will eventually "trickle up" to the judiciary. Of course, the characteristics of the pool of potential judicial applicants itself reflects the continuing existence of a range of systemic and often discriminatory barriers to education, experience and the kinds of professional credentials understood as relevant to judicial appointment.[42] While it is true that the pool may offer a partial explanation for current statistics, passivity in the face of a stubbornly homogenous bench is no longer a constitutionally defensible response. At the very least, we need to give careful and critical attention to the ways in which merit and professional competence are being evaluated by monitoring and reporting on relevant characteristics of the applicant pool. Only informational transparency will allow the kinds of sophisticated remedial responses which the lack of diversity demands.[43]

Non-discrimination is not the only constitutional norm at issue. Fifteen years after the Supreme Court of Canada decided in *R. v. Gladue* that the overrepresentation of Aboriginal peoples in the criminal justice system qualified as a "crisis",[44] the likelihood of an Aboriginal person

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sexual orientation or disability." (at 23) Ethical Principle 6 provides: "Judges must be and should appear to be impartial with respect to their decisions and decision making. The appearance of impartiality is to be assessed from the perspective of a reasonable, fair minded and informed person." (at 27)

[41] See, for example, Devlin, *et al*., *supra*, note 9, at 789-90 and Lawrence, *supra*, note 21, at 205. The claim is that as law schools become more diverse, so too will the profession, with the judiciary eventually and inevitably following suit. The problem is the potentially glacial pace of the "trickle". See note 70, *infra*, for a discussion of current actuarial projections for gender parity in the federal judiciary. As of March 2013 the expected date is 2035.

[42] See text *infra* and generally the rigorous discussion in "Data and Diversity", *supra*, note 16.

[43] "Data and Diversity", *id.*

[44] *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 64 (S.C.C.) and more recently, *R. v. Ipeelee*, [2012] S.C.J. No. 13, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 62 (S.C.C.),

facing an Aboriginal judge is virtually unchanged. The number of federally appointed Aboriginal judges in Canada hovers at less than 1 per cent.[45] In my view, the evolving jurisprudence on juror impartiality is relevant here.[46] Recent cases about the constitutional dimensions of the right to a jury roll compiled by a process ensuring inclusive representation of on-reserve Aboriginal peoples offer fodder for an argument about the constitutional sufficiency of a selection process which seems resistant to diversity. I think that the continuing failure of the federal bench to offer institutional (structural) impartiality to Aboriginal persons is arguably inconsistent with the substantive equality guaranteed by section 15, the independence and impartiality guaranteed by section 11(d), and more generally with unwritten constitutional norms related to democracy, the protection of minorities and the rule of law.

III. A Summary of the Federal Appointment Process

Federal judicial appointments are managed by the Office of the Commissioner for Federal Judicial Affairs. The website materials state, that "[t]he Office of the Commissioner was established in 1978 to 'safeguard the independence of the judiciary' in addition to providing

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where the Court acknowledged that "statistics indicate that the overrepresentation and alienation of Aboriginal peoples in the criminal justice system has only worsened [since the decision in *Gladue*]".

[45] Lawrence, *supra*, note 21, at 214, n. 55, estimates that (as of 2010) fewer than 20 judges in Canada were black, and about 20 were Aboriginal, but correctly points out that it is virtually impossible to confirm these statistics.

[46] *R. v. Kokopenance*, [2013] O.J. No. 2752, 2013 ONCA 389 (Ont. C.A.), leave to appeal granted [2013] S.C.C.A. No. 308 (S.C.C.). See also *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci* (February 2013), online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/pdf/First_Nations_Representation_Ontario_Juries.pdf>. The Report focuses on jury selection but notes the impossibility of singling out one problem from the larger and ongoing crisis in the delivery of justice to First Nations people. Justice Iacobucci writes (at 1, 2):

> As this Report will demonstrate, there is not only the problem of a lack of representation of First Nations peoples on juries that is of serious proportions, but it is also regrettably the fact that the justice system generally as applied to First Nations peoples, particularly in the North, is quite frankly in a crisis. … Overrepresented in the prison population, First Nations peoples are significantly underrepresented, not just on juries, but among all those who work in the administration of justice in this province, whether as court officials, prosecutors, defence counsel, or judges. This issue is made more acute by the fact that Aboriginal peoples constitute the fastest-growing group within our population, with a median age that is significantly lower than the median age of the rest of the population.

Justice Iaccobucci warns (at 2) that: "Put more directly, the time for talk is over, what is desperately needed is action."

administrative support to federally appointed judges".[47] Duties of the office include "managing the Judicial Appointments Secretariat, which administers 17 advisory committees responsible for evaluating candidates for federal judicial appointment".[48] The current advisory committee structure is heir to the reforms initiated by the Mulroney government in 1988, reforms which were the result of a consultative process, and which were intended to increase transparency in a manner consistent with judicial independence.[49] While the Canadian Judicial Council is on record that "[t]he key element in the adopted model was the creation of advisory committees independent of the appointing government … intended to screen all candidates for competence [and] to ensure that merit would govern the selection process",[50] in fact, the process lacks the structural capacity to do more than an initial vetting. The final decision rests with the government and it is both unreviewable and opaque.

In 2007, the government made a number of changes to the structure and decision-making process of the Appointments Committees. These changes had the effect of limiting the Committees' power to meaningfully differentiate between candidates, adding a "representative of the law enforcement community", giving government appointees a working majority, and making the judicial representative a mostly non-voting chair.[51] Interestingly, the Canadian Judicial Council made a highly unusual public intervention in the aftermath of these changes,[52] raising three distinct concerns relating to the perceived and actual independence of the judicial appointment committees. First, the Council was highly critical of the government's "unilateral" failure to consult with the legal community. Second, the Council argued that the removal of the highly recommended designation raised "questions about whether the most qualified individuals will continue to be identified for appointment". Third, the Council was highly critical of the compositional changes, suggesting that it had always been understood that independent

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47 OCFJA website, *supra*, note 3.

48 *Id.*

49 See Andre S. Millar, "The 'New' Federal Appointments Process: The First Ten Years" (2000) 38 Alta. L. Rev. 616. See also Carissima Mathen, "Choices and Controversy: Judicial Appointments in Canada" (2008) 58 U.N.B.L.J. 52 [hereinafter "Mathen"]; McCormick, *supra*, note 9, at 62-66; Sossin, "Accountability", *supra*, note 9, at 25-27.

50 "Judicial Appointments: Perspective from the Canadian Judicial Council", press release from the Canadian Judicial Council, online: <https://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_2007_0220_en.asp>.

51 A description of the reform can be found in Mathen, *supra*, note 49, at 61.

52 *Supra*, note 50.

committees would "reflect the diversity of society in each jurisdiction". The Council concluded that:

> Because the majority of voting members are now appointed by the Minister, the advisory committees may neither be, nor be seen to be, fully independent of the government. This puts in peril the concept of an independent body that advises the government on who is best qualified to be a judge.[53]

Council continued with what can only be read as a veiled threat, noting that judicial participation could continue "only if the principle of judicial independence is respected and judicial candidates are recommended strictly on the basis of merit". I was unable to find any public follow-up to this position. This is unsurprising given that the Code of Ethics for Advisory Committee members counsels confidentiality on all matters pertaining to the decision-making process.[54] This understandable provision nevertheless suggests that the judicial oversight implied by the Canadian Judicial Council's statement is more rhetorical than real.

Only the name and appointing body for the members of each Judicial Appointment Committee are publicly available on the OCFJA website. As of May 1, 2014, 12 of the 17 committees were chaired by men. Of the 106 other members (there are a number of vacancies) 80 or 75 per cent of the committee members were male. Three committees are currently all-male, although one has a vacancy.[55] This surprising gender imbalance was brought to the attention of the Law Society of British Columbia by its Equity and Diversity advisory committee after that committee heard submissions on judicial diversity from retired Supreme Court Justices Donna Martinson and Lynn Smith. Speaking before the Committee in September 2013, Ms. Martinson noted:

> When appointing Committee members, the Minister of Justice "attempts to reflect factors appropriate to each jurisdiction including

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[53] *Id.*

[54] See in particular clause 5, which reads:

> All Committee discussions and proceedings shall be treated as strictly confidential and must not be disclosed outside the Committee, except to the Minister of Justice, except that a Committee Chair may inform the Chief Justice of the names of the candidates who have been recommended by the committee. A member shall not communicate to a candidate or to any other person, during his or her term or thereafter, the substance or details of any interviews held, of discussions within the Committee nor of recommendations made.

Online: <http://www.fja.gc.ca/appointments-nominations/committees-comites/ethics-ethiques-eng.html>.

[55] British Columbia, Ontario West and South, and Saskatchewan (one vacancy — a nominee of the Federal Minister of Justice).

> geography, language, multiculturalism, and gender." Yet, all the members of the British Columbia Judicial Advisory Committee are men. Only one is a visible minority lawyer, and most are from traditional areas of practice.[56]

These concerns about the composition of judicial advisory committees reflect legitimate apprehension about how committees will interpret and apply their mandate. While "professional competence and overall merit" are the primary qualifications for appointment, committees are encouraged to "respect diversity and to give due consideration to all legal experience, including that outside a mainstream legal practice".[57] While the website counsels the committees to consult broadly, and involve the community, the confidentiality requirements make it impossible to ascertain how these procedural ideals are implemented. The list of publicly available criteria has been described as "a laundry list into which every conceivable consideration was inserted rather than a focussed set of qualifications".[58] It appears that the list of criteria has undergone subtle shifts over the last 15 years. In 2000, Devlin *et al.* described a policy that included the heading "Social Awareness", and included a specific reference to "sensitivity to gender and racial equality".[59] The current assessment criteria are bundled in two categories — professional competence and experience, and personal qualities.

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[56] The Honourable Donna J. Martinson, Q.C., "Diversity on the Bench: Speaking Notes", Meeting of the Benchers of the Law Society of British Columbia, July 12, 2013 (on file with the author) [hereinafter "Speaking Notes"].

[57] OCJFA website, *supra*, note 3.

[58] Sossin, "Accountability", *supra*, note 9, at 34. The assessment criteria provide:

> The following list of factors, though not exhaustive, is intended to provide a basis for assessing the suitability of candidates for judicial appointment.
>
> **Professional Competence & Experience**
>
> (While courtroom experience is an asset, it is only one of many factors which may be considered in assessing a candidate's suitability for the role of judge.) ... general proficiency in the law[;] intellectual ability[;] analytical skills[;] ability to listen[;] ability to maintain an open mind while hearing all sides of an argument[;] ability to make decisions[;] capacity to exercise sound judgement[;] reputation among professional peers and in the general community[;] area(s) of professional specialization, specialized experience or special skills[;] ability to manage time and workload without supervision[;] capacity to handle heavy workload[;] capacity to handle stress and pressures of the isolation of the judicial role[;] interpersonal skills — with peers and the general public[;] awareness of racial and gender issues[;] bilingual ability
>
> **Personal Characteristics** ... sense of ethics; patience; courtesy; honesty; common sense; tact; integrity; humility[;] punctuality[;] fairness[;] reliability[;] tolerance[;] sense of responsibility[;] consideration for others[.]

[59] Devlin *et al.*, *supra*, note 9, at 843.

Social awareness has disappeared, while "*awareness* of racial and gender issues" and "bilingual ability" are now included under competence.

In 2008, Professor Lawrence pointed to language on the OCFJA website which stated that a goal of the process was "ensuring the development and maintenance of a judiciary that is representative of the diversity of Canadian society".[60] The diversity goal has disappeared from the primary website, although it still appears on the Personal History Form (accessed by hyperlink) as follows: "Given the goal of ensuring the development and maintenance of a judiciary that is representative of the diversity of Canadian society, you may, if you choose, provide information about yourself that you feel would assist in this objective. There is no obligation to do so."[61] No information related to that objective is publicly available, nor is any kept.[62] This complete lack of information makes any kind of accountability impossible. And of course, the committees themselves have no real power, aside from the power to vet applications, to control appointments which remain in the hands of politicians. It is hard to disagree with the claim that the "committees serve an accountability function that they in fact have neither the authority nor the will to perform".[63]

IV. A LOOK AT RECENT APPOINTMENTS

I examined federal appointments made between April 17, 2012 and May 1, 2014. There were 107 initial appointments to the bench. I did not examine elevations from provincial courts, or to appellate courts.[64]

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[60] Lawrence, *supra*, note 21, at 216.

[61] It is possible that the concession to privacy/choice with respect to "diversity" information reflects a concern that requiring disclosure violates human rights obligations. However, as Lawrence, *supra*, note 21, explains at 214, the federal *Employment Equity Act*, S.C. 1995, c. 44, encourages employers covered by the Act to collect data in order to implement employment equity (s. 9) with respect to the four groups designated by the legislation: Aboriginal peoples, women, persons with disabilities and members of visible minorities (s. 2). Section 3 defines visible minorities as "persons, other than aboriginal peoples, who are non-Caucasian in race or non-white in colour".

[62] Lawrence, *id.*, at 217, n. 70, describes her unsuccessful attempt to collect "aggregate numbers or percentages of applicants/appointees who are members of underrepresented groups (First Nations, Visible Minorities, Persons with Disabilities)" through a freedom of information request. For a sustained critique of the failure to track statistics, see "Data and Diversity", *supra*, note 16.

[63] Sossin, "Accountability", *supra*, note 9, at 26.

[64] I decided to examine only initial appointments to the bench by the federal government. I did not consider elevations from provincial courts to federal courts, or from federal trial courts to appeal courts. See note 23, *supra*, for comments on provincial appointments. I recognize that my choice may fail to count demographic changes to the federal courts which reflect elevations from the

1. Gender

As of May 1, 2014 there were 1,121 federally appointed judges in Canada. Of those judges, 382 (34 per cent) are women.[65] Thirty-two per cent of trial judges are women. Forty per cent, or 43 of the 107 recent appointments made in the last 23 months, were of women. This percentage significantly outstrips the current overall percentage of women on the bench, and appears out-of-step with prior practices of the government. In November 2011, Kirk Makin suggested that parity had been "within reach" until the 2006 change in government.[66] In 2011, a Department of Justice spokesperson said that "30 per cent of the 420 judges appointed since 2006 were women", a figure which she claimed was statistically reflective of both the applicant pool and the pool of recommended candidates.[67] There is, of course, no way of confirming these claims. And they suggest that the government is content to conform with a formal "trickle-up" approach to appointment, notwithstanding the exponential increase of women into the legal profession[68] as well as the

provincial courts. I decided to do this for a number of reasons: (1) I wanted to add my statistics on racialization to *The Globe and Mail* statistics and the research done by *The Globe* did not consider elevations; (2) elevations to the superior court which increased the demographic of racialized judges on the superior court would only end up in an overall increase in judicial diversity if the province replaced the provincial appointee with another racialized individual. There were no guarantees that would occur, and I was unable to do the research necessary to determine if it had. As well, the original appointment decision reflecting a commitment to diversity was not a federal government decision, although the elevation may have been. I was also interested in considering professional experience prior to appointment, an issue which this approach made possible. In the end, I decided the most straightforward choice was to only consider initial appointments. I had a (to my mind) surprising e-mail exchange with a federally appointed judge after this paper was presented at the Osgoode Constitutional Cases conference. The judge asked for an explanation of my decision and when I offered one, was dismissive of both my explanation and my research.

[65] It is clear that the number of women on the bench is increasing slowly. For example, on January 1, 2009, there were 1,064 federally appointed judges, with 335 women or 31.4 per cent.

[66] Makin, "Slump", *supra*, note 18, citing former Liberal Minister of Justice Irwin Cotler's claim to have aimed for a 40 per cent female appointment rate in 2005.

[67] *Id.*

[68] See for a representative sample Michael Ornstein, *Racialization and Gender of Lawyers in Ontario* (Toronto: The Law Society of Upper Canada, 2010). See the Federation of Law Societies Statistical Report 2010, online: <http://www.flsc.ca/_documents/2010-Statistical-Report.pdf> [hereinafter "Ornstein, *Racialization*"]. The Federation reports the following statistics: In 2010, there were 22,261 practising women lawyers and 37,617 practising men lawyers. For new lawyers practising 0 to 5 years, in many areas, women are the majority, or close to the majority, and their numbers and percentages increased from 1998 to 2010: Manitoba: 60 per cent of the newest lawyers are women, up from 44.1 per cent in 1998; Saskatchewan: 52.1 per cent, up from 45.6 per cent; Ontario: 52 per cent, up from 47.1 per cent; British Columbia: 53 per cent, up from 46.9 per cent; Barreau du Québec: 61.3 per cent, up from 58 per cent.

large pool of "brilliant and exceptionally qualified women lawyers to draw upon".[69] In March 2014, an actuarial report on the "Pension Plan for Federally Appointed Judges as at 31 March 2013" was tabled before Parliament. The last valuation was completed in March 2010. In that valuation, the Chief Actuary assumed that there would be an equal number of male and female judges by 2027. As of March 2013, the date has been pushed back to 2035, presumably because fewer women than expected have been appointed.[70]

2. Racialization

An informational vacuum confronts anyone who wishes to examine any aspect of identity beyond gender. *The Globe and Mail* relied on Internet searches and information from judicial sources and law firms where judicial appointees worked[71] for its statistics. I employed similar tools … but with deep misgivings. Clearly, relying on pictures and/or biographical information as a method of identifying ascriptive characteristics relevant to judicial representativeness is deeply unsatisfying, and potentially inaccurate. However, the alternative seems equally unpalatable. It cannot be that the choice to withhold relevant information can stifle legitimate debate. In fact, one could argue that the deliberate provision of public biographical information which makes identity invisible, and which requires cautious reliance on potentially inaccurate or incomplete data, is, in itself, relevant to the diversity objective. If the justification for substantive diversity on the bench is about more than what the bench looks like, it must be that how appointees publicly describe themselves is relevant to their capacity to truly widen the perspectives and life experiences represented on the bench.[72]

I was able to identify only one racialized judicial appointee in the 107 successful candidates I examined. Ninety appear to be white. I was unable to find sufficient identifying information to warrant drawing a

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[69] Professor Elizabeth Sheehy, Shirley Greenberg Chair for Women and the Legal Profession, University of Ottawa, as quoted in Makin, "Slump", *supra*, note 18.

[70] Pension Plan for Federally Appointed Judges as at March 31, 2013, online: <http://www.osfi-bsif.gc.ca/Eng/oca-bac/ar-ra/faj-jnf/Pages/faj-jnf14.aspx#Toc-1>, Demographic Assumptions at Appendix 6.

[71] See Makin, "New federally appointed judges", *supra*, note 20.

[72] I am grateful to my colleague Joanne St. Lewis for helping me to think through this question. She was, as always, helpful, thoughtful, respectful and creative in our conversation.

conclusion on 16 other appointees. Accepting *The Globe and Mail* data as the starting point, this means that in the last approximately five years, three of 191 appointees to a provincial superior court where a determination can be made are not white. *The Globe and Mail* claimed that the two "non-white" appointments it discovered were Métis. I identified one racialized person, who the Minister of Justice has subsequently described as "Indo-Canadian".[73] This represents an appointment rate to provincial superior courts of 1.04 per cent for Aboriginal judges, and 0.5 per cent for visible minority judges.[74]

This is an appalling statistic. Data from the 2011 Household Survey collected by Statistics Canada tell us that 19 per cent of the Canadian population is made up of visible minorities.[75] The visible minority population in large urban centres is significantly larger — with

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[73] Justice Neena Sharma, appointed to the British Columbia Supreme Court on December 18, 2013. On June 22, 2014, Minister MacKay released the following statement on Facebook in response to public criticism about judicial appointments:

> Notable appointments by our Government include Chief Justice Nicole Duval-Hesler, the first female Chief Justice of the Quebec Court of Appeal; Justice Leonard Mandamin, first Aboriginal judge appointed to the Federal Court; Justice Diana Cameron, the first Aboriginal judge appointed to the Manitoba Court of Appeal; Justice Guylène Beaugé who was born in Haiti and is now on the Quebec Superior Court; Justices Neena Sharma and Dev Dley, both of Indo-Canadian descent, were appointed to the BC Supreme Court; and Justice Michael Tulloch, originally from Jamaica, appointed to the Ontario Court of Appeal; among many others. The fact that these appointments were female and representative of minorities is important, but ultimately based on the only truly important criteria applied to all our appointments: merit and legal excellence. No matter who they are, or where they come from, our judiciary must be filled by the most accomplished and capable legal minds our Country has to offer. The necessity of qualified jurists is of utmost importance to Canadians and the daily function of our legal system. Canadians rely on Judges in many aspects of their lives and we require the very best occupying the bench. Improving the diversity of Canada's benches is a continuous multi-stakeholder effort and a challenge we must all embrace. We will continue to work with the judicial advisory committees, law schools, law societies, bar associations, and law firms to ensure highly qualified candidates that reflect the diversity of Canada and will achieve legal excellence are elevated to the bench.

It should be noted that of the seven judges the Minister refers to, four were actually appointed from the profession by other governments and subsequently elevated by the current government. Only three were in fact appointed from the profession by the Harper government.

[74] There were no territorial court appointments made by the federal government in the period of time I examined. Three Aboriginal persons were appointed to territorial superior courts between 2009 and March 2012. Including these appointments in the statistics results in an appointment rate of 2.6 per cent which, while much better, is heavily skewed by its reflection of three small superior courts providing services to 0.3 per cent of the Canadian population. See my discussion, *supra*, note 20.

[75] Statistics Canada, *Immigration and Ethnocultural Diversity in Canada* (Ottawa: StatCan, 2013), at 14. Online: <http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.cfm#a4>.

Vancouver at 45.2 per cent and Toronto at 47 per cent[76] — and 4.3 per cent of the Canadian population is Aboriginal.[77] While the demographics of the profession do not match the demographics of the population, there is clear evidence that the profession is changing. Two recent studies by the Law Societies in Ontario and British Columbia have detailed these demographic shifts.[78] Both are based on the 2006 Census. Numbers have presumably continued to increase in the eight years since then. In 2006, Aboriginal lawyers in Ontario represented 1 per cent of the profession,[79] while 11.5 per cent of Ontario lawyers (or 3,685) were from visible minority communities in 2006. In British Columbia the percentages were very similar: 1.5 per cent of the profession were Aboriginal and 14.6 per cent were from visible minority communities. One does not need

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[76] *Id.*, at 17. Online: <http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/2011001/tbl/tbl2-eng.cfm>.

[77] Statistics Canada, *Aboriginal Peoples in Canada: First Nations People, Métis and Inuit* (Ottawa: StatCan, 2013), at 6. Online: <http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm>.

[78] For example, see the Report prepared on behalf of the Equity and Diversity Advisory Committee for the Law Society of British Columbia: "Towards a More Representative Legal Profession: Better practices, better workplaces, better results" (June 2012), online: <https://www.lawsociety.bc.ca/docs/publications/reports/Diversity_2012.pdf> [hereinafter "B.C. Report"]. The Report contains comprehensive statistics on Aboriginal and visible minority lawyers in British Columbia. See also Ornstein, *Racialization*, *supra*, note 68. That report states (Executive Summary, at 3):

> The legal profession in Ontario is changing dramatically. The number of lawyers who are women, Aboriginal and members of a visible minority continues to grow, transforming the face of a profession that until the early 1970s was primarily White and male. … Leading the transformation is an extraordinary increase in the percentage and number of women lawyers. Accounting for just 5 percent of Ontario lawyers in 1971, growth in the number of women lawyers has continued unabated for 35 years. In 2006 women accounted for nearly 60 percent of the youngest lawyers and 38 percent of all lawyers in Ontario. This trend will continue as older, predominantly male cohorts retire. In the last decade, gains in the representation of women are attributable largely to increased numbers of racialized women. Racialized women account for no less than 16 percent of all lawyers under 30, compared to just 5 percent of lawyers 30 and older; racialized men account for 7 percent of lawyers under 30, compared to 6 percent of lawyers 30 and older. The percentage of Ontario lawyers who were Aboriginal was unchanged between 1981 and 2001, but increased from 0.6 to 1.0 percent between 2001 and 2006. …The progress of visible minority lawyers can be seen in the dramatic increase in the percentage of lawyers between the ages of 25 and 34 who are members of a visible minority: 2 percent in 1981, 3 percent in 1986, 6 percent in 1991, 11 percent in 1996, 17 percent in 2001 and 20 percent in 2006. This trend will also continue as older, predominantly White lawyers retire.

[79] In Ontario, 80 Aboriginal lawyers were between the ages of 45 and 64 and presumptively eligible for judicial appointment. Almost 700 visible minority lawyers were between the ages of 45 and 64. See Ornstein, *Racialization*, *id*. In British Columbia, at least 65 of the 160 Aboriginal lawyers had the requisite 10 years of experience, while 300 visible minority lawyers were between the ages of 45 and 64: B.C. Report, *id.*

sophisticated statistical skills to comment on what is obvious. The demographics of federal judicial appointments have failed to keep pace with the changing demographics of the profession. And, they have failed utterly to respond to the changing demographics of the population.

3. Professional Experience

Judicial advisory committees are instructed to give "due consideration to all legal experience, including that outside a mainstream legal practice."[80] Mainstream is unexplained, but it is clear that a host of assumptions are captured by the claim that legal practice can be so categorized, as well as in the sub-textual inference that the committee may instinctively privilege particular types of practice. The judicial appointments announcements on the Department of Justice website are more boilerplate than informative. A typical announcement identifies the new justice's most recent professional experience, the justice whom he or she will replace and the effective date of the appointment. A short paragraph or two is devoted to education, date and location of call and professional history, including a brief description of primary practice areas. The final paragraph is usually a nod to professional activity, such as membership in the Canadian Bar Association, participation in professional organizations, teaching experience in Continuing Legal Education, bar admission courses or other educational institutions, and membership in societies like the Advocate's Society. Community involvement, when mentioned, is often vague — although service on community boards and membership in community service organizations is sometimes specified. In short, it is extremely difficult to glean much, if anything, about the appointee's life.

Recognizing that the practice descriptions employed in these terse paragraphs will tend to mask and homogenize professional experience, it is nevertheless clear that certain professional profiles dominate. An astonishing 48 per cent of the 107 appointees (52) were described as either civil litigators or corporate/commercial lawyers. Other numerically significant groups included six sole practitioners, eight lawyers with a focus on family law, and six (non-criminal) government lawyers. Eighteen of the appointees specialized in criminal law — and 17 of those

[80] "Process for an Application for Appointment: Assessments and Confidentiality", available online: <http://www.fja.gc.ca/appointments-nominations/process-regime-eng.html>.

(or 95 per cent) were Crown prosecutors. Notable by absence or omission were references to clinic experience, social justice work, human rights or public interest advocacy, with the exception of the one law professor who was appointed with a combined record of academic work, advocacy and litigation experience from a large firm. The absence of application statistics makes it impossible to know whether there is, in fact, a dearth of applicants from these practice fields, or whether there is an appointment preference at work.

Two comments are in order. First, these terse official announcements are in marked contrast to the personal narratives presented by both the Minister of Justice and individual nominees at the Parliamentary Hearings on Supreme Court nominations. In these circumstances we hear about parents who were underpaid hockey players and professional singers, summer work on road gangs, the value of exposure to difference, and the importance of immigrant heritage.[81] These remarks of Justice Karakatsanis are typical: "I have always felt grateful to be able to draw on the strengths of different cultures, and my immigrant heritage has also been important to me in my professional life. I believe it has made me more sensitive to the challenges that immigrants face and more receptive to different cultures."[82]

American scholar Sherrilyn Ifill makes a similar observation about the nomination hearings for the Supreme Court of the United States. She writes:

> The effort by the nominee is always to communicate something very specific to the American public at the outset of the hearing. Even though I'm a highly educated judge, I'm like you at my core. I understand your experience and the experience of average people. In fact, nominees are telling the public to believe that, in addition to what the nominees learned in law school, in the practice of law, or as judges on the bench, they will take something more into the conference room. They will take with them an understanding of how life is lived for average people.[83]

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[81] Transcripts of the committee hearings can be found on the Department of Justice website: <http://www.justice.gc.ca/eng/news-nouv/ja-nj.asp?tid=4>. For discussion of these hearings, see Mathen, *supra*, note 49, at 61-65. For a careful review and analysis of recent reforms to the Supreme Court appointment process, see Adam Dodek, "Reforming the Supreme Court Appointment Process, 2004-2014: A 10-Year Democratic Audit" in this volume.

[82] Ad Hoc Committee on the Appointment of Supreme Court of Canada Justices, October 19, 2011, online: <http://www.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc_32665.html>, at 1620-25.

[83] Sherrilyn Ifill, "Judicial Diversity" (2009) Autumn 13 Green Bag 2d 45, at 46.

For Ifill this demonstrates our instinctive understanding of the need for diversity on the bench. I would add that it also demonstrates our understanding that humanity, in all its rich complexity, is essential for judgment. There is simply no way to assess the human qualities we value, and the human qualities which even the government recognizes as essential to the capacity to judge, from the information provided to the public on judicial appointees. The most benign interpretation of this informational vacuum is the privacy of the appointee. However, I would argue that the public nature of judicial appointment, the public trust which it implies, and the public good which it serves, require more information. We are entitled to know who our judges are. And, we are entitled to know how well the institution reflects the population it serves, whose legal and constitutional rights offer it legitimacy. I agree with Sossin, who argues:

> [A]ccountability depends on a clear and comprehensive base of data. … We know virtually nothing about who is applying, who is not applying, and why, nor how the government chooses from among "qualified" applicants once the lists generated by the advisory committees are complete. … [H]ow merit is defined, what data are collected and disseminated about the appointments process, and which communities are over or under represented in Canada's judiciary, all bear on the role of the courts in a constitutional democracy and a pluralist society.[84]

Second, despite the informational inadequacies of these descriptors, common sense tells us that recent federal judicial appointees are remarkably professionally homogenous, with the kinds of professional expertise that do not translate easily into a capacity to understand the social and personal contexts of private citizens who turn to the courts to resolve often deeply personal conflicts. Retired Justice Martinson has adverted publicly to the potentially discriminatory outcomes for women and vulnerable peoples when judicial appointments appear to over-privilege certain professional experience. Referring to the shortage of family law experience on the British Columbia bench, she wrote:

> [T]he assumption among many members of the legal profession seems to be that family law is not a serious branch of law, but something that is more intuitive, not requiring particular legal expertise or skill. … This is difficult to understand. Family law, among other things, grapples with fundamental societal issues and values that affect

[84] Sossin, "Accountability", *supra*, note 9, at 42.

> everyone, requires a consideration of the meaning of substantive equality in our Charter, and deals with issues of fairness and judicial impartiality. Family law is also critical to the public's perception of the justice system. This is the area of law where most people come into contact with the legal system and it shapes the way people view the fairness of laws and court processes. Family law issues, particularly those relating to child custody, child protection, and financial support, matter a great deal to women.[85]

These same arguments can be made with equal force with respect to the criminal law. The very structure of criminal practice, and the choice that it requires from lawyers, reflect its multidimensionality, and the important constitutional rights at play when the state is pitted against the criminal accused. Criminal law is where the state and the individual citizen come into direct conflict, and criminal law requires a depth of expertise on a range of constitutional rights as well as empathy for the human condition. It requires a sophisticated understanding of the kinds of disadvantage and inequality which characterize most of those caught up in the criminal justice system as accused, victims and members of the broader community.[86] It is hard to resist the conclusion that the overwhelming preference for Crown prosecutors in federal judicial appointments reflects the government's political agenda, an agenda which was overtly reflected in the addition of a law enforcement representative to the judicial advisory committees in 2006. Indeed, Prime Minister Harper is on record linking the government's determination to "crack down on crime" with judicial appointments, saying: "We want to make sure our selection of judges is in correspondence with those [safer streets and communities] objectives."[87]

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[85] Marjorie Griffin Cohen & Donna Martinson, "Supreme Court of B.C.: Who's the Judge?" *The Vancouver Sun*, online: <http://www.vancouversun.com/technology/Supreme+Court+judge/7427983/story.html>.

[86] Rosemary Cairns Way, "Attending to Equality: Criminal Law, the Charter and Competitive Truths" in Benjamin Berger & James Stribopoulos, eds., *Unsettled Legacy: Thirty Years of Criminal Justice under the Charter* (Markham, ON: LexisNexis Canada Inc., 2012) (also published in (2012) 57 S.C.L.R. (2d) 39).

[87] *House of Commons Debates*, No. 110 (February 14, 2007), at 1420, online: Parliament of Canada <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Ses=1&DocId=2700118>.

V. CONCLUSION

In 2008, Lorne Sossin warned that our appointment process was out of step with our "legal and political culture", despite the fact that the traditionally high quality of the appointees meant that "fixing judicial appointments truly [may be] a solution in search of a problem".[88] Six years and hundreds of appointments later, the problems seem less abstract, and the need for a solution, more urgent. This paper has focused on the continuing lack of diversity on the federal bench and has characterized it as a problem of constitutional dimensions. While imagining a total transformation of the appointments process is politically naïve, there are still opportunities for strategic interventions intended to challenge the current climate of deliberate indifference to diversity. Here are a few modest suggestions.

The first antidote to indifference is information. It is time to insist that the government collect and make publicly available information about relevant characteristics of the applicant pool, as well as of the bench. Ongoing efforts in the United Kingdom provide an example of *bona fide* efforts to diversify the judiciary firmly rooted in, and driven by evidence.[89] The rigorous analysis undertaken by the Advisory Committee on Judicial Diversity, the creation of a Judicial Diversity Taskforce to oversee delivery of the Committee's recommendations, and the yearly reports submitted by that Taskforce, are evidence of a continuing commitment to statistical transparency and public accountability. Second, further research is needed on the possibility of constructing a Charter claim around the continuing failure to take representativeness seriously. In my view, this claim is particularly resonant with respect to the continuing, judicially noticed, discrimination imposed on Aboriginal peoples by and within the legal system. Third, members need to insist that both the Canadian Bar Association and the provincial law societies only nominate appointees to the judicial advisory committees who will bring a commitment to, and an understanding of, the representation project to their role on the committees. In other words, those with the power to nominate members of the judicial advisory committees must do so in a way which will increase the likelihood that diversity is, at least,

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[88] Sossin, "Accountability", *supra*, note 9, at 12.

[89] For an example of how diversity statistics could be compiled and made available to the public, see information from the Judiciary of England and Wales, online: <http://www.judiciary.gov.uk/publications-and-reports/statistics/diversity-stats-and-gen-overview>. See also "Data and Diversity", *supra*, note 16.

named during committee deliberations. Fourth, both the public and professional media should be encouraged to attend to the question of how individual appointments contribute to ensuring that the judiciary is in fact "representative of the public it serves". As Donna Martinson has observed, law societies are well placed to "monitor the issue of diversity in judicial appointments [alone and/or] in collaboration with other organizations, such as the Canadian Bar Association".[90]

Former Minister of Justice and Minister of Public Safety Vic Toews was appointed to the Manitoba Court of Queen's Bench on March 7, 2014. Justice Toews' appointment triggered a (relatively) vigorous public and media response. William Trudell, chair of the Canadian Council of Criminal Defence Lawyers, wrote the following pointed but still polite letter to the editor of *The Globe and Mail*:

> We congratulate Vic Toews on his appointment as a judge of the Manitoba Queen's Bench. We are confident that he will park his politics at the courtroom door, as all judges must, and that once he takes the oath, he will apply the law with wisdom, compassion and fairness. He can no longer be a spokesperson for a rigid law and order agenda.
>
> We are aware that the Prime Minister has stated publicly on more than one occasion that he wants a certain type of judge to reflect his government's policy.
>
> In Canada, judges are not puppets of the state. We expect that Justice Toews agrees.[91]

One lawyer who represented a number of clients affected by the former Minister's political decisions commented, politely: "One hopes that, in his judicial persona, he finds a way to be judicial, to consider all sides and ensure fairness."[92]

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[90] Speaking Notes, *supra*, note 56.

[91] Contributed to *The Globe and Mail*, "March 12: Inside the PQ's tent – and other letters to the editor", *The Globe and Mail*, March 12, 2014, online: <http://cached.newslookup.com/cached.php?ref_id=123&siteid=2115&id=5181995&t=1394600400>.

[92] Mary Agnes Welch, "A Closed Mind on the Bench?" March 13, 2014. Online: <http://www.winnipegfreepress.com/local/a-closed-mind-on-the-bench-250014831.html>. The article includes a smorgasbord of judicial commentary on Minister Toews' right of return decisions which were reviewed by the Federal Court, many of which suggest, in my view, that in his political role Minister Toews failed to consistently display the capacity to exercise sound judgment, or the common sense, integrity, fairness, or sense of responsibility listed as relevant criteria for appointment on the OCFJA website.

I think the time has come to stop being polite. I agree with Professor Jamie Cameron, who said, when asked about the Nadon appointment, that she was abandoning her usual policy of "no comment", because she believed that the appointment reflected "the Prime Minister's lack of respect for the Supreme Court as an institution".[93] In my view, the Harper record of superior court appointments is just as disrespectful of the institutional integrity of the federal judiciary. Although the lack of transparency makes it impossible to be certain, the evidence strongly suggests that representativeness is not only being ignored — it is being consciously ignored. The result of that conscious disregard is the maintenance of a homogenous status quo which is impossible to justify. In my view, the continuing lack of diversity on the bench threatens the capacity of Canadian courts to deliver truly impartial justice in a time of rapid change, increasing diversity and mounting inequality. We all deserve better.

VI. POSTSCRIPT

The final draft of this essay was submitted for review on May 15, 2014. Since that time, there has been a flurry of attention to federal judicial appointments, triggered primarily by a raft of appointments made on June 13, 2014.[94] Thirteen appointments or elevations were made on that date. Six were elevations from provincial and superior courts and seven were new appointments. All seven of the new appointments were male, and five of the six elevations were also male. These appointments were, not unusually, ignored by the media, until June 18, when it was reported that Justice Minister MacKay had responded to questions about judicial diversity at an Ontario Bar Association meeting with comments which allegedly focused exclusively on women and their reluctance to apply for judicial appointment because of the demands of young children, the existence of an "old boys club" and the demands of judicial travel.[95] Reports of the Minister's remarks set off a storm of controversy

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93 *Supra*, note 7.

94 See the OCFJA website, *supra*, note 3, for details.

95 A sampling of reporting on these comments, which the Minister has, at different times, contested making, argued were taken out of context, and reiterated includes: Tonda MacCharles, "Peter MacKay tries to explain lack of diversity on federal courts" *Toronto Star*, June 18, 2014, online: <http://www.thestar.com/news/canada/2014/06/18/peter_mackay_tries_to_explain_lack_of_diversity_on_federal_courts.bb.html>; Tonda MacCharles, "Lawyer disputes Peter MacKay's claim that women, visible minorities don't apply to be judges" *Toronto Star*, June 19, 2014, online:

with respect to the government's record on gender. Despite the attempts of a number of commentators to shift the debate to include other diversity criteria, the media seemed content to focus on gender — likely because of the astonishingly antiquated perceptions of parenthood and female ambition reflected in the Minister's words. The Minister's reaction, the public debate, and the media interest suggest that, at least with respect to gender, the government's conscious disregard of diversity is becoming less politically and publicly defensible. This is a good thing. However, in my view, gender equality claims are much easier to assert (if not necessarily to uphold) than are claims about racial or other forms of diversity, a truth made evident by the relatively narrow focus of the latest appointment controversy. I suspect that those who hope that the government will modify its pattern of indifference to "pervasive patterns of under-representation in our judiciary"[96] will continue to be disappointed by its judicial appointments. I would love to be proven wrong.

<http://www.thestar.com/news/canada/2014/06/19/lawyer_disputes_peter_mackays_claim_that_women_visible_minorities_dont_apply_to_be_judges.bb.html>; Chantal Hébert, "Peter MacKay — the kamikaze justice minister: Hébert" *Toronto Star*, June 20, 2014, online: <http://www.thestar.com/news/canada/2014/06/20/peter_mackay_the_kamikaze_justice_minister_hbert.bb.html>; Tonda MacCharles, "Peter MacKay uses Facebook to rebut 'inflammatory' media reports" Toronto Star, June 23, 2014, online: <http://www.thestar.com/news/canada/2014/06/23/peter_mackay_uses_facebook_to_rebut_inflammatory_media_reports.html>. See an excerpt from the Minister's Facebook response *supra*, note 73. The response also states:

> There has been a lot of inaccurate and inflammatory rhetoric in the media based on false comments attributed to me. Specifically, that: 'Women don't apply to be judges because they fear this may take them away from their children' and '...that children need their mothers more than their fathers.' These 'quotes' attributed to me in a closed meeting, are comments I did not make. These allegations are simply untrue and in fact the opposite of everything that I said. Rather, in addressing a few dozen lawyers I took the opportunity to encourage MORE women and minorities to apply to be judges, to enable the Federal Government to promote them to the bench and thus to better reflect the diversity that is Canada today. That was the intent and tone of my remarks.

[96] See the op-ed by Rosemary Cairns Way, Adam Dodek, Carissima Mathen & Lorne Sossin, "Forget MacKay, a woman's place is on the bench" *The Globe and Mail*, June 20, 2014, online: <http://www.theglobeandmail.com/globe-debate/forget-mackay-a-womans-place-is-on-the-bench/article19256607/?service=mobile>.