2009

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Should Canada Have a Representative Supreme Court?

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INTRODUCTION

Should Canada have a representative Supreme Court? While the idea has an undeniable appeal, and is received wisdom in a variety of institutional settings in the public sphere (the federal public service, for example, is committed to becoming a representative institution), it sparks some questions. What groups or values should judges represent and how should they represent them? By what criteria should representation be assessed and in whose eyes? Finally, what does representation mean to and for the Supreme Court, and those affected by its decisions?

This set of interlocking questions must be asked against the backdrop of two broader debates in Canada – one surrounding judicial appointments and the other involving the evolving law of bias in judicial decision-making. In other words, the value we assign identity and experience of Supreme Court justices cannot be disentangled from how we appoint them, or from how we understand judicial impartiality more broadly.

In this essay, I elaborate on the questions set out above and focus on the relationship between a representative court, judicial appointments and bias. My analysis is in three parts. In the first part, I explore Canada’s increasing multicultural make-up, the rationales for a Court that reflects the diversity of Canadian society, and the current approach to representation on the Supreme Court of Canada. In the second part, I consider the relationship between a representative court and judicial impartiality, with particular focus on the Supreme Court’s decision in *R. v. R.D.S.* in 1997. Finally, in the third part, I examine the relationship between representation and judicial appointments.

I conclude that the Supreme Court, for reasons tied both to democratic legitimacy and the quality of adjudication, ought to be composed of people with a mix of identities and experiences that broadly reflects the Canadian experience. This shift to value identity and experience more transparently may mean that, in years to come, the Court will and should “look” different than it now does, but in order to achieve a genuinely reflective Court, we will need both a broader and a deeper conception of diversity. Further, as part of this conceptual shift, we will need to develop along the way a broader and deeper understanding of judicial impartiality and the judicial appointment process.

PART ONE: TOWARD A REPRESENTATIVE SUPREME COURT?

Canada has been transformed from a society with predominantly European roots into one that embraces many cultures and traditions. One Canadian in nine is a member of a visible minority group and more than half of the residents of Canada’s largest city, Toronto, were born outside Canada or are from a visible minority community. There are more than ninety different ethnic groups in the Toronto Census Metropolitan Area (CMA) and over one million non-English or French speaking people. The top six ethnic groups in Toronto include: European (997,180), East and Southeast Asian (488,350), British (457,990), Canadian (311,965), South Asian (291,520) and Caribbean (167,295).

In the 1996 census, visible minorities in Canada numbered more than three million. Two million came as immigrants; one million are Canadian by birth. As a result, a variety of private and public institutions has had to grapple with the question of whether particular communities are over or underrepresented in their workforces. A federal government report emphasized that the federal public

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service is supposed to serve all Canadians, yet its workforce does not reflect the diversity of the Canadian population. The report pointed out that visible minorities are under-represented and that, in 1999, only one in 17 employees in the federal public service was a member of a visible minority group and that visible minorities are almost invisible in the management and executive categories (one in 33).²

Visible minorities, of course, represent only one of many communities of identity that one might wish to see reflected on the Supreme Court (a Court which, to date, has not had an appointment from a visible minority community). I believe it is important at the outset to address what we might mean by diversity when it comes to the composition of the Supreme Court.

As discussed below, the overarching priority for the government in Supreme Court appointments is regional diversity, driven in part by the statutory requirement to appoint at least three judges from Quebec. Regional diversity also is a proxy for linguistic diversity (at least between anglophones and francophones).

Since the enactment of the Charter, and the appointment of Bertha Wilson as the first woman on the Supreme Court in 1982, gender representation has become a consistent factor in discussions of a representative Court. The focus on gender was no doubt intensified by the engagement of the Court with a series of high-profile Charter and human rights cases involving equality rights relating to gender. While focusing on barriers of gender in society, it was natural for the court to pay more attention to barriers in the legal profession and the underrepresentation of women on the bench generally and on the Supreme Court in particular. By 2004, four out the nine justices were women and Beverley McLachlin had been appointed Chief Justice of the Court. The logic between the subject matter of the Court’s decision-making and a focus on its composition is not always straightforward. While the Court has championed gay and lesbian rights under the Charter, for example, no similar scrutiny has been brought to bear on the sexual orientation of Supreme Court justices.

Religion remains a controversial community of identity for a host of reasons. As a secular institution of government, there is no obvious reason why the religious affiliation or beliefs (which may not be the same!) of Supreme Court justices should be relevant. That said, because religious approaches to morality and justice parallel aspects of the legal system so closely, it would be disingenuous to suggest religion has nothing to do with judging. Further, religious communities often overlap and interact with communities of ethnicity. In an aboriginal context, for example, spiritual beliefs cannot easily be disentangled from community identity.

Other kinds of identity change over time. For example, by definition, every Supreme Court justice was once young but no longer is at the time of her or his appointment. Does the experience of youth mean justices tend to have the ability to identify with the problems of youth, or does the distance from this experience mean justices lack this ability? The same might be said of a judge’s socioeconomic status. While some may have grown up or lived part of their life in poverty, this is by definition not the case once an individual is appointed to the Supreme Court and is thereby the recipient of an annual salary in the range of $300,000.

Importantly, there are also communities of identity that remain largely hidden, but which may reflect important experiences for a representative Supreme Court to draw upon. For example, having had exposure to mental illness such as depression or schizophrenia or people suffering from trauma related disorders could well provide rich insight for a judge, but many may choose not to disclose this experience. Growing up in poverty or emotional deprivation similarly shape identity but in ways that are difficult to measure. People also may choose not to identify with a community of identity. Someone born into a religious community may decide to have no connection to that community later in life. Someone

² Ibid. at 20.
with a physical disability may choose not to view themselves as disabled or identify in any way with others who share a similar condition.

Any concept of a representative or reflective Supreme Court has to confront the almost infinite complexities of pluralism both within and between communities of identity. This complexity includes both intersectionality (some people might both be members of a visible minority and a religious majority, or be at once transgendered and disabled), and individuality (no category or categories of identity can capture all of the unique experiences and perspectives that make every person an individual). For both groups, identity may be a dynamic rather than a static phenomenon, and the very act of attempting to “categorize” a person may be perceived as illogical and even offensive.

Finally, it is important to clarify that not all communities of identity need be treated or valued in the same way. Membership in majority communities may be less important for the Court to “reflect” than minority or marginalized communities. While there undoubtedly will be intense scrutiny of the experience of the first South-Asian or African-Canadian Supreme Court justice, few would suggest that an additional “white” perspective is important to the Court.

The purpose of the above discussion is not to settle on a definitive meaning of diversity or the categories which will or should “count” for purposes of achieving a representative Supreme Court. Rather, my comments are intended to hint at why a broader and deeper approach to diversity is needed, one that accommodates both the aspects of people that we can see and those we cannot. Like Canadian society, the Supreme Court ought to be seen as a complicated, evolving and heterogeneous community. To the extent that the composition of the Court has failed to keep pace with the changes in Canadian society, in my view, we should view this as a deficiency to be remedied.

Beyond attempting to broaden and deepen what we take diversity to mean, I believe it is also important to understand why a court should reflect the diversity of society. Do we, and should we, expect the decisions reached by a representative judiciary to differ from the decisions reached by an unrepresentative judiciary (or a judiciary selected without representation in mind)? Would a representative Court be any less valuable if it turned out not to lead to any measurable difference in outcomes than a homogenous Court? Is the ideal of a representative Court symbolic, substantive or a little of each?

It is to the rationales for a representative court in a multicultural society that I now turn.

A. The Rationales for a Representative Court

Liberal democracy is built on the claim that public institutions should be inclusive, and is tied directly to the aspiration of “government by the people.” This interest in a barrier-free route of entry into the judiciary is of particular concern in Canada, as for many decades the Canadian judiciary was a vehicle for social exclusion.

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3 For a review of this trend, see Vidu Sonhi, “A Twenty-First Century Reception for Diversity in the Public Sector: A Case Study” (2000) 60 Public Administration Review 395.


The removal of barriers, however, is not the same as the proactive commitment to a representative judiciary. An actively representative court implies that judges will actively “represent” the interests, values or representativeness of their community. A passively representative court suggests that judges would not seek to represent their communities but that demographic proportionality is a good in and of itself. Many proponents of passive representation, however, assume that active representation is a likely consequence of such changes to the make-up of the judiciary. Whatever the relationship between the two, the tension between passive and active representation in the judiciary raise important issues as to the rationale of a representative court.

1. **Fairness: The exercise of adjudication should reflect values of the community.**

A compelling rationale for a judiciary that reflects society is that fair adjudication requires it. Judicial decision-making calls on judges to determine who is credible, what would shock the conscience of Canadians, what would bring the administration of justice into disrepute, what limitations on rights are justified in a free and democratic society, just to name a few. These sorts of subjective determinations ought to reflect the community’s mix of identities and experiences. Fairness in a pluralist society, in other words, requires pluralist decision-making.

2. **Reasonableness: The more perspectives and backgrounds included in public decision-making, the more reasonable those decisions will be.**

On this rationale, related to the fairness of decision-making, different voices and perspectives will help refine and improve the quality of judicial decision-making.

This rationale reflects the claim that a representative judiciary will adjudicate in a more compassionate, empathetic and effective manner than a judiciary that is not representative. This claim is particularly apposite in the context of appellate adjudication which makes decisions as panels, where judges must deliberate and craft decisions collaboratively.” Thus, one can see the fact that the Supreme Court sits as a bench of 5, 7 or 9 as an indication that pluralist perspectives are valued. A homogenous bench reflecting the same identities and experiences would defeat the purpose of this appellate structure.

3. **Equality: In a society devoted to the constitutional value of equality, courts should be responsive to the ethnic, cultural and gender composition of the population it serves.**

Whether or not a difference in the Court’s make-up leads to any apparent difference in its decision-making, a representative Court still may be justified on grounds of democratic legitimacy and equity. In a democratic society with an aversion to discrimination, we should expect the Court to reflect society. Therefore, where there is no substantive difference in suitability for the judicial role, as in the case of gender, underrepresentation is presumptively a concern. This factor is amplified by the fact of

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6 For one of the first studies to focus on this distinction, see David Rosenblook & Jeanette Featherstonhaugh, “Passive and Active Representation in the Federal Service: A Comparison of Blacks and Whites” (1977) Social Science Quarterly 873.


political accountability of the government for its judicial appointments. Since governments are accountable for their appointments to the Supreme Court, if that Court fails to resonate with the public, it is the government that pays a political price.

While political accountability may suggest an inclination to reflect majority will, as with the development of the constitutional ideal of equality under section 15 of the Charter, we should also be more concerned with representation of disadvantaged and disenfranchised minorities. In other words, the underrepresentation of otherwise disadvantaged or marginalized groups will merit remedial measures more than the underrepresentation of otherwise privileged groups. Whether or not members of underrepresented groups bring fresh and different perspectives to these kinds of decision-making settings, if groups are underrepresented in the judiciary, this may undermine public confidence in these critically important judgments. Underrepresentation may be particularly damaging in minority communities which are otherwise discriminated against, vulnerable or marginalized.

4. Minority Rights: The Court's commitment to the protection of minority rights and reconciliation between communities through constitutional interpretation is enhanced by a Court with first-hand experience with the minority/outsider experience.

Entry of its members into the judiciary is a tangible sign of enfranchisement for minority groups, especially new immigrant communities. Beyond its symbolic significance, it is also a tangible conduit of social mobility for many groups who confront discrimination, exclusionary requirements or other barriers in society. As Sonia Lawrence has observed, “we cannot ignore the connection between the judiciary and the other hierarchies which mark our society without allowing the judiciary to be a(nother) symbol of hierarchy through difference, another marker of where power resides in terms of colour, ethnicity and gender.”

For Lawrence, the bench is another example of persistent exclusion, and as such it may undermine the confidence of the public, particularly those sections that are unrepresented. In other words, if the consequences of a homogenous bench could include a loss of faith in the ability of the courts to deliver fair and impartial justice, this creates a clear and important role for diversity on the bench in establishing and maintaining judicial independence.

Conclusion

As I have attempted to show, these rationales raise significant questions and concerns which are rarely the subject of serious debate. In Canada, at least, the aspiration for a representative judiciary has become an article of faith tied to support for multiculturalism. To agree with the aspiration, however, is not necessarily to subscribe to any or all of these rationales. Yet the rationales, it seems to me, are as important as the aspirations (and in some cases may be more so). Depending on which of these rationales predominates, one may develop more passive or more active expectations of how representation will influence discretionary decision-making.

In the analysis below, I explore this apparent dichotomy and suggest problems in viewing representativeness only through passive or active lenses. In areas where discretion turns on value structures, administrative culture and empathy, this bright line becomes decidedly blurred. Here, the question is not whether decision makers represent particular viewpoints, perspectives and preferences but simply which viewpoint, perspective and preference is given priority and why, and how a justice system

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committed to transparency ought to address the ways in which the humanity of decision makers informs their judgments.

**B. Representation and the Supreme Court of Canada**

The Supreme Court is distinct among Canadian courts in that appointments to it already are based on representative principles, at least in limited ways. The point of departure for representation on the Supreme Court is regionalism. By virtue of s.6 of the *Supreme Court Act*, at least three judges must be appointed from Quebec. While the principle underlying this provision appears to be to ensure a sufficient number of judges are proficient in the Civil Law of Quebec, there may be other goals which this requirement serves – for example, to ensure at least a component of the Court has been exposed to issues of minority rights protection inherent in the Quebec experience. Because three of the nine judges on the Court will come from Quebec, the Government has recognized the principle of regional representation more broadly, roughly in correlation to population. As a result, in addition to the three judges from Quebec, the Court will also have three judges from Ontario, one judge from the Atlantic Provinces (with a loose understanding that the appointment should rotate between provinces, so that with the retirement of Justice Michel Bastarache from New Brunswick in 2008, the Government appointed Justice Tom Cromwell from Nova Scotia), one judge from British Columbia, one judge from the other Western provinces (Alberta, Saskatchewan and Manitoba).

While regionally diverse,\(^{11}\) the Court historically was criticized as overwhelmingly homogenous. As Peter McCormick observed, "For most of the Court's history, the basic characteristics of its justices were easily described: They were middle-aged (or older) white professional males of British or French ethnicity."\(^{12}\) Writing in the 1970s, Paul Weiler stated bluntly that, “The most obvious limitation in the membership of the Supreme Court is that it is an all-male society.”\(^{13}\)

Because regional representation has been valued so highly, other forms of representation may have received too little attention. The exception to this rule has been those identity characteristics closely tied to regional representation (i.e. linguistic community and religion). For example, at least one of the non-Quebec judges historically has been francophone (examples would include LeDain, La Forest, Arbour, Bastarache, and most recently Charron).\(^{14}\) A similar proxy-regional concern was the mix of Catholic and Protestant Supreme Court justices. It was therefore noteworthy when the first Jewish judge (Bora Laskin), was appointed in 1970. Justice Fish became the second Jewish member of the Supreme Court in 2004, joined by Abella later the same year, and subsequently by Marshall Rothstein in 2008. The first woman, Bertha Wilson, was appointed as discussed above in 1982, and has been followed by L'Heureux-Dubé in 1987, McLachlin in 1989, Arbour in 1999, Deschamps in 2003, Abella in 2004, and Charron in 2004. John Sopinka, a Ukrainian-Canadian, was (apart from Laskin) the first person appointed who was not clearly of British or French descent, and Frank Iacobucci, an Italian-Canadian, was the second.

\(^{11}\) It is necessary to qualify the degree to which even regional diversity has been achieved. Important constituencies within the federation remain unrepresented, notably Canada’s three territories (Yukon, Northwest Territories and Nunavut). Additionally, the province of Newfoundland which entered Canada sixty years ago still has not had a Supreme Court judge.


\(^{14}\) The reverse convention—that one of the Quebec judges would be an anglophone—seemed to have gone into suspension after the 1954 appointment of Abbott, but may have been revived by the 2004 appointment of Fish.
While the diversity of the Court has clearly been enhanced over the past three decades, particularly with respect to the categories indicated above, the Court remains distinctively and remarkably homogenous. The Court has yet to have a justice from the aboriginal community, or someone not born into a Judeo-Christian religious culture, or from a racialized or visible minority community or openly homosexual. In this sense, at first glance, the Supreme Court appears markedly out of step with the rapidly evolving heterogeneity of Canadian society.

As discussed above, assessing the representative nature of the current Supreme Court is not as simple as a roll count of ethnicity, gender, religion or linguistic identity. Chief Justice McLachlin was born into a small-town community in Alberta, while Justice Abella was born into a displaced persons camp in Germany. Are these experiences not as formative as the various identity communities into which those judges might claim membership?

The discussion above on the rationales of a representative court becomes important in this context. If our concern is a diverse range of perspectives on the substantive issues which face the Court, we might privilege judges with diverse experience even if they are members of majority communities. If the more compelling rationale for a representative court is visual – that society see a Supreme Court that “looks like them” - then identity communities might take precedence even if this results in homogeneity of experience (e.g. judges from diverse ethnic communities who went to the same schools, practiced in the same firms, lived in the same neighbourhoods and enjoyed the same privileges). Clearly, experience may count as much as identity when it comes to the factors that shape a representative Court.

The question underlying the distinction between identity and experience may be which has a significant role in shaping judicial decision-making? The answer is certainly “both”. The relationship between identity and decision-making, however, is neither linear nor one-dimensional. Some have argued (myself included) that members of the Supreme Court have viewed the development of constitutional rights through the prism of their own life experiences. Yet, at the same time, it would be difficult to sustain the argument that the judges have been unable to reach beyond their own experiences in the application of Canadian law, and in particular the Charter of Rights and Freedoms. A Court had no member with aboriginal roots and yet was able to recognize aboriginal rights and value the aboriginal perspective in cases such as Calder and Sparrow.

While the identity of a judge does not dictate how that judge will decide any particular case, or even a class of cases, it arguably does affect the ideal of impartiality to which all judges aspire. It is to that question that I now turn.

PART TWO: REPRESENTATION & JUDICIAL IMPARTIALITY

The puzzle of a representative judiciary is that we want a diverse bench because their more varied experience will enhance judicial decision-making, and yet we worry about a representative judiciary

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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.

The absence of bias is sometimes referred to as an independent procedural entitlement, but in Canada, the Supreme Court has made clear that it should be understood as a further aspect of the duty of fairness.\textsuperscript{17} It is not necessary to establish actual bias in order to invalidate a judicial decision. Rather, the requirement is to demonstrate a mere reasonable apprehension of bias. The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in Committee for Justice and Liberty \textit{v. National Energy Board}:

...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [T]hat test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.\textsuperscript{18}

The standard for reasonable apprehension of bias, as with the other aspects of procedural fairness, will vary according to the context and the administrative decision-maker involved, so that it differs, for example, for a judge in a court and a judge appointed as a Commissioner of a public inquiry.\textsuperscript{19}

The originating principle of bias is that a decision-maker should not decide her or his own case. A reasonable apprehension of bias may arise when a party or witness is related to the judge. Relationships may be of a personal, professional or business nature. The issue is whether the relationship is such that a reasonable person might fear the decision-maker would not approach the matter with an open mind. As a result, not every relationship will result in a reasonable apprehension of bias. In the case of a purely professional association, for example, the associated tribunal might not rise to this standard if tribunal members are normally drawn from among the ranks of the profession in question. Judges may hear cases, for example, argued by lawyers who were once their partners. The courts have confronted only incidentally the question of whether membership in a particular cultural, racial, ethnic or linguistic group could give rise to a reasonable apprehension of bias. Judges address this issue individually when deciding if they need to recuse themselves from a particular matter. The failure to recuse in circumstances where the impartiality of the judge, and therefore the fairness of the hearing is in doubt, can lead both to grounds for reversing the decision on grounds of bias and potentially to a disciplinary proceeding against the judge for unethical conduct.\textsuperscript{20}

The Supreme Court considered these issues most squarely in the context of \textit{R.D.S. v. The Queen}.\textsuperscript{21} In that case, the trial judge (who was African-Canadian), was hearing a case involving an African-Canadian

\textsuperscript{17} See, for example, \textit{Baker v. Canada (Minister of Citizenship and Immigration)}, [1999] 2 S.C.R. 817 at 849.

\textsuperscript{18} [1978] 1 S.C.R. 369 at 394; this test was adopted in \textit{R. v. S. (R.D.)}, [1997] 3 S.C.R. 484, infra, discussed at 496 per Major J., 502 per L'Heureux-Dubé and McLachlin JJ. and 530-531 per Cory J.


\textsuperscript{20} A decision which gave rise both to a reversal and a disciplinary proceeding involved Justice Matlow. He participated in a decision quashing a City of Toronto construction project. Based on a conflict of interest arising from Justice Matlow’s opposition to a construction project in his neighbourhood, the decision in which Justice Matlow participated was reversed, and an Inquiry into his ethical conduct was undertaken by the Canadian Judicial Council – see \url{http://www.cjc-ccm.gc.ca/cmslib/general/Matlow_Docs/Final%20Report%20En.pdf}.

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 towards 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 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.

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. 408-409.22 (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.23

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 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.”24

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22 Ibid. at para. 119-120.

23 Ibid. at para 152.

24 Ibid. at paras. 44-45.
Thus, when one takes stock of the various concurring and dissenting judgments in the case, the majority of the Court found that the comments did not constitute a reasonable apprehension of bias, but that majority split on the question of whether it was desirable and appropriate that the trial judge refer to her own “personal understanding and experience of the society” in which she lived and worked. When combined with the dissenting judges who concluded the comments were both inappropriate and reflected bias, this led to the majority view in the case being, first that the comments did not render the decision legally invalid, but second, that it would have been preferable had the trial judge not addressed the social context surrounding that assessment in her reasons.

If judges follow the direction provided by a majority of the judges in R.D.S., we arguably would be left with a situation where judges were encouraged to draw on identity and experience in their decision-making but then required to explain those decisions on other grounds. We would, in other words, learn little about the influence of identity and experience on the content of judging.

The R.D.S. approach would impair the development of a judicial and public dialogue about the kinds of identity and experience related factors which ought to shape judgments, and those which ought not to do so. If judges rely on these factors to shape their decisions, but make no mention of them in their reasons, it may be difficult if not impossible to refine which kinds of experiences are appropriate to use and which might create a reasonable apprehension of bias. For example, if a judge has a child with special needs, should that judge sit on a case dealing with a constitutional challenge to underfunded programs for children with special needs? On the one hand, that judge will have special insight into the facts and issues raised in the case, and her judgment may be enriched by such insight. On the other hand, because the judge may be personally affected by the decision, would a reasonable person likely conclude that the judge could not be unbiased? If a parent of a child with special needs should not sit on a case involving funding for children with special needs, should only childless judges sit on cases dealing with public schools? At some point along the spectrum of judicial impartiality, we reach a point where identity and experience cannot be said to create bias, but without transparency in judicial decision-making, this spectrum will remain opaque.

Clearly, identity and experience have always influenced judging (even if this mostly has meant that the identity of being a member of the dominant community and the experience of privilege has shaped the judicial mindset), especially in contexts of credibility assessments. Yet, judges have rarely acknowledged the ways in which such cultural factors affect their decision-making - so, the prevailing view in R.D.S. simply restates and affirms the status quo.

Perhaps ironically, the decision that reflected the resilience of the status quo also set in motion significant change. One aspect of that change was a program initiated by the National Judicial Institute to educate the Canadian judiciary on “social context.” While controversial at the start, social context programs have become a well accepted part of judicial education, which enable judges to reach beyond their own experience.25

While there is arguably significant support for the move to a representative judiciary, and a judiciary with an understanding of social context beyond their own experience, there is real ambivalence surrounding what difference such a shift would generate. 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. To the extent we privilege identity and seek a Supreme Court that is representative, merit matters less; and, to the extent merit is the sole driver

of appointments, identity recedes as a priority. But need these concepts be oppositional? Should a candidate’s familiarity with another perspective or set of life experiences itself be an element 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.26

It is against this backdrop of the tension between objective merit and subjective identity that the selection process for Supreme Court justices emerges as a critical issue in reconciling the various aspirations we have for the Supreme Court. We need the Court to serve as an expression of democratic will and as an expression of counter-majoritarian protection for minority rights. Walking this particular tightrope is a quintessentially Canadian enterprise.

PART THREE: REPRESENTATION & JUDICIAL APPOINTMENTS

Should identity be a factor considered in merit-based judicial appointments, or as a justifiable exception to, or additional factor beyond merit? While the debate regarding merit is an interesting and important one, what is important to keep in mind in this discussion is the virtually unfettered nature of judicial appointments in Canada. Merit, in other words, is whatever the government decides it is.

There is no obvious connection between whether an appointment system is merit based or not and its reflection of society’s diversity.27 Some might argue that a more truly merit based system would remove the many barriers which marginalized, underrepresented communities now experience. Others might argue that a political commitment to diversity in appointments is more important than an allegedly objective set of merit criteria which simply would perpetuate existing barriers. Either way, I would suggest the key both to enhancing diversity and to enhancing the quality of appointments more broadly is transparency.

Transparency is critical as the appointment power afforded to the federal government is so expansive and is not subject, as a practical matter, to review or oversight. Under the Constitution Act, 1867, judges of s. 96 and s. 101 courts are appointed by the Governor-General in Council (i.e. the federal Cabinet), on the recommendation of the Minister of Justice (save for appointments to the Supreme Court of Canada and of Chief Justices, which are made on the recommendation of the Prime Minister). The Constitution Act, 1867 does not speak to the content of the judicial appointments process or to the criteria for judicial selection. The Charter of Rights and Freedoms is also silent on the appointments process, although s. 11 of the Charter states that “any person charged with an offence has the right... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”. (Emphasis added.) While independence and impartiality are guaranteed by constitutional and legal requirements, there is no legal answer to the question of the qualifications necessary for judicial office.


27 For a study attempting to find connections between methods of appointment and diversity, see Mark Hurwitz & Drew Noble Lanier, “Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts” (2003) 3 State Politics & Policy Quarterly 329. The study failed to identify a correlation between a particular appointment model and diversity.
The legislative framework for Supreme Court appointments, as set out in the *Supreme Court Act*, is straightforward. Section 5 indicates that, “Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.” The most remarkable and distinctive feature of the appointment criteria is the provision in the Act requiring “at least” three judges of the Supreme Court be from Quebec.

Some have raised the question about what other forms of representation ought to be similarly entrenched. A recent panel report on Supreme Court appointments, commissioned by the Canadian Association of Law Teachers (CALT), recommended that the proportion of women on the Supreme Court not be permitted to drop below the current level of four, and further recommended a requirement that at least one member of the Supreme Court be of aboriginal heritage (either as a constitutional or statutory amendment).

While the future of judicial appointments has engaged a growing community of academics and activists, we still know very little about the present. A rare window into the appointment process at the Supreme Court was offered by Minister of Justice Irwin Cotler, in 2004, when he appeared before a standing Parliamentary Committee on Justice, Human Rights, Public Safety and Emergency Preparedness to explain the government’s existing approach to Supreme Court appointments. He described the appointment process as it existed then as “not so much secretive as unknown.” He noted that no government had appeared before a parliamentary body to explain the process, and proceeded to do so, highlighting that the selection of a Supreme Court justice is the product of extensive consultations in the province or region where a vacancy has emerged (including discussions with the Chief Justice of Canada, the Chief Justices of the courts of the relevant region, the Attorneys General of the relevant region, at least one senior member of the Canadian Bar Association, and at least one senior member of the law society of the relevant region). He indicated that the assessment of potential nominees involved three categories of merit: professional capacity, personal characteristics and diversity. He described professional capacity in the following terms:

Highest level of proficiency in the law, superior intellectual ability and analytical and written skills, proven ability to listen and to maintain an open mind while hearing all sides of the argument, decisiveness and soundness of judgment, capacity to manage and share consistently heavy workload in a collaborative context, capacity to manage stress and the pressures of the isolation of the judicial role, strong cooperative interpersonal skills, awareness of social context, bilingual capacity and specific expertise required for the Supreme Court.

With respect to diversity, he stated simply, “Ce titre porte sur la mesure dans laquelle la composition de la cour reflète convenablement la diversité de la société canadienne.”

The lack of specificity with respect to diversity is as revealing as its inclusion as a selection criterion. Whereas professional capacity may be assessed by a range of objective factors, diversity is in the eye of the beholder.

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29 See “Canadian Association of Law Teachers Panel on Supreme Court Appointments”, online: Canadian Association of Law Teachers <http://www.acpd-calt.org/english/docs/SupremeCourt_panel.pdf>.


The evolution of Supreme Court appointments in Canada has culminated in a process with both an Advisory Committee for vetting names prior to the government’s decision and a hearing process before a Parliamentary Committee after the selection of a candidate for appointment. Importantly, however, the government is not bound by the outcome of either process, and in the case of Thomas Cromwell’s appointment in December of 2008, this process was not followed, and the appointment was simply announced by the federal government in the midst of its constitutional crisis after the Governor General prorogued Parliament.

In my view, the desire for a judiciary generally, and a Supreme Court in particular, which reflects Canadian society can only be satisfied by greater transparency by government in articulating the reasons for its appointments. If diversity is as significant an aspect of Supreme Court appointments as professional capacity and personal characteristics, then it is reasonable to expect government to account for the way or ways in which a candidate resonates with the diversity of Canadians just as government ought to be able to account for why the professional capacity and personal characteristics of a candidate led to the candidate’s selection.

In May of 2009, President Obama announced the nomination of Judge Sonia Sotomayor. In his remarks, he referred to Judge Sotomayor’s professional capacity (for example, her experience as a prosecutor, corporate litigator and trial judge) and her personal characteristics (being principled, practical, etc), but also spoke of her “inspiring example,” and her “extraordinary journey,” from a childhood spent in a housing project in the Bronx to scholarships at Princeton and Yale. Obama focused on the importance of her experience as a member of a disadvantaged minority community and her perseverance in surmounting barriers – this led, in his view, to her understanding of how “ordinary people live.”

While every Supreme Court justice’s path is unique, understanding what in that judge’s path is of value to the government is a necessary point of departure. Though necessary, justification and transparency by themselves are not sufficient. The goal of a representative Supreme Court is not only an aspiration which the government needs to advance. It also needs to be the subject of public engagement, legal discourse and political accountability.

CONCLUSIONS

Whatever the merits of a representative Supreme Court, it is clear that the composition of the Court reflects the commitments and challenges of a range of institutions beyond the Supreme Court, from universities and law schools, to law firms and organizations, to public servants, ministers and Parliamentarians. The pool of possible Supreme Court appointments, in other words, already reflects a filtering which leads to the structural underrepresentation of a host of communities for a host of reasons. By the same token, as those organizations make diversity an aspiration, there will be a “trickle-up” impact on Supreme Court appointments.

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32 Justice Rothstein was appointed following an aborted advisory committee vetting process (cut short by the Liberal’s election loss in 2006) and after a brief hearing before an ad hoc committee of MPs (which had concluded before its allotted time had expired, as the members of the Committee agreed they had heard enough to reach a conclusion). The conclusion was an enthusiastic endorsement of Justice Rothstein, and he was sworn in as a justice of the Supreme Court of Canada on 6 March 2006. See Peter Hogg "Appointment of Justice Marshall Rothstein to the Supreme Court of Canada" (2006) 44 Osgoode Hall L.J. 527-538.

33 See President Obama’s remarks at http://www.huffingtonpost.com/2009/05/26/sotomayor-video-obama-int_n_207548.html.
In addition, Supreme Court appointments have the power to create change throughout the legal community and beyond. For example, the appointment of Bertha Wilson as the first woman to the Supreme Court did not, overnight, remove gender barriers in the legal community, but her presence on the Court nonetheless had a transformative impact which made the appointment of other talented women both more likely, and indeed, expected.

Similarly, our understanding of judicial impartiality needs to be enhanced by the rationales for a representative Court. The most compelling rationales, in my view, focus on the fact that a progressive and multicultural society, committed to surmounting the barriers that marginalize the less powerful, should look to public institutions to be a reflection of society. This reflective aspiration includes more than the categories of identity that can easily be “counted.” Impartiality signifies an open mind, not a blank slate. One of the least helpful metaphors in the administration of justice is the notion that justice wears a blindfold. This image is meant to convey that the poor and the rich, the powerful and the powerless, all find equal justice in our courts and equal benefit of the law, and most of all in our Supreme Court. Justice, however, is not blind. It is informed by the humanity of the judges who stand at the fulcrum of the justice system. That humanity, of course, does not arise in a vacuum.

Ultimately, the argument for a representative Court, in my view, is an argument to ensure we do not lose sight of that humanity. It need not and should not lead to one-dimensional assumptions about how white males or women of colour see the world. It should, rather, lead to enhanced public understanding and public engagement with the justice system. This public discussion needs to be informed by clear and transparent accounts of how a Supreme Court justice’s identity, life experiences and perspectives are valued. This clarity and transparency begins with the government’s selection process. When it comes to Supreme Court appointments, the criteria should be clear, the process should be transparent and the outcome be explained by the government in as authentic terms as possible. That same commitment to transparency ought to continue through to the judicial decision-making process. Whether explaining determinations of credibility, or elaborating on concepts such as “reasonableness” and “fairness,” all judges and most of all Supreme Court justices ought to explore the extent to which their decisions are shaped by culture, ethnicity, religion, race, gender and life experiences. In this sense, R.D.S. represents an important early chapter in an unfinished manuscript.

The goal of this process is not to cast doubt on the legitimacy of the judicial process, but rather to situate that process within project of Canadian society. The Canadian project has its roots in accommodation, tolerance, mutual recognition, protection for minority rights, and democratic accountability. Given the centrality of the Supreme Court in articulating and advancing this project, it is worth understanding the Court as one of its primary works in progress.