

THE SEVENTH ANNUAL DEAN'S FORUM ON ACCESS TO JUSTICE AND DISPUTE RESOLUTION
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Diversity and Inclusion in the Legal Profession

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DEAN'S FORUM
ON ACCESS TO JUSTICE AND DISPUTE RESOLUTION

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EXECUTIVE SUMMARY

Access to justice is an urgent problem facing the legal profession and Canadian society. Barriers to access include the high cost and time involved in undertaking legal processes as well as cultural, geographical, and socioeconomic restrictions caused by marginalization, social exclusion, and bias. These barriers affect not only access to lawyers but also the constitution of law firms.

Existing research demonstrates that, while half of law students are female, just over a third of active lawyers are women. Further, the percentage of Saskatchewan lawyers who identify as Indigenous is significantly lower than the percentage of the overall population. There is no data on how many Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) lawyers are out at work.

Having a profession which is critical to society and yet unrepresentative of the Canadian population it serves, endangers its legitimacy and ability to serve diverse communities. **This policy paper aims to consider barriers to the legal profession for equity-seeking groups and how to foster an inclusive justice system by ensuring the legal profession is representative of Canadian society and thereby competent to meet its wide-ranging legal needs.**

Building on the work of previous years' Dean's Forums, we carried out a comprehensive literature review on the topic of diversity and inclusion as well as consultations with stakeholders in the legal profession. Based on the initiatives undertaken in Canada and other Commonwealth countries, as well as the insights provided by the interviewees, we have made three recommendations:

1. **That the Law Society of Saskatchewan collect data on the percentage of female, LGBTQ, and Indigenous lawyers at each firm, divided by associate and partnership positions;**

2. **That the Canadian Bar Association and the Law Society of Saskatchewan create a recognition program for firms that meet a certain threshold of female, LGBTQ, and Indigenous lawyers; and**
3. **That the University of Saskatchewan, College of Law incorporate content for first year students on the historical issues faced by women and LGBTQ people, and that it continue to build on its efforts to educate students on Indigenous peoples, laws, and the history of colonization.**

These recommendations serve three main purposes. The first recommendation seeks to obtain **reliable data on diversity in the legal profession in Saskatchewan**, which is essential for an accurate assessment of the efficacy of diversity and inclusion measures adopted by stakeholders in the legal community.

The second recommendation seeks to recognize firms that champion equal opportunities for female, LGBTQ, and Indigenous lawyers. Based on the consultations carried out with stakeholders in the legal community, **measures that recognize best practices and nudge firms towards being more diverse and inclusive** are preferable over compulsory requirements. **True inclusion requires changing hearts, not simply ticking boxes.**

The third recommendation acknowledges the **importance of educating future lawyers with respect to the historical legal constraints** imposed on women, LGBTQ individuals, and **Indigenous peoples**. Such knowledge is important to give context to the ongoing inequality that persists in society at large and in the legal profession. Without knowledge of the restrictions imposed by government on such groups, students may be prone to thinking that equity-seeking individuals do not hold high-level positions because they have not “tried hard enough.” The reality is that the **legislative barriers that prevented women, LGBTQ individuals, and Indigenous peoples from having equal constitutional rights for most of Canada’s history still play a role in today’s fight for equality of opportunity.**

1. INTRODUCTION

Access to justice is an urgent problem facing the legal profession and Canadian society. Barriers include the high cost and time involved in undertaking legal processes as well as cultural, geographical, and socioeconomic restrictions caused by marginalization, social exclusion, and bias.¹

These barriers affect not only access to lawyers but also the constitution of law firms. Having a profession which is critical to society and yet unrepresentative of the Canadian population it serves, endangers its legitimacy and ability to serve diverse Canadian communities. **This policy paper aims to consider barriers to the legal profession for equity-seeking groups and how to foster an inclusive justice system by ensuring the legal profession is representative of Canadian society and thereby competent in meeting its wide-ranging legal needs.**

The lack of diversity in the legal profession has been acknowledged for several decades.² **This issue is just as important now as it was several decades ago, if not more so.** The overall population of Saskatchewan is becoming increasingly diverse³ and a failure of the legal profession to be representative risks harming public trust in the profession's ability to provide the community with legal services. For this reason, **addressing diversity is a critical component of addressing the access to justice crisis.**

Diversity is difficult to address because **it is embedded in institutions, cultural practices, and socioeconomic realities.** Therefore, a primary theme emerging from consultations is that no one segment of the legal profession can address diversity on its own. Rather, the legal profession

¹ The Canadian Bar Association, *Reaching Equal Justice Report: an invitation to envision and act* (Canada, 2013) at 36, [CBA, *Equal Justice*], online (pdf):

<http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf>.

² See e.g. Canadian Bar Association, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa, 1993).

³ Government of Saskatchewan, "Saskatchewan Immigration and Ethnocultural Diversity", online (pdf): <<http://publications.gov.sk.ca/documents/15/104389-2016%20Census%20Ethnic%20Origins.pdf>>.

must take **collective accountability** for diversity and invest in **multi-pronged strategies** that address the biases, barriers, and discrimination that prevent women, LGBTQ individuals, and Indigenous peoples from entering and staying in the legal profession. Justifications for this will be further expanded throughout the paper.

"I'm exceptionally proud to be a member of the legal profession. It's a great honour that I hold in high regard. I'm not proud to say that I've experienced race-based assumptions and actions carried out by some members of my profession."⁴

The primary framework engaged in for this policy paper is the role of **inclusion** in supporting diversity. **Without inclusivity, the legal profession will continue to struggle in retaining lawyers from equity-seeking groups.** Failing to support diversity in the legal profession risks compromising its accessibility to the diverse public it serves; actively working to create accessible and inclusive workspaces is critical. Given high rates of mental illness and experiences of imposter syndrome in the profession,⁵ improving the inclusivity and openness of the profession will have far-reaching positive effects for people of equity-seeking groups and otherwise.

"[W]hether and how differences are actually incorporated depends on the degree to which the structure, culture, and behaviors in the organization are inclusive. It is inclusiveness that delivers on the promise of diverse perspectives and backgrounds."⁶

⁴ The Continuing Legal Education Society of British Columbia, "But I Was Wearing a Suit" (23 November 2017) at 00h:09m:15, online (video): *YouTube* <<https://youtu.be/HTG7fi-5c3U>>.

⁵ Michelle McQuigge, "Lawyers More Likely to Experience Mental Health Problems the More Successful they Are: Study" *The Globe and Mail* (22 October 2017), online: <<https://www.theglobeandmail.com/life/health-and-fitness/health/lawyers-more-likely-to-experience-mental-health-problems-the-more-successful-they-are-study/article36681757>>.

⁶ Kathleen Nalty, "Going 'All In' on Diversity and Inclusiveness" (9 December 2013), online (pdf): *The Canadian Bar Association* <[https://www.cba.org/getattachment/Publications-Resources/Practice-Tools/Measuring-Diversity-\(1\)/Resources/Resources/SecurePDF/Going-All-In%E2%80%9D-on-Diversity-and-Inclusiveness/goingAllInEng.pdf](https://www.cba.org/getattachment/Publications-Resources/Practice-Tools/Measuring-Diversity-(1)/Resources/Resources/SecurePDF/Going-All-In%E2%80%9D-on-Diversity-and-Inclusiveness/goingAllInEng.pdf)>.

2. METHODOLOGY

The authors utilized three methods in conducting the present research. First, the authors undertook to build on the work of previous years' Dean's Forums. Second, the authors carried out a comprehensive literature review on the topic of diversity and inclusion in the legal profession, focusing on the experiences of Indigenous, female, and LGBTQ lawyers and law students. Third, the authors carried out consultations with stakeholders in the legal profession. Each of these approaches is explained in the subsections that follow.

2.1 Building on the work of previous years' Dean's Forums

Previous years of the Dean's Forum have covered topics related to the access to justice crisis including the culture of the legal profession (2014),⁷ the role of legal education (2015)⁸ and putting the public first (2016).⁹ Stakeholders on the topic of professional culture noted that promoting **emotional intelligence** and **meaningful mentorship** opportunities in law school is important in creating a bar **invested in access to justice**.¹⁰ These kinds of initiatives would likely be similarly effective in promoting diversity among the bar and in supporting inclusive professional workplaces. Those consulted on the topic of "putting the public first" noted that working in the public interest ensures that justice initiatives meet the diverse needs of the public.¹¹

If the justice system is to put the public first and if its services are to be relevant and accessible to the public, then it must actively seek diversity. This year's topic of diversity and inclusion in the legal profession builds upon the previous work undertaken by the Dean's Forum

⁷ "Justice Innovation and the Culture of Legal Practice" (March 2014), online (pdf): *University of Saskatchewan* <https://law.usask.ca/documents/research/deans-forum/02_JusticeInnovation_CultureofLegalPractice_2014DeansForum.pdf>.

⁸ "Access to Justice: A Legal Education Initiative" (March 2015) [Dean's Forum, "Legal Education"], online (pdf): <https://law.usask.ca/documents/research/deans-forum/09_LegalEducation_PolicyDiscussionPaper_2015DeansForum.pdf>.

⁹ "Putting the Public First" (February 2016), online (pdf): <https://law.usask.ca/documents/research/deans-forum/12_PuttingthePublicFirst_PolicyDiscussionPaper_2016DeansForum.pdf>.

¹⁰ *Ibid* at 4.

¹¹ *Ibid* at 8.

initiative to examine how the composition of the legal profession affects its legitimacy and ability to provide inclusive legal services.

2.2. Literature Review

The authors surveyed existing literature on female, LGBTQ, and Indigenous lawyers. Emphasis was placed on the business and moral cases for diversity, barriers to recruitment and retention of lawyers from equity-seeking groups, and diversity initiatives undertaken by private firms and law societies across Canada.

2.3. Consultations

The authors reached out to 31 professionals in the legal system, of which 20 were interviewed. Consultees were stakeholders in the legal profession and included individuals self-identifying as Indigenous, LGBTQ, and women. Interviewees included:

- Lawyers in private practice;
- Lawyers at the Saskatchewan Ministry of Justice;
- Lawyers in the public sector;
- Executive members of the Law Society of Saskatchewan (LSS), including Barbra Bailey, Policy Director;
- Executive members of the Saskatchewan branch of the Canadian Bar Association (CBA), including the heads of the Saskatchewan Women’s Sections;
- Law professors, including Dr. Beth Bilson, Q.C. and Dr. Jaime Lavallee;
- Michael Gatin, mediator;
- Ken Fredeen, co-founder of Legal Leaders of Inclusion and Diversity;
- Martin Phillipson, current Dean of the University of Saskatchewan, College of Law; and
- Colin Druhan, Executive Director of Pride at Work Canada.

The questions for the interviewees followed six thematic areas:

1. The interviewee’s experience with diversity initiatives;
2. The interviewee’s experiences with discrimination, if any;
3. The business and moral case for increasing diversity;
4. Actions that private law firms can undertake to increase their hiring and retention rates;
5. Areas of opportunity to increase diversity in the legal profession in Saskatchewan;
6. Actions that equity-seeking groups themselves can undertake to increase their participation in the legal society.

Interviews were carried out in person and over the phone. They lasted approximately 30-60 minutes. Interviewees were given the option of having their names and professional information kept confidential.

3. WHERE WE WERE AND WHERE WE ARE NOW

To understand the forces that shape the legal profession today, one must acknowledge its past. Until 1913, only men were allowed to practice law in Saskatchewan—women were legally prohibited from becoming lawyers.¹² This is an important fact that is often forgotten in discussions regarding diversity and inclusion. Many of the same individuals that worry about creating quotas for women and minorities wilfully ignore the fact that for much of its history Saskatchewan had a quota system that reserved *every* legal position exclusively for men. Thankfully, in the years since, much has changed.

Women currently represent roughly 50% of law students, and data indicate that among new lawyers (practicing for 0-5 years), women are in or close to the majority in many regions.¹³ In fact, in New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, and Quebec women constitute more than 50% of new lawyers, ranging from 51.9% in Ontario to 63.2% in Quebec.¹⁴ LGBTQ students are more visible than ever on law school campuses, and law schools and law firms are increasingly promoting environments in which LGBTQ students and lawyers are able to be out.¹⁵ Likewise, programs are being created to better the work prospects of Indigenous law students.¹⁶

¹² Alan Kilpatrick, “Chronology: Women and the Legal Profession in Saskatchewan” (9 March 2015), online: *Law Society of Saskatchewan* <<https://lsslib.wordpress.com/2015/03/09/chronology-women-and-the-legal-profession-in-saskatchewan>>.

¹³ “Women in Law - Quick Take” (2 October 2018), online: *Catalyst* <<https://www.catalyst.org/knowledge/women-law>>; Kathleen Killin, “Will It Ever Be 50/50?: Diversity and Gender in the Law Firm and on Corporate Boards” (2016) 12:5 Osgoode Hall L School Leg Studies Research Paper Series, Research Paper No 25 at 2.

¹⁴ *Ibid.*

¹⁵ For a list of law school policies and supports for LGBTQ students, see Law School Admission Council, “LGBTQ & Law School” (2019), online: *LSAC* <<https://www.lsac.org/discover-law/diversity-law-school/lgbtq-law-school>>.

¹⁶ “‘A Big Day’: Indigenous students guaranteed 2 spaces at U of S law, and work at home in N.L.” *CBC News* (8 June 2018), online: <<https://www.cbc.ca/news/canada/saskatchewan/law-school-indigenous-students-1.4697285>>.

As of 2017, the LSS began requesting information from its members on a voluntary basis for those self-identifying as members of an equity-seeking group.¹⁷ **In 2017, the LSS survey indicated that only 6.5% of lawyers in Saskatchewan identify as First Nations, Métis, or Inuit, even though census data for Saskatchewan indicate that these groups constitute 16.3% of the population.**¹⁸ At the same time, the number of lawyers in Saskatchewan who identify as LGBTQ resembles that in the general population—3% in both the LSS survey¹⁹ and Statistics Canada estimates.²⁰ **It is unknown, however, how many LGBTQ lawyers are actually out at work.**

Data collection on gender and age has been collected for a longer period by the LSS and demonstrate that the retention rates for women in private practice are low. They find that **“although 49% of law students are women, only 37% of active lawyers in Saskatchewan are women and only 53% of those are in private practice, compared to 71% of male lawyers.”**²¹

The data indicates that there are barriers preventing proportionate representation in the legal profession. However, as lawyers are regulated individually, there is no information on the demographic makeup of firms themselves. Saskatchewan initiatives to increase data collection have largely been restricted to the individual level. This is likely to change as jurisdictions, including Saskatchewan,²² consider entity regulation.

Private law firms, law societies, and governments are increasingly recognizing the importance of diversity in the workplace. Both small and large law firms are taking measures to increase the recruitment and retention of female, LGBTQ, and Indigenous employees. National law firms are taking the lead.

¹⁷ Barbra Bailey, “Collecting Demographic Data to Better Understand our Membership and Address Barriers in the Legal Profession”, online: *Legal Sourcery* <<https://lsslib.wordpress.com/2018/11/15/collecting-demographic-data-to-better-understand-our-membership-and-address-barriers-in-the-legal-profession-2/>>.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Statistics Canada, “Same-sex couples and sexual orientation... by the numbers” (25 June 2015), online: <https://www.statcan.gc.ca/eng/dai/smr08/2015/smr08_203_2015#a3>.

²¹ Bailey, *supra* note 17.

²² Law Society of Saskatchewan, “Innovating Regulation”, online: <<https://www.lawsociety.sk.ca/initiatives/innovating-regulation/>>.

McCarthy Tétrault was the first firm in Canada to hire a senior director of inclusion and community engagement, a position dedicated to fostering inclusive work environments and recruitment, retention, and professional development, as well as linking with the community in a meaningful way to ensure that the diversity goals and the social impact goals are aligned.²³

Likewise, Osler, Hoskin & Harcourt has implemented a Championing Women strategy, which provides mentorship and coaching for women, women's only events, a women's network, a maternity/paternity buddy program, and non-partnership track that allows for greater flexibility and work-life balance. Osler's strategy is producing significant results: 47% of new partners between 2014 and 2018 were female.²⁴ The firm also provides its LGBTQ lawyers and staff with access to a firm-wide pride network.²⁵

In Saskatchewan, a significant number of private firms have signed on to the Justicia Project, which aims to increase the number of women in the legal profession.

Despite the progress made, much work remains to be done, especially at senior levels of legal practice. For example, although the number of women entering practice generally matches that of men, women are far less likely to be partner and many leave private practice entirely in their 30s.²⁶ While data for Saskatchewan is unavailable, a similar pattern is likely to exist. In fact, women appear to still be significantly under-recognized in the Saskatchewan legal community. For example, only 5.5% of the recipients of the CBA, Saskatchewan Branch Distinguished Service Award are women.²⁷ Further, it is unclear whether any recipients openly identify as LGBTQ.

²³ Gabrielle Giroday, "McCarthy Tétrault creates position to promote inclusion, community engagement" (15 October 2018), online: *Canadian Lawyer* <<https://www.canadianlawyermag.com/legalfeeds/author/gabrielle-giroday/mccarthy-tetrault-creates-position-to-promote-inclusion-community-engagement-16350>>.

²⁴ Osler, "Diversity at Osler: 2018 Year in Review" (2018), online (pdf): <<https://www.osler.com/osler/media/Osler/reports/corporate-governance/Diversity-Annual-Report-2018.pdf>>.

²⁵ *Ibid.*

²⁶ In Ontario, 22.3% of men were partners versus 9.3% of women in 2016 (see Law Society of Upper Canada, "Statistical Snapshot of Lawyers in Ontario" at 10-11, online (pdf): <http://annualreport.lsuc.on.ca/2017/common/documents/Snapshot-Lawyers18_English.pdf>.

²⁷ Canadian Bar Association, "Distinguished Service Award" (2019), online: <<https://www.cbask.org/Who-We-Are/Awards-and-Recognition/Distinguished-Service-Awar>>.

4. INTERNATIONAL EXPERIENCES

The lack of diversity in the legal profession is not unique to Canada. Other jurisdictions have similarly recognized the issue and are working to improve diversity.

In 2015, the former president of the American Bar Association, Paulette Brown, developed the Diversity and Inclusion 360 Commission.²⁸ In her statement announcing the program, Brown recognized that the American legal profession was far less diverse than comparable professions.²⁹ Brown noted that ongoing inequity in the profession diminishes everyone and the system itself, and damages public confidence.³⁰ Her view was bolstered by studies demonstrating public perception that racial and ethnic biases pervade the system.³¹ She argued lawyers have the power to change these perceptions and must act as **“social engineers for justice.”**³²

Similar arguments have been raised in England and Wales. Hilary Sommerland, previous Research Director of the Centre for Professional Legal Education and Research at the University of Birmingham, has noted that the idea of merit, a concept that is rarely criticized, is saturated with stereotypes that contribute to exclusion.³³ She cites a statement from Lord Neuberger in his role as Chairman to the Working Group on Entry to the Bar, where he writes: **“Diversity and inclusivity are essential if a modern profession is to maximise its credibility and to contribute towards a fairer and more effective society...Moreover, they are not inconsistent with selection on the grounds of ability and potential, which are both vital criteria for practice at**

²⁸ Paulette Brown, “Social Engineering: Greater Diversity and Inclusion in the Legal Profession will help Achieve Justice for All” (2015) 101 ABA J 8 at 8.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ “The Social Magic of Merit: Diversity, Equity, and Inclusion in the English and Welsh Legal Profession” (2015) 83 Fordham L Rev 2325.

the Bar. On the contrary.³⁴ The Law Society of England and Wales has made commitments to monitoring diversity³⁵ and has created a framework aiming to promote inclusion and diversity.³⁶

5. THE MEANING OF INCLUSION

Diversity and inclusion are concepts that have become increasingly interconnected over time. These concepts are treated as one but they are complementary and individual.³⁷ **Diversity and inclusion should be considered separately because where diversity is sought without meaningful inclusion to support it, benefits are minimal.**³⁸

Where individuals are able to be a part of a workspace but are not embraced for their differences or feel they must hide their true selves, they are unable to reach their full potential and suffer in comparison to those who are better able to fit the traditional norm.

"I attended a refugee hearing where, despite seeing my name, the adjudicator was trying to figure out whether to call me Ms. or Mr. [last name]. My supervising lawyer was obviously surprised and uncomfortable that this was coming up. He allowed me to manage it and checked in with me afterwards. That was a situation where I corrected the adjudicator and got it sorted out in a way that was quite direct in an effort to just conclude the conversation efficiently.

The same kind of situation has occurred with judges calling me Mr. [last name] instead of Ms., or judges being obviously unsure about how to address me.

I don't want to pin this on individual judges - they are in a situation where there's a lot of gendered language and not a lot of good routines to deal with it. It seems to me that we just need a couple new norms - a norm of gender inclusive language. Just call everyone counsel,

³⁴ *Ibid* at 2329, n17, citing The General Council of the Bar, *Entry to the Bar Working Party Final Report (2007)* at 5, online (pdf): <<https://www.barcouncil.org.uk/media/164103/finalreportneuberger.pdf>>.

³⁵ The Law Society, "Diversity and Inclusion Framework 2016-2019", online: <<https://www.lawsociety.org.uk/about-us/corporate-responsibility/equality-diversity/equality-diversity-and-inclusion-framework-2016-19>>.

³⁶ *Ibid*.

³⁷ Bernardo M. Ferdman, "The Practice of Inclusion in Diverse Organizations: Toward a Systemic and Inclusive Framework" in Bernardo M. Ferdman & Barbara R. Deane, eds, *Diversity at Work: The Practice of Inclusion* (San Francisco: Jossey Bass, 2014) 3 at 4.

³⁸ *Ibid* at 3.

you don't need Mr. or Ms. for that, and have a norm of asking people how they would like to be addressed/pronouns.”

-Anonymous interviewee

At the core of meaningful inclusion lies the creation of a “psychological experience of inclusion.”³⁹ This is highlighted by the phenomenon of imposter syndrome, whereby an individual feels they are inadequate or not worthy enough to be in their position.⁴⁰ **The severe effect of imposter syndrome in the legal profession can be exacerbated for individuals from equity-seeking groups.**⁴¹ Pressures not only to achieve high levels of competence as a lawyer but also to fit into the firm culture, or the need to hide parts of one’s identity, may contribute to the slow pace of the legal profession in increasing diversity.

Inclusion is a practice that must be actively developed and maintained.⁴² In the consultation process, we asked participants what barriers exist and how they might be broken down. Several consultees noted that **we, as a society and a profession, consciously and unconsciously create barriers to some individuals entering or succeeding in the profession.** These barriers are often unnecessary and arbitrary. For example, interest in sports was a common theme arising in the literature⁴³ and our consultations. It was stated as a common example of the club-like practices that can contribute to particular types of individuals fitting into a workplace. These norms and traditions have tended to favour masculinity.⁴⁴

³⁹ *Ibid* at 4.

⁴⁰ American Bar Association, “Imposter Syndrome? 8 tactics to combat the anxiety” (October 2018), online: <https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/tell-yourself-_yet--and-other-tips-for-overcoming-impostor-syndr>.

⁴¹ *Ibid*.

⁴² Ferdman, *supra* note 37 at 16.

⁴³ See Sommerland, *supra* note 33 at 2329.

⁴⁴ *Ibid* at 2347.

Inclusion can benefit a workplace and all people within it, whether part of an equity-seeking group or not. It creates space for people to be comfortable in their own skin. This comfort contributes to the wellness, productivity, and diversity of a firm.

“As an LGBTQ individual, I always feel like I’m managing everybody’s comfort because that is in my self interest and in the interest of the client to just minimize the awkwardness for the other people, because if someone is feeling weird and bad about me that won’t help me or the client.”

-Anonymous interviewee

6. CRITICAL THEORY ON INCLUSION

Although inclusion offers a useful framework for opening the profession to diverse ways of being and knowing, it is also important to recognize where these frameworks may cause damage or fail to address issues of bias and discrimination.

Institutional declarations of anti-racism can, in some cases, work to conceal racism and make it more difficult to identify and address.⁴⁵ Critical theorist Sarah Ahmed cites the example of the response of Royal Holloway in London to a report alleging experiences of racism by international students. The College denied the truth of the allegations and raised in defence its policies of pastoral care and anti-racism.⁴⁶ **Future initiatives must be developed in a manner that create meaningful change and fosters open communication, as opposed to hiding and denying experiences of exclusion.**

Ahmed also warned of the risks of focusing on documenting diversity numbers where its effect is merely to try to prove inclusivity or deny racism.⁴⁷ **Documenting numbers of diversity, as we recommend, will be an important step to understand the representativeness of the legal**

⁴⁵ Sara Ahmed, “The Nonperformativity of Antiracism” (2006) 7:1 *Meridians* 104 at 110.

⁴⁶ *Ibid* at 110-111.

⁴⁷ *Ibid* at 117-118.

profession but it is not a solution nor does it stand to definitively prove the extent to which racism, homophobia, and sexism do or do not exist.

7. THE BUSINESS AND MORAL CASES FOR DIVERSITY

A common theme arising in consultations and literature was the role for the moral and business cases when advancing diversity.

The moral case states that supporting and seeking diversity should be undertaken because it is “the right thing to do.”⁴⁸ One consultee noted that this should be a natural justification for lawyers to understand and follow given their role as justice seekers, as well as their power as advocates.

The business case stands for the idea that **diversity is good for business**. It makes firms more adaptive and responsive to the needs of their clients, and increases profitability.⁴⁹ Having a diverse workforce improves innovative thinking by bringing in new experiences and worldviews and facilitating access to a wider client base.

Although each make a strong case for investing in diversity, the moral and business case work together to create strong incentives for law firms to diversify.

8. CREATING INCLUSIVE WORKSPACES

There is limited information on the diversity of law firms, since, as previously mentioned, lawyers are regulated individually. Despite limited data, the inability of private law firms to retain individuals from equity-seeking groups has been discussed extensively by scholars and policy developers.⁵⁰ **Existing research highlights that the culture of firms is built upon restrictive**

⁴⁸ Beth Bilson, “A Dividend of Diversity: The Impact of Diversity on Organizational Decision Making” (2011) 44 UBC L Rev 9 at 11.

⁴⁹ Banks have been an example of an industry investing in diversity and inclusion due to the strong business incentive it offers (see e.g. Tara Perkins, “How RBC Became a Champion of Diversity” *The Globe and Mail* (23 March 2010), online: <<https://www.theglobeandmail.com/report-on-business/careers/how-rbc-became-a-champion-of-diversity/article4310764>>.

⁵⁰ Asher Alkoby & Pnina Shenker, “Out of the Closet and Up the Ladder? Diversity in Ontario’s Big Law Firms” (2017) 34:2 Windsor YB Access Just 40; Canadian Centre for Diversity and Inclusion, “Diversity by the Numbers: The Legal Profession: Unpacking Hegemonic Masculinity in the Culture of Private Practice Law” (2017), online (pdf): <<https://ccdi.ca/media/1391/20180125-dbtn-qualitative-research-final-updated.pdf>>; Killin, *supra* note 13.

norms and business practices that make it difficult for people of diverse backgrounds and experiences to succeed, advance, and stay in the profession.

This issue has been recognized for decades, yet the profession has been slow to change. One must therefore ask: **how can we move forward?** As Saskatchewan becomes increasingly diverse, it will be critical for law firms to find ways to retain diverse talent. Several interviewees noted that to succeed in parts of the country that are high diverse, **failing to diversify is not an option. Firms that fail to be diverse and inclusive risk their reputation, legitimacy, and profitability, as well as the wellbeing of their employees.**

Ken Freeden, General Counsel at Deloitte Canada and co-founder of Legal Leaders for Diversity and Inclusion, described that when firms lack diversity and inclusion, they will struggle to thrive and grow and, as a result, business will suffer. He noted that inclusive and diverse teams are more productive and innovative, and that failing to be inclusive results in lost talent and business opportunity. **Organizations such as Legal Leaders for Diversity and Pride at Work Canada have seen significant increases in the number of firms and companies actively seeking to foster inclusivity and diversity, and furthermore to be held accountable for doing so.**

Despite these promising investments, the question is how to genuinely improve inclusivity and diversity within a law firm. Interviewees with experience in diversifying have emphasized what the process is not. They have emphasized that the process involves **more than “box checking”** and that **it does not mean taking out a qualified employee and replacing them with a less qualified person.** Rather, it means **working to identify and remove the barriers that we, as individuals and as a profession, have created so that there is equal opportunity** to find employment as well as to succeed and advance in that employment.

Interviewees also identified that increasing diversity requires inclusivity. **Inclusivity and diversity go hand in hand;**⁵¹ as a result, a significant component of addressing the issue lies in

⁵¹ See Elena Hanson, “What it’s like when an organization champions diversity but doesn’t grasp inclusion” *The Globe and Mail* (30 January 2019), online: <www.theglobeandmail.com/business/careers/leadership/article-what-its-like-when-an-organization-champions-diversity-but-doesnt>.

cultural change. Increasing diversity without inclusivity is meaningless because those individuals are unable to speak out and instead are forced to conform or to leave their position.

Colin Druhan, Executive Director of Pride at Work Canada, recommended starting with **small, simple changes and making them part of the routine**. For example, including preferred gender pronouns on event nametags is a simple way to make a space more inviting for a person who is non-binary or gender fluid. These kinds of changes can **incrementally broaden the openness of firms to different ways of knowing and being** that may have previously been considered radical. Creating environments open to people acting and speaking outside the norm can make a workspace more safe, ethical, and successful.

Another theme related to private practice raised in consultations was **the restrictiveness of the business structure of private firms**. This issue affects women in particular, as they more often are the primary caregivers for children. Law firms are known for having high billable hour targets and highly competitive atmospheres. Accommodating individuals who prefer more flexible work structures may require more than surface-level concessions within the traditional firm model. For example, several consultees noted that even where effective maternity leave policies are in place in a firm, leaving a position for several months to a year can have devastating effects and can lead to one being taken less seriously in the firm.

Meaningful inclusivity can improve through the adoption of flexible business models that accommodate a wide variety of individuals and career goals. For example, having available career paths within a firm that do not lead to becoming a partner or support part time work options may make a firm structure inclusive to individuals not seeking the position of partner. These kinds of changes are already in the works at some law firms, as the legal profession has already been considering and implementing different ways of providing legal services to clients such as through unbundling legal services,⁵² virtual services, and fixed fees.⁵³ These types of

⁵² Equal Justice: Balancing the Scales, “Lawyers”, online: *Canadian Bar Association* <<http://www.cba.org/CBA-Equal-Justice/Getting-Involved/Lawyer>>.

⁵³ Jordan Furlong, “The 21st Century Law Firm”, online: *Canadian Bar Association* <<https://www.cba.org/Publications-Resources/CBA-Practice-Link/solo/2014/The-21st-century-law-firm>>.

changes have been identified as mechanisms that may improve access to justice as well as help diversify firms by making them inclusive to a wider class of individuals with different needs in the workplace.

9. EDUCATION

The University of Saskatchewan, College of Law also has an important role to play in preparing students to be inclusive once they enter the legal profession. In the same way as the College of Law currently teaches students about Indigenous history and law, it must expand students' knowledge of the historical challenges women and LGBTQ individuals faced in the legal profession. For example, the College of Law could make use of its property and constitutional law classes to teach students about the legal prohibitions on women owning property, the lack of equal rights for women and LGBTQ individuals for most of Canadian history, and the legal prohibitions on women becoming lawyers.

In terms of furthering education on colonization and Indigenous peoples, one consultee noted that **it is important that members of the legal profession learn to “shift on the bench” to create an ethical space for Indigenous laws and knowledge to occupy.**⁵⁴ Indigenous peoples had systems of laws prior to colonization that were subsequently removed and displaced by the common law. The interviewee emphasized that a **collective approach to education** that creates space for Indigenous laws to exist equally, side by side with Western European traditions would ensure those entering the legal profession are aware of what (and who) the common law system represents and why it will be important as members of the legal profession to create ethical space for, and dialogue with, Indigenous laws and legal systems.

On a similar note, one consultee noted that the focus on cultural competence should not be limited to a single course but should pervade all courses as no legal subject is sheltered from history or society. **Education can play an important role in ensuring that incoming lawyers are**

⁵⁴ This comment was summarizing work of Willie Ermine (see “The Ethical Space of Engagement” (2007) 6:1 Indigenous L J 193).

aware of the implications of the justice system for equity-seeking groups as a result of its interaction with historic and ongoing socioeconomic, political and, cultural conditions.

10. THE ROLE OF REGULATION

10.1. Regulation of the Legal Profession

Regulation of the legal profession falls under the responsibility of provincial law societies, who govern with the authority of provincial statutes. One such statute is Saskatchewan's *The Legal Profession Act, 1990*.⁵⁵ Canadian law societies are mandated to govern the profession in the interest of the public. In furtherance of this mandate, the law society implements and enforces rules that all lawyers in the province must follow to remain in good standing.

"Regulating legal entities as well as the individuals who practise in them reflects the reality of modern practice that many regulatory requirements are fulfilled by the law firm not the individual lawyer. And moving to outcomes-focused regulation will shift the regulatory focus from reacting to complaints to proactively encouraging ethical best practices."⁵⁶

10.2. Entity Regulation

While the LSS has the authority to regulate both individual lawyers as well as firms,⁵⁷ it only exercises its authority over individual lawyers. Under this model of regulation, the LSS will receive complaints about individual lawyers and react to those complaints. Lately, this model has been questioned as being the most effective way to govern.⁵⁸ Law societies themselves are exploring alternative means of governing, as are organizations like the CBA. In this exploration, the leading suggestion is that of entity regulation.

⁵⁵ SS 1990-91, L-10.1.

⁵⁶ The Canadian Bar Association, "Entity Regulation: Governing the Forest as Well as the Trees" (29 March 2016), online: <<https://www.cba.org/Our-Work/cbainfluence/Submissions/2016/April/entityregulation>>.

⁵⁷ *Ibid*, s.2(1)(h)(ii).

⁵⁸ The Prairie Law Societies, "Innovating Regulation" (November 2015), online (pdf): *The Law Society of Saskatchewan* <<https://www.lawsociety.sk.ca/media/127107/INNOVATINGREGULATION.pdf>>.

Entity regulation means “**governing the forest as well as the trees,**”⁵⁹ or in more plain terms, governing law firms as well as individual lawyers. The thought behind entity regulation is that the culture of law firms plays a large role in determining the ethical and professional conduct of lawyers, and that developing regulations for firms themselves will be a proactive move towards preventing professional misconduct before it ever happens.⁶⁰ Assuming this to be true, it is in the public interest to implement some form of entity regulation, at least in the context of large law firms. If transgressions are due in part to the environment that lawyers are working in, then we need to think more about what that environment looks like.

In the context of diversity and inclusion, firm structure and governance can contribute to an environment that is unwelcoming of lawyers who are members of equity-seeking groups. This unwelcome attitude can take many forms, including homophobia, transphobia, harassment, sexism, discrimination, racism, and hegemonic masculinity. **When these attitudes become entrenched within the system, it takes more than intervention at the individual level to address.** Programs that tackle discrimination on a firm-wide basis, such as the Justicia Project, must be advanced.

10.3. Justicia Project

The Saskatchewan Justicia Project is an ongoing endeavour to support the retention and advancement of women in the legal profession.⁶¹ The Saskatchewan project is based on Justicia Projects in place in other Canadian jurisdictions and involves a partnership between the LSS and law firms in the province.⁶²

Fundamental to the Justicia Project is the recognition that women are entering the profession in record numbers, but are leaving disproportionately. These numbers are replicated

⁵⁹ The Canadian Bar Association, "Entity Regulation: Governing the Forest as Well as the Trees" (29 March 2016), online: <<https://www.cba.org/Our-Work/cbainfluence/Submissions/2016/April/entityregulation>>.

⁶⁰ *Ibid.*

⁶¹ Law Society of Saskatchewan, "Saskatchewan Justicia Project" (2019), online: <<https://www.lawsociety.sk.ca/initiatives/saskatchewan-justicia-project>>.

⁶² *Ibid.*

across Canada. As previously mentioned, hiring diverse individuals is only one part of the equation - inclusivity is necessary so that those individuals feel welcome in the firm.

Participation in the Justicia Project means implementing model policies in the workplace that create a more welcoming workplace for women. Firms that implement such model policies may call themselves *Justicia Firms*.⁶³ The data collected through the Justicia Project is being used by working groups to guide the development of resources in three areas: family leave, flexible work arrangements, and mentorship/work environments.⁶⁴

The Justicia Project represents a significant step towards a more diverse workplace. The LSS has indicated through its implementation of the project that it takes seriously the fact that women are underrepresented in the legal workforce, and commits to doing better. In addition to advocating for more diverse workplaces, the LSS has developed model policies in order to help law firms make this a reality.

The Justicia Project exists in conjunction with the more general work of the LSS's Equity Office, which promotes equity and diversity in the workplace by providing assistance to lawyers and firms to improve in such areas. Resources like this from law societies and other organizations are fundamental in helping law firms and other legal organizations identify and address systemic discrimination and other barriers for individuals from equity-seeking groups. They are especially impactful coming from the body regulating the profession, but that does not detract from the impact that other reports can have. The TRC's Calls to Action are an example of a work causing major changes in the way that law societies regulate law firms.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

10.4. The Truth and Reconciliation Commission's Calls to Action

The LSS made public its commitment to respond to the TRC Call to Action #27,⁶⁵ which makes a number of calls to action for the Federation of Law Societies of Canada:

We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal – Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.⁶⁶

It is recognized within this Call to Action that training is required. The LSS has made efforts to implement the TRC Call to Action #27 by offering various Continuing Professional Development (CPD) sessions on matters raised by the Call to Action.⁶⁷ The Calls to Action are also being addressed by the Federation of Law Societies⁶⁸ and the CBA.⁶⁹

There is an ongoing need to consider the Calls to Action and truth and reconciliation more generally; there are no quick and easy solutions.⁷⁰ It can be anticipated that more work will need to be done by law societies and other entities towards reconciliation and that part of this work will result in changes to the regulatory framework under which the profession operates.

⁶⁵ The Law Society of Saskatchewan, "Truth and Reconciliation" (2019), online: <<https://www.lawsociety.sk.ca/initiatives/truth-and-reconciliation>>.

⁶⁶ Truth and Reconciliation Commission of Canada, "Truth and Reconciliation Commission of Canada: Calls to Action" (2015), online (pdf): *National Centre for Truth and Reconciliation* <http://nctr.ca/assets/reports/Calls_to_Action_English2.pdf>.

⁶⁷ The Law Society of Saskatchewan, "Truth and Reconciliation", *supra* note 65.

⁶⁸ "Federation News", online: <<https://flsc.ca/federation-of-law-societies-commits-to-effective-response-to-trc-report>>.

⁶⁹ The Canadian Bar Association, "We Can Handle the Truth: CBA Policies in Line With TRC Action Items" (29 March 2016), online: <<https://www.cba.org/Our-Work/cbainfluence/Submissions/2016/April/cbapolicies>>.

⁷⁰ TRC - CVR, "What Is Reconciliation" (2011-12) at 00h:01m:15s, online: *Vimeo* <<https://vimeo.com/25389165>>.

"[A] good understanding of Canada's legal system must include the history of our Indigenous peoples and their traditions, and this knowledge is also essential for reconciliation."⁷¹

10.5. The Future of Regulation

Canadian law societies have been adapting in recognition of problems within the legal profession, and it will no doubt continue to do so. It has yet to be seen whether entity regulation will be among those adaptations, but it seems to be an appropriate step with support from lawyers and legal organizations. When the LSS intervenes in matters like diversity and inclusion, as indicated by the Justicia Project and the commitments made in response to the TRC's Calls to Action, it is evidence of a serious problem requiring solutions.

There must be effective mechanisms for legal professionals to report instances of discrimination. Complaints must be seriously investigated and firms must be held accountable for discriminatory conduct. Measures that go beyond preventing discrimination and impose more specific duties with regards to diversity and inclusion can, however, backfire. This is evidenced by the backlash against the Law Society of Ontario's (LSO) mandatory statement of principles. Even long-time proponents of equality and members of equity-seeking groups have opposed the LSO's intervention in such a way.⁷² As noted by Sadie Etemad, an Iranian-born lawyer practicing in Toronto and University of Saskatchewan alumni, the LSO's statement of principles may decrease open and frank conversations between colleagues, and impose unjustified infringements on employees and clients' freedom of expression and conscience.⁷³ Etemad also notes that this type of intervention may discredit the bar in the eyes of the public.⁷⁴

⁷¹ The Canadian Bar Association, "We Can Handle the Truth: CBA Policies in Line With TRC Action Items" (29 March 2016), online: <<https://www.cba.org/Our-Work/cbainfluence/Submissions/2016/April/cbapolicies>>.

⁷² See Murray Klippenstein & Bruce Pardy, "How Social Justice Ideologues Hijacked a Legal Regulator" (11 February 2019), online: *Quillette* <<https://quillette.com/2019/02/11/how-social-justice-ideologues-hijacked-a-legal-regulator>>.

⁷³ Sadie Etemad, "Why the Statement of Principles Troubles Me as a Visible Minority" (5 February 2018), online: *Canadian Lawyer* <<https://www.canadianlawyermag.com/author/sadie-etemad/why-the-statement-of-principles-troubles-me-as-a-visible-minority-15282>>.

⁷⁴ *Ibid.*

“A good start would be to start programs celebrating diversity, not imposing policies on people's speech and behaviour.”

- Sadie Etemad, Lawyer at S.E.T. Law

Instituting legal reforms do not necessarily lead to changes on the ground. It is essential that measures adopted by the LSS increase diversity while also furthering other essential values, such as meritocracy and freedom of expression. All lawyers in Saskatchewan deserve to be assessed based on their competence, rather than their gender, sexual orientation, or race. To the extent that any regulations are implemented, they must further genuine inclusion, not merely promote a “checking of boxes” like the LSO’s statement of principles.

11. MENTORSHIP

Mentorship might mean many things to many people, but generally having a mentor means having someone to bounce ideas off of, ask confidential questions to, and share the ins and outs of a firm with.⁷⁵ A mentor can offer advice on professional development, network building, and business knowledge. A mentor is someone who cares about the development of their mentee not just as a resource, but as a person.⁷⁶ There are many aspects of being a lawyer not developed in law school, and having a guide through the acquisition of these skills can be a great benefit to the start of that new lawyer’s career; one of the most essential resources is a mentor relationship with a more senior lawyer.

The CBA has several resources in place to assist lawyers and firms to address diversity. These resources consist of tools to help firms measure their diversity,⁷⁷ webinars that address common questions, and forums to speak with other lawyers engaging with similar issues. It also has sections dedicated to different areas of law as well as for different equity-seeking groups

⁷⁵ Canadian Bar Association, "The Every Lawyer: Let's Talk Mentoring" (25 October 2018) at 00h:01m:15s [CBA, "The Every Lawyer"], online (podcast): *Canadian Bar Association* <<https://theeverylawyer.simplecast.fm/lets-talk-mentoring>>.

⁷⁶ *Ibid* at 00h:03m:30s.

⁷⁷ "Measuring Diversity", online: *Canadian Bar Association* <[https://www.cba.org/Publications-Resources/Practice-Tools/Measuring-Diversity-\(1\)](https://www.cba.org/Publications-Resources/Practice-Tools/Measuring-Diversity-(1))>.

such as female and LGBTQ lawyers. These sections help lawyers build a network among those who are experienced either in certain areas of law or in dealing with particular difficulties in the legal profession.

For women and minorities entering the profession, there are challenges finding a mentor given that, sometimes, senior lawyers who have not faced challenges based on their gender, sexual orientation, or race may not fully understand the barriers faced by such groups. That is why programs that connect lawyers to each other based on a wide range of criteria are so effective. One of the most important things to establish prior to entering into a mentor/mentee relationship is what exactly one is looking to get out of the relationship⁷⁸ When mentors and other leaders are capable of addressing a range of issues and potential barriers to new lawyers, these lawyers are more likely to advance in the profession.

12. WHAT EQUITY-SEEKING GROUPS CAN DO

In consulting members of the legal community, we asked not only what the LSS, firms, and law schools can do to increase diversity and inclusion but also what members of equity-seeking groups can do themselves to advocate for inclusive workspaces.

“A big part is being out and showing others you can do it. As members of equity-seeking groups, we need to encourage each other.”

-Curtis Clavelle, Articling Student at Robertson Stromberg

Several consultees emphasized the importance of community, networking, and speaking out. Building community is important so that members of equity-seeking groups can share their experiences, advocate for their interests, and support each other. One consultee described how women are less likely to recognize their own achievements than men and recommended that women lift each other up by taking the time to nominate trailblazing women for awards.

⁷⁸ CBA, “The Every Lawyer”, *supra* note 75 at 00h:07m:25s.

Consultees recognized that speaking out and raising awareness of the barriers actively placed in front of certain groups of people are powerful ways to promote change.

“We need to do more for women and other disadvantaged groups in the profession; we need to do more organizing and advocacy to move ourselves forward. Look at the number of women who received awards for the CBA and the number who are on the bench, on board, in high positions - we need to organize to start lifting each other up, nominating each other, recommending each other. We need to ensure there are women available for these positions. As women we still don’t recognize our achievements as much as men do. We need to start pointing out other women’s amazingness.”

-Reche McKeague, Solicitor for the City of Saskatoon

13. LIMITATIONS AND CRITIQUES

In preparing this report, there were several limitations that restricted its scope and depth. In addition to its limited depth, there were also limitations to the methods used to prepare the report. Some of these critiques are self-identified while others were pointed out to the authors during consultations. Further, many of the limitations overlap but have been categorized for the purpose of the report.

The most pervasive limitation was time. The involvement of this group of students within the Dean’s Forum occurred over a period of two months, from January to March of 2019. A number of concessions had to be made, and these will become apparent throughout this section.

13.1. Scope of Diversity

This report looked at diversity from the lens of three equity-seeking groups: women, Indigenous peoples, and LGBTQ individuals. The decision to focus as such was made by the three authors of the report based on preliminary research and the data it revealed. This preliminary research was all secondary, and no formal consultations had taken place prior to the decision. The authors take responsibility for the decision to focus on these particular populations; however, the decision was not the result of any conscious agenda.

As an example of other equity-seeking groups whose situation might have been addressed, during one consultation the attention of the authors was directed towards the situations of persons with disabilities. This is an area where progress towards greater equity has been especially slow. Additional attention is required into the barriers that are holding these individuals back from equitable access to the legal profession.

13.2. Consultations

As previously mentioned, there was a limited time period during which to carry out research; as a result, consultations had to be undertaken strategically. It was not possible to speak with each individual who ideally would have been consulted on this topic. The authors were based in Saskatoon, which limited in-person consultations geographically, although some interviews were conducted by telephone.

13.3. Access

The final concern regarding the consultations process was that of access. The authors were able to establish that there was ongoing work in several areas, but only to the extent that such information was publicly available or made known to the authors. It is recognized also that not all work being done at such a level is considered publishable. While the importance of this work should be stated, it was not included by reason of lacking awareness.

14. RECOMMENDATIONS

Although the legal profession and society generally have made progress on diversity and inclusion, we are not “there yet.” Today, we are more conscious and aware that authentic and sustainable “inclusivity” has subjective and psychological dimensions. We are still learning about what barriers stand in the way of meaningful inclusion. Sometimes, well-intentioned initiatives only serve to disguise the real problem. And, yet, there is opportunity at this moment in time to have open dialogue about the issue driven by this heightened awareness on the business and moral imperatives behind “getting there”.

We are hopeful about the chance to embrace new possibilities in the realm of education, regulation, and mentorship. We considered various options as we reflected on ‘best practices’ and interviewed stakeholders in the legal community. Against this backdrop, three options have arisen as meaningful steps that we think could frame and support the next stages:

- 1. That the LSS collect data on the percentage of female, LGBTQ, and Indigenous lawyers at each firm, divided by associate and partnership positions.**
- 2. That the CBA and/or the LSS create a recognition program (e.g. award) for firms that meet a certain threshold of female, LGBTQ, and Indigenous lawyers - e.g. at least 30% of female partners.**
- 3. That the University of Saskatchewan College of Law teach first year students about the historical issues faced by women and LGBTQ people and that it continue to build on its efforts to educate students on Indigenous peoples, laws, and the history of colonization.**
This could be taught as part of constitutional law (e.g. the lack of equal rights for women and LGBTQ individuals for most of Canada’s history; prohibitions on females becoming lawyers), criminal law (e.g. the criminalization of homosexuality), and property law (e.g. prohibitions on women owning property).

The first recommendation, that the LSS collect data on the percentage of female, LGBTQ, and Indigenous lawyers at each firm, divided by associate and partnership positions, serves two purposes. First, it measures the current percentages of females, LGBTQ, and Indigenous lawyers at different levels of the legal profession. Second, and most importantly, it allows one to assess the effectiveness of specific measures at increasing diversity and inclusion.

The second recommendation, that the CBA and the LSS create a recognition program for firms that meet a certain threshold of female, LGBTQ, and Indigenous lawyers, will nudge firms to create more inclusive and diverse workplaces and recognize firms who are leaders in this area.

The third recommendation acknowledges the importance of educating future lawyers with respect to the historical legal constraints imposed on women, LGBTQ individuals, and Indigenous peoples. Such knowledge is important to give context to the current inequality that persists in society at large and in the law profession. Without knowledge of the restrictions imposed by government on such groups, students may be prone to thinking that equity-seeking individuals simply do not hold high-level positions because they have not “tried hard enough”. The reality is that legislative barriers that prevented women, LGBTQ individuals, and Indigenous peoples from having equal constitutional rights for most of Canada’s history still play a role in today’s fight for equality of opportunity.

15. CONCLUSION

This policy paper sought to consider barriers to the legal profession for equity-seeking groups and how to foster an inclusive justice system. The authors focused on diversity from the lens of three equity-seeking groups: women, Indigenous peoples, and LGBTQ individuals. A failure of the legal profession to be representative of the population it serves risks harming public trust in the profession’s ability to provide the community legal services. For this reason, addressing diversity is a critical component of addressing the access to justice crisis.

Additionally, without inclusivity, the legal profession will continue to struggle in retaining lawyers from equity-seeking groups. Failing to support increasing diversity in the legal profession risks the profession’s accessibility by the diverse public it serves. Actively working to create accessible and inclusive workspaces is critical.

As was emphasized throughout the consultations, no one portion of the legal profession can address diversity on its own. Rather, it is important for the legal profession to take collective accountability for diversity and invest in multi-pronged strategies to address the biases and barriers that prevent minority groups from entering and staying in the profession.

APPENDICES

APPENDIX A - Diversity in the Cromwell Report, CBA Reaching Equal Justice Report, and Dean's Forum Reports

The CBA Reaching Equal Justice Report and Cromwell Report on Diversity

The ability of the justice system to meet the needs of the communities it serves is an ongoing concern, particularly since the notable recognition of the access to justice crisis by the Action Committee on Access to Justice in Civil and Family Matters' report *Access to Civil & Family Justice: A Roadmap for Change*⁷⁹ and the CBA's *Reaching Equal Justice Report: an invitation to envision and act*.⁸⁰ The materials aimed and succeeded in "provid[ing] an impetus for meaningful change"⁸¹ and have inspired ongoing discussion since their publications in 2013.

The reports recognize that although financial inaccessibility, although a "primary barrier," is not the only barrier to receiving legal services.⁸² Legal services can also become unattainable or unlikely to be pursued where people are part of a marginalized community, particularly where their community is unrepresented or unaccommodated by legal service providers.

On the topic of diversity, the *CBA Report* raises the importance of "equal and inclusive justice" to meaningfully meet communities' legal needs.⁸³ Inclusiveness may be best achieved by focusing on "people's relationship to the justice system and their need for assistance in different

⁷⁹ Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa, Canada, 2013), [*Cromwell Report*], online: <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf>.

⁸⁰ CBA, *Equal Justice*, *supra* note 1.

⁸¹ *Cromwell Report*, *supra* note 79 at v.

⁸² CBA, *Equal Justice*, *supra* note 1 at 17, 36.

⁸³ *Ibid* at 61.

situations.”⁸⁴ Where social exclusions and barriers are reflected in the justice system, the legal needs of various groups of people are unmet and their legal issues are unresolved.⁸⁵

The *Cromwell Report* states that the “justice continuum must be reflective of the population it serves” and must be “responsive to Canada’s culturally and geographically diverse population.”⁸⁶ Barriers caused by “language, financial status, mental health capacity, geographical remoteness, gender, class, religion, sexual orientation, immigration status, culture and aboriginal status” must be identified and removed for services to be meaningfully accessible.⁸⁷

Together, these reports demonstrate the importance of addressing diversity as a barrier to equal justice. Accessible services are dependent not only on financial ability but also accessibility based on a variety of social, geographical and cultural factors that require responses and accommodation from the justice system.

Revisiting Past Forums

Topics and ideas produced at the Dean’s Forum in previous years identify important issues related to barriers caused by diverse needs and worldviews in the public. Although all reports include important and relevant information to the topic of diversity, I shall overview a selection of some relevant points to this year’s topic.

The Dean’s Forum 2014-15 Progress Report⁸⁸ considered client-centred and holistic problem solving approaches as innovations which may meet individual needs and overcome barriers.⁸⁹ It identified language and literacy,⁹⁰ cost of legal services⁹¹ and geographical

⁸⁴ *Ibid.*

⁸⁵ *Ibid* at 62.

⁸⁶ *Cromwell Report*, *supra* note 79 at 13-14.

⁸⁷ *Ibid* at 14

⁸⁸ “The Dean’s Forum on Dispute Resolution and Access to Justice: Progress Report” (March 2015), online: <https://law.usask.ca/documents/research/deans-forum/05_ProgressReportI_2014-2015.pdf>.

⁸⁹ *Ibid* at 12-13.

⁹⁰ *Ibid* at 26.

⁹¹ *Ibid* at 27.

constraints⁹² as barriers which may prevent an individual from accessing legal services or enforcing their rights.

During interviews, young lawyers identified working with clients with “cultural, sexual and gender diversity as one of the hardest and most surprising aspects upon entering the profession.”⁹³ Stakeholder discussions revealed several principles related to the need to consider the role of social problems in legal issues and to be more inclusive generally.⁹⁴

The third meeting in March 2015 discussed in part the topic of legal education and its role in access to justice. The policy report⁹⁵ notes the importance of ensuring colleges of law demonstrate diversity throughout the institution in terms of the students and faculty who work and study there as well as by reflecting different worldviews and ways of being in its teachings and environment.⁹⁶ As gatekeepers to the profession, legal institutions play a prominent role in fostering diversity in the legal system.

The fourth meeting took place February 2016 and addressed in part the topic of putting the public first.⁹⁷ In the context of public engagement during legal development, the report notes the importance of diverse representation when shaping the justice system. Consulting individuals with diverse backgrounds and experiences reduces unknowns and drives user-centred change, as opposed to system-centred change.⁹⁸ Innovations driven by the Truth and Reconciliation Report are addressing issues of cultural competence and of decolonization of the justice system.⁹⁹

⁹² *Ibid* at 29.

⁹³ *Ibid* at 64-65.

⁹⁴ *Ibid* at 33.

⁹⁵ Dean’s Forum, “Legal Education”, *supra* note 8.

⁹⁶ *Ibid* at 8-9

⁹⁷ “Improving Access to Civil and Family Legal Services in Rural Saskatchewan” (February 2016) [Dean’s Forum, “Improving Access”], online: <https://law.usask.ca/documents/research/deans-forum/12_PuttingthePublicFirst_PolicyDiscussionPaper_2016DeansForum.pdf>.

⁹⁸ *Ibid* at 10.

⁹⁹ “Summary Notes from February 29, 2016”, online: <https://law.usask.ca/documents/research/deans-forum/14_FourthMeeting_2016SummaryNotes.pdf>.

The sixth Dean’s Forum in March 2018 included discussion of geographical location as a barrier to access to justice. As a province with a significant proportion of the population in rural areas, geographical location is an important barrier to consider and address in Saskatchewan.¹⁰⁰

APPENDIX B - Existing Programs, Innovations, and Policies

Public Initiatives

1. **Mandatory statement of principles** – the Law Society of Ontario is requiring legal professionals to come up with a statement of principles that acknowledges their obligation to promote equality, diversity and inclusion generally, and in their behaviour towards colleagues, employees, clients and the public. Licensees can either choose a statement template provided by the law society or come up with their own, but they must indicate on their annual report to the regulator that it’s been done.
 - The statement of principles was a recommendation from the law society working group, Challenges Faced by Racialized Licensees, which spent four years looking into those challenges. The recommendation was adopted unanimously by the law society’s board.
 - Cons: There has been criticism from some lawyers who say this infringes on their freedom of speech. One has actually gone to court to seek an injunction to stop the law society from requiring this statement.
 - <https://www.thestar.com/news/gta/2017/11/20/law-society-initiative-to-improve-diversity-is-about-justice-not-politics-lawyers-say.html>
2. **Collection of statistics on diversity at firms and implementation of diversity best practices** – the Barreau du Quebec is conducting the Panorama Project, which promotes the recruitment, retention and advancement of lawyers from ethnocultural groups within Quebec law firms and company legal teams. This is a voluntary program. The firms and

¹⁰⁰ Dean’s Forum, “Improving Access”, *supra* note 97.

partner legal departments involved in the project commit to sharing best practices to achieve greater ethnocultural diversity and a true inclusion in their workplaces and in the profession.

- <https://www.lavery.ca/en/news/988-lavery-joins-the-partners-of-the-barreau-du-quebecs-panorama-project.html>

3. **Raising awareness of and correcting unconscious bias** – BC Law Society – Firms can demonstrate commitment to diversity and inclusion by implementing meaningful workplace equality policies and developing clear processes for addressing discrimination and harassment. Firms may also consider raising awareness about gender and racial stereotypes and unconscious bias by promoting diversity-related resources. Lawyers should also be supported in developing skills and competencies in addressing bias, and responsibility for dealing with discrimination should be shared by everyone, not left to visible minority lawyers and Aboriginal lawyers.

- https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/Diversity_2012.pdf

4. **Developing bias-free performance evaluation**– BC Law Society – The experience of some US firms has shown that developing bias-free systems is a best practice that demonstrates results. For example, some firms have revised their evaluation systems to focus on competencies and behaviours rather than subjective impressions: for example, “can conduct dispositions with minimal supervision,” instead of more ambiguous attributes, such as, “shows initiative.” These evaluation systems work best when one person is trained with respect to cognitive bias and serves to review all evaluations based on identified competencies to look for trends. While implementing bias-free evaluation processes takes more time and resources, it has been suggested that failing to do so may lead to other “significantly greater costs, including attrition, poor morale, diminished productivity, lower client satisfaction and exposure to discrimination claims.”

- https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/Diversity_2012.pdf

5. **Promoting flexibility** – BC Law Society – The Project for Attorney Retention (PAR) has recently focused its research on the evidence based link between diversity and flexibility. Results to date suggest that more inclusive work environments are not likely to be developed without balanced hours programs and more workplace flexibility, particularly for women and women of colour lawyers, who often carry disproportionate family and community responsibilities. Best practices include developing non-stigmatized flexible work policies and ensuring that work is referred to lawyers working balanced hours.

- https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/Diversity_2012.pdf

6. **Promoting mentoring and sponsoring** – Mentoring can be a powerful tool for lawyer retention. Mentors can provide advice and support related to practice management, meeting client needs and managing workload. Mentors can also provide critical access to informal networks and intelligence regarding the “unwritten rules” in a work environment that can significantly impact advancement. In the US, women of colour have identified the lack of influential mentors as an important barrier to advancement. Mentors may not be enough; while mentors can provide access to networks and information, sponsors can be powerful and influential voices at leadership and decision-making tables. For visible minority and Aboriginal lawyers, mentors can be an invaluable resource for sharing experiences and for seeking advice related to navigating the racism and unconscious bias that they encounter in their firms and in the profession.

- The SK chapter of the CBA has a mentorship program for students. See: <https://www.cbask.org/Events/College-of-Law/Mentorship-Program.aspx>
- https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/Diversity_2012.pdf

Private Practice

1. **Senior director of inclusion and community engagement** – McCarthy Tetrault created Canada’s first “senior director of inclusion and community engagement” position. MT

hired the PBSC director for this role. This role is focused not only on inclusive work environments and recruitment, retention, and professional development but also on linking with the community in a meaningful way and making sure that both the diversity goals and the social impact goals are aligned.

- More at: <https://www.canadianlawyermag.com/legalfeeds/author/gabrielle-giroday/mccarthy-tetrault-creates-position-to-promote-inclusion-community-engagement-16350/>

2. **Name blind hiring (summer students)** – Lenczner Slaght Royce Smith Griffin LLP in Toronto is removing names from hundreds of applications it receives from law students hopeful to land a summer position at the firm, in an effort to promote more diverse recruitment. The name-blind review is for the initial round of selection, prior to on-campus interviews.

- More at: <https://www.canadianlawyermag.com/legalfeeds/author/gabrielle-giroday/law-firm-to-start-name-blind-hiring-for-summer-students-15964/>
- For criticisms of this initiative, see: <https://www.canadianlawyermag.com/author/naomi-sayers/name-blind-hiring-wont-fix-the-legal-professions-diversity-problem-15984/>

3. **Pro bono project to help transgender people change their gender on their IDs** – Gowling WLG will be working with the Canadian Centre for Gender & Sexual Diversity to help transgender and non-binary people change gender markers on their identification documents.

- More at: <https://www.lawtimesnews.com/article/monday-september-24-2018-16246/>

4. **Formal work assignment systems** – Some firms have developed assignment systems through which associates can indicate their availability and the skills and experience they

wish to gain, which can be matched by partners assigning files. This type of system may also help handle workflow and volume. This is done, for example, by McCarthy Tetrault.

- https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/Diversity_2012.pdf

APPENDIX C - Literature Review

Asher Alkoby & Pnina Alon-Shenker – *Out of the Closet and Up the Ladder? Diversity in Ontario's Big Law Firms*

There are protections against discrimination, but there are still barriers facing LGBTQ peoples within law firms. The data is limited because of the hesitation to be “out” at work. There were three general themes:

1. Racialized gay lawyers described their experiences at big law firms as negative and related them to their minority status
2. Gays and lesbians are forced to negotiate and perform their identity in a heteronormative workplace
3. Diversity programs devised by law firms may have helped diversify the lower ranks of law firms, but they seem to have failed to address the barriers that equity-seeking groups continue to face in retention and advancement through the ranks

Culture in most firms is still heteronormative, and the composition of firm leadership perpetuates this. Despite attempts by law schools to diversify this is not reflected in firms.

Over a third of LGBTQ lawyers have experienced some form of discrimination in the workplace, and over a quarter are not "out" at work. There is incomplete data on the makeup of LGBTQ people in the general population and in the legal profession, so it is difficult to say anything regarding representation; the available data, however, suggests they are underrepresented. For those who are in the profession, they say that many of the norms work

against them and that heterosexual people cannot recognize this. "Whereas homophobia manifests itself through direct discrimination ... heteronormativity operates in more subtle ways and it is therefore much more challenging to address".

To address these issues, some helpful things include training on unconscious bias, pressure from big clients and other market imperatives, task forces, and mentorship programs that are more formalized (and thus less likely to favour white males). Companies need to generally be transparent about their efforts.

Beth Bilson – *A Dividend of Diversity: The Impact of Diversity on Organizational Decision Making*

While it is fine to work towards diversity because it is “the right thing to do”, there is a tangible business case to be made. The focus in this article is that diversity leads to better decision making and thus improved services. A distinction is made between surface-level diversity (a dissimilarity of characteristics that is obvious) and deep-level diversity (dissimilarity in less evident characteristics, such as attitudes, personality, and values). Diverse groups perform better because members will assume (based on surface-level traits) that deep-level differences are likely and will imagine that everyone in the group is in possession of different information and perspectives. They will, therefore, see it as appropriate to place their own information and perspective on the table. Such diverse groups may lead to more conflict, but there are a number of tactics that managers can use to minimize that risk.

Kathleen Killin – *Will It Ever Be 50/50?: Diversity and Gender in the Law Firm and on Corporate Boards*

While women account for fifty percent of law school graduates, they are far less represented in private practice law firms. Firms were traditionally seen as places for wealthy white men, and that image has not been shed entirely. The issue is particularly noticeable regarding retention

and advancement. Some of the reasons for this are the restrictive career ladder and greater career flexibility in other available positions.

Canadian Centre for Diversity and Inclusion – *Diversity by the Numbers: The Legal Profession*

In private practice, racism and sexism persist. Marginalized groups need to conform to certain norms and behaviours if they are to fit in. This study talks to those people because when looking at culture, there is a need to talk with those who do not benefit from the dominant culture; for those who do the culture is normalized to the point of imperceptibility. In the legal profession, there are elements of sexism and racism but those things exist in the broader culture as well, so there must be broader social change if the problem is going to be truly fixed.

Every year, women are strongly represented as articling students and associates, but those numbers fall when it comes to partners and senior leadership roles. Part of this has to do with hegemonic masculinity and the hierarchy that it creates; the masculine is the ideal, and those who conform more closely to it are rewarded the most. This is reflected by the “Old Boys’ Club” in law firms. Another aspect of it is entrepreneurialism, in which those who can prioritize the firm and devote all of their resources towards it are those who are valued the most in the firm. There is the aspect of informalism, where those who participate in social activities are the ones who form relationships and get promotions; the problem is that many of these activities involve alcohol or are those favoured by wealthier people. Another issue is that those who have connections within the profession (likely white males) will already have started making social connections. Lastly is the aspect of paternalism, in which those at the top of the hierarchy make unquestioned decisions for the rest of the firm. These people are mostly men.

For out-groups, the options are either to conform (which comes at a personal and emotional cost), not conform (which comes at a career cost), or leave. For these reasons, efforts need to be made to change the culture at firms. This could involve training or a third-party HR

professional, but it requires a new perspective from leadership that involves acknowledging the barriers faced by women and racialized lawyers.

Naomi Sayers – *Name-Blind Hiring Won't Fix the Legal Profession's Diversity Problem*

A number of law firms have taken to name-blind hiring practices, where applicants are assessed in such a way that their names are not attached to their application materials. The goal is to reduce stereotyping and bias in hiring and to increase diversity in the profession. This does not solve the problem since there are many indicia of background aside from just name - stereotyping can arise from all types of personal identifying information. If everything that could lead to stereotyping was removed there would be nothing left on which to judge the candidate. This is backed by a 2018 study that found that name-blind hiring practices did nothing to affect the screen-in rate for visible minorities. The problem of a lack of diversity cannot be solved just through hiring practices since there are many other barriers to become a lawyer such as the financial, mental, and emotional costs.

Charles C Smith – *Who is Afraid of the Big Bad Social Constructionists?*

There is a lack of racial diversity in the legal profession - even in comparison to other professions such as medicine or engineering. We should not use the metaphor of “bleaching” within the profession (as a previous article had done) because it implies that (1) someone is responsible for the bleaching, and (2) that the profession has ever been anything otherwise. Instead of looking to metaphors to describe the situation, we should look instead to the realities of the situation and call it what it is.

One of the issues is the education system, which was designed by and for white British men; some aspects of the system still favour that reality; indeed law schools are the gatekeeper

into the profession. Until recently, it was impossible for certain groups to even get into the profession, and the debt involved is still a barrier for many. There have been a number of efforts to make the situation better, but progress is slow. There are, however, many practices that could be adopted, such as scholarships, subsidies, and programs like that of the Native Law Centre.

Joan Brockman – *Racism and the Legal Culture: Is There Room for Diversity on the Legal Profession?*

This article is a response to the Smith Article. Even aside from the actual statistics on diversity and discrimination in the profession, the perception among lawyers is that discrimination does exist within the legal profession against racial or ethnic minority groups. We do need actual measurement because otherwise we cannot truly say whether things are getting better. The data that we do have doesn't say enough, it only gives a snapshot of one point in time. The legal culture supports racism and sexism, and this needs to be addressed at every level.