# Improving Representation in the Judiciary: A Diversity Strategy

June 27, 2012





### AGENDA

- Diversity and the Judiciary
- Legal Leadership in the GTA (2011)
- Representation In Provincial And Federal Courts (2012)
- Towards an Inclusive Judiciary: A Systems Approach
- Conclusions





#### **DIVERSITY AND THE JUDICIARY**

- Many dimensions of "Diversity". Need to prioritize gender, visible minority, aboriginal and disability.
- Judicial impartiality and independence is a cornerstone of democracy.
   So is representation.
- Embedded problems of systemic discrimination reduce access to justice
- Perceptions of discrimination and fairness vary with demographics
- "The ultimate justification...is to keep the public's trust. The public must perceive its judges as fair, impartial and representative of the diversity of those who are being judged" (cited by B. Wilson, 1990)
- Substantive diversity in the judiciary improves decisions (Ifill, 2000)
- Few objective standards for assessing performance once in the judiciary – quality control is in selection





### **LEGAL LEADERSHIP IN THE GTA (2011)**

- Examined the legal sector in the GTA
- Publicly available information on leadership positions analyzed:
  - Judges Court of Appeal, Ontario Superior Court of Justice, and Ontario Court of Justice
  - Governing Bodies (Law Society of Upper Canada and Ontario Bar Association) and Law Schools
  - Partners in top 20 law firms
  - Crown and Deputy Crown Attorneys
- Only 26.7% of legal leaders were women (versus 51.3% of the population)
- Only 6.8% of legal leaders were visible minorities (versus 49.5% of the GTA population)
- Within the OBA, 20% of leaders were visible minorities compared to 5% of LSUC benchers





### Women in the Legal Sector in GTA

Judges\* (40.2%)

Partners in Law Firms (25%) Crowns and Deputy Crowns (42.9%)

Practising Lawyers (+/- 38 %)

Law School Enrolments (51.5%)

\*Court of Appeal for Ontario, Ontario Superior Court of Justice, and Ontario Court of Justice





## Visible Minorities in the Legal Sector in the GTA

Judges \*(8.3%)

Partners in Law Firms (6.6%) Crowns and Deputy Crowns (0%)

Practising Lawyers (14.6%)

Law School Enrolments (28-30%)

\*Court of Appeal for Ontario, Ontario Superior Court of Justice, and Ontario Court of Justice





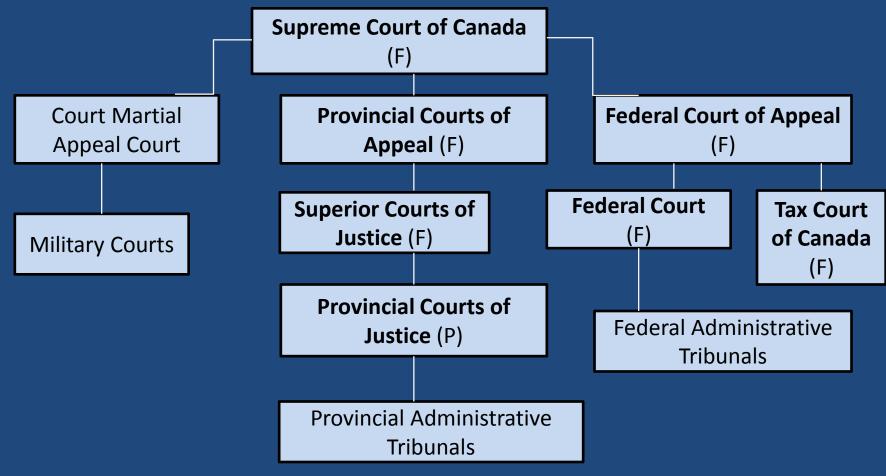
## REPRESENTATION IN PROVINCIAL AND FEDERAL COURTS (2012)

- Examined representation of judges in the Supreme Court, Federal courts and the Provincial courts in Ontario
- Unable to obtain official data
- Gender analysed for all 753 positions and visible minority status for 359 (48%) based on publicly available sources
- Methodology supported by OHRC (2010)





## Canada's Court System









### Supreme Court Appointment Process

- Advisory Committee formed for vacancy includes an MP from each major political party
- Minister of Justice suggests 7 names (usually after consultation with Prime Minister) to Advisory Committee
- Forwards 3 recommendations from the Advisory Committee to the Federal Cabinet to select and recommend to Prime Minister
- Prime Minister recommends the final appointee to Governor General





### Federal Appointment Process

(Federal Court of Appeal, Federal Court, Provincial Courts of Appeal, Superior Courts of Justice)

- Committees: 3 in Ontario, 2 in Quebec and 1 in others
- 8 members include 1 nominee each from: provincial/territorial law society, Canadian Bar Association, Chief Justice, Attorney General, law enforcement community, and 3 nominees from the Federal Minister of Justice
- Tax Court of Canada Advisory Committee has 5 members, 4 nominated by the Minister of Justice.
- Committees assess qualifications of lawyers who apply for appointment
- Minister of Justice makes recommendations to Prime Minister and Cabinet for final appointment





### Provincial Appointment Process

- Legislation requires composition of the committee to reflect the diversity of Ontario's population: gender, geography, racial and cultural minorities
- 13 committee members appointed for 3 years: Attorney General (7) Chief Justice of Ontario Court of Justice (2) Ontario Judicial Council (1) Law Society of Upper Canada, Ontario Bar Association, and County/District Law Presidents' Association (1 each)
- All vacancies are advertised in the Ontario Reports and The Lawyers Weekly, and legal associations are contacted with advance notice
- Members provided with applicants' information to review and recommend for next stage
- Each member provided with the list of applicants that at least four or more members have selected
- Interviews conducted by the entire committee and recommendations made to the Attorney General





## Diversity Trends in Appointments to the Judiciary

Ontario Court of Justice Appointments (1989-2010)

- Applications by women increased from 12% in 1989 to 41% in 2010
- Appointments of women increased from 32.1% in 1989 to 66.7% in 2010
- 7.0% of the appointments made were visible minorities

#### Federal Court Appointments

- Recent reports (Hamalengwa, 2012) indicate slippage in the proportion of women among federal court appointments in 2011 as 8/49 (16%) and 2010 (26%) 13/50
- 98% of recent federal appointments (Makin, 2012) were white





## Federal and Provincial Judges (Women)

	Population	Sample	# of Women	% of Women
FEDERALLY APPOINTED				
Supreme Court of Canada	9	9	4	44.4%
Federal Court of Appeal	13	13	5	38.5%
Federal Court	41	41	12	29.3%
Tax Court of Canada	26	26	6	23.1%
Court of Appeal for Ontario	25	25	10	40.0%
Ontario Superior Court of Justice	313	313	104	33.2%
Total Federally Appointed Judges	427	427	141	33.0%
PROVINCIALLY APPOINTED				
Ontario Court of Justice	326	326	105	32.2%





## Federal and Provincial Judges (Visible

9

39

26

18

122

221

138

100.0%

53.8%

95.1%

100.0%

68.0%

39.0%

51.5%

42.3%

ble

0.0%

0.0%

0.0%

3.8%

5.5%

2.5%

2.3%

10.9%

0

0

3

5

15

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Minorities)						
	Population	Sample	% of Population Analyzed	# of Visible Minorities	% o Visik Minor	
FEDERALLY APPOINTED						

9

13

41

26

25

313

427

326

Supreme Court of Canada

Court of Appeal for Ontario

Ontario Superior Court of

**Total Federally Appointed** 

PROVINCIALLY APPOINTED

**Ontario Court of Justice** 

Federal Court of Appeal

Tax Court of Canada

**Federal Court** 

Justice

**Judges** 

# Judicial Appointments of Ontario Court of Justice (1989-2010)

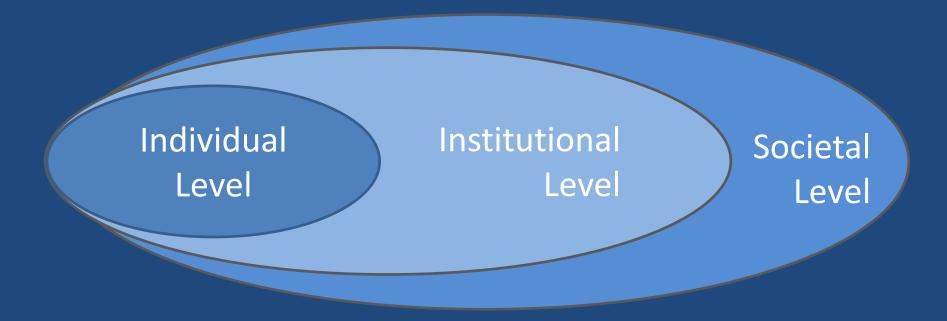
Legal Background	Total Number*	Percentage
Private Practice	205	68.3%
Provincial Crown	61	20.3%
Federal Prosecutor	11	3.7%
Government	23	7.7%
Representative Groups	Total Number	Percentage
Women	108	36.0%
Francophone	19	6.3%
First Nations	5	1.7%
Visible Minority	21	7.0%
Persons with Disability	0	0%

\*Appointments: 300





## AN INCLUSIVE JUDICIARY: A SYSTEM APPROACH







## Three Models (McCormick, 2010)

- Democratic election eg. the USA
- Merit bureaucratic competitive eg. European civilian systems in France, Spain, Germany, Austria (include formal study, examination)
- Executive appointment eg. Canada and much of the world. Variations include:
  - after the fact ratification or rejection or
  - before the fact screening and nominating committees
- Little conclusive empirical evidence that any one system produces a more diverse judiciary (Kenney, ND) Key element is the will to do it.





#### **Standards**

- Merit, accountability, openness, objectivity, representativeness, probity (McCormick, 2010)
- Proposed Reforms (2005) "Merit as the terminal objective... Diversity within the framework of merit....Accountability and nonpartisanship through two-pronged transparency" (Nadler citing Kotler, 2006)





#### A Critical Review of Processes

- Recognition of uneven playing field: it is not nor has it been a meritocracy
- "New process does appear to have prevented the politically motivated appointment of completely unqualified candidates" (Hausegger et. al., 2010)
- "There is no legally binding or generally accepted statement of what constitutes merit... There is no special training for entry into the judiciary and no examination process" (Mack and Andleu, 2012)
- Role of political connections and patronage





## Improve Processes

- Leadership and political will
- Recruitment
  - Openness and transparency
  - Advertising and outreach
  - Developing the pipeline
  - Mentoring and coaching
- Selection Processes
  - Composition of committees larger, representative, substantial and active lay component
  - The role of informal networks: "peer" review can reinforce the status quo
  - Examine hidden assumptions and bias in criteria and selection processes
  - Consider alternative career paths
  - Examine definitions and standards of "merit"
- Regular data analysis and reporting: What gets measured gets done





#### Individual Level

- Intersection of socio-economic factors and other dimensions - eg. Camille Nelson, Dean of Suffolk Law School
- Career path: women, visible minorities and aboriginal lawyers concentrated in different streams
- Issues around self-selection and promotion
- Retention issues
- Exclusion from informal networks/mentoring/coaching
- Role models
- Perceptions of opportunities
- Awareness of process





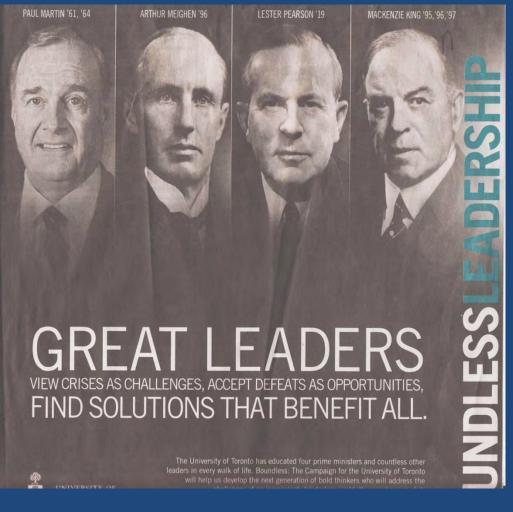
### The Social Environment

- Systems and organizations do not exist in a vacuum
- Cultural "carriers" reinforce values and stereotypes legislation, media etc.
- Allow (re) constructions of "merit" around the needs of certain preferred groups in a way that has unfairly advantaged them
- Continued efforts to improve representation within law bodies and advocacy by CBA, LSUC, Indigenous Bar Association, Federation of Asian Canadian Lawyers, and others
- Results oriented strategies to accelerate inclusion in the profession: eg. Legal Leaders for Diversity
- Tracking and reporting on progress













#### **CONCLUSIONS**

- Progress has been made: consider trajectory of women in the judiciary, but it can stall
- Leadership: Continued commitment and initiatives by governing organizations
- Communications: raising awareness and advocating for diversity
- Expanding the Pool: Developing the pipeline
- Outreach in recruitment
- Diverse committees, bias-free and transparent selection processes
- Tracking, measurement and accountability





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