

*Who is Afraid of the Big Bad  
Social Constructionists? Or Shedding  
Light on The Unpardonable Whiteness Of  
The Canadian Legal Profession<sup>1</sup>*

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<sup>1</sup> This paper reflects my own personal views based on research conducted over a number of years. The points and perspectives within the paper do not reflect those of any organization I am associated with. I have taken some liberty with the title based on Derrick Bell's *Who Is Afraid of Critical Race Theory?*

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The title for this session, *Bleached-Out Professionalism*, is one of those metaphors that seems easy to grasp. Most of us are aware of efforts within the legal profession, i.e., law schools, law firms, the courts, etc, to diversify their representation so that it is more inclusive of the racialized and cultural make-up of the broader society. The record of positive intention has been and continues to be articulated repeatedly in studies, reports, policies and programs written, developed and implemented by law schools, law societies, legal associations and law firms. Since the 1993 report of the Wilson Task Force, a considerable number of these reports and studies have been published<sup>2</sup>.

Over the past six years I have had the benefit of working in three legal associations on these issues. I have also provided advice and services to several law firms and legal associations. Through all of this, I have gained considerable insight into the challenges related to this topic. This has enabled me to research this matter and to develop policies and programs for the Law Society of Upper Canada, the Canadian Bar Association and, very recently, the Indigenous Bar Association where I support their efforts to form a national secretariat to identify, challenge and eliminate hate and racism in Canada. (One of the issues this group has been concerned about is the appointment of Aboriginal judges to higher courts, including the Supreme Court of Canada<sup>3</sup>.)

It is for these reasons that I question the topic of this session. There are two notions which are at issue here. One is that '*Bleached-Out Professionalism*' suggests eradicating stains or foreign elements in order to return to or 'create' some more homogenous, uniform construction. And this is exactly where the second contentious issue emerges. I shall phrase it in the form of a question: Assuming that 'bleaching' renders its objects white, when was the legal profession not bleached?<sup>4</sup> Was there ever really a need to 'bleach it'? Or wouldn't it be more important to talk about 'unbleaching' the profession, particularly now given the challenges faced by Aboriginal peoples and subordinate racialized groups in entering the legal profession?

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<sup>2</sup> For example, see *Access to Legal Education and the Legal Profession: A Commonwealth Perspective*, W. Twining, Butterworths, London, 1989; *Survey of Black Law Students, Black Articling Students and Recently Called Black Lawyers*, Law Society of Upper Canada, 1992; *Touchstones for Change: Equality, Diversity and Accountability, Women of Colour in the Legal Profession, Aboriginal Women in the Legal Profession, Multiple Discrimination: Issues of Gender and Multiple Discrimination in Canadian Law School Settings*, Canadian Bar Association, 1993; *Now that the Door Is Open*, Patricia Monture-Angus in *Thunder in My Soul: A Mohawk Woman Speaks*, Halifax, Fernwood Publishing, 1995; *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession*, Law Society of Upper Canada, 1997; *Racial Equality in the Canadian Legal Profession*, Canadian Bar Association, 2000; *Concerns Regarding Discrimination in Attracting Articling Positions*, and, *Articling Student Feedback Report*, Law Society of Upper Canada, 2000 (August) and 2001; *Addressing Discriminatory Barriers Facing Aboriginal Law Students and Lawyers*, Law Society of British Columbia, 2000; *Ten Years Into the Future: Where Are We Now After Touchstones for Change?* Canadian Bar Association, 2003; *Diversity and Change: The Contemporary Legal Profession in Ontario*, Fiona M. Kay, C. Masuch, P. Curry, Law Society of Upper Canada, 2004.

<sup>3</sup> See National Secretariat Against Hate and Racism Canada position paper on *Aboriginal Appointments* to at [www.indigenousbar.ca](http://www.indigenousbar.ca)

<sup>4</sup> Oddly enough, the concept of 'bleaching' has two opposing definitions depending on usage, i.e., popular usage in terms of bleaching clothing to make it white or photographic bleaching which actually supports colouring of photographs.

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Looking at the faulty metaphor conjures up the great difficulty the legal profession has in talking about race and racism, in society generally and within its ranks in particular. Rather than talk about race and racism directly, problematic metaphors are used. Given the rather undramatic increase in the numbers of Aboriginal lawyers and those from subordinate racialized groups, one would think this would be named directly. However, it appears that there is a lack of commitment by the legal profession to produce concrete results aimed at ensuring the profession reflects the make-up of the Canadian population. For example, Richard Devlin, A. Wayne MacKay and Natasha Kim's recent article on *Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a "Triple P" Judiciary* point out the challenges in increasing the racial diversity of the bench. One of the key challenges they encountered in doing their research was that at the federal level there was no information about the racialized composition of the bench and that the same held true for most provinces and territories<sup>5</sup>. Further, neither law societies nor the CBA have canvassed their members to assess their representation based on race or Aboriginal status.

On a related point, Dr. Alan King notes in his recent study of 'accessibility' in five Ontario law schools that: "Admissions policies that target groups with unique characteristics are not necessarily intended to produce a student body that mirrors the Canadian population<sup>6</sup>." As well, the Governor General recently commented on the difficulties in increasing the racial diversity of the legal profession<sup>7</sup> and the Law Society of British Columbia produced a report on discriminatory barriers faced by Aboriginal law students and lawyers<sup>8</sup>.

In this regard, the legal profession, which may pride itself on being 'different' because of its adherence to the rule of law and democratic principle, is really not unlike other professions or the Canadian society at large. Or as Professor Troy Duster wrote in his submission to the Association of American Law Schools:

Professions and the institutions which serve them tend to view themselves as having unique traditions, values, skills and missions -- even callings. While to some degree this is true, from the perspective of students of higher education, there are strong patterns or parallel trends and forces for a wide range of academic disciplines and professional schools. These parallel experiences and subsequent institutional and organizational dilemmas are particularly salient when we look to the changes that are occurring and have occurred over the last twenty years in institutions of higher education around the shifting demographic composition of undergraduate and graduate student bodies. The experiences of other institutions - both educational and corporate - as they have confronted

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<sup>5</sup> On this point, the authors state "At the federal level, the only information provided was a list of the names of active and supernumerary judges..." At the provincial and territorial levels, there was a disparate response..." *Alberta Law Journal, Vol. 38, No. 3, Special Issue on Judicial Appointments*, Guest Editor F.C. DeCoste, at 761

<sup>6</sup> See *Study of Accessibility to Ontario Law Schools*, Report submitted to the Deans of Law at Osgoode Hall, York University, University of Ottawa, Queen's University, University of Western Ontario, University of Windsor, Alan J.C. King, Wendy K. Warren, Sharon R. Miklas, Social Program Evaluation Group, Queen's University, October 2004, at 81

<sup>7</sup> See *Speech on the Occasion of an Honourary Doctorate of Laws Degree from the Law Society of Upper Canada*, [www.gg.ca/media/speeches/archive-2003/20030277e.asp](http://www.gg.ca/media/speeches/archive-2003/20030277e.asp)

<sup>8</sup> *Supra*.

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contested terrain around issues of gender, race, and ethnicity, can help clarify the strategies for addressing areas of conflict within schools of law<sup>9</sup>.

Evidence indicates the same dilemmas across the legal profession. Finally, one other underlying but critical issue is that the construction of a 'bleached' or overwhelmingly white profession requires us to consider the agents behind the bleaching/whiteness. In other words, who is 'bleaching' the legal profession? Or keeping it white? Why? How is this being done? And what must be done to change this?

This is the reason for the title and focus of this paper. Given the number of studies, reports, policies, task forces, programs, etc., one might expect that the legal profession would be much further along in addressing issues of its racialized composition. One might expect more significant numbers of Aboriginal peoples and individuals from subordinate racialized groups studying law and in legal practice; or results that were at least similar to other elite professions, eg., doctors, engineers, university professors. Unfortunately, this is not the case. The legal profession, for all its attention to this, lags well behind these other professional fields and so, once again, we are gathered to discuss this fact under the guise of '*Bleached-Out Professionalism*'

My contention with this subject forms the basis of this paper; and in discussing the legal profession, I also contend that it is essential to look at the pathways to it. This requires some discussion on the importance of education and, in particular, legal education.

***Whiteness and the Legal Profession In Canada:***

Discursive analysis on the education of non-dominant groups and its influence on professional attainment have been emerging over the course of a considerable period of time, particularly concerning legal education and entry into the practice of law. These matters do not exist in isolation but, rather, form part of a social context in which relations between dominant and non-dominant groups are situated, especially in terms of race. This has been explored by Aboriginal thinkers and critical race theorists<sup>10</sup>. Many of these authors contend that this relationship is symbiotic and based on an inequitable sharing of resources and power. In particular, Aboriginal peoples and peoples from subordinate racialized groups describe the power imbalance dominating their lives as a centrifugal force placing the pressures of assimilation squarely before them or blocking their access into society's elite professions. Further, as Cornell West notes, these prevailing forces, particularly influenced by the regime of law and legal education, have shaped and continue to shape social policy, institutional practices and community interactions<sup>11</sup>.

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<sup>9</sup> See *From What We Can Learn From Other Experiences in Higher Education*, AALS Special Commission on Meeting the Challenges of Diversity in an Academic Democracy, 1997, Chapter Four at 1.

<sup>10</sup> See, for example, R. Delgado and J. Stefancic *Critical Race Theory: The Cutting Edge*, 2<sup>nd</sup> ed. (Philadelphia: Temple University Press, 2000), K. Crenshaw et al *Critical Race Theory*, Adrien Katherine Wing *Critical Race Feminism: A Reader* (New York University Press: New York 1997), and Katharine T. Bartlett & Rosanne Kennedy *Feminist Legal Theory: Readings in Law and Gender*

<sup>11</sup> Cornell West, "Reassessing the Critical Legal Studies Movement" in *Keeping Faith: Philosophy and Race in America* (Routledge: New York, 1993) at 195-205, and, "Critical Legal Studies and a Liberal

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In this context, discrimination in education and professional occupations is mirrored and reinforced by discrimination in society, eg., through statutes, social policy, institutional practices or individual and community actions. Such statutes and practices are condoned as acceptable within the social mores of their times and, as such, impact on the abilities of non-dominant groups to participate in and benefit from the study and practice of law. In examining the whiteness of the legal profession, it is essential to look at the pathways to the practice of law. This means looking at access to a legal education and to those institutions which enable individuals to consider and pursue a legal education and legal practice. In this context, the history of racial discrimination in Canadian educational systems is inescapable.

For example, based on statues adopted in 1850, *The Common Schools Act*, in Ontario, separate schools for Blacks continued until 1891 in Chatham, 1893 in Sandwich, 1907 in Harrow, 1917 in Amherstburg, and 1965 in North Colchester and Essex counties. Based on statues dating back to 1833, it was until 1940 that Black children were barred from attending the only public school in Halifax County and in 1959 school buses still stopped only in white sections of Hammonds Plains. In 1960, there were seven formal Black school districts and three additional exclusively Black schools in Nova Scotia. The repeal of the Ontario and Nova Scotia statues authorizing racial segregation in education did not occur until the mid-1960s. Further, the *Indian Act*, had extremely restrictive provisions regarding the education of Aboriginal peoples.

In terms of legal education, W. Wesley Pue summarizes the racist values that contributed to the establishment of common law legal education in Canada. In detailing the history of its development, he writes:

The period from roughly 1910 to 1920 was important in laying new cultural foundations for modern common law legal education. It produced a melding of persuasive new ideas developed and tested in the USA with longstanding British middle class traditions regarding practical knowledge, honour and authority. For a variety of reasons English Canada's dominant cultural ethos was receptive to influences of both sorts. The conjuncture of industrialization and westward expansion dominated English Canadian imperial visions ... Challenged by a world of ideas which held no traditions sacrosanct, English élites ... were freed and forced to consider their own futures. This reappraisal included fundamental questions about which sorts of institutional arrangements were best suited to the peculiar position of this new, northern, British and free people<sup>12</sup>.

In this context, Pue describes efforts by the Manitoba Law Society to stop the development of proprietary schools which "(j)udging by U.S.A experience ... would also almost certainly have opened the door to legal careers for much larger numbers of

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Critic" in *Keeping the Faith*, at 207-225. See also, Duncan Kennedy, "Legal Education and the Reproduction of Hierarchy" (1982) 32 J. Legal Ed. 591-675, Margaret Thornton, "Technocentrism In The Law School: Why The Gender and Colour of Law Remain the Same" (1998) 36 Osgoode Hall L.J.369-3985.

<sup>12</sup> See W. Wesley Pue *Common Law Legal Education in Canada's Age of Light, Soap and Water* *Manitoba Law Journal*, at 661-662.

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young men (and women?) of working class or minority ethnic background. This prospect would not have been viewed with equanimity by Manitoba's Anglo élite, who were embedded in a culture which was fiercely pro-British and hierarchical, nativist, even xenophobic<sup>13</sup>.

He also notes "...the most vigorous proponents of what might be called a 'cultural' agenda in legal education were prominent, energetic, busy, successful practising lawyers. All were either born into the Anglo élite or thoroughly integrated into it. All were active in matters in law society governance or in the activities of bar associations"; and further that "... the cultural assumptions of individuals in that period must be assessed if we are to make any sense of the history of common law legal education in Canada. If we are to understand at all, we have to begin to understand the intellectual climate of the élite, British, Protestant world in which these men lived".<sup>14</sup>

Mirroring Pue's comments, Christopher Moore provides a sense of what the legal profession looked like in the 19<sup>th</sup> and early 20<sup>th</sup> centuries. He notes that "[t]he vast majority of nineteenth century Ontario lawyers were English, Scots, or Irish in origin and Protestant in religion, and they tended to take in students of their own class and kind ... Throughout the nineteenth century, successful families from outside the Anglo-Protestant mainstream were occasionally able to find articling positions for sons inclined to the law<sup>15</sup>."

It was not until 1855 that Robert Sutherland was called to the Bar in Ontario, becoming the first Black Canadian lawyer<sup>16</sup>. This was followed by Delos Rogest Davis in 1885<sup>17</sup>. Davis' call to the Bar was not a simple passage but, rather, required a special act of the Ontario Legislature to which the Law Society of Upper Canada protested<sup>18</sup>. While information on other Blacks called to the practice of law is difficult to ascertain, it appears certain that the effects of discrimination in education combined with racism in society generally limited the number of Blacks who entered into law school and, further, those who did faced barriers in undertaking legal education, particularly in attracting articling positions<sup>19</sup>.

Chinese, Japanese, South Asian and Aboriginal peoples were prohibited from becoming members of the Law Society of British Columbia until 1947, and 1948 for people of Japanese descent. Further, until it was amended in 1951, the *Indian Act* required

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<sup>13</sup> Ibid at 669.

<sup>14</sup> Ibid at 675.

<sup>15</sup> See *The Law Society of Upper Canada and Ontario's Lawyers: 1797-1997*, Toronto: University of Toronto Press, 1997 at 176.

<sup>16</sup> Ibid at 177. See also Ian Malcolm *Robert Sutherland: The First Black Lawyer in Canada?*, *Law Society Gazette*, 1992, 26.

<sup>17</sup> See *History of Blacks in the Law Society of Upper Canada*, Lance Talbot, *Law Society Gazette*, 1990, 25.

<sup>18</sup> Supra Moore at 177-179 and Talbot at 65. Davis was denied the opportunity to article. As such, he twice requested legislative action to enable him to be, first, a solicitor and then a barrister. See also Justice Julius Isaac *Delos Rogest Davis, K.C.*, *Law Society Gazette*, December, 1990:293-302.

<sup>19</sup> See *Historical Connexions, Law Society of Upper Canada & Black Lawyers*, 1999:1-2. Delos Rogest Davis was one of several Black Canadians called to the Bar who either did not have articling or found difficulties finding an articling position

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Aboriginal peoples to relinquish their status if they were to pursue higher education<sup>20</sup>. This prevented many Aboriginal peoples from entering university and considering legal education.

The prevailing presence of social and statutory barriers made it all but impossible, and in some cases impossible, for particular groups to receive a legal education in Canada and to enter into legal practice. This has resulted in some communities having few successes in legal education and is a matter of grave concern in terms of efforts to promote equity and diversity in legal education and the legal profession.

***Contemporary Challenges and the Unpardonable Whiteness of Being:***

Professor Michael Ornstein has conducted two studies of the demographic makeup of the legal profession<sup>21</sup>. While focusing particularly on Ontario, his research provides insights into the personal characteristics of lawyers across Canada. In both of these studies, Ornstein confirms that the legal profession is predominantly white<sup>22</sup>. This view is also supported by reports by the CBA and the Law Society of British Columbia<sup>23</sup>.

Ornstein points out that individuals from subordinate racialized groups and Aboriginal peoples tend to choose professions other than law for their careers. In some cases, the differences are quite significant. For example: 3.1% of Ontario lawyers are South Asian compared with 9.6% physicians, 7.0% engineers, 4.2% university professors; and 2.1% of Ontario lawyers are Chinese compared with 7.7% physicians, 9.6% engineers and 4.7% university professors. While there is no data examining career choices within these communities, these results are a clear indication of the strong differences in this matter. Professor Ornstein further notes that subordinate racialized groups comprise 25.9% of physicians, 27.3% of engineers, 15.2% of professors, 11.2% of high level managers and 15.7% of middle managers compared to 9.2% of lawyers<sup>24</sup>.

The racialized composition of the legal profession has been an issue for some time. Both statistical and anecdotal accounts have been written on this subject and, to date, numerous legal associations have been formed within subordinate racialized communities and amongst Aboriginal lawyers to provide opportunities for them to come

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<sup>20</sup> See Canadian Bar Association *Racial Equality in the Canadian Legal Profession* at 3.

<sup>21</sup> See *Lawyers in Ontario: Evidence from the 1996 Census*, and, *The Changing Face of the Ontario Legal Profession*. Both reports for the Law Society of Upper Canada, respectively January, 2001 and October, 2004.

<sup>22</sup> *Lawyers in Ontario* notes that the legal profession across Canada is 94.2% White and within Ontario is 92.7% White. See also Camille Nelson *Towards a Bridge: The Role of Legal Academics in the Culture of Private Practice* at 3 where she sites numerous sources drawing the same conclusion, including Geraldine R. Segal *Special Report on Race and the Law* (*ABA Journal*, 1999), Elizabeth Chambliss *Organizational Determinants of Law Firm Integration* (*46 Am. U.L. Rev.* 669, 1997), and David Wilkins and G. Mitu Gulati *Why are there so Few Black Lawyers in Corporate Law Firms? An Institutional Analysis* (*84 Calif. L. Rev.* 493, 1996). Further, in *Priming the Pipeline to Diversity in the Legal Profession*, the American Crown Counsel Association has identified that people of colour comprise 8% of all lawyers and judges in the United States (at 3).

<sup>23</sup> *Supra*.

<sup>24</sup> See *The Changing Face of the Ontario Legal Profession*, 12-14.

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together, nurture each other and support each other's social, cultural, educational and professional growth and development<sup>25</sup>.

The legal profession is not alone in this dilemma. The experience of Aboriginal lawyers and those from subordinate racialized groups are not much different than those of individuals from these communities working within other professions. For example, in a recent submission to the United Nations International Committee on the Elimination of All Forms of Racial Discrimination, the African Canadian Legal Clinic summarized a number of common issues besetting peoples of African descent and other subordinate racialized groups in terms of equality in employment. This submission describes the numerous reports identifying challenges and barriers to equal employment and provides social science data identifying the wage and position differential between groups based on race. In presenting this data, the report suggests that such differences are evident even when individuals from subordinate racialized groups have higher educational credentials than their White counterparts<sup>26</sup>.

When it comes to the practice of law, while there may be nuances that are different from other professional fields, clear and compelling explorations demonstrating the commonality of this issue with those of other employment sectors have been addressed in a number of articles<sup>27</sup>. Further, law societies, the Canadian Bar Association, law schools and law firms have undertaken various initiatives to address this challenge<sup>28</sup>. Unfortunately, the pace of change appears to be very slow and this is particularly a concern in terms of the racial composition of Canada's largest and most prestigious law firms.

For example, Michael St. Patrick Baxter suggests, "Here is the reality. Based on the 1997 *Canadian Law List*, there are about 23 Bay Street firms in Toronto. These 23 firms represent a total of about 3,117 lawyers. Of these 3,117 Bay Street lawyers, about 20 are black. This represents six-tenths of one percent of the Toronto Bay Street lawyers<sup>29</sup>." This has happened for several reasons: (1) because of the absence of a critical mass of Aboriginal lawyers or lawyers from subordinate racialized groups being within these law firms; (2) large law firms work in ways that are both alien and alienating to individuals from these communities; and (3) the impact of the discriminatory

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<sup>25</sup> There are a number of such associations within the community of practicing lawyers. These include the Canadian Association of Black Lawyers, the Association of Chinese Lawyers, South Asian Lawyers Association, the Indigenous Bar Association, Rotiio taties (an Ontario based Aboriginal lawyers' group). There are also similar associations of students within law schools across Canada. These groups have been formed because of the experiences of prejudice, harassment and discrimination its members have experienced from the dominant group within the legal profession. These experiences have led individuals within these associations to feel a sense of alienation from the 'mainstream' of Canadian legal practice. As such, in addition to creating their own law firms they have also created their own associations.

<sup>26</sup> See *Anti-Black Racism in Canada: A Report on the Canadian Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination*, Charles C. Smith and Erica Lawson for the African Canadian Legal Clinic, 2002 at 55 - 65.

<sup>27</sup> See *Black Bay Street Lawyers and Other Oxymora*, 30 *Canadian Business Law Journal*, 1998, and *Black Bay Street Lawyers: Looking Back, Looking Ahead* 28 *Law Society Gazette* 1994. See also Camille Nelson *supra*.

<sup>28</sup> Several law societies and law schools have set up equity and diversity programs and committees to address this matter and a number of corporate law firms have also established similar committees.

<sup>29</sup> *Supra* at 270.

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treatment, individual and systemic, that numerous individuals say they have experienced when working in these firms<sup>30</sup>.

As has been noted elsewhere, law schools are "...the gatekeepers of legal education...Ultimately the ethos of the profession is determined by the selection process at law school. In order to ensure that our legal system continues to fulfill its important role in Canadian society it is important that the best candidates be chosen<sup>31</sup>." This concern has been quite a focal point in terms of studying the issue of access to legal education and the implications of the deregulation of tuition fees on Aboriginal peoples and individuals from subordinate racialized communities, particularly in terms of the increasing costs of legal education and the potential barriers this may present to these communities.

For example, two Ontario law schools approved significant increases to their tuition fees, marking a rise from approximately \$2,451 in 1995 to \$16,000 for the 2003-04 at the University of Toronto and from \$3,228 in 1997 to approximately \$8,961 in 2003 at Queen's University. Further, the University of Toronto intends to increase tuition fees until they total \$22,000 and Queen's University has projected to increase its fees to \$12,856 by 2005.

Concerns regarding the impact of tuition fees on individuals from historically subordinate communities have been addressed by a number of organizations. For example:

- Statistics Canada data indicates that 38.7% of youth aged 18-21 years from wealthy families attended university compared to 18.8% of youth from poorer families.
- In the Canadian Centre for Policy Alternatives' *Missing Pieces IV* it is suggested that higher tuition fees result in lower participation and that "Researchers at the University of Guelph found that 40% fewer students from low-income families were attending University after tuition fees rose."
- The Canadian Association of University Teachers suggests that, if current trends continue, access to post-secondary education will be increasingly divided along income lines.
- Recent census data indicates that Aboriginal peoples and individuals from subordinate racialized groups tend to fall below the Low-Income Cut Off (LICO) more so than others. The result of this is lowered earnings, leaving them less able to support the educational advancement of their children<sup>32</sup>.

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<sup>30</sup> For example, see *Summary of Concerns Regarding Proposed Law School Tuition Increases - Community Impact In An Already Exclusionary System*, African Canadian Legal Clinic, March 31, 2003

<sup>31</sup> Ibid at 2 which references *Law Students, Law Schools, and their Graduates*" Larry Chartrand, *Windsor Year Book on Access to Justice*, 2001, citing Supreme Court of Canada Chief Justice Dickson (as he was then).

<sup>32</sup> See *Comments on Methodologies for Law School Accessibility Studies: A Background Paper for the Standing Committee on Equality/Canadian Bar Association*, Charles C. Smith, 1-4. This paper was also published in the Canadian Centre for Policy Alternatives *Missing Pieces V: An Alternative Guide to Canadian Post-Secondary Education*, fall 2004, at 75.

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The potential impact of increasing law school tuition fees has been explored by the University of Toronto<sup>33</sup>. As the basis for increasing its law school tuition fees to \$22,000, the University initiated a study to demonstrate that there would be little, if any, negative impact. This study was completed by the University's Provost and released to its Board of Governors. The points noted immediately above are critical to examining the U. of T. Provost's study on accessibility. However, the Provost's study ignores the well-known history of disparate outcomes in legal practice, including articling, for specific groups. This masks deeply entrenched societal and systemic inequalities and evades a critical point on the likely deleterious impact increasing tuition fees will have.

In terms of students from families with low incomes, the report indicates that the numbers are small in the low-income areas with 17.3% of students compared to 33% of students with family incomes above \$90,000 and 33.5% of students who have not reported their family income. Given that individuals from this latter group do not seek financial assistance, it is likely safe to assume that these individuals are financially well-off. As such, this indicates that over 66% of students in the Faculty of Law come from families with incomes above \$90,000 per year as compared to 17% with incomes less than \$60,000 per year<sup>34</sup>.

This data supports the concerns expressed earlier, specifically that 38.7% of youth aged 18 - 21 from wealthy families attend university compared to 18.8% of youth from poorer families and, further, that if such trends in increasing tuition fees continue, post-secondary education will be increasingly divided along class lines. Given the intersections between race and family incomes, these divisions will likely be along the lines of race as well.

Following this study, all five law schools in Ontario have examined the issue of 'accessibility' in legal education and the implications/impact of deregulation of tuition of fees<sup>35</sup>. There are some startling indicators from this research, including that:

- Aboriginal students comprise 1.3% of law school students but make up 3.6% of the Ontario population and their numbers have decreased in law school
- The number of students of African descent have decreased in law school<sup>36</sup>;;
- African Canadian students are twice as likely as their cohorts to leave law school with an accumulated debt of over \$70,000 and South Asian students have significant numbers with similar debt loads<sup>37</sup>;
- Choosing a specialization in law effects student course selection and most students prefer Civil Litigation and Commercial Law which are the more financially lucrative. This has particular relevance to student interest in human

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<sup>33</sup> See *Provost Study of Accessibility and Career Choice in the Faculty of Law*, Shirley Neuman, Vice President and Provost, University of Toronto, February 24, 2003

<sup>34</sup> Ibid at 5.

<sup>35</sup> I have placed this term in quotation marks because it is currently a disputable point as to whether this study actually examines access to legal education. For instance, the purpose of this study has been noted by its author to

<sup>36</sup> Supra King et al at 91 and 98.

<sup>37</sup> Ibid at 133

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rights/social justice studies which have declined from 11% to 5.6% from third to first year students with only 1.2% of recent graduates practicing in these areas<sup>38</sup>.

Some of the comments of these students are worth noting. For example:

*With the rising tuition costs, it will be very difficult for other black students like myself to have access to a legal education or to finish the legal education they have already commenced. I am one of five black law students in a class of 180 and I see the numbers going down in the future years because of the high expense incurred to go to law school and the few avenues available which provide financial assistance (Year 3, Female)*

*If tuition costs keep going up, First Nations people will not be able to pursue professional careers. As it is now, most Bands will not allow its members to apply to U.of T. due to high cost. Raising costs will inhibit First Nations People's career choices (Year 1, Female)<sup>39</sup>*

Beyond the direct impact of increasing tuition fees, it is useful to once again review Professor Ornstein's data on the significant earning differential between lawyers based on race. His research indicates that:

- White lawyers between the ages of 25 - 29 earn approximately \$4,000 per year more than lawyers from subordinate racialized groups (\$52,000 v. \$48,000) . This gap increases to approximately \$14,000 for lawyers between the ages of 35-39 (\$85,000 v. \$71,200) and to \$39,000 for lawyers between the ages of 40 - 44 (\$97,000 v. \$57,000)<sup>40</sup>;
- Wage differentials between whites lawyers and those from subordinate racialized communities are quite dramatic in the peak earning years of 50 - 54 with whites earning \$70,000 more.<sup>41</sup>

As the CBA paper on the U. of T. study suggests:

It is essential to highlight these points... It is rather unusual to approach a study on accessibility and to decontextualize the fundamental issues affecting students, particularly their personal characteristics and how individuals from specific social groups have succeeded in the practice of law. By omitting reference to this information, the Provost study ignores the well-known history of disparate outcomes in legal practice, including articling, for specific groups and appears to operate on the assumption that once in law school all are equal. This masks deeply entrenched societal and systemic inequalities and evades a critical point on the likely deleterious impact that increasing tuition fees will have<sup>42</sup>.

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<sup>38</sup> Ibid 30-32.

<sup>39</sup> Ibid 77-78

<sup>40</sup> See *The Changing Face of the Ontario Legal Profession* at 29

<sup>41</sup> See *Lawyers in Ontario Executive Summary* at i and ii respectively.

<sup>42</sup> See *Response to the Provost Study of Accessibility and Career Choice in the University of Toronto Faculty of Law* at 5

The same might be said of Dr. King's study. Reviewing the earlier comments regarding students who graduate with higher debt loads and limited practice opportunities (i.e., Aboriginal peoples, South Asian and African Canadians), it is likely that increasing tuition fees will pose significant barriers to their entry and success in the practice of law.

***What Can Be Done and By Whom:***

In specifically addressing access to the practice of law, Aboriginal lawyers and law students as well as those from subordinate racialized groups have stressed that the organizations within the legal profession need to demonstrate concrete results in terms of attracting, supporting, retaining and promoting lawyers from their communities<sup>43</sup>. Over the years, it has been pointed out that large, prestigious law firms are not very racially diverse, that a number of articling students and lawyers from Aboriginal communities and subordinate racialized groups have not had good experiences working in these firms and, as such, have left them<sup>44</sup>.

To address these concerns, it is useful to look at some of the promising practices in the U.S. These practices signify the importance of law firms and law schools working together through specifically targeted initiatives aimed at increasing the racial diversity of legal education and practice. For example:

- Haynes & Boone LLP has established the Haynes & Boone Minority Scholars Program which is available to first year students at SMU Dedman School of Law and the University of Texas School of Law. For these efforts, the firm was given the prestigious Thomas L. Sager Award from the Minority Corporate Counsel Association for its commitment to improving the hiring, retention and promotion of 'minorities' and women in 2002<sup>45</sup>.
- The Bar Association of San Francisco has established both a Bay Area Minority Summer Clerkship Program and Bay Area Minority Law Student Scholarship Program. Through this program, the Bar Association works with the following law schools: Boalt Hall, UC Berkeley; Davis; Golden Gate University; Hastings; McGeorge; Santa Clara University; Stanford; University of San Francisco<sup>46</sup>.
- Despite the impact of *Hopwood v. Texas*<sup>47</sup>, the University of Texas Law School has established a number of programs to attract 'minorities' to the study of law. For example, it set up the University of Texas Law School Partnership Task Force which prepares undergraduate students at public colleges to compete as law school candidates and then succeed in law school. The Law School was declared by ***Time***

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<sup>43</sup> Supra African Canadian Legal Clinic, Canadian Bar Association, Law Society of British Columbia.

<sup>44</sup> This issue has also been written about by Camille Nelson, supra at 7, and Michael St. Patrick Baxter, supra at 273-274. For example, Nelson suggests that "...much of the culture of elite law firms is problematic precisely because elite firm lawyers have had a lack of experience with Blacks and other persons of colour." St. Patrick Baxter suggests "...the problem is attributable in large part to the fact that the people who, historically, have controlled the portals of the Bay Street firms have suffered from a lack of personal experience with blacks."

<sup>45</sup> See [www.hayboo.com/career/career.asp](http://www.hayboo.com/career/career.asp) ***Career Centre***

<sup>46</sup> See [www.sfbar.org/about/diversity.html](http://www.sfbar.org/about/diversity.html) ***Diversity Programs and Model Policies***

<sup>47</sup> Fifth U.S. Circuit Court of Appeals, 1996. This case resulted in the overturning of the University of Texas Faculty of Law affirmative action program aimed at increasing the recruitment of African Americans and other under-represented groups.

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**Magazine** to be a national leader among schools working to broaden the traditional applicant pool. It was also named as the top law school for Latino students in 2002 by the **Hispanic Business** magazine<sup>48</sup>.

- The Sponsors for Educational Opportunity have established an internship program in the field of corporate law. This program allows interns opportunities to work with established lawyers on assignments that range from major corporate transactions to pro bono projects. Some of the law firms involved in this project include Cleary, Gottlieb, Steen & Hamilton; Davis Polk & Wardell; Fried, Frank, Harris, Shriver & Jacobson; Milbank, Tweed, Hadley & McCloy; Sullivan & Cromwell; Shearman & Sterling; Simpson, Thacher & Bartlett; and Weil, Gotshal & Manges<sup>49</sup>.
- The Law School Admissions Council has established a program entitled PLUS (Pre-law Undergraduate Scholars Program) which provides grants to law schools to institute pre-law education programs to inspire students of colour to become lawyers and to provide them with knowledge, skills and other forms of assistance that will strengthen their preparation for law school<sup>50</sup>.
- The Santa Clara University School of Law has set up a Summer High School Minority Law Program and established the Russel W. Galloway Jr. Scholarship Fund, in memory of a law professor who was committed to diversity, and the Thurgood Marshall Scholarship Fund named after the former first African American appointed to the Supreme Court. In 2001, the University received the Law School Racial and Ethnic Diversity Award from the California Minority Counsel Program and was recognized as one of the ten most diverse law schools in the country by **U.S. News and World Report**<sup>51</sup>.
- The American Crown Counsel Association has established a program entitled **Pipeline to Diversity in the Legal Profession**. This program seeks to enable law firms to improve their recruitment and retention of minority candidates and has established a Review Board to guide its efforts as well as mentorship, outreach and educational programs<sup>52</sup>. The American Crown Counsel Association participates with several groups including the Minority Legal Education Resources program, the Nashville High School Summer Intern Program, the Holland & Knight Charitable Foundation Opening Doors Program in Palm Beach and Streetlaw, Inc. which sponsors projects in which law school students teach in high schools for academic credit.
- Similar initiatives have also been established by: the law schools in the state of Ohio which have established the Racial Fairness Project<sup>53</sup>; Archer and Grenier LLP<sup>54</sup>; the

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<sup>48</sup> See [www.utexas.edu/law/news/time.html](http://www.utexas.edu/law/news/time.html) *UT Law #1 in Reaching Out to Students of All Backgrounds*

<sup>49</sup> See [www.seo-ny.org/sub\\_career\\_programs/corporate\\_law.html](http://www.seo-ny.org/sub_career_programs/corporate_law.html) *Corporate Law*

<sup>50</sup> See *Memorandum No. 02-100 PLUS Program Call for Proposals*, October 29, 2002

<sup>51</sup> See *Law School wins award for commitment to ethnic and racial diversity*, Press Release [www.scu.edu/news/releases.cfm/0601/diversity.html](http://www.scu.edu/news/releases.cfm/0601/diversity.html)

<sup>52</sup> See *Priming the Pipeline to Diversity in the Legal Profession: ACCA Diversity Pipeline Kit* [www.acca.com/diversity/pipeline](http://www.acca.com/diversity/pipeline), 2001. The Review Board for this program includes law firm representatives at the associate and managing partner levels as well as student and law school representatives.

<sup>53</sup> See [www.racialfairness.org/Law%20Schools.htm](http://www.racialfairness.org/Law%20Schools.htm).

<sup>54</sup> See [www.archerlaw.com/recruit\\_diverse.html](http://www.archerlaw.com/recruit_diverse.html)

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Florida Board of Education Division of Colleges and Universities<sup>55</sup>; LeBoef, Lamb, Greene & MacRae LLP<sup>56</sup>; Faegre & Benson LLP<sup>57</sup>; and Canadian law schools at the universities of Saskatchewan and Dalhousie.

- Further, in cooperation with law schools across the U.S., the American Bar Association has established the Legal Opportunity Scholarship Fund to support students who would otherwise not be able to afford a legal education<sup>58</sup>.
- LeBeof, Lamb, Greene & MacRae LLP participate annually in the Black Law Students Association annual student recruiting conferences as well as Legal Outreach, a program to encourage inner-city high school students to consider law as a career. This firm also participated in the Brooklyn Legal Services Internship Program as well as with Sponsors for Educational Opportunity's corporate law program.
- Faegre & Benson LLP works with the Minnesota Minority Recruitment Conference and Southeastern Minority Job Fair which hosts job fairs aimed at attracting lawyers of colour.
- Parker Poe Adams & Bernstein LLP recruits first year 'minority' associates each summer through the North Carolina Bar Association Minority Recruitment Program or through direct contact with potential students.
- Perkins Coie works with a number of organizations that are actively addressing development, hiring and retention of lawyers from diverse backgrounds, eg., Washington State Minority and Justice Commission; Ninth Circuit Task Force on Race, Religion and Ethnic Fairness, Seattle-King County Bar Association/Diversity Coalition and Diversity Merit Program.
- The Bar Association of San Francisco works with three bay area county bars to sponsor the First Year Minority Clerkship program. This program now involves 15 - 20 employers in the San Francisco area.
- Several law firms and law schools attend job and university fairs established specifically for 'minority's students<sup>59</sup>; and several law schools engage their alumni in outreach initiatives including the University of Georgia, the University of Texas, the University of Wisconsin, Florida A&M University and Florida International University.

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<sup>55</sup> See [www.fldcu.org/releases/press/prs/RegentsApproveProgram.asp](http://www.fldcu.org/releases/press/prs/RegentsApproveProgram.asp)

<sup>56</sup> See [www.lgm.com/recruiting/diversity/recruitment.asp](http://www.lgm.com/recruiting/diversity/recruitment.asp)

<sup>57</sup> See [www.faegre.com/diversity/diversity\\_recruit.asp](http://www.faegre.com/diversity/diversity_recruit.asp)

<sup>58</sup> See [www.abanet.org/fje/lsmf.html](http://www.abanet.org/fje/lsmf.html) *ABA Legal Opportunity Scholarship Fund*. Some of the law schools that have committed to participate include: University of Chicago Law School, Drake University Law School, Duke University School of Law, Fordham University School of Law, Hofstra University School of Law, Marquette University Law School, University of New Mexico School of Law, Northwestern University School of Law, Oklahoma City University School of Law, Rutgers University School of Law - Camden, Seton Hall University School of Law, Yale Law School and Yeshiva University - Benjamin Cardozo School of Law.

<sup>59</sup> For example, such activities are conducted by Archer & Grenier LLP, University of Georgia Law School, Faegre & Benson LLP, the University of Wisconsin Law School, the University of Texas Law School, Perkins Coie LLP and others. In particular, Parker Poe Adams and Bernstein LLP recruit directly from the historically African American North Carolina Central University Law School.

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In referencing these promising practices, it is instructive to acknowledge their targeted focus and the degree of cooperation between law firms, law schools, bar associations, high schools, university and community organizations for subordinate racialized groups. These partnerships allow for diverse interests to work together for a common goal, one that is clear and produces definable numerical results within designated timelines. If we were to truly 'unbleach' the legal profession, these are the kinds of programs that would be useful to put into place in this province – programs that specifically name their purpose, take the leadership to construct essential partnerships and to then challenge and change their institutional structures to ensure the success of Aboriginal peoples and subordinate racialized groups in the study and practice of law.

**Conclusion:**

In Canada, there are some examples we can look toward. For example:

- The Law Society of Upper Canada has a mentoring program and a high school outreach program and law societies in B.C., Saskatchewan, Manitoba, Alberta, Nova Scotia and Ontario have some form of discrimination harassment counsel to enable individuals to seek advice and support if they perceive they have been discriminated against by a lawyer;
- Law societies and the CBA have established codes of conduct on discrimination and harassment to address individual acts and systemic issues and the CBA is now working to develop an Equity and Diversity Audit Template for Law Firms to provide a resource for legal workplaces to assess themselves in terms of their diversity and can be used by law schools as well as firms.
- Pre-law programs have been established by the University of Saskatchewan through its *Native Law Centre* and through the Dalhousie University, Faculty of Law *Indigenous Black and MicMaq* program.

While there has been some increase in the racial diversity of law school students and members of the legal profession, this diversity needs to be increased dramatically in order to develop a critical mass of Aboriginal lawyers and lawyers from subordinate racialized groups so that the legal profession will be at the same level of other professions and begin to reflect the make-up of the population.

To achieve this goal, law schools and law firms must demonstrate clear and unequivocal leadership that is time-specific and measurable. The importance of this matter is underscored when considering the social significance of attaining a legal education, a point which is well articulated in the University of Windsor study on law school admissions criteria where the authors write:

By necessity, the nature, quality, and effectiveness of the legal system are greatly dependent on the types of individuals who receive a formal legal education. As lawyers, judges, educators, administrators, and legislators, legally trained persons control or materially affect the majority of decision-making and

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law-enforcement processes in society. Law school graduates continue to develop careers in many non-traditional occupations requiring legal expertise; this broadens the profession's sphere of influence. Thus, the legal system, intended for the benefit of all members of society, reflects in some measure the cultural, social, and economic views of the legally trained. To the extent that the legally trained influence the organs of government, access to formal legal education can also be viewed as an important determinant of the political, social, and economic reality. Yet, legal education has traditionally been accessible only to majority groups in Canada. Therefore, minority perspectives concerning our societal choices may have had only limited influence<sup>60</sup>.

This, in the name of professionalism, is what we have to change.

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<sup>60</sup> See *The Impact of Law School Admission Criteria: Evaluating the Broad-Based Admission Policy at the University of Windsor Faculty of Law*, Dolores J. Blonde, K. Hildebrandt, B. Mazer, C.J. Wydrzynski, *Saskatchewan Law Review*, 1998.