

Ms. Josée Bouchard, Director, Equity Initiatives
The Law Society of Upper Canada
Osgoode Hall, 130 Queen Street West
Toronto, Ontario, M5H 2N6

Dear Ms. Bouchard;

Re: LSUC Discussion Group Paper “Developing Strategies for Change: Addressing Challenges Faced by Racialized Licensees”

I hope that you are well. My name is Robert Girvan. I am a former Crown prosecutor and Defence Lawyer.

I have reviewed this paper, and have a number of comments to make. While this paper is, in theory, merely a first stage in consultation with the profession, I note that many Professional Continuing Education Sessions in many parts of the province have been set up to discuss this paper. However, I hope the conclusions in this paper are not a foregone conclusion, and those who have prepared it will listen to the view of those who write in, such as myself.

Before I begin, I should say that I am aware of some European societies in which people with a foreign-sounding name do not even receive an interview despite excellent credentials. I completely agree that we must ensure that this is not happening and does not happen in Canada. Having said this, I do have some further comments.

“Racialized” Licences.

While the goal of this position paper is laudable, I find the word “racialized” to be a very unfortunate choice of words. As Martin Luther King said, “I hope for the day when my little children will be judged, not by the colour of their skin, but by the content of their character.” I understand that this quote can be used to block progress, and blindly allow for the status quo. This is not my intention.

However, I am concerned with the focus on race, and the focus on “equity”, with its emphasis on substantive equality, rather than on the word justice, which to my mind includes a broader range of factors. A vital aspect of justice is “equality of opportunity”, or, put more broadly, human freedom to rise or fall in society based on one’s effort and ability. In my view the goal should be to have

no “racialized licences”, to have race and ethnicity become *irrelevant* to the advancement of each of us according to *merit, thus promoting a society committed to excellence.*

By focusing solely on “equity” and ignoring “human freedom” and “excellence” your paper ignores vital aspects of Justice. As a result, your conclusions stray beyond their appropriate and legitimate limits.

1– Equity v. Excellence

I do agree that as a matter of justice, whatever the colour of one’s skin, or ethnic background, they should have an equal opportunity to show that they are the best person for a given position, and should rise or fall in an organization based on their level of excellence at performing the core functions of the job, and not for extraneous factors, such the colour of one’s skin, or being part of “the old boys network.”

Furthermore, I accept that all human beings, whatever the colour of their skin or ethnic background, possess the same range or distribution of human abilities. Therefore, all other factors being equal, there should be, as a matter of justice, a rough equivalence between the demographics in society and in the legal profession.

I also accept all of your evidence about the existence of a gap between the distribution of legal position in the profession today, with some groups under-represented I also believe, that all things being equal, lawyers will hire other lawyers like them in demographic background, based on habit and other factors. I furthermore accept, that justice requires steps to assist the under-represented groups to be given assistance of some kind to give them a better opportunity to compete fairly for the jobs in question. I also accept that work should be done with the legal profession to work on values, and assumptions, or biases, to ensure that individuals of all groups have an equal opportunity for any given job.

The Grave Danger Of A Mandatory System

What I do strongly oppose is any sort of mandatory system or quotas in which the legal profession or the Law Society is forced to have a particular distribution of ethnic groups at any given time. This is an unfair and unjust idea. What it

does is set up the danger that the best person might not get the job, and thus the client will not have the best person doing the work on the file.

Let me be very clear, so no one who dislikes my words can take my comments out of context. I am **NOT** saying as a matter of principle that there is any difference between ethnic groups in ability. What **I am saying** is that in every hiring choice, that best person should get the job, as a profound principle of justice, and excellence. In any given case, it may be a person who is subject to “equity” concerns, or it may not, but the best person should be hired, fostering a culture of excellence.

However, I do believe that without quotas or mandatory rules, the following positive step can be taken. There may well be cases where two candidates are of equal or very very close in capacity, and thus the firm could in good conscience hire either one of them based on excellence. In this case, and in this case alone, I believe that the preference should be given to the person subject to “equity” concerns, to ensure that our overall legal system is more just, without sacrificing excellence. This is where the law society can work with the legal profession, to raise awareness of these issues, so that those hiring at a firm are ready to take this step when it is open for them to do so. This is the crucial area in which the dangers of the “old boys network” and “fear of those who are different” can be addressed.

If some communities remain unrepresented in law firms despite these steps, then the issue may not be only the hiring practices of the law firms themselves, but rather, there may be issues within unrepresented communities that need to be explored. For example, is access to a good education being blocked in some way and thus limiting the number of competitive candidates?

Forcing law firms to provide detailed data on ethnicity, and forcing the Law Society to make decisions on which firm to hire in a given situation based on equity demographics at a law firm, is in my view a draconian and unnecessary step. If the Law Society works with law firms, and raises awareness on these issues, then they will have gone a long way to addressing these concerns, without acting like a Big Brother presuming to interfere indirectly in the hiring choices of the firms, in a hard era in which law firms are struggling to survive a tough work climate.

I have no objection to a the Law Society requesting information regarding the “general profile” of the firm regarding ethnicity and racial background, provided it is not used to penalize the firm, or exert pressure on it, but rather, to work with the firm further to raise awareness on the importance of these issues.

I have no objection to the Law Society doing an so-called “Equity Audit” provided the Law Society retains the right and the culture to hire the very best person for the job, subject to the preference I mention above in the interests of justice, where two candidates are roughly equal.

In Conclusion

Imagine one is in a Boeing 747 in a storm over the south Pacific. Who wouldn't want the best possible pilots in the cockpit, whatever the colour of their skin? Clients in Ontario deserve no less. Yet, in the interest of social cohesion, and justice, we must work to ensure that there is a strong relationship between our demographics, and those who have jobs and positions of power in our society.

I agree with the goal of this paper, yet I want to ensure that we develop towards this goal by raising awareness, not through coercion, and that we protect that vital human need and longing for excellence. For any society to be strong, it needs both justice, and excellence.

Robert Girvan, former Crown prosecutor, Defence Lawyer, and writer.