Racialized Licensees, the Law Society and Catalysts for Change

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I offer the thoughts below in response to the call for input by the "Challenges Faced by Racialized Licensees Working Group" and specifically to their consultation paper "Developing Strategies for Change." I begin by applauding the Law Society of Upper Canada (LSUC) for this initiative and for highlighting the voices of racialized licensees, and more broadly the value of diversity, in our community. Having demonstrated that change is needed, however, the LSUC must now do all it can to deliver on that change, and be seen to have done all it could in that regard!

The Law Society is at its best as a catalyst for change, I would suggest, when it neither regulates nor fails to regulate, but instead works creatively to facilitate leadership in realizing the legal profession's shared values and goals. The Law Society's approach to the Justicia Project or the Treasurer's Advisory Group (TAG) on Access to Justice could be framed in these terms. The "Racialized Licensees" Working Group enables the Law Society to demonstrate leadership in a sphere that is vital to the present and the future of the profession.

In our article, "Diversity and Data in the Canadian Justice Community" (2014) 11 Journal of Law and Equality 85-131, Sabrina Lyon and I argue that sound and evidence-based policy initiatives aimed at greater inclusion in the legal community must begin with reliable data. I was pleased to see the ways in which the Consultation Paper builds on similar premises. Notwithstanding the clear rationales for obtaining such data, we discovered surprising resistance to this idea in Canada and particularly among the larger law firms clustered in downtown Toronto. The reason appeared to be a mistrust of "numbers." In other words, just measuring how many lawyers or paralegals are hired/promoted from diverse groups was seen as potentially harmful to the reputation of firms that are actively pursuing policies of inclusion but whose record of hiring or promoting in a given year might not (yet) demonstrate the success of such policies. Others expressed concerns that a mere quantitative snapshot would miss longitudinal and comparative benchmarks, or regional differences or differences in the size of legal employers, different walks of practice, and so forth. Numbers, in other words, while necessary, arguably were not sufficient to be the basis on which assessments of the status quo and paths were reform are based.

In our study, we conclude that while some of the anxieties about data resonate, none suggest any benefits to knowing less. With this dynamic in mind, Sabrina and I suggested that the LSUC should take an active role in facilitating the collection and dissemination of quantitative and qualitative data, in comparative and longitudinal contexts. Since the publication of the aforementioned study, as noted in the Consultation Paper, the Canadian Centre for Diversity and Inclusion (CCDI) has launched the "Diversity by the Numbers: The Legal Sector" (DBTN) initiative building on the idea that demographic data needs to inform the policies of legal employers who wish to become more inclusive. In 2014,8 large Canadian law firms participated covering over 3700 licensees (and over 7500 employees in total). It is projected that 20 firms will

take part in 2015. Other well publicized initiatives have featured major clients such as BMO calling on law firms who want their business to meet specific standards in relation to diversity and inclusion. In 2012, the CBA issued a resource paper, Measuring Diversity in Law Firms, for employers looking to track their diversity and inclusion performance, and in 2013, 16 large law firms joined together to create the Law Firm Diversity and Inclusion Network. These are clearly progressive steps, but in my view, they do not relieve the Law Society of the imperative of its own leadership in this area.

Quantitative data is a necessary foundation because what we count signals what we believe counts, but it is not a sufficient evidentiary basis on which to be a catalyst for sustainable change. Sabrina Lyon and I argued the optimal approach to the metrics of inclusion is a mix of quantitative and qualitative measures which, together, can provide the basis for a "report card" on progress. The Inclusion Index needs to be transparent in its criteria and developed and implemented by an independent, non-profit, third party organization with expertise in the area. The LSUC can provide input on such an Index but it needs to have the credibility and independence that is only possible with an outside organization (or consortia of organizations). While the article did not detail what that mix in an Inclusion Index ought to be, a sample could look as follows:

- Development and dissemination of anti-discrimination and harassment policies
- Professional development, training and education on diversity and inclusion
- Mentorship policy and participation rates
- Establishing proportional benchmarks on diversity in hiring and promotion (e.g. % goal for numbers of associates and partners from diverse background
- Qualitative measures such as holding focus groups and surveys within firms with respect to cultural competencies
- Quantity, quality and impact for outreach initiatives to engage and support diverse lawyers and law students (e.g. support for conferences, social innovation, etc)

These criteria need not be exhaustive, and of course much will turn on the "weight" assigned to each measure – but this kind of broad index will, I believe, effectively distinguish the leaders from the laggards, which is the point of the exercise. In this sense, an Inclusion Index also goes beyond the DBTN approach by integrating quantitative and qualitative metrics and leading more clearly to assessments of leadership. The discussion around what should be "counted" is likely as important as the counting itself. However an Inclusion Index is developed, however, its methodology must be transparent and defensible and its results must matter.

Endorsing an Index or other forms of benchmarking is valuable, but the LSUC is uniquely positioned to ensure the effectiveness of such measures. At a minimum, the LSUC can track and publish rates of participation in these measures (as it does, for example, in relation to pro bono activities). Additionally, the LSUC can use these measures as a condition for participation in other related settings. For example, the LSUC could tie participation in the OCI process with Law Schools or articling and LPP placement process to participation in the Inclusion Index. Or, a

surcharge could be imposed on firms over a certain size (e.g. 50 lawyers) if they choose not to participate, which could be used to fund additional diversity mentorship initiatives. Or firms which do not participate in the Index could be required to explain their lack of participation, in a similar vein to current "comply or explain" OSC initiatives in relation to board diversity in corporate governance discussed in the consultation paper. The variations of carrots and sticks available to the LSUC are many, and are available whether or not the LSUC decides to move further into the realm of regulating firms as opposed to individual lawyers.

One option, which I would not recommend, is for the LSUC to engage in "naming and shaming" *per se*. Such exercises may be legitimately experienced as a regulatory penalty by those named and suggest the dilemma we faced is a matter of bad behaviour by some rather than system dynamics. Alternatively, highlighting those who are leading the way precisely because some recognize holistic approaches are needed strikes me as a better approach (and consistent with the Justicia and TAG models). So, for instance, if 100 employers participate in an Inclusion Index, perhaps the top 50 should be recognized and those in the top 10 be celebrated. The group in the bottom half of this evaluative exercise need not be named as their absence from the leadership group will itself serve as an impetus for reform. In the U.S. firms form across the country compete to be included in Yale's list of the top "Family Friendly" firms - http://yalelawwomen.org/top-ten-list/. Creating market rationales for joining the ranks of leaders seems to me more effective than the LSUC, in effect, being seen to impose market penalties. It is also important that the Law Society take a proactive role in promoting this initiative and in profiling the results. The LSUC's power to communicate values and instill shared expectations is far more powerful than the reach of its rules and limits to enforcement.

It is important, in my view, that the Law Society tangibly support those demonstrating leadership and tangibly signal to others that the status quo is no longer acceptable in Ontario. This kind of culture change can only succeed through collaboration. Traditionally, the LSUC has been wary of collaboration which it comes to performing regulatory roles. The story of legal education in Ontario in the first half of the twentieth century is perhaps the most dramatic example of this dynamic. This frailty is perhaps in the DNA of regulators of all stripes, but it is why the LSUC has reluctantly followed so many important innovations rather than led the way (at Osgoode, the struggles by the Law School against the Benchers to establish Parkdale Community Legal Services in the 1970s continue to drive a negative perception of the Law Society and its core values). Of course, this dynamic has evolved and arguably come full circle, so that now collaboration has now become the Law Society's watchword. Justicia and TAG, mentioned above, are two examples, while the Law Commission of Ontario (where the Law Society has collaborated with the Ministry of the Attorney General, Law Foundation of Ontario and all of Ontario's law schools) and it more recent LPP partnership with Ryerson, the University of Ottawa and Lakehead represent other important precedents. I continue to believe the benefits of partnership in the sphere of reforms toward greater inclusion far outweigh the risks, in my view. These are just some examples of the model which the Law Society could adopt to express its leadership in tangible ways without adopting a unilateral, rule based approach.

And in addition to these opportunities to facilitate and incentivize the leadership of others in the legal community, the LSUC can also lead by example itself. I was impressed with the discussion in the Consultation Paper of initiatives tying procurement and the adoption of equity policies.

For the Law Society itself to adopt proactive procurement policies in relation to any firms which undertake work on its behalf, for example, can serve for a model for other major clients of legal services. I also would endorse other approaches suggested in the consultation paper for infusing diversity and inclusion goals in other activities of the Law Society, from its enforcement of relevant existing Rules of Professional Responsibility to including cultural competency more expressly within the field of professional responsibility and practice management for purposes of the CPD context and elsewhere.

I also wish to raise, however, areas notable for their omission in the consultation paper. For example, there is no mention of the detrimental impact of the LSUC's choice to fund the LPP largely on the fees paid by candidates and articling students (who can afford it least), or the decision to allow the Ryerson/University of Ottawa LPP to be completed through unpaid placements, even though these policies may well have a disproportionate impact on equity seeking and racialized candidates. These points are highlighted in recent correspondence to the Law Society by the Law Students' Society of Ontario (LSSO) and I would commend the insights of our students to the Working Group for consideration.

The most important voices in this consultation will be those of lawyers, paralegals and students who are experiencing the impact of barriers and the achievements of overcoming them. That said, it is also important that the work of the Racialized Licensees Working Group be understand as relevant and necessary for the entire profession to be engaged. The risk of diverse licensees' voices going unheard is as significant a mischief as the risk of these issues being portrayed as simply *their* issues rather than *our* issues. My hope is that the tangible, doable and meaningful steps outlined above, or variations on these themes, will make clear that we all have an ownership stake in the values of the legal profession and all have work to do where the experiences of licensees fails to live up to those values.

Finally, I wish to thank the Law Society for the opportunity to be a part of this process, and to emphasize that the above observations and perspectives are offered in my personal capacity and not on behalf of Osgoode Hall Law School or York University.

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