

Judging: the Challenges of Diversity

**Remarks of the Right Honourable Beverley McLachlin, P.C.
Chief Justice of Canada**

Judicial Studies Committee Inaugural Annual Lecture

**June 7, 2012
Edinburgh, Scotland**

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A. INTRODUCTION

Lord President Hamilton, Lord Justice Clerk Gill, Cabinet Secretary for Justice, Mr. McAskill, Senators of the College of Justice, Master of the Rolls Lord Neuberger, distinguished guests, ladies and gentlemen. I must begin by thanking you, Lord Hamilton, on two counts: first, for those very kind words of introduction; and second for inviting me to deliver the Judicial Studies Committee's inaugural annual lecture.

It is a great honor to appear before this very august audience. I am particularly pleased to be here in Edinburgh, although our stay in your beautiful city is regrettably short.

The links between Scotland and Canada run deep. Over the course of three centuries, many thousands of sons and daughters of Scotland left their homes in search of life in Canada. They were farmers, craftsmen, soldiers, merchants, bankers, politicians, lawyers and judges. They include our first Prime Minister, Sir John A. MacDonald and our longest serving Chief Justice, Sir Lyman Duff. Their contribution to my country has been profound and enduring.

Indeed, the list of distinguished Canadians with Scottish roots is such that some have suggested the Scots should be Canada's founding people. Despite the claims made at our many annual Robbie Burns Day parties, the truth is more complex.

Canada was born of diversity — the coming together of three groups of peoples - the aboriginal nations, the French settlers of Acadia and Quebec, and English speaking peoples from England, Scotland and the United States.¹ And Canada is becoming ever more diverse. According to a recent Census 1 in 5 Canadians were born outside of Canada and nearly 1 in 6 are visible minorities.² In two of our largest cities, Toronto and Vancouver, Caucasians are in the minority. We continue to be a country of immigrants, and all signs suggest that diversity in Canada will only increase in the years to come.

Scotland has a different history of human settlement and migration. If we go back a few millennia, we find Celts, invaded by Danes and Norse, succeeded by the French and English. They merged in time to become the Scottish people. Now, once again, new people from far

¹ John Ralston Saul, *A Fair Country* (Toronto: Viking Canada, 2008).

² Statistics Canada, *Selected Demographic, Cultural, Educational, Labour Force and Income Characteristics (830), Mother Tongue (4), Age Groups (8A) and Sex (3) for the Population of Canada, Provinces, Territories, Census Metropolitan Areas and Census Agglomerations, 2006 Census - 20% Sample Data*.

places are settling in Scotland. And, as in Canada, the ethnic minority population is growing at a much faster rate than the general population.³

Diversity enriches a society. But it also presents challenges. The judiciary is not immune from these challenges — which brings me to my subject tonight, judging in a diverse society.

I will begin by describing some of the challenges of judging in a diverse society. I will then discuss three related responses that assist in meeting these challenges: (1) an informed approach to judicial impartiality; (2) an understanding of social context; and (3) a Bench that reflects the diversity of the population.

B. THE CHALLENGES OF JUDGING IN A DIVERSE SOCIETY

Judging in a diverse society presents a number of special challenges. Let me mention a few.

The first challenge of judging in a diverse society is that people appearing in Court — whether witnesses or litigants — will often be very different from the judge hearing the case.

³ Office of the Chief Statistician, Analysis of Ethnicity in the 2001 Census - Summary Report, February 2004.

Their experiences, values and perspectives, even the language they speak, may be quite foreign to the judge. This may impact on the ability of the judges to appreciate their circumstances, assess their credibility, and craft appropriate remedies.

A second challenge of judging in a diverse society is that the issues that come before the Court may be different. They may be entirely novel. Or they may be familiar, but presented in a new way with new implications. As a law student, I never dreamed that I would be called upon to decide whether a religious Muslim woman may be permitted to wear a Niqab while testifying, or whether same-sex couples should be allowed to marry, or whether children can refuse life-saving medical treatment on religious grounds, to take but three examples. New questions and new contexts inevitably challenge pre-conceived notions and expectations.

A third challenge of judging in a diverse society is the challenge of complexity. The legal issues that arise tend to be complex, and to involve competing values. The problems are polycentric. Professor Lon Fuller evokes the metaphor of a spider web⁴ to describe such problems. Not only does one need to sort out the different and intersecting strands of the web; one must proceed knowing that to pull on one strand is to set up a new and complex dynamic that impacts on the other strands — sometimes subtly, sometimes dramatically.

⁴ Lon L. Fuller, *Law and Morality* (New Haven: Yale University Press, 1969).

A final challenge of judging in a diverse society is the challenge of maintaining confidence in the justice system. Members of minority communities may have emigrated from countries afflicted by corruption, where the administration of justice is neither independent nor impartial. They may not trust judges; they may assume that the system is stacked against them. They thus approach the justice system with distrust. Not trusting or understanding the justice system, they may avoid it or find alternative routes to what they want or deem just. Ultimately, public confidence in the judiciary — essential in a society based on the rule of law — may be eroded.

In his most recent book, *Making Our Democracy Work*, Justice Stephen Breyer of the United States Supreme Court poses a “puzzling question” — why does the public accept and follow decisions made by the judiciary, a body he describes as “inoffensive, technical, and comparatively powerless.”⁵ The answer to this question, he suggests, rests in the confidence of the people. This is the ultimate challenge of judging in a diverse society — to ensure that all segments of the community learn to have confidence that administration of justice is fair, independent and impartial.

C. MEETING THE CHALLENGES

⁵ Stephen Breyer, *Making Our Democracy Work: A Judge's View* (New York: Alfred A. Knopf, 2010) at 11.

Having discussed the challenges of judging in a diverse society, let me look at three ways we can ensure that we meet these challenges: first, by an informed concept of judicial impartiality; second, by an appreciation of social context; and third, by a diverse bench.

1. An Informed Approach to Impartiality

Impartiality lies at the heart of the judicial role. Judges have but one task: to judge between competing claims, impartially in accordance with the law. The good judge has many attributes — intelligence, mastery of the law, sound judgment, patience. But much the same can be said for many who hold important offices or positions. What sets judges apart is their impartiality. Judges must approach their every task with absolute impartiality, irrespective of the person before them or the issue to be decided.

Everyone, you say, understands this. Indeed, it is why the blindfolded figure of *Justitia* is an enduring metaphor for the judicial function. But what does impartiality really mean? And how does it play out in a diverse society, made up of people of many creeds and cultures? Let me suggest that the image of the blind judge must be supplemented by the image of the informed judge, hence the phrase, “informed impartiality”.

Understanding impartiality begins with the recognition that judges are human beings. The great American judge Jerome Frank once wrote: “Much harm is done by the myth that,

merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine.”⁶ Like everyone else, judges possess preferences, convictions and — yes — prejudices. Judges are not social or political eunuchs.⁷ They arrive at the bench shaped by their experiences and by the perspectives of the communities from which they come. As human beings, they cannot help but to bring these “leanings of the mind” to the act of judging. In short, judging is not an exercise of cold reason, uncontaminated by personal views and preconceptions.

The myth decried by Judge Frank is harmful because if we fail to recognize the existence of a subjective element in judging, we cannot get a grip on what is required for a judge to be impartial. Subjectivity intrudes on judicial thinking at all levels. Take for instance the fact-finding exercise. In assessing expert evidence or the testimony of ordinary witnesses, judges must make decisions about credibility and must draw inferences from the evidence they accept — and they cannot do this without drawing on their general knowledge and understanding of human behaviour.

Of course, logical argument — reasoning by deduction, induction and analogy — plays a prominent role in judging. It is tempting to think that this leaves little room for subjective feelings. Yet, research on how the brain works suggests otherwise. Scholars argue that reason is not a faculty separate from the emotions, and emphasize that even the most abstract exercises of

⁶ *In re J.P. Linahan Inc.*, 138 F.2d 650 (1943 - 2nd Cir.), at pp. 652-653 [reference omitted.].

⁷ J.A.G. Griffith, *The Politics of the Judiciary* (Manchester: Manchester University Press, 1977), at pp. 187-190; see also B. Wilson, “Will Women Judges Really Make a Difference”, (1990) 28 *Osgoode Hall L.J.* 507, at p. 509.

reasoning are responsive to our emotions.⁸ The intertwining of logic and feeling is simply a fact about how the human mind works.

This is no less true in the legal domain than it is in everyday life. As Baron MacMillan — a great Scottish judge — wrote with some insight, “the warmer tints of imagination and sympathy are needed to temper the cold light of reason if human justice is to be done”.⁹ Michael Kirby, recently of the High Court of Australia, put the point well:

Decision-making in any circumstance is a complex function combining logic and emotion, rational application of intelligence and reason, intuitive responses to experience, as well as physiological and psychological forces of which the decision-maker may only be partly aware.¹⁰

In the end, it is clear that a variety of subjective influences — our beliefs about the world and about human nature, our emotions, and our sense of justice — are inescapably part of judicial decision-making.

We tend to think that reasoning by induction and analogy constitute “good judging”, and decision-making on gut-feeling or instinct is bad judging. We prize eloquent well-reasoned judgments, while deploring “palm tree” justice. But the truth is more complex. Our instincts,

⁸ See, for example, J. Nedelsky, “Embodied Diversity and Challenges to Law” (1997) 42 *McGill L.J.* 91, at pp. 101-103.

⁹ Lord MacMillan, *Law and Other Things* (Cambridge: Cambridge University Press, 1938) at pp. 217-218.

¹⁰ M. Kirby, “Judging: Reflections on the Moment of Decision” (1999) 18 *Aust. Bar Rev.* 4, at p. 21.

including our instincts for what is fair or right or just — are the distillation of all we have learned over our lifetimes.

In his recent book, *Thinking, Fast and Slow*,¹¹ Nobel prize-winner Daniel Kahneman argues that the expert, and this includes judges, is an expert precisely because her experience leads her to quickly and instinctively sort out complex patterns of data and come to the right conclusion. Kahneman uses the metaphor of two thinking systems — System 1 and System 2. The System 1 brain is our instinctive response based on our accumulated lifetime of study and experience. It is a way to jump to quick and (usually) valid conclusions. The System 2 brain is the intellectual verification that “checks” the System 1 response. It asks whether the instinctive response is correct and appropriate, and evaluates whether a departure from past practice is necessary — in a word, whether to innovate and, if so, how. Whether one is an artist, a doctor, a scientist or a judge, both systems of the brain must be engaged for effective decision-making.

Kahneman illustrates the point with a study done on Israeli parole judges.¹² He found that the number of rejections increased sharply as the morning wore on and lunchtime approached. The story was picked up by the popular press and run under the variants of headline, “Hungry judges are bad judges”. There may be wisdom in that but Kahneman’s explanation is more profound. What was happening, he hypothesizes, was that as the judges became more tired, more pressured (that stack of unopened files) — and yes, perhaps more hungry — they were less willing (or perhaps less able) to think slow! So they fell back on the

¹¹ Daniel Kahneman, *Thinking Fast and Slow* (Toronto: Doubleday Canada, 2011).

¹² *Ibid*, pp. 43-44

comfortable but safe default and easier position of denying requests for parole. Instead of using the System 2 brain to check and reconceptualise the situation, they contented themselves with the easier System 1 response.

The distinction between slow thinking and fast thinking helps us to understand our reaction to social diversity. The fact that our thinking is based in instinctual responses — the System 1 brain — means subjective elements automatically enter into it. This means that along with all the valuable knowledge and experience we have embedded in our System 1 brain, come certain unhelpful, misleading subjective elements, such as prejudices and biases, which, if not checked by the intellectual processes of our System 2 brain, will enter into the decision-making process and skew it.¹³ And this risk is increased in a diverse society where judges are confronted with a great variety of individuals with experiences and values different from their own.

The key to maintaining impartiality in a diverse society is slow-thinking, System 2 reflection that, for want of a better term, I call “conscious objectivity”. Impartiality in a diverse society lies not in the elimination of all preconceptions and personal inclinations. Using the intellectual tools of reasoning and the values that underlie our justice system and democratic society, the judge evaluates her initial “fast think” response, and then goes on to identify inappropriate preconceptions and prejudices that it may contain, thus consciously eliminating illegitimate elements from the reasoning process.

¹³ See: *Liteky v. U.S.*, 114 S.Ct. 1147 (1994), *per* Scalia J. at p. 1155; M. Omatsu, “The Fiction of Judicial Impartiality” (1997) 9 *Canadian Journal of Women and the Law* 1, at p. 6; K. Mason, Unconscious Judicial Prejudice (2001) 75 *Aust. L.J.* 676, at p. 680; and *In re J.P. Linahan Inc.*, *supra*, at pp. 651-652.

These practices are easily stated. Their actual attainment, however, is much more difficult. It requires constant attention to the processes involved in reaching a particular factual or legal conclusion. And it requires that the judge cultivate certain attitudes and dispositions — in particular, introspectiveness, openness, and empathy. I will deal briefly with each of these attitudes.

The first attitude that the judge must cultivate is introspectiveness. A judge must be willing to take moral stock of herself.¹⁴ As Justice Frank put it “[t]he conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect.”¹⁵ Similarly, Aharon Barak, former Chief Justice of the Supreme Court of Israel, writes that a judge “must be capable of looking at himself from the outside. He must be capable of analyzing, criticizing and controlling himself.”¹⁶ The purpose of introspection is to obtain a clearer understanding of the individual judge’s mental and ethical susceptibilities. In a diverse society introspection is essential to ensuring that the phenomenon of difference confronting the judge does not skew the decision-making process.

The second attitude the good judge must possess is openness. The judge’s mind must be open and receptive to ideas and arguments that may compete with the judge’s personal preconceptions. This willingness to receive and act upon new and different ideas, arguments and

¹⁴ A. Barak, “A Judge on Judging: The Role of a Supreme Court in a Democracy” (2002) 116 *Harv. L. Rev.* 16, at p. 56.

¹⁵ *In re J.P. Linahan, Inc.*, *supra*, at pp. 652-653; see also K. Mason, *supra*, at p. 686.

¹⁶ A. Barak, *supra*, at p. 56.

views lies at the heart of true impartiality.¹⁷ Impartiality implies an appreciation and understanding of the different attitudes and viewpoints of the parties to a controversy.¹⁸ Litigants can have no absolute expectation that their perspective will be determinative. But they have an unqualified right to a judge who will truly hear them and who is willing to be convinced by views different from her own.

A disposition to openness or “enlargement of mind”¹⁹ is linked to the third attitude necessary to good judging — empathy. Empathy emphasizes the common humanity of us all — judges, litigants, witnesses and all other participants in the justice system. It is the ability to see the world from the perspective of others and become engaged in their experience²⁰. Empathy recognizes the legitimacy of diverse experiences and viewpoints. Justice Bertha Wilson, who immigrated to Canada from Scotland and became the first woman on the Supreme Court of Canada, wrote that judges must, or at least earnestly attempt to, “enter into the skin of the litigant and make his or her experience part of your experience and only when you have done that, to judge.”²¹ The judge, by an act of imagination, should systematically attempt to imagine how each of the contenders sees the situation. This is critical to impartiality and openness. Empathy

¹⁷ Canadian Judicial Council, *Commentaries on Judicial Conduct* (Cowansville, Quebec: Yvon Blais, 1991), at p. 12; *Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia*, 1990, at pp. 26-27.

¹⁸ B.L. Shientag, “The Virtue of Impartiality” in J.R. Winters, ed., *Handbook for Judges: An Anthology of Inspirational and Educational Writings for Members of the Judiciary* (American Judicature Society, 1975) at pp. 57-58.

¹⁹ J. Nedelsky, *supra*, at p. 107.

²⁰ K.L. Karst, “Judging and Belonging” (1987-1988) 61 *S. Cal. L. Rev.* 1957, at p. 1966.

²¹ B. Wilson, *supra*, at p. 521.

does not require one to adopt particular cause. It simply allows the judge to truly hear the parties who appear before her. Empathy of this sort sustains rather than defeats impartiality.²²

In a diverse society, this is what litigants, irrespective of their background, are entitled to: a judge who is aware of the influence of her own experiences and perspectives, who is willing to act on different views and ideas and who has the capacity to truly hear and understand the perspectives of all those who come before her.

2. Appreciating Social Context

I have spoken of the importance of impartiality and openness to competing perspectives and experiences for judging in a diverse society. However, this only gets the judge so far. It is important that the judge truly understand and appreciate the various perspectives that are relevant to resolving the case in a just fashion. This is particularly important in a diverse multi-cultural society. The judge must understand the facts and the law. But he should also understand the social context from which they arise.

What do we mean when we say a good judge appreciates the social context of the dispute before her? We mean, that the judge understands not just the legal problem, but the social reality out of which the dispute or issue before the court arose. Attentiveness to social context is

²² K.L. Karst, *supra*, at p. 1966.

nothing new. Good judges have long recognized that the law is a human endeavour aimed at governing the behavior of human beings in all their diversity and complexity. Judges apply rules and norms to human beings embedded in complex, social situations. To judge justly, they must appreciate the human beings and situations before them, and appreciate the lived reality of the men, women and children who will be affected by their decisions. As our Court has stated: “Judicial inquiry into context provides the requisite background for the interpretation and application of the law”.²³

Understanding the social context of disputes and legal issues became particularly important in Canada after the adoption of the *Canadian Charter of Rights and Freedoms* in 1982. The *Charter* requires judges to assess legislation and government action for compliance with fundamental rights and freedoms. Defining the ambit of these rights and how they interact with one-another in a way that is meaningful and workable requires appreciation of the social context in which these rights are claimed.

To take but one example, social context has helped Canadian courts to grasp the full ambit of the right to equality guaranteed by section 15 of the *Charter*. In its first s. 15 case,²⁴ the Supreme Court of Canada recognized “substantive discrimination” — discrimination that arises not from inequality on the face of the law, but from when identical sufficiently equal treatment that has a negative effect or impact on a disadvantaged group. Social context allows one to

²³ *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 43; see also para. 123.

²⁴ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

understand how rules and programs which may appear quite unobjectionable from a majoritarian perspective actually, in their impact, perpetuate disadvantage through prejudice or stereotyping.

Appreciating social context can also be important in statutory interpretation. A recent decision of my Court regarding the sentencing of Aboriginal offenders offers a good example. The case is known as *Ipeelee* and involved two Aboriginal men with a history of serious offences. Although they had served their jail sentences and had been released from custody, each was subject to a community supervision order.²⁵ As a result of minor breaches of alcohol or drug consumption, both men were charged and convicted for breaching their supervision orders, and each received lengthy sentences of imprisonment for the breach. At issue was a provision, added to the Canadian *Criminal Code* by Parliament in 1996, which states that sentencing judges must pay “particular attention to the circumstances of Aboriginal offenders”.²⁶

Social context formed a crucial component of the Court’s majority reasons with respect to both the interpretation and application of the Aboriginal sentencing provision. The majority judgment of Justice Lebel noted that the Aboriginal sentencing provision was aimed at ameliorating “the serious problem of overrepresentation of Aboriginal people in Canadian prisons”,²⁷ resulting from a history of colonialism, displacement and residential schools. In interpreting Parliament’s directive, judges may properly take judicial notice of these circumstances and their role in bringing the Aboriginal person before the justice system. The

²⁵ *R. v. Ipeelee*, 2012 SCC 13.

²⁶ Section 718.2(e) of the *Criminal Code*, R.S.C. 1985, c. C-46.

²⁷ *Ipeelee*, *supra*, par. 59; see also *R. v. Gladue*, [1999] 1 S.C.R. 688.

result is not an automatic sentencing discount, but rather a direction to craft an appropriate sentence which, in all the circumstances, is proportionate to the gravity of the offence and the specific offender's moral blameworthiness.

At the same time, we have learned that judges should be careful not to misuse or overuse social context evidence. Quantities of unfocussed and often contradictory information and expert opinion on social context may obfuscate rather than clarify, and may improperly divert the trial from the law and the facts into the realm of optimum social policy. The judge must always remember that social context is an aid. It complements, but does not supplant, the traditional judicial techniques of statutory construction, reliance on precedent and the weighing of evidence presented through the adversarial system.

The National Judicial Institute — our equivalent to your Judicial Studies Committee — has been instrumental in alerting Canadian judges to the importance of social context and its proper use. Social context, along with skills training and substantive law, constitute the three prongs of every National Judicial Institute educational program.

Considering social context has proved important to ensuring that Canada's judges meet the challenges of judging in a diverse society. It has helped ensure that our laws are interpreted in a way that is responsive to the realities of Canadian society. Perhaps more than any other single measure, it has helped minority and disadvantaged Canadians see the justice system, not

as an elite institution imposing the will of the majority, but as a process that understands their particular reality. In short, as a process that is just and fair.

3. A Diverse Bench

I have spoken of the importance of informed impartiality and social context to judging in a diverse society and maintaining confidence in the judicial system. Important as these are, one more element of meeting this challenge must be mentioned. I refer to the need for diversity on the bench.

Let me begin by noting that the Canadian judiciary— at least from the perspective of gender and ethnicity — is not a particularly diverse group. I suspect that much the same could be said of here in Scotland. A majority of Canadian judges — about 68% — are men. While Canadian judges belong to various religions and linguistic groups, we are very largely Caucasian. We have made progress — to have women as a third of our judges and holding four of nine places on the Supreme Court of Canada is no mean accomplishment. But we could do better. The same applies to social minorities. If we are to fully meet the challenges of judging in a diverse society, we must work toward a bench that better mirrors the people it judges.

Diversity within the judiciary is important for two reasons. First, like understanding social context, diversity on the bench is a useful way to bring different and important points of

view and perspectives to judging. Second, a diverse bench that reflects the society it serves enhances public confidence in the justice system. Let me briefly explore each of these points.

A diverse bench brings different and valuable perspectives to the decision-making process. This enriches the judging process and may lead to better decisions. Regardless of gender, race or background, judges must be capable of making fair decisions for women and members of minority communities. And they do. Still, my personal experience has led me to the conviction that women on the bench do make a difference. I have seen deliberations take a new turn because of the perspective brought by a woman to an issue involving a woman. And I have seen court culture change as the number of women on a court moves from one, to three, to four.

A near majority of Canadian jurisprudence has acknowledged the difference diversity makes.

*R. v. Lavallée*²⁸ demonstrates how the perspective of women judges can improve an area of the law developed under a uniquely male paradigm. Ms. Lavallée shot her common-law spouse in the back as he was leaving the room. She was charged with murder. Her defense was a difficult one — self-defense. It was clear that Ms. Lavallée was not in immediate peril as the law had traditionally defined it; she could have retreated and left the room. The trial judge allowed evidence of “battered woman syndrome” to go to the jury, in support of Ms. Lavallée’s

²⁸ *R. v. Lavallee*, [1990] 1 S.C.R. 852.

defense that she believed that if she did not shoot her spouse as he was leaving the room he would have killed her. The jury acquitted. The issue on appeal was whether this evidence was properly admitted. The majority held it was. Justice Bertha Wilson penned this eloquent defense of the importance of understanding the female perspective.

If it strains credulity to imagine what the “ordinary man” would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to the circumstances which are, by and large, foreign to the world inhabited by the hypothetical “reasonable man”.

Another case that illustrates the importance of minority judicial perspectives — this time relating to race — is *R.D.S.*²⁹

The accused, a 15 year old black youth, was charged with assaulting a police officer and resisting arrest in an altercation involving a number of young black people and police in Halifax, Nova Scotia. The judge, a black woman, acquitted the accused on the basis that the officer’s testimony had left her with a reasonable doubt, noting in passing that the police had been known to overreact and mislead when dealing with non-white groups.

The issue on appeal was whether this showed bias. The Supreme Court rejected this argument, holding that the judge, as a member of the community, was entitled “to take into

²⁹ *R. v. S. (R.D.), supra.*

account the well-known presence of racism in that community and to evaluate the evidence of what occurred against that background”.³⁰

I have been arguing that diversity on the bench is important so that the perspectives of women and minorities inform the judicial process. But there is a second reason for a diverse bench in a diverse society – to foster public confidence in the administration of justice. Let me be clear, I am not advocating quotas of judges advocating for specific communities. I am making the broader point that there is value in people seeing a bench that includes at least some people “like them”. Representativeness in this sense is about ensuring that the public sees itself reflected in the judiciary. It is about legitimacy and public confidence.

Let me tell you a story of an experience I had as a trial judge, which may bring home to you the importance of a representative bench. One slow afternoon, I was asked to take a family property division case. The wife’s counsel was female. The court reporter was female. The court clerk was female. The only male in the room was the husband, representing himself. We heard the wife’s case first. I then turned to the husband and invited him to make submissions. He seemed to be having trouble rising to his feet. I repeated my invitation, reassuring him that he need not be nervous; we simply needed to have his side of the story and his evidence in order to make a just decision. Finally, he struggled to his feet. With a look of umbrage, he said: “Frankly, your Honor, I feel a little outnumbered.”

³⁰ *R. v. S. (R.D.)*, *supra*, par. 56.

I assured him that he needs have no concern because he was the only man in the courtroom; we would do justice, and he would not be prejudiced by his gender. He proceeded to present his side of the case, and in the end, I divided the property 50-50, as the law required. It is only when I went home later that evening that the thought struck me: how many times, for how many decades, had women stood before all-male tribunals with all-male lawyers at counsel table and in the body of the courtroom — if they had the courage to even enter them — and felt more than “a little outnumbered”? How many Aboriginal Canadians and other members of minority communities brought before an austere and perhaps alien justice system would have similarly felt “a little outnumbered”?

The reality, to which I earlier alluded, is that many people, particularly women and visible minorities, may have less than complete trust in a system composed exclusively or predominantly of middle-aged white men in pinstriped trousers. They will question whether such a court can reflect the various viewpoints and values of an increasingly pluralistic society. It may be impossible to have the bench that perfectly mirrors society in all its diversity. But if great segments of the population are excluded or represented only by the occasional token judge, public confidence in the administration of justice may suffer. Women and minorities, like the gentleman in my story, may feel unwelcome and outnumbered in the courtroom — a space where no one should feel excluded on account of gender or background. Diversity on the bench can only enhance the credibility of our justice systems and the reputation of the administration of justice.

The path to a diverse judiciary that reflects women and minority groups is difficult. While several thousand people have made it to the summit of Mount Everest, not one pluralist country to my knowledge has achieved a bench that adequately reflects its diversity. How can this be remedied?

I am not an expert, and each country must find its own path to diversity on the Bench. But it seems to me that two things can help — an open gateway and a fair merit-based selection process.

By open gateway I mean the ability of anyone who meets minimal requirements to be a judge, to apply. But I also mean a process that does not inadvertently narrow the pool from which potential judges are drawn by assuming that only those with a particular background for example, a distinguished career at the bar may apply. Our experience in Canada suggests that lawyers with a variety of pre-judicial experiences can make excellent judges.

By a fair merit-based process I mean a process that evaluates merit by asking the question: what is required to be a good judge? Merit has often been defined to reflect a very traditional ideal of excellence in the practice of law, specifically litigation. Unfortunately, this principle, although intended to identify the best candidates for appointment, has frequently operated to exclude qualified women and members of minority groups from the bench. If merit is defined restrictively to exclude all those but senior litigators with a dossier of high profile

cases and clients, if merit is defined as excluding the special perspectives that women and members of minority communities can bring to the Bench, we will never reach the summit of this particular Everest.

We should remind ourselves of what psychologists have documented — human beings see “merit” in those who exhibit the same qualities that they possess. To put it in terms averted to earlier, we tend to apply System 1 thinking to the appointment process without fully engaging System 2 analysis. Senior lawyers and judges are no exception. When they look for merit, they tend to automatically look for someone like themselves. That is their instinctive response. The result is in the appointment of individuals with a traditional practice and profile – male, Q.C., an all-round decent chap. Those who have excelled in non-mainstream legal work, often women and members of minority groups, tend to be excluded from appointment. That’s System 1 thinking: System 2 thinking tells us that a variety of career paths can prepare one for a judicial career, and that a different perspective may be a factor in establishing merit.

Let me be clear. We should only appoint people of merit. We must never compromise on the quality of the judges we appoint. But merit must be understood in the sense of ability to do the job and in full appreciation of the diverse perspectives and legitimacy that judges from diverse backgrounds bring to the bench. When we understand merit in this way, we open the door to appointing women and minorities and to building a judiciary that is a more accurate reflection of the society it serves.

D. CONCLUSION

Allow me to conclude. I have spoken of the challenges of judging in a diverse society. I have mentioned how we can better meet these challenges by cultivating an informed approach to impartiality in the face of difference, an appreciation of the insight that social context offers, and diversity on the bench.

Responding to the challenges of judging a diverse society requires effort. But, in the end, there can be nothing more rewarding for a judge. Judges are asked to grapple with difficult, complex and fascinating issues — issues that can have a profound impact on people’s lives and that go to the very nature of our society. And judges are tasked with serving the community by doing justice and preserving the rule of law. To do these things well, judges must respond to the challenges of diversity.

I thank you for your attention.

END