

Shouldn't the Bench be a Mirror? The Diversity of the Canadian Judiciary

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Abstract

This paper assesses the diversity of the judiciary in Canada's most diverse urban centres of Toronto, Vancouver, and Montreal and it measures the gap between the demographic composition of the judiciary and the population that it serves. The paper then considers the factors that contribute to and perpetuate the homogeneity of Canadian courts, and it addresses the arguments that an identity-conscious appointment process could compromise meritocracy, or that it would challenge the presumed objectivity of judicial decision-making. We argue that reliable public data on the composition of the bench and a clear government vision and strategy are crucial for the administration of justice in Canadian courts.

Key words

Diversity; judiciary; Canada; equity

Resumen

Este artículo examina la diversidad del sector judicial de los centros urbanos más diversos de Canadá –Toronto, Vancouver y Montreal– y mide la brecha entre la composición demográfica del cuerpo judicial y la población a la cual sirve. A continuación, el artículo toma en consideración los factores que contribuyen a perpetuar la homogeneidad de los juzgados canadienses, y hace referencia a los argumentos de que un proceso de nombramiento que tomara en cuenta la identidad podría poner en entredicho la meritocracia o la presunta objetividad de la toma de decisiones judiciales. Nosotros argumentamos que unos datos públicos fiables sobre

We thank the reviewers of this manuscript and to the participants of the Onati workshop “Too Few Judges?” for their helpful comments and suggestions. We thank Mr. Griffith as well for his cooperation and for making his data-set available for analysis. Finally, we wish to thank for their tireless efforts our researchers: Tamar Becker, James DesRoches, Melissa Golberg, Adam Solomon, Sara Wong and last but not least, Marisha Roman, who led and coordinated this project with unparalleled dedication.

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la composición de los juzgados y una visión y una estrategia claras por parte del Gobierno son cruciales para la administración de la justicia en los juzgados canadienses.

Palabras clave

Diversidad; sector judicial; Canadá; equidad

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1. Introduction

Should Canada have more judges of a diverse background? How many such judges are there? These are the questions this paper addresses as part of the more general discussion of the appropriate number of judges for a society that is the topic of this special issue. The call for diversity is not a new call. As early as 1990 Madam Justice Bertha Wilson (1990, pp.517-518) said:

[T]he ultimate justification for deliberately seeking judges of both sexes and all colors and backgrounds is to keep the public's trust. The public must perceive its judges as fair, impartial and representative of the diversity of those who are being judged.

Indeed, the calls for enhancing the diversity of the bench in the Canadian public discourse typically rely on two types of arguments. The first is Justice Wilson's argument above, that a diverse bench would enhance the public's trust in Canada's legal system. The second is that diversity enhances the quality of decision making on the bench. In the more recent words of the Chief Justice of the Supreme Court of Canada, Beverley McLachlin (2012, p. 17):

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.

Others (McMurtry 2007) have emphasized the value of a diverse bench for society more generally, in that "it is vital for all in our society, and most especially our young people, to witness minorities citizens excelling in every area of important human endeavour."

While there is a general sense that the Canadian judiciary should be more diverse, and despite growing interest from professional and general media (Law Times 2012, Vancouver Sun 2012, 2015, Canadian Lawyer 2014, Share Newspaper 2014, The Globe and Mail 2015, CBC 2016, Lawyers' Weekly 2016), the extent to which the Canadian bench currently mirrors the public that it serves is largely unknown. Data on judicial appointments are usually not made public, and those who actively seek it run into numerous barriers. As a result, not a lot has been written about the facts of diversity of the bench, and the few commentators have restricted themselves to normative arguments about the value of, and need for, diversity, and for the need for greater transparency in the judicial appointment process (Lawrence 2010, Cairns Way 2014, Lyon and Sossin 2014, Griffith 2016). Cairns Way (2014, p. 26) for example, cites the record of the Harper government in federal judicial appointments as a clear example of disregard for diversity as a qualification for a potential judicial appointment and also disregard for the voices of numerous organizations and associations who called for substantive changes to the judicial appointment process.

Although there are differences from province to province, and between the provincial and federal appointments, generally the appointment process of a judge to the bench in Canada consists of an application by a candidate, that is then vetted by a committee which is comprised of members of the bench, members of the bar, and members of the community. Applications are not in response to a specific vacancy or advertisement, and applicants are notified generally whether the committee is able to recommend them for a judicial position, or not.

The election of a new federal government in 2015 included a promise for review of the appointment process for Supreme Court Justices (Trudeau 2015). Similar statements were made with respect to lower court appointments. The number of current vacancies on the bench at the superior court levels in many provinces, at almost fifty as of 2016 (Office of the Commissioner for Federal Judicial Affairs 2016a), gives advocacy groups an opportunity to put direct pressure on the government to address the diversity issue in its candidate review and appointment process. In a recent announcement of new judicial appointments, the federal government affirmed

its commitment to improving the judicial appointment process. Along with the appointment of new judges, Minister of Justice Judy Wilson-Raybould (2016a) stated:

[T]he Government is considering ways to strengthen the judicial appointments process, guided by the same principles of openness, transparency, and merit as reflected in the Government's new process applicable to Governor in Council (GIC) appointments more generally. The Government is committed to ensuring that Canada's judiciary truly reflects the face of Canada.

Indeed, late in 2016 the federal government revised its questionnaire to include, for the first time at the federal level, an option for applicants to self-identify as diverse. We discuss the questionnaire and the appointment process below. Together with this statement, it signals a welcome acceptance of the need to ensure that the judiciary is reflective of the public that it serves.

The purpose of our paper is twofold. First, since no such measure currently exists, we make an effort to establish a baseline measurement with respect to the diversity gap, and examine the demographic makeup of the judiciary in Canada's most diverse urban centres: Toronto, Montreal and Vancouver. Our study complements other recent efforts (Griffith 2016) but highlights as well the urgent need for governments across Canada to publish reliable data. Second, and in light of our findings, we consider the factors that contribute to, and perpetuate, this diversity gap.

We began by collecting available demographic data relating to gender, racialization, Aboriginal status, francophone, disability and LGBTQ identity for the general population, and the legal profession in Toronto, Montreal and Vancouver. We adopted the practice followed by the Law Society of Upper Canada (2016a) in the terminology and definition of the diversity categories to include women, members of the racialized, Aboriginal and LGBTQ (Lesbian-Gay-Bisexual-Transgendered-Queer) communities, and persons with disabilities. The term 'racialized' is a comprehensive category that the Law Society of Upper Canada uses to include the following groups: Arab, Black, Chinese, East-Asian, Latin American, Hispanic, South Asian, South-East Asian and West Asian. For most of these groups examples are provided by the Law Society in its reporting (e.g., Iranian or Afghan for West Asian). The term 'racialized' is increasingly preferred as a term of choice over the older term 'visible minority'. The term Aboriginal includes First Nation, Métis and Inuit peoples and is increasingly replaced by the term 'Indigenous'. However, we did not replace it in this paper since it is still in use by the Law Society in its publications.

The three urban centres of Toronto, Montreal and Vancouver were chosen on the basis that they represent Canada's three most diverse urban centres and would, presumably, feature the most diverse lawyer population, which in turn, provides the most diverse candidate pool for the judiciary. We then collected available demographic data for the same six categories, where available, for the current bench at the provincial, superior and appellate levels in these three urban centres. Finally, we compared available data on appointees to the bench over the last eleven years to identify significant patterns.

The collection was fraught with challenges. The offices of the selection committees and the offices of the Ministries of Justice (or Attorney General) were either non-responsive or declined to provide the requested information, with the exception of the Office of the Chief Judge of the Court of Quebec. It was not clear whether any one of these offices collects diversity information beyond what is available in published reports, and to the extent that they had such information there were no clear terms for its disclosure. We were also unable to obtain such information from the associations of federal and provincial judges and from the federal and provincial associations of lawyers.

Accordingly, we resorted to collecting publicly available information from various sources, such as official court websites, law school websites, government websites and social media platforms such as Facebook and LinkedIn. Such information gave

us a preliminary classification of judges by gender, racialized groups, LGBTQ and disability, through a combination of press releases, biographical details and photographs. We then cross-referenced this information and enriched it through secondary sources such as the various equity and diversity groups that represent members of the bar in Canada. We reached out to numerous organizations that were happy to assist us, including the Arab-Canadian Lawyers Association, Canadian Association of Black Lawyers, Toronto Lawyers Association, South Asian Bar Association, Federation of Asian-Canadian Lawyers, Canadian Hispanic Lawyers Association, Hellenic Lawyers Association, Indigenous Bar Association, Law Society of Upper Canada, and the Law Society of British Columbia. We asked them to confirm our initial classification based on their membership lists and of course the self-identification of their member judges. Finally, we compared our information to the data collected by Griffith (2016). We discuss this comparison in greater detail when we present our findings; it resulted in similar information to a very large extent and we did not detect any discrepancies. Therefore, while our method was to collect (out of necessity) public data, and while the data may be as a result incomplete, we are convinced that it provides the best baseline for the diversity of the bench in the three metropolitan areas we studied until such time that the provincial and federal governments make available whatever demographic information that they have on the composition of the bench.

In the following sections, we provide for the reader not familiar with the Canadian system an overview of Canada's courts and the processes of appointment to the bench. We then present our findings and discuss the reasons for the existence of a diversity gap in the areas we researched (and more broadly across Canada). We conclude with a call for more information, greater transparency and a clear plan on behalf of the government of Canada to turn the bench into a mirror of Canadian society.

2. Overview of Canada's Court System and Process for Appointing Judges

2.1. Canada's Court System

The Canadian judiciary consists of four levels of court. Each type of court has its own jurisdiction, which means that it has the authority to decide specific types of cases:

- Provincial and territorial (lower) courts: These courts handle most cases that come into the system, dealing with most criminal offences, various family law matters, young persons from 12 to 17 years old in conflict with the law, traffic and bylaw violations, provincial/territorial regulatory offences, claims involving money up to a certain amount, and small claims.
- Provincial and territorial superior courts were established under section 96 of the Constitution Act, 1867. They deal with more serious crimes and also hear appeals from provincial and territorial courts. Although the provinces and territories administer superior courts, the federal government appoints and pays these judges.
- Provincial and territorial courts of appeal: These courts hear appeals from the decisions of the superior courts and the provincial/territorial courts. These can include commercial disputes, property disputes, negligence claims, family disputes, bankruptcies, and corporate reorganizations. Appeals are usually heard by a panel of three judges. The courts of appeal also hear constitutional questions that may be raised in appeals involving individuals, governments, or governmental agencies.
- The federal court system runs parallel to the provincial and territorial court system. It consists of the Federal Court and the Federal Court of Appeal. These courts deal with matters that are under the jurisdiction of the federal government, such as immigration and refugee law, navigation and shipping,

intellectual property, tax, matters of national defence, security and international relations.

- The Supreme Court of Canada is the final court of appeal from all other Canadian courts. It has jurisdiction over disputes in all areas of the law. These include constitutional law, administrative law, criminal law, and civil law. The Court does not hold trials, but hears appeals from all other Canadian appeal courts.

Depending on the level of court, there are two processes for appointing judges in Canada. The federal government appoints judges to the federal courts, the provincial/territorial courts of appeal, the superior courts of the provinces/territories, and the Supreme Court of Canada. The Commissioner for Federal Judicial Affairs administers the advisory committees, representing each province and territory, which assess the qualifications of the lawyers who apply for federal judicial appointments. For example, a candidate for a federal appointment must have been a lawyer for at least ten years to be appointed and must be qualified to practise law in the jurisdiction in question. The provincial and territorial governments appoint judges to provincial and territorial courts. There are similar eligibility requirements for provincial and territorial appointments.

All federally appointed judges are appointed by the Governor in Council. This consists of the Governor General acting on the advice of the Prime Minister for judges of the Supreme Court of Canada and chief and associate chief justices in the provinces; and on the advice of the Minister of Justice for all other superior court judges.

2.2. The Federal Appointments Process

Individuals who wish to be considered for appointment as a judge of a superior court in a province or territory or of a federal court must apply to the Commissioner for Federal Judicial Affairs Canada. The statutory qualifications for appointment generally require ten years at the bar of a province or territory, or a combination of ten years at the bar and performing judicial duties (Office of the Commissioner for Federal Judicial Affairs Canada 2016b). Persons interested in applying must complete a Questionnaire for Federal Judicial Appointments (Office of the Commissioner for Federal Judicial Affairs Canada 2016c), which provides the basic data for the subsequent assessment by the appropriate advisory committee. We referred to this form above, as it has been revised as of late 2016 to include an optional section titled "Self Identification Regarding Diversity" (Office of the Commissioner for Federal Judicial Affairs Canada 2016c, p. 3). The section allows candidates to self-identify in the following categories: 'Indigenous', 'Visible Minority', 'Ethnic/Cultural Group or other', 'Disabilities', 'LGBTQ2', and 'Woman'. There is also room for the candidate to provide additional information in writing. The section is prefaced by the following sentences:

The government will seek to support the achievement of gender balance and a reflection of the diversity of the members of Canadian Society on the Superior and Federal Courts. Please provide information about yourself that you feel would assist in this objective.

The form continues to include older (mandatory) sections that require information that may disclose diversity-related information, such as gender, place of birth, educational and work history. It also includes two other sections related to diversity. The first is mandatory and asks candidates to answer the question "How has your experience provided you with insight into the variety and diversity of Canadians and their unique perspectives?" (Office of the Commissioner for Federal Judicial Affairs Canada 2016c, p. 20). As we discuss below, this question reflects the opinion that perhaps all that is required of judges is cultural competence. The second is optional and asks candidates to answer the question "Given the goal of ensuring that Canadians are able to look at the justices appointed to the bench and see their faces and life experiences reflected there, you may, if you choose, provide information

about yourself that you feel would assist in this objective.” (Office of the Commissioner for Federal Judicial Affairs Canada 2016c, p. 24). Taken in its entirety, the revised form reflects a welcome commitment to diversity that we hope will generate data that currently does not exist. We discuss the potential of the form in the final two sections of this paper.

The applications are then assessed by the Judicial Advisory Committees. There is at least one committee in each province and territory; because of their larger population, the province of Ontario has three regionally based committees and Quebec has two. Each committee consists of eight members representing the bench, the bar, law enforcement associations and the general public. Each nominator is asked by the federal Minister of Justice to submit a list of names from whom an appointment to the relevant committee can be made. In outlining the process of appointing the members of the committees, the federal government (Office of the Commissioner for Federal Judicial Affairs Canada 2016d) notes the effort to ensure their diverse composition:

When appointing Committee members, the Government seeks to achieve a gender-balanced Committee that also reflects the diversity of members of each jurisdiction, including Indigenous peoples, persons with disabilities and members of linguistic, ethnic and other minority communities, including those whose members' gender identity or sexual orientation differs from that of the majority. When suggesting nominees, the nominators are invited to work cooperatively with the Minister of Justice to achieve this goal.

Further, when assessing candidates, committees are instructed as follows (Office of the Commissioner for Federal Judicial Affairs Canada 2016e):

Jointly with this assessment of professional competence and overall merit, committees must strive to create a pool of candidates that is gender-balanced and reflective of the diversity of each jurisdiction, including Indigenous peoples, persons with disabilities, and members of linguistic, ethnic and other minority communities, including those whose members' gender identity or sexual orientation differs from that of the majority. In doing so, committees should give due consideration to all legal experience, including that outside of mainstream legal practice. Broad consultations by the committees, and community involvement through these consultations, are essential elements of the process.

The assessment of candidates by the committee results in “recommend” and “unable to recommend” for appointment lists. These lists are then forwarded to the Minister of Justice, who may choose to consult with judges, the bar, and other stakeholders before making final recommendations to the Cabinet, and the appointment itself is made by the Governor General, acting on the advice of the Cabinet.

2.3. The Provincial Appointment Process in Ontario

Applicants for judicial appointments in Ontario (Ontario Judicial Appointments Advisory Committee 2016a) are assessed by the Judicial Appointments Advisory Committee (JAAC). In addition to seven lay members who are appointed by the Attorney General, the JAAC also includes two judges who are appointed by the Chief Justice of the Ontario Court of Justice, one member is appointed by the Ontario Judicial Council and three from the legal community are appointed by The Law Society of Upper Canada, Ontario Bar Association and the County and District Law Presidents' Association. In the appointment under the latter category as well as the lay members of the committee, The Courts of Justice Act (1990, para. 43.3) requires a consideration of “Ontario's linguistic duality and the diversity of its population.”

Applications are in response to advertised vacancies. To qualify for consideration for a provincial judicial appointment, applicants must have at least ten years membership at the Bar in one of the provinces or territories of Canada. Applications are encouraged from women, aboriginal peoples, Francophones, persons with disabilities, and visible and ethno-cultural minorities. The application form (Ontario

Judicial Appointments Advisory Committee 2016b, p. 2) further encourages applicants: "If you wish to identify yourself as a member of a traditionally under-represented group, please do so."

While the Courts of Justice Act (1990, para. 43.9) allows the JAAC to establish criteria for assessment, it provides that such criteria include "*professional excellence, community awareness and personal characteristics of candidates and recognition of the desirability of reflecting the diversity of Ontario society in judicial appointments.*" In outlining the criteria established by the JAAC, the application form (Ontario Judicial Appointments Advisory Committee 2016b, p. 3) provides the following statement:

The Judiciary of the Ontario Court of Justice should be reasonably representative of the population it serves. The Committee is sensitive to the issue of under-representation in the judicial complement of women, visible, cultural, and racial minorities and persons with a disability. This requires overcoming. However, professional excellence is still the paramount criterion in assessing judicial candidates.

Note the assumption of a tension between diversity and excellence, that we discuss below. Following the assessment, reference checks and interviews, the JAAC ranks applicants with recommendations to the Attorney General who is required to make the appointments from that list. Unsuccessful applicants are not notified (Ontario Judicial Appointments Advisory Committee 2016a).

2.4. The Provincial Appointment Process in Quebec

The statutory requirements for eligibility in Quebec are similar to those in Ontario (Court of Quebec 2016). A selection process is conducted by a committee composed of five people, including the associate chief judge of the Court of Québec or designate, who acts as chair. Two other members are designated by the Barreau du Québec: an advocate and a person who works in the field of law but whose professional activities do not include representation before the courts. Two additional members are selected by the Office des professions du Québec. The regulations under Quebec's Courts of Justice Act regarding the composition of the committee (Quebec Court of Justice Act Regulations 2012, para. 17) require that the Barreau du Québec and the Office des professions du Québec "tend toward gender parity and promote the representation of cultural communities and that of the population of the region covered by the position of judge to be filled." One of the enumerated criteria to be assessed by the committee (Quebec Court of Justice Act Regulations 2012, para. 25) includes "the candidate's awareness with respect to social realities".

The application form (Quebec Court of Justice Act Regulations 2012, Schedule A) invites applicants to state their gender as well as check an optional box indicating whether they are "member of a cultural community." This term is not defined in the regulations or elsewhere. We provide some further discussion of this feature in section D of this article.

Applicants apply in response to advertised vacancies. After reviewing candidate applications and conducting interviews, the committee provides the names of three qualified candidates it recommends to the Minister of Justice who makes the final recommendation to the Cabinet. Applicants are notified whether they have been recommended or not, once an appointment has been made.

2.5. British Columbia Appointment Process

Under the British Columbia Provincial Court Act, the Lieutenant Governor in Council appoints Provincial Court Judges on the recommendation of the Judicial Council (Provincial Court of British Columbia 2014a). This council is composed of nine members, chaired by the Chief Judge, with four members appointed by the Attorney General, and representation from the Provincial Court Judge Association, the Canadian Bar Association and the Law Society of British Columbia. Unlike other

recommending bodies, there is no indication that the membership of the Judicial Council itself be diverse.

Similar to the federal process, applicants apply as an expression of interest in becoming judges, and not in response to an advertised vacancy. Applicants must be members of the bar for at least ten years. The B.C. Council (Provincial Court of British Columbia 2014b) "encourages applications from candidates of diverse backgrounds for appointment as judicial officers." One of the 'criteria and competencies' that the Judicial Council considers is the candidate's "experience with cultural and ethnic diversity" (Provincial Court of British Columbia 2014a).

The application form to become a judge in the B.C. Provincial Courts (Provincial Court of British Columbia 2014c) includes a section on diversity. The section states:

The Provincial Court of British Columbia is committed to encouraging a broad range of diverse applicants to the Court, and to reporting on those applications from information contained throughout this form. To that end, please answer the following questions:

- Are you an aboriginal person?
- Do you identify yourself as part of one or more ethnic or visible minority groups?
- Do you identify yourself as part of one or more diverse groups?

In answering the second and third questions, applicants are also asked to specify the group they are part of. Unlike the other application forms reviewed above, the form does not indicate that these are optional questions, although the Judicial Council in its annual reports describes them as optional (Provincial Court of British Columbia 2016, p. 22). We discuss the information collected through this section below.

The council reviews applications, conducts interviews and recommends candidates for appointment. When an opening is available, the Chief Judge sends the Attorney General a list of approved candidates who are eligible for appointment to that region. Candidates are not notified about the outcome of their application.

3. Findings

The following charts provide in graphic form the results of our data collection. We present the current diversity baseline by each municipal area, followed by the appointment records for each city for the last ten years and some additional comparative information between the municipalities.

3.1. Toronto Courts

Our Toronto dataset is limited to the population statistics for judges, the legal profession and the general population within the boundaries of the amalgamated city of Toronto. These boundaries align with the Toronto judicial district boundaries for both the provincial court and the superior court, enabling a direct comparison between data results.

Table 1 compares the gender representation of the current roster of judges on the provincial and superior courts in Toronto.

TABLE 1

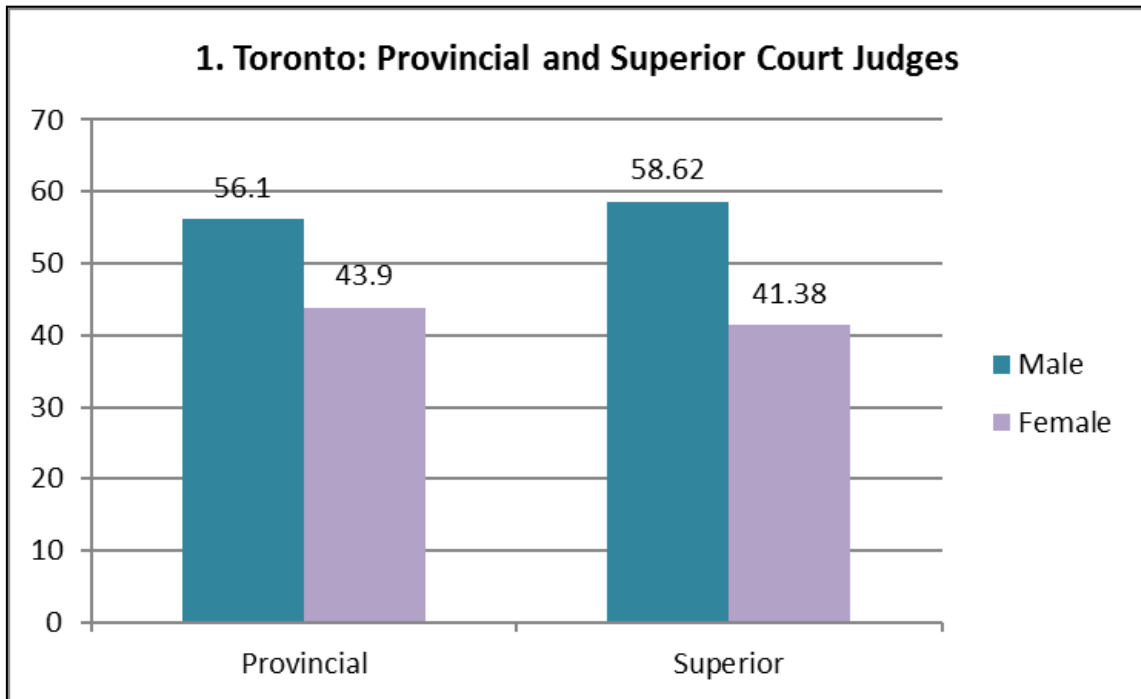


Table 1. Toronto: Provincial and Superior Court Judges.

Table 2 compares the gender representation for the current roster of judges on the provincial and superior courts in Toronto in comparison to the gender representation for lawyers in Ontario (Law Society of Upper Canada 2016a) and for the overall population in Toronto (Statistics Canada 2011).

TABLE 2

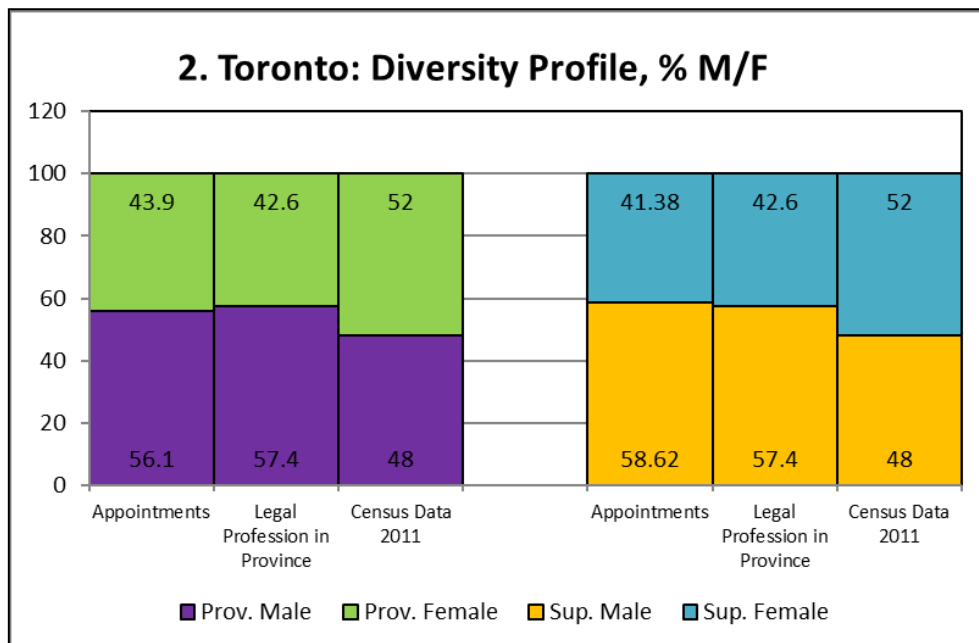


Table 2. Toronto: Diversity Profile, % M/F.

Tables 3 and 4 show the diversity representation on the current rosters of the provincial and superior courts in Toronto. Due to the low actual numbers of racialized, Aboriginal, francophone and LGBTQ judges, these categories are not broken down into further sub-categories.

TABLE 3

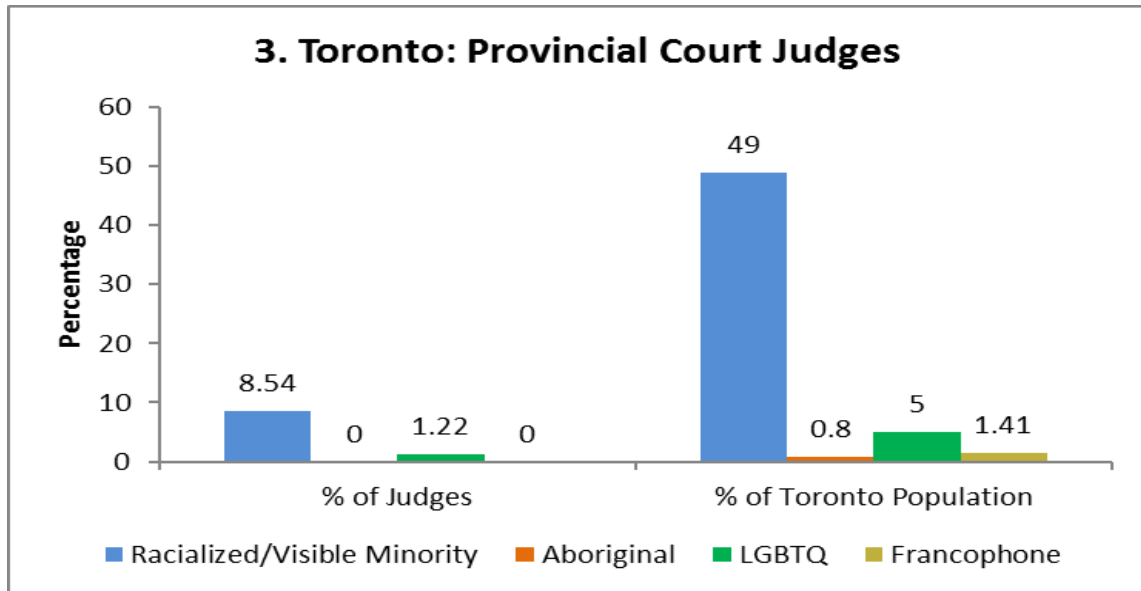


Table 3. Toronto: Provincial Court Judges.

TABLE 4

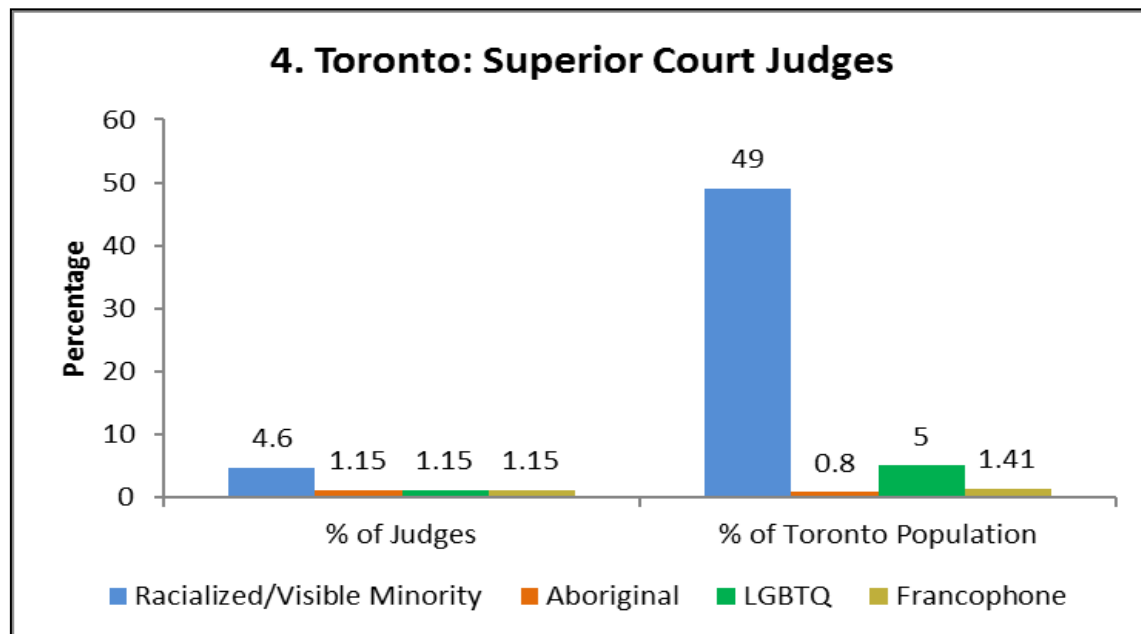


Table 4. Toronto: Superior Court Judges.

Table 5 compares the racialized and other non-gender diverse representation for the current roster of judges on the provincial and superior courts in Toronto in comparison to the racialized and other non-gender diverse representation for lawyers in Ontario and for the overall population in Toronto.

TABLE 5

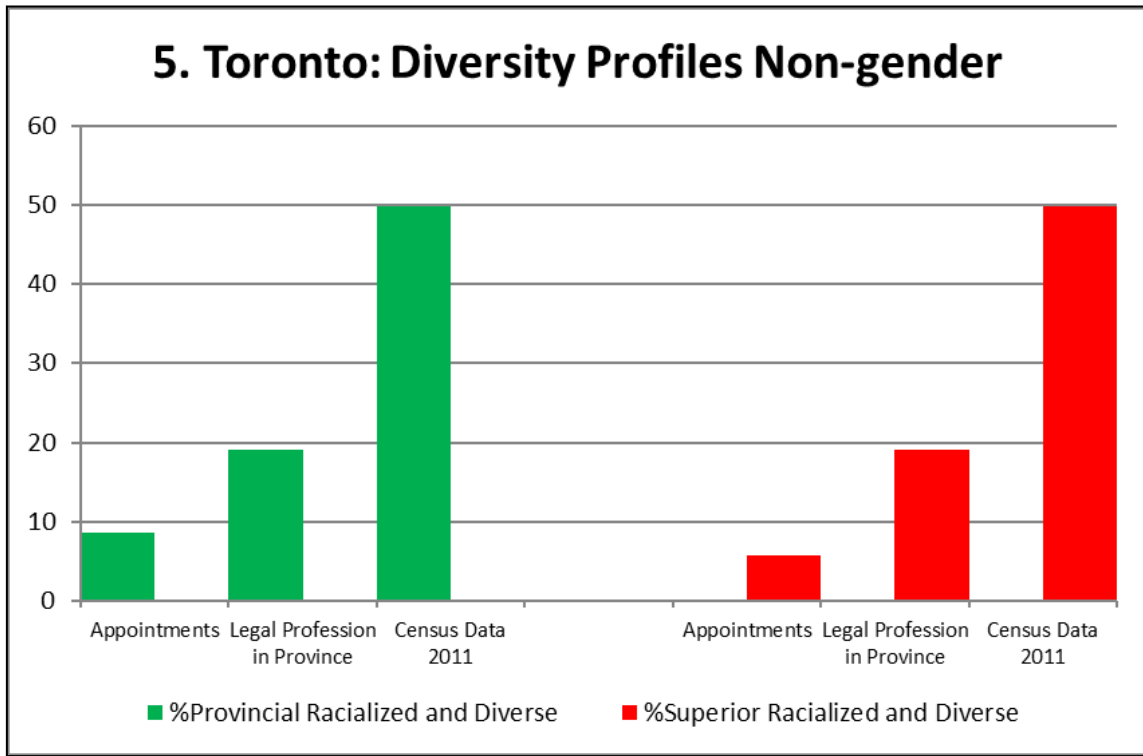


Table 5. Toronto: Diversity Profiles Non-gender.

3.2. Montreal Courts

Our Montreal dataset corresponds to the population statistics for judges, the legal profession and the general population within the boundaries of the Census Metropolitan Area (CMA) for Montreal. These boundaries align with the Montreal judicial district boundaries for both the provincial court and the superior court, enabling a direct comparison between data results.

In addition to the graphic charts, the secretariat within the Ministry of Justice responsible for the administration of the appointment process publishes an annual report which is expected to include, among other things, “an analysis of the appointments for judicial office considering the representation of men and women and that of cultural communities” (Quebec Court of Justice Act Regulations 2012, para. 6). The latest report (Quebec Secretariat 2016, p. 25) indicates that for the period of February 2015 to March 2016, seven women and one individual who self-identified as a member of a cultural community were appointed to the Court of Quebec out of fifteen appointments in total. In the previous year, nine women were appointed of the fourteen confirmed. The number of self-identified members of a cultural community was zero (Quebec Secretariat 2015, p. 16).

Table 6 compares the gender representation of the current roster of judges on the provincial and superior courts in Montreal.

TABLE 6

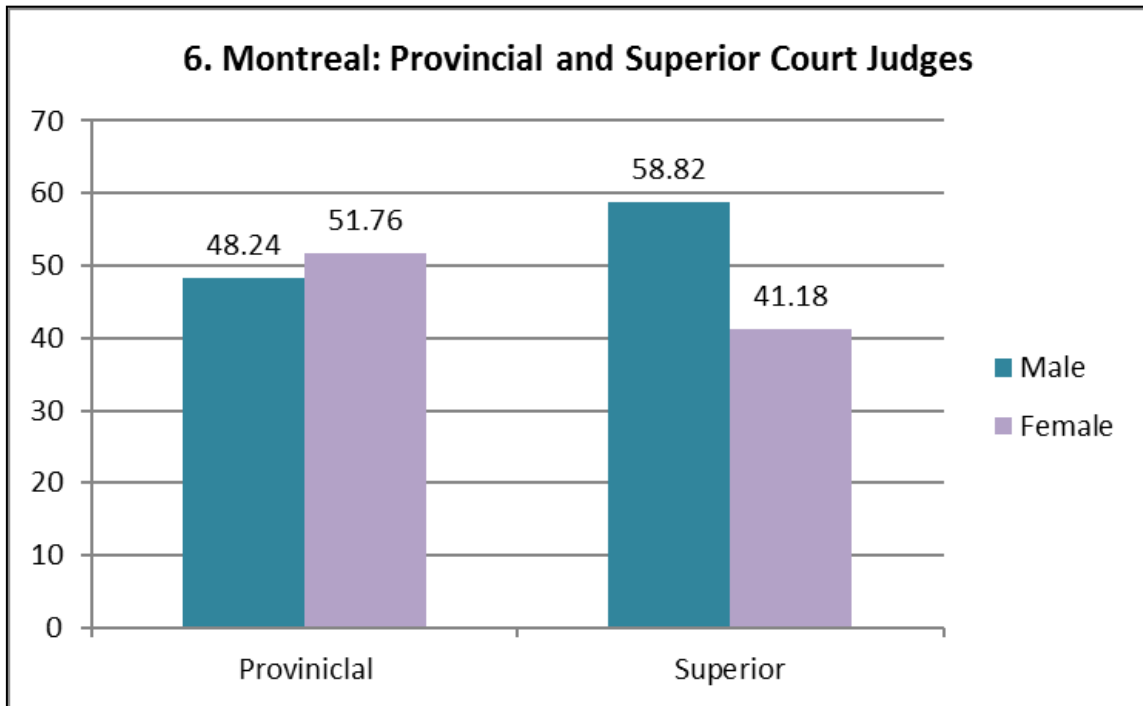


Table 6. Montreal: Provincial and Superior Court Judges.

Table 7 compares the gender representation for the current roster of judges on the provincial and superior courts in Montreal in comparison to the gender representation for lawyers in Quebec (Barreau du Quebec 2016) and for the overall population in Montreal (Statistics Canada 2011).

TABLE 7

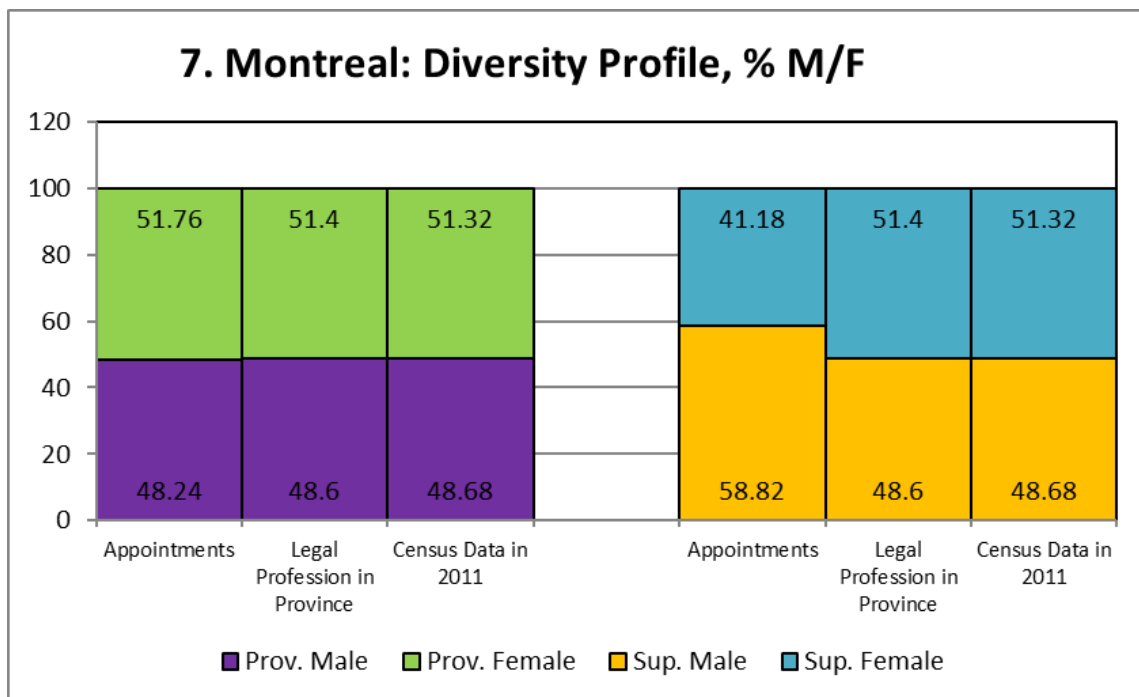


Table 7. Montreal: Diversity Profile, % M/F.

Tables 8 and 9 show the diversity representation on the current rosters of the provincial and superior courts in Montreal. Due to the low actual numbers of racialized, Aboriginal, francophone and LGBTQ judges, these categories are not broken down into further sub-categories.

TABLE 8

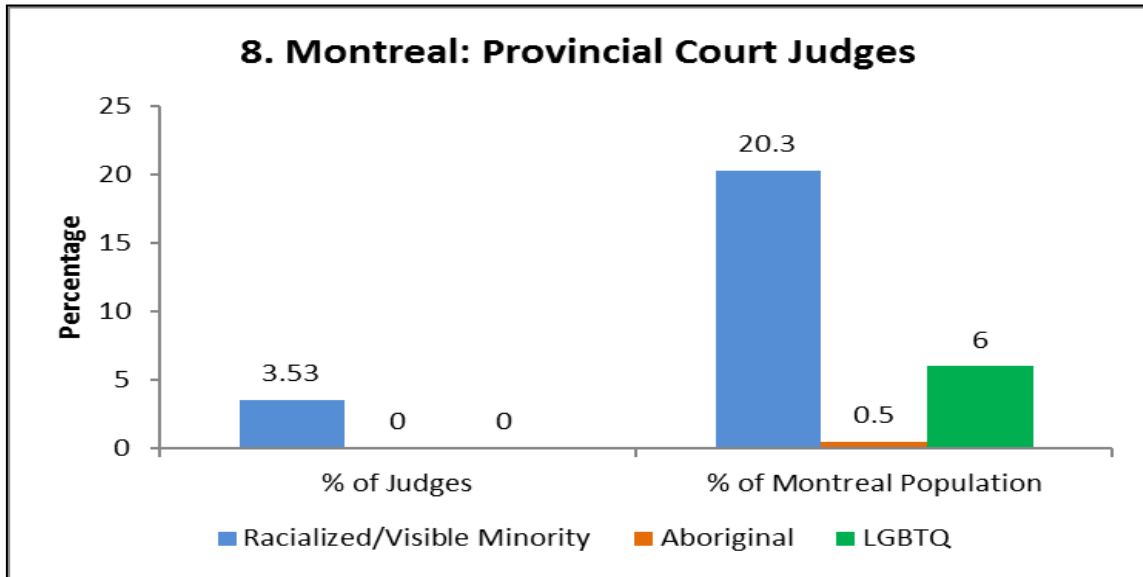


Table 8. Montreal: Provincial Court Judges.

TABLE 9

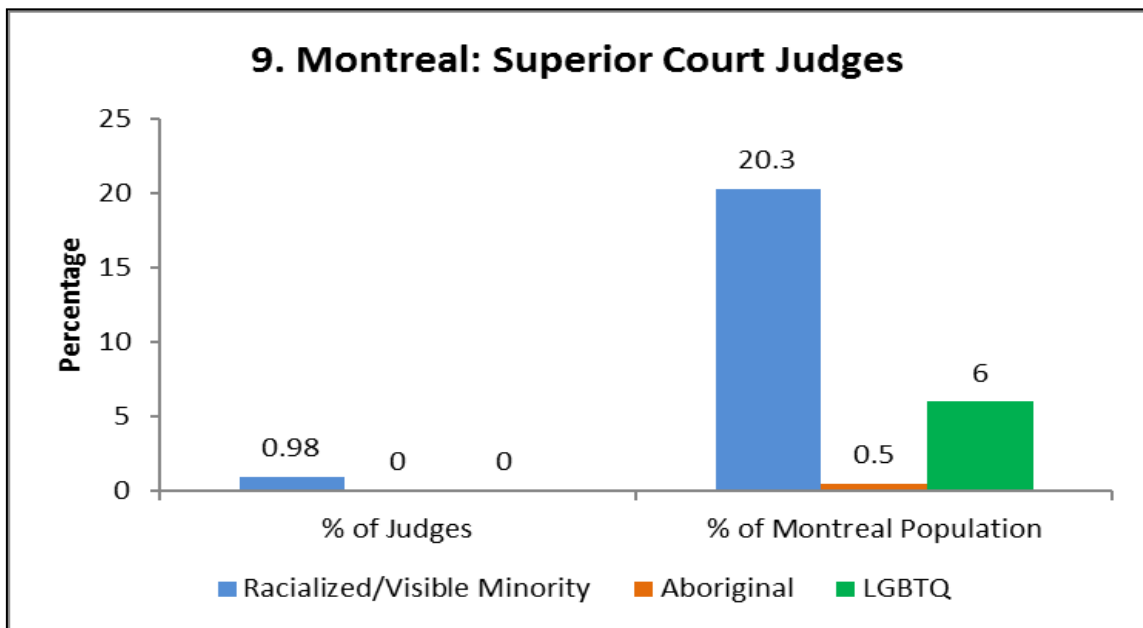


Table 9. Montreal: Superior Court Judges.

Table 10 compares the racialized and other non-gender diverse representation for the current roster of judges on the provincial and superior courts in Montreal in comparison to the racialized and other non-gender diverse representation for lawyers in Quebec and for the overall population in Montreal.

TABLE 10

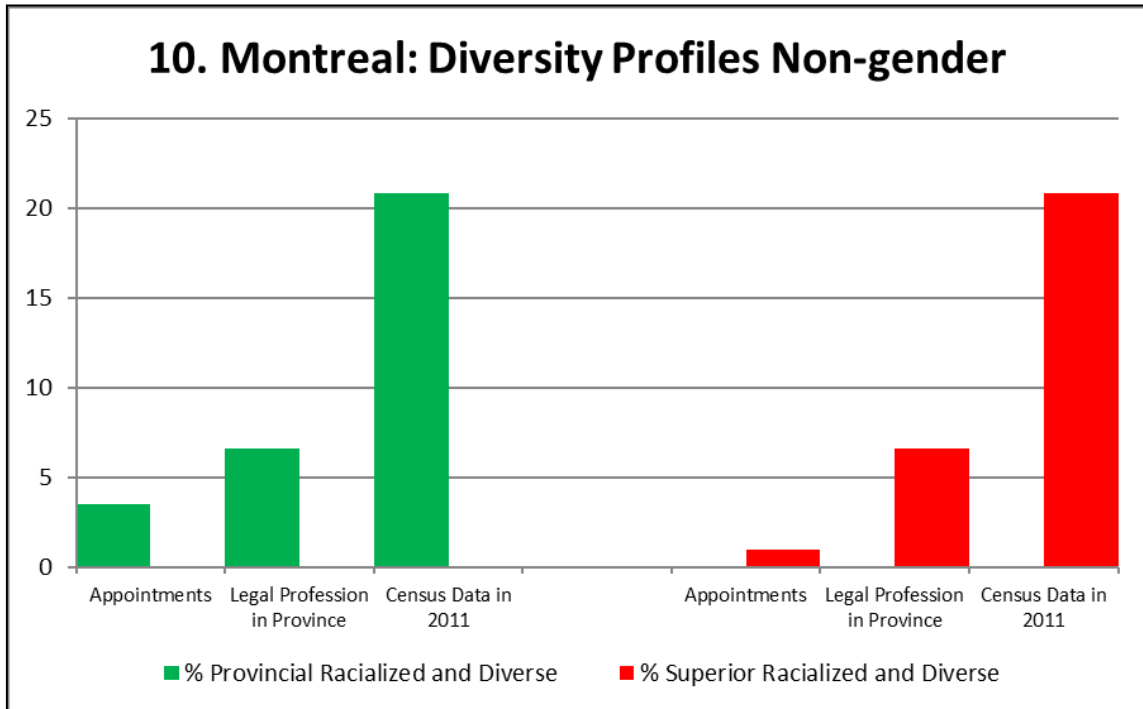


Table 10. Montreal: Diversity Profiles Non-gender.

3.3. Vancouver Courts

Our Vancouver dataset corresponds to the population statistics for judges, the legal profession and the general population within the boundaries of the City of Vancouver. These boundaries align as closely as possible (although not perfectly) with the Vancouver judicial district boundaries for the provincial court and the supreme courts, enabling a close comparison between data results.

In addition to the graphic charts, the Judicial Council has been collecting on its application form, as mentioned above, diversity information. The council started collecting this information after revising the form in 2013 and has been reporting the results in its annual report. In 2014, out of a total of thirty-four new (as opposed to repeat) applicants, fifteen answered the three questions and self-identified as belonging to one of the three categories. Two identified as Aboriginal, twelve as ethnic or visible minority and four as "other", for a total of sixteen (Provincial Court of British Columbia 2016, p. 22). The discrepancy is not explained in the report but it may be that it reflects the self-identification of an applicant with more than one category. In 2015, out of a total of nineteen new applicants, eleven answered the three questions. None identified as Aboriginals, five identified as ethnic or visible minority and six identified as other (Provincial Court of British Columbia 2016, p. 23).

It is difficult to determine whether the relative increase in applicants that self-identify (11/19 in 2015 compared to 15/34 in 2014) is a positive indication of the significance of diversity, or the result of a relative drop in the total number of applications, since in 2015 there was a relative drop compared to the earlier ten years for reasons that are unknown (Provincial Court of British Columbia 2016, p. 38).

In addition, while the analysis of the gender gap is detailed, and compares the male / female applications received, reviewed, approved for interview, recommended and

appointed, the same is not provided for the aboriginal, minority, and other categories. It is therefore not clear how many of the fifteen applicants in 2014 and the eleven applicants in 2015 were interviewed, recommended and appointed.

Table 11 compares the gender representation of the current roster of judges on the provincial and supreme courts in Vancouver (a reminder that as noted above the B.C. Supreme Court is the equivalent of the Superior Courts of Ontario and Quebec).

TABLE 11

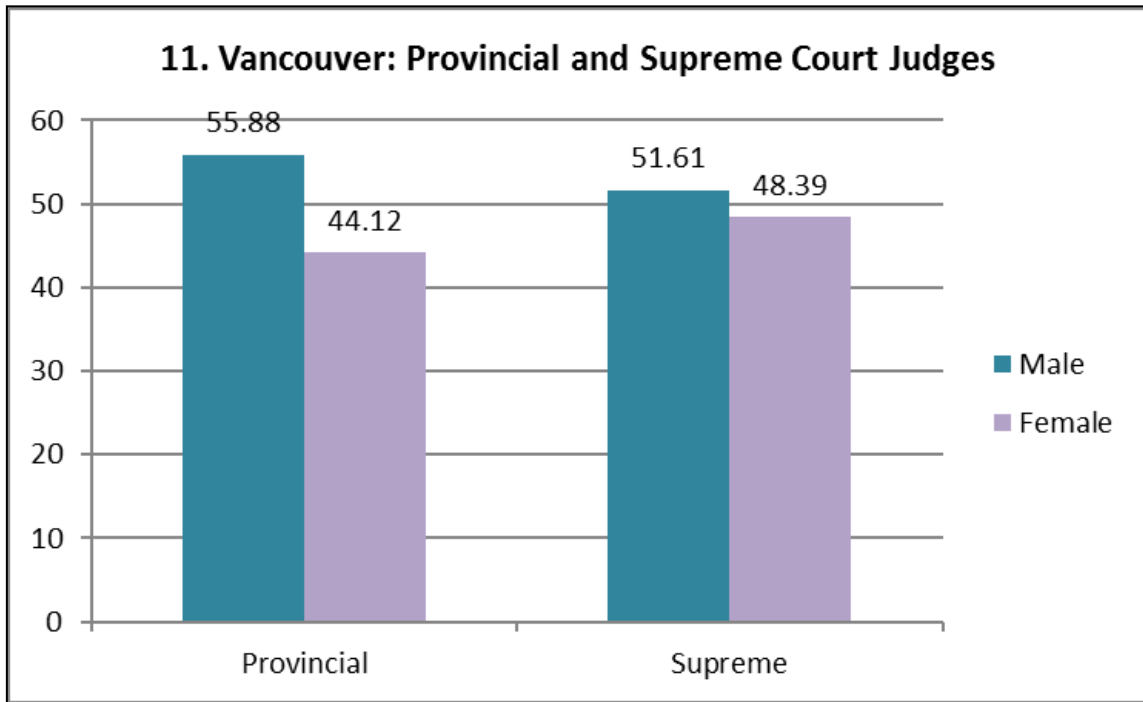


Table 11. Vancouver: Provincial and Supreme Court Judges.

Table 12 compares the gender representation for the current roster of judges on the provincial and supreme courts in Vancouver in comparison to the gender representation for lawyers in British Columbia (Law Society of British Columbia 2016) and for the overall population in Vancouver (Statistics Canada 2011).

TABLE 12

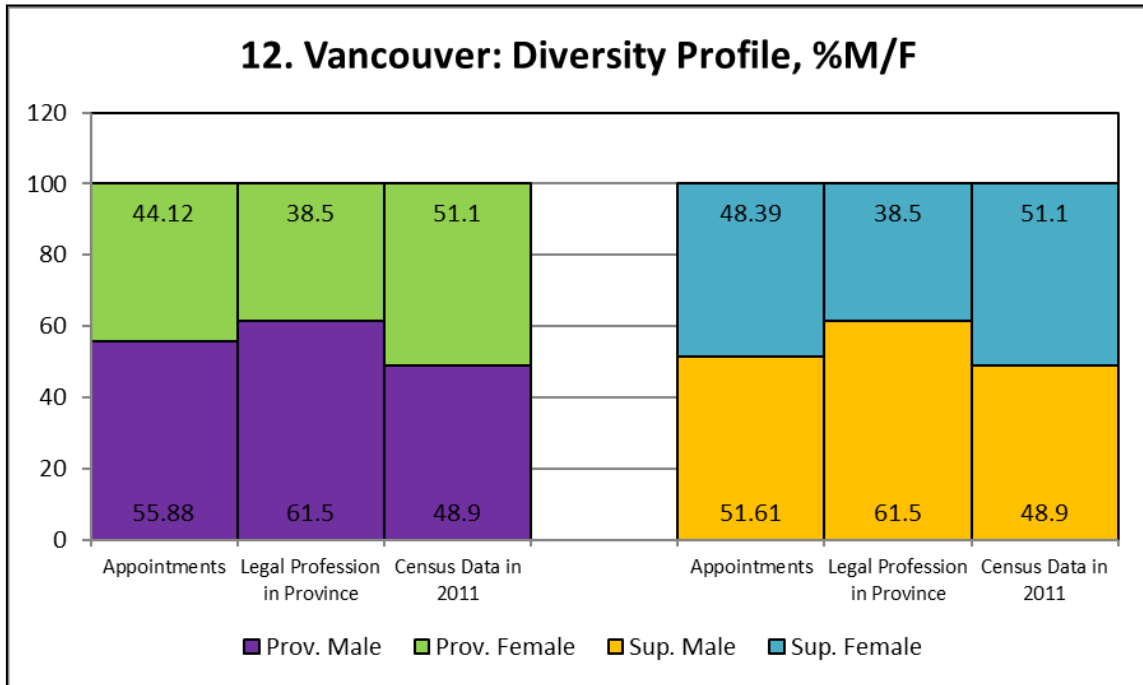


Table 12. Vancouver: Diversity Profile, % M/F.

Tables 13 and 14 show the diversity representation on the current rosters of the provincial and supreme courts in Vancouver. Due to the low actual numbers of racialized, Aboriginal, francophone and LGBTQ judges, these categories are not broken down into further sub-categories.

TABLE 13

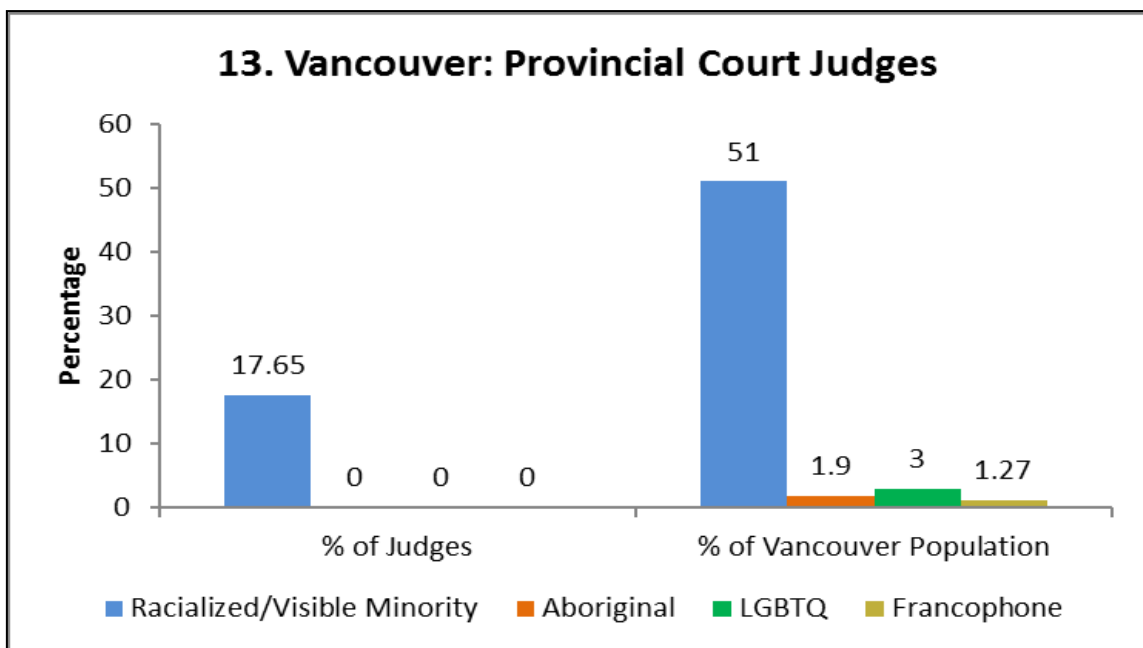


Table 13. Vancouver: Provincial Court Judges.

TABLE 14

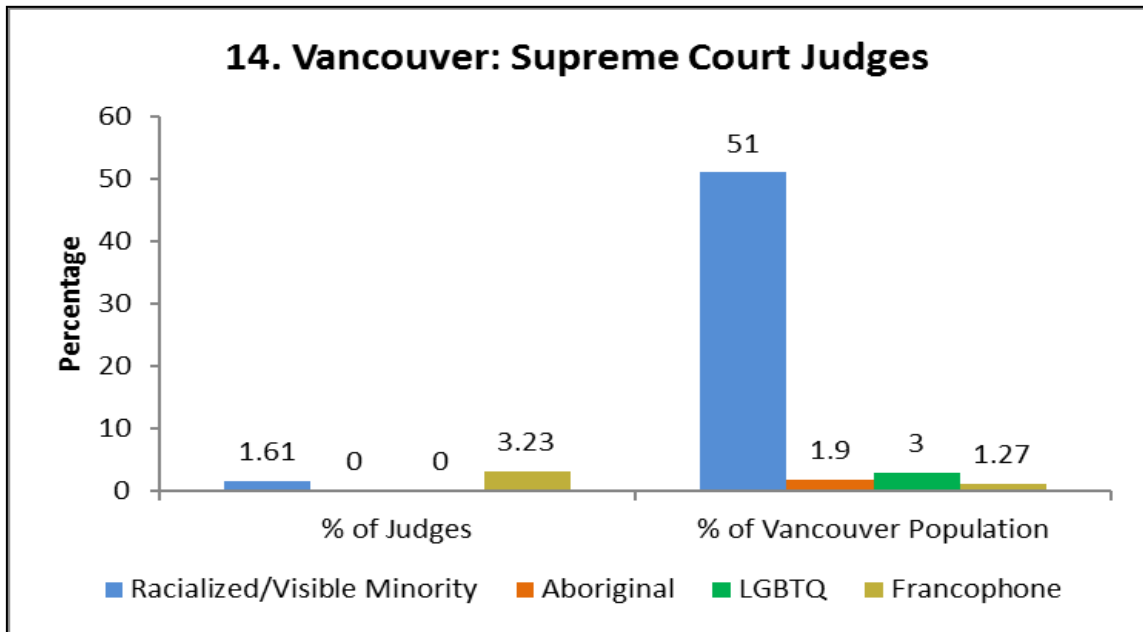


Table 14. Vancouver: Supreme Court Judges.

Table 15 compares the racialized and other non-gender representation for the current roster of judges on the provincial and superior courts in Vancouver in comparison to the racialized and other non-gender representation for lawyers in Vancouver and for the overall population in Vancouver.

TABLE 15

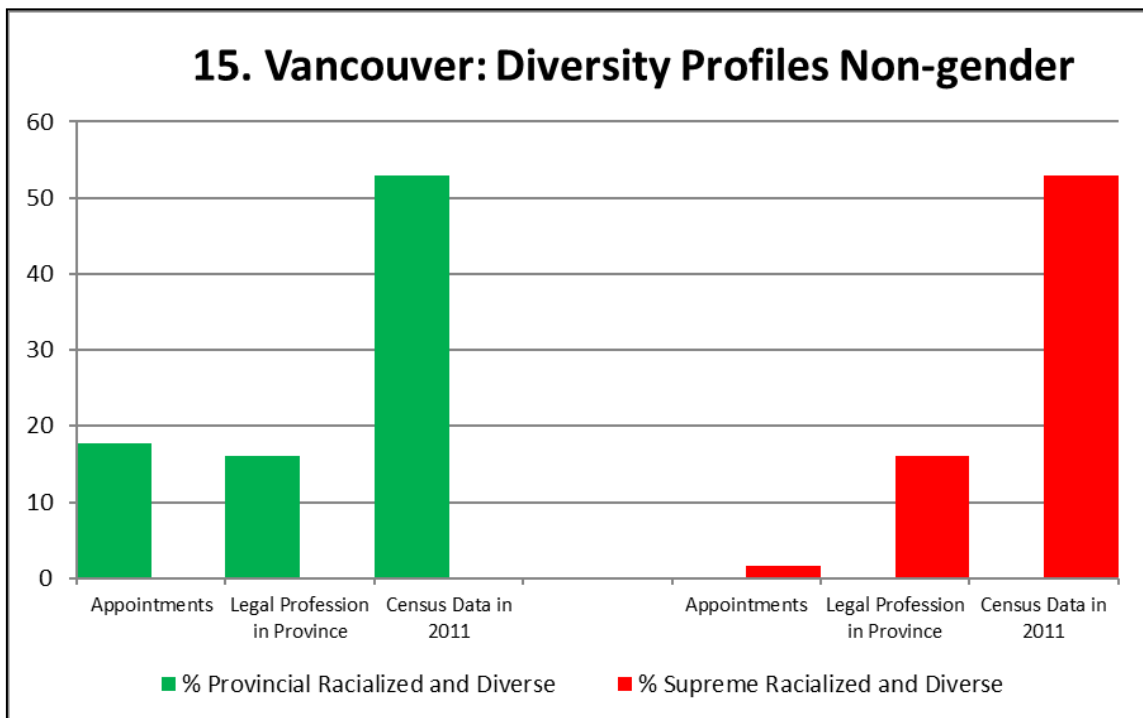


Table 15. Vancouver: Diversity Profiles Non-gender.

3.4. 11-Year Review of Appointments to the Courts in Toronto, Montreal and Vancouver

In this section we present information about court appointments over the last decade in each city. Table 16 presents the data for the actual number of appointments to the provincial and superior courts in Toronto for the period of 2005 to 2016.

TABLE 16

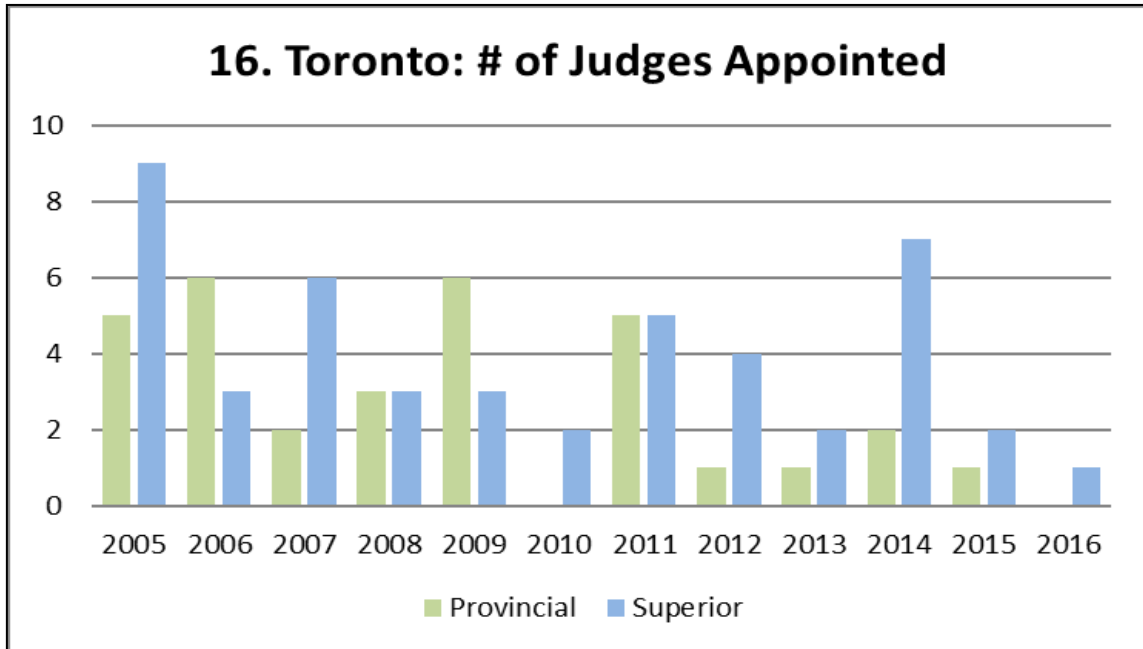


Table 16. Toronto: # of Judges Appointed.

Table 17 presents the same information broken down by gender and racialized and other diverse category status for the period of 2005 to 2016. The table allows the reader to quickly determine the dominant category of appointment for each year, or the lack of appointments in a certain category. For example, there have been only two racialized appointments to the superior court in the past decade.

TABLE 17

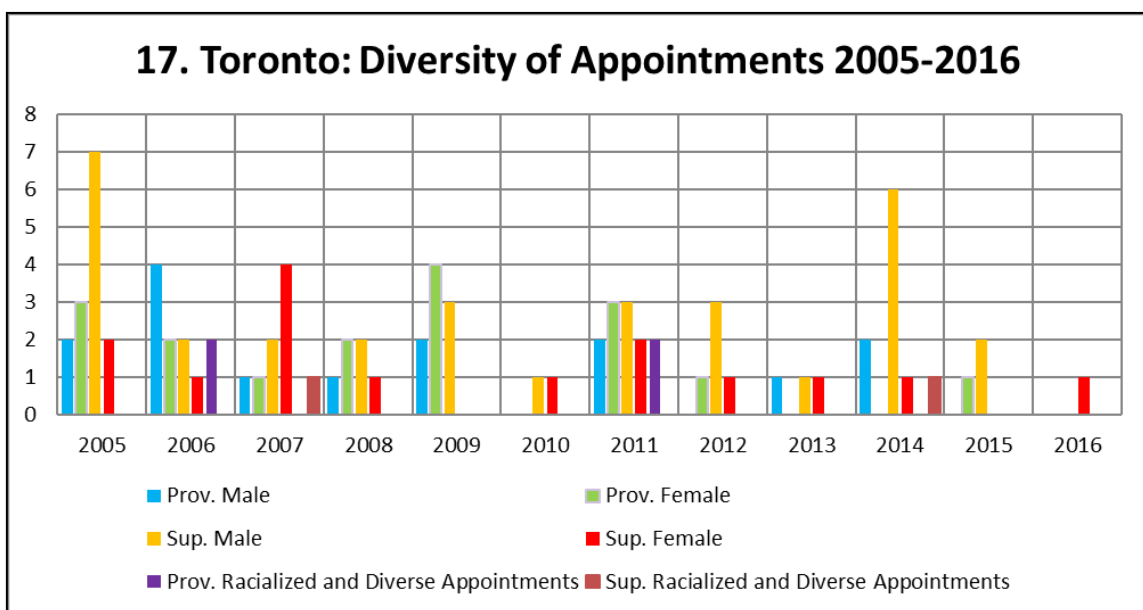


Table 17. Toronto: Diversity of Appointments 2005-2016.

Table 18 presents the data for the actual number of appointments to the provincial and superior courts in Montreal for the period of 2005 to 2016.

TABLE 18

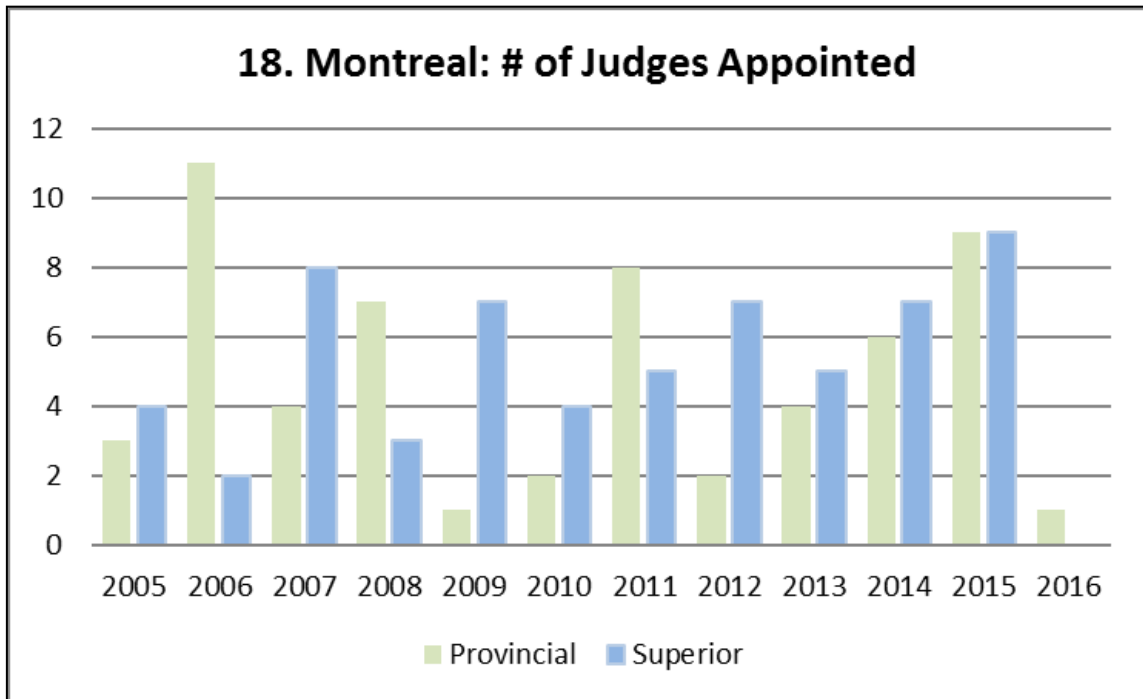


Table 18. Montreal: # of Judges Appointed.

Table 19 presents the data for the actual number of appointments to the provincial and superior courts in Montreal broken down by gender and racialized and other diverse category status for the period of 2005 to 2016. The table allows the reader to quickly determine the dominant category of appointment for each year, or the lack of appointments in a certain category. For example, there has been only one racialized appointment to the superior court and only one racialized appointment to the provincial court in the past decade.

TABLE 19

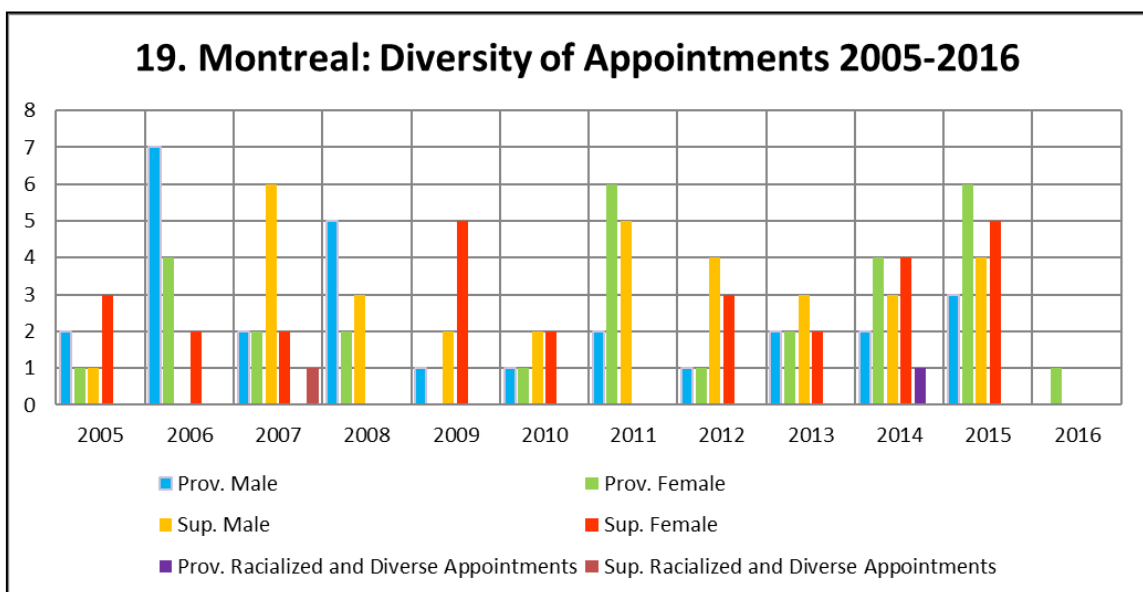


Table 19. Montreal: Diversity of Appointments 2005-2016.

Table 20 presents the data for the actual number of appointments to the provincial and supreme courts in Vancouver for the period of 2005 to 2016.

TABLE 20

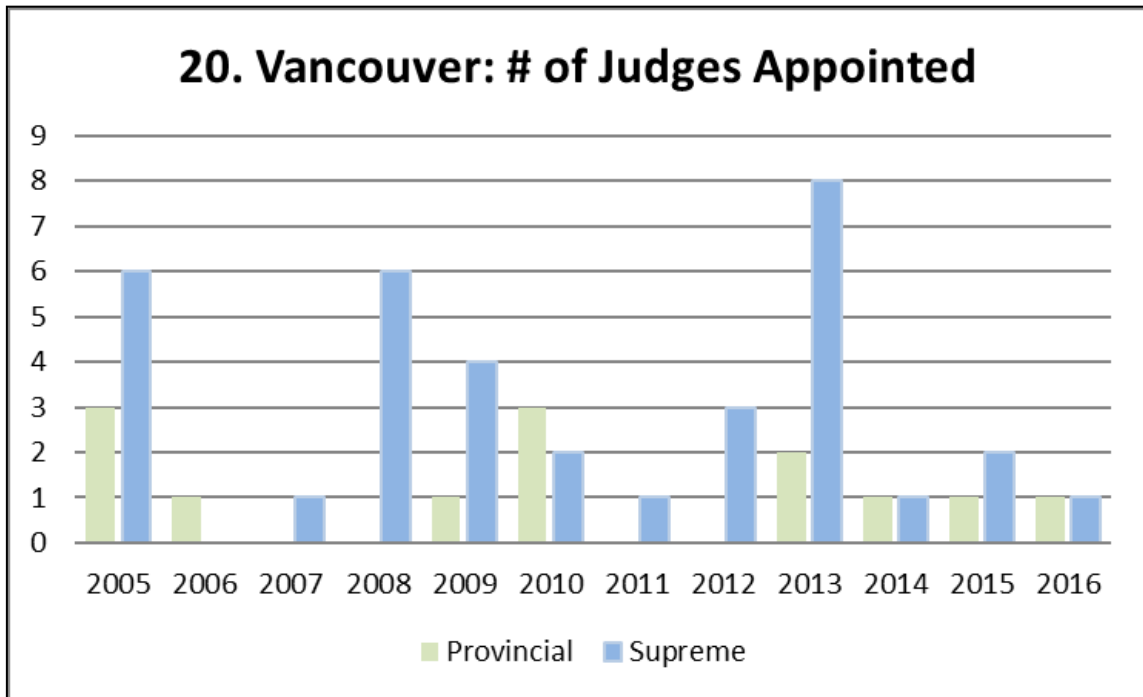


Table 20. Vancouver: # of Judges Appointed.

Table 21 presents the data for the actual number of appointments to the provincial and superior courts in Vancouver broken down by gender and racialized and other diverse category status for the period of 2005 to 2016. The table allows the reader to quickly determine the dominant category of appointment for each year, or the lack of appointments in a certain category. For example, there have been only two racialized appointments to the provincial court in the past decade.

TABLE 21

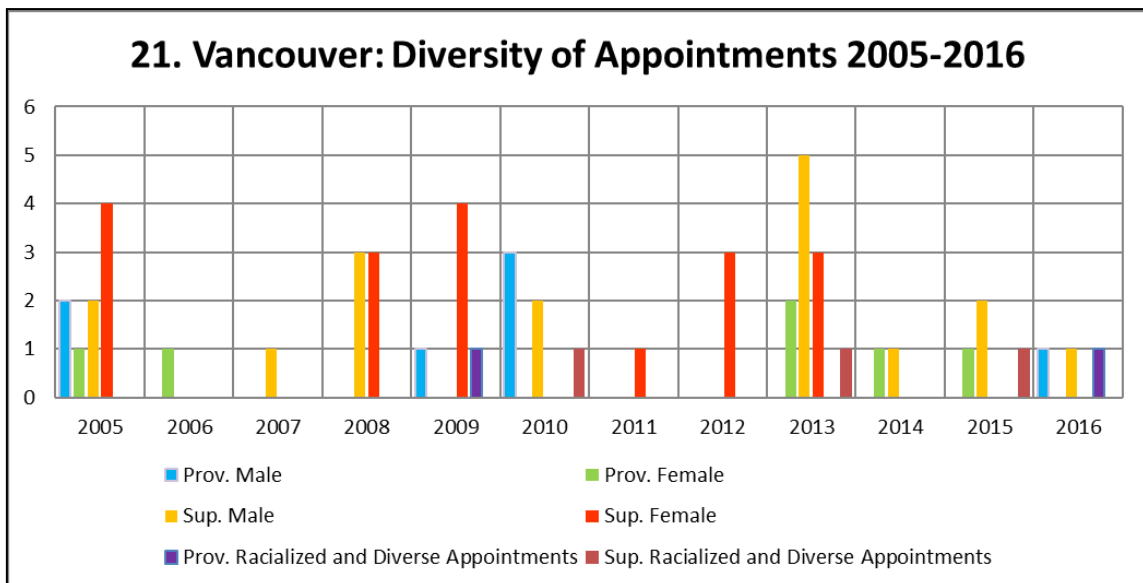


Table 21. Vancouver: Diversity of Appointments 2005-2016.

As noted above, one of the eligibility criteria for applying for a judicial appointment, and the reason we were interested in examining the record of appointments over the last decade, is ten years of membership in the province's law society. Table 22

presents the results of data on the average years of practice for appointees to the provincial and superior (supreme) courts in Toronto, Montreal and Vancouver.

TABLE 22

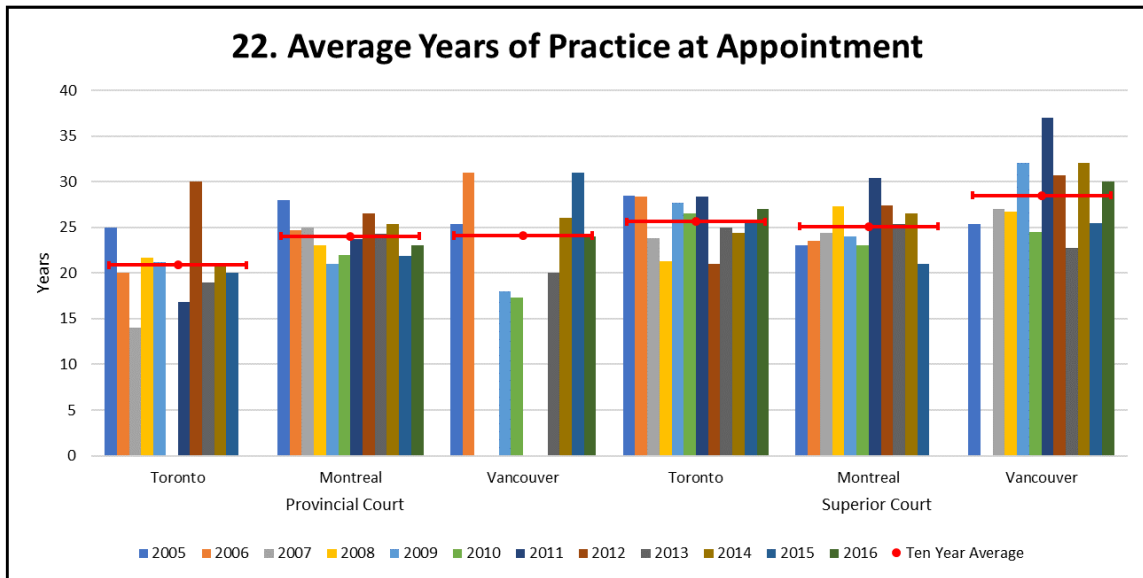


Table 22. Average Years of Practice at Appointment.

3.5. Summary of Findings

The collection of data was challenging in two ways. First, there is limited access to data on the proportion of judges who are members of the racialized, LGBTQ and francophone communities. There is no data available on judges who are members of the disability community. This gap in information makes an assessment of representation difficult. We were fortunate to be able to corroborate our data through a comparison with Griffith (2016). The comparison showed consistency of categorization of judges in terms of their membership in underrepresented groups.

Second, there are inconsistencies relating to how data are reported. For example, the boundaries for the provincial and supreme (superior) court districts for the Vancouver region are vastly different. This kind of disparity presents an obstacle to defining the scope and for capturing a demographic profile of the judiciary. Further, the various appointment (selection) committees have established different practices and follow their own practices inconsistently, to the extent that a meaningful comparative analysis is impossible. For example, Ontario has reported on appointments since 1989, but stopped doing so in 2013. British Columbia has only reported on appointments since 2012 but it reports on “ethnic minority” appointments which the other provinces do not.

In spite of the data collection challenges, we are able to draw conclusions about the representativeness of the judiciary in Toronto, Montreal and Vancouver across specific diversity categories. We were able to confirm (Tables 2, 7 and 12) that generally, women are represented on the bench in all three cities similarly to their representation in the general population, except for the Montreal provincial court, where women remain underrepresented in the judiciary in comparison to the general population. While women may be slightly underrepresented with respect to the general population, they are over-represented on the bench in comparison with their representation in the legal profession. Furthermore, the difference between women’s level of representation on the bench, in the profession, and in society, are small in comparison with the underrepresentation of members of the racialized and Aboriginal communities.

A review of the appointments to the provincial courts over the period of 2005 to 2016 reveals that women have been appointed to Toronto and Montreal judicial positions at a rate of above 50% while slightly less than 50% for Vancouver judicial appointments. At the superior court level, women have been appointed to positions in Toronto in 32% of opportunities, and between 45% and 48% in Montreal and Vancouver, respectively (Tables 17, 19 and 21).

Overall, provincial level courts have greater representation of racialized judges than do the superior courts, where appointments are made by the federal government (Tables 5, 10 and 15). The Vancouver provincial court is the only court where the proportion of racialized judges exceeds the representation rate in the British Columbia bar, although it still lags in representation compared to the racialized population in Vancouver. Both the provincial and superior courts in Toronto and Montreal lag significantly for representation of racialized judges compared to both the profession and the general population. The most significant gap for representation on the provincial court in Toronto and in both levels of court in Montreal and Vancouver is in the category of Aboriginal judges. Little to no reliable data is available with regard to the representation of judges from the LGBTQ community or the disabled community.

The rate of appointment for members of the other diversity categories (racialized, Aboriginal, francophone and LGBTQ) between 2005 and 2016 is presented collectively (Tables 17, 19 and 21). There have been no confirmed judicial appointments for persons with a disability during this period. For racialized and other diverse candidates, the highest rates of appointment are at the provincial court levels in Toronto and Vancouver. The lowest rates of appointment, at less than 2% for the period, are for opportunities in Montreal at both the provincial and superior courts.

Here (with racialized, Aboriginal, LGBTQ and disability representation) is where the diversity gap is at its widest. These groups are greatly underrepresented on the bench when compared to the general population as well as with their representation in the legal profession. The argument with respect to all categories could be made that representation on the bench could only improve once representation in the legal profession improves as well. This is a version of the 'pipeline' argument that we discuss below.

As to the pipeline itself, the data related to the average number of years for appointees shows that, although the eligibility criteria for applying for a judicial role requires ten years of membership in a law society, appointed candidates average between 21 and 24 years of practice for provincial court roles in Toronto, Montreal and Vancouver and between 25 and 28 years of practice for superior court roles (Table 22). Further, our data also show that at the superior court appointees from private practice were selected for the vast majority of opportunities between 2005 and 2016. There was a closer balance between the private and public sectors in the selection of appointees for the provincial court, particularly in Toronto and Montreal. To illustrate the combined impact of these findings, for the 2015 appointment year the candidates in the "pipeline" were largely lawyers from private practice, called to the bar in or around 1995 and earlier. At that point in time the ratios of representations of the various groups in private practice, in the profession, and in the general population were different than they were in 2015. That 'built-in' twenty-year lag is a point we discuss below as well.

In conclusion, our data search revealed details about two key factors – the extent of the diversity gap on the bench in Toronto, Montreal and Vancouver and, more importantly, the nature and extent of the data gap. The data collected allowed us to establish a baseline for the three cities we reviewed, and to confirm not only the expected gaps but also the somewhat unexpected and more positive signs of change to the demographic make-up of the judiciary, particularly as it relates to gender representation. However, our experience confirms much the gist of the criticism already levelled at government (whether federal or provincial): without consistent

demographic and related data about the judiciary, collected and disclosed by the government, it is nearly impossible to accurately measure all aspects of change, to note the successes and identify where progress still needs to happen.

4. Factors Contributing to the Diversity Gap

4.1. Absence of Government Policy and Strategic Vision on Diversity and the Bench

There appears to be a lack of consistency in government policy with regard to diversity on the bench and whether it is an aspirational goal or an intended outcome. It is also often not clear who is responsible for promoting and enhancing diversity on the bench within government. This is further complicated by the responsibility of two levels of government for judicial appointments. Political changes in government further contribute to the uncertainty in the absence of clear and consensual policy. For example, the Conservative federal government came under criticism for its lack of interest in diversity (Cairns Way 2014) but the federal Liberal government has made its support for diversity explicitly clear (Wilson-Raybould 2016). In the absence of a cross-Canadian policy, however, it remains to be seen whether the federal changes of 2016 will have a lasting impact, and the resulting experience of the diversity legal organizations, which are volunteer-run, has been to take on the task of building and supporting the pipeline in the absence of government programs and initiatives.

In contrast, the UK established in 2012 a Judicial Diversity Committee tasked with developing a comprehensive judicial diversity strategy (UK Courts and Tribunal Judiciary 2012). One important element of the strategy is, with the cooperation of government, the courts and the legal profession, the active encouragement of applicants from a diverse background to apply to become judges by means of mentoring, job shadowing and assistance in preparing applications for the judicial appointment recruitment schedule (UK Courts and Tribunal Judiciary 2016a). The UK has also seen the establishment of a gender parity initiative in which the judiciary, academe and the profession cooperate with the aim of achieving gender parity on the bench by 2020 (Judicial Diversity Initiative 2016).

Although Canada has seen successful meetings between appointment committee members and diversity organizations in order to provide information about the judicial application process, it has been an inconsistent process at best. The Conservative federal government, for example, rejected the arguments advancing diversity and requests by diversity organizations to meet the Justice Minister at the time (Peter McKay) were declined. The formal position was that diverse candidates are not applying to become judges. Until there is a clear strategic vision guided by the Canadian government at the federal and provincial level, diversity remains at the mercy of the ruling ideological power, and comprehensive initiatives similar to the UK are not likely to develop.

4.2. The Application Forms and the Appointment Process

The appointment process for judges remains, to a large extent, a black box. At the Provincial level (with the exception of Quebec), an unsuccessful applicant can only learn about the outcome of the process in the announcement of judges appointed. With the federal process, an application stands for two years before a renewal statement is required. Applicants are not informed of the status of their application. In each of the processes we reviewed above, the committees provide information regarding the professional and personal characteristics that form the basis of assessment. What remains unclear is how diversity considerations play into the assessment. We have seen above (in section 2) that the commitment to diversity is stated in each of the application packages reviewed. The stated criteria for assessment, however, typically make reference to some level of cultural competency,

which is not the same as representativeness. At the federal level, "awareness of racial and gender issues" is required. In Quebec, "awareness with respect to social realities," and in British Columbia, "experience with cultural and ethnic diversity." In Ontario, the application form unusually lists "Demographic" as an assessment criterion, stating that underrepresentation "requires overcoming." The way in which the JAAC chooses to qualify this criterion on the application form, however, is particularly telling: "*Professional excellence is still the paramount criterion in assessing judicial candidates*" (Ontario Judicial Appointments Advisory Committee 2016b, p. 3).

By including 'demographics' in the assessment criteria and then qualifying it in this way, the JAAC seems to take one step forward and two steps back. Rather than attempting to reframe the notion of professional excellence to include identity-based experiences, this committee implies that diversity and merit-based selection of judges may be mutually exclusive, which is to accept a false dichotomy. It overlooks the concern that merit, or 'professional excellence' as the application form describes it, may not be definitive, neutral or objective and that cognitive bias often introduces subjectivity into the selection processes. A more thoughtful selection process, one that recognizes that the existing view of 'merit' or 'professional excellence' as objective criteria is deeply flawed, is required.

Furthermore, to suggest that 'professional excellence' is the paramount criterion is to ignore that not all potential candidates begin from an equal playing field with regards to the access to opportunities to demonstrate their excellence. Consider, for example, the report from the Law Society of Upper Canada (2014, p. 7) where an extensive engagement process concluded that racialized lawyers in Ontario face barriers to realizing their fullest capacity for excellence:

Some participants felt that racialized licensees are often not offered the same opportunities for advancement. They also described feeling alienated from the dominant culture of the legal profession. Some also noted that racialized licensees have much to gain from mentoring but are often unaware of available programs or do not have access to them. They also said that many racialized licensees lack a strong network of legal professionals, mentors or sponsors who can provide guidance and advocate for them in the workplace.

These realities have a direct impact on the ability of an otherwise highly qualified candidate to demonstrate "[a] high level of professional achievement in the area(s) of legal work in which the candidate has been engaged," as required in the Ontario application form (Ontario Judicial Appointments Advisory Committee 2016b).

In Quebec, we saw that the form provides an optional box to check, indicating whether the candidate is a "member of a cultural community." This category is so broad as to render it meaningless in the selection process. It is also unclear, however, whether more differentiated categories would impact the selection process in a meaningful way. When consulting with a Quebec judge (transcript on file with authors, 31 August 2016) who is familiar with the selection committee's work, we heard a similar concern to the one implied in the Ontario application form:

[Diversity] is important to us but it does not trump all the other qualities that are required of the kind of judge that we need in court.

At the provincial level, the application form in British Columbia is the only one of the three we examined which asks for specific demographic information from candidates, and as we have seen above, this allows the Judicial Council to report regularly on the diversity of appointments from year to year. While there are still gaps in the reporting practice as noted above, this is a step in the right direction.

At the federal level, the revisions to the application form late in 2016 that we discussed above (section 2) are a further step in the right direction. We hope that the inclusion, for the first time, of an optional section that allows candidates to self-identify indicates that the federal government will begin collecting information and

reporting on the diversity of applicants and appointed judges. Further, the statements in support of diversity of the form are simple. The government states that it “will seek to support the achievement of gender balance and a reflection of the diversity of the members of Canadian Society on the Superior and Federal Courts” and that it has a goal of “ensuring that Canadians are able to look at the justices appointed to the bench and see their faces and life experiences reflected there” (Office of the Commissioner for Federal Judicial Affairs Canada 2016c). Importantly, these statements do *not* contrast diversity with excellence. That is an additional welcome step.

4.3. Diversity on Committees and Diversity on the Bench

It could be argued that a way to address the judicial independence concern is to limit government influence on the appointment process by ensuring that the selection committees themselves are diverse. Would a diverse selection committee help improve judicial diversity? Is ‘trickle-down’ diversity possible? We maintain that without a clear mandate given to these diverse committees, meaningful change is unlikely.

It seems that the federal government had similar concerns in mind when it took what appear to be additional steps towards greater diversity on the bench in revamping the membership of the advisory committees that it appoints. Late in 2016 the government announced an open process for the selection of the three members representing the general public on each committee. Minister Wilson-Raybould (2016b) stated: “The measures we are introducing today... will [result] in a judiciary that is more reflective of Canada’s diversity.” It is clear from the Minister’s statement that the government expects a causal link between the increased diversity of the committees and the anticipated increased diversity of the bench. Further, the government announced that it will expect bodies that nominate individuals to serve as committee members to take diversity into account, and that it will provide all members with “training on diversity, unconscious bias, and assessment of merit” (Government of Canada 2016).

The Minister’s statement and the statements regarding the training that will be provided to committees indicate that the federal government is aware that increased diversity on committees does not lead by itself to increased diversity on the bench.

When the first appointments to the revamped committees were announced early in 2017 Minister Wilson-Raybould (2017) stated that

The diversity on the Judicial Advisory Committees is unprecedented and better reflects the make-up of this great country. These Committees have a heavy responsibility to ensure that only the most meritorious candidates are recommended for appointment to the bench. By fulfilling their mandate, they are meeting not only the expectations of Canadians but also the needs of our justice system. Today’s announcement is an important step towards ensuring that our judiciary reflects Canada’s diversity.

A quick examination of the new committee members representing the general public reveals promisingly that in British Columbia two out of the three members are Aboriginal men, and that in Ontario, on one committee two out of three members are racialized (one woman, one man), and on the second committee two out of the three members are women. Finally, in the one announced committee in Quebec, one member is gay and another is a woman (Government of Canada 2017).

While the announcement of the Minister emphasizes the need for merit and excellence on the bench it does not contrast them with diversity. Taken together with the composition of the committees, it seems the federal government, at long last, with its new-found understanding of diversity, excellence and unconscious biases, is beginning to approach the makings of a comprehensive diversity strategy. It remains to be seen whether the provincial governments will follow.

4.4. *The Experience Threshold*

The ten-year experience threshold for appointments – which applies in all three provinces – is another factor that contributes to the diversity gap and a barrier that has a disparate impact on lawyers from communities who traditionally have struggled to achieve sustainable work as well as foreign-trained lawyers. Opinions on the necessity of an experience requirement differ. One judge from British Columbia we spoke with thought it should be *more* than ten years. The judge said (transcript on file with authors, 17 August 2016): “I don’t think it’s a job for a 30 or 40-year-old.” In this view, younger appointments have more difficulty on the bench and struggle to gain the respect of lawyers who appear before them, especially older and highly experienced lawyers. However, another judge we spoke with, who presides in a Quebec court, disagreed (transcript on file with authors, 31 August 2016). In Europe, it was noted by the judge, judging is a distinct career path and some judges are appointed in their twenties to the bench. Further, among otherwise qualified candidates, older age and length of experience do not guarantee greatness: “[Y]ou can have someone who is exceptional at 36 and someone who’s just ordinary at 65” (transcript on file with authors, 31 August 2016).

There appears to be no current place for concerns over the young age of judges, as our research revealed that appointment to the bench after only ten years of experience are rare. Indeed, in the three cities we reviewed, in the last decade, the judge appointed with the least experience had fourteen years of it when appointed in Toronto in 2010. The norm rather is that judges across the country are appointed after significantly more years of practice, between 21 and 24 for the provincial courts in Toronto, Montreal and Vancouver and between 25 and 28 for the federal appointments to superior courts (Table 22).

As we noted above this norm of appointments of applicants with around twenty to twenty-five years of experience causes the diversity of the bench to lag behind the diversity of the profession, which itself can only be described as a work in progress and not on par with the diversity of the general population. The Law Society of Upper Canada, for example, decided on a number of actions it would take to improve the diversity of the profession late in 201 (Law Society of Upper Canada 2016b). Among them was the following requirement (Law Society of Upper Canada 2016b, p. 1):

Each year, the Law Society will measure progress quantitatively by providing legal workplaces of at least 25 licensees in Ontario with the quantitative self-identification data of their licensees compiled from the Lawyers Annual Report and the Paralegal Annual Report in a manner consistent with the best practices established to protect licensees vulnerable to harm that may flow from this disclosure, so they can compare their data with the aggregate demographic data gathered from the profession as a whole through the annual reports.

This requirement, titled “Measuring Progress through Quantitative Analysis” is important not only with respect to the data vacuum (which we discuss immediately below) but also because it establishes a process for closing the lag of the profession behind the general population that hopefully will close the lag of the bench behind the bar.

Furthermore, it allows us to fully understand the impact of the experience threshold. Recall that at the superior court the vast majority of appointments were from private practice. Although the balance between public sector and private firms was better in provincial court appointments, these data clarify why relatively few judges of a diverse background have been appointed so far. That is because after more than twenty years the lawyers that made it through the pipeline of law school, articling, and private firm promotion, and that are of a diverse background, are few and far between (Law Society of Upper Canada 2016b). Once these lawyers are put through the vetting of committees and the relevant government’s approval, even fewer are appointed to the bench. As we wrote elsewhere, it is as if the pipeline is in fact a funnel or a filter, which serves to exclude at every stage of a professional legal career

persons from underrepresented communities (Levin and Alkoby, 2013). This pattern creates a heavier burden for lawyers from diverse communities, particularly those who enter the profession at an older age for reasons related to their underprivileged background.

4.5. *The Data Vacuum*

In the absence of a baseline measurement, a meaningful plan to address the diversity gap would not be possible. The lack of accessible and consistent data prevents clear understanding of the current diversity profile of the bench in Canada, the issues related to attracting and appointing diverse applicants, setting goals for diverse appointments and measuring progress. In order to establish the demographic profile of the bench in the three cities examined, we had to rely on publicly available data and engage in a lengthy search for bits of data rather than on official records that are based on self-identification reporting. Whatever information that is put out by the judiciary or executive branches of government in the form of press releases or official websites is inconsistent and varies federally and from province to province. For example, the Ontario Court of Appeal and the Federal Court (courts that were not included in this study) provide a biographical statement as well as a photo (federal court) for their roster of judges, while no information is available for Ontario Superior or Provincial Court judges. Similarly, the annual reports of the Judicial Council of British Columbia provide data for gender as well as racialized status of applicants and recommended candidates whereas the British Columbia provincial court annual reports only provide data on gender. Biographical statements generally do not highlight the diversity of an appointed judge, requiring careful reading and parsing of information in order to conclude for example that a judge is a member of a racialized group, or of a certain religion.

As we noted above, the lack of information about diversity in the legal profession is not limited to appointments to the bench. It is a pervasive problem that touches upon every aspect of legal professional life, from the composition of the applicant pool to law school, to the composition of the accepted class, to the composition of the applicant pool for big law-firm articling positions, to the composition of law firms' associate and partner ranks. It is a lack of information not only about diversity, but also about inclusion, and retention and the resulting attrition rates of individuals from underrepresented groups.

To the credit of Ontario's regulator, it embarked late in 2016 on a path that will hopefully fill the data vacuum within a few years (Law Society of Upper Canada 2016b). We hope that regulators in other provinces will take similar measures. As to the bench, we must still look to other jurisdictions as leaders in data collection and publication. For example, the United Kingdom courts have published annual reports providing demographic information on the sitting judiciary for more than ten years (UK Courts and Tribunal Judiciary 2016a). Although there have been some problems with the reliability of the information on racialized groups the easy availability of the information facilitates diversity initiatives such a gender parity by 2020, discussed above (Judicial Diversity Initiative 2016). The United States federal courts provide an online searchable database for federal judicial appointments that enables researchers to search by demographic categories including gender and race for appointments going back to those made by President George Washington (US Federal Judicial Center 2010).

Official government data will also enable further study of important questions related to the diversity of the bench. We wonder, for example, what the impact of the rate of retirement of sitting judges of a diverse background is on the overall diversity of the bench. If their retirement rate is outpacing the rate of appointment of diverse judges, the progress made so far will lose ground. In the absence of official data we cannot tackle this question. Similar questions explore the length of tenure of judges on the bench before transitioning to supernumerary status and before retiring

completely. These are relevant questions related to understanding the renewal of the bench, as supernumerary status and retirement are the prime drivers for new appointments. To answer these questions, data on the age of lawyers at appointment would be crucial. See, for example, earlier attempts to estimate the replacement rate in Ontario and British Columbia based on the 'turn-over' rates of the courts, as 5% and 4% respectively (McCormick 2010, p. 61).

As discussed in the previous section, only the federal government (with its recent changes) and the Judicial Council in British Columbia have taken steps to include explicit diversity sections on their application forms inviting applicants to voluntarily self-identify. And so far, only the B.C. Judicial Council has committed to reporting on the results of the data it collects through this form. Still, it provides no information on the current overall composition of the judiciary in its courts. The federal government has not made any commitment to report the data it collects or to report on the diversity of the federally-appointed bench.

In a telling anecdote, a lawyer who is familiar with the Ontario selection process suggested that the JAAC has the relevant data on the applicant pool, and that most applicants who belong to equity-seeking groups voluntarily provide demographic information in their application. This factor is noted by the Secretary of the JAAC who prepares the files for the committee to review (Ontario Judicial Appointments Advisory Committee 2014). Consequently, the JAAC in Ontario publishes annual reports with data on the number of women, francophones, First Nations, visible minorities, and persons with disabilities that have been appointed to the bench since 1998. It does not, however, provide data on the overall composition of the bench or information on the number of applications submitted by members of equity seeking communities (other than women). Neither does Quebec. This state of affairs must change.

Advocacy groups we spoke with agreed that the government's priority should be data collection, in order to establish benchmarks, and that this information must be shared. The sense was that if the statistics were favourable, they would have been shared by the courts or the government. Further, the lack of consistency that we see in the spotty data collection today makes it impossible to compare information between jurisdictions.

5. Conclusion

Does the bench reflect society? It does not. Should the bench reflect society? We argue that it should, and that those who accept a non-reflective bench have, at the very least, an obligation to justify their acceptance. For example, is cultural competence training an equivalent and a substitute for a judiciary reflective of society, as is discussed by the Law Society of Upper Canada (2016b)? We would argue that in the long term it is not, but given the story that our data tell, of a particularly slow change in the composition of Canadian courts, cultural competence training may well be the short term lesser evil in comparison with a bench which seems monolithic not only in appearance but arguably in thought and culture as well.

Conversely, there is no guarantee that an increase in the numbers of diverse judges on the bench will enhance access to justice or equity considerations in the administration of justice. While the diversity identifiers of gender, racialization, Aboriginal, LGBTQ and disability status are among the facets of an individual's capacity to engage and act in way that is inclusive and respectful, it must also be ensured that a capacity for diversity analysis is evident in those who review and recommend judicial applicants and in the judges themselves.

Others would argue that a proactive government and an explicit diversity policy could threaten judicial independence (see the discussion in Lawrence 2010). The factors we identified above as leading to the diversity gap are recast by this argument as essential for judicial independence. We have argued that the Federal and provincial

governments ought to clarify their position on judicial diversity and how it may be obtained, and develop policy statements and strategic plans for putting this policy into action. The federal and provincial governments should also consistently collect and report data on diversity for judicial appointment applicants, recommended candidates, appointees and the current roster in order to establish a baseline for future policy planning. Such data collection can only occur if appointment application forms are amended to enable applicants to self-identify and clarify how diversity (lived experience and experience working in diverse environments) should be considered and weighted as a factor for selection and appointment. In that regard, the recent changes made by the federal government are an important step forward, and it is interesting to note that concerns over judicial independence have not been raised over the additions to the form and the changes to the committees' composition.

Enhancing the transparency of the selection process is also crucial. This was another theme that emerged from our conversations with diversity groups. There does not appear to be a consistent practice for the review of applicants and there is significant variation in the application forms, reference checks, interviews, and independent enquiries between different selection committees. Some groups were concerned that one result of this secrecy is a perception of patronage appointments among lawyers from equity seeking communities. While there is no data to support the claim that lawyers from diverse communities do not tend to apply for judicial appointments, the impression of advocates is that many highly qualified lawyers do not apply because they do not believe they would be successful. Increased transparency of the appointment process, they maintain, could help change this perception.

Yet the opaque appointment process, the lack of clear process and information, are in reality, according to the point of view concerned primarily with judicial merit and independence, simply obstacles that are placed in government's way in order to ensure the democratic separation of powers. According to one judge who was previously involved in the appointment process, transparency of decisions is not always possible. Judicial temperament for example, the judge said (transcript on file with authors, 17 August 2016), is often determined through a subjective assessment that is impossible to articulate: "You can't put a reason on this rejection – a transparent or open reason. It's just a gut feeling and a decision made behind closed doors. I don't think you can change that part." It seems to us that whether or not fitness for the bench can be assessed through some objective criteria or simply by relying on a 'gut feeling' is a matter that should be at the very least publicly discussed and debated.

Furthermore, although we are creating a bit of a straw person with this characterization, two points should be evident upon reflection and upon comparison with other democracies. First, government intervenes in appointments constantly and some high-level appointments, such as those to the US Supreme Court, are explicitly political. Second, the transparency of the appointment process and the provision of information about the diversity of the bench has not led to subservient judges in jurisdictions such as the UK, and there is no reason to believe it would do so in Canada either. Further, arguing that a government policy that would enhance diversity on the bench would compromise judicial independence implies that we have not enjoyed such independence in the past, since historically it has been a homogenous bench (Lawrence 2010).

After many years during which the federal and provincial governments paid lip-service to diversity, we may now be at a point in time where there is a real opportunity to create a comprehensive, cross-governmental, Canadian diversity strategy with the aim of creating a bench that is independent, excellent and a reflection of contemporary society. In order to do that all levels of government must revise their process of appointments to the bench, so that it is transparent and unbiased, and all levels of government must enter into systemic collection and official

publication of diversity data so that it is clear how far we have come, and how far we have yet to go. To that extent, this paper provided, for the first time, a snapshot of the existing gap between the bench and society in Canada's three largest multicultural and diverse metropolitan areas. This gap must be closed, and we will only be able to close it once we have a complete picture of the composition of the bench, and a clear policy to increase its diversity, which government will commit to and implement.

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