



THE CANADIAN
BAR ASSOCIATION
British Columbia Branch

FORUM

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CBABC Aboriginal Lawyers Forum

The Aboriginal Lawyer's Forum (ALF) welcomes co-chairs, Adam Munnings and Tina Dion for 2014 – 2015.

Executive Update

By Tina Dion

As co-chairs, Adam and I and the entire executive continue to build on the excellent work of the previous executives to strengthen our mandate to provide network opportunities, leadership and mentoring, all while celebrating our Aboriginal cultures. We worked hard to make the 2014 Holiday Banquet the huge success that it was, not only for the excellent turn out (not only did we sell the targeted 100 seats, but we managed to squeeze in a few more chairs!), but we were honoured to have The Honourable Lynn Smith, Q.C., (retired), as our keynote speaker and the generous sponsorship of the event by our corporate sponsor [Playtime Gaming Inc.](#)



The Honourable Lynn Smith's speech was uplifting, inclusive and timely in terms of critically examining the under-representation of Aboriginal Peoples on the bench. Her speech was very warmly welcomed and appreciated, so much so we have included her entire speech in this issue, and we thank her for permitting us to do so. We were also very fortunate to have Councillor Nolan Charles, of the Musqueam Nation as our Master of Ceremonies for the evening and he did a fine job; we couldn't have laughed any harder – his humour was such good medicine! We were also thankful that elder Mary Charles, Nolan's mother, was able to join us and open the event with a welcome to the unceded territory of the Coast Salish People. Finally, ALF honoured Ms. Linda Thomas as the recipient of the 2nd Special Contribution Award, for her outstanding service and advocacy on behalf of Aboriginal Peoples.

Soon after tidying up the loose ends on the Holiday Banquet, we moved to planning the 4th Annual ALF Retreat, which will be held at the Tulalip Casino Resort May 1-3, 2015. Our theme, Cross Border: Lands and Resources, has drawn an excellent round of speakers, including Chief Roger William of Xeni Gwet'in First Nation and David Rosenberg who will speak about the Tsilhqot'in Decision, and John Borrows - we hope all of our ALF members and supporters can join us! The ALF is always looking for ways to meet and exceed our multi-pronged mandate and to do that, we need members and volunteers to join us in continuing the good work; please join us as we walk forward.

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Contact Us

Are you interested in writing an article for the ALF Newsletter or have any comments or feedback? Email us at ALF@cbabc.org.

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Why Quebec but not Indigenous appointments to the Supreme Court?

By Bruce McIvor

The Supreme Court of Canada's decision nullifying the appointment of Justice Nadon to the Court is of importance to Indigenous peoples seeking justice through the Canadian court system.



Since 1875 there has been a requirement that a certain number of seats on the Supreme Court be reserved for Quebec. There is no equivalent requirement that any seats on the Court be reserved for Indigenous peoples.

The majority of the Supreme Court in the Nadon decision concluded that Justice Nadon was ineligible for one of the Quebec seats because at the time of his appointment he was not a member of the Quebec bench or the Quebec bar.

Importantly, the Court held that one of the purposes for Quebec seats on the Court was to “ensure that Quebec’s distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Quebec in the Supreme Court as the final arbiter of their rights.”

The Court’s reasoning in the Nadon decision lends support to calls for Indigenous appointments to the Supreme Court. The composition of the Supreme Court rightly recognizes Quebec’s special place in confederation. There is no historical, legal or principled justification for not also recognizing the special place of Indigenous people.

Respect for the distinct legal traditions and social values of Indigenous peoples has been enshrined through section 35 of the Constitution Act, 1982. Persistent government denial of Indigenous rights has forced Indigenous peoples into the Canadian court system in search of justice with the Supreme Court as the final arbiter of their rights.

To enhance Indigenous peoples’ confidence in the Canadian legal system and to ensure the recognition of the distinct legal traditions and social values of Indigenous peoples, qualified Indigenous people should be appointed to the Supreme Court.



Fun, Food, Fellowship & CPD: The 3rd Annual ALF Retreat was a huge success!

By Christina J. Cook

In 2014 we held the retreat at the beautiful First Nations' owned Spirit Ridge Resort in beautiful Osoyoos, B.C. The resort was attractively situated on the waterfront and offered many attractions to our registrants, including a cultural centre, winery, golf, and pool with water slide. We raise our hands to the Osoyoos First Nation for building such a first-rate resort and allowing us to host our retreat there.



In addition to the stunning location, our retreat brought together Aboriginal lawyers and students from across B.C. and Alberta. We had attendees from Vancouver Island, Kelowna, Kamloops, Vancouver, Penticton, Prince George, and Lethbridge, Alberta. The highlight of the retreat was the amazing and inspiring speakers. We were pleased to have the Honourable Bob Rae speak to us about effectively interfacing with government and what the Aboriginal legal landscape is like in Ontario. UBC Professor Gordon Christie enlightened us with a "Year In Review" discussing the key Aboriginal law cases that occurred in 2012 – 2013. David Rosenberg, counsel for the Tsilhqot'in First Nation presented on the Tsilhqot'in title case and all the parties submissions to the Supreme Court of Canada. Additionally, we heard from Caleb Behn about Aboriginal law in the grass roots context. Caleb facilitated a very engaging roundtable discussion. For Saturday afternoon, we offered free time for the attendees to explore and enjoy the resort. At the Saturday evening dinner, we all enjoyed a delicious three course meal and heard from Chief Clarence Louie of the Osoyoos First Nation on economic development and strategic partnerships.

We were pleased to have been able to gather together for the third year in a row to discuss legal issues, network with other Aboriginal lawyers, and support a First Nation owned resort. On behalf of all attendees, we thank the organizers of the event and in particular Dana-Lyn MacKenzie and Joshua Nichols for organizing such a great event!

SO please save the date for May 1 – 3, 2015 where we will be meeting again for the 4th Annual ALF Retreat, at the Tulalip Casino, USA!!



Event Listings

May 1 – 3, 2015

The [4th Annual ALF Retreat](#) is hosted by CBABC Aboriginal Lawyers Forum

Topic:

Cross Border: Lands and Resources

Location:

Tulalip Resort Casino, Washington, USA

Agenda:

Friday, May 1, 2015

2:00pm – 5:00pm – CPD Presentations

7:00pm – Welcome Reception

Saturday, May 2, 2015

9:00am – 3:45pm – CPD Presentations

6:30pm – Dinner

Sunday, May 3, 2015

10:00am – Breakfast

11:00am – Ethics Roundtable Discussion

Accommodation:

There is a special ALF room rental rate \$169 + tax (max 2 occupancy) details is provided upon registration. Rooms must be reserved by April 1st 2015 to guarantee CBABC ALF rate.

Membership Early Bird Rate:

(Before April 1, 2015)

CBA Member: \$450

Non-Member: \$500

Regular Rate:

(After April 1, 2015)

CBA Member: \$500

Non-Member: \$550

Cost:

All registrants must arrange their own travel and accommodation, above cost is for registration only.



A Response to the Justice Smith's Presentation at the 2014 Holiday Banquet

By Larry Gilbert

(Note: Justice Smith's presentation is attached to the end of this newsletter)

The Honourable Lynn Smith, Q.C., formerly Madame Justice Smith of the Supreme Court of British Columbia spoke to Aboriginal students and lawyers about why so few aboriginal judges sit in federally appointed Courts and why only a few more sit in provincially appointed Courts. Her speech was inspiring, informative and entertaining. It is refreshing to have read so many of her decisions and then to listen to her speak about a subject that is so timely. The purpose of this article is to examine very briefly some of the ideas discussed by Lynn Smith and to offer another perspective on the subject. When Lynn Smith introduced the topic of "Why Diversity Matters" she wrote:



It's really quite easy to support diversity in principle. The true debate is about what should be done to accomplish it and its relationship with the merit principle.

The first issue is how to build diversity. Borrowing heavily from Lynn Smith, inclusive competitions must be inclusive from the top down. Judicial Advisory Committees must include Aboriginal lawyers or Aboriginal judges. The perspective of the Committee is determined by the mind-set of its members. If the Committee members are all male and all at least 60 years old and all caucasian, the mind-set or the perspective of the committee will reflect their membership. If Aboriginal lawyers and Aboriginal judges are on the committee, the perspective of the committee will be broadened.

The reality of the appointment rate for Aboriginal judges in federally appointed courts is dismal. As Lynn Smith points out, in the provincial courts Aboriginal judges in British Columbia constitute 3.8% of the full-time complement of the Provincial Court.

A challenging question is how do we define merit? It was refreshing to hear how the Chief Justice of the Supreme Court of Canada approached that question:

A variety of career paths can prepare one for a judicial career and a different perspective may be a factor in establishing merit.



Two factors go into the mixture of what makes a good judge. One is “equality according to law” and the second one is the requirement of “impartiality.” Equality means everyone is treated the same; there are no favourites of the court. Everyone enjoys the same benefit and the same protection of the law. The requirement of “impartiality” is not a difficult concept. Judges are expected to hear each case with a fresh and open mind. When there is a panel of judges and there is an expectation that all of the judges will decide a particular issue such as jurisdiction in the same manner; it is called *stare decisis*. If the Aboriginal judge decides the issue differently, he or she is said to have lost their impartiality.

Perspective means everything. If the jurisdictional issue means something different to the Aboriginal judge; is it correct to suggest that he or she has lost their impartiality? Might not a better approach be to respect differences in perspective and to refrain from labelling judges because of their origin?

As the Chief Justice of the Supreme Court of Canada noted “a different perspective may be a factor in establishing merit.”

Until the Judicial Advisory Committees include Aboriginal lawyers and Aboriginal judges, the appointment of more Aboriginal judges to federal courts or provincial courts will continue to move at a snail’s pace. And until the definition of merit is changed to include different perspectives, the retention of Aboriginal judges will be a problem.

ALF Member Profile

By Isabel Jackson

Aaron S. Bruce (Kelts'-Tkinem)

Aaron is a partner in the Aboriginal Law Group at Ratcliff & Company LLP. He is a member of the Squamish Nation and is passionate about working with First Nations to balance economic development opportunities with the protection of Aboriginal rights and title interests and environmental conservation. He advises on land and resource issues, Aboriginal rights and title, matters under the Indian Act, First Nation governance issues, economic development opportunities, and acts as general counsel for First Nations governments. Aaron specializes in the negotiation of impact-benefit agreements, accommodation agreements with the Crown, and other interim agreements concerning land and natural resources.



Event Listings

June 2015

National Aboriginal Day 2015

In partnership with the Department of Justice BC Region, the ALF continues to raise funds toward the CBABC's [Aboriginal Law Student Scholarship Trust](#) to assist Aboriginal law students at UBC, UVic and Thompson River University! This year we will hold our 8th National Aboriginal Day On-line Auction & Reception. Not only is this a successful fundraiser the reception provides a fun time for supporters to come together to recognize and celebrate National Aboriginal Day. Stay tuned for details of this year's event.

What can you do now?

You can support our 2015 auction event by soliciting or directly donating an item to be auctioned off. Auction items include original works such as books, photography, paintings, limited edition prints and jewellery. Other popular items include tickets, passes, gift certificates/ cards, etc. Solicit a donation from your favourite restaurant, spa or other business that you patronize. Opportunities for corporate promotions are provided on the auction website as well as at the reception event. There is also an “other” category for select pre-owned items that remain suitable for recycling/re-gifting. Be creative when considering what you can donate that will attract a bid!

Did You Know?

You can get FREE counselling through PPC Canada that is paid for by your Law Society dues. PPC Canada is a long established (since 1977) Employee and Family Wellness Program provider with a reputation for quality with integrity. This program is also open to your family and legal staff. Call PPC to find out more: Telephone: (604) 431-8200 or 1 (800) 663-9099

ca.ppcworldwide.com



CBABC Membership

“Our biggest change has been to radically increase the value of membership – access to all 78 Branch and 41 National Sections is now freely open. We offer new, big discounts for part-time, non-practising, retired and new lawyers, and monthly payment plans to reduce financial barriers. And we have an aggressive advocacy and law reform agenda that feeds-up from the grassroots views of Sections, firms and members into the halls of the Legislature and Parliament, the board-rooms of law societies, and the courts of our country.”

– Caroline Nevin, [“The Power of One”](#)

Discounted rates

Did you know that part-time, retired, non-practising, and new lawyers qualify for discounts up to 75%? Discounts are also available for scholars, students, and associates.

BC Advantage

Enrollment for all 78 BC and 41 National Sections and Forums (including all ALF groups) is now free of charge with the BC Advantage.

Visit cbabc.org/advantage for details on CBABC membership.

Did You Know?

You can get 50% off ANY CLE presentation just by calling them and advising them you are Aboriginal.

This discount is on any presentation by the Continuing Legal Education Society. However, you cannot get the discount if you register online; you must call to register for a presentation. So the next time there is a CLE that you want to attend, don't forget to call to get 50% off!

cle.bc.ca

UVic and UBC Aboriginal Awareness Camps

By Stephen Mussell, UBC ILSA President

In late September, nine members of UBC's Indigenous Law Students' Association (ILSA), including myself, set off to take part in what has become an annual trip to Vancouver Island for UVic Law's Aboriginal Awareness Camp. This three-day camp, set in the picturesque traditional territory of the Tsawout and Tsartlip First Nations, seeks to expose students entering their first year of study at UVic Law to Indigenous traditions, both legal and otherwise. The camp gives participants the opportunity to engage with elders, as well as spiritual and community leaders, who lead attendees through sweat lodge ceremonies, canoe tours, informative nature walks, elders' circles, cedar weaving, and so much more. This program has proven successful in that it informs and educates students who may have had no previous experience or meaningful contact with British Columbia's Indigenous peoples.

The camp is often described as transformative, and the results truly speak for themselves. Having attended the camp for the past three years, I have witnessed first-hand the emotion and passion that can be invoked in such a short period of time. Individuals who had been completely unfamiliar with the concepts and peoples they encounter at the camp find themselves leaving with a desire to help. Issues that seemed so distant only three days prior become personal. For approximately half of UVic's 1L population, and the small contingent sent by UBC each year, they carry the Aboriginal Awareness Camp experience with them through to graduation and beyond.

Because of this, UBC ILSA (in conjunction with the UBC Indigenous Legal Studies Program), has had a desire to establish our own Indigenous Awareness Camp for quite some time. On October 25th, 2014, this dream will become reality. Like UVic's camp, two First Nations have graciously offered to host us – the Tsleil-Waututh and the Musqueam. For the inaugural camp, law students will canoe up Indian Arm with Tsleil-Waututh Nation cultural guides to learn about Coast Salish cultural practices, eco-botany and traditional medicines, and will participate in spiritual ceremonies at Granite Falls and camp overnight as well. The third day of the camp will be devoted to exploring Musqueam culture and how their First Nation maintains relevance in a modern urban centre.

While the format, nations, and location of the UBC and UVic camps may differ, the fundamental goal of both remains the same: to have a future legal community sensitive to the unique position of the Indigenous peoples in this country, which, in my opinion, is an invaluable outcome. Thank you to the UVic Indigenous Law Students Association, the UVic Indigenous Law Club, The Tsartlip First Nation, the Tsawout First Nation, the Musqueam, and the Tsleil-Waututh Nation.





Off the coast of Vancouver Island.



Participants of the UVic and UBC Aboriginal Awareness Camp.

Thompson Rivers University Faculty of Law

Indigenous Law Students' Association 2014/15

Wey'tk,

My name is Jake Archie, the new president of the TRU ILSA. I would like to introduce the new executive of the new ILSA at TRU:

- Jake Archie, President
- Debra Febril, Vice President (Alumni Member)
- Vacant, Secretary
- Lynda Price, Society of Law Students (SLS) Representative

My involvement with ILSA began as soon as I walked through the doors of TRU Law just over two years ago. Now that I am in 3L I have the opportunity to take the lead with this amazing group. I have witnessed some truly trail-blazing work with the past executives and I will strive to continue on this crucial path.

The upcoming year is set to be full of engaging events held by, or co-hosted by ILSA. Our premier event will be to host a panel speaker event in February to be filled with academics, activists... maybe a politician? Details to follow, stay tuned. Some other events that we are planning include a smudge ceremony (one per semester pre-exams), a sǫ́lye (sweatlodge) as well as a meet and greet with a special guest. We have also had a movie night in coordination with the Environmental Law club.

This year I would like to speak with all of the various ILSA/ALSA groups across the colony to get an idea of things such as: where the funding comes from, what has worked for them/what has not, types of events held, etc. It would be a knowledge sharing exercise and any information offered would be welcome. So expect to hear from me in the next few months.

Kukstemc,

Jake Archie, ILSA President



TRU – ILSA update

By Miranda Schmold

On July 24, 2014 the Thompson Rivers University (TRU) Indigenous Law Students' Association (ILSA) released a comprehensive executive report entitled, Concerns and Recommendations 2011 – 2014. The report is a collaborative document that was compiled by the past and current members of ILSA's Executive Committee. It tells the story of ILSA's formative first three years as an advocacy and student governance group comprised of Indigenous and non-Indigenous students at Thompson Rivers University's Faculty of Law (TRU Law).



As one of only a few groups at TRU that is focused on issues specific to Indigenous students, ILSA fulfills a broad and essential role within an institution that has expressly committed to being the "University of Choice for Aboriginal Students." This report demonstrates just how important and how very difficult fulfilling that role has been.

Over the past three years ILSA has stepped up to fill overlooked gaps in the institutional framework at TRU.

When it appeared that no planning had been done to ensure that the new law building would be opened in accordance with the local protocol of the Secwépemc people, ILSA campaigned fiercely to all levels of administrative decision-making at TRU to ensure that this institution honoured its commitments. These efforts led to the holding of an appropriate 'soft opening' ceremony led by Elder Mike Arnouse who smudged the building before it was occupied. ILSA's efforts also ensured that planning for the Indigenous aspects of the Grand Opening and First Convocation of the law school was made a high priority. In securing a territorial marker for the new law building, ILSA not only brought the matter directly to the attention of TRU President Alan Shaver, but they further acted as a credible liaison with key groups outside TRU like the Tk'emlúps te Secwépemc Chief and Council and the local artisans who were selected to create the marker.

While the Faculty of Law has had difficulty establishing connections with the local Bar, ILSA has been very active in the local and wider provincial Aboriginal Bar. ILSA's level of involvement and contact with the Bar has often led to strong reciprocal support from local Aboriginal lawyers, not only on a personal and professional level, but at the institutional level as was the case when executive members from the Aboriginal Lawyers Forum intervened on ILSA's behalf to ensure the necessary accommodations were being made for ILSA members to attend important ALF networking events. For students ILSA has acted as an important cultural resource organizing annual sweat ceremonies, pre-exam smudges and on-campus events where students can meet and talk with Aboriginal lawyers and internationally renowned scholars.

ILSA's successes and achievements have not come without a great deal of personal sacrifice and constant effort to overcome serious barriers that exist within the existing administration and culture at TRU. These are also documented in the report. In keeping with the mandate of ILSA, it is the overarching purpose of this report to ensure that future generations of Indigenous law students will find TRU Law a more welcoming place each year. As this report makes clear, there is a lot of work for ILSA and TRU to do if it is going to honour its commitments to be an exceptional institution for Aboriginal education.

The ILSA Concerns and Recommendations report was released to various individuals, groups and organizations within TRU as well as within the broader Kamloops community and Indigenous Bar community. Recipients included the TRU Law Faculty Administration, TRU President Alan Shaver, the TRU Society of Law Students, the TRU Gathering Place, Tk'emlúps te Secwépemc Chief and Council, the Law Society of BC, the Indigenous Bar Association, the BC Law Foundation, the Aboriginal Lawyers Forum, and many, many others. If you would like to receive a copy of this report please contact Miranda Schmold at mirandaseymour@hotmail.com



Aboriginal Law Students Scholarship Trust – be Indspire-d

By Alex Shorten

The Background

Since the inception of the Aboriginal Law Student Scholarship Trust (ALSST) back in 2007, many important milestones have been achieved, not the least of which was the endowment of the original fund thanks to the many generous founding contributors. Now eight years later the Trust has reached an incredible **\$202,140**. In addition to individual donations during the year, much of the yearly contribution is raised from the Aboriginal Day On-Line Auction sponsored by the CBABC ALF. In 2014 we raised another \$6000 bringing our total to date \$44,000!



The BC Branch of the Canadian Bar Association (CBABC) negotiated an agreement with [Indspire](#) (formerly known as the National Aboriginal Achievement Foundation) to advance legal education for Aboriginal persons through the establishment of annual scholarships for Aboriginal persons to attend law school at the [University of British Columbia](#) (UBC), the [University of Victoria](#) (UVic), and [Thompson Rivers University](#) (TRU).

The Recipients

In 2014 there were six scholarships awarded to UBC students and another two at UVic. The recipients are Catriona Dooley (UBC), Justin Fontaine (UVic), Isaac Hill (UVic), Nicole Iaci (UBC), Yvan Larocque (UBC), Caroline Roberts (UBC), Chantelle Roy (UBC), and Megan Young (UBC). Visit cbabc.org/alsst for a list of past recipients.

We have more than reached the original funding goal as it continues to thrive with self-sufficient funding for the yearly scholarships.

2014 ALF Special Contribution Award

By ALF Executive

The 2014 ALF Special Contribution Award winner is Linda D Thomas. Linda is of Cree – Norwegian ancestry, (Duncan’s Band) is a member of the Tk’emlúps te Secwépemc (formerly Kamloops Band) through marriage. The TteS community has been her home for 30 years. Linda practices in area of child protection and family law in Kamloops, Merritt and Lillooet. Her past experiences practicing in criminal and prison law and involvement in social justice issues, led her towards establishing a First Nations Court; a sentencing court for aboriginal people in Kamloops. Linda is the Chair of the Aboriginal Justice Council; a multi-agency committee that she established to serve as an advisory to the First Nations court. This year, Linda had the opportunity to serve as duty counsel at the New Westminster First Nations Court. Linda is also a member of the Indigenous Advisory Committee to the First Nations Court in BC Evaluation research project led by Dr. Shelly Johnson at UBC. This committee recently hosted Healing Courts, Healing Plans, Healing People: International Indigenous Therapeutic Jurisprudence Conference at UBC. Linda is also board member of the BC Courthouse Libraries and member of the Canadian Bar Association Criminal Law section, Women’s Lawyer and a member of the Kamloops Bar Association.



Welcome to the 2014 – 2015 ALF Executive



Co-Chair
Tina Dion



Co-Chair
Adam Munnings



Vice-Chair
Bruce McIvor



Secretary
Michelle Casavant



Treasurer
Nicole Bresser



UBC Student Representative
Samantha Urano



Member at Large
Miranda Schmolz



Past Co-Chair
Christina J. Cook



Past Co-Chair
Isabel Jackson



ABORIGINAL LAWYERS FORUM BANQUET SPEECH

November 28, 2014

Fairmont Hotel Vancouver

By The Honourable Lynn Smith, Q.C., (retired)

Introduction

It is a great honour and pleasure to be with you at this annual Aboriginal Lawyers Forum banquet. I wish to acknowledge and thank the Coast Salish People, on whose unceded territory we are tonight. And I thank Adam Munnings and Tina Dion for the invitation and for the warm welcome they have provided to me and my husband, Justice Jon Sigurdson.

When I was a student at UBC Law in the early 1970's, the first course on aboriginal law was being taught for the first time, by Michael Jackson. Alfred Scow, UBC Law's first aboriginal graduate in 1961. had just been appointed to the Provincial Court, in 1971. But there was, I believe, only one aboriginal student in the U.B.C. law class of 1973, and he was UBC Law's second aboriginal law graduate -- Bill Wilson, maybe now better known as Jody Wilson-Raybould's father. Just as I suspect I am likely better known as Elin Sigurdson's mother.

When I was full-time at U.B.C. Law I had the pleasure of meeting, teaching and learning from a number of aboriginal students, especially during my term as Dean, and also had the excellent experience of working with two Directors of the First Nations Legal Studies Program

(as it was then called), John Borrows and Stephen Point. Judge Alfred Scow was a great friend of the law school. A number of people I've met over the years are here tonight, and it's wonderful to see you, and to meet others for the first time.

I thought I would begin with a brief update about what is happening at the U.B.C. law school. (My thanks to Darlene Johnston, Dana-Lyn Mackenzie and Gordon Christie, who took the time to bring me up to date on the program.)

Update on UBC Law

Back again at UBC Law, it has been good to see that the indigenous legal studies program is thriving. UBC Law aspires to be a national leader in indigenous legal studies, and it appears to be meeting that goal.

Around 20 indigenous J.D. students per year are admitted through the program; in addition there are currently two indigenous Ph.D. students and three LL.M. students pursuing graduate studies. The cohort of indigenous students is among the strongest in Canada. Four indigenous faculty members are involved in the Indigenous Legal Studies Program: its Director, Gordon Christie, Associate Director, Dana-Lyn Mackenzie, and two other faculty members, Darlene Johnston and Johnny Mack.

UBC Law has by far the most extensive curriculum on aboriginal law and indigenous issues in Canada with numerous optional offerings in second and third year, and now one-third of the mandatory First Year Constitutional Law course is devoted to aboriginal rights and s. 35 of the *Constitution Act*. The Faculty now offers a Specialization in Aboriginal Law as part of the J.D. program. Students who complete the specialization receive a certification to that effect. The requirement is that they complete 12 credits in the field of aboriginal law.¹ UBC Law also continues to offer six students per year the opportunity to work for a term in the Indigenous Law Clinic on Alexander Street, with two new co-directors, Alex Wolf, and Patricia Barkaskas.

The Aboriginal Students Lounge in the new building at Allard Hall is available for use whenever the building is open. And for the first time this year, the Indigenous Legal Studies Program organized an Indigenous Awareness Camp, working with the Musqueam and the Tsleil Watuth. It provided an opportunity for indigenous and non-indigenous students to have a two-day canoe trip and camping experience with guides, and to visit the territories of the two nations.

¹ This includes a mandatory entry-level course – Aboriginal Peoples and Canadian Law. In addition, nine of the credits (two to four other courses) must be from: Indigenous Peoples in Comparative and International Law, Aboriginal and Treaty Rights Litigation, Aboriginal Self Government, First Nations and Economic Development, Topics in First Nations Law, Kawaskimhon (Aboriginal Rights) Moot, Clinical program (Indigenous Community Legal Clinic) or from such other courses with sufficient Aboriginal law context as are approved

Here is what one returned camper had to say: “The Indigenous Awareness Camp was a wonderful opportunity to step inside a world that I had only studied from the outside. The conversations around the fire and the friendships made, were priceless. I got the opportunity to give real life meaning to cases I had only read about like *Guerin* and *Sparrow*.”²

I’m told that the UBC Law program has graduated 365 students since the program began 35 years ago. Other law schools, too, have produced aboriginal graduates. However, despite the number of aboriginal graduates from UBC and other Canadian law schools over time, the number of aboriginal practitioners has not increased proportionately (the figure in the 2012 Law Society Report *Towards a More Representative Legal Profession* puts the number of aboriginal lawyers in B.C at 160, that is 1.5% of the profession).

This is a worrying situation, because diversity matters.

Why Diversity Matters

It’s difficult to be against diversity -- certainly, if we’re talking about the strength of an ecosystem or a stock portfolio, diversity is apparently a good thing. Even more so when human beings and their communities are involved. It’s really quite easy to support diversity in

² Dana-Lyn Mackenzie, Associate Director of Indigenous Legal Studies, shared with some of the quotes from students who attended the camp.

principle. The true debate is about what should be done to accomplish it, and its relationship with the merit principle.

Why does diversity matter? Is it just some kind of diversion, or a way of pandering to the “politically correct”? I’m going to suggest that diversity and inclusion in the legal profession and the judiciary matters, a great deal. It is not a marginal or merely cosmetic goal, but a centrally important one. I advance four reasons for this contention.

(1) **It’s only fair.** Equal access to the opportunity of obtaining a law degree, practising law and serving as a judge should be available to all qualified persons of aboriginal and non-aboriginal origin, from both of Canada’s two founding genders, and of all cultural backgrounds and ethnicities, religions, sexual orientations, or levels of physical ability. Regardless of such characteristics, all who have the capacity should be able to benefit from what the legal profession has to offer, including service in the desirable, prestigious and stimulating role of a judge.

(2) **It makes a difference who is in the room when decisions are made.**

I think we all know this as a common sense matter; but it appears from social science that it is both true and not that simple. Tali Mendelberg of Princeton University has researched implicit racial communications and their effectiveness in U.S. political campaigns, and the reduced authority implicitly granted to women in discussions of

matters of public interest.³ I found these three take-home points in this research: (1) it definitely matters who is in the room; (2) communication and allocation of authority take place both at an implicit and explicit level; and (3) it is necessary to be in the room, but not enough, because human interaction is complex and subtle.⁴

(3) Enhancing diversity would enhance the credibility of the profession and the judiciary.

A community's trust in the justice system is likely to be enhanced if members of that community can see themselves reflected in it, that is, if they can see the law being argued, interpreted and applied by persons who share their personal characteristics such as aboriginal origin, gender, race, sexual orientation, religious beliefs, culture, or visible disability.

(4) Diversity is likely to lead to more accurate and appropriate outcomes.

To my mind, this is about increasing the odds, not guaranteeing perfection. But I would say that, for example, having aboriginal lawyers in a law firm increases the chances that there will be a good understanding of an aboriginal client's wishes and needs, and that there will be a good understanding of issues affecting aboriginal peoples.

³ *The Silent Sex: Gender, Deliberation and Institutions* (with Christopher Karpowitz). Princeton University Press (August 2014); *The Race Card: Campaign Strategy, Implicit Messages, and the Norm of Equality*. Princeton: Princeton University Press, 2001.

⁴ For example, being the sole "representative" of a group can be tricky. Is that person obliged always to speak to issues involving the group? How to do justice to the fact that the group and its views are not homogenous?

Having aboriginal judges on a court similarly increases the chances that important points affecting an aboriginal community will not be overlooked. It has been suggested that the results of a group deliberation are improved if the group is more diverse.⁵

How Diverse is the Judiciary? What is Happening with Judicial Appointments?⁶

I will begin with federal judicial appointments.

As you know, the federal Minister of Justice, or, in some cases, the Prime Minister, makes the appointments, with the assistance of the Commissioner for Federal Judicial Affairs. Judicial Advisory Committees in each province play a key role in the screening of candidates. These committees are selected by the Minister of Justice. Certain organizations (the Law Society, the Ministry of Justice for the province, the Canadian Bar Association, and the “law enforcement community”) are invited to submit a list of names from which committee members can be appointed by the federal government. A judge appointed by the Minister of Justice chairs the committee. The process was changed in 2006, to remove the judge’s vote except in the event of a tie, and to add this representative of the “law enforcement community”.

⁵ For a recent, brief discussion, see James Surowiecki, “Valley Boys”, *The New Yorker*, November 24, 2014.

⁶ The Honourable Donna Martinson has done considerable research on this topic, and I wish to acknowledge and thank her for her collaboration and insights.

On paper, each provincial Judicial Advisory Committee is supposed to reflect the diversity of the province. According to his published Guidelines, the Minister of Justice “attempts to reflect factors appropriate to each jurisdiction including geography, language, multiculturalism, and gender.” It must be said that that if any such attempt was made, it has failed -- unless British Columbia has become 100% non-aboriginal male. Currently⁷, all members of the British Columbia Judicial Advisory Committee are men and only one is a visible minority lawyer. I am not aware that any of the members is of aboriginal origin.

A look at other provinces shows that several other committees have no women whatsoever, and judging from surnames they are not diverse on other dimensions as well. I do not know if any of the advisory committees across the country has a member who is of aboriginal origin.

An analogous issue is the representativeness of juries. The Supreme Court of Canada has heard argument in *Kokopenace*, a case out of Ontario.⁸ An accused aboriginal man challenged the representativeness of the jury panel from which his jury was selected. The Ontario Court of Appeal held that the government had not made reasonable efforts to ensure “an honest and fair process, the end result of which would be to allow Aboriginal on-reserve residents a fair opportunity

⁷ As of November, 2014.

⁸ *R. v. Kokopenace*, 2013 ONCA 389.

to have their distinctive perspectives included in the jury roll”.⁹ The Court ordered that Mr. Kokopenace’s conviction for manslaughter be set aside and a new trial be held. In the Supreme Court of Canada, arguments were advanced under s. 11 and s. 15 of the *Charter*, and the Court has reserved judgment. Earlier, the Government of Ontario had commissioned former Supreme Court of Canada Justice Frank Iacobucci to investigate ways and means of increasing aboriginal participation in criminal juries and coroners’ juries, and steps are being taken to implement his recommendations.¹⁰ As for British Columbia, I am not up to date with current initiatives, but it appears that in 2011, in response to complaints from the British Columbia Civil Liberties Association, the Ministry initiated a procedure to obtain lists of band members in order to enhance the sheriffs’ procedures for assembling jury rolls.

I mention the *Kokpenace* case because it seems to me that, for the same reason that fairness requires that an aboriginal accused be tried by a jury selected from a panel where aboriginal people have had a fair opportunity to be included, fairness requires that reasonable efforts be made to include aboriginal persons on the federal Advisory Committees. And by the same reasoning, fairness requires that the pool of judges who may hear an aboriginal litigant’s case include some judges of aboriginal origin.

I note the welcome development that the Benchers have adopted a recommendation from a subcommittee of its Equity and Diversity Committee that it “be pro-active in selecting a more diverse list of

⁹ At para. 187.

¹⁰ Found in *First Nations Representation on Ontario Juries*, February 2013.

lawyers as the Law Society candidates for appointment to the Federal Advisory Committee.” I am advised that the Benchers have acted on that recommendation.

Turning from the Judicial Appointment Advisory Committees to the results of the appointment process, it is interesting to look at the last five years or so of appointments to the B.C. Supreme Court. I pause to note that I do not suggest that the individuals who have been appointed are other than well qualified, experienced and likely to be excellent judges. However, the demographics are disappointing. The appointees have been two-thirds male, and almost all are non-visible minority and non- aboriginal lawyers. Almost all come from traditional areas of practice.

Looking at the B.C. Supreme Court as a whole, the present members are, similarly, about two-thirds male, with very few visible minority judges. Madam Justice Jennifer Powers, in Nanaimo, is the sole member of the Court who is of aboriginal origin. The Court of Appeal has no judges of aboriginal origin.

As of June 2013, my former colleague Justice David Masuhara calculated, the BC Supreme Court had 103 members of whom only 5 were from visible minorities. Of the 22 members of the Court of Appeal, none were from visible minorities. The Provincial Court had 160 judges, of whom 12 were from visible minorities.

Provincial courts, such as the Provincial Court of British Columbia and the Ontario Court of Justice, are doing better at achieving diversity and have a more transparent process. Chief Justice Crabtree very kindly filled me in on the current process and the current composition of the Provincial Court of British Columbia. There are currently four judges of aboriginal origin: Judge Buller in Port Coquitlam, Judge Marchand in Kamloops, Judge Smith in Port Coquitlam and Judge Point in Abbotsford. Three of those judges were appointed during the last three years, though Stephen Point was a repeat appointee, having taken a break from judging to serve as Lieutenant-Governor for a term and then coming back to the Provincial Court. The aboriginal judges constitute 3.2% of the total judicial complement or 3.8% of the full-time complement of the Court.

As for the Provincial Court process, a recent change is that applicants for the Provincial Court are asked to indicate on a voluntary basis whether they are of aboriginal ancestry, a member of a visible minority or of “diverse background”.

The merit principle

Having looked at some numbers, which show a judiciary, particularly the federally appointed judiciary, that is not reflective of the population, I turn to the merit principle. It is indisputable that appointments must be made based on merit. Does a push for diversity require softening or compromising the search for merit -- and ceasing to

look for the best person for the job? I think the real question is, “how do we define merit?”

Chief Justice McLachlin, when addressing an international judicial audience in 2012,¹¹ emphasized the importance of both diversity on the bench, and an inclusive approach to defining merit. In her view, a diverse bench brings different and valuable perspectives to the decision-making process, which enriches the judging process and may lead to better decisions. She said:¹²

We should remind ourselves of what psychologists have documented –human beings see merit in those who exhibit the same qualities that they possess....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.

In a recent report on diversity in the legal profession, this concept was referred to as “in-group bias”.¹³

¹¹ Judging: the Challenges of Diversity, Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, to the Judicial Studies Committee Inaugural Annual Lecture, June 7, 2012, Edinburgh, Scotland, <http://www.scotland-judiciary.org.uk/Upload/Documents/JSCInauguralLectureJune2012.pdf>

¹³ Towards a More Representative Legal Profession: Better practices, better workplaces, better results, A Report prepared on behalf of the Equity and Diversity Advisory Committee, The Law Society of British Columbia, June 2012.

Chief Justice McLachlin also observed in her lecture that “...a variety of career paths can prepare one for a judicial career, and a different perspective may be a factor in establishing merit.”

The Chief Justice’s observations about “merit” find resonance in the *Ethical Principles for Judges*, promulgated by the Canadian Judicial Council.

Ethical Principles 5 and 6 are particularly relevant to the qualities that are required of a judge. Those principles require (under the heading of “equality”) that “judges conduct themselves and proceedings before them so as to assure equality according to law” and (under “impartiality”) that “Judges must be and should appear to be impartial with respect to their decisions and decision making.”

The commentary under the principles shows that the Canadian Judicial Council believes that judges have an ethical obligation to understand and promote the *Charter* value of equality. In other words, judges are required to understand and have consideration for all persons, and to implement the principle that equality may require positive steps where necessary to assure substantive equality.

The Ethical Principles also state that individual judges must be impartial in the sense that they must understand the community in which they live, and avoid the mistake of confusing their own singular

experience with the universal experience of humankind. I think that there is a corresponding duty on the judiciary as an institution, and that the judiciary would be better able to carry out that duty if its composition more accurately reflected the composition of the community as a whole.

It is interesting to think about how we would make judicial appointments if diversity really mattered.

If diversity really mattered, we might adopt some of the measures taken in the United Kingdom by the Judicial Appointments Commission (the “JAC”). It is an independent body which in 2006 was given responsibility for selecting candidates for judicial office. The JAC states that an important goal is to create a judiciary that is more representative of the general population, in the context of judicial selection on merit, through fair and open competition. ¹⁴

Interestingly, the JAC just completed a consultation followed by an amendment to one of its merit criteria. The definition of “ability to understand and deal fairly” was amended, adding the criterion “An

¹⁴ Under the *Constitutional Reform Act 2005*, the JAC has a statutory duty to: select candidates solely on merit; select only people of good character; and have regard to the need to encourage diversity in the range of persons available for selection. In addition, under the *Equality Act 2010*, as a public body, it has a duty to: eliminate unlawful discrimination, harassment and victimisation; advance equality of opportunity between different groups; and foster good relations between different groups. Regulations require it to publish relevant, proportionate information demonstrating compliance with the equality duty and to set specific, measurable equality objectives.

awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs”.

The measures the JAC has taken include setting up a very transparent process. For example, the JAC publishes the diversity profile of candidates at all stages of the recruitment process. It also liaises with organizations to encourage applications from underrepresented categories of persons, and it publishes the results of judicial selection exercises.

We can see from the U.K. JAC, that conscious effort to increase the diversity of the judiciary is possible, and will be taken seriously when, for example, it is required by statute.

Sometimes what is needed is a “bias interrupter”. For example, many leading symphony orchestras have, since the 1970’s, conducted blind auditions. Aspiring musicians audition for a spot in the orchestra from behind a screen. It appears that the percentage of women hired for symphony positions has quintupled since blind auditions became the norm.¹⁵

Conclusion

I’ll end on an optimistic note. I’ve said why I think diversity in the legal profession and the judiciary matters, both to institutional health

¹⁵ See the article at note 4 above.

and credibility and to those who have suffered exclusion and discrimination. I've talked about some statistical information suggesting that the pace of change is slow, and I've referred to the need to think harder about what we define as "merit".

But there has been progress. Aboriginal lawyers are making their mark in the profession. It is wonderful to see the aboriginal students I knew at UBC law showing up in court, or as leaders of their communities, or as journalists or entrepreneurs. Law schools such as those at UBC and the University of Victoria are making strong efforts to continue the process of attracting aboriginal students and providing them with a good legal education as well as providing education about aboriginal law to all of their students.

We've also developed better ways of thinking about the issues, realizing the positive side of diversity, and good minds have been developing sophisticated measures -- such as those currently underway or under consideration by the Law Society and the CBA and in use by bodies such as the Judicial Appointments Commission in the U.K. The Canadian Bar Association of British Columbia through the Aboriginal Lawyers Forum and the Law Society through the Aboriginal Lawyers Mentorship Program have been taking creative and positive steps to improve the retention rates of aboriginal law graduates in the profession.

It is clear what needs to be done: reaching out to communities, identifying what are the barriers to full participation, figuring out ways to remove or lower those barriers. And achieving an understanding that merit should be determined comprehensively, not simply as we have always defined it.

I wish all of you the very best in your practice, education, or other work, and I also wish you a festive and relaxing holiday season.