

Equality in the Legal Profession, Esmeralda M.A Thornhill, Roads to Equality, Vol. 4, Toronto: Canadian Bar Association, 1994.

INTRODUCTION

I welcome this long awaited forum, **Roads to Equality** which, for the Legal Profession, is particularly topical and timely. I have been asked to address the issue of **Equality in the Legal Profession from the Perspective of "Race"**, a mandate which has far-reaching implications for the Profession. This Paper will attempt to answer the following broad questions:

- What are the issues?**
- What changes do I recommend?**

CONTEXTUALIZATION

This mandate, **Equality in the Legal Profession from the Perspective of "Race"**, is fraught with pitfalls, for it overturns several conventional wisdoms and challenges established mindsets. Consequently, certain observations are in order before I proceed to share my thoughts and views. They contextualize my presentation:

1. Equality necessarily means **substantive equality** and not just **formal equality**.
2. Substantive equality forces us to acknowledge and deal with the existing inequities and inequalities rife within the Profession.
3. From a "race" perspective, such inequalities represent the harsh "**material reality**" of Racism that "racialized" peoples are daily confronting in the Legal Profession.

MYTHOLOGIES

The logic of the foregoing affirmations compels us to shift certain entrenched and accepted paradigms of thinking because the theme, **Equality in the Legal Profession from the Perspective of "Race"** raises difficulties that shatter these mythologies to the core.

A Celebratory Tradition Pervades Law and the Legal Profession

There exists a celebratory tradition in constitutional law and scholarship wherein the essential message (of that tradition) is that Law is emancipatory and liberatory for everyone, has served the nation well, and has furthered human freedom. The obvious dissonance is that "from the point of view of Racism's victims_survivors. there is little to celebrate. Nevertheless, as Professor Randall Kennedy points out celebrants have consistently lauded the celebratory nature of Law:

- * by analysing it in ways that protect its reputation from potential embarrassment
- * by employing strategies which, intentional or unconscious, have had the effect of obscuring the role of Law in perpetuating oppression
- * by denying that the "race" question creates any embarrassment
- * by asserting the affirmative good of decisions which in essence undermine the status of "racialized" groups
- * by ignoring the troublesome and irritating presence of racial subordination and by showing utter disregard for the race relations jurisprudence of the courts
- * by maintaining a deafening silence in the face of "race" issues
- * by offsetting judicial performance or legal track record in "race" cases against countervailing performances in other areas__ - however incommensurate the comparison
- * by accentuating progress.

These strategies of containment respond to conventional wisdom which dictates that we defer to the celebratory tradition. This celebratory tradition plays a decisive role in determining the premises, tone and conclusions of historical legal analyses, all of which end up being ultimately redemptive.

Racial Inexplicitness is the Unspoken Societal Policy

Traditionally, in our *society* and in our institutions, inexplicitness vis_a_vis "race" has been the unspoken public policy. Consequently, "Race", ___- a psycho_social phenomenon ever present in our daily lives --- became an unmentionable embarrassing R_word, a taboo. And a pervasive reflexive resistance still tends to meet every race_specific focus, be it analytical study, or corrective measure. Law and the Legal Profession have not been excepted:

“ . . . this denial and erasure bequeathed to us by colonialism are in part responsible for the seemingly gaping legal void of our law when it comes to dealing with Racism or the right to non_discrimination.

Our Canadian legal tradition has been willfully blind and/or insidiously complicitous before the litany of flagrant acts of racial discrimination that punctuate the history of this country".

In the past, we have pursued a public policy of inexplicitness with respect to issues of “Race” and Education, “Race” and Law. This must stop: Racism must be named and addressed, up front.

The ensuing result of these two mythologies is that the Legal Profession faces a veritable dilemma if we really are determined to address the issue of **Equality in the Legal Profession from the Perspective of "Race"**. For, how do we reconcile this disturbing dissonance of simultaneously celebrating law while taking seriously its deficient response to the subjugation of Blacks Aboriginal Peoples, and other "racialized " groups? How do we deal with those well_developed mechanisms that allow us to resist information which challenges the behaviour and beliefs we so take for granted everyday? Given the historical generalized resistance, some additional cautionary observations are needed to contextualize my comments before proceeding further.

Exemplary Role of Legal Profession

This chosen theme, **Equality in the Legal Profession**, forces us to hold our profession up to the glare of public light for self_scrutiny and self—censureship. Some of us may be indignantly objecting to what in our eyes would appear to be an unseemly and unwarranted exercise in self_flagellation.. But such is not the case. For Law and the Legal Profession are accountable to “Race."

Since laws represent a codification of the expectations and standards of behaviour deemed appropriate by a society, our Legal Profession, *ipso facto*, has an exemplary obligation to be itself the epitome of ethical behaviour. Law, like other institutions, must be transformed to truly reflect new notions of Equality, fairness and appreciation for the rich diversity Canadians bring. "Concepts of social justice coupled with the common law tool of Equity compel the legal

profession to pursue equality which will promotes enhance and value cultural, ethnic racial and sexual diversity to enable" heretofore excluded group members to be, them too, productive, successful, and satisfied members of the Legal Profession.

We in the Profession know and are increasingly being made aware of the prevailing inequities: For example, we in the Profession are being forced to confront the conspicuous dearth of "Visible Minorities" in the Profession, AT ALL LEVELS. We in the Profession are being forced to acknowledge the absence of excluded or marginalized voices from the discussion, construction, and articulation of legal doctrine, theory, and discourse. We in the Profession are being forced to examine critically and reassess the paradigms, perspectives, and values that undergird our current legal constructs and assumptions. We in the Profession are being forced to understand that the legal profession must now re_define itself along more inclusive, participatory, and democratic lines that are not exclusively Eurocentric, male and White, but also do embrace a multiplicity and diversity of experiences, themselves configured and socially constructed by factors of race) colour, sexual orientation, disability, gender, ethnicity, We in the Profession are being forced to acknowledge and address Racism and other inequities that exist right now in our society as well as in our institutions. We in the Profession are being forced to be accountable for the authority and actions designed to end such discrimination and redress such inequalities."

Trained and accustomed to working with evidence, can we in the Profession deny the "raw fact of continuing racial injustice?" To ignore or dismiss such evidences according to the very standards set by our Profession, would constitute unethical behaviour and would be tantamount to collective professional misconduct on our part .

Equality Means Substantive Equality.

"Equality without an income is of little value." **Equality In the Legal Profession** signifies **substantive equality**, which means, in addition to intent and process, outcomes and consequences, and the right to an equal economic opportunity. **Equality in the Legal Profession** means that the recourses and procedures on the books should be accessible to and should work for, "racialized" minorities seeking redress, remedy, relief or reparation. **Equality in the Legal Profession** means that Law and the Legal Profession need to respond concretely to the very visibly changed face of Canada and inclusively allow diversity to enrich the ranks, vision, perspectives, constructs and analytical frameworks of Canadian Law.

THE ISSUES

In order to truly address **Equality in the Legal Profession**, we should be asking and answering the following kinds of questions:

- . Who are those "racialized" members in -__ and more importantly __- on the fringe of the Profession?
- . Are they adequately represented throughout the Profession?
In all sectors? At all levels?
- . Are their experiences fully documented?
- . Do they as faculty members, researchers, administrators benchers practitioners, and members of the Judiciary participate in the governance and policymaking arenas of their institutions and the Profession?
- . To what extent have traditional methods and strategies that are used to attract students! faculty members, new firm recruits, and bench appointees been successful for " racialized?" groups?
- . Are "Visible Minority" members of the Profession treated similarly to White colleagues in tenure and promotion processes and judicial appointments?
- . Are vacancies, promotions, transfers, and/or appointments disclosed and the information made available to **all** employees?
- . When training, professional development! or job/ career enhancement opportunities are offered, are they made available to **all** employees?
- . Has your institution or firm managed to recruit **and succeeded in retaining as satisfied productive members Aboriginal and Black legal professionals?**
Or, is the claim: *"But there are no qualified candidates!"* invoked to defend a poor track record?
- 10. Do "minority" colleagues work twice as hard as everyone else to be accepted?
- . With what dizzying frequency is your "Community of One" Equity colleague trotted out to high profile events in order to enhance the image of your institution?
- . Are "Visible Minority" members of the Profession stigma-

tizingly labelled "Affirmative Action Hire" or "Affirmative Action Recruit", and treated in patronizing and condescending ways?

. Do we know that the racial prejudice which over a century ago prevented Delos Rogest Davis from doing his articles is still vibrantly operative today?

. Is the scholarship and research of First Nations and other "minority" jurists as valued as that of their White colleagues? Is it judged by the same criteria?

. Do Law Society personnel, university officials, faculty, practitioners, and members of the Judiciary grasp the racial/ethnic issues that affect their members as well as fast growing sectors of the population?

. Does our Profession keep alive the memory of pioneering role_models such as Robert Sutherland or James Robinson Johnston? Are we familiar with their names?

. In short, to what extent has the Profession factored in "race" as a significant interferent in Access to Equality in the Legal Profession?

This paper will begin to answer some of these questions. But, ideally, hopefully it will stimulate institutions and members of the Profession to answer them more fully and to raise additional questions as well.

The Issue Is Access

The reality is that Law itself constitutes part of the problem; for, in Canadian legal culture, "a general conspiracy of silence still operates not only to obfuscate the issue of Racism, but also to deny its very existence". The ensuing dearth of "Race" critical scholarship and doctrine means that **existing Law does not effectively reach and can neither address nor redress the discrete racial discrimination which many continue to experience but fewer and fewer are able to prove.**

As Professor Kimberle Crenshaw so accurately points out, there prevails in current law a **dominant group perspective** which confers upon itself at one and the same **time a normative**

value and perspective-less nature. In legal inquiry, "minority" perspectives are excluded and dominant group perspectives privileged; in the discussion of doctrine, "minority" perspectives are devalued while dominant group perspectives hold up the frameworks; and in the construction of paradigms and legal theory, "minority" perspectives are excluded and dominant group perspectives hold sway. In current Human Rights anti_discrimination doctrine, the general exclusion of "minority" perspectives and the privileging of dominant group perspectives generates an ongoing and increasing tension between frameworks used for defining and remedying racial discrimination_--- the **discrimination approach competes** against the **domination** approach. Here, the significance of the victim_survivor's experience of domination is minimized, if not nullified, through the search for an actor who **intentionally and irrationally discriminated against a certain victim.** Instead of constituting an additional insult to established injury, intentionality become the principal operative..

The Academy: Prime Gate Keeper

A review of the fast growing body of literature reveals the extent to which the Legal Profession is being pressured, from outside as well as from within, to address the issue of Equality from a "race" perspective. The Academy sets the tone, pace, and quality of the professional pathway for every student. A 1992 Justice Canada Report on ten Law Schools concluded that discrimination attributed to Race/ Ethnicity both observed and experienced by "Visible Minorities" and First Nations Peoples was reported: outside the Law School; within the Law School, perpetuated by both students and professors alike; and also during the application for admissions process.

Once "minority" students get to campus, they find that they are members of a Community which tends to treat them differently ... as outsiders, as intruders, as not belonging. Isolation, invisibility,! indifference, hostility and lack of understanding are all too often part of the chilling climate with which they must contend. Rarely are "minority" students integrated into the life and culture of their institutions; and they are excluded from the informal and social aspects of their departments and institutions. In addition, there are no clear pathways for them to effect change should they possess the necessary courage and energy.

"In our Law Schools, there is a dearth of positive role models for non_white students to emulate. In Law School throughout their course of study, Black and other students of colour fall victim to social alienation and become the objects of a range of exclusionary mechanisms which penalize them while conferring on their White classmates numerous "in_group bonding", and networking advantages such as: note_sharing and note-swapping, group study, team projects, advice, recommendations, and "tips" for internships, articling, and job placement, professional *encadrement*, mentoring, or supervision, summer jobs and contractual work, and, eventual permanent, gainful employment. In a nutshell, we are talking about paving the way and constructing a network of "contacts" --_ that professional "network" so indispensable to the daily survival of every practitioner in the legal field.

Classroom Dynamics

In the classroom, White students get the most attention from the teacher and "Minorities" get less, or are often ignored. Low teacher expectations towards "minority" students have a direct impact on diminished self_esteem and stunted aspirations. Time and again in class, "minority" students are sporadically called upon to "show and tell", and, under strictest scrutiny, give "fishbowl" command performances wherein they are expected to speak for their entire Collectivity or Community and, indulge episodic interest by providing parenthetical exotica. "Minority" students frequently are met with disbelief or surprise when they respond correctly, ask a probing question, or otherwise show good performance. Their silence or non- engagement in the classroom is frequently mis_ interpreted as sullenness, while their articulate dissent or assertive verbal remark is mis_ construed as a challenge, disrespect, arrogance aggressive behaviour. "Minority" students all too often find themselves in a "Catch 22 " situation wherein they risk retaliatory punishment if they use their survival skills.

Curriculum

Law School curriculum not only reflects the general policy of "Race inexplicitness", but, more particularly, it has failed patently to keep pace with the burgeoning scholarship on "Minorities".

"Law School curricula at all levels of education is grounded within a White patriarchal middle class system of values that 'disappears' or erases other world views in an unquestioned belief in the universality of the dominating Euro_ centric experience. The nature and structure of curriculum content engenders discussions that focus exclusively on problems, interests and values that either do not shares or that obscure or overlook issues which are particularly relevant to "Visible Minority" students. Right now, most 'minority' students go through Law School bereft of role models, they experience legal education like an out_of_ body experience, ever feeling that something is missing being told from constant daily bombardment that they are an 'outsider'. To get through Law School, students from excluded groups are forced to engage in discussions as though they are not Black, not Aboriginal, not of Asian ancestry, not disabled, not female.. but rather colourless neutered legal analysts. To get through Law School, minority students must run the gauntlet of objectification, sub- jectification, invisibility, alienation and isolation. Current Canadian Law School curricula and legal scholarship of f er no safe harbour in which "minority" students can anchor their own experiences. no solid moorings to which they can ground their analyses. Narrowly constructed boundaries of classroom decorum penalize analyses predicated on individual and collective experiences as well as immunize Law from serious criticism unless the student dares to go against the current and run the risk of being labelled 'emotional', 'hysterical', and ... 'unlawyer_ like'."

"In general, Law School teaching is devoid of any racial perspective. Yet, Racism should also inform the teaching of: Constitutional Law, Administrative Law, Human Rights Law,

Immigration Law, Law of Contracts, Property Law.... Concrete facts that would assist us in providing the proper critical perspective in which to teach contemporary Law should include: the destructive effects of colonialism; the **Indian Act**; various disguised and discriminatory legislation targeting Chinese and Japanese Canadians, and other Asians; Immigration Policy; the overriding primacy given to the right to contract freely against the right to non_discrimination; restrictive covenants of a racial nature..."

Teaching/Pedagogy.

When opting for particular methods of Teaching or Evaluation, few instructors take into account the interfering factor of "Race" and its impact on individual learners. For example, group projects or teamwork ___-- especially if groups "self-select freely" ---- exact a heavy toll from "minority" students who carry a tremendous strain due to prevailing prejudicial attitudes. Far too often, "natural selection" leaves the "minority" student(s) floating "solo", cut loose, adrift from any group. If numerous enough the "minority" students form a together out of residual necessity, or they appeal for "instructor intervention" so that they can be assigned to a group where, more often than not, they inherit the trivial and more tedious assignments and are shut out of the more important tasks.

"Minority" students often do not receive encouragement from counsellors and advisors to pursue graduate training, higher education , or studies abroad. They find their credentials frequently tested and re-tested, over and over again. Isolated as outsiders, they are often shut out of **informal networks of collegiality** where information circulates freely about fellowships, research grants, publishers, conferences, and contract work. The scholarship and research of "minority" legal scholars is often assessed and judged by uninformed White colleagues who, unappreciative of non-traditional subjects or non-traditional views, tend to trivialize, discredit, and de-value it. Excluded from university networks, "minority" members of the Profession must look to **extra-university networks and cross-fertilization across disciplines for the professional** stimulation and nurturing support (mentoring, coaching, sponsorship, recommendations, references ...) They need to survive. The end result is that rather than attending to the competencies which they go to the Academy to attain, "minority" students end up spending their time coping with overt and covert threats to their "entitlement to be" --- to be who they are to be in Law School.

THE WORKPLACE

"Whereas Delos Rogest Davis ... ever since the year one thousand eight hundred and seventy_three, and from before that time... has endeavoured and has been anxious to enter the profession of law; that in consequence of prejudices against his colour and because of his being of African descent he has not been articted to any attorney

or solicitor, or served any articles... is desirous of being admitted to practise as a solicitor in the Supreme Court of Judicature for Ontario".

In 1884 Delos Rogest Davis formally petitioned the Government of Ontario for passage of a special Act of the Ontario Legislature in order to be admitted to the practice of Law, without serving articles. The cause was racial prejudice. "The struggle of man against power is the struggle of memory against forgetting." Job discrimination was a major problem back then for Rogest Delos Davis, one of the first Black lawyers called to the Bar in Canada, and job discrimination remains today a major problem for "racialized" members of today's Legal Profession:

"When looking for placement in the job market, holders of resumes on which appear the applicants whose affiliations with Black groups or Black Community advocacy work must often run a gauntlet of reactions: ranging from open intimidation and naked hostility, through barely contained amusement, to subtly veiled contempt and cynicism -__ all of which impact adversely on the hopeful job seeker."

"Minority" job seekers continue to face exclusionary barriers of **tight shut social networks, information bias and statistical discrimination** in entry positions, all of which contribute to the problems of closed internal job markets. Other exclusionary barriers crop up at **the candidate stage**, when recruiting a pool of candidates openings; at **the job entry stage** when the individual is actually selected to fill a vacancy; and at **the promotion stage**, when transfers or sponsorships are made within a firm respectively to fill spots or to take up appointments at higher levels.

"Minority" job seekers find themselves shut out of informal networks; they are neither privy to the circulating information, nor beneficiaries of those recruitment methods which rely heavily on **informal social networks of information**. Traditionally, these are the most frequently used recruitment methods for filling jobs in the Legal Profession. And they severely disadvantage "minority" job seekers who themselves are inordinately dependent on informal word_of-mouth information gleaned from relatives and friends within their own informal Community social network.

At the job entry stages, "minority" applicants are unfairly excluded by certain selection practices **such as statistical discrimination** wherein employees use negative group images based on uninformed stereotypes to judge a candidate for employment instead of directly assessing the candidate on objective criteria and performance. Sometimes, **dossier discrimination** through **information bias** operates to penalize "minority" job hopefuls. Information provided by "minority" candidates, recommendations and sponsorships are somehow deemed to carry less weight because a White employer is less familiar with sponsors, or views the referees'

attestations as inherently suspect because of stigma and stereotypes attached to "minority" sources.

Innumerable are the examples of interviews wherein "minority" applicants will confirm how the **low immediacy behaviour** of interviewers triggered in them nervousness, and a marked decrement in their performance. Eloquently, will they articulate the progression of their personal deflation evidenced through such unobtrusive measures as voice tones, incidence of avoidance behaviour, less or absence of eye contact, less friendliness, less verbal interaction, physical distancing such as less forward body lean, shorter interview, slackened standards of politeness such as speech errors, introductions omitted, common courtesies neglected such as holding the door, invitation/indication to be seated, being addressed by one's name...

When it comes to job promotion, most "Visible Minorities" come in at dead_end levels without access to training opportunities, professional enhancement, or upward career ladders. Employers tend to downgrade the abilities of "Minorities" as quick learners and copers, and rarely do they disclose to them upcoming promotion opportunities. More often than not, such information short_circuits the public and gets wired to particular, individuals favoured for promotion or transfer.

"Racialized" individuals often find themselves at the mercy of a "triple jeopardy status" caused by their **"Race" status**, the **solo work mode** forced upon them, and **the token status** imposed by their environment. Black_solo_token professionals, for example, work under strictest scrutiny, are the object of exaggerated expectations and extreme evaluations, are subjected to unfair performance

appraisals and suffer from the lack of constant, realistic and helpful feedback on their work performance — all of which thwarts their career development. In addition, they are all too familiar with the **"ultimate attribution error"** according to which work behaviour is seen as **dispositionally** rather than **situationally determined**. Here, negative behaviour is typically attributed to situational factors for intimates: Intimates receive the benefit of the doubt; strangers and perceived "outsiders", do not. Therefore, when Blacks behave in a manner perceived to be negative, Whites, especially those who are prejudiced, are likely to attribute their behaviour to the personal character of the Blacks i.e. certain innate, immutable attributes, that are often consistent with cultural stereotypes. Situational determinants of negative Black behaviour such as the effects of solo status or role requirements are generally ignored or dismissed and are not taken into account. On the other hand,, high level Black performance is frequently attributed to such transitory causes as luck, unfair special advantage, and the availability of good equipment or plentiful assistance, rather than to the skills and abilities of the Black employee.

AFFIRMATIVE ACTION / EMPLOYMENT EQUITY

"There is error in the commonly held view that the long effort by Blacks to gain freedom and civil rights constitutes a long unbroken line of steady progress. Rather, what is denominated

progress has been a cyclical phenomenon in which rights are gained then lost, then gained again in response to economic and political developmentsover which Blacks exercise little **or no control.**" New forms and expressions of racial prejudice are emerging among White job recruiters, supervisors and ordinary workers. Modern racial prejudice is more subtle and indirect, but, just as costly for the victim_survivor. Rejecting gross and global stereotypes and blatant forms of discrimination, White opposition now comes cloaked in ostensibly non_racial concerns such as "*academic freedom*", "*politically correct*", "*myth of meritocracy*". White attitudes about racial policy in general and Affirmative Action programmes in particular are deeply intertwined with widespread conceptions of opportunity and privilege and those perceived threats to existing benefits prior claims and entitlement.

Affirmative Action/Employment Equity is currently formulated, implemented, and opposed in an adversarial context. Strong support of principles of racial equality often meet with lukewarm endorsement or even rejection of concrete proposals for implementation; So much so, that Affirmative Action/Employment Equity requires a re_winning of ground already won. For Affirmative Action/Employment Equity represents a direct assault on the *status quo* and it strikes in their cores the fundamental ideological beliefs and material interests of vast segments of the North American populace. By way of explanation, consider the following graphic illustration:

The Proper Perspective

"Imagine that we are in a helicopter hovering in the sky above an oval Olympic size race track! We note that there are approximately ten individual lanes demarcated for the runners. Our bird's eye vantage point, coupled with the physical reality before us, and sheer common sense immediately tell us that there exist significant differences among the ten lanes, particularly if we compare, for example, the two inside lanes to the two outside lanes. The runners on the inside lanes have the edge. And consequently, for every lap around the oval track the actual physical distance to be covered by each runner will be commensurately greater as we move farther and farther away from the first inner lane.

A race is about to start! We note that the ten runners are not all starting off identically from the customary common horizontal START_FINISH line. Instead, they are "strung out" at varying distances along the track, with the two runners in the last two outer lanes seemingly well ahead of the two runners in the first two inner lanes. Again, our bird's eye view, our vantage point, reality, and common sense put the situation in its proper perspectives immediately informing us that this is an appropriate remediating initiative which will compensate for the inherent and unavoidable inequalities of the oval track. It is a FAIR way of bringing some form of equality to the oval track; of correcting or "equalizing" identifiable and quantifiable odds and creating **Equal Opportunity for every contending runner** so that each one, given his or her potentials has an equal chance to win.

In a nutshell, this is Affirmative Action! This aerial view:

- * illustrates the proper perspective and stand_point from which Affirmative Action should be viewed;
- * reveals the solid philosophical rationale of Equality that undergirds and justifies Affirmative Action programmes; and it,
- * allows us to envisage and deconstruct some of the key elements of an Affirmative Action Programme, for example, its "identifiable" and "measurable" targets goals and time tables." [...]

"Even though Affirmative Action is a philosophical, political, legal and administrative response that:

1. Acknowledges a *de facto* situation of entrenched institutional inequality and,
2. Attempts to redress s this *inequilibrium* in the *status quo* by creating Equality of Opportunity and Access,

yet much misunderstanding, hostility, resentment, and undermining tend to precede and engulf Affirmative Action Programmes --_ mostly because of lack of knowledge about the *de facto* historical reality - __ past and present, they seek to address. Take, for example the buzz term "reverse discrimination" whose simplistic reduction obfuscates the solid principle and rationale of Equality on which Affirmative Action is grounded. This catch phrase, according to Professor Derrick Bell, has been "elevated" from a mere opposition slogan to a judicially recognized limit on the remediation of racial injustice. How could this have come to pass?

Many are the opponents of Affirmative Action __- declared and undeclared _- who, informed only by the sole vantage point of a short_sighted ground level view of the "race around the oval track" object vociferously or "do little by doing nothing". Imagine now that you yourself, you are on the race track. You are a contending runner in one of the first two lanes. As you try to concentrate on the distance ahead of you, you espy in your peripheral field of vision the rival next to you a short distance ahead. You think confidently to yourself "*Oh! that's not too bad! I can handle that!*" But as you continue to strive to concentrate on looking ahead, down the track, the backs of the other eight runners intrude on your field of vision. Everyone else it seems is "strung out" in front of you, farther and farther ahead. Not only does this intrusive picture undermine, erode and shake your initial self confidence, it downright rankles ! To you, this does not seem __ indeed is NOT FAIR. You feel shortchanged. For, without benefit of the bird's eye view of the TOTAL picture you do not see, nor can you appreciate the common sense rationale of

progressively "stringing out" ahead of the inside lane runner all outer runners __ a measure which, *ipso facto*, takes into account the inherent inequalities of the oval track. Nothing and no one can convince you that you are not losing your "right". Nothing and no one can explain to you that the only "deprivation" you undergo is the sure advantageous privilege of an inevitable **"head start" which would have guaranteed that you WIN** __ - not because you are the fastest runner on the track but because, being on the inside track, the dice are loaded in your favour".

Harvard Dean Henry Rosovsky has challenged the pervasive nostalgic thinking about collegiate life as a mythological ideal and romanticized bygone era. He affirms that the perceived past lack of racial/ethnic tensions was "for a good reason" since **campuses were largely devoid of racial/ethnic minority students**. This is no longer the case. "Racialized" groups and other "minority" group status individuals today view higher education as critical to their viable futures. As such, colleges, universities, law faculties, Law Societies, law firms, the Bench ... are no longer, (if they ever were) ivory towers separated from wide public concerns.

There are those advocates who reduce the concept of Affirmative Action/Employment Equity to "an idea worn like a badge without any real concern (by them) that they will ever even be mildly inconvenienced by its operation. **Yet, Affirmative Action/Employment Equity constitutes a legal basis for ensuring opportunity for education and occupational inclusion or consideration for individuals long excluded from consideration because of, for example, their racial identity.** If we hope to alter substantially the cyclical "gain and loss" of equality rights Affirmative Action/Employment Equity policies and programmes must focus not only on Employment process but also on Employment outcomes.

Affirmative Action/Employment Equity will fast become a Public Policy issue. Let us not delude ourselves! If we put any credence in futurists' projections, "Visible Minorities" will comprise a critical mass in the workforce of the 21st century. And, to compete in the world market, employers are going to have to rely increasingly on the very groups that have been discriminated against in the past. Therefore, Affirmative Action/Employment Equity policies and programmes can no longer be viewed as merely addressing a social problem that needs correcting. For the need to harmonize and manage a diverse world force will determine an employer's ability to survive as well as this country's ability to remain competitive in the world market.

CONCLUSION

In the words of Professor Sidney Willhelm, "[t]he myth of equality within a context of oppression will simply provide a veneer for more oppression". For "minorities", **Equality signifies** a positive immunity or right, the right to exemption from unfriendly legislation - __ i.e. from unfriendly interpretation, from unfriendly application of facially neutral legislation __- that goes against them distinctly because they are "minorities". Exclusion of "minorities" from the Legal Profession and

discrimination against those "minorities", members of the Legal Profession, need to be treated as a crisis in the Legal Profession. For, after all, is the Legal Profession not rather like the country's conscience and professional watchdog?

Informed minds are more likely to change their ways of doing; and "altered behaviour is often the precursor of altered attitudes". **Behaviour is learned; therefore bad behaviour can be unlearned.** We can help modify and shape behaviour by shaping situations and changing contexts. However, forceful authority supporting institutional change is key. The breadth and depth of the scope for change will always be commensurate with the colour of commitment, strength of resolve, and degree of creativity we each bring to the notion of Equality. I offer the following sample list of the endless possibilities for change:

RECOMMENDATIONS

GENERAL

GET THE PROPER "MINDSET" ----COLLECTIVELY. PUT AFFIRMATIVE ACTION/EMPLOYMENT IN ITS PROPER PERSPECTIVE.

- 1.. Affirmative Action/Employment Equity is adopted as an imperative corrective to restore and guarantee Equality of Opportunity. Ensure that the perspective or rationale for Affirmative Action/Employment Equity is explained, continuously repeated, and given high visibility.
2. Take an up front commitment to Equality and Equal Opportunity for all.
3. Put in place legal policies geared to equity of treatment and opportunity.
- 4.. Aim for and implement outcome_based policies.

END THE POLICY OF RACE INEXPLICITNESS. START SEEING THE REALITY OF COLOUR WITH ALL ITS IMPLICATIONS.

5. Explicate Racism. Deconstruct the patterns of Racism and the ensuing implications for Law, for interpersonal dynamics.

6. Include in the Mission Statement of Commitment to Equality a concomitant stand against Discrimination. For example, it is very good to state up front: “The Canadian Bar Association is an Equal Opportunity Institution/Employer that does not discriminate on the grounds of Race, Colour, Sex, National and Ethnic Origin, Disability, Sexual Orientation
7. Adopt and put in place a clear Anti_Racism Policy.
8. Make racist behaviour unacceptable. Include sanctions by high-ranking authorities. Make non_compliance costly through rigorous enforcement of Equality legislation.
9. Revise the institution's Code of Ethics/Code of Conduct/Guidelines for Ethical Behaviour and include an anti_discriminatory clause.
10. Prohibit Racism and racial discrimination by making them constitute sanctionable misconduct.
11. Set up mandatory Anti_racist Training Programmes for **all** Personnel .
12. Set about fostering and creating a climate favourable to and inhostile towards "Visible Minority" members of the Legal Profession .

RECRUITMENT

- 13.. Avoid "word_of_mouth" or "walk_in" methods of recruitment.
14. Reflect the Equal Opportunity and Anti_Racist commitment through visual representation in all recruitment materials, advertising and stationery. Ensure that positive references are made to "minorities".
15. Disclose job openings at all levels by listing them with public employment agencies.
16. Advertise in media specifically directed to "Minorities".
17. Systematically extend job information networks to "Minority" Communities by using community agencies that specialize in providing "minority" candidates.
18. Cultivate and develop closer working ties with High School and Colleges by having recruitment teams “outreach” via school visits, radio and television appearances; sponsor recruitment drives on an on_going basis.

19. Systematically involve "Minorities" in the Recruitment Process.
20. Reduce reliance on informal word_of_mouth recruitment channels by taking steps to ensure that validated job relevant criteria are used to screen candidates for entry jobs, promotions, sponsorship, and appointments.
21. Avoid selection standards that require greater educational credentials or competencies than are actually needed to perform the job adequately.
22. Systematically involve "Minorities" in the Candidate Selection Process by ensuring that they sit on Recruitment Teams, Public Relations Teams, Search Committees...
23. Encourage schools to assist students in the development of "**career passports**" or "**job search portfolios**": portable records of academic and non_academic accomplishments that their graduates, and particularly their "minority" graduates, can carry with them as job applicants. (Contents: behaviour and accomplishments in school, record of school attendance, membership/leadership in extra_curricular activities, transcript of academic courses and grades, written recommendations...)

PROMOTION AND RETENTION

24. Set about analyzing your own employment practices and determine what correctives must be put in place.
25. Apply eligibility criteria based on non_discriminatory reasons to determine who goes where, or to limit participation.
26. Ensure that job assignment practices do not exclusively restrict "Minorities" to "dead_end" or "problem areas"; make available to "Minorities" areas of governance and policy.
27. For judicial and other government appointments, develop validated selection criteria **that will not disparately disqualify** "Minorities" in particular, and women in general.
28. Disclose **to A11 Employees** opportunities for promotion, transfer, appointment...
29. Disclose and make accessible to all employees possibilities for training, professional development, career/job enhancement...

30. Ensure that institution_sponsored activities including social and recreational ones are available and accessible to **A11 Employees**.

CANADIAN BAR ASSOCIATION AND LAW SOCIETIES

31. Collect on a regular basis experiential ("anecdotal") and statistical data to determine whether "Minorities" of all ranks and within all sectors are treated equitably with regard to responsibilities **and rewards**.
32. Establish a Law Society policy stating that all official publications should reflect the presence and contributions of "Minorities" in both visual and textual materials.
33. Establish policies and set timetables to increase the numbers of "Minority " students and professionals. Such policies should identify administrators who will be responsible for implementing, monitoring, and evaluating these policies.
34. Support and enhance the organization of "Minority" self_help groups .
35. Establish a Distinguished Visiting Scholar Series.
36. Sponsor Administrative Internships and other programmes to encourage and promote "Minorities" for leadership roles.
37. Incorporate into all activities and programmes (AGMs publications speeches...) issues concerning climate for "Minority" members.
38. Stimulate research and scholarship on "Race" issues by doing a self_study and setting short and long range goals.
39. Encourage professional and other organizations locally and nationally to profile and publicize "Minorities" who do **“Race” Advocacy work** and thus show support and validation for the accomplishments of these individuals.

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ENDNOTES

