

ABSTRACT

A recent analysis of neutrals affiliated with one of the largest providers of dispute resolution (DR) services in the United States revealed 25 per cent were women and seven per cent belonged to a minority group. Given Canada's stronger reputation for respecting diversity, one would reasonably expect broader representation within the Canadian DR profession. The lack of pertinent statistics, however, makes it difficult to judge. In an attempt to establish a baseline of information, the author analyzed the public rosters of three reputable pan-Canadian professional organizations. While he identified a relatively greater proportion of women on most rosters, the proportion of visible minorities was as low, if not lower than the American data suggest. For example, in one organization, 47 per cent of members were women but only seven per cent were identified as indigenous or a visible minority. The author observed that the Canadian DR profession currently does not reflect the population it could potentially serve.

The article begins with a discussion of cultural fluency. The author asserts that the ability to understand how people respond to conflict and how culture impacts those responses is an essential DR skill. He further argues that in addition to widely recognized advantages of diversity in general, greater diversity within the DR profession would enhance professional development initiatives and the reputation of DR; it could also lead to growth opportunities within the industry. The author then provides details of his roster study, which evidenced a marked underrepresentation of visible minorities in DR compared to both the Canadian population and the legal profession. He concludes that collecting and publishing demographic data is an essential first step toward improving diversity within the Canadian DR bar.

I. INTRODUCTION

In 1971, Canada became the first country in the world to adopt multiculturalism as an official policy.¹ Underlying this philosophy is a belief that all citizens are equal, with every Canadian encouraged to integrate into society while maintaining his or her own cultural identity.² *Diversity is Canada's strength*—we are told—and the country is succeeding culturally, politically, and economically because of this diversity, and not in spite of it.³

But is this vision of Canada as a diversity-embracing nation more idealistic than realistic? Concerns regarding the underrepresentation of women, visible minorities, and indigenous people in a vast number of industries and professions—especially among the leadership ranks—abound. The noticeable diversity deficit within the legal profession and judiciary in particular remains a live issue, as those working within the field of justice continue to struggle with the question of how their professions might better reflect the diversity of the communities they serve.

One might suspect such lack of diversity to be mirrored among those who facilitate *dispute resolution* (DR)⁴ outside of formal adjudication (e.g. through the use of negotiation, mediation, and/or arbitration processes), given the DR industry has traditionally been dominated by lawyers and former judges. Indeed, a recent American study lends support to this theory: an analysis of neutrals⁵ affiliated with one of the

1. Marc Leman, “Canadian Multiculturalism” (15 February 1999), online: Government of Canada <publications.gc.ca/Collection-R/LoPBdP/CIR/936-e.htm>.

2. *Ibid.*

3. Justin Trudeau, “Diversity is Canada’s Strength” (Speech delivered at London, United Kingdom, 26 November 2015), online: Office of the Prime Minister website <pm.gc.ca/eng/news/2015/11/26/diversity-canadas-strength>.

4. Traditionally known as *Alternative Dispute Resolution* or *ADR*. The terms *DR* and *ADR* are used interchangeably in this article. For a discussion of developments in dispute resolution, see e.g., John C Kleefeld *et al.*, *Dispute Resolution: Readings and Case Studies*, 4th ed (Toronto: Emond Montgomery, 2016) at xxxvii.

5. A *neutral* refers to a dispute resolution practitioner that acts as a third-party mediator or arbiter of disputes.

largest providers of DR services in the United States revealed 25 per cent were women, and only seven per cent belonged to a minority group.⁶

On the other hand, given Canada's stronger reputation for respecting diversity one might reasonably expect a broader representation to be reflected in similar metrics if evaluated in the Canadian context. I set out to affirm this hypothesis. Ultimately, after analyzing the public roster of one of Canada's largest DR organizations, while I did find 47 per cent of the members to be women, *only seven per cent were identified as a visible minority or indigenous*. Thus, while gender balance within the Canadian DR profession might be healthier compared to the United States, visible minorities were comparably underrepresented in both countries.

This result was rather surprising given Canada's relative openness to cultural diversity, and the widely held belief that Canadian social policy is more *culturally fluent* compared to the social policies of the United States.⁷ Notably, in Canadian DR education, practitioners are trained to recognize the increased potential for misunderstanding and heightened conflict when parties do not share the same cultural or social behavioural norms.⁸ Similarly, in lawyer regulation, *cultural competence* is now increasingly seen as a core skill to be developed alongside traditional lawyering skills.⁹ To be certain, these initiatives—intended to raise cultural awareness—represent important steps toward improving access by Canadians to justice. Indeed, *we have come a long way*, so the saying goes.

In my view, however, cultural education without broader representation among those who facilitate the delivery of justice—whether they be lawyers, judges, or DR practitioners—serves only to limit the efficacy of access to justice initiatives. Diversity within the profession is a prerequisite to achieving greater trust and engagement among potential users of DR processes, particularly those belonging to currently underserved

6. Ben Hancock, "ADR Business Wakes Up to Glaring Deficit of Diversity" (5 October 2016), *Law.com*, online: <behblaw.com/Hidden-Pages/ADR-Business-Wakes-Up-to-Glaring-Deficit-of-Diversity.pdf>.

7. See e.g., Michelle LeBaron, "Shapeshifters and Synergy: Toward a Culturally Fluent Approach to Representative Negotiation" in Colleen M Hanyecz *et al.*, *The Theory and Practice of Representative Negotiation* (Toronto: Emond Montgomery, 2008), ch. 6 at 139-140.

8. Kleefeld *et al.*, *supra* note 4 at 75.

9. Amy Salyzyn, "Cultural Competence and the Next Generation of Lawyers and Lawyer Regulation" (16 February 2017), *Slaw* (blog), online: <slaw.ca/2017/02/16/cultural-competence-and-the-next-generation-of-lawyers-and-lawyer-regulation/>.

communities skeptical of a legal system perceived to be run by people unable or unwilling to appreciate different cultural perspectives. While changes in this regard will take time, a committed, coordinated effort by all stakeholders is needed to ensure continued progress is made. Meanwhile, greater inclusivity can help enhance the reputation and growth of the DR profession—a “win-win” situation for everyone.

In this article I begin, in Part II, by introducing the concepts of *conflict* and *culture* generally, and the importance of developing *cultural fluency* in the practice of DR. I also highlight some *best practices* on how DR practitioners might improve their cultural fluency. Subsequently, in Part III, I emphasize the importance of a diverse DR profession, and present findings of my diversity study on several Canadian DR organizations; statistics that can serve as a baseline for future studies are provided. Finally, in Part IV, I conclude by addressing various proposed initiatives that speak to the issue of diversity in DR, and the critical need to collect and publish relevant demographic data. The resultant transparency will better enable research into potential solutions while also revealing prospects for industry growth.

II. CONFLICT AND CULTURE

Although the notions of *conflict* and *culture* will seem intimately familiar to most, articulating precise definitions for these terms can be a challenge. Professor Michelle LeBaron defines *conflict* as “a difference within a person or between two or more people that touches them in a significant way... Only those differences [that] we perceive as challenges to something we believe in or need, or to some aspect of our individual or shared identities, become conflicts.”¹⁰

Culture, on the other hand, can be broadly described as “the shared, often unspoken, understandings in a group... [C]ulture shapes our idea of what is important, influences our attitudes and values, and animates our behaviours.”¹¹ In addition,

[c]ultural messages whisper to us from the many groups of which we are part. They come not only from groups that share race, ethnicity, and nationality, but from cleavages of generation, socioeconomic class, sexual orientation, different abilities, political and religious affiliation, language, gender—the list goes on.¹²

10. Michelle LeBaron & Venashri Pillay, *Conflict Across Cultures: A Unique Experience of Bridging Differences* (Boston: Intercultural Press, 2006) at 12.

11. *Ibid.* at 14.

12. *Ibid.* at 14-15.