

APPEAL



REVIEW OF CURRENT LAW AND LAW REFORM

VOLUME 13 ■ 2008

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Appeal: Review of Current Law and Law Reform is published annually by:

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P.O. Box 2400
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Appeal publishes the work of law students, recent graduates, articling students, and students pursuing undergraduate or graduate work in law-related disciplines. Appeal endeavours to publish articles that are timely, relevant, and which address possibilities for Canadian law reform.

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The Editorial Board would like to thank Professors Judy Fudge and Neil Campbell for all of their help and guidance with all aspects of this edition. With their encouragement, we have been able to approach Appeal with a fresh perspective this year.

In addition, the Board would like to thank Emily Clough for her hard work and dedication to the journal over the past year.

TABLE OF CONTENTS

Law Review Readership – What Makes Students Tick BURCIN ERGUN	1
COMMENTARY	
Moving Beyond the Bedrooms of Our Nation: Redefining Canadian Families from the Perspective of Non-Conjugal Caregiving JAMIE WOOD	7
Section 6 of the Indian Act and “The Second Generation Cut-off Rule” – A Factum ROGER WAH-SHEE	14
Fathers Not Shortchanged by Current Adoption Legislation NAVNIT DUHRA	22
ARTICLES	
When Rights Collide: Liberalism, Pluralism and Freedom of Religion in Canada ALEX FIELDING	28
Insidious Idolatry: Canada’s Aboriginal Leaders and the Legal Whiplash JOHNNY VAN CAMP	51
Employment Standards for Non-Employment: A Legislative Framework for Agency Work in Canada GILLIAN BARNETT	74
BOOK REVIEWS	
The First Women Layers (Mary Jane Mossman) REVIEWED BY NICOLE BERMBACH	90
Global Biopiracy: Patents, Plans and Indigenous Knowledge (Ikechi Mgbeoju) REVIEWED BY CHRISTOPHER PENG	95
Lawyers Gone Bad: Money, Sex and Madness in Canada’s Legal Profession (Philip Slayton) REVIEWED BY JULIA RENOUF	99
Lawyers Gone Bad: Money, Sex and Madness in Canada’s Legal Profession (Philip Slayton) REVIEWED BY KATRINA EDGERTON-MCGHAN	102
Supercapitalism (Robert B. Reich) REVIEWED BY REBECCA LEWIS	105
The Last Word: Media Coverage of the Supreme Court of Canada (Florian Sauvageau, David Schneiderman, David Taras) REVIEWED BY MIKE JAMES	109

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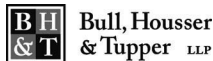


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INTRODUCTION

LAW REVIEW READERSHIP – WHAT MAKES STUDENTS TICK

By **Burcin Ergun***

CITED: (2008) 13 Appeal 1-6

INTRODUCTION

Founded in 1993, Appeal is a student-run journal dedicated to publishing student legal writing. In publishing this thirteenth volume, the editors were plagued with questions that student editors across Canada are all too familiar with. What types of articles do we want to publish? Who is our audience? How can we create student interest? Are there topics that are overwritten? Lastly, and most importantly, how can we get students to read more of Appeal?

There are many audiences for a law journal, and they include academics, practitioners, students and the judiciary. The fact that law journals are cited in judgments has been well documented. One study has found that the University of Toronto Faculty of Law Review alone was cited in forty-nine judgments in courts across Canada by the year 2001.¹ This, however, is only one of the benefits of the law review. There are many other, perhaps more important, advantages to keeping alive the law review. Some of these include prestige for the law school, advancement of the law through the accumulation of knowledge and debate, and last, but not least, the pure experience that student editors gain in publishing such a review.

This rosy image however, is only one side of the coin. The debate on the future of student run journals and their usefulness for practitioners is a “hot” discussion even today and has been the topic of many such articles.²

Thus, we are faced with the question of publishing as an educational experience in itself that does not need some greater good as compared to publishing articles that will be considered by courts and practitioners. Professor Hutchinson is critical of the view that academic work should serve the end goal of judicial needs, the results of which are measured through the number of judicial citations. He argues that scholars owe their allegiance to academia, not the courts, and should engage in work that has critical bite and intrinsic value.³ On the other

* Burcin Ergun is a third year student at the University of Victoria, Faculty of Law. Burcin has a background in marketing research and undertook this study for the Appeal Law Review in November, 2007.

1 Patricia McMahon, “Canadian Judicial Citations of Articles Published in the University of Toronto Faculty of Law Review” (2001) 59 U.T. Fac. L. Rev 367 at 5.

2 For an excellent bibliography on the role of law reviews and the surrounding debate, see Tracie Scott, “The Role of the Law Review: A Select Bibliography” (2001) 39 Alta. L. Rev. 690.

3 Allan Hutchinson “The Role of Judges in Legal Theory and the Role of Legal Theorists in Judging” (2001) 39 Alta. L. Rev. 657 - 667 cited in Bruce Ziff, “The Canadian Law Review Experience; Introduction to the Symposium” (2001) 39 Alta. L. Rev. 611 at 8 [Ziff].

hand, the influential article by Fred Rodell, "Goodbye to Law Reviews", argues that law is supposed to be a device to serve society and law reviews should discuss important problems of the day and contribute to solutions.⁴ Professor Greschner notes that by their existence alone, law reviews remind us that the law is not only a practice, but also an intellectual discipline and pursuit.⁵

Regardless of the ultimate goal of the law review, law reviews do not fulfill any goal if they are not being read. Some authors even comment that more law review editors read their article in the editing process than the article is ever read after it is published.⁶

In considering these issues and the broader debate, we noted that there is very little written about law reviews in Canada, let alone any studies of who reads law reviews and how they are used. Professor Ryder notes that there is almost a complete absence of published scholarship about scholarly legal periodicals in Canada.⁷ The Canadian law review experience has been building without any apparent overall design, examination of organizational structure, practices and procedures and their scholarly and educational aims.⁸

Thus, we set out to find out what law students want from a law journal. In doing so, we operated from the premise that, at least for Appeal, our primary audience is students. We conducted a survey in an attempt to identify what law students want from a legal journal and how we can publish a review that is a welcome and anticipated forum for students.

FINDINGS

Fifty randomly selected law students from the University of Victoria participated in the survey (attached as Appendix A with aggregate results in percentages). The survey took approximately ten minutes to complete, with respondents equally divided between second and third year students. No significant difference was found between the answers of second and third year students.

The first set of questions surveyed the frequency of journal readership. Seventy-two percent of students responded that they had read a law journal article for school purposes in the last week and 12 percent in the last month. Only eight percent of students had never read an article for law school. It should be kept in mind that the survey was conducted in November; prime season for law papers.

When we asked students the last time they read a journal article for their own interest, the results were much starker. Forty-six percent had read one in the last month, as compared to 26 percent who had never read an article for their own interest.

Sixty-four percent of students stated that they are more likely to read journal articles found online than in print. However, there was no significant difference between journal articles actually read online and in print. This disparity may be explained by the fact that the majority of students were reading articles for school purposes and thus may have had to find and read the article regardless of its source. The majority of students, 72 percent, stated that they were comfortable searching for articles.

Lastly, and somewhat encouragingly, 84 percent of students said they had discussed a law

4 Fred Rodell, "Goodbye to Law Reviews" 23 Va. L. Rev. 38 (1936-1937), cited in Donna Greschner, "Law Reviews as Cultural Narrative" (2001) 39 Alta. L. Rev. 616 at 1-2.

5 *Ibid.* at 15.

6 Frances Olsen, "The Role of Student-run journals in opening North American Law" (2001) 39 Alta. L. Rev. 678 at 18 [Olsen].

7 Bruce Ryder, "The Past and Future of Canadian Generalist Law Journals" (2001) 39 Alta. L. Rev. 625.

8 *Ibid.* at 1.

journal article with a friend or colleague within the last month. Twelve percent of students had submitted an article for a law review and two thirds of those were actually published. From this, we see that students are relatively engaged with law reviews, both in terms of readership and discussions, but that most have not submitted articles. When we asked students what would encourage them to submit articles, we received little guidance. Seventy-two percent of students stated that the prize or monetary award associated with publishing had little or no affect on submissions. Similarly, only 12 percent stated that they would submit more articles if there were less requirements and formalities to follow.

The next set of questions focused on the style of law journal articles. Only 12 percent of students found articles difficult to understand. However, 64 percent stated that they would read more journal articles if they were written in a plain and clear language, with only 16 percent disagreeing with this statement. Similarly, 44 percent of students stated that law journals would not lose credibility if they were not written in a formal tone. Thus, we see that while students do not have trouble reading articles as they are currently written, they would prefer clear and plainly written articles. When we asked students what they thought were the most important attributes of law journals, the highest ranked attribute was articles written by leading academics and experts, followed by online availability, originality of the subject matter, and clarity in language.

Critics charge that much of what student-run journals publish is conventional, irrelevant and over-footnoted.⁹ We therefore decided to ask students about the content of law reviews. Twenty-six percent agreed that law journals have articles on latest events while the majority, 66 percent, neither agreed nor disagreed. This suggests that most students are not sure whether law reviews contain articles on latest events, likely because they use them to research for school purposes and not for current events or interest. Interestingly, 60 percent of students stated that law journals have many articles on developing areas of law. This is in line with Professor Olsen's statement that several new fields in legal scholarship such as feminist legal theory and critical race theory would not have been nearly as easy to get going had it not been for the institution of the law journal.¹⁰ Lastly, 44 percent of students stated that they would read more articles if they had edgy or "off the beaten track" subjects, while only 18 percent disagreed with this statement.

Critics also argue that the law review has a very limited audience. One such quote summarizes the pessimist camp:

We do not need to worry about the consumers of law reviews because they really do not exist. A few professors who author texts must read some of the articles, but most volumes are purchased to decorate law school library shelves. The only purchasers of law reviews outside of academe are law firms which gladly pay for volumes even though no one reads them.¹¹

Thus, we decided to ask students questions regarding who they thought composed the audience of law journals. Sixty-six percent of students agreed that law journals are written for academics and researchers, while only 12 percent disagreed. On the other hand, 70 percent disagreed that law journals are not very relevant for practitioners. This suggests that students see law reviews as being written for and by academics and that practitioners are left to sort through them to find articles of use.

Lastly, we asked students about the promotion of law journals. The results were quite

9 *Olsen, supra* note 6 at 6.

10 *Ibid*, at 6.

11 John E. Nowak, "Woe Unto You, Law Reviews!" 27 *Ariz. L. Rev.* 317 (1985).

awakening in that 64 percent of students surveyed stated that there is not a lot of promotion of law journals while only two percent agreed that there was. Eighty-four percent of students stated that there are no law journals that they read regularly. These results lend themselves to a certain hypothesis. Perhaps students do not read law articles for their own interest because they have not specialized in the law and see no use in regularly following an area of law. Also, they do not receive communications on what law reviews have to offer. Thus, there is a niche for Appeal to fill by offering edgy articles on current topics that will be of interest to students. The key is that this message must be communicated clearly.

CONCLUSION

The overall picture we are left with at the end of this survey is that students see the law review as a source of legal opinion when they are in a situation where they are required to research such opinions. Regrettably, they are not reading law reviews for their own interest. Thus, the challenge for Appeal and law reviews in general is to create this interest. One way that we can change these results is through the promotion of law reviews and their content.

Appeal's advantage is that it publishes student writing; presenting a medium for students, by students. In meeting this goal it has the opportunity to focus more on what students look for in a law review. We have found that these are clarity, relevant and current subject matter, and pushing the boundaries through "off the beaten track" and perhaps even controversial articles. In presenting this forum, it is our hope to create interest in law reviews overall and encourage regular law review readership in students as the practitioners of tomorrow.

Professor Ziff's remarks state precisely the void that Appeal seeks to fill: "while the large number of journals might suggest that the quality of some published material is questionable, the array of choice increases the likelihood that worthwhile writing will see the light of day, including articles that are unorthodox, even radical."¹²

Taking the opinions of these students into account, Appeal will strive to provide a medium where students of the law can publish topics they are interested in and be inspired by the work of others. As students specialize in their chosen areas of law, they may begin to regularly follow specialized law reviews. For the time being, Appeal can act as the law journal tailored to meet student needs.

12 Ziff, *supra* note 3 at 10.

APPENDIX A: The Survey

1. What year of law school are you in? 2nd __ (48%)
3rd or higher __ (52%)

2. What is your academic background? Social Sciences (36%)
Business/Commerce (18%)
Science/ Engineering (20%)
Applied Programs (music, fine arts, physical education) (6%)
Arts (20%)
Other (specify) _____

3. When was the last time you...

		WITHIN THE:	LAST WEEK	LAST MONTH	LAST TERM	LAST YEAR	NEVER
A	read a journal article for school purposes?		72%	12%	4%	4%	8%
B	read a journal article for your own interest?		26%	20%	6%	20%	26%
C	read a journal article online?		64%	12%	6%	14%	4%
D	read a journal article in print?		48%	24%	8%	16%	4%
E	read an article in the Appeal Law Journal?		0	2%	4%	22%	72%
F	read industry publications such as Canadian Lawyer or Lexpert?		14%	34%	26%	14%	12%
G	read a magazine?		62%	28%	10%	0	0
H	discussed an article with a friend or colleague?		62%	22%	6%	2%	8%

4A. Have you ever submitted an article to a law journal? Yes __ (6)
No __ (44)

B. If yes, was it published? Yes __ (4)
No __ (2)

5. Please rate each statement:

		STRONGLY DISAGREE	DISAGREE	NEUTRAL	AGREE	STRONGLY AGREE
A	Law journal articles are difficult to understand	8%	28%	52%	8%	4%
B	There are law journals that I read regularly	32%	52%	14%	2%	0
C	I am more likely to read journals online rather than in print	10%	6%	20%	38%	26%
D	I feel comfortable searching for law journal articles	4%	12%	12%	64%	8%
E	Whether or not I submit an article for a law journal has a lot to do with the prize or monetary award offered	14%	30%	28%	20%	8%
F	Law journals regularly have articles on latest events	2%	4%	66%	22%	4%
G	Law journals are written for academics and researchers	4%	8%	22%	54%	12%
H	Law journals are not very relevant for practitioners	18%	52%	20%	8%	2%
I	I would submit more articles to law journals if there were not as many requirements and formalities to follow	10%	34%	38%	18%	0
J	I would read more articles if law journals were more popular culture or magazine like	8%	20%	40%	28%	4%

		STRONGLY DISAGREE	DISAGREE	NEUTRAL	AGREE	STRONGLY AGREE
K	Judges refer to law journal articles in their judgments	2%	24%	34%	40%	0
L	There is a lot of promotion of law journals	8%	56%	34%	2%	0
M	Law journals have many articles on developing areas of law	0	4%	38%	46%	12%
N	I would read more journal articles if they had edgy or 'off the beat' articles	2%	16%	38%	38%	6%
O	I would read more journal articles if they were written in a plain and clear language	2%	14%	20%	58%	6%
P	A law journal would not be credible if it was not written in a formal tone following academic writing guidelines	12%	32%	28%	28%	0

6. Please **rank** the following attributes of a law journal from 1 to 7 where 1 is the most important attribute and 7 is the least important.

- A. Originality of the subject matter _____ (52% ranked in top 3)
- B. Articles written by leading academics and experts _____ (64 % ranked in top 3)
- C. Layout of the journal in terms of visual appeal _____ (30% ranked in top 3)
- D. Clarity in language _____ (52 % ranked in top 3)
- E. Online availability _____ (62 % ranked in top 3)
- F. How well known the journal is and its prestige _____ (36 % ranked in top 3)
- G. How often the journal is cited in court _____ (16 % ranked in top 3)

7. What is the first law journal that comes to your mind? _____

8. In the space below, please provide your comments on topics or stylistic features you would like to see more of in law journals and/or qualities that you dislike about law journals.

COMMENTARY

MOVING BEYOND THE BEDROOMS OF OUR NATION: REDEFINING CANADIAN FAMILIES FROM THE PERSPECTIVE OF NON-CONJUGAL CAREGIVING

By **Jamie R. Wood***

CITED: (2008) 13 Appeal 7-13

Good evening, Canada. Tonight's guest is Jamie Wood, author of Moving Beyond the Bedrooms of Our Nation.¹ Her book is hailed by some as a model for a more inclusive, care-centred Canada and criticized by others as a recipe for family destruction and social chaos.

Welcome, Ms. Wood. Why did you make this call for the "desexualization" of family?

It has been forty years since Pierre Trudeau told Canadians on the CBC evening news that "There is no place for the state in the bedrooms of the nation."² Trudeau made this statement in response to press questions about a controversial bill he introduced in Parliament to decriminalize private homosexual acts. Since then, his purpose in coining this phrase has been met and surpassed.³ Yet, the state has not vacated Canada's bedrooms; it has merely become a little more tolerant of the types of partners it sees as legitimate in the boudoir.

One peek between our sheets reveals bedbug laws that, among other things, define family and family breakdown from the perspective of the marital or "marital-like" dyad,⁴ give special recognition and privilege to conjugal dyads, require consummation to form a valid marriage, afford special consideration to adultery in divorce, and assign unmarried conjugal cohabitants roles, rights and responsibilities associated with marriage.⁵

At a fundamental level, I believe that family's value as an institution primarily resides in its caregiving functions. I am joined in this belief by other scholars, including American Martha Fineman.⁶ It is in the state's interest to recognize and reward relationships of care, regardless of

* Jamie R. Wood is a third year law student at the University of Victoria. She graduated in 2003 with her Masters of Arts degree in Family Studies from the University of British Columbia.

1 This article assumes the format of an imaginary interview about a fictional book.

2 "There's no place for the state in the bedrooms of the nation" *CBC Television* (21 December 1967), online: CBC Archive <<http://archives.cbc.ca/400d.asp?id=1-73-538-2671>>.

3 See e.g. *EGALE Canada Inc. v. Canada (Attorney General)*, 2003 BCCA 251.

4 Note: A dyad is an ongoing relationship between two people.

5 See e.g. *Criminal Code*, R.S.C. 1985, c.C-46, ss. 290, 291 & 293; *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3; *Family Relations Act*, R.S.B.C. 1996, c. 128; *Income Tax Act*, R.S.C. 1985, c.1; *Marriage (Prohibited Degrees) Act*, R.S.C., 1990 c.46.

6 Martha Albertson Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (New York: Routledge, 1995).

conjugal, because they help individual members of society and lessen our collective burden.

Focusing benefits and obligations on sexual dyads is counterproductive. Historically, Euro-Canadian socio-religious, moral and legal traditions have framed matrimony as the natural adult state.⁷ Today, fewer Canadians are legally marrying⁸ and divorce rates remain high. Yet, the government ignores the care commitments of non-conjugal adults and continues to ramrod conjugal cohabitants who want to exercise autonomy. In 2001, the Law Reform Commission of Canada called for a more principled approach, guided by equality and autonomy, in its report *Beyond Conjuality*.⁹ Nicholas Bala argues that conjuality should co-exist with adult care as a legal construct.¹⁰ I disagree. I want to see the state eliminate the special legal status of marriage because of its powerful history as a “natural” category that eclipses all other ties.

Like Fineman, I am particularly concerned with the plight of the most vulnerable in our society – children, elders, the ill and the challenged. Benefits targeted at sexual dyads aren’t trickling down to these vulnerable people. Child poverty is rampant, especially among children from single-parent families.¹¹ This fact illustrates the distracting impact of focusing subsidies on conjuality. The elderly are in a similarly desperate state, particularly elderly women. Given Canada’s aging population, this problem will only swell if it is left unaddressed.

Why does sexuality garner so much government attention in defining and shaping family?

One answer to this question can be found in antiquated undercurrents of patrilineal kinship that continue to infuse our legal and social norms. Today, most Canadians practice bilateral kinship – where inheritance, status and kin ties flow through both the father’s and mother’s lines. However, Canadian law is rooted in patriarchal, patrilineal kinship traditions. In these systems, children are traditionally seen as their fathers’ possessions rather than as persons in their own right. Kin ties, and intergenerational transfers of property and status pass via the male line from father to son. British customs favoured eldest sons; habitant French Canadian customs allowed fathers to select which son to benefit.¹²

The Achilles’ heel of all patrilineal descent systems is paternal uncertainty. Women always had absolute knowledge of their biological offspring until recent “advancements” in reproductive technology made it possible for egg donation and gestation to be divided.¹³ Men have never had this luxury, so women’s sexuality is monitored and restricted in patrilineal systems to reduce the risk of propertied men being cuckolded into benefiting non-biological children.

Historically, Canada’s mainstream patrilineal orientation has, at times, demeaned and coerced non-conforming communities. Rose Johnny of the Lake Babine First Nation in British Columbia tells of how her community was thrown into turmoil in the 1920s when British Columbia required trap lines to be registered and transferred from father to son, rather than from maternal uncle to nephew, thus eroding the authority and dignity of that nation’s matrilineal

7 Mark D. Walters, “Incorporating Common Law Into the Constitution of Canada: *EGALE v. Canada and the Status of Marriage*” (2003) 41 *Osgoode Hall Law Journal*, 75, at para. 26.

8 Statistics Canada, “2006 Census: Families: Families, marital status, households and dwelling characteristics” *The Daily* (12 September 2007), online: Statistics Canada <<http://www.statcan.ca/Daily/English/070912/d070912a.htm>>.

9 Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* (2001) in Gillian Calder, *Law 322: Family Law*, vol. 1 (Victoria: University of Victoria, 2007) at 13-19.

10 See Nicholas Bala “Controversy over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships” (2003) 29 *Queens Law Journal* 41 at paras. 122 & 131.

11 Statistics Canada, “Family Income” *The Daily* (30 November 2002), online: <<http://www.statcan.ca/Daily/English/021030/d021030a.htm>>.

12 See James M. White *et al.*, *Families in Canada: Social Contexts, Continuities and Changes* 3rd ed. (Toronto: Pearson, 2005) at 77-84.

13 See e.g. Note on *Rypkema* and Surrogate Mothers in Gillian Calder, *Law 322: Family Law*, vol. 1 (Victoria: University of Victoria, 2007) at 128.

Houses.¹⁴ Aboriginal women have especially suffered from the intersection between paternalism, sexuality and the law. They had to fight government and men in their own communities to gain recognition of their Indian status under the *Indian Act*¹⁵ that is independent of their mate selection choices.¹⁶

Today, Canadian law has shifted to a more functional understanding of parenthood based on care and support rather than biology, though there have been judicial blips such as *Trociuk*.¹⁷ Distinctions between children born inside and outside of wedlock, and between adoptive and biological ties have been abolished by statutes.¹⁸ However, the priorities of our propertied male ancestors still infuse certain aspects of our law. For example, “child” is narrowly defined in estate law. In BC, only spouses, and biological and adopted children can make claims under the *Wills Variation Act*¹⁹ (*WVA*). In *McCrea v. Bain Estate*,²⁰ Crawford J. of the BCSC concluded that a minor stepchild who had been financially supported by his mother’s deceased cohabiting partner could not make a *WVA* claim on his stepfather’s estate, though he would have otherwise been entitled to child support under the *Family Relations Act*²¹ (*FRA*) if his mother’s cohabitation with his stepfather had ended by consent rather than death.²² The court said that the boy’s equality rights under s. 15(1) of the *Charter* were not offended because he could still make claims on his biological or adoptive parents’ estates. This support-inheritance distinction likely finds its roots in 19th Century values. Due to high mortality and remarriage rates, the percentage of stepfamilies in England then was roughly equivalent to contemporary Canada.²³ Stepparents helped to financially maintain stepchildren during life, but inheritance was a different matter.

In 1983, the Law Reform Commission of British Columbia recommended broadening the scope of “child” under the *WVA* to include minor stepchildren.²⁴ The government hasn’t moved to action. It is perhaps telling that property division under the *FRA* is also the only legal distinction between cohabiting and marital relationships in British Columbia.²⁵

Turning to bedbug laws, in *Baxter v. Baxter*,²⁶ the House of Lords stated that the consummation requirement for a valid marriage is about “men’s” comfort, not procreation interests. I am not convinced that this modern “intimacy” lens accurately depicts the original intent of consummation requirements. Judicial willingness to infuse broad, modern meanings is also evident in courts expanding the common law definition of adultery to include same-sex acts and extending the fault-based adultery exception under the *Divorce Act*²⁷ to same-sex infidelity in

14 Jo-Anne Fiske & Rose Johnny, “The Lake Babine First Nation Family: Yesterday and Today” in Marion Lynn, ed., *Voices: Essays on Canadian Families* 2nd ed. (Scarborough: Nelson Thompson Learning, 2003) 181 at 189.

15 *Indian Act*, R.S.C. 1985, c. I-5.

16 See e.g. Janet Silman, *Enough is Enough: Aboriginal Women Speak Out* (Toronto: The Women’s Press, 1987).

17 See discussion of *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835 in Gillian Calder, *Law 322: Family Law*, vol. 1 (Victoria: University of Victoria, 2007) at 124-127. In *Trociuk*, the Supreme Court of Canada found that absolutely excluding a father from his offsprings’ birth registration and surnaming violated his equality rights under s. 15 of the *Charter*.

18 *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 61 and *Adoption Act*, R.S.B.C. 1996 c.5, s. 37.

19 *Wills Variation Act*, R.S.B.C. 1996, c. 490, s. 2.

20 *McCrea v. Bain Estate* (2004), 27 B.C.L.R. (4th) 103, 2004 BCSC 208.

21 *Family Relations Act*, R.S.B.C. 1996, c. 128.

22 Note: Had the mother been legally married, her son would have qualified for child support under the *Divorce Act*.

23 Elizabeth Church, “Kinship and Stepfamilies” in Marion Lynn, ed., *Voices: Essays on Canadian Families* 2nd ed. (Scarborough: Nelson Thompson Learning, 2003) 55 at 58.

24 Law Reform Commission of British Columbia, *Report on Statutory Succession Rights* (1983), online: <<http://www.bcli.org/pages/publications/lrcreports/frameset.html?http://www.bcli.org/pages/publications/lrcreports/repsum102>>.

25 See note on *Nova Scotia v. Bona*, 2002 SCC 83 in Gillian Calder, *Law 322: Family Law*, vol. 1 (Victoria: University of Victoria, 2007) at 89.

26 See discussion of *Baxter v. Baxter*, [1948] A.C. 274 in Calder, *Law 322: Family Law*, vol. 1 (Victoria: University of Victoria, 2007).

27 *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

British Columbia and New Brunswick.²⁸ This formal equality treatment masks the scary fact that adultery has historically been defined in the common law as involving “reproductive powers” not sexual behavior.²⁹

Elizabeth Emens argues that adultery laws could be modified to empower people to make conscious choices about whether they want adultery provisions to apply to their relationships.³⁰ I resist because choice does not address my own concerns about creating legal space for, what I perceive to be, property interests in partners' sexuality. Canadians are typically hyper-sensitive to any perceived commodification of humans or their parts, as is evidenced by the government's haste in enacting the *Assisted Human Reproduction Act (2004)*.³¹ Despite harbouring harsh attitudes about adultery, extra-marital sexuality is common among Canadians.³² I don't promote deception, but I think we should take a sober look at legislating on this ground, particularly because “biology” and “romance” arguments often collude to make sexual jealousy an excuse for violence.³³

If you want to desexualize family, why do you accept polyamory? Isn't it immoral?

Polyamory finds acceptance in my book precisely because I believe that sexuality should be an irrelevant factor in defining family. Monogamous marriage is one legitimate lifestyle, but some people don't have sexual partners and others have many. George Murdock's famous cross-cultural analysis revealed that 195 of 250 societies preferred plural forms of marriage, though monogamy was universally practiced due to sex ratios and economic barriers.³⁴ So, even in a historical sense, we can't equate morality to our privileging of monogamy and serial monogamy.

Emens describes a diverse spectrum of people who self-identify as polyamorous.³⁵ Many in this community do not consider traditional patriarchal forms of polygamy to be polyamory – preferring to identify as “radically honest” and egalitarian. There is disagreement about whether one needs to have multiple sexual partners to be polyamorous or if it is an attitude. There also isn't consensus as to whether sex is a necessary component. Regardless, if these relationships involve caregiving, people who want legal recognition should receive it. Depending upon each person's situation, this could include one, many or no relationships receiving legal recognition. Denying privileges over concerns about bankrupting public and private benefits programs is unprincipled. We don't restrict nuclear families in the number of recognized dependent children.

Isn't your proposal just an attack on the traditional family?

“Traditional” must be used cautiously when describing family. Before the emergence of other social institutions, family was the sociopolitical, economic and religious unit that met all individual and group needs. Family theorists contend that it was extended and all-powerful.³⁶ In contrast, modern references to “traditional” are synonymous with the nuclear family, a form that some feel is structured to meet the demands of industrialized societies. It has been used

28 See *P.(S.E.) v. P.(D.D.)*, [2005] BCSC 1290; *Thebeau v. Thebeau*, [2006] N.B.J. No. 178.

29 See discussion of *Orford v. Orford* (1921), 49 O.L.R. 15 (S.C.) in Gillian Calder, *Law 322: Family Law*, vol. 2 (Victoria: University of Victoria, 2007) at 21.

30 Elizabeth F. Emens, “Monogamy's Law: Compulsory Monogamy and Polyamorous Existence” (2004) 29 *New York Review of Law and Social Change* 277 at 364.

31 *Assisted Human Reproduction Act*, R.S.C. 2004, c. 2.

32 White, *supra* note 12, at 211-212.

33 See e.g. David M. Buss, “The Strategies of Human Mating” (1994, May-June) 82 *American Scientist* 238.

34 George Peter Murdock, *Social Structure* (New York: The MacMillan Company, 1949) at 24.

35 Emens, *supra* note 30, at 359.

36 White, *supra* note 12, at 67-69.

to cast other structures, including single-parent, post-divorce, intergenerational, matrifocal, polygamous, blended and non-conjugal families, as deviant, dangerous and unworthy of equal recognition.

Nonetheless, this isn't an attack. To the extent that relationships in nuclear families, or any other type of family of orientation, fulfill caregiving functions, they should be legally recognized and fostered. Adult siblings and adult child-parent relationships are ideally situated to benefit from my proposal. Currently, people who are strangers, friends or distant relatives can form non-conjugal relationships under the guise of marriage. These marriages, however, are voidable so people run the risk of having one partner seek annulment on the grounds of non-consummation.³⁷ Even if voided some legal responsibilities still flow from these relationships.³⁸ In contrast, s. 2(2) of the *Marriage (Prohibited Degrees) Act*³⁹ prohibits people from marrying parents or siblings and s. 3(2) voids such relationships.⁴⁰ So, non-conjugal adult relationships spawned from childhood families of origin are currently least likely to get recognition or benefit.

Don't caregiver models marginalize men from family?

Caregiving has traditionally been gendered work. Fineman uses the Mother-Child metaphor as a nod to this reality.⁴¹ That doesn't mean that women are positioned, either biologically or socially, to have a monopoly on care. Men can and do fulfill these roles. I reject Fineman's metaphor in my own work, however, because mothers receive social recognition and exaltation that is typically denied to their unmarried, childless sisters. These women, who are socially cast as having no families, have historically carried some of the heaviest elder care burdens – a less socially valued form of caregiving than parenting in our society.⁴² I feel that using the Mother-Child metaphor doubly renders these women's experiences invisible.

But, don't economic realities place women in more caregiving roles?

For decades, feminists and social scientists have been crying for solutions to the wage gap and to women's disproportionate responsibility for family work. No remedy has been found despite much political puffery. It is interesting that we suddenly seem attuned to their exploitation now that we think it could potentially give women an edge in public policy.

I argue that we are still working from a male wage earner model.⁴³ Marrying women off to men is arguably the oldest form of social welfare. I am cautiously optimistic that a new framing of family could prompt the market to pay women more because the state itself would see their caregiving, and hence their time, as valuable. Conversely, if it isn't biology or marital ties that make a father a father, what we are really signaling to men is that we value their ongoing, caring involvement in the lives of their children, partners, parents, siblings and friends.

What do you say to gays and lesbians who have finally gained access to legal marriage?

Queer communities are intimately acquainted with the cruel arbitrariness of how law defines family and the pain of exclusion. Some wanted and rightly received formal equality treat-

37 See Gillian Calder, *Law 322: Family Law*, vol. 1 (Victoria: University of Victoria, 2007) at 84.

38 See *Ibid.*

39 *Marriage (Prohibited Degrees) Act*, R.S.C., 1990, c.46.

40 See H.R. Hahlo, Nullity of Marriage in Canada: With a Sideways Glance at Concubinage And Its Legal Consequences (Toronto: Butterworth, 1979) at 43-44 in Gillian Calder, *Law 322: Family Law*, vol. 1 (Victoria: University of Victoria, 2007) at 90.

41 Fineman, *supra* note 6, at 233-235.

42 Susan A. McDaniel, "Family/Work Challenges among Mid-Life and Older Canadians" in Marion Lynn, ed., *Voices: Essays on Canadian Families* 2nd ed. (Scarborough: Nelson Thompson Learning, 2003) 153 at 157.

43 See e.g. Fineman, *supra* note 6.

ment for their cohabiting and marital relationships after years of arduous legal battles.⁴⁴ Others shun being squeezed into a “but for” box that is defined from a monogamous, heteronormative perspective.⁴⁵ I understand that if marriage is emptied of its civil meaning heterosexuals are left with the option of religious marriage. Depending upon their faith backgrounds, many same-sex couples would be frozen out of these religious rites on the grounds of religious freedom.⁴⁶ However, without the legal aspect, Queer communities would be free to construct and practice ceremonies for conjugal partners, or polyamorous groups, if desired.

I ask that people see the justice in helping to gain equal legal recognition for non-conjugal adult caregiving relationships. The only solace I can provide is that caregiving is a universal concept that cuts across sexual orientation and does not position heterosexuals in a place to claim first right.⁴⁷ I argue that gays and lesbians sought and won equal recognition for their conjugal relationships not because their sexuality is the same as heterosexuals', but because their economic and emotional ties are equally worthy of recognition. I argue abandoning conjugality as a relevant legal factor is the path to substantive equality.

I am reminded of the story of Tina, a transgendered person, who died of AIDS.⁴⁸ During her illness, Tina had a non-conjugal, fictive kin network of ex-lovers and friends who housed her, cared for her and gave her companionship. Currently the state does nothing to recognize or support the powerful work of families like Tina's. Under my model that would change.

Religious leaders have reacted quite negatively to your work. What is your response?

Freedom of religion is enshrined in our *Constitution Act, 1982* under s. 2(a) of the *Charter*. Nothing that I propose interferes with any religious group's ability to offer marriage rites. I only argue that no legal status should flow directly from those rites. Despite living in a period of historically low religious service attendance, most Canadian high school students report that they would opt for a religious wedding over a civil ceremony.⁴⁹ This indicates to me that many Canadians view religious recognition as qualitatively distinct from legal status.

Many religious communities have complained for years, though not always convincingly, that state action to liberalize divorce, define cohabitation as marital ascription and accept same-sex dyads has undermined sacred meanings.⁵⁰ Government vacating the field offers a solution.

Potentially, my recommendations could foster freedoms for marginalized religious and cultural minorities who have traditions of plural marriage, but have been denied the opportunity to practice because of *Criminal Code* provisions or, as in the case of the polygynous community of Bountiful, B.C., exercise their faith in the threatening shadow of the law.⁵¹ These groups include, but aren't limited to Muslims, Mormons, some Aboriginals and some Africans.

In terms of placing caregiving, rather than sexuality, at the epicenter of family life, I hope that people of all faiths can identify with this theme as a familiar one. For example, the Jewish faith passes from mother to child, not from spouse to spouse. Similarly, if we think of the most

44 See e.g. *EGALE Canada Inc. v. Canada (Attorney General)*, 2003 BCCA 251.

45 Gillian Calder “Class 5: Same-sex marriage” (Lecture presented to UVic Family Law, 20 September 2007).

46 See Note on *Reference Re: Same Sex Marriage* at para. 58 in Gillian Calder, *Law 322: Family Law*, vol. 1 (Victoria: University of Victoria, 2007) at 108. See also *Civil Marriage Act*, R.S.C. 2005, c. 33, s. 3.1.

47 See generally Rachel Epstein, “Lesbian Families” in Marion Lynn, ed., *Voices: Essays on Canadian Families* 2nd ed. (Scarborough: Nelson Thompson Learning, 2003) at 77.

48 White, *supra* note 12, at 7.

49 Reginald W. Bibby and Donald C. Posterski, *Teen Trends: A Nation in Motion* (Toronto: Stoddart, 1992) at 30.

50 See Walters, *supra* 8, at 9-14 for discussion of the complex history between law and religion in defining marriage.

51 See *Criminal Code*, R.S.C. 1985, c. C-46, ss. 290, 291 & 293. See also Gillian Calder, *Law 322: Family Law*, vol. 1 (Victoria: University of Victoria, 2007) at 87-88.

celebrated “couple” in Western history, famous lovers like “Brangelina” cannot compete with Mary and Jesus – mother and child.

I know that many of my critics identify with Christianity. In *Jesus: A Revolutionary Biography*, John Crossan depicts Jesus as a radical egalitarian who opposed the power structures of patriarchal family and despised the notion of children as property of their parents.⁵² Crossan sites scripture to illustrate his point, including *Mark 10:13-16* where Jesus universally accepts all children into his fold, despite his disciples’ protests. Crossan contrasts this with the 1st Century practice of empowering biological fathers to choose between accepting infants into their houses or exposing them for death or slavery. I am not an expert in theology, but it seems that attempts to tie Jesus to a wife and biological offspring have met resistance partially because they reflect priorities that distract from this social father’s caregiving example.

What is the biggest barrier to moving your plan from paper to policy?

The status quo gives the main body of voters special status and allows the market to exploit non-conjugal care under the guise of simplicity and efficiency. There isn’t political currency in telling the privileged that policy needs to change. Even partnered people who see the justice in extending legal recognition to non-conjugal units will likely not fully embrace moving out of the bedroom and will want to keep monogamous conjugality as a *de facto* trump card.⁵³

Thank you. We are out of time. ... Tune in next week when I am joined by Gillian Calder.

52 John Dominic Crossan, *Jesus: A Revolutionary Biography* (New York: Harper Collins, 1994) at 58-64.

53 Bala, *supra* note 10, at paras. 122 & 131.

COMMENTARY

SECTION 6 OF THE INDIAN ACT AND “THE SECOND GENERATION CUT-OFF RULE” – A FACTUM

By Roger Wah-Shee*

CITED: (2008) 13 Appeal 14-21

In the Appeal Law Review Court

BETWEEN

Roger Wah-Shee, Shaeden Wah-Shee

PLAINTIFFS

and

Canada (Registrar, Indian and Northern Affairs)
and The Attorney General of Canada

DEFENDANTS

I - OVERVIEW

Despite Parliament's efforts to eliminate inequities in the *Indian Act*¹ (the “Act”) in 1985, status Indians continue to be discriminated against in relation to their ability to pass Indian or treaty status to their children. The passing of *Bill C-31*² resulted in numerous categories of Indians and restrictions on status which continue to target the core of Indian families for assimilation into Canada.

This factum was inspired by the recent British Columbia Supreme Court (“BCSC”) decision *Mclvor v. Canada*³ (“*Mclvor*”) which successfully challenged s. 6 of the Act⁴ on similar grounds. It was held that s. 6 continues to prefer descendants who trace their Indian ancestry along paternal lines over those who trace it along maternal lines.⁵ The BCSC declared s. 6 to be unconstitutional insofar as it authorized the differential treatment of matrilineal and patrilineal

* Roger James Wah-Shee is from the Tlicho Nation in the Northwest Territories and is a third year law student at the University of Victoria. He extends a “mahsi cho” (big thanks) to Professor Gillian Calder for her assistance and encouragement in finalizing this factum.

1 *Indian Act*, R.S.C. 1985, c. I-5.

2 *An Act to Amend the Indian Act*, S.C. 1985, c.31.

3 *Mclvor v. Canada (Registrar, Indian and Northern Affairs)*, 2007 BCSC 827, [2007] B.C.J. No. 1259 (QL) [*Mclvor* cited to B.C.J.].

4 *Indian Act*, *supra* note 1, s. 6.

5 *Mclvor*, *supra* note 3 at para. 343.

descendants born prior to 1985 in conferring Indian status. Canada will continue to defend this discriminatory scheme at the upcoming appeal with a view to continuing the assimilation of status Indians into the Canadian mainstream.

This factum addresses yet another fault with s. 6 of the *Act*; the “second generation cut-off rule”, which results in the loss of Indian status after two successive generations of parenting by non-status Indians. It is submitted that Indians registered under s. 6(2) (registration based on one entitled parent) of the *Act* have fewer rights than do those registered under s. 6(1) (primary registration or registration based on two entitled parents) because they cannot pass on status to their child unless the child’s other parent is also a registered Indian.⁶

II - FACTS

1. Shaeden Wah-Shee (SW) was born in Yellowknife, Northwest Territories on April 28, 2007.
2. Roger Wah-Shee (RW), SW’s father, is a status Indian within the meaning of the *Act*. RW is registered in the Indian Registry System under s. 6(2) of the *Act*.
3. Jillian Wah-Shee (JW), SW’s mother, has maternal roots in the Sepwepemc Nation but is not recognized by the government as an Indian within the meaning of the *Act*.
4. In July, 2007, RW submitted an application for SW’s Indian status at the Department of Indian and Northern Affairs Canada (“INAC”).
5. On July 27, 2007 the INAC Membership Clerk responded with a letter denying the application for SW’s Indian status. The letter stated, “Roger, you are registered in the Indian Registry System under Section 6(2) of the *Indian Act*. This states that you have only one entitled parent and the mother of the child is Non-Indian. Therefore, you are not entitled to pass your status onto your children.”
6. On August 3, 2007, RW requested INAC’s final decision regarding the application.
7. On August 7, 2007, the INAC Manager of Registration, Revenue and Band Governance, affirmed the Membership Clerk’s decision to deny the application. The letter of denial noted, “Any person who has one parent entitled under subsection 6(2) and, whose other parent is a non-Indian or not identified as an Indian, is not entitled to be registered as an Indian. In this case, the father of Shaeden is registered under subsection 6(2) and the mother is a non-native, therefore, your child is not entitled to registration under the *Indian Act*.”
8. Further, RW and SW are “Tlicho Citizens” as defined under s. 1.1.1 of the *Tlicho Agreement*⁷ (the “*Agreement*”).
9. The Tlicho Nation is a First Nation in the Northwest Territories.
10. On August 22, 1921, the Tlicho signed *Treaty 11*⁸ with the Government of Canada at Fort Rae, Northwest Territories.
11. On August 25, 2003, the Tlicho, the Government of Canada, and the Government of the Northwest Territories signed the *Agreement* which is protected under s. 35 of the *Constitu-*

6 Jill Wherrett, “Indian Status and Band Membership Issues”(February 1996) Political and Social Affairs Division, Research Branch.

7 Indian and Northern Affairs Canada, *Tlicho Agreement*, (2003) Queen’s Printer for Canada, online: <www.ainc-inac.gc.ca/pr/ agr/nwts/tliagr2_e.html> [*Agreement*].

8 TREATY No. 11 (JUNE 27, 1921) AND ADHESION (JULY 17, 1922) WITH REPORTS, ETC. Reprinted from the Edition of 1926 by Edmond Cloutier, c.m.g., o.a., d.s.p. Queen’s Printer and controller of Stationery Ottawa, 1957.

tion Act, 1982⁹ (the “*Constitution*”). The *Agreement* is a new treaty that recognizes the historical and cultural importance of *Treaty 11*.¹⁰

III - ISSUES

1. Does s. 6 of the *Act* violate s. 15(1) of the *Canadian Charter of Rights and Freedoms*¹¹ (the “*Charter*”) insofar as it discriminates between a status Indian who has one parent with status and an Indian who has both parents with status; in relation to their ability to pass Indian status onto their children?
2. Is a parent, who is part of an Indian treaty, able to transmit that treaty Indian status to their child as a treaty right?

IV – ARGUMENTS

Issue 1 - Does s. 6 of the Indian Act violate s. 15(1) of the Charter?

12. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination.¹² The general purpose of s. 15(1) of the *Charter* is to prevent the violation of human dignity through the imposition of disadvantage based on stereotyping and social prejudice and to promote a society where all persons are considered worthy of respect and consideration.¹³
13. INAC’s final decision to deny SW Indian status based on s. 6(2) of the *Act* cannot withstand the scrutiny of the test in *Law v. Canada*¹⁴:
 1. Does the impugned law (a) draw a formal distinction between the claimant and others based on one or more personal characteristics, or (b) fail to take account of the claimant’s already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
 2. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
 3. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of promoting the view that the individual is less capable or worthy of recognition as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

With respect to the third question, the court is to consider contextual factors, such as:¹⁵

9 *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11 s. 35 [*Constitution*].

10 *Agreement*, *Supra* note 7, s. 2.5.1: “The historical and cultural important of *Treaty 11* is hereby recognized and there shall be annual meeting to affirm this recognition, to make annual treaty payments and to recognize the importance of the *Agreement*.”

11 *Canadian Charter of Rights and Freedoms*, s.15(1), Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c.11 [*Charter*].

12 *Ibid.*

13 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 5, McLachlin C.J.C and Bastarache JJ [*Corbiere*].

14 *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at 548-9, Iacobucci J [*Law*].

15 *Ibid.* at para. 88.

- a) pre-existing disadvantage;
 - b) correspondence between the distinction and the claimant's characteristics or
 - c) circumstances; ameliorative purposes or effects; and
 - d) the interest affected.
14. The *Act* draws a formal distinction between status Indian parents registered under s. 6(2) and status Indian parents registered under s. 6(1) in regards to their ability to pass status on to their children.
 15. Alternatively, a parent registered under s. 6(2) who procreates with a non-status Indian, as opposed to a status Indian, is deemed less worthy and unable to pass Indian status.
 16. This legislation fractures the family unit by denying Indian status based on family status, marital status, parental status, race and Indian status.
 17. Discrimination of this nature touches the essential dignity and worth of an individual in the same way as recognized grounds of discrimination violative of fundamental human rights norms. It touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice. This is a matter of defining importance to individuals. It is not a matter which should be excluded from *Charter* consideration on the ground that its recognition would trivialize the equality guarantee.¹⁶
 18. Further, INAC's decision to deny SW Indian status violates human dignity and freedom by imposing disadvantages. It reinforces the stereotype that Indians are vanishing or being absorbed into the socio-political mainstream in Canada. The decision embodies social prejudice and fails to promote a society in which Indian people can enjoy equal recognition at law as human beings equally capable and equally deserving of concern, respect and consideration.¹⁷
 19. The decision strikes at the heart of the cultural identity of both parents and their children registered under s. 6(2) in yet another stereotypical way by presuming that neither are interested in preserving this aspect of their cultural identity, and are therefore less deserving of continuity in their Indian status. This engages the dignity aspect of the s. 15 analysis and results in the denial of substantive equality.¹⁸
 20. The question of transmission of status as a benefit of the law in which both the parent and the child have an interest arose in *Benner v. Canada (Secretary of State)*.¹⁹ Iacobucci J. cited with approval, "in this situation, the discrimination against the mother is unfairly visited upon the child."²⁰
 21. A denial of status Indian benefits negatively affects both the parent and child.²¹ The discrimination is twofold because parents are responsible for supporting their children. INAC's letters state "...your child is not entitled to registration under the *Indian Act*"²² and "...you are not entitled to pass your status onto your children."²³ The authors' choices in words indicate the dual nature of the discrimination.
 22. INAC's decision to deny SW Indian status withholds benefits including annual treaty pay-

16 *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 151, McLachlin J for the majority.

17 *Corbiere*, *supra* note 13, at para. 58.

18 *Ibid.* at para. 18.

19 *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 [Benner].

20 *Ibid.* at para. 85. See also *McIvor*, *supra* note 3 at para. 180, per Ross J.

21 *Ibid.* at para. 179.

22 INAC letter, August 7, 2007 [emphasis added].

23 INAC letter, July 27, 2007 [emphasis added].

ments at the anniversary of *Treaty 11*, health benefits including prescription medication, dental services, eyeglasses, and scholarship support.

23. A reasonable person in the position of the claimants, fully apprised of the context, would see the differential treatment contained in s. 6 as suggesting that parents registered under s. 6(2), and their children, are less worthy or valuable as Aboriginal people. They are offered less concern, respect, and consideration than status Indians, and their children, registered under s. 6(1).
24. Although the government constructed the notion of Indian status, it is clear that this notion has come to form an important aspect of cultural identity.²⁴ This is especially so in the context of Crown-Indian treaties and the continuity of the treaty relationship between successive generations of treaty Indians and the Crown.
25. Finally, as human beings, one of our most basic expectations is that we will acquire the cultural identity of our parents, and that as parents, we will transmit our cultural identity to our children.²⁵

Issue 2 - Is a parent, who is part of an Indian treaty, able to transmit that treaty Indian status to their child as a treaty right?

26. The existing aboriginal and treaty rights of the aboriginal people of Canada are recognized and affirmed by the supreme law of Canada.²⁶ Further, the *Constitution* enshrines and protects the historical and cultural importance of *Treaty 11*.²⁷
27. Extinguishing Indian status in Indian families is unconstitutional and inconsistent with treaty rights interpretation in Canada and in the international community at large.
28. Harold Cardinal describes the Indian perspective on the importance of treaties: "To the Indians of Canada, the treaties represent an Indian *Magna Carta*. The treaties are important to us, because we entered into these negotiations with faith, with hope for a better life with honour."²⁸
29. Section 6 of the *Act* is inconsistent with Canada's fiduciary duty to First Nations in Canada.²⁹ The Crown owes this duty to RW and SW because of the sacred nature of *Treaty 11* and the impact that INAC's decision has on the family's connection to that solemn relationship with the Crown.³⁰ The decision undermines this relationship's cultural and historical importance between the family and the *Treaty* itself.
30. The honour of the Crown is always at stake in dealing with Indians and the Crown's arbitrary, sharp dealing in this case should not be sanctioned.³¹
31. Treaties must be construed not according to the technical meaning of their words but in the sense that they would naturally be understood by the Indians. Evidence as to how the parties understood the treaty, or conduct thereof, is of assistance in giving treaties content.³²
32. Notwithstanding the challenges created by the use of oral histories as proof of historical

24 *McIvor*, *supra* note 3 at paras. 179, 193.

25 *Ibid.* at paras. 186, 191.

26 *Constitution*, *supra* note 9, s. 35(1), s. 52(1).

27 *Tlich Agreement*, *supra* note 7, s. 2.5.1.

28 Harold Cardinal, "The Unjust Society: The Tragedy of Canada's Indians" (Edmonton:Hurtig, 1969) at 28-29.

29 *Guerin v. R.* (1984), 13 D.L.R. (4th) 321 at 326.

30 Peter Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997), 27.6(c) at 691.

31 *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 41. See also, *Claxton v. Saanichton Marina Ltd.*, [1989] 57 D.L.R. (4th) 161 (Q.L.).

32 *Ibid.*

facts, the laws of evidence must be adapted in order for this type of evidence to be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with; mainly being historical documents.³³

33. According to Dene elder Adele Lafferty, who was present at the *Treaty 11* signing on August 22, 1921:

But Chief Monfwi (who signed on behalf of the Tlicho) told the Indian Agent, "If the season will be closed for my people I will not take treaty money. Not one of my people will take the money." The RCMP, the Bishop and the Indian Agent were all seated. The Indian Agent said "They will not be closed for you (the hunting seasons). As long as the river flows and the sun rises from east to west in this land of yours, nothing will be closed. You can continue on hunting fishing, and trapping they way you have always done, like for ducks, caribou and fur-bearing animals of all types, for the reason that you have depended on them. Your children after you will also continue on living your ways of life. It will not be closed for you nor for your children." The old people said it would good then, if their children were taken care of by treaty.³⁴

34. Based on the elder's testimony, it is clear that the treaty was intended to extend to children and the treaty was understood as being, without limitations, based on family status. The phrase "as long as the river flows and the sun rises from east to west" indicates a limitless, temporal aspect, or "forever".
35. Dene elder Jonas Lafferty recalled Chief Monfwi's reaction to the Catholic bishop's encouragement to sign the treaty, "Bishop Breynat said: 'That's understood. I will write my name on the paper and there will be no restrictions. I will read the paper to you.' Louis Lafferty interprets: 'No restrictions as long as the sun rises and as long as the river flows downstream.' Monfwi said: 'Because of your word, I will take the treaty.'" ³⁵
36. INAC's decision to deny SW Indian status violates the spirit of *Treaty 11* and ignores the promises which induced Chief Monfwi into signing on behalf of the Tlicho. At the signing, had the Commissioner stated or implied, "but there will come a day when your children will no longer be part of this treaty and they will not be allowed to receive annual treaty payments or receive medicine when they are sick", the old people and Chief Monfwi would have surely rejected it because of the negative impact on future Tlicho children who would be cut-off by the second generation rule.

Indigenous Peoples – The International Perspective

37. Up until the election of the current minority Conservative government, Canada supported the *UN Declaration on the Rights of Indigenous Peoples*³⁶ (the "*Declaration*"). The federal government's current stance against the *Declaration* does not invalidate the overwhelming majority of support for Indigenous rights from the international community.³⁷
38. The doctrine of adoption states that customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation.³⁸ We

33 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 87.

34 Rene Fumoleau, "As Long as This Land Shall Last. A History of Treaty 8 and 11, 1870-1939", 2nd ed. (Calgary: University of Calgary Press, 2004) at 247 [emphasis added].

35 *Ibid.* at 249 [emphasis added].

36 *Declaration on the Rights of Indigenous Peoples*, (13 September 2007) A/RES/61/295, online: <<http://www.un.org/esa/socdev/unpfii/en/declaration.html>>.

37 *Ibid.* 104 for, 4 against, 11 abstaining (US, Canada, New Zealand and Australia).

38 *R. v. Hape*, [2007] S.C.J. No. 26 at para. 37.

submit that the current legislation, although contrary, is of no force and effect due to the supremacy of s. 15 of the *Charter* and s. 35 of *Canada's Constitution*.

39. On October 17, the Supreme Court of Belize held that the *Declaration* embodies guiding principles for domestic law and used the *Declaration* to interpret in favour of the indigenous Maya in their land dispute with the state.³⁹
40. The following principles of the *Declaration* must be used to inform Aboriginal and treaty rights, including *Treaty 11*:

Article 2: Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.⁴⁰

Article 5: Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.⁴¹

Article 8.1: Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.⁴²

Article 8.2: States shall provide effective mechanisms for prevention of, and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(d) Any form of forced assimilation or integration.⁴³

Article 13.1: Indigenous peoples have the right to revitalize, use, develop and transmit their histories to future generations.⁴⁴

Article 13.2: States shall take effective measures, whenever any right of indigenous peoples may be threatened, to ensure this right is protected and also to ensure that they can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.⁴⁵

Article 22.1: Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons.⁴⁶

41. Denying Indians registered under s. 6(2) the right to pass this identity onto their children violates all of the above principles.

39 Ed John, (Indigenous Bar Association Conference, delivered in Victoria B.C., October 27, 2007). See *Aurelio Cal in his own behalf and on behalf of the Maya Village of Santa Cruz et al. v. The Attorney General of Belize and The Minister of Natural Resources and Environment*, Supreme Court of Belize, Claims 171 and 172 of 2007.

40 *Supra* note 36, Article 2.

41 *Ibid.*, Article 5.

42 *Ibid.*, Article 8.1

43 *Ibid.*, Article 8.2 (a) and (d).

44 *Ibid.*, Article 13.1.

45 *Ibid.*, Article 13.2.

46 *Ibid.*, Article 22.1.

V - CONCLUSION

42. Although Parliament constructed the notion of Indian status, it is clear that it has come to form an important aspect of cultural identity. INAC's decision to deny SW Indian status based on the "second generation cut-off rule" contravenes s. 15(1) of the *Charter* and must be reviewed based on Iacobucci J.'s analysis in *Law v. Canada*.⁴⁷
43. The decision discriminates on the analogous grounds of marital status, family status, parental status, Indian status, and race, and effectively severs the continuity of treaty-Indian status in the Wah-Shee family. This severance results in a breach of s. 35⁴⁸ treaty rights, degraded human dignity and an arbitrary denial of numerous intangible and tangible benefits otherwise available to those parents and children whose Indian status flows from s. 6(1) of the *Act*. Finally, the decision fails to conform with international law and its binding force on domestic law in the face of invalid domestic legislation.

VI – ORDER SOUGHT

The plaintiffs request declarations that SW is a status Indian and also that s. 6 of the *Act* is of no force and effect insofar as it discriminates against status Indians affected by the "second generation cut-off rule".

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Roger Wah-Shee

⁴⁷ *Law*, *supra* note 14.

⁴⁸ *Constitution*, *supra* note 9.

COMMENTARY

FATHERS NOT SHORTCHANGED BY CURRENT ADOPTION LEGISLATION

By Navnit Duhra*

CITED: (2008) 13 Appeal 22-27

Issues around adoption can be both emotion arousing and contentious. This is evidenced by the public reaction to a recent British Columbia Supreme Court (BCSC) decision assessing the issue of birth fathers and adoption notice. In her ruling, Smith J. overruled the decision made by Master Caldwell, in which he found that the adoption of an aboriginal child could not proceed until the mother divulged the identity of the birth father so that he could be provided with notice of the adoption proceedings. Her decision sparked debate over the merits of the current adoption legislation and the disservice it does to father's rights. In response to her decision, the *Vancouver Sun* published an editorial arguing that the current legislation prevents birth fathers who are unaware they have children from ever knowing those children unless the mother decides to name them, and that this is not in the best interests of the child.¹ Yet the editorial acknowledges that Smith J. interpreted the *Act* correctly, and therefore deemed the problem to lie with the *Act* itself, which needs to be remedied if the best interests of the child are to be protected. However, upon examining the *Act*, it is found that provisions are in place to protect unacknowledged birth fathers. As such, the B.C. *Adoption Act* ("*the Act*"), in its current form, sufficiently balances the interests of the father, the mother and particularly the child in adoption proceedings and should not be amended to accommodate the interests of birth fathers who are unaware they have fathered a child.

THE ADOPTION ACT

The purpose of the *Act* is to "provide for new and permanent family ties through adoption, giving paramount consideration in every respect to the child's best interests."² As such, it can be stated that the proper lens through which the *Act* is to be interpreted is that provided by the best interests of the child principle; however, this is not to say that the *Act* does not consider the birth mother's or birth father's rights. For the purposes of this discussion, the relevant provisions of the *Act* are ss. 6(1)(g), 10, 11 and 13.

Section 13(1) states that the consent of the child (if over the age of 12), the birth mother, the birth father and any person appointed the child's guardian are required for a child's adoption. Furthermore, s. 13(2) specifies who is considered a father for the purposes of the *Act*. It

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1 "Adoption Law Needs Overhauling to Give Children Knowledge of Their Birth Dads" *The Vancouver Sun* (3 October 2007).

2 *Adoption Act*, R.S.B.C. 1996, c. 5, s. 2.

states that the father of a child is anyone who is or was the child's guardian, is acknowledged by the birth mother as the father and is registered on the birth fathers' registry, or anyone who has acknowledged paternity by either signing the child's birth registration, by having custody or access to the child or by supporting, maintaining or caring for the child.³ If a man fulfills any of the above criteria, his consent would be required for an adoption to proceed, subject to s. 11, which will be discussed shortly. Furthermore, s. 6(1)(g) states that before placing a child for adoption, a director or an adoption agency must make reasonable efforts to give notice of the proposed adoption to (i) anyone who is named by the birth mother as the child's birth father if his consent is not required under s. 13, and (ii) anyone who is registered under s. 10 in the birth fathers' registry in respect of the proposed adoption.⁴

With respect to the birth fathers' registry, s. 10 of the *Act* states that a birth father may, in accordance with the regulations, register on the birth fathers' registry to receive notice of a proposed adoption.⁵ This provision, which was added when the *Act* was amended in 1996, provides fathers with the ability to register and receive notice prior to any adoption proceedings, thereby ensuring their consent is obtained. Therefore, in situations where the mother does not acknowledge the father and the father is not protected pursuant to the conditions listed in s. 13(2), his rights will still be protected under s.10(1). As stated by the Hon. J. MacPhail in legislative debates, s. 10 allows a man who believes he is the father of a child to be able to register his name with the Ministry and thereby receive notice of a proposed adoption of the child. As such, it "will give the birth father the opportunity to become involved in the planning very early in the process and therefore really reduce the risk of a custody application later in the placement process."⁶ However, it should be remembered that the onus to register with the Ministry falls on the father; therefore, if a man is unaware that he has fathered a child and does not register with the Ministry, he would have no entitlement to notice.

Finally, s. 11(1) of the *Act* looks at situations where it is appropriate to dispense with the requirement to provide the birth father with notice of a proposed adoption. These include situations where it has been satisfied that it is in the best interests of the child to do so or any other circumstance that may justify dispensing with the notice. Whether the reasons provided meet either of these requirements is determined by a judge, and is only an issue in situations where the birth mother has named the father or where the father has registered pursuant to s. 10(1).

CASE LAW

The case in question involved the adoption of an aboriginal child. The birth mother, who was not in a relationship with the birth father, chose not to inform him of the child's adoption. As such, no notice was provided to the birth father. The case originally came before a Master, who dismissed the adoption application primarily on the grounds that the father was required to receive notice of the adoption prior to any approval being granted. His reasoning was based on a misinterpretation of the *Act* and reference to inappropriate case law. Specifically, the Master relied on s. 11, finding that no evidence had been provided that would "allow him to properly exercise [his] discretion under s. 11", stating that a simple assertion by the mother that the birth father is unaware of the pregnancy and birth, and that she decided not to name him is insufficient in his view. Furthermore, the Master supported his decision by relying on case law that examined the importance of obtaining consent and providing notice in a general sense, rather than specifically focusing on the provisions in the *Act*.⁷

3 *Ibid.* s. 13.

4 *Ibid.* s. 6.

5 *Ibid.* s. 10.

6 British Columbia, *Official Report of the Legislative Assembly*, No. 18 (28 June 1995) at 16368 (Hon. J. MacPhail).

7 *Birth Registration No. 06-014023 (Re)*, 2007 BCSC 304.

As the Master's decision precluded the granting of a final order of adoption, the decision was appealed and came before the BCSC. Smith J. overruled the Master's decision on the grounds that he erred in interpreting the provisions of the *Act*. In her judgment, Smith J. stated that within s. 13 of the *Act*, there is no requirement to obtain the consent of the birth father in situations where the mother has not acknowledged the birth father or where the birth father has not registered with the birth fathers' registry. Furthermore, she found that s. 11 is only applicable in situations where the birth father falls within the categories of father as stated under ss. 6(g)(i), 10(1) or 13. From this, it can be seen that the Master incorrectly interpreted the *Act*, as he found that s. 11 stated that notice must be provided to the birth father, unless reasonable evidence is provided to him stating why such notice could not be given. Furthermore, according to the Master's interpretation, s. 11 does not allow for notice to be dispensed with if the father has registered with the birth fathers' registry.

Since the public interest would not be served if courts were at liberty to 'amend' the legislation by means of its 'inherent jurisdiction',⁸ Smith J. overruled the Master's decision and affirmed that s. 13 of the *Act* does not require that notice of a proposed adoption be given to a birth father who is unacknowledged, has no legal rights or obligations to a child that is the subject matter of an application for an adoption order or who is not registered with the birth fathers' registry. She further stated that why the birth mother declined to advise the birth father of the child's birth, or why she did not name or acknowledge the birth father, is immaterial to determining the issue of who must be notified of a proposed adoption pursuant to the *Act's* provisions.⁹

POSSIBLE AMENDMENTS

As the *Act* currently stands, cases where men who do not know they have fathered a child and where the mother refuses to acknowledge the father, are technically out of luck as the *Act* does not require the mother to identify him and thus provide him with notice of the adoption proceedings. It is for this reason that father's rights groups are arguing that the *Act* needs to be remedied if it is to protect the interests of those fathers and particularly the interests of the child. In evaluating what type of amendment may help remedy this supposed "flaw" in the *Act*, it is useful to look to the Supreme Court of Canada case of *Trociuk v. British Columbia (Attorney General)* ("*Trociuk*").¹⁰ Although not on point, *Trociuk* is factually similar to the current case in that it too involved a birth mother who chose to mark the birth father as unacknowledged in the statement of live birth. As such, pursuant to the B.C. *Vital Statistics Act*, the mother was entitled to choose and register the child's surname. Furthermore, once registered, the father was precluded from subsequently altering that registration.

Unlike the *Adoption Act*, the *Vital Statistics Act* listed three categories of fathers whose particulars can be excluded from the registration: those fathers that are arbitrarily unacknowledged; those fathers who are unacknowledged for valid reasons; and those fathers who are incapable or unknown.¹¹ With respect to those fathers who are unacknowledged for valid reasons, the Court held that permitting mothers the option of excluding them did not justify "arbitrarily exposing a father, without recourse, to the possible disadvantages that flow from an unacknowledgement that protects neither her legitimate interests nor the best interests of the child."¹² As such, the Court found that the provisions of the *Vital Statistics Act* discriminated against biological fathers on the basis of sex, violating s. 15(1) of the *Charter of Rights*

8 *Registration Number 06-014023 (Re)*, 2007 BCSC 1441 at para. 30.

9 *Ibid.* at para. 41.

10 *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34.

11 *Ibid.* at para. 22.

12 *Ibid.* at para. 22.

and Freedoms, and therefore should be amended. However, to ensure that mothers who were unacknowledging the father for valid reasons were able to do so, the Court in *Trociuk* suggested that provisions be put in place to allow these women to address a judge in chambers, who would alone determine whether a father has been justifiably excluded based on affidavit evidence.

Such an approach was implemented in the Alberta case of *L.J.J. (Re)*.¹³ In this adoption case, the birth mother refused to disclose the father's identity for reasons that were unknown. Referring to *Trociuk*, the Court concluded that fathers have certain rights which cannot be arbitrarily overwritten, even if the mother is adamant in doing just that.¹⁴ As such, it was decided that the adoption application would not be granted until the mother had provided some further explanation for why the father's identity could not be disclosed. Her explanation could be provided to a judge in chambers thereby protecting the mother's privacy. Another Alberta case, *C.M.S. (Re)*,¹⁵ also stated that more information is required with respect to why the birth mother is unwilling to identify the biological father before notice can be dispensed with, and that this could be done via an affidavit or in private to the judge.

Placing a provision in the *Act* similar to that proposed in *Trociuk* could certainly reduce the number of fathers who are unacknowledged, as it would take decision making out of the mother's hands and place it in those of an objective third party. However, this can be problematic, as often what might be considered a valid and pressing reason not to disclose by the mother may not be considered to be so by the judge. In such situations then, the mother would be left with no recourse other than being precluded from continuing with the adoption proceedings, which may have detrimental consequences for both mother and child, which will be discussed below. Furthermore, it is important to note that legislature had considered implementing such a requirement in the *Act*, but had serious misgivings about doing so. As stated in legislative debates, the only way to ensure that unacknowledged fathers are named would be to implement a provision such as that suggested in *Trociuk*, which they refused to do. The Hon. J. MacPhail stated, "I wouldn't want the state to interfere to the extent that the birth father's name has to be registered, by any means. That would be the only way to prevent that, and we are not going to do that."¹⁶

Furthermore, according to Daphne Gilbert, "requiring a mother to give reasons for why the father is "unacknowledged" could further stigmatize her or her child."¹⁷ This might occur in cases where the mother is unacknowledging the father because the child was the result of prostitution, or because the mother does not know who the father is and therefore cannot name him. In these situations, a judge may find the mother's actions to be morally reprehensible, and although they could not require the mother to disclose the father's information, as that might not be possible, she would be subjected to his or her scrutiny. This would undoubtedly be harmful to the mother, as putting a child up for adoption is already a difficult process for her to have to endure. As well, requiring that the mother disclose the name of the father places a significant burden on her to protect the father's interests. If men are having sexual intercourse with women, it should come as no surprise that pregnancy is a possibility, especially given that contraception use is not guaranteed one hundred percent. Therefore, men should also be required to take responsibility to ensure that no pregnancies have resulted from their actions or if they have, then to exert their rights via the birth fathers' registry.

13 *L.J.J. (Re)*, 2003 ABQB 962.

14 *Ibid.* at para. 30.

15 *C.M.S. (Re)*, 2004 ABQB 567.

16 *Supra* note 6 at 16368.

17 Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the Charter" (2003) 48 McGill L.J. 627 at para. 44.

BALANCING INTERESTS AND IMPLICATIONS OF THE MASTER'S DECISION

The *Act*, in its current form, appropriately balances the interests of all the parties involved. As stated by Tom Christensen, Minister for Children and Families, “at the end of the day it wouldn't be reasonable to compromise the opportunity of a child to have a brighter future through adoption simply because of a birth mother's inability or refusal to name the birth father.”¹⁸ This balancing is especially critical in these types of circumstances because the legislation cannot account for every possible personal situation, and therefore will never be perfect in that respect.

By allowing fathers the opportunity to register with the birth fathers' registry, their rights and interests are protected, as it provides these men the chance to participate in the adoption process or file to receive custody or access of the children themselves. As such, the father can play an active role in the child's life and, as stated in the editorial, this would undoubtedly be in the best interest of the child. The mother's interests are also protected under the current provisions. Though it may be that the birth mother is simply vindictive and is not naming the birth father solely out of spite, these situations are likely few and far between. The majority of women who choose not to name the birth father do so for reasons relating to privacy and security. Specifically, the mother may feel shame over an unwanted pregnancy that resulted out of rape or incest, and fear disapproval from her family and society; or she may be worried that if she acknowledges the father, she will be subjected to violence or harassment from him.¹⁹ Because the mother has the right under the *Act* not to name the father, she is protected from having to endure any stigma from the community or harassment from the birth father. In situations such as these, the mother's privacy rights should outweigh the father's right to notice.²⁰ Furthermore, the child's interests are protected by allowing him or her the opportunity to grow up in a stable and caring environment. These interests would not be well served if the child had to wait to be adopted until the mother decided to name the father, which she may not be able to do, or until the father registered with the birth fathers' registry, which he may not know to do.

Had the Master's decision been upheld, it would have had serious consequences for the birth mother. As mentioned above, very rarely does a mother not acknowledge the father out of spite but instead does so out of concern for her privacy and safety. If these women were required to identify the father in order to place their child for adoption, they would endure serious psychological stress from having to do so and possibly suffer a significant financial burden that raising a child would impose. As many of these women are in a financially precarious state, either due to employment circumstances or as a result of their youth, the requirement that they keep the child and raise him or her themselves would unlikely provide for the most stable and nurturing environment. As such, if the option of adoption is taken away from these women, the result could be devastating for both mother and child, and this would not be in the best interests of either.

A final point that should be made pertaining to fathers and the Master's decision is the conceptualization of 'father'. Emphasis in the law has been significantly placed on the genetic component of what it means to be a father, rather than social and contextual factors. This is demonstrated by Deschamps J.'s decision in *Trociuk*, where she reduced fatherhood to genetic paternity and accorded genetic fathers the full panoply of constitutionalized paternal rights.²¹

18 Steve Merti, “Fathers not Short-Changed by B.C. Adoption Act, Minister says” *Canadian Press Newswire*. (Toronto) (1 October 2007)

19 Karen Thompson, “The Putative Fathers Right to Notice of Adoption Proceedings: Has Georgia Finally Solved the Adoption Equation?” (1998) 47 *Emory L.J.* 1475 at 1497.

20 Tonya Zdon, “Putative Fathers Rights: Striking the Right Balance in Adoption Laws” (1994) 20 *Wm. Mitchell L. Rev.* 929 at 956.

21 Hester Lessard, “Mothers, Fathers and Naming: Reflections on the Law Equality Framework and *Trociuk v. British Columbia (Attorney General)*” (2004) 16(1) *C.J.W.L.* 165 at 190.

However, upon examining s. 13(2) of the *Act*, half of the provisions pertain to contextual factors. In this sense, by taking into account these other factors, the current legislation is moving in the right direction. That is, there is more to be said for what constitutes a father than mere genetics, and the law should not blindly protect those men who engage in sexual relations and then do not attempt to determine if any child may have resulted from that encounter. These men, although they fit the description of father in a genetic sense, do nothing more to consolidate their role in the child's life, and therefore should not be protected by legislation.

CONCLUSION

Under the current adoption legislation, birth mothers are not required to identify the birth father in adoption proceedings. As such, if the mother decides not to name the father and the father does not register with the birth fathers' registry, the father will not be provided with notice of the child's adoption. It is for this reason that fathers' rights groups contest the law, arguing that it is not in the best interests of children to not know their fathers, and that the law needs to be amended, requiring mothers to acknowledge the father. However, such requirements would have negative consequences on mothers who are not disclosing the father's identity for legitimate reasons, such as rape or incest. Precluding these women from proceeding with the adoption would also have negative consequences for the child, who may be deprived of being raised in a stable and nurturing environment. Therefore, as the current *Act* takes into account the interests of the mother, the father and the child, and appropriately balances these interests against one another, it should not be amended.

ARTICLE

WHEN RIGHTS COLLIDE: LIBERALISM, PLURALISM AND FREEDOM OF RELIGION IN CANADA

By Alex Fielding*

CITED: (2008) 13 Appeal 28-50

ABSTRACT

In a time where the influx of immigrants with diverse religions conflict with the laws of the majority, the question of how to live together in disagreement when Charter rights collide goes to the heart of pluralism, the 'common good' and the modern liberal exercise in Canada. The recent debates over sharia tribunals, faith-based education, same-sex marriage, and the accommodation of religious marriage commissioners illustrate the difficulties in balancing the religious and 'secular' in the public sphere.

This paper looks to liberal theory, freedom of religion jurisprudence, and contemporary thinkers for answers to these timely questions. It advocates for a more deferential, accommodating form of liberalism along the principles of *modus vivendi* where individual rights are limited only to the extent that they infringe on the rights of others. By moving away from the vague, all-encompassing language of "Charter values" to John Stuart Mill's harm principle, we create a more pluralistic public sphere that gives reasons for religious minorities and ethnic groups to reciprocate such tolerance and participate actively in civil society. If we relegate such views to the private sphere by imposing a 'rational consensus' on a divided public, we do so at our peril. For it will further fragment the civic fabric of Canadian society into scattered islands of faith communities, leaving all sectors impoverished.

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INTRODUCTION

*Liberalism is not a possible meeting ground for all cultures; it is the political expression of one range of cultures and quite incompatible with other ranges...Liberalism is also a fighting creed*¹ – Charles Taylor

*Here I stand, I can do no other*² – Martin Luther

On the 25th anniversary of Canada's *Charter of Rights and Freedoms* ("Charter"), the entrenchment of individual rights, the strategic litigation that followed and the policy-laden decisions of the Supreme Court have left some groups rejoicing with others shaking their heads (and pulpits). The rights of women,³ gays and lesbians,⁴ official language minorities⁵ and the criminally accused⁶ have arguably been accelerated beyond what reluctant legislatures would have enacted. On the other hand, the *Charter* has largely been a disappointment for a range of sectors like poverty advocates,⁷ law enforcement,⁸ racialized groups⁹ and many religious groups.¹⁰ Religious leaders would have been shocked had they known in 1982 that this liberal rights document would be the catalyst, and in some cases impetus, for extending civil marriage to gays and lesbians, quashing a school board's decision not to license books depicting homosexual relationships, compelling a religious private printer to serve a gay advocacy organization, and striking down legislation that prohibited Sunday trading.

The development of freedom of religion jurisprudence under the *Charter* has left the Canadian state, judiciary, and society at large grappling with some fundamental questions. How do we balance the equality rights of gays and lesbians asserted under s. 15 with the religious freedoms of marriage commissioners protected under s. 2(a)? How can we reconcile temporal and divine sources of authority when the rule of law and the supremacy of God collide? How can a "secular" state encourage religious diversity, pluralism and the "common good"? Such questions depend on how they are framed and how we define and understand liberalism, pluralism, the 'secular' and the rule of law. In a time where the rights of same-sex couples and the freedoms of religious groups have come to a head, and where the influx of immigrants with diverse religions conflict with the laws of the majority, this question of how we live together in disagreement goes to the heart of pluralism, the 'common good' and the modern liberal exercise in Canada.

1 Charles Taylor, "The Politics of Recognition" in Charles Taylor ed., *Philosophical Arguments* (Cambridge: Harvard University Press, 1995) at 249.

2 Martin Luther, Speech to Diet of Worms, 1521.

3 See *R v. Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321; *R. v. Butler*, [1992] 1 S.C.R. 452, S.C.J. No. 15, but, see contra *Newfoundland Association of Public Employees (NAPE) v. Newfoundland* 2004 SCC 66, [2004] 3 S.C.R. 381; *Law v. Canada*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1; *Hodge v. Canada (Minister of Human Resource Development)*, 2004 SCC 65, 244 D.L.R. (4th) 257.

4 See *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710; *Halpern v. Canada (Attorney General)*, [2003] 225 D.L.R. (4th) 529, O.J. No. 2268; *EGALE Canada Inc. v. Canada (Attorney General)*, [2003] 225 D.L.R. (4th) 472, B.C.J. No. 994; *Brockie v. Ontario (Human Rights Commission)*, [2002] O.J. No. 2375, 222 D.L.R. (4th) 174; *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493; *Egan v. Canada*, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609; *Re Rosenberg et al. v. Attorney General of Canada*, 38 O.R. (3d) 577, 158 D.L.R. (4th) 664.

5 See *R. v. Beaulac*, [1999] 1 S.C.R. 768, 173 D.L.R. (4th) 193.

6 See *R. v. Feeney*, [1997] 2 S.C.R. 13, 146 D.L.R. (4th) 609; *R v. Stinchcombe*, [1991] 3 S.C.R. 326, [1992] 1 W.W.R. 97; *R. v. Collins*, [1995] 2 S.C.R. 1104, 183 N.R. 285.

7 See *Gosselin v. Quebec (Attorney General)*, 2005 SCC 44, [2005] 2 S.C.R. 286.

8 See *supra* note 6..

9 See *R. v. R.D.S.*, [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193.

10 See *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710; *Halpern v. Canada (Attorney General)*, [2003] 225 D.L.R. (4th) 529, O.J. No. 2268; *Brockie v. Ontario (Human Rights Commission)*, [2002] O.J. No. 2375, 222 D.L.R. (4th) 174; *Reference Re Same Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698.

In this paper, I will argue that the best way of accommodating different faiths, cultures and worldviews when rights collide is a *modus vivendi* approach, as articulated by John Gray.¹¹ *Modus vivendi* is a more honest, accommodating and genuinely tolerant face of liberalism, which seeks pluralistic, peaceful coexistence as its end goal as opposed to a rational consensus dictated by the judiciary in the name of all-encompassing “*Charter* values.” Indeed, liberalism itself was borne out of a theory of the common good that was focused on the *individual*, free from interference and imposition by the sovereign, the Church or the state. That said, the judiciary does have a duty to mediate this pluralism by ensuring that the assertion of the rights of one individual does not infringe on the rights of another. In delineating that fine line in the sand, this paper will advocate a return to John Stuart Mill’s harm principle - using individual rights as deliberative markers of harm. In the conflict between claims of same-sex equality and religious freedom – be it in public education, civil marriage or private businesses – the adversarial, winner-take-all litigation model is poorly designed for peaceful coexistence and should be used as a last resort only when individual rights have been infringed. It is the realm of civil society that is better suited for not simply tolerating difference, but understanding and embracing it.

Part I of this paper will canvas the ideas of liberal theorists John Gray, Charles Taylor,¹² and John Stuart Mill.¹³ Part II will examine the freedom of religion jurisprudence in the pre and post-*Charter* era with respect to Sunday closing laws, residential by-laws, and same-sex equality claims in civil marriage, public education and private businesses. Part III will analyze the Canadian experience of attempting to balance so-called “secular” liberalism and religious freedom, drawing on the writings of Chief Justice Beverly McLachlin,¹⁴ Jean Bethke Elsttain,¹⁵ Iain T. Benson,¹⁶ Bruce MacDougall,¹⁷ and Benjamin Berger.¹⁸ Part IV will look at some contemporary examples in Canada like the tension between same-sex civil marriage and religious marriage commissioners, and present the case for a more inclusive, pluralistic liberalism where *Charter* rights of religious freedom and equality collide.

PART I: THE CHANGING FACES OF LIBERALISM

Liberalism is one of the most commonly used, yet least understood, concepts in politics and law. Part of the problem lies in its very definition, which varies widely based on different theorists, countries and time periods. This paper does not attempt to explain or reconcile the myriad understandings of liberalism but rather to juxtapose the ideas of certain theorists with contemporary issues in Canada and challenge some of the “liberal” assumptions underlying recent jurisprudence.

11 John Gray is a Professor of European Thought at the London School of Economics. In *Two Faces of Liberalism*, he warns against the “liberal” pursuit of a rational consensus on the best way of life and argues for a *modus vivendi* liberalism with peaceful coexistence as the end goal. For an analysis of John Gray’s *modus vivendi* in the contemporary Canadian context, see Iain T. Benson, “Considering Secularism” in Douglas Farrow ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal: McGill-Queens University Press, 2004) at 83.

12 Charles Taylor is a Professor of Philosophy at McGill University who has written extensively on morality, identity and the cultural and sociological dimensions of liberalism.

13 John Stuart Mill (1806-1873), a British philosopher and political economist, was one of the most influential liberal thinkers of the 19th century and the author of *On Liberty*, which introduces the oft-cited harm principle.

14 The Right Honourable Beverly McLachlin has been the Chief Justice of the Supreme Court of Canada since 1998. In a debate with Jean Bethke Elsttain in October 2002 at the “Pluralism, Religion and Public Policy” conference at McGill University, she described the tension between religion and the rule of law as a “dialectic of normative commitments”.

15 Jean Bethke Elsttain is a Professor of Social and Political Ethics at the University of Chicago Divinity School, and a contributing editor for *The New Republic*.

16 Iain T. Benson is a constitutional lawyer and the Executive Director of the Centre for Cultural Renewal. He has written extensively on the nature of pluralism, religion, the “secular” and “secularism” in Canada and western societies.

17 Bruce MacDougall is a Professor at the University of British Columbia, Faculty of Law, and a leading advocate of same-sex rights.

18 Benjamin Berger is a Professor at the University of Victoria, Faculty of Law, and has written extensively about the cultural dimensions of law, liberalism and pluralism in Canada.

Liberalism's common features include the high valuation of individual reason, liberty and agency, with an understanding of law as a tool to limit the state's interference in the lives of the individual.¹⁹ Liberalism seeks to respect *individual* moral thought, free from moral or epistemological claims of "truth." However, where these commonly-held views diverge is in the *interpretation* of tolerance, universal values, and the growing challenge of cultural pluralism. In this paper, I will attempt to illustrate how the "liberal" judicial treatment of civic or *Charter* values has moved us away from the classical liberal tenets of individual autonomy and negative liberty into the imposition of a societal consensus of the "common good" as defined by the Supreme Court of Canada (the "SCC").

In *Two Faces of Liberalism*, John Gray presents two contradictory principles that lie at the heart of liberal tolerance. He summarizes these conflicting faces of liberalism as follows:

In one, toleration is justified as a means to truth. In this view toleration is an instrument of rational consensus, and a diversity of ways of life is endured in the faith that it is destined to disappear. In the other, toleration is valued as a condition of peace, and divergent ways of living are welcomed as marks of diversity.²⁰

In the first view, "rational consensus" liberalism is rooted in the enlightenment project of a universal civilization. From this perspective, "liberal toleration is the pursuit of an ideal form of life."²¹ This is the language of universal values or human rights, which has greatly impacted international law in the last fifty years. In Canada, these are articulated as "*Charter* values" or "civic values" like security, dignity and autonomy. According to Gray, this liberalism of a universal regime is supported by such theorists as John Locke, Immanuel Kant, and in more recent times, John Rawls and F.A. Hayek. Arguably, Ronald Dworkin, one of the chief proponents of Rawls' conception of liberalism, should also be included on this list.

In the second view, *modus vivendi* liberalism is rooted in the peaceful coexistence of warring communities and different ways of life. *Modus vivendi* embodies an older current of liberal thought about toleration in expressing the belief that there are many forms of life in which humans can thrive.²² The aim here is not for convergence or the "good life", but rather to reconcile individuals and ways of life honouring conflicting values to a life in common.²³ According to Gray, theorists like Thomas Hobbes, David Hume, Isaiah Berlin and Michael Oakeshott have expressed this liberalism of peaceful coexistence.

As I will explain in greater detail in Part III, this *modus vivendi* approach is particularly salient in the Canadian context, not only because of the influx of immigrants with diverse faith backgrounds, but because of Canada's "neutral but supportive" position with respect to religious groups. This complex reality is ill served by the false dichotomies of church vs. state, religious vs. secular, the rule of law vs. the supremacy of God and public vs. private religious expression. Far from being mutually exclusive, the accommodation and encouragement of diverse faiths in a pluralistic public sphere can actually strengthen civil society and the social fabric of Canada. Relegating religious views to the private sphere creates the illusion of a secular society where equality reigns supreme. In reality, it will only serve to further isolate, alienate and fragment religious groups in the dark corners of Canada's mosques, churches, synagogues and temples, far removed from public scrutiny, accountability and a common space to live *together* in disagreement.

19 Benjamin Berger, "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State" (2002) 17 Can. J.L. & Soc. 39.

20 John Gray, *Two Faces of Liberalism* (New York: The New Press, 2000) at 105.

21 *Ibid.* at 2.

22 *Ibid.* at 5.

23 *Ibid.* at 6-7.

As a deeply multicultural society built on immigrants of a diversity of ethnic backgrounds, how we understand liberalism in Canada has profound impacts on citizenship, religion and the rule of law. Writing from the Canadian experience, Charles Taylor is critical of the purported neutrality and comprehensiveness of liberal claims, arguing that “[l]iberalism is not a possible meeting ground for all cultures; it is the political expression of one range of cultures, and quite incompatible with other ranges...[l]iberalism is also a fighting creed.”²⁴ Taylor suggests that people are always acting and finding meaning in a normative context. Therefore, what is considered as the “good” in a liberal polity reflects a certain cultural reality and is poorly designed to meet the challenge of contemporary cultural pluralism. Taylor’s view of a liberal society is “one that is trying to realize in the highest degree certain goods or principles or right.”²⁵ However, the concept of the good life is deeply value-laden and in a society that is getting more multicultural by the day, Taylor advocates for ethically richer notions of liberalism to meet the demands of such diversity.

It is precisely this claim of comprehensiveness, recently espoused by Chief Justice McLachlin with respect to the constitutional rule of law,²⁶ which jars against individual freedom, religious faith, and the submission of devout adherents to an entirely different worldview that cannot simply be relegated to the private sphere. However, if we see liberalism for what it really is – one of many ideological frameworks based in a specific cultural context with its accompanying normative assumptions – we can begin to enlarge the debate and the public sphere to better accommodate religious and cultural groups. Once again, the goal here should not be societal consensus with the SCC as the vehicle for “secular” liberalism, but an expansive pluralism that is limited only by Mill’s harm principle.

Much guidance can be found in John Stuart Mill’s *On Liberty*, one of the foundational texts on liberalism that remains highly influential in any rights discourse. Mill was primarily concerned by the exercise of power by society over an individual. He is credited as the first to articulate the harm principle in order to delineate the limitations on the rights and freedoms of the state in respect to individuals, and of individuals in respect to each other:

The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-preservation. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.²⁷

Mill believed that the individual was sovereign over his own body and mind and he should not be compelled to do what is considered wise, right or moral in the eyes of others. This idea that the rights and freedoms of an individual or group only extend until they infringe on the rights of others has been fundamental to contemporary liberal societies and the rights revolution in Canada. Only by critically examining the historical treatment of liberalism in the writings of theorists like Mill, Gray and Taylor, can we fully understand, and indeed challenge, the values underlying freedom of religion jurisprudence outlined in Part II. As I will explain in greater detail in Part IV, by moving away from the vague language of *Charter* values to Mill’s harm principle, we follow a more honest conception of liberalism that searches for a way of living together in disagreement to better accommodate competing rights in the public sphere.

24 Taylor, *supra* note 1 at 249.

25 *Ibid.* at 257-8.

26 McLachlin C.J.C. described the rule of law as making “total claims upon the self” in Douglas Farrow ed., *Recognizing Religion in a Secular Society: Essays in Pluralism Religion, and Public Policy* (Montreal: McGill-Queens University Press, 2004) at 16 (“Recognizing Religion”).

27 John Stuart Mill, *On Liberty* (New York: Doubleday, Doran and Company, Inc., 1935) at 310.

PART II: FREEDOM OF RELIGION JURISPRUDENCE IN CANADA

To fully understand Canada's "neutral yet supportive" approach to religious groups, a historical analysis of the statutory, constitutional and common law protections of religious freedoms is necessary. With the religious conflicts of the Old World still fresh in the minds of colonial powers, Canada's early history was marked by a robust protection for Protestants and Catholics. The roots of these protections can be traced back to the Articles of Capitulation for Quebec (1759) and Montreal (1760), which granted the inhabitants of the cities "the free exercise of the Roman religion."²⁸ The Treaty of Paris (1763), which put an end to imperial wars in Canada, clearly affirmed the rights of Roman Catholics in Quebec. This was further articulated in the *Quebec Act* (1774), which expanded religious freedom by replacing the oath of allegiance's reference to the Protestant faith, guaranteeing the free exercise of the Roman Catholic faith (more protection than was given to Catholics in England!) and empowering the Crown to support the Protestant religion and clergy. And although the *British North America Act* (1867) had no specific freedom of religion provision, s. 93 did entrench the protection of minority Roman Catholic and Protestant schools in Ontario and Quebec.

The mid-20th century witnessed a dark chapter in Canada's history for religious groups like the Doukhobors in British Columbia²⁹ and Jehovah's Witnesses in Quebec under Premier Maurice Duplessis. In a series of events beginning in the 1930s up until the Quiet Revolution of the 1960s, the challenges faced by Jehovah's Witnesses at the hands of Quebec police, municipalities and provincial governments were indicative of Canada's early history of religious freedom. The cases that followed illustrated the need for a constitutional remedy to limit the powers of the state.

In *Saumur v. City of Quebec*,³⁰ a Jehovah's Witness challenged the validity of a by-law of the City of Quebec forbidding distribution of any book, pamphlet, booklet, circular or tract without permission from the Chief of Police. The SCC overturned the decisions at the trial and appellate levels by ruling that the by-law did not extend so as to prohibit Jehovah's Witnesses from distributing their writings. Rand J. established religious freedom as a "principle of fundamental character" and stated the following:

Freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order.³¹

Thus, religion is interpreted as being much more than mere choice, but rather a fundamental aspect of identity, community and self-expression. This expansive view of religion stands in stark contrast to later *Charter* decisions like *Brockie* (before being overturned on this point by the Ontario Divisional Court) and *Chamberlain* which would restrict religion to the private sphere or to the realm of belief and not action whenever it conflicts with *Charter* values. I would argue that this view of the comprehensiveness of religious adherence better serves the current debate over conflicting rights which has tended to reduce religious beliefs to one of many rational choices that must be measured against, and limited by, *Charter* values.

28 Art. VI of the Articles of Capitulation of Quebec, in Shortt and Doughty, *Documents Relating to the Constitutional History of Canada, 1759-1791*, 6, cited in B. McLachlin, "Freedom of Religion and the Rule of Law: A Canadian Perspective," in *Recognizing Religion*, *supra* note 26 at 12.

29 See John McLaren, "The Doukhobor Belief in Individual Faith and Conscience and the Demands of the Secular State" in John McLaren & Harold Coward, eds., *Religious Conscience, the State and the Law* (New York: State University of New York Press, 1999).

30 *Saumur v. City of Quebec*, 4 D.L.R. 641, [1953] 2 S.C.R. 299 [*Saumur* cited to D.L.R.].

31 *Ibid.* at 670.

A landmark constitutional case involving religious freedom is *Roncarelli v. Duplessis*.³² The plaintiff Roncarelli, a Montreal restaurant owner, had his liquor license cancelled at the instigation of Premier Maurice Duplessis after he had acted as bailman for a number of Jehovah's Witnesses charged with violating municipal by-laws prohibiting the distribution of religious literature. Rand J, in his oft-cited reasons for the majority judgement, ruled that Duplessis had exceeded his official powers and the unwritten constitutional principle of the rule of law meant no public official was above the law.

As a result of *Saumur* and *Roncarelli v. Duplessis*, the SCC had given implicit constitutional status to freedom of religion, limited only by rational laws of general application. These early cases reflected a more pluralistic liberalism by limiting Duplessis' vision of the "common good" in favour of common institutions that promoted the peaceful coexistence of Jehovah's Witnesses and the Catholic majority in Quebec's public sphere. They also underlined a tension between religious freedom and the laws of the majority that is still playing itself out today. As we will see, the *Charter* jurisprudence has been far from clear, though the recent SCC decisions in *Amselem*³³ and *Multani*³⁴ appear to be returning to a more expansive interpretation of religious freedom with a duty of reasonable accommodation.

The Scope and Content of Religious Freedom in the Charter Era

After the disappointing jurisprudence following the enactment of the Canadian Bill of Rights,³⁵ the *Charter* articulated Pierre Elliott Trudeau's vision for a constitutionally entrenched individual rights document to unite the country, limit state power and provide the legal protections for a flourishing multicultural society. Following on from the practices of many countries (and in keeping with international human rights doctrine), Canada entrenched a rights document with explicit protections for freedom of religion in a number of places. Religious freedom is upheld in s. 2(a), as well as s. 15 which prohibits discrimination based on religious grounds. Even the *Charter* preamble itself evokes religious doctrine in establishing that "Canada is founded upon principles that recognize the supremacy of God and the rule of law."³⁶

Although certain commentators and judges have dismissed the supremacy of God as a "dead letter...that can only be resurrected by the Supreme Court of Canada",³⁷ its conjunctive inclusion alongside the rule of law speaks to its continuing relevance in our "secular" state, as has been argued by Iain T. Benson.³⁸ Other commentators have also criticized the "dead letter" approach as failing to give proper weight to the history, purpose and relevance of the *Charter's* preamble.³⁹ According to Bruce Ryder,⁴⁰ the supremacy of God is best understood as a reminder

32 *Roncarelli v. Duplessis*, [1959] S.C.R. 1921, C.C.S. No. 857 [*Roncarelli* cited to S.C.R.]

33 *Syndicat Northcrest v. Amselem*. [2004] 2 S.C.R. 551, 241 D.L.R. (4th) 1 [*Amselem* cited to S.C.R.].

34 *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 264 D.L.R. (4th) 577 [*Multani* cited to S.C.R.]

35 Despite the enactment of expansive rights provisions including freedom of religion, the Canadian Bill of Rights was severely limited by its lack of constitutional status (it was merely an Act of Parliament that could be repealed) and application to federal laws only.

36 Preamble, *Canadian Charter of Rights and Freedoms*. The preamble's inclusion was accomplished by an amendment to the Charter, as proposed by Liberal Member of Parliament Roch Pinard, and seconded by the then Minister of Justice, Jean Chrétien, on 23 April 1981. See Anne F. Bayefsky, *Canada's Constitution Act 1982 and Amendments: A Documentary History*, vol. 2 (Toronto: McGraw-Hill Ryerson, 1989) at 816.

37 *R. v. Sharpe*, [1999] B.C.J. No.1555 at ss.78 to 80, per Southin J.A. Academics Peter Hogg, Dale Gibson and Bruce MacDougall have also disregarded the constitutional significance to the 'supremacy of God' in the preamble.

38 See Iain T. Benson, "Considering Secularism" in *Recognizing Religion*, *supra* note 63 at 83-98.

39 See David Brown, "Freedom from or Freedom for?: Religion as a Case Study in Defining the Content of Charter Rights" (2000) 33 U.B.C.L. Rev. 551, Jonathon W. Penney & Robert J. Danay, "The Embarrassing Preamble? Understanding the 'Supremacy of God' and the Charter" (2006) 39 U.B.C. L. Rev. 287, Iain T. Benson, "The Freedom of Conscience and Religion in Canada: Challenges and Opportunities," (2007) 21 Emory Int'l L. Rev. 151, and Lorne Sossin, "The 'Supremacy of God,' Human Dignity and the Charter of Rights and Freedoms" (2003) 52 U.N.B. L.J. 227.

40 Bruce Ryder is an Associate Professor at the Osgoode Hall Law School and the Director for the Centre for Public Law and Public Policy.

of the state's role in not just respecting the autonomy of faith communities, but also in nurturing and supporting them in an even-handed manner.⁴¹ Following along this line, Gonthier J., writing for Bastarache J. and himself in the *Chamberlain* dissent, referred to the preamble as having interpretive weight for a more religiously inclusive conception of the "secular" when he notes that "the preamble to the *Charter* itself establishes that "...Canada is founded upon principles that recognize the supremacy of God and the rule of law."⁴²

The scope and content of s. 2(a) was first articulated in *Big M. Drug Mart*, a leading authority on freedom of religion in Canada. The respondent grocery store, Big M Drug Mart, challenged the Federal *Lord's Day Act*⁴³ that prohibited retailers from carrying on business on a Sunday. The SCC held that since the purpose of the *Lord's Day Act* was to compel religious observance of a sectarian Christian ideal, it violated the religious freedom of non-Christian Canadians under s. 2(a) and was not saved by s. 1. In his reasons, Dickson C.J. expressed the core of religious freedom as follows:

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.⁴⁴

Dickson's language of extending religious freedom only to the point that "such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own"⁴⁵ relies heavily on Mill's harm principle. He continues along Mill's path in writing that freedom of religion is limited to protect "public safety, order, health or morals or the fundamental rights and freedoms of others."⁴⁶ In the Court's analysis, such freedom to manifest one's beliefs free from coercion or constraint is grounded in the inherent dignity and rights of the human person. This concept of "dignity" and the way in which it comes to be interpreted and applied has proven to be a critical question in the evolution of freedom of religion jurisprudence in Canada, most notably in balancing s. 2(a) religious freedoms against s. 15 equality rights of same-sex couples.

Two other important precedents that flow from *Big M Drug Mart* should also be noted. First, Chief Justice Dickson refused to limit s. 2(a) to the content of the freedom as it stood in 1982 or in the *Canadian Bill of Rights*. In doing so, he opened the door to broad judicial discretion as to the content of s. 2(a) that could evolve over time. Any limitations on the scope of s. 2(a) would have to take place under the s. 1 override clause. Second, the formal equality rule that overlooks personal differences in applying equal treatment was rejected in favour of substantive or "true" equality as it relates to religious freedom. Chief Justice Dickson ruled that "[t]he equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment."⁴⁷

41 Bruce Ryder, "State Neutrality and Freedom of Conscience and Religion" (2005) 29 S.C.L.R. (2d) at 176.

42 *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 at para. 137, [2002] 4 S.C.R. 710.

43 *Lords Day Act*, R.S.C. 1970, c. L-13.

44 *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at para. 94, 18 D.L.R. (4th) 421 [*Big M Drug Mart* cited to S.C.R.].

45 *Ibid.* at para. 123.

46 *Ibid.* at para. 95.

47 *Ibid.* at para. 362.

Thus, each individual case will be concerned with the *impact* of the law on different religious groups, which may require differential treatment and a highly contextual analysis.

One year later, Chief Justice Dickson considered a similar question in *Edwards Books*,⁴⁸ a case which challenged the constitutionality of a Sunday-closing law in Ontario. Four Ontario retailers were charged with failing to ensure that no goods were sold on a Sunday contrary to the *Retail Business Holidays Act*.⁴⁹ An exemption existed under s. 3(4) of the Act which allowed stores to open on Sunday if they had been closed on Saturday, with no more than seven employees working and less than 5,000 square feet of retail space to serve the public.

Writing for the majority, Dickson C.J. upheld the Act and its partial exemption as a reasonable limit on freedom of religion under s. 1. In distinguishing *Big M Drug Mart*, Dickson characterized the purpose of the Act as being non-religious, invoking the need for a common day of rest for purely secular reasons. *Edwards Books* shows greater deference to legislatures in emphasizing the reasonableness of the state's objective (giving people a day of rest) over the infringement itself. After having rejected the distinction between belief and action in *Big M Drug Mart*, Dickson also rejected the previously-held distinction between direct and indirect burdens on freedom of religion: "all coercive burdens on religious practice, be they direct or indirect, intentional or unintentional, foreseeable or unforeseeable, are potentially within the ambit of s. 2(a)."⁵⁰ By constitutionally prohibiting indirect burdens that effectively degrade the ability to practice one's religion, *Edwards Books* affirmed *Big M Drug Mart's* broad interpretation of freedom of religion, subject only to the infliction of harm, or the infringement on the rights of others.

Another important chapter in the freedom of religion story is the recent case of *Syndicat Northcrest v. Amselem*.⁵¹ Although it did not deal with same-sex equality claims, the comprehensive legal test and broad interpretation of religious freedom will undoubtedly influence the balancing exercise when such rights collide in the future. The appellants, Orthodox Jews who co-owned units in luxury buildings in Montreal, set up *succahs* on their balconies to fulfill the biblically mandated obligation to dwell in temporary huts during the annual 9-day Jewish festival of *Succot*. They challenged the by-laws in the declaration of co-ownership which prohibited decorations, alterations and constructions on the balconies. In a 5-4 decision, the majority held that the burdens placed upon the appellants constituted a non-trivial interference and thus an infringement of their s. 2(a) rights to dwell in a *succah* during the festival of *Succot*. It also broadly defined religion itself as follows:

In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to his or her self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.⁵²

After *Amselem*, the "value" of a religious belief in the eyes of the Court no longer mattered. What mattered was simply whether the belief was deeply held and integral to the claimant's self-definition. This comprehensive definition, which affirmed religion as integral to identity, was a welcome change from the confused and narrow interpretation in *Chamberlain*.

The majority then established the scope and content of freedom of religion under the Que-

48 *R. v. Edwards Book and Art Ltd.*, [1986] S.C.R. 713, 35 D.L.R. (4th) 1 [*Edwards Books* cited to S.C.R.].

49 Retail Business Holidays Act, R.S.O. 1980, c. 553, s. 3(4).

50 *Edwards Books*, *supra* note 48 at 716.

51 *Amselem*, *supra* note 33.

52 *Ibid.* at para. 39.

bec *Charter of Human Rights and Freedoms* and the Canadian *Charter of Rights and Freedoms* as follows:

freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.⁵³

Thus, *Amselem* stands for the important precedent that a “religious belief” need not be reasonable, objectively held or sanctioned by official dogma, but rather a “sincerely held belief with a nexus with religion.” Once non-trivial interference in a religious belief is established, religious conduct can only be limited if it would potentially cause harm or interference with the rights of others with a view to the underlying context in which the conflict arises.

This legal framework broadening the scope of freedom of religion was affirmed in *Multani*. In a 5-3 decision (Major J. took no part in the judgement), the majority quashed a decision by a public school's council of commissioners to prohibit Multani from carrying a concealed *kirpan* (Sikh ceremonial dagger) to school. Since the religious belief was sincerely held and the burden was non-trivial, Multani's freedom of religion was infringed. The Court held that this prohibition could not be saved by s. 1 since it was not minimally impairing. After the broad interpretation of reasonable accommodation for the particularities of sincerely held religious beliefs in *Amselem* and *Multani*, the SCC appears to be moving in the direction of a more accommodating *modus vivendi*. By seeking to accommodate the greatest number of viewpoints in the public square, we move away from the “winner take all” litigation approach towards genuine diversity and tolerance.

The Same Sex Story: Balancing Religion and Equality Under the Charter

The debate over same-sex rights under the *Charter* has transcended law into the realm of culture, religion, identity and politics. The conflict between same-sex equality and freedom of religion has become the focal point for the competing faces of liberalism, evident in a number of recent cases dealing with civil marriage, freedom of contract and both public and private education. One of the first major cases to balance religious freedom, same-sex equality rights and the civic values articulated by Chief Justice Dickson in *Big M Drug Mart* was *Trinity Western*.⁵⁴ At issue in this case was the refusal of the British Columbia College of Teachers (BCCT) to approve the teacher training program of Trinity Western University (TWU), a private university associated with the Evangelical Free Church of Canada. The BCCT denied the application on the grounds that the student Code of Conduct contained discriminatory practices by having students agree to abstain from “biblically condemned” practices which encompassed “sexual sins...including homosexual behaviour.”⁵⁵ A majority of the SCC overturned the decision of the BCCT for lack of evidence that graduates of the TWU program would be unfit to teach in the public school system. As a result, the Court distinguished the protected *belief* of TWU from the unprotected *conduct* of graduates in the public school system.

Trinity Western implicitly affirmed Mill's harm principle as the most appropriate mechanism to balance competing rights claims. The case was decided in TWU's favour on the absence of evidence that students in the public education system had their rights infringed upon by TWU graduates. Iacobucci J. and Bastarache J. writing for the majority, define the scope of religious

53 *Ibid.* at para. 46.

54 *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772.

55 *Ibid.* at para. 12.

freedom as follows:

Students attending TWU are free to adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others. Their freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society.⁵⁶

In the absence of evidence of tangible harm through the conduct of TWU graduates, the imposition of a symbolic affirmation of homosexuality in a private, religious school would lead us squarely down the path of rational consensus liberalism. TWU does not need to agree with or publicly affirm homosexual conduct to give effect to s. 15 rights. The impetus for including s. 15 in the *Charter* was not to use the law to forge a societal consensus on the “good life.” The premise of this paper is that the judiciary’s duty to intervene is triggered when tangible harm has been caused. If TWU graduates teaching in the public education system were found to be treating homosexual students differently, or substituting their own religious views on homosexuality in place of the curriculum, then a good case could be made for limiting s. 2(a) for infringing on the rights of individual students. However, to proactively restrict *Charter* rights to protect students from an abstract, nebulous notion of potential harm would fail to provide the kind of accommodation of difference and disagreement that lies at the heart of pluralism.

Moving from the private to the public education context, the *Chamberlain* decision further complicated this conflict of rights with the sensitive issue of the role of parents and teachers in early childhood education. Under the *School Act*⁵⁷ of British Columbia, the Minister of Education confers on school boards the authority to approve supplementary education resource material, subject to Ministerial discretion. At issue was the Surrey School Board’s decision not to approve three books depicting same-sex parented families for the family life educational curriculum of Kindergarten – Grade One (K-1) children.⁵⁸ The Board cited the cognitive dissonance and age-appropriateness of such controversial material in light of some parents’ objection to the morality of same-sex relationships. The crux of the case rested upon the interpretation of “strictly secular” and “non-sectarian” requirements of the *School Act*.

McLachlin C.J., writing for the majority, quashed the Board’s resolution for acting outside of its mandate under the *School Act*. According to the majority, the Board violated the principles of secularism and tolerance in s.76 of the Act, departed from its own regulation by failing to consider the relevance of the proposed material and needs of children of same-sex parented families, and applied the wrong criteria by failing to consider the goal that all children be made aware of the diversity of family models in society. McLachlin C.J. measured religious freedoms against the *Charter* values of dignity and tolerance and found that *Charter* values prevailed. Importantly, all nine judges of the SCC affirmed the unanimous B.C. Court of Appeal’s interpretation of “secular” as being religiously inclusive, rejecting the B.C. Supreme Court’s characterization of “secular” as “non-religious” or “not influenced even in part by religion.” This important shift away from an a-religious secularism would later be affirmed in the SCC decisions of *Amselem* and *Multani*.

In a lengthy, strongly worded dissent, Gonthier J. (writing for himself and Bastarache J.) would have deferred to the expertise of the School Board and upheld the resolution on administrative law principles. The lack of a privative clause, the local expertise in balancing interests of different groups, the purpose of the Board’s authority to allow for local input, and the highly contextual and polycentric nature of the analysis all weighed in favour of deference to the

⁵⁶ *Ibid.* at para. 36.

⁵⁷ *School Act*, R.S.B.C. 1996, c. 412, s. 85(2)(b).

⁵⁸ The three books at issue depict parents in same-sex relationships and were submitted for approval as “educational resource material” to be used at the discretion of individual teachers in K-1 classrooms.

School Board. Gonthier emphasized the paramount role of parents in the education of children and the state's secondary role (especially with the K-1 age group), respecting the decisions of local school boards who can take into account contextual factors and the needs of parents.⁵⁹ He joined the majority in criticizing the religiously exclusive interpretation of "secular" espoused by Saunders J. of the B.C. Supreme Court in which one's moral view should not be heard in the public square if it manifests from a religiously grounded faith.

The reasoning in the dissent echoes the *modus vivendi* liberalism articulated by John Gray in seeking peaceful coexistence, as opposed to a rational consensus, on the issue of homosexuality. It is fine if a consensus develops organically as is arguably occurring with the death penalty in Canada. But if we are to be honest with Canada's pluralism of faiths and identities, as well as the very impetus for the liberal state, than it is not the role of the judiciary or the state to impose this societal consensus on a divided public. This is perfectly articulated in Gonthier's dissent:

Nothing in the *Charter*, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy...The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of a modern pluralism.⁶⁰

The true measure of tolerance in a liberal state is found not in our ability to reach a societal consensus along the lines of *Charter* values, but in our ability to live together peaceably in disagreement. This *modus vivendi* was the impetus for the liberal state, and must be reclaimed by liberal theorists, political leaders and judges if it is to hold promise and meaning for increasingly diverse societies in an age of globalization.

From the realm of education to the private sphere, same-sex equality litigation has also had a significant effect upon freedom of contract under provincial human rights legislation. In *Brockie*,⁶¹ a lower-level but oft-cited case from the Ontario Divisional Court, the appellant Scott Brockie challenged an order of the Board of Inquiry of the Ontario Human Rights Commission requiring him to provide printing services to the Gay and Lesbian Archives (GALA) and other organizations existing for the benefit of gays and lesbians. Brockie held the religious belief that homosexual conduct was sinful and while he did serve homosexual *individuals*, he argued that s. 2(a) of the *Charter* protected his religious freedom to refuse service to a gay advocacy organization. The Court found the original order to serve GALA and all related organizations to be overly intrusive in achieving its objectives, but still ordered Brockie to pay the \$5,000 in damages and provide printing services to gay and lesbian organizations unless the specific material came into direct conflict with the core elements of his religious beliefs. Notably, the Court rejected Brockie's distinction between discrimination based on sexual orientation and discrimination based on the political act of promoting the causes of those who have such characteristics.⁶²

As Peter Pound and Iain T. Benson have noted, when it comes to human dignity, the distinction between a person and a cause (or political organization) is important.⁶³ If Brockie had happily served homosexual clients, how does his refusal to support a political organization

59 *Chamberlain*, *supra* note 42 at para. 103.

60 *Ibid.* at para. 137.

61 *Brockie v. Ontario (Human Rights Commission)*, [2002] O.J. No. 2375, 222 D.L.R. (4th) 174, [*Brockie*].

62 *Ibid.* at para. 29.

63 See T. Peter Pound & Iain T. Benson, "Court Overturns Key Aspect of Human Rights Board of Inquiry Decision: Religious Freedom Respected, but Narrowly. Ontario Human Rights Commission v. Scott Brockie," LEX VIEW, No. 51 (2002), online: Centre for Cultural Renewal <<http://www.culturalrenewal.ca/qry/page.taf?id=53>>.

and lobby group on religious grounds infringe upon the rights of GALA? If GALA faced undue hardship in its reasonable accommodation of Brockie's religious beliefs (to use the language of human rights legislation), they might well satisfy the harm principle and thus limit Brockie's freedom of religion. If, on the other hand, any other printer in Toronto could provide the same services, it would be difficult to prove tangible harm and compel Brockie to act against his religious beliefs. In fact, the Canadian Civil Liberties Association intervened in *Brockie* at the Divisional Court level and argued that there was no valid ground to impose a supposed "state policy" of advancing the "visibility" of gays and lesbians over the beliefs of a citizen such as Brockie to express his own beliefs in the public square.

In 2003, *EGALE Canada Inc. v. Canada (A.G.)*⁶⁴ was the first of a series of cases across the country that expanded the common law definition of marriage to include same-sex couples. At the time, only Holland, Belgium and Spain had legalized same-sex marriage. In a rapid and radical transformation, the *EGALE* decision was followed by the Ontario Court of Appeal in *Halpern v. Canada (A.G.)*⁶⁵ and the Quebec Court of Appeal in *Hendricks c. Quebec (P.G.)*⁶⁶. By 2005, same-sex marriage was legal in all other provinces and territories except for Alberta, P.E.I., Nunavut and the Northwest Territories. In a controversial policy move, the federal government did not appeal any of the decisions, and instead referred draft legislation to the SCC following the *Reference Re Same Sex Marriage*.⁶⁷ This led to the enactment of the *Civil Marriage Act*⁶⁸ in July 2005, which extended the right of civil marriage to same-sex couples across the country.

In the landmark *Halpern* decision, the Court held that the common law rule in *Hyde v. Hyde*⁶⁹ which prescribed marriage as a union between a man and a woman violated s. 15(1) of the *Charter* by denying homosexual couples access to the regulatory regimes that govern and constitute marriage at law. The Ontario Court of Appeal found that the human dignity of same sex couples had been violated by the discriminatory effect of the formal distinction based on sexual orientation and this could not be saved under s. 1. Accordingly, the existing definition was declared invalid and was reformulated as "the voluntary union for life of two persons to the exclusion of all others."⁷⁰ The same-sex trilogy of cases and the piece meal evolution of the common law that followed forced the federal government's hand in enacting the *Civil Marriage Act* on a fiercely divided public in the name of *Charter* rights.

PART III: IN GOOD FAITH TO WHOM? RECONCILING COMPETING SOURCES OF AUTHORITY

As the case law has shown, the Canadian state is now conceived, in popular and constitutional discourses, as officially "secular" yet supportive of religious pluralism and multiculturalism.⁷¹ Religious freedom has been given a wide interpretation, subject only to potential interference in the rights of others. In contrast to the US position at law of an impregnable wall

64 *EGALE Canada Inc. v. Canada (Attorney General)*, [2003] 225 D.L.R. (4th) 472, B.C.J. No. 994 [*EGALE* cited to D.L.R.]. Following the *Halpern* decision, the British Columbia Court of Appeal issued another ruling in July 2003 lifting the stay it had put on the government in its earlier decision to prevent the unequal application of the law between Ontario and British Columbia.

65 *Halpern v. Canada (Attorney General)*, [2003] 225 D.L.R. (4th) 529, O.J. No. 2268 [*Halpern* cited to D.L.R.].

66 *Hendricks v. Canada (Attorney General)*, [2004] 238 D.L.R. (4th) 577, Q.J. No. 2593 [*Hendricks* cited to D.L.R.].

67 *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698.

68 *Civil Marriage Act*, S.C. 2005.

69 *Hyde v. Hyde*, 1866 C.C.S. No. 30, L.R. 1 P. & D. 130.

70 *EGALE*, *supra* note 64 at para. 18.

71 Ryder, *supra* note 41 at 169. Ryder examines Canadian political traditions, constitutional texts, and jurisprudence regarding church and state, to distinguish Canada's position of neutrality *between* religions with the American constitutional requirement of neutrality *about* religion. In the former, the state can aid religion so long as it does so in a manner that respects the principle of neutrality or even-handedness between religions. In the latter, the state is constitutionally pre-empted from enacting laws regarding the establishment of religion.

between church and state, the Canadian position is more nuanced. While there is an underlying separation of church and state, Canada's approach to multiculturalism has been translated into a fostering of religious expression and conduct, provided that it is done in a neutral, even-handed manner.

We have only to look at our comparative constitutional elements to explain this difference. According to the First Amendment of the United States Constitution (1791), "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof".⁷² This non-establishment clause stands in marked contrast to the *Charter* Preamble, which recognizes both the supremacy of God and the rule of law. The reconciliation of sacred and secular sources of authority, coupled with Canada's commitment to nurture communities of faith in an even-handed manner, is no simple task for Canada's increasingly pluralistic society of diverse faiths, cultures and identities.

Early *Charter* cases established an expansive definition to religious freedom in an attempt to foster religious practice in an even-handed manner, yet religious values are ultimately evaluated against the values of the rational, non-religious actor, articulated in Canada as the constitutional rule of law. When such worldviews collide in a conflict of rights, religious 'choice' will be only be accepted in belief not action (*Trinity Western*), private not public (*Big M Drug Mart*), or if in public, only in accordance with *Charter* values (*Chamberlain*). This is a problem that Chief Justice McLachlin, Jean Bethke Elshain, Iain T. Benson, Bruce MacDougall and Benjamin Berger have all attempted to resolve by finding the proper balance between religious freedom and the 'secular' rule of law.

Religion and the Rule of Law: A Dialectic of Citizens or Normative Commitments?

Chief Justice McLachlin's article entitled "Freedom of Religion and the Rule of Law: A Canadian Perspective"⁷³ offers us a rare glimpse into the reasoning underlying decisions of the SCC. Far from a cloistered, modest perspective, McLachlin C.J. makes the bold assertion, borrowed from Yale professor Paul Kahn, that the rule of law "makes total claims upon the self and leaves little of human experience untouched."⁷⁴ As religion exerts a similarly comprehensive claim, the law must assert its own ultimate authority while carving out a space for individuals and communities to manifest alternative, often competing, sets of ultimate commitments.

This view demonstrates a "dialectic of normative commitments" which McLachlin C.J. explains as follows:

What is good, true, and just in religion will not always comport with the law's view of the matter, nor will society at large always properly respect conscientious adherence to alternate authorities and divergent normative, or ethical, commitments. Where this is so, two comprehensive worldviews collide...It is the courts that are most often faced with this clash and charged with managing this dialectic.⁷⁵

This language of "total claims upon self" echoes what was once the exclusive realm of metaphysical claims of complete submission to this ultimate authority. As Iain T. Benson has noted, this worldview positions law as "capable of determining not only what is just but what is 'good'

72 U.S. Const. amend. I.

73 McLachlin, C.J.C., *supra* note 26 at 12.

74 *Ibid.* at 16.

75 *Ibid.* at 21-22.

and 'true'.⁷⁶ The definition and imposition of the "common good" as a sort of objective truth is precisely what liberalism was reacting against. Individual autonomy, not societal consensus as dictated by the state or judiciary, is liberalism's true vehicle for self-fulfillment and the determination of what is "good" and "true." The irony is that the very same liberal values are used by the Chief Justice as a justification of the absolute comprehensiveness of the rule of law.

In her response to Chief Justice McLachlin, political philosopher and ethicist Jean Bethke Elshtain questions this characterization of religion and the rule of law as a dialectic of normative commitments. Instead of assuming that law is a comprehensive worldview capable of managing this dialectic, Elshtain views the adversarial legal system as a last resort. Her alternative to McLachlin's "clash of commitments" can be summarized as follows:

I believe that the 'dialectic of normative commitments'...is (or should be) primarily a dialectic of *citizens*, variously located, through a culture of democratic argument: citizens engaging one another and sorting things out, as often they will, in a rather untidy, rough and ready way.⁷⁷

Elshtain's view of the goods at stake are not totalistic religious or legal goods, but more complete understandings of a *public* good, variously derived. Instead of reducing differences of opinions to the rights trump card in the adversarial courtroom, the Courts should take a more modest approach and allow the pluralism of the public sphere to flourish free from pre-emptive adjudication. Only when that pluralism inflicts tangible harm on other groups and individuals should the courts intervene. This "dialectic of citizens" would necessarily take place in the realm of civil society, which I will analyze in greater detail in Part IV.

Elshtain also correctly notes that "religious faith is not a private matter: it is constitutive of a form of public membership in a church, temple, synagogue, or mosque."⁷⁸ Religious adherents⁷⁹ cannot leave their faith at the gate when they enter the public square. Elshtain's views of the totality of religion are echoed by Benjamin Berger:

When religious conscience is properly understood as a pervasive claim upon the lives of believers, a liberalism that demands the severance of moral claims and political positions and a vision of secularism that requires an a-religious public space are irreconcilable with the freedom of religion accorded by the *Charter*.⁸⁰

To the devout adherent, religious belief infuses all aspects of being. It flows from a divine authority and at the same time "asserts the complete pervasiveness of this transcendent principle."⁸¹ Liberalism's fundamental flaw is that while it tolerates different worldviews, it ultimately asserts its superiority over them. It fails to recognize that adherence to a faith community, whether it be religious or non-religious, is more than an individual choice in the rational liberal exercise; it is another valid way of experiencing reality. It is deeply tempting for all of us who view the world through a liberal lens to see religion, like every other decision in life, as a matter of individual choice. However, this approach is blind to the deeper issues at play. When

76 Iain T. Benson, "The Context for Diversity and Accommodation in the Democratic State: The Need for a Re-evaluation of Current Approaches in Canada" (August 2006) online: Centre for Cultural Renewal <http://www.culturalrenewal.ca/downloads/sb_culturalrenewal/BENSONPaperPresentedatCBA.pdf> at 12, as presented at the Canadian Bar Association National Conference in St. John's Newfoundland, August 13 - 15, 2006.

77 Jean Bethke Elshtain, "A Response to Chief Justice McLachlin" in *Recognizing Religion*, *supra* note 26 at 39.

78 *Ibid.* at 38.

79 I use "adherents" instead of the misleading term "believers" as all thinking individuals are "believers" in something, whether it be religious or not. See Iain T. Benson, "Notes Towards a (Re)definition of the Secular" (2000) 33 U.B.C L. Rev. 519.

80 Berger, *supra* note 19 at 67.

81 *Ibid.* at 46.

we measure an irrational, divine source of authority against objective reason in the form of the rule of law, the decision is an easy one. This flawed assumption means that the terms of the debate are already decided before religious groups even get to court. However, by failing to understand the values underlying the constitutional rule of law and liberalism itself, we fail to see law and religion for what Berger has described as a “cross-cultural encounter.”⁸²

Understanding the “Secular”

Central to the debate at hand is the way in which basic terms like “secular” are defined and understood. Iain T. Benson has written extensively on the use (and misuse) of “secular” and “secularism” which are frequently cited in defining the contours of law and politics in Canada.⁸³ According to Benson, the “secular” has come to incorrectly signify a realm that is neutral or “religion-free,” something which poses a challenge to all religions. He critiques the *Chamberlain* decision’s confused understanding of a-religious “secularism” and the religiously inclusive “secular”:

Its confusion about secularism led to practical results that did not so much uphold diversity as undermine it. Contrary to the court’s own principles, the *Chamberlain* decision produced a rank-ordering of rights in which the sexual dogma of same-sex advocates effectively trumped all challengers, including those of parents with religious convictions about their children’s education.

By delving into the historical uses of the term “secular,” Benson explains that the Roman Catholic distinction between “secular” and “religious” is purely jurisdictional in the sense that “secular clergy” served in the world (ie. parishes) and “regular clergy” were those who lived according to a “rule” (ie. those who took vows of poverty and obedience) and served outside of the parish.⁸⁴ From these religious origins, the concept of secularism has become a belief system or faith unto itself. Its purported neutrality and objectivity is dangerously misleading, as it has been elevated to a new form of sectarianism which places explicit belief systems at a marked disadvantage in politics, public education and law itself.

Benson advocates for a religiously inclusive view of the state which is not run or directed by a particular religion, but aims to develop a notion of moral citizenship with the widest involvement of religious *and* non-religious faith groups:

A proper understanding of the secular, however, will seek to understand what faith claims are necessary for the public sphere, and a properly constituted secular government (non-sectarian not non-faith) will see as necessary the due accommodation of religiously informed beliefs from a variety of cultures.⁸⁵

By correctly understanding the “secular” as non-sectarian as opposed to non-faith, the terms of the debate, whether they be in the courtroom, classroom or public square, are enlarged to not simply tolerate, but to better understand, and seek guidance from, Canada’s diverse faiths. However, if religious expression goes completely unchecked by the judiciary in the name of pluralism, there is a danger of tacitly encouraging and accepting religious extremism, preaching hatred and the infliction of tangible harm on others in the name of a superior metaphysical

82 *Ibid.*

83 See Iain T. Benson, “Considering Secularism” in *Recognizing Religion*, *supra* note 26 at 83-98, and “The Freedom of Conscience and Religion in Canada: Challenges and Opportunities,” (2007) 21 *Emory Int’l L. Rev.* (2007) at 151-161.

84 Elshain, *supra* note 77 at 537-8.

85 *Ibid.* at 520.

claim to truth.

If Benson's perspective is one of largely unmitigated pluralism that hopes for a much more modest, deferential SCC in regards to religious groups and civil associations, then Bruce MacDougall presents the opposite view. MacDougall compares the distinctions of heterosexual and homosexual rights made by the SCC in *Trinity Western* and the B.C. Court of Appeal in *Chamberlain* (which was overturned in certain aspects on appeal at the SCC) and the refusal of marriage commissioners to officiate at same-sex civil marriages to similar, yet unacceptable distinctions based on race or gender. On the marriage commissioner issue, he argues that it is constitutionally inappropriate to accommodate religious freedom in that it would deny equality of access for same-sex couple through the use of a "religious veto."⁸⁶ In any other competing rights claim in the public sphere, MacDougall argues that freedom from discrimination on the basis of sexual orientation should prevail over religious sensibilities, though he is quick to say that this does not set up a hierarchy of *Charter* protections. In marked contrast to Benson, MacDougall posits that "in order for true equality to exist, the members of a group must not be shown just compassion and condonement, but must be *celebrated* by the state"⁸⁷ (emphasis added). In sum, the full realization of dignity based on s. 15 rights not only requires equal treatment, but the public affirmation of homosexuality by the Canadian state and judiciary. The values of "tolerance" and "equality" would therefore become the vehicles for imposing a societal consensus on a divided public in the name of *Charter* values.

The flaw in MacDougall's analysis is in the belief that greater social cohesion and understanding will flow from imposing this consensus in the name of dignity and the public affirmation of homosexuality. By relegating the dissenters to the private sphere, MacDougall fails to tackle the problem head on (ie. through dialogue, civil society and Elstain's "dialectic of citizens") and compounds the lack of understanding and fragmentation of Canadian society. Lastly, MacDougall takes issue with the religious characterization of homosexuality as an issue of morality, arguing that such moralities of aspiration are not well suited to legal adjudication in a secular world. I would argue that different individual moralities of aspiration are *exactly* what are needed to reflect and affirm genuine tolerance and a plurality of worldviews in the public sphere.⁸⁸

Somewhere in between Benson's religiously inclusive conception of the state and MacDougall's public affirmation of *Charter* values is Benjamin Berger's view of increased cultural pluralism in the public sphere, subject only to the "civic values" of security, dignity and autonomy. Berger writes that conventional approaches to liberalism and secularism have intensified the challenge of reconciling freedom of religion in a secular polity by providing a misguided vision of an a-religious and hyper-rational public space devoid of moral commitments.⁸⁹ He goes on to describe the constitutional rule of law and religious freedom as a distinctly "cross-cultural encounter". Berger criticizes the fact the rule of law has been positioned as *the* arbiter of competing worldviews when rights collide, instead of a participant in a pluralistic public sphere. Accordingly, his solution to the doctrinal requirements of religion and law is "the invocation of a core set of civic values – the values that will guide liberalism and mediate pluralism."⁹⁰

While this language of civic values appears to strike a balance between religious freedom and the security, autonomy and dignity of the individual, the interpretation of these broad, ill-defined "values" has the potential to lead us back down the path of convergence. By elevating

86 Bruce MacDougall, "Refusing to Officiate at Same-Sex Civil Marriages" (2006) 69 Sask. L. Rev. 351 at 361.

87 *Ibid.* at 359 [emphasis added].

88 See also Geoffrey Trotter "The Right to Decline Performance of Same-sex Civil Marriages—A Response to Professor Bruce MacDougall" (2007) 70 Sask. L. Rev. 2 at 365.

89 Berger, *supra* note 19 at 67.

90 *Ibid.*

certain rights as *Charter* or civic “values,” it imposes a “one size fits all” remedy when rights collide. The judicial treatment of dignity illustrates this vague and potentially overbroad application.⁹¹ If dignity were interpreted to mean public affirmation of homosexuality (as MacDougall has argued), then failure to affirm such dignity in the public sphere would leave little room for disagreement. In an indirect way, Berger’s language of “civic values” could be used to impose a societal consensus and strip the public sphere from the cultural and religious pluralism he espouses. According to Benson:

If citizens (religious and non), continue to attempt to speak to surrounding cultures in confused language (such as by misusing the term “secular” or using the pseudo-moral language of “values” when they mean an objective category of truth and meaning), they will never succeed in communicating those matters that are deepest and most essential to citizenship and culture.”⁹²

Only by identifying and challenging some of the normative assumptions of underpinning the law, can we create a public sphere that accommodates a diversity of faiths, identities and cultures. However, the point of this paper is that pluralism should be mediated by the harm principle, not by civic values that can unwittingly bind liberalism to a rational consensus.

PART IV: LIBERALISM UNBOUND: TOWARDS A MORE INCLUSIVE PUBLIC SPHERE

Liberalism needs to be reclaimed. Imposing a societal consensus as to the common good based on ill-defined “*Charter* values” flies in the face of liberalism’s *raison d’être* and the *modus vivendi* principles that should guide a pluralistic society. Borrowing heavily from Kant, Hannah Arendt offers guidance with her theory of judgement based on an “enlarged mentality.”⁹³ It maintains that judgement is distinct from provable truth claims because it involves the act of reflecting on a matter from the perspective of others. Since judgement is seen as inherently subjective, it cannot compel others in the same way as an objective truth. We see these same ideas reverberating in Charles Taylor’s discussion of the normative “good” and John Gray’s principles of *modus vivendi*.

Far from being universal, liberalism’s exclusive focus on the individual is a relatively recent phenomenon that is grounded in the unique circumstances of the West. The ultimate supremacy of the individual and “secular reason” is deeply problematic for Aboriginals, ethnic groups in an increasingly multicultural landscape, and the millions of Canadians who cannot simply relegate their faith to the private sphere. But even the most pluralistic, accommodating liberalism is not a panacea. Since the courts and the state reason from a liberal paradigm with its faith in rationalism, skepticism, individualism and objectivity, liberalism is not seen as an ideology or cultural system in itself, but rather *the* impartial arbiter of ideological or cultural encounters in the public sphere. When rights collide, religion must ultimately “listen to reason.”⁹⁴

Applying *Charter* values should not mean relegating “dissenters” to their own private realms. Human dignity and religious accommodation are not mutually exclusive. The impact of litigating these polarizing positions in a “winner take all” courtroom is felt by more than just some irate fundamentalists. By stripping away religion from the public sphere, diversity is subtly transformed into fragmentation. When ethnic and religious groups are alienated in an

91 It is ironic that in a liberal state so skeptical of the official sanctioning of certain moral claims, select “values” like security, dignity and equality have been used as the measuring stick for all other moral claims or religious beliefs.

92 Elshain, *supra* note 77 at 546.

93 Ronald Beiner, ed., *Hannah Arendt, Lectures on Kant’s Political Philosophy* (Chicago: University of Chicago Press, 1982).

94 Paul Horwitz, “Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond” (1996) 54 U. Toronto Fac. L. Rev. 2 at 24.

a-religious and a-cultural public sphere (ironically, in the name of greater integration), such groups withdraw into their own ghettoized communities. If there is no space in the public sphere for moderate religion, it will retreat into greater extremism, stereotyping and lack of understanding. To take a recent example from Quebec, if Muslim girls are not allowed to play soccer while wearing the hijab for so-called safety reasons, they will simply stop (or be forced to stop) playing the game entirely.⁹⁵ If elements of *sharia* law are not allowed to co-exist in family law arbitrations and tribunals, such disputes will disappear into the dark corridors of the private sphere, far from the scrutiny, accountability and civic value of the public sphere.⁹⁶ If children of deeply religious families are faced with a public school system that does not accommodate certain views on early childhood education, the proliferation of home schooling and private, religious education could be close behind. This would have disastrous consequences for the public school system, not just financially, but in terms of the fundamental civic lessons of understanding, compromise, debate and respect for difference.

To avoid this problem with the vague language of civic values, I have argued for a more accommodating form of liberalism limited only by Mill's harm principle. This principle was affirmed by Dickson, C.J. in *Big M Drug Mart* and *Ross v. New Brunswick School District No. 15*⁹⁷ where the Court stated that an individual's freedom to express one's religious beliefs "is restricted by the right of others to hold and to manifest beliefs and opinions of their own, and to be free from injury from the exercise of the freedom of religion of others."⁹⁸ Without elevating certain vague 'civic values' above all others (be they religious or not), it allows for a more clearly defined and modest balancing of competing rights in the public sphere. Viewing the same-sex marriage debate through the harm principle would go a long ways to pre-empt the valid criticisms of the courts imposing a rational consensus in the name of *Charter* values. It would be much more difficult to demonstrate the tangible harm inflicted on heterosexual couples by extending civil marriage to same-sex couples, especially considering the exemption in the *Civil Marriage Act* for religious marriage, which allows officials of religious groups to refuse to perform same-sex marriages.

In *The Collapse of the Harm Principle*,⁹⁹ Bernard Harcourt deconstructs the normative dimensions of the harm principle to show how it has been widely used in the United States for the de facto enforcement of morality. He illustrates how the harm principle has justified the regulation of pornography, prostitution, disorderly conduct, homosexuality, intoxication, drug use and fornication in support of a conservative agenda.¹⁰⁰ Harcourt argues that the pervasive claims of harm and the lack of principled guidance in resolving them, has led to the collapse of Mill's harm principle as a *critical principle*. The question for this paper is how the harm principle can avoid the traps of the civic or *Charter* values argument that impose a societal consensus based on this purportedly objective moral compass.

While Mill's harm principle remains a useful analytical device,¹⁰¹ it needs to be updated in order to falling into the same trap of overbroad, all-encompassing *Charter* values. Our concep-

95 See "Muslim Liberals Decry Charest's Stand on Soccer Hijab", *CBC News* (27 February 2007), online: <<http://www.cbc.ca/canada/montreal/story/2007/02/27/qc-soccerhijab20070227.html>>.

96 See Marion Boyd, "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion" (20 December 2004), online: Ontario Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/>> and Eli Walker, "Don't Throw Out my Baby! Why Dalton McGuinty was Wrong to Reject Religious Arbitration" (2006) 11 Appeal 94 - 105.

97 *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, 133 D.L.R. (4th) [Ross cited to D.L.R.].

98 *Ibid.* at para 72.

99 Bernard Harcourt, "The Collapse of the Harm Principle" (1999) *J. Crim. L. & Criminology* 181.

100 *Ibid.*

101 Note that Mill always considered harm to be a necessary, but not sufficient condition for legal enforcement. By interpreting harm through the lens of rights infringement and along *modus vivendi* principles, its overbroad application that Harcourt critiques is limited.

tions of “harm,” like any other justification for law, will be heavily influenced and limited by its cultural context. Many would argue that the harm principle is simply one step removed from the normative assumptions that underlie the *Charter* values approach. Indeed, abstract notions of harm have the potential to justify a paternalistic state, overzealous judiciary and distinctly illiberal approach of legislating morality.

However, by looking at harm through the lens of our contemporary, rights-based democracy, we begin to see rights as the deliberative markers of harm. When rights collide, they should be limited by their degree of infringement on the rights of others. While rooted in the harm principle, this mechanism of reconciling competing rights claims will only legally prohibit harm if tangible infringement can be established. By doing so, it limits the scope of the harm principle and avoids its overbroad application along Harcourt’s examples of indirect or abstract harm. This rights-based interpretation of the harm principle also provides for a more accommodating, inclusive public sphere in mediating competing rights claims.

This was the approach taken in *R v. Labaye*,¹⁰² commonly known as the Montreal swingers club case. In *Labaye*, the accused was charged with keeping a common bawdy-house for the practice of acts of indecency under s. 210(1) of the Criminal Code. The accused operated a club in Montréal the purpose of which was to permit couples and single people to meet each other for group sex. Only members and their guests were admitted to the club. On appeal, the conviction was overturned with a 7 – 2 majority judgement that adopted Mill’s harm principle for criminalization of conduct. The test for indecent criminal conduct was established as follows:

In order to establish indecent criminal conduct, the Crown must prove beyond a reasonable doubt that two requirements have been met. The first is that by its nature the conduct at issue causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws by (a) confronting members of the public with conduct that significantly interferes with their autonomy and liberty, (b) predisposing others to anti-social behaviour, or (c) physically or psychologically harming persons involved in the conduct. The categories of harm capable of satisfying the first branch of the inquiry are not closed. The second requirement is that the harm or risk of harm is of a degree that is incompatible with the proper functioning of society. This two-branch test must be applied objectively and on the basis of evidence.¹⁰³

Since participation was voluntary and equal, none of the three categories of prohibited harm (which, the Court noted, were not closed categories) mentioned above were found to have occurred.

Notably, the SCC rejected the community standards test as being too subjective in favour of the more objective harm principle. In doing so, it overturned its earlier rejection of the harm principle in *R v. Malmo-Levine*.¹⁰⁴ McLachlin, C.J.C., writing for the majority, explains the shift as follows:

102 *R v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728. For commentary on *Labaye* and the harm principle, see Peter Lauwers and Iain T. Benson, “Swingers Clubs” *R v. Labaye*, LEX VIEW, No. 56 (2005), online: <<http://www.culturalrenewal.ca/qry/page.taf?id=114>>.

103 *Ibid.* at para. 62.

104 *R v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571. In this case, a s. 7 challenge to the constitutionality of the criminal code provisions against marijuana possession under was dismissed. The law was found to be neither arbitrary nor irrational, and the larger public policy question over decriminalization was left for Parliament to decide. Notably, the harm principle was rejected as a legal principle or a principle of fundamental justice for failing to meet the standard of a “significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.”

Historically, the legal concepts of indecency and obscenity, as applied to conduct and publications, respectively, have been inspired and informed by the moral views of the community. But over time, courts increasingly came to recognize that morals and taste were subjective, arbitrary and unworkable in the criminal context, and that a diverse society could function only with a generous measure of tolerance for minority mores and practices. This led to a legal norm of objectively ascertainable harm instead of subjective disapproval.¹⁰⁵

This is a marked shift, as it appears to prohibit Parliament from legislating based on social morality and criminalizing ‘victimless’ crimes. This approach echoes Mill’s conception of liberalism where the only justification for power over a member of the community (or a limitation on individual rights) is the protection from harm. Gray’s principles of *modus vivendi* are also at play here, in that differing views on morality are accepted in an understanding of tolerance as a condition for peace and diversity.

By viewing harm through the lens of the “Constitution or similar fundamental laws” and establishing a more objective, evidence-based standard, *Labaye* goes a long way in addressing Harcourt’s critique of the overbroad application of the harm principle. Our democratic institutions, through the language of rights, provide guidance for a more modest judiciary, to intervene only when rights have been infringed, as opposed to a proactive imposition of normative “*Charter* values” upon a divided public. Like any justification for law, there will always be a subjective element in delineating criminally prohibited harm and the infringement of rights in the public sphere. However, if we are honest with these limitations and develop a better sense of what can be reasonably expected from a liberal state, this view of the harm principle can provide clearer guidance for the mediation of pluralism.

From the Courtroom to Civil Society to Modus Vivendi: Renewing Pluralism

Accommodation of difference lies at the very core of civil society, defined by Elstain as “the many networks, institution and relationships that lie, to a great extent, beyond the purview of the state’s writ in a pluralistic, constitutional order.”¹⁰⁶ In a diverse, multicultural polity like Canada, civil society creates and maintains a shared social fabric. This is the realm in which citizens grapple with divergent views, conflicting rights and the pragmatic realities of a *modus vivendi* on a daily basis. Structurally speaking, civil society appears to be better equipped to sort out differences than the adversarial, winner-take-all litigation system. By developing civic skills of compromise, stewardship, understanding and debate, civil society can play an educative role that our legal system is unwilling, and often unable, to play. Of course, our courts should continue to intervene when harm is inflicted or rights are infringed in the civil society setting. However, it should be take a more modest approach when it reaches its inherent limits as to dialogue, compromise and cross-cultural understanding.

This hybrid space incorporating both public and private spheres is fragile and could be seriously threatened if we impose the rigid separation of church and state rather than call for their cooperation. Too often we create false dichotomies between the rule of law and the supremacy of God as opposed to looking at the vast areas of commonality between *Charter* values of dignity, equality, security and autonomy and religious values like grace, humility, forgiveness, and charity. When these worldviews do in fact collide, the debate is better served in the public sphere or in civil society than in the adversarial courtroom. As I have argued, the courts should adjudicate as a last resort where the “dialectic of citizens” has failed and harm is being inflicted on an individual. Whether it be compelling marriage commissioners to officiate at same-sex

105 *Ibid.* at para. 14.

106 Elstain, *supra* note 77 at 38.

marriages, ordering printing companies to print the materials of gay advocacy groups or refusing to accredit education programs at private universities who disagree with homosexuality, preemptively legislating or ruling in the abstract leads us down the road to Gray's rational consensus liberalism. Let the balancing take place when rights actually collide, not at the proactive, symbolic rights affirmation stage.

Joseph Cardinal Bernardin¹⁰⁷ posited three ways in which religion plays a vital public role: in contributing to civil society through religiously based institutions in education, health care, and family services; in direct outreach to the poorest members of society; and in the realm of civic and moral formation as religion teaches service to one's neighbours and a sense of civic stewardship.¹⁰⁸ The contribution of religious groups to public life is impossible to measure and well beyond the scope of this paper. However, the civilizational antecedents and moral compass that have infused our laws, policies and institutions for hundreds of years are rooted in the Judeo-Christian moral tradition. Charities, non-governmental organizations, volunteer associations and community groups are heavily populated by religious individuals and groups. Principles such as grace, forgiveness, charity and redemption that have infused our common ethos are profoundly rooted in, and many would argue, maintained by, religion. We should be aware and unashamed of that by accepting and fostering religious freedoms, subject only to their infringement of the rights of others, as was the case in *Amselem* and *Multani*.

Let me come back to where I began in considering the issue of compelling marriage commissioners to officiate at same-sex marriages. Solemnization is a provincial responsibility and different provinces have reacted to the *Civil Marriage Act* in different ways (the Act itself leaves open the door as to ways of accommodating religious objections to performing same-sex marriages). For many same-sex activists, the dignity requirement of s. 15 requires symbolic, public affirmation in compelling marriage commissioners to officiate at same-sex marriages irrespective of their religious beliefs. According to Bruce MacDougall, accommodating the religious beliefs of marriage commissioners would create a "religious veto" over the availability of a public service and run contrary to legal authority that protects equality based on sexual orientation.¹⁰⁹

The issue here is not as simple as whether gay and lesbian Canadians should be afforded their *Charter* rights or not. The question is whether public affirmation and celebration of same-sex marriage, in the form of proactively compelling marriage commissioners, is necessary to satisfy the dignity requirement of s. 15. However, as with so many of these "conflicting rights" and false dichotomies of law versus religion, there is a middle ground which can offer a way of respectfully living together in disagreement better than the "one size fits all" approach proposed by MacDougall and others.

First, this conflict between same-sex couples and marriage commissioners would likely occur only in a fraction of cases as same-sex couples would not want to be married by someone who fundamentally disagrees with their way of life, especially considering the places where such religious objections would be most prevalent. Second, in those select cases where this conflict would occur, a more accommodating administrative solution exists. The provincial government would have an obligation to find a marriage commissioner who would be willing to officiate. This step could very well be done subtly and proactively on an administrative level to avoid the situation where marriage commissioners who have religious objections would be asked to perform such a marriage. Third, all future marriage commissioners would be compelled to officiate at same-sex marriages, thus 'grandfathering' the existing marriage officials. Fourth,

107 Cardinal Joseph Bernardin was an American prelate of the Roman Catholic Church who served as Archbishop of Chicago from 1982 until his death in 1996.

108 Elshain, *supra* note 77 at 38.

109 MacDougall, *supra* note 86 at 361.

if this administrative solution fails and a *Charter* challenge arises, then the SCC would balance the dignity of the same-sex couple under s. 15 with the religious freedom of the marriage commissioner under s. 2(a) in a contextual, fact-specific analysis. However, by legislating in the abstract to solve a problem that will rarely, if ever, arise, we unnecessarily antagonize both groups. In doing so, “tolerance” becomes a vehicle for convergence which defeats its very purpose, namely, the accommodation of a diversity of worldviews.

The tendency to cast the debate in black and white terms as being either anti-religious or anti-gay alienates both and corrodes the social fabric of civil society. In the name of liberal “tolerance,” dignity” and “*Charter* values,” there is the potential of oversimplifying the “clash of commitments” (to use the language of Chief Justice McLachlin) leading to a stripping away of the genuine tolerance and pluralism that liberalism was originally conceived to protect. What is at stake here is not the alienation of some fundamentalist sects, but an array of religious adherents who play a critical role in civil society groups across the country. Indeed, a far more honest and effective means of confronting perceived intolerance is not to hide it away in the private realm of churches, religious schools and homes, as the disciples of secularism are attempting to do, but to confront it, debate it and try and understand it under the scrutiny of public schools, civil society institutions and political debate. Simply relegating divergent views to the private sphere in the name of a societal consensus will, in addition to stifling important debates on questions of the day, further fragment the civic fabric of Canadian society. Scattered islands of faith communities (whether they be religious, non-religious or cultural as they all share a sincerely-held *faith* in something) do not constitute a pluralistic public sphere, but rather a way to live *apart* in disagreement, leaving all sectors of society impoverished.

The realm of civil society is precisely where Arendt’s “enlarged mentality” can flourish. When we reflect on this matter from the perspective of others, aware of the profoundly cross-cultural encounter saddled with all of its normative assumptions, the debate is transformed from a rigid, rational consensus to a culture of genuine tolerance and diversity. In affirming the complexity of identity and embracing the value of difference, we give reasons for minority groups and divergent religious faiths to reciprocate such tolerance and participate actively in civil society. History has shown that both the religious and non-religious have been, and can be, guilty of a “diminished mentality.” The best setting in which to combat such intolerance, whether it be religious fundamentalism, radical secularism, or other extremist views, is in an enlarged public sphere. Our *modus vivendi*, or how we live together in disagreement, will be the central challenge for Canada’s ever-changing, multicultural society.

ARTICLE

INSIDIOUS IDOLATRY: CANADA'S ABORIGINAL LEADERS AND THE LEGAL WHIPLASH

By Johnny Van Camp*

CITED: (2008) 13 Appeal 51-73

"And our interest increases when we discern in the unhappy wanderer the germs of heroic virtues mingled among his vices, a hand bountiful to bestow as it is rapacious to seize, and even in the extremist famine, imparting its last morsel to a fellow sufferer; a heart which, strong in friendship as in hate, thinks it not too much to lay down life for its chosen comrade; a soul true to its own idea of honor, and burning with an unquenchable thirst for greatness and renown."¹

PROLOGUE²

Just after midnight on March 22, 2006, members of the Gitga'at First Nation in the community of Hartley Bay, on the coast of British Columbia, overheard an emergency transmission from B.C. Ferries' *Queen of the North*. Onboard were 101 souls and a number of vehicles. The *Queen* had missed a critical course change after exiting the Grenville Channel and was cruising just under its maximum speed of 20 knots before it slammed into the shore of Gil Island. Passengers sleeping in their cabins were immediately awakened by an ominous metallic shriek as the rocks ripped the hull from stem to stern. Preparations for abandoning the *Queen* began immediately.

Without hesitation, the community sprang into action. In the dead of the cold dark and

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1 Francis Parkman, *The Conspiracy of Pontiac and the Indian War After the Conquest of Canada: To the Massacre at Michillimackinac*, vol. 1 & 2 (Nebraska: Bison Books University of Nebraska Press, 1994) at 44 [Parkman].

2 The prologue was compiled from numerous news stories that have reported from various angles on the *Queen of the North's* accident on March 22, 2006. The ones I found most compelling include: Iona Campagnolo, "Presentation to the Village of Hartley Bay" (5 May 2006), online: Office of the Lieutenant Governor <http://www.lt.gov.bc.ca/whatsnew/sp/sp_may03_2006.htm>; "Hartley Bay residents in heroic rescue operation" *CTV* (23 Mar. 2006), online: *CTV* <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060323/rescue_ferry_060323/20060323/>; Gerry Bellet, "Rescuers gave clothes off their backs" *The Vancouver Sun* (23 Mar. 2006), online: *The Vancouver Sun* <<http://www.canada.com/vancouver/news/story.html?id=e1329b94-9598-45d0-9537-623700c97fe4&p=2>>; "Hartley Bay residents in heroic rescue operation" *CTV* (23 Mar. 2006), online: *CTV* <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060323/rescue_ferry_060323/20060323/>.

rainy night, the men jumped into their speedboats and gillnetters to commence the arduous task of navigating the rocky channels, guided only by the silhouettes of the mountaintops illuminated against the stars of the night sky. The rescuers traveled 16 kilometres, arriving within 45 minutes to find the remaining passengers and crew bobbing in rigid-hull inflatables, two life-boats and a few life-rafts, all tied together amidst the remnants of rafts which had malfunctioned and failed to inflate.

As the Gitga'at begin to coordinate the loading of the survivors onto their vessels, they were soon assisted by the crew of the Coast Guard's icebreaker, the *Sir Wilfrid Laurier*, accompanied and guided by its companion helicopter. Before long, an airplane was onsite doing flyovers, dropping flares to turn the night into day. The *Laurier* had taken longer to prepare and arrived just in time to see the *Queen's* death-throes immediately after wading through the unnerving sight of floating lifejackets whose straps appeared as limp arms under the limited visual conditions.

Laurier crewmembers recall the crashing of vehicles onboard the *Queen* as they collided into one another, blowing out windows in chorus with the scream of the hull crushing under the weight of the inverted vessel as it sought to defy the laws of the sea by reaching toward the sky. As the stern submerged, the vessel shot up three quarters out of the water before crashing down with a pressure so great that sheets of metal were torn free and blasted 30-50 feet over the bow.

Meanwhile, back at the village, the Gita'gat women had taken charge. They immediately opened up the church and community hall to serve as reception centers for the incoming survivors. Instinctively, they began to bake, prepare blankets and ransack their homes, searching for all the clothes that they could find. Everyone from children to elders in the community, even those who could hardly walk, worked to prepare for the arrival.

When 99 of the 101 passengers and crew finally made it to Hartley Bay they were all cold, wet and in shock. Many of them were still in their pyjamas and without footwear; many broke down when they realized that they had survived and were now invited into a community of warmth and love, far from their near fate at the bottom of Wright Sound. The villagers worked all night to ensure that the survivors were clothed, comforted and fed.

Due to Gitga'at's efforts, 99 of 101 passengers were saved. In recognition, Hartley Bay was awarded the first-ever community Governor General's Commendation for Outstanding Service Award for answering "the highest calling of what it is to be human, by meeting the desperate need of people in difficulty with compassion, concern and life-preserving action." In addition, B.C. Ferries has paid \$150,000 for a new boardwalk, rescue boat, playground and a community plaque. Shortly after the incident, B.C. Ferries proclaimed their intent to name the replacement vessel the "*Spirit of Hartley Bay*". Finally, the B.C. Lieutenant Governor General, Iona Campagnolo, invited the rescuers to a banquet in their honour in the capital of Victoria.

INTRODUCTION

Russel Lawrence Barsh contends that Canada's treatment of Aboriginals has been characterized by ambivalence.³ He notes the effect Aboriginals have in pressuring Canadian morality and directing Canadians' "need to be perceived, and to perceive themselves, as more tolerant...than other nations and peoples".⁴ In spite of this idealism, however, Canadians simultane-

3 Russel Lawrence Barsh, "Aboriginal Peoples and Canada's Conscience" in David Newhouse, Cora Voyageur & Dan Beavon, eds., *Hidden in Plain Sight: Contributions of Aboriginal Peoples to Canadian Identity and Culture* (Toronto: University of Toronto Press, 2005) at 270-274.

4 *Ibid.* at 280.

ously agree that Canada mistreats its Aboriginal peoples.⁵ Furthermore, “Canadians persist in the belief that they have achieved a high level of justice” notwithstanding this dissonance.⁶ The issue has become one where the impact that Aboriginals have on the Canadian conscience has been taken for granted. To the extent that Canadians do realize the extent of this contribution, they remain unwilling to expressly recognize or do anything to honour it.⁷

This is a very frustrating dissonance for Aboriginals, especially in light of the efforts and sacrifices they have made to contribute to our national character. The most perplexing circumstances have come from Canada’s failure to sustain a just recognition for the merits and contributions of Aboriginal leaders and heroes. George Woodcock contends:

[H]eroism is always a kind of imposition; the hero is dominating us by his strength, by his brute courage, and we have become suspicious of such qualities. ... We are suspicious because, as Canadians, we see ourselves generally imposed upon or...[ironically], colonized...we suspect the sheer gigantic irrationalism of the heroic, for we like to consider ourselves a reasonable people.⁸

It is high time for this issue to be confronted. To do so we can look back on three of the greatest Aboriginal leaders of all time and reflect upon their legal narratives to see how their efforts to protect their people were captured by the law and how the Canadian legal conscience has failed to honour their contributions. Oftentimes, Aboriginals look to their elders – their leaders – for guidance. This practice is not entirely unlike the advice given by the courts to aid in the formation of a just society. Aboriginals look to their leaders for help in understanding the law of the land, to draw on their experience to seek out higher paths. Vine Deloria Jr. pays tribute to the influence of these leaders by acknowledging each as having:

a sense of personal worth, of a mission to be accomplished, and of a relationship with the life forces of the greater cosmos in a measure that we have not seen since. Fighting overwhelming odds, suffering the loneliness of knowing the situation was hopeless, and maintaining their sense of person was an achievement few of us can conceive and none of us can match.⁹

Aboriginal leaders possess qualities the law should strive to acknowledge, honour and respect. This paper will trace the legal contributions and struggles of the Ottawa War Chief, Pontiac; the Métis hero, Louis Riel; and the first treaty Aboriginal elected to a provincial legislature,

5 *Ibid.* at 281-282. Barsh relies on survey information to back up his claim that “Canada has become a [stereotypical] middle-class country, preoccupied with individual material gain” with an increasing egocentric and materialistic agenda. In his analysis he includes a 1992 Angus Reid survey conducted amongst 4510 citizens in sixteen of the most industrialized countries where eighty-two percent of Canadian respondents were convinced that Canada is tolerant; twenty-eight percent “strongly agreed” that Canada mistreats Aboriginals.

6 *Ibid.* at 282.

7 Survey by Angus Reid Group, September 21-September 25, 1995, (January 26, 2008) online: CPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut. <http://roperweb.ropercenter.uconn.edu/cgi-bin/hsrun.exe/Roperweb/cPOLL/StateId/RnlnKli1Wt5_KogiAtX6WqQMX0GsP3-VjHJ/HAHTpage/Summary_Link?qstn_id=1651623>. In 1995, 21% of the Canadians polled believed that “no progress at all” had been made in addressing Aboriginal concerns; 51% believed that “not much” progress had been made. Of course, I do recognize the argument that Aboriginal rights have been entrenched in our Constitution via s. 35 of the Constitution Act, 1982. However, a full-fledged discussion on the scope of the rights therein and their substance is beyond the scope of this paper. See generally: Halie Bruce & Ardith Walkem eds., *Empty Box or Box of Treasures: Two Decades of Section 35* (Penticton: Theytus Books, 2003). Articles in this anthology analyze the 20 year history of the section to expose its lack of clarity and the role of judicial activism in defining its limitations.

8 George Woodcock, *Gabriel Dumont: The Métis Chief and his Lost World* (Edmonton: Hurtig Publishers, 1975) at 10.

9 Vine Deloria Jr. quoted in Taiaiake Alfred, *Wasase: Indigenous Pathways of Action and Freedom* (Peterborough: Broadview Press, 2005) at 79.

Elijah Harper.¹⁰ I will argue that their vision and uncompromising dedication to justice for their peoples has had a significant impact upon Canadian law. In reaction to the law's initial recognition, Canada's colonial reflexes sought immediately to subvert, manipulate and mitigate these leaders' efforts to protect the sovereignty, rights and status of their peoples. This phenomenon, which I have termed the "legal whiplash", has corrupted the significance of the Aboriginal impact on Canada's legal history and crippled the legacies of these great leaders.

By recounting the legal narrative of each leader, I will trace the evolution of the legal discourse between Aboriginals and the state from the battlefield to the political arena. I will show this evolution has done nothing to prevent the legal whiplash from stifling Aboriginals' impact upon Canadian law. It is worth recounting these injustices because, "[s]ometimes, in telling the story of a fight against an old injustice, we help to bring about something nearer to justice in the future."¹¹ The consequent subversion of their contributions will bring home the fact that the laws they created were initially intended to protect the sovereignty, rights and status of Aboriginal peoples. With this knowledge, Canada can begin to come to clear terms with the Aboriginal heritage embedded within our laws and the Canadian legal consciousness. Canadians must overcome their inherent suspicion of heroism – especially Aboriginal heroism – to grant these leaders the recognition they deserve and acknowledge the injustices they endured for the sake of our nation's prosperity.

The road ahead is not easy. To advance an era of true reconciliation, we cannot move forward without looking back at a past marred with the unjust legal and political subversion that has stained the virtues of these great leaders and the initial spirit of the laws they inspired. By redressing this injustice and restoring to these leaders the respect they deserve, the government can begin to recognize and reconcile the significance of Aboriginal contributions to the formation of Canada with what it means to be Canadian. The stories of these leaders will be told with a view toward clarifying their historical plight and the obstacles they were forced to overcome in order to appeal to Canada's higher virtues. Only then can the merits of these great Aboriginal leaders and their contributions to the judicial nature of our country be understood, accepted and endorsed. We must seek to appreciate their pursuit for justice in protecting the sovereignty, rights and status of their peoples by honouring their memory: only then will a legitimate reconciliation follow – not before.

PONTIAC'S PROCLAMATION, 1763

Often referred to as a "fundamental document"¹² in delineating Aboriginals' legal relationship with Canada, the *Royal Proclamation* of 1763 was intended to be a treaty with the Crown – not a unilateral declaration of the Crown.¹³ Looking to the circumstances surrounding the issuance of the *Royal Proclamation* supports this claim.

10 Although Harper was the first Treaty Indian elected to the provincial legislature, Dr. Frank Calder of the Nisga'a Nation in British Columbia was the first Aboriginal elected to a provincial government in 1949. Dr. Calder's contribution to Canada through his efforts to bring the *Calder* case before the Supreme Court of Canada was instrumental to the genesis of modern day Aboriginal rights in Canada. See: *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313, a decision referred to throughout this paper. It is my hope that his legacy endures the legal whiplash evident in the evolution of case law that, in my view, contorts and limits Aboriginal rights by refusing to have them challenge assumed Crown sovereignty.

11 Woodcock, *supra* note 8 at 20.

12 *Calder*, *supra* note 10 at 395, Hall J.; *St. Catharine's Milling and Lumber Co. v. The Queen*, [1887] 13 S.C.R. 577 at 652, Gwynne J.. Gwynne J. refers to it as the "Indian Bill of Rights."

13 *Royal Proclamation of 7 October 1763* (U.K.), reprinted in R.S.C. 1985, App. II, No. 1 [*Royal Proclamation*]. To avoid a word for word enumeration of this lengthy document, it is assumed that the reader is familiar with its terms. "[T]he Royal Proclamation of 1763 was entirely unilateral and was not, and cannot be described, as a treaty": *R. v. Kruger and Manual* (1976), 60 D.L.R. (3d) 144 (B.C.C.A.) at 147; *R. v. Tennisco* (1982), 131 D.L.R. (3d) 96 (Ont. H.C.J.) at 104 cited in John Borrows, "Constitutional Law from A First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1 at 3 note 11 [Borrows, "First Nation Perspective"].

Without the assurance of stability in North America, British advancement and settlement in the Age of Imperialism was threatened. The Crown, under King George III, sought to appease the First Nations by recognizing their sovereignty and thereby eliminate the threat of further insurrection after the Seven Years' War.

After the French signed the *Treaty of Paris*, they confirmed their defeat and promised to cease further hostilities against Britain.¹⁴ However, this 'peace of paper' could not ensure the French would honour its terms, especially in the New World; after the defeat of Montcalm on the Plains of Abraham in 1759, the French were incapacitated, but not incapable of regrouping at any moment, even after the signing of the *Treaty of Paris*.¹⁵ Nevertheless, the British intended to gain reprieve from hostilities to consolidate their foothold in the New World. Further evidence of this is apparent upon review of the great Ottawa War Chief Pontiac and his armed resistance against the British after the *Treaty of Paris* which led directly to the issuance of the *Royal Proclamation*.

Duplicity before and after the war was all too common. Aboriginal groups in the Great Plains and Woodlands were in a constant tug-of-war between the French and English, each vying for their favour to strengthen their armies during the bloody contest, and each with feigned interest in honouring this friendship beyond procuring control over the land.

The French regaled their allies with "all their machinery of conciliation," using gifts, praise and declarations of their superiority over the British – Francis Parkman described their attempts as caressing with one hand while maintaining a firm grasp on a drawn sword with the other.¹⁶ Genuine or not, by honouring Aboriginals this way the French were welcomed with open arms.

Witnessing the growing strength of their rivals, and the mounting "arbitration of the sword," the English followed suit and allied with the Iroquois through a treaty of friendship.¹⁷ Parkman, whose racial overtone reflects the imperial sentiments of the time, concludes that "the savages did not become French, but the French became savage", whereas the "English colonies displayed no such phenomena of mingling races, for there a thorny and impracticable barrier divided the white man from the red.... though they became barbarians, they did not become Indians".¹⁸ Even if "they did not become Indians", Aboriginal alliances were vital in order to offset the growing threats to the Crown's power in the New World. Thus, the English, out of necessity rather than ingenuity, took up the gift-giving diplomacy pioneered by the French.

With the temporary cession of hostilities created by the *Treaty of Paris*, trade with the Aboriginals began in earnest. In their zeal to establish forts for trading, English soldiers trespassed upon the lands of Pontiac. They were greeted by his delegation and instructed to advance no further. Pontiac himself soon came to greet the soldiers and demand their reasons for intruding upon his people's lands without permission.¹⁹ After being informed of the defeat of the French and the general intent of the English to restore peace to these lands, Pontiac thought long before replying that he would "live at peace with the English, and suffer them to remain in his country as long as they treated him with due respect and deference."²⁰ Before allowing the soldiers to move on, Pontiac, his chiefs and the soldiers smoked the calumet to honour their

14 Definitive Treaty of PEACE between France, Great Britain and Spain, 10 February 1763, G.B.T.S. 1763 No.1, Cons. T.S. 1763 279 (entered into force 10 March 1763, signed and ratified by Great Britain, France, Spain and Portugal) [Treaty of Paris].

15 Parkman, *supra* note 1, at 161.

16 *Ibid.* at 76, 88.

17 *Ibid.* at 93, 102.

18 *Ibid.* at 77-79.

19 *Ibid.* at 166.

20 *Ibid.*

arrangement and to restore harmony between their nations.²¹

After consolidating and fortifying their footholds in the Ohio Territory, senior British administrators began to treat the gift-giving protocol as “extravagant and unnecessary,” rather than essential to the maintenance of peaceful relations.²² Noting the subsequent wane in trade, Parkman writes:

In truth, the intentions of the English were soon apparent. In the zeal for retrenchment, which prevailed after the close of hostilities [with the French], the presents which it had always been customary to give the Indians, at stated intervals, were either withheld altogether, or doled out with niggardly and reluctant hand; while, to make the matter worse, the gents and officers of the government often appropriated the presents to themselves, and afterwards sold them at an exorbitant price to the Indians.²³

These trade restrictions resulted in extreme Aboriginal hardship. The lack of promised ammunition severely limited their ability to hunt and, in turn, what they could trade for essential goods. Allan Eckert confirms that “[s]oon most of the tribes were reduced to near starvation, with no relief in sight.”²⁴ As the Aboriginals grew more vulnerable, the English began to ignore the agreement that the soldiers had made with Pontiac and further intrude upon the lands of his people.

Under these conditions, the Aboriginals held to an ever-slipping odious détente until they could no longer stand the British alleviating themselves of their promises. Seeing an opportunity to slight the British, the French encouraged an uprising amongst their former allies with assurance of their support. For them, Canada had been lost “beyond hope of recovery; but they still might hope to revenge its loss.”²⁵ Pontiac could stand no more and soon arose to strike back at the heart of the British footholds in the Ohio Valley.

Pontiac worked to assemble the surrounding tribes of the Great Lakes: the Ottawas, Chipewas, Potawatomies, Hurons, Delewares and Shawnee.²⁶ Heeding his call, the surrounding tribes came bearing war-belts of wampum and the red-stained tomahawks, each gifted from Pontiac to honour the commitment to an alliance for the upcoming war against the British. Pontiac convinced each tribe that in order to retain control of their lands “they must lift the hatchet and drive [the British] away.”²⁷ His masterful oratory had successfully incited in his brethren a renewed lust for English blood.

The first pan-Aboriginal confederacy gained entrance into the forts under the guise of peace before revealing the tomahawk.²⁸ They struck hard and fast: in total, the alliance attacked 13 English forts beginning with Detroit. Although progress at Detroit was stalled by an informant,²⁹ they still took down the forts at Sandusky, Miami, Ouiatenon, Green Bay, Edward Augustus, LeBoeuf, Venango and the Presque Isle.³⁰

21 *Ibid.*

22 Allan Eckert, *A Sorrow in Our Heart: The Life of Tecumseh* (New York: Bantam Books, 1992) at 24 [Eckert].

23 Parkman, *supra* note 1, at 173.

24 Eckert, *supra* note 22 at 25.

25 Parkman, *supra* note 1 at 177; Eckert, *supra* note 22 at 25.

26 Eckert, *supra* note 22 at 27-28.

27 Borrows, “First Nation Perspective”, *supra* note 13 at 13 note 42; Eckert, *supra* note 22 at 27-28; Parkman, *supra* note 1 at 186-187.

28 Tony Penikett, *Reconciliation: First Nations Treaty Making in British Columbia*, (Vancouver: Douglas and McIntyre, 2006) at 41.

29 *Ibid.* at 43-44.

30 *Ibid.* at 41; Eckert, *supra* note 22 at 28-29.

The time for the French to honour their promise to reinforce Pontiac was apparent, but they soon revealed the true nature of their loyalty by deferring to the terms of the *Treaty of Paris*; when the time came to drive their drawn swords into the heart of their sworn enemy, they chose instead to drive them into the backs of their allies with the sting of betrayal. Without support from the French, the British were able to hold out. Consequently, the rebellion languished and, eventually, Pontiac's alliance crumbled. However, it was not before instilling a fear great enough to force the British to forego trade into remote areas occupied by Aboriginals for two years.³¹

The duplicity of the times had created a climate of fear and distrust. It was to this fear that the *Royal Proclamation* spoke. In Pontiac and his pan-Aboriginal confederacy's moment of triumph, the British had come to see that Aboriginals were a force to be reckoned with. The tomahawk cut deep into the imperial psyche, demanding recognition for Aboriginal sovereignty and respect for their autonomy. Pontiac took back the power robbed from his trust in the English. In a Nietzschean moment of roughly equal power, the *Royal Proclamation* was invoked to recognize and accommodate these fundamental rights to prevent further abuses.³² Subsequent events surrounding the treaty at Niagara elucidate this point.

Aboriginal law professor John Borrows argues that one must strive to interpret the *Royal Proclamation* from an Aboriginal perspective.³³ He re-introduces legal historians to the wampum exchange that took place at Niagara in 1794, immediately after the issuance of the *Royal Proclamation*. Through the exchange of the sacred wampum belts, it was ratified by Aboriginal acceptance of British representations and promises to recognize their sovereignty over their lands and rights to remain undisturbed therein. Thus, the *Royal Proclamation* officially became a treaty.

Without the alliance of peace forged by this treaty, it is very likely that the British reign would have fallen back into earlier patterns of treating the Aboriginals with disrespect and allowing tensions to remount. At the time, the terms of the *Royal Proclamation* were relatively generous; the increasing advancement of the American settlers and the discriminatory American policies that followed which promoted this advancement were not. Consequently, many tribes under American control were forced into the Ohio territory under the protection offered by the British under the *Royal Proclamation*.³⁴

In this respect, Pontiac's uprising was successful and even beneficial to the British in the long-term. His resistance influenced the next pan-Aboriginal alliance led by the legendary Tecumseh, Chief of the Shawnee: "the real hero of the [War of 1812],"³⁵ described best by his sworn enemy, Governor and former American President William Henry Harrison, as "one of those uncommon geniuses which spring up occasionally to produce revolutions and overturn the established order of things."³⁶ Without the aid of Tecumseh and his alliance in the War of 1812, Canada would have been overrun by the Americans.³⁷

31 Borrows, *First Nation Perspective*, *supra* note 13, at 17 footnote 57.

32 Friedrich Nietzsche, *Daybreak: Thoughts on the Prejudices of Morality*, Maudemarie Clark and Brian Leiter, eds., (Cambridge: Cambridge University Press, 1997) "On the Natural History of Rights and Duties," Book II, s. 112 at 111-112. Nietzsche argues that rights prevail in relationships where conditions and degrees of power are maintained: "diminution and increment[s] warded off."

33 Borrows, "First Nation Perspective", *supra* note 13. Borrows specifically advocates for the use of the "First Nation" perspective. This is technically different from the "Aboriginal" perspective, which includes the Métis perspective, and which I use throughout this paper. Though the specific meanings of these words in the legal realm are important, I don't wish to split hairs; I know that Borrows' argument was intended to open the door to a multitude of perspectives.

34 *Ibid.* at 26.

35 John Sugden, *Tecumseh: A Life* (New York: Henry Hold and Company, 1997) at 294.

36 William Henry Harrison quoted *ibid.* at 215.

37 *Ibid.* at 310-311, 391.

It is unfortunate that the historical ambivalence espoused by Canadians toward their Aboriginal heritage has been taken advantage of by the legislature and judiciary. Despite the fact that the *Royal Proclamation* has been constitutionalized in s. 25 of the *Constitution Act, 1982* ("*Constitution Act*")³⁸ and is cited expressly in our common jurisprudence, the first pan-Aboriginal confederacy under Pontiac and the largest gathering of Aboriginals ever, hosting approximately 2000 chiefs and 24 Nations extending from the Mississippi, to the Hudson Bay, to Nova Scotia, have both been relegated to historical and legal nonevents.³⁹ As a treaty, the *Royal Proclamation* would fall under the protection of s. 35(1) of the *Constitution Act*, thereby confirming an inherent right to self-government. Any changes would have demanded consent from the Aboriginals. This has dishonoured the spirit of the *Royal Proclamation* to protect Aboriginals from further abuse at the hands of the state. Moreover, it has dishonoured the memory of Pontiac, the significance of the wampum exchange, and the resulting treaty delineating the terms of a relationship of shared sovereignty envisioned from the Aboriginal perspective.

Borrows claims this perspective "discredits the claims of the Crown to exercise sovereignty"⁴⁰. Pontiac and the pan-Aboriginal alliance fought to remain as free peoples on their own lands. Such resistance is proof of the "desire of Indian people to continue to exercise responsibility over [themselves], their institutions and their surroundings."⁴¹

The hegemonic interpretations by Courts that found the *Royal Proclamation* to be a "unilateral declaration of the Crown" have exacerbated the problem. Dickson C.J.'s view that the *Royal Proclamation* proved "there was never any doubt that sovereignty and legislative power and indeed the underlying title to such lands vested in the Crown" is a fallacy that blatantly disregards the resistance of Pontiac's confederacy.⁴² Neither Pontiac's uprising nor the treaty at Niagara have influenced the court's interpretation of the *Royal Proclamation* to recognize Aboriginal sovereignty and inherent rights to self-governance in spite of the instrumental roles played by each in its creation.

The *Royal Proclamation* was intended to capture and eliminate the condition of fear that prevented the British from gaining ground in the New World. The *Royal Proclamation* promised that the British would reserve "hunting grounds" wherein the First Nations would remain "unmolested"; these lands would be protected from advancing settlers, and they could only be surrendered to the Crown and only through a public transaction.⁴³ These were seemingly very attractive terms. However, given the Janus-faced nature of the times, it is not surprising that this document has been allowed to deviate from the intent to appease Aboriginals and respect their sovereignty; it would appear that there is no place in history for an admission that the Crown acquiesced to the threat of force from a justified Aboriginal insurrection. Make no mistake: the *Royal Proclamation* was a document born of fear, yet we need not fear its rightful interpretation.

Borrows brings to light an opportunity dormant within the "moments of accommodation"⁴⁴ provided by recent Supreme Court of Canada decisions. These decisions could open the door to re-interpreting the *Royal Proclamation* and acknowledging its treaty status. In *R. v. Sioui*, Lamer J. referenced the Aboriginal perspective in acknowledging the *Royal Proclamation* as a

38 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s. 25.

39 Borrows, "First Nation Perspective", *supra* note 13.

40 *Ibid.* at 24, 28.

41 John Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L. J. 291 at 302-304. Borrow's concentration in this article is on Tecumseh's alliance with Britain in the War of 1812. His argument, however, is intensified with regard to Pontiac, who had only marginal aid from the French.

42 *R. v. Sparrow*, [1990] 56 C.C.C. (3d) 263 (QL) at para. 49 quoted in Borrows, "First Nation Perspective", *supra* note 13 at 38.

43 *Royal Proclamation*, *supra* note 13.

44 Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L. J. 382 quoted in Borrows, "First Nation Perspective", *supra* note 13 at 40.

means of recognizing Aboriginal "autonomy" by alleviating the "dangerous trouble among the Indians".⁴⁵ Furthermore, in *R. v. Simon*, Dickson C.J. upheld a previous ruling that treaties should be "given a fair and liberal construction in favour of the Indians" with "doubtful expressions resolved in [their favour]" so as to construe the terms of the document in the "sense they would naturally be understood by the Indians."⁴⁶

It is time to re-enshrine the legacy of Pontiac and the *Royal Proclamation* by attributing to each the Aboriginal perspective that places them in their rightful places. It is not surprising that this was among the first recommendations made by the Royal Commission on Aboriginal Peoples:

The new relationship should be heralded by a symbolic step to demonstrate that a lasting commitment has been made. For this reason we recommend that the Sovereign issue a Royal Proclamation to signal the new beginning at a special gathering called for the purpose. The proclamation would set out the principal elements of the new relationship and outline its central institutions.⁴⁷

Renowned treaty negotiator Tony Penikett has argued that the *Royal Proclamation* and Pontiac's uprising are what forced the British, the Americans and the Aboriginals to make treaties in the first place.⁴⁸ His summation of Pontiac's contribution in this respect is both informed and admirable:

Pontiac's proclamation protected Indian hunting grounds. The spirit of that [Proclamation], if not the treaties it inspired, is accommodation, not assimilation; reconciliation rather than conquest. That is, or should now be, the Canadian way.⁴⁹

LOUIS RIEL: FATHER OF CONFEDERATION AND SON OF CANADA

With no alternative, Pontiac was forced to protect his people by resorting to violence. Although Louis Riel's resistance would end similarly, this was not his intent. His primary contribution to Canada came from his role in peacefully negotiating the terms of Manitoba's entrance into Confederation. Through the *Manitoba Act, 1870* ("M. Act"), Riel sought to ensure the protection of Métis land rights. For these efforts, the Canadian government, under John A. Macdonald, invoked the legal whiplash to conspire and renege on promises made to the Métis in order to facilitate the systematic dispossession of their lands. To defend his people, Riel was forced to resort to violence. Consequently, he was branded a traitor and his legacy has yet to escape this controversy.

While it may often be wondered what more can be said about Riel, the tragic hero of the Métis martyred between the pillars of justified resistance and unrelenting westward expansion, I choose instead to wonder whether enough has been said. Riel's life was one of incessant contestation with Macdonald, who would rather have him hanged as a traitorous madman than in his rightful place by his side as a fellow Father of Confederation. Some legal scholars have

45 *R. v. Sioui*, [1990] 1 S.C.R. 1025 at paras. 74 & 98 (QL) cited in *ibid.*

46 *Nowegijic v. The Queen*, [1983] 1 S.C.R. 29 at para. 25 (eC); *R. v. Simon* (1985), 24 D.L.R. (4th) 390 at para. 24 (eC) quoted in Borrows, "First Nation Perspective", *supra* note 13 at 38-39.

47 Canada, Report of the Royal Commission on Aboriginal Peoples, *Renewal: A Twenty-Year Commitment*, Vol. 5 Chapter 1 "Laying the Foundations of a Renewed Relationship," (Ottawa: Ministry of Supply & Services, 1996), online: < http://www.ainc-inac.gc.ca/ch/rcap/sg/sk1_e.html#1.%20A%20New%20Beginning > [emphasis added].

48 Penikett, *supra* note 28 at 46.

49 *Ibid.* at 123.

attempted to delineate the virtues of Riel's character through his tenuous grasp on sanity.⁵⁰ Others paint him as a visionary leader and the unfortunate victim of his own success in challenging Macdonald.⁵¹

The fact remains that Riel's martyrdom marked a very low point in the administration of Canadian law. It would take Parliament over 100 years to acknowledge Riel as the Founder of Manitoba and begin mending relations with the Métis. The Manitoba Legislature and Federal Parliament have both since passed unanimous resolutions that acknowledge Riel's historic role.⁵² Nonetheless, a substantive legal recognition and endorsement of Riel's contribution has yet to come.

The Métis Nation has noted that no fewer than 14 exoneration Bills have been introduced by private members in the House of Commons and the Senate since 1982, only to falter before enactment.⁵³ Recent attempts include Bill S-35, *An Act respecting Louis Riel*, proposed in 2001.⁵⁴ The initial Bill proposed to "vacate" Riel's conviction for treason and to honour May 12th as "Louis Riel Day," the day the *M. Act* was assented.⁵⁵ Later this Bill was revised and introduced as Bill S-9, *An Act respecting Louis Riel and the Métis Peoples* – without mention of an exoneration. After its second reading, this Bill was referred to the Standing Senate Committee on Legal and Constitutional Affairs, which dissolved shortly thereafter.⁵⁶ Recognition of Canada's greatest Métis leader has yet to transcend the lip service of politicians to take root within the law: currently, Riel remains both the *de facto* "founder of Manitoba"⁵⁷ and traitor *de jure!*⁵⁸

Seeing the original Bill through to exonerate Riel would go a long way toward repairing the relationship between Métis peoples and the government of Canada. Advocates such as Senator Gerry St. Germain challenge Canada's innate suspicion of heroes:

[I]t is right to recognize and remember those individuals who played a political role in protecting the rights of their people, or heroes. Honestly, I do not believe Canada does enough to educate its people about our history, our culture and what makes us truly unique in the world.⁵⁹

However, Riel has yet to be exonerated for his "crimes" in defending the Métis people against the unjust overtures of an advancing Canada. Furthermore, no admissions have been made as to the injustices he and his Métis people have suffered as a result.

It must be remembered that inasmuch as Riel was Aboriginal, he was also French: the em-

50 For examples, see generally: Thomas Flannigan, *Louis 'David' Riel* (Toronto: University of Toronto Press, 1979) [Flannigan, *Louis*]; Thomas Flannigan, ed. *The Diaries of Louis Riel* (Edmonton: Hurtig Publishers, 1976) [Flannigan, *Diaries*].

51 See generally: George Goulet, *The Trial of Louis Riel: Justice and Mercy Denied* (Calgary: Tellwell Publishing, 1999) [Goulet].

52 *Resolution to Recognize the Historic Role of Louis Riel*, Manitoba Legislative Assembly, May 1992; *House of Commons Debates*, vol. VI (10 March 1992) at 7879. Both referred to in Jean Teillet, "Exoneration for Louis Riel: Mercy, Justice, or Political Expediency?" (2004) 67 Sask. L. Rev. 359 at 361 [Teillet].

53 Jean Teillet, "Métis Law Summary 2006," online: <<http://www.Métisnation.ca/pdfs/MLS-2006.pdf>> at 104-105 [Teillet, "Law Summary"].

54 Bill S-35, *An Act to honour Louis Riel and the Métis People*, 1st Sess., 37th Parl., 2001.

55 *Ibid.*, cl. 3-5.

56 Parliament of Canada, "Senate bills not passed by Senate – 1867 to Date," online: <<http://www.parl.gc.ca/information/about/process/info/senbills.asp?Language=E>>.

57 Teillet, *supra* note 52 at 361.

58 It should be noted that the current *Act Respecting Louis Riel* was introduced by Pat Martin of the NDP in the House of Commons on May 5th, 2006 in Bill C-258. It has received its first reading and is currently in legislative limbo awaiting further action. Unlike its predecessors, this Bill moves for a direct exoneration with the express purpose of reversing Riel's conviction "to formally recognize and commemorate his role in the advancement of the Canadian Confederation and the rights and interests of the Métis people..." See Teillet, "Law Summary", *supra* note 53 at 105.

59 *Debates of the Senate (Hansard)*, 89 (19 February 2002) at 16:20-16:30 (Hon. Gerry St. Germain) [Debate, St. Germain].

bodiment of both the “Indian Problem” and the “French Fact.” As such, I believe that lawyer and Riel’s great-grandniece Jean Teillet would agree with Woodcock’s contention and add that it has exacerbated Canada’s suspicion of heroes. She argues that the exoneration movement has been more about political expediency than justice.⁶⁰ After the defeat of the Meech Lake Accord and the resulting Oka Crisis, Canada was “[f]aced with what seemed to be a disintegrating social fabric on two fronts – Quebec and Aboriginal peoples – [therefore], provincial and federal ministers took steps to appease both at the same time.”⁶¹

Teillet notes both sides of the exoneration debate even among Riel supporters. Advocates for exoneration seek the restoration of Riel and his family’s honour to strengthen the argument that his actions were justified. They also seek an official commemoration of his contribution to Canada; by contrast, others would rather “let the stain remain” on Canada’s honour as a reminder of the past injustices committed against Aboriginals.⁶²

Acts of Métis resistance began well before Confederation. In 1849, when the Métis were settling the Red River area along with their neighbours, the Selkirks and the French, the Hudson Bay Company (“HBC”) monopolized fur trading in the area with the legal authority to demand enforcement for violations. When the HBC tried to convict four Métis locals for illegally trading furs to feed their families, Jean Louis Riel led an armed mutiny outside the courtroom, threatening to forcibly free the accused were they found guilty and jailed.⁶³ The judge met Riel Sr. halfway. Although he did convict, mercy was granted and punishment stayed. This resistance devastated the stranglehold imposed by the HBC monopoly and pulled Métis traders out from under its despotism.⁶⁴ The clash would leave a lasting impression on young Riel: justice was in his blood.

After Macdonald negotiated the sale of Rupert’s Land to Canada in 1870 with the British Parliament and the HBC, he would have done well to acknowledge this history. Instead, he immediately sought to overrun the western Métis settlements along the Red River without consultation.⁶⁵ Although the Métis were not adamantly opposed to joining Canada, they wanted to do so peacefully, on their own terms.⁶⁶ With this intent, Riel established a democratically elected provisional government. After his election as President, Riel and the “Convention of 40” – 20 French and 20 English – quickly began to negotiate the terms of enjoining Confederation.⁶⁷

Viewed as an act of political dissidence, this did not sit well with loyal Canadians within the colony. Uprisings immediately followed. Even though they were put down with little effort, they did lead to “catastrophe for Riel” for his role in overseeing the execution of Thomas Scott, a bigot and an ardent rival of the Métis.⁶⁸ The audacity of such drastic action proved too much for English Canadians to bear. It was also exactly what Macdonald would use to discredit Riel and amass support against the Métis insurgence: “In the long run, the Scott affair brought

60 *Ibid.*

61 Teillet, *supra* note 52 at 366.

62 Paul Chartrand quoted *ibid.* at 362 footnote 12.

63 Flannigan, *Louis*, *supra* note 50 at 4-5.

64 Goulet, *supra* note 51 at 17-18.

65 Chester Brown, *Louis Riel: A Comic Strip Biography* (Montreal: Drawn and Quarterly Publications, 2006) at 4 & 8-10 [Brown]. The extent of Brown’s research into Riel is expansive. Upon review of his bibliography and the accolades provided at the end of the book by Time Magazine, The Globe and Mail and Maclean’s it is apparent that his choice of the comic book medium is as progressive as our times demand “in telling the story of a fight against an old injustice... to bring about something nearer to justice in the future” quoting Woodcock, *supra* note 8. For those that doubt the power of comic books in relating powerful historical events, see: Art Spiegelman, *Maus, A Survivor’s Tale I: My Father Bleeds History* (New York: Pantheon, 1986) and *Maus, A Survivor’s Tale II: And Here My Troubles Began* (New York: Pantheon, 1991). Spiegelman won a Pulitzer Prize for both volumes in 1992.

66 *Ibid.* at 16.

67 *Ibid.* at 44-45.

68 Flannigan, *Louis*, *supra* note 50 at 29.

about Riel's downfall. When English Canadians learned of Scott's fate, there was widespread outrage; and Riel became such a controversial figure that he was prevented from having any future in Canadian politics."⁶⁹ As a result of Scott's execution and his resulting infamy amongst English Canadians, Riel was denied his right to sit in Parliament, notwithstanding his three elections to the office.⁷⁰

Despite Scott's execution, negotiations with Macdonald and delegates sent to Ottawa on behalf of the provisional government continued and culminated in the creation of Manitoba (Cree for "the God that speaks") through the *M. Act*.⁷¹ It is unfortunate that the treatment of this agreement has mirrored the treatment of the *Royal Proclamation*. The *M. Act* was not a "unilateral declaration" as it has since been interpreted; from the Aboriginal perspective, it was also a treaty ratified by the provisional government once the delegates returned.⁷² Acknowledging the *M. Act* as a "unilateral declaration" aided the subsequent dispossession of Métis lands, which otherwise would not have occurred – as a treaty, consent would have been required before any of the dubious legal manoeuvres that facilitated this dispossession and Canada's breach of its promises.

Unfortunately, after the negotiations, Macdonald realized that the amnesty promised to Riel as a precondition to the *M. Act* would result in political suicide and anything he could do to harm Riel would actually gain him the votes he required to stay in power. As a result, troops were soon sent to the Red River to terrorize the Métis.⁷³ Macdonald still lost the election to the Liberals under Mackenzie who campaigned that Riel would not be granted the amnesty promised even though he continued winning his seat in Parliament. Unfortunately, with all the animosity for Riel in Ottawa held by the members of Parliament and the threat of his immediate arrest, Riel never took his seat. As a result he lost his seat and was banished from Parliament. However, Mackenzie shied away from his stance against Riel somewhat after Riel embarrassed him by getting re-elected – again! Mackenzie eventually granted amnesty to all those responsible for the "North West troubles" – except Louis Riel. Riel then fled to the United States under the protection of President Ulysses S. Grant.⁷⁴ Once rid of Riel, Mackenzie was free to advance Macdonald's calculated legislative scheme to dispossess the Métis of the 1.4 million acres of land guaranteed under s. 31 of the *M. Act*.⁷⁵

Unlike the collective and inalienable tracts reserved for the First Nations, Métis lands were individualized, alienable and issued in scrip. These scrips were nothing more than feeble paper promises for lands that took three years to survey. Métis law professor Paul Chartrand recounts the story of Métis dispossession as one which challenges the rule of law to make right "a great

69 *Ibid.* at 30.

70 Goulet, *supra* note 51 at 30; Paul Chartrand, "Aboriginal Rights: The Dispossession of the Métis" (1991) 29 *Osgoode Hall L. J.* 457 at 466 [Chartrand].

71 Brown, *supra* note 65 at 75.

72 John Borrows, "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission" (2000-2001) 46 *McGill L. J.* 615 at 656 [Borrows, "Domesticating"].

73 Report of the Royal Commission on Aboriginal Peoples, Perspectives and Realities, Vol. 4 (Ottawa: Ministry of Supply & Services, 1996), online: <http://www.ainc-inac.gc.ca/ch/rcap/sg/sj22_e.html#2.%20The%20M%20E9tis%20Nation>.

74 When he was in power Mackenzie could not stop Riel from running and continuing to win his seat in Parliament. His decision to grant conditional amnesty to Riel was most definitely a result of this political embarrassment. Brown, *supra* note 65 at 102-105; Goulet, *supra* note 51 at 30-31.

75 *The Manitoba Act, 1870*, S.C. 1870 c. 3, s. 31. For brevity, the wording of the provision has not been provided. Frankly, the history of s. 31 is a horrible legislative morass. Debate has centered the claims of D. N. Sprague and Thomas Flannigan as to the legitimacy of the government in its implementation and subsequent amendments. While Flannigan has argued that the government "generally fulfilled, and in some ways overfulfilled, the land provisions of the Manitoba Act," Sprague and Chartrand have argued convincingly that such claims are completely false. The Royal Commission endorsed these latter views. See generally: D.N. Sprague, "Government Lawlessness in the administration of Manitoba Land Claims, 1870-1887" (1979-1980) 10 *M. L. J.* 415; Chartrand, *supra* note 70; Royal Commission on Aboriginal Peoples, Perspectives and Realities, Vol. 4 (Ottawa: Ministry of Supply & Services, 1996).

historical wrong."⁷⁶ The policy of carving out individual parcels from a communal land base ensured a "fast track version" of Indian enfranchisement.⁷⁷ Against the Métis preference for long narrow riverfront lots that would have ensured their communal security and maintenance of their way of life as farmers, Macdonald's preference for devious political solutions would eventually – and purposely – adopt the American quadrilateral system, disbursing the Métis across the province upon his re-election in 1878.⁷⁸ Métis leader Clem Chartier wrote: "[T]he government allowed gross injustices to be perpetrated against the half-breed people through the implementation of a [land] grant and scrip system, leaving the half-breeds landless."⁷⁹

Section 31 implemented neither "the long established policy of extending governmental protection over the lands given in exchange for Indian title...[nor] the policy of keeping such lands [from] the public".⁸⁰ Consequently, speculators arrived in droves to buy up all the scrip they could get their hands on for "a mere song."⁸¹ By 1886, all Métis claims to the lands granted under s. 31 had been disposed of with over 90% delivered directly to banks and speculators.⁸² This drove the Métis further west in order to stay ahead of the advancing settlers:

Their traditional economy was destroyed by the disappearance of the buffalo, the decline of the fur trade, and the introduction of new forms of transport superior to their cart trains and boat brigades. Their language and religion were jeopardized by massive English and protestant immigration. Their ownership of land was threatened...by problems with the survey and issue of patents.⁸³

As if that was not enough, after his re-election, Macdonald began desperately advancing his plans for the oncoming railway: a project on the verge of bankruptcy, threatening Macdonald's legacy and his vision of expanding Canada "from sea to sea."⁸⁴ In spite of his opposition to s. 31 under Mackenzie's Liberals, Macdonald continued his legacy of procrastination in addressing Métis concerns west of Manitoba, rekindling the spirit of resistance that drew Riel out of exile!⁸⁵

Upon his return in 1884, Riel spared no time in creating a second provisional government, provoking the cycle of peaceful process, government denial.⁸⁶ After peacefully attempting to petition the government for terms similar to those granted under the original *M. Act*, Macdonald responded with a vague set of promises that included the establishment of a commission – the favoured Canadian device for procrastination – to examine the extent of Métis grievances.⁸⁷

Rebuffed for the last time, and seeing no other choice, Riel and the Métis of Saskatchewan took up arms.⁸⁸ What followed was a series of battles between the Métis, led by Riel and his

76 Chartrand, *supra* note 70 at 467.

77 *Ibid.* at 470.

78 Woodcock, *supra* note 8 at 126-127.

79 Clem Chartier, quoted in Borrows, "Domesticating", *supra* note 72 at 657.

80 Chartrand, *supra* note 70 at 470.

81 John A. Macdonald quoted in Chartrand, *supra* note 70 at 474; Clem Chartier, "Aboriginal Rights and Land Issues: The Métis Perspective" in Menno Boldt and J. Anthony Long, eds., in association with Leroy Little Bear, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1988) 54 at 57-60.

82 Chartrand, *supra* note 70 at 471; Chartier, *ibid.*

83 Flannigan, *Louis*, *supra* note 50 at 182-83.

84 See generally: Pierre Berton, *The Last Spike: The Great Railway, 1881-1885* (Canada: Anchor Canada, 2001) [Berton].

85 Goulet, *supra* note 51 at 37-38; Woodcock, *supra* note 8 at 140.

86 Woodcock, *supra* note 8 at 151; Teillet, *supra* note 52 at 395; Berton, *supra* note 84 at 340.

87 Berton, *supra* note 84 at 343.

88 Flannigan, *Louis*, *supra* note 50 at 134.

military commander, Gabriel Dumont, and the Canadian army led by Macdonald. Even though the Métis were grossly outnumbered, they still chose to fight because their freedom and pride as peoples were threatened. Despite early successes, the Métis were overwhelmed by the Canadian troops, dispatched with the aid of the new railway. Riel was captured and carted off to Regina to be tried for treason.

Riel's trial provides another example of how the rule of law was manipulated by the legal whiplash to cast a pall over his achievements for the Métis – and for Canada. George Goulet has argued, most convincingly, that Riel's trial was an abysmal exercise that failed to render justice at every turn. The list of discrepancies uncovered by Goulet are outrageous: Macdonald purposely relocated the trial from Winnipeg to Regina to exploit the less advanced laws of the Northwest Territories and guarantee his conviction;⁸⁹ Riel was charged with high treason for levying war against a Queen to whom he owed no allegiance, under a statute rehashed after 530 years for the sole purpose of ensuring that he received the death penalty for levying war against a Queen to whom he owed no allegiance;⁹⁰ the presiding Stipendiary Magistrate, Hugh Richardson, appointed at the pleasure of the federal government, was biased in favour of conviction;⁹¹ the jury was formed solely by English Canadians, each personally selected by the magistrate;⁹² and worst of all, Riel's own counsel conspired to pursue an unauthorized defence of insanity doomed to fail.⁹³

Not surprisingly, this concerted effort brought about Riel's downfall. The jury's verdict was an ominous recast of the one overturned by his father. Unfortunately, this time there was no riot outside the courtroom threatening to set right the enforcement of an unjust punishment to a just soul. When the six jurors returned, the foreman issued the guilty verdict and then pleaded with the magistrate to grant Riel mercy and spare him the death penalty while "crying like a child":⁹⁴ dramatic, but futile as Macdonald promptly refused this request.

Riel's overwhelming power of influence and the plight of the Métis forced the jury to come to terms with the injustice of playing a part in Riel's execution under such deplorable circumstances. In his final speech, Riel was relieved to finally be able to speak from a position beyond that of defending his sanity. After putting his life on the line, he stated that "it seems to me I have become insane to hope for justice."⁹⁵

The magistrate officially condemned Riel as a man "'guilty of a crime the most pernicious and greatest that man can commit' – high treason; that he had let loose the flood gates of rapine and bloodshed; aroused the Indians; and brought ruin on their families." Goulet highlights

89 Goulet, *supra* note 51 at 46-48. Goulet argues that MacDonald fully conspired to have the trial located to Regina to take advantage of the *Northwest Territories Act* of 1880. This Act limited the make-up of the court and trial procedure. In Winnipeg Riel would have been entitled to a 12 member jury split half-and-half between French and English speakers. He would have also been entitled to a superior court judge with security of tenure instead of a stipendiary magistrate whose office was held at the pleasure of the federal government.

90 *Ibid.* at 48-55, 67-72, 201-202.

91 *Ibid.* at 56-62. Goulet condemns Richardson for a multitude of reasons. However, upon further research I was directed to the Thesis of Shelley Ann Marie Gavigan, *Criminal Law on the Aboriginal Plains: The First Nations and the First Criminal Court in the North-West Territories, 1870-1903* (Toronto, University of Toronto: 2007), albeit only recently! Gavigan is much more objective in her analysis of Richardson as the man most responsible for molding a relationship of relative understanding with Aboriginals under his jurisdiction in the Northwest Territories, especially when compared to other magistrates in the area. Though, she does not take head on Goulet's criticism, she does combat authors who have taken similar positions regarding Richardson's bias against Riel and lack of experience by arguing their lack of knowledge of the rigors of his jurisdiction, workload, questioning the extent of their research and their conclusions. Unfortunately, I cannot comment further on her article at this date other than to point out that she appears to have deliberately deemphasized Richardson's role in the Riel trial to highlight his other contributions to the evolution of the criminal law in the Northwest Territories.

92 *Ibid.* at 63-66.

93 *Ibid.* at 117-124. Goulet enumerates a long list of injustices perpetuated throughout Riel's trial. To me, these were the most straightforward and striking.

94 *Ibid.* at 168.

95 *Ibid.* at 171.

the fact that the *North-West Territories Act, 1880* required that a death sentence could not be carried out until “the pleasure of the Governor” was known; meaning, “John A. Macdonald and his Cabinet would eventually determine that it was their ‘pleasure’ that Louis Riel be hanged.”⁹⁶

Macdonald was at all times the orchestrator of Riel’s demise; the allegations of insanity and the concerted efforts by Riel’s own lawyers to uphold this defence would prove his *coup de grace*. This defence proceeded, despite Riel’s express wishes, and has remained inexorably linked to his historical and national character. In this respect, Macdonald’s victory was twofold: not only did he conspire to guarantee Riel’s conviction and subsequent death; he also managed to sabotage Riel’s legacy as a great leader and defender of justice for his Métis people throughout the pages of history. There is no shortage of these pages that critique Riel’s shortcomings. I am not prepared to judge what it must have taken for him to endure the gross injustices he suffered for the sake of his Métis people. I choose instead to acknowledge the respite offered by even the most ardent and unsympathetic opponent of Aboriginals, Thomas Flannigan, after his thorough review of Riel’s alleged plunge into madness:

His insanity – if it may be called that – was a message of hope. Common conceptions of what is normal may suffice for normal times, but they do not encompass the range of human response to adversity. We need a broader view of sanity to comprehend the actions of men in dark times.⁹⁷

The legal whiplash has crippled Riel’s legacy long enough. Having borne the “criminal brand” of a “traitor” over the generations after giving “their best and brightest son to the Métis cause”, the Riel family issued a statement demanding their participation in the enactment of a Bill that grants Riel his rightful place in history as a Father of Confederation and founder of the province of Manitoba and acknowledges his wrongful conviction to the effect that his innocence is proclaimed.⁹⁸ Without the political will to admit the government’s part in condemning Riel to death, any progress made toward reconciling its relationship with the Métis will be minimal. Canada has shown in its treatment of Riel and promises made to the Métis that concern for reconciliation is sorely lacking. It is time for the politicians of this country to pass the legislation required to officially remove the legal whiplash and elevate Riel’s status to accord with his family’s wishes.

ELIJAH HARPER AND THE MEECH LAKE DISCORD

Inasmuch as it is important to accept the effect that armed conflicts have had in shaping the laws that surround Aboriginal sovereignty, rights and status, instances where this conflict transcended the traditional resort to violence must also be acknowledged. This evolution underscores Aboriginal attempts to engage the Canadian government and the reach of the legal whiplash in subverting these attempts to subvert and minimize accomplishments made under the banner of peaceful democratic dialogue. One such instance came from Elijah Harper’s refusal to grant Manitoba’s endorsement of the Meech Lake Accord. The first treaty Indian MLA’s filibuster successfully stalled negotiations in the provincial legislature past the Accord’s self-imposed deadline, giving Newfoundland the political leverage to follow suit in its free vote that officially marked the death of the Accord.

When Harper whispered his barely audible final dissent to the suggestion that deliberations continue past the normal sitting hour of the Manitoba legislature in June of 1990, he was

96 Goulet, *supra* note 51 at 172.

97 Flannigan, *Louis*, *supra* note 50 at 186.

98 Riel Family Press Statement, Winnipeg, April 1998 [unpublished] quoted in Teillet, *supra* note 52 at 363.

stroking the grains of the Eagle feather, a gift in honour of his courage and acknowledgment of Aboriginal support across the country. His dissent was to “hundreds of years of being ignored and to centuries of patiently waiting to be treated fairly by people welcomed to this country by the original inhabitants.”⁹⁹

Prime Minister Brian Mulroney’s initial description of the Accord as an agreement in which “no one loses” expressed the satisfied euphoria of successfully pressuring the First Ministers – all non-Aboriginal – into renewing their commitment to the agreement after an intensive week-long spectacle of deliberative endurance in his “roll of the dice meeting.”¹⁰⁰

Such a “roll of the dice” was only a veneer for the resort to dubious executive federalism foiled from the start by Mulroney’s obliviousness as to what Dale Turner has since coined the “Kymlicka Constraint”: a concept that has prevailed throughout Canada’s history, but only recently essentialized and put into words by Professor Will Kymlicka: “For better or worse, it is predominantly non-[A]boriginal judges and politicians who have the ultimate power to protect and enforce Aboriginal rights”.¹⁰¹ Drafted under the Kymlicka Constraint, the Accord had once again brought to the fore mounting tensions between Canada’s founding groups. J. Edward Chamberlin argues that this resulted in the fundamental flaw of the Accord:

[The Accord] is completely oblivious to the fact that the [A]boriginal people will be hurt by its provisions, though it has taken kindly concern about the welfare of everybody who in its view really counts. In constitutional terms, [A]boriginal people obviously don’t count...¹⁰²

The Accord would have officially divided Canada into two societies by constitutionalizing the absurdity that the English and French were the sole “founders” of Confederation. Thus, the future of the Aboriginal rights discourse would have found itself at the mercy of two societies when it was difficult enough just getting through to one!

The decade preceding the Accord was one of immense political turmoil. Quebec made its first attempt to separate from Canada by holding a referendum whose result was swayed by the promise of a revised federalism that would grant Quebec a special place in the Confederation – a promise that fell to the floor when Pierre Trudeau’s liberals left Quebec out of the decision to patriate the constitution.¹⁰³ Afterwards, there was a series of First Ministers Conferences on the topic of Aboriginal issues that ended bitterly when the provinces rejected the notion of constitutionalizing Aboriginal self-governance. Mulroney hammered home the failure of these meetings with the statement that Aboriginal governments would never “stand separate and apart” from the provincial or federal governments.¹⁰⁴

At the close of the last Conference, Métis leader Jim Sinclair delivered an impassioned speech charging Ottawa with not having the guts to put sovereignty on the table.¹⁰⁵ He predicted that the government would soon bring Quebec to the negotiation table to overshadow

99 Pauline Comeau, *Elijah: No Ordinary Hero* (Vancouver: Douglas and McIntyre, 1993) at 216 [Comeau].

100 Peter Hogg, “The Meech Lake Accord” (2003-2004) 30 M.L.J. 39 at 40.

101 Dale Turner, *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) at 58 quoting Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Oxford University Press, 1989) at 154.

102 J. Edward Chamberlin “Aboriginal Rights and the Meech Lake Accord” in K.E. Swinton & C.J. Rogerson, *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988) 11 at 11 [Swinton, Rogerson].

103 Peter H. Russell, “Meech Lake and the Supreme Court” *ibid.* at 97.

104 Brian Mulroney cited in Comeau, *supra* note 99 at 126; Mary Ellen Turpel and Patricia Monture, “Ode to Elijah: Reflections of Two First Nations Women on the Rekindling of Spirit at the Wake for the Meech Lake Accord” (1990) 15 Queen’s L. J. 345 at 350 [Turpel & Monture].

105 Jim Sinclair referenced in Comeau, *supra* note 99 at 127.

Aboriginal issues.¹⁰⁶ True to form, the Accord, concocted seemingly overnight, strove to give Quebec status as a distinct society, amongst other elevated provincial rights, to quell the nationalist movement that once again threatened to rupture the nation. However, though passed unanimously by the First Ministers, it was still subject to the unanimous consent of the provinces – including Manitoba, whose process also demanded unanimous consent – including Harper's. Once again, Aboriginals were forced to remind Canada that, contrary to 'unpopular' belief, this nation was not founded by "two nations warring within the bosom of a single state"¹⁰⁷ – it was founded on the land of Aboriginals!

Proponents of the Accord argued to convince Manitoba that it was a commendable first step in a series of accommodations that would address Aboriginal concerns in the future as a means of striking a new balance.¹⁰⁸ Ever mindful of Canada's lacklustre follow-through on promises and commitments to Aboriginals after the attainment of immediate objectives, Harper would give no credence to these claims. This time things would be different. No longer would the Aboriginal peoples be completely removed from the discourse. This time Harper would use Canada's own democratic principles to bring the government's historical maltreatment of Aboriginals into the limelight of the Canadian legal consciousness:

Our relationship with Canada is a national disgrace. What we are fighting for is democracy, democracy for ourselves and democracy for all Canadians. And we will use the democratic principles in this country to obtain our rightful place in Canada. We are prepared to hurt a little. What we are fighting for is for our people, for our children – for the future of our children, our culture, our heritage and what we believe in. Most of all, we are fighting for our rightful place in Canadian society...¹⁰⁹

This appeal to the fundamentals of democracy forced Canadians to take notice of the corruption at the root of the process. It also provoked an increasing amount of support for the Aboriginal cause. Most Canadians "felt they were seeing one honest politician. They saw integrity and honesty."¹¹⁰ Even ardent supporter and founder of "the Friends of Meech Lake" Jeremy Webber, who viewed the Accord as "a mere pittance" in granting the terms of Quebec's entrance into the constitutional family, couldn't really blame Harper.¹¹¹

Notwithstanding Webber's view, others have argued that the Accord was not only bad for Aboriginals; it was bad for Canada in general. Pierre Trudeau saw the Accord as encouragement for a provincial nationalist paradigm and argued vehemently that it would only benefit the political clout of the First Ministers promoting the issue to Quebec. He stated categorically that the Accord would summon "the peace of the grave for the Canada we know and love."¹¹² His fear was that Canada would be thrown into an unending debate surrounding the merits of federalism and the unequal distribution of powers amongst the provinces. Parliamentary supremacy would be devastated and the federal legislature would be compelled to cater to Quebec's elevated status.

106 Jim Sinclair paraphrased in Turpel & Monture, *supra* note 104 at 349.

107 The Report of the Earl of Durham, Her Majesty's High Commissioner & Governor General of British North America, 1839.

108 Thomas J. Courchene, "Meech Lake and Federalism: Accord or Discord?" in Swinton, Rogerson, *supra* note 102, 121 at 143.

109 Harper quoted in Comeau, *supra* note 99 at 197.

110 *Ibid.* at 185.

111 Interview of Jeremy Webber (7 March 2007). Friends of Meech Lake was a group that laboured in support of the Meech Lake Accord during the years leading up to Mulroney's meeting of first ministers.

112 Donald Johnston, ed., *Pierre Trudeau Speaks Out on Meech Lake* (Canada: General Paperbacks, 1990) at 35. In addition to other terms, Trudeau took issue with the constitutional veto the agreement would have given to Quebec. This would have, arguably, solidified the legislation and limited other provincial advancements and participation in future constitutional reform.

Harper may have had the last word on Quebec's drive to become Canada's eminent province alongside the federal government's attempt to casually dismiss Aboriginals, but this did nothing to quell the remaining tensions surrounding unresolved land claims. In fact, these tensions only escalated, culminating in the now infamous standoff at Oka; within just three weeks of the Accord's defeat, members of the Kanesatake Mohawks began their blockade to prevent the town's proposed golf course expansion over their sacred burial grounds.¹¹³

Harkening back to Pontiac's uprising and Riel's resistance, and once more exhibiting Canada's propensity to escalate and coerce resolution of Aboriginal issues through violence, Mulroney invoked the provisions of the *National Defense Act* without calling an emergency session of parliament to give Quebec premier and co-champion of the Accord Robert Bourassa permission to deploy over 4,000 Canadian troops to relieve the Surete du Quebec after an ill-planned attack left one officer dead and the rest retreating from their own tear gas.¹¹⁴

Harper immediately went to Oka to help defuse hostilities and offer his support. While there, he was permitted to cross over army lines to speak directly with the Mohawks under siege.¹¹⁵ After hearing their story, Harper warned the military to back off: "the constant pressure from the army was making it almost impossible to negotiate a solution".¹¹⁶ Soon after, three troops defied the military's promise to give clear warnings before advancing and proceeded to cross into the Mohawk camp in the dead of night where they then beat a Mohawk elder on watch to within an inch of his life.¹¹⁷

When hostilities finally ceased after 78 days, by way of diverting attention from his maladministration Mulroney followed through on his offer, initially rejected by Harper as a bribe, to set up the Royal Commission on Aboriginal Peoples.¹¹⁸

It has been over 10 years now since the Royal Commission on Aboriginal Peoples was conducted. The Assembly of First Nations has recently reported the resounding failure of Canada to implement its recommendations.¹¹⁹ Honourable mention in the report went to: the establishment of an annual "National Aboriginal Day"; the Aboriginal Healing Foundation, in lieu of the recommended public inquiry into residential schools; and the Aboriginal Sports Council, despite its insufficient funding. Dishonourable mention went to the overwhelming majority of other recommendations.¹²⁰

After Harper's refusal to grant the required support to the Accord, it was believed by many that Canada could no longer continue to ignore Aboriginal issues. Since that time, however, it has become apparent that Canada has found such a way. The current Conservative government has refused to issue the apology, promised by the Liberals under Paul Martin, for the administration of residential schools that forcibly extracted Aboriginal children from their homes, com-

113 Tiellet, *supra* note 50 at 366.

114 Philip Raphals, "Mohawks Rouse the Captive Nations," *The Nation* (October 15, 1990), online: Questia.ca <http://www.questia.com/PM.qst?a=o&d=5002157493>; Linda Pertusati, *In Defense of Mohawk Land: Ethnopolitical Conflict in Native North America* (Albany: SUNY Press, 1997) at 110-111.

115 Geoffrey York & Loreen Pindera, *People of the Pines: The Warriors and the Legacy of Oka* (Toronto: Little, Brown & Co., 1991) at 367.

116 *Ibid.*

117 *Ibid.* at 367-371.

118 Mulroney sent a number of promises to entice Harper into agreeing to the accord including the establishment of a Royal Commission on Aboriginal Affairs, to which Harper responded: "Mulroney had the power to call a royal commission at any time. We have had studies on [A]boriginal people for many years... There are a number of recommendations that are sitting on the government's desk. There is nothing in the Meech Lake accord that will benefit [A]boriginal people." Quoted in Comeau, *supra* note 98 at 192 & 197.

119 Assembly of First Nations "Royal Commission on Aboriginal People at 10 Years: A Report Card," online: < http://www.afn.ca/cmslib/general/afn_rcap.pdf >.

120 *Ibid.* at 7 and 18. National Aboriginal Day received the only 'A' in the Report. The Healing foundation and Sports Council each received a 'B+'. The report gave an 'F' to a total of 37 out of the 66 recommendations.

munities and culture and subjected many of them to abuse and neglect for over 100 years.¹²¹ Currently, one in ten Aboriginal children in Canada is a ward of the state compared to one out of every 200 non-Aboriginal children. This represents three times as many children than were in the residential schools at the pinnacle of their operation and a 65 percent increase in Aboriginal children in care since 1996.¹²² The Royal Commission highlights the current plight:

Aboriginal people are at the bottom of almost every available index of socio-economic well-being, whether [they] are measuring educational levels, employment opportunities, housing conditions, per capita incomes or any of the other conditions that give non-Aboriginal Canadians one of the highest standards of living in the world.¹²³

Yet the Kelowna Accord, which promised more than five billion dollars to upgrade health care, housing and education for Aboriginals, has similarly been dismissed despite a majority vote in the House of Commons and the support of the three opposition parties.¹²⁴ These are just a few examples of how Aboriginals continue to be ignored by the government despite agreements and promises to ameliorate and redress the enduring effects of colonialism.

In Harper's address to the Assembly of Manitoba Chiefs at the Winnipeg Convention Centre in the days leading up to his final dissent, the magnitude of his decision was as apparent as his devotion to this country:

[W]hat I am doing I feel... I feel it is not just for [A]boriginal people [but] also for [other Canadians]. I love this country, too. That's why I've said we shared this land... [T]he strength that I got was from all of you, and also from all the elders, the prayers that have been placed to our Creator. And I believe he has heard our prayers... [T]he elders at home have been building fires in the evenings and praying for us – not only for me but for the leaders, so that they may make the right decision. And I believe we have made that decision, the right decision...¹²⁵

When Canada begins to honour the spirit of Aboriginal people's capacity to share and contribute to our national character and legal framework it will be able to see the nation as Harper did. His dissent was a humble request for Canadians to reconsider Canada's Aboriginal heritage. It may not always be apparent, but history has shown that it has been no less effective in altering our laws and the shape of this country.

121 Bill Curry, "No residential school apology, Tories say: Indian Affairs Minister contradicts pledge made by Liberals two years ago" *The Globe and Mail* (27 March 2007), online: *The Globe and Mail* <<http://www.theglobeandmail.com/servlet/story/RTGAM.20070327.wxnatives27/BNStory/National/>>; for information on residential schools see generally: Ward Churchill, *Kill the Indian, Save the Man: The Genocidal Impact of American Indian Residential Schools* (San Francisco: City Lights Books, 2004); John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879-1986* (Manitoba: University of Manitoba Press, 2003).

122 "First Nations Child and Family Services – Questions and Answers" (February 2007), online: Assembly of First Nations <<http://www.afn.ca/article.asp?id=3372>>. The AFN has indicated that it will pursue a human rights complaint and possibly a charter challenge unless the federal government does not commit to a timely, comprehensive national strategy, see "Leadership Action Plan on First Nations: Child Welfare" (February 2007), online: <<http://www.afn.ca/misc/afn-child.pdf>> at 11.

123 Royal Commission on Aboriginal Peoples, *Choosing Life, Special Report on Suicide among Aboriginal People* (Ottawa: Supply and Services, 1995) at 24.

124 Bill Curry, "Opposition force passage of Kelowna accord: Tory government ways it will regard the vote as merely a 'statement'" *The Globe and Mail* (22 March 2007), online: *The Globe and Mail* <<http://www.theglobeandmail.com/servlet/story/RTGAM.20070322.wxkelowna22/BNStory/National/>>.

125 Harper quoted in Comeau, *supra* note 99 at 181.

CONCLUSION

Despite the government's renewed commitment to combat the difficult realities of Aboriginal peoples resulting from generations of abuse and maltreatment at the hands of a colonial government, Aboriginals are still fighting for the recognition they deserve. They are also still fighting for the respect that they deserve, not only as the First Peoples, but also for the contributions that they have made to a legal framework that subverts the few moments of legal recognition achieved by Aboriginal leaders in order to serve colonial objects. This conspiracy has successfully invoked the legal whiplash to undermine justified Aboriginal resistances resulting from Canada's failures to uphold promises made to protect Aboriginal sovereignty, rights and status. Overshadowing legal contributions that all Canadians can be grateful for has not only dishonoured the memory of three of the greatest Aboriginal leaders of all time – it has also dishonoured Canada.

Without the pan-Aboriginal alliance led by the great Ottawa War Chief, Pontiac, the *Royal Proclamation* would not have drawn the support required to fend off the advancing Americans. Pontiac was a fearless leader who sought to uphold Aboriginal rights to remain undisturbed in their lands and to be respected for sharing them when they consented to do so. His vision of a united Aboriginal front inspired subsequent resistances that helped protect our nation in its time of need. His uprising was an awakening as to the consequences of dishonouring promises to Aboriginals. Heeding Penikett's respectful acknowledgment of the *Royal Proclamation* as "*Pontiac's Proclamation*" ought to set right the current misunderstanding surrounding the interpretation of the document that embodies the spirit of Pontiac's resistance. This acknowledgement will also serve in the drafting of a new *Royal Proclamation* that lays the foundation of a renewed relationship between Aboriginals and the government of Canada.

Louis Riel bore the brunt of Canada's early scorn for the Métis. As "Prophet of the New World," he forced Macdonald and the Canadian government to come to terms with the Métis' resistance to assimilation into the rubric of confederation without land rights and governance.¹²⁶ Riel steadied Macdonald's hand long enough to see his Métis people integrate on their own terms into what would become Canada's fifth province. In spite of all the obstacles that threatened his mission, Riel found the strength to resist the government's dictatorial drive to run roughshod over his brethren, to guarantee the foundation of Métis rights in the terms of the *M. Act*. What set Riel apart from Pontiac is that, although his struggle also ended in a violent insurrection, his main contribution to Canada was political. It is time for the honour of Canada's Métis son and one of the Founding Fathers of Confederation to be restored.

Were it not for the sole dissenting voice of Elijah Harper sending shock waves across the nation, Canada would have exacerbated the ramifications of colonialism by constitutionally entrenching the lie that the French and English were the only founders of Canada via the Meech Lake Accord. Moreover, elevating Quebec to distinct society status would have plunged the dream of a strong Canadian federalism into a raging political maelstrom regarding the unequal distribution of provincial powers.

In his plea to exonerate Riel, St. Germain sought admirably to pierce the armour of Canadians' innate suspicion of heroes:

One thing that makes this country unique is its leaders. People need leaders. They need heroes. People need leaders who have the ability to see what is going on around them, apply their knowledge and surmise what the future will bring. Leaders seek to move their people forward. They help steer them down better roads.¹²⁷

¹²⁶ Flannigan, *Louis*, *supra* note 50 at 172.

¹²⁷ Debate, St. Germain, *supra* note 57.

The law has not yet honoured the fact that Canada, our legal framework, and our national sense of justice have all been shaped by the countless sacrifices of Aboriginal leaders and heroes. Yet, Aboriginal influence on the Canadian legal consciousness is not enough; Aboriginals must enter the Canadian consciousness, for Aboriginals are Canada's conscience. Each time, these heroes rose above the mire to capture the attention of the rule of law in an effort to steer Canadians toward higher virtues and conceptions of justice; each time, the ensuing legal whiplash conspired to ensure their fall from grace in the pages of Canada's legal history. This refusal to grant a just recognition for these leaders' efforts to contribute to Canada and our national character has been shameful. Canada owes each of these leaders a debt of gratitude – a debt that this country can begin to repay by honouring the object of their struggle: promoting a peaceful Canada, respect for its First Peoples, and a grateful recognition of the Aboriginal heritage embedded within our laws.

EPILOGUE¹²⁸

Nearly two years have passed since the *Queen* met her fate and the Gitga'gat were summoned from the comforts of their community to answer "the highest calling of what it is to be human". Instead of continuing to hail the efforts of the community, the focus has shifted to: the negligence of B.C. Ferries; the class action lawsuit by survivors that has limited disclosure surrounding the critical 14 minute time period where the *Queen* was to change course; and allegations of sexual activity and regular drug use taking place amongst the crew onboard.

The subtext of Campagnolo's request for the heroes of Hartley Bay to come to Victoria for their banquet was the expectation that they find and pay their own way. The band council was initially expected to pay the estimated \$25,000: a heavy blow to a fishing community with a 65 percent unemployment rate. After reports exposed the issue, the government stepped up and offered to pay for hotel rooms and incidentals; B.C. Ferries then offered to take care of the ferry traveling expense, including a free buffet dinner onboard. When a local airline began making inquiries, however, it simply offered to fly the heroes the whole way.

In the end, B.C. Ferries decided to renege on its initial proposal to name its replacement vessel after Hartley Bay. Apparently, the *Spirit of Hartley Bay* was not in line with its long term marketing strategy. Instead, the company has chosen to name the replacement vessel, the *Northern Discovery*. Chief Councilor of the Gita'gat, Bob Hill, says the solution is obvious: rename the village after the *Northern Discovery*!

128 Similar to the prologue section, the epilogue has been factually compiled from the news stories surrounding the anniversary of the *Queen's* demise. A few of the articles canvassed include: Sandra Mcculloch, "Hartley Bay upset with B.C. Ferries" *Times Colonist* (6 Jan. 2007), online: <http://www.canada.com/victoriatimescolonist/news/story.html?id=fc99ead1-7ec4-42df-b1ee-dd1db7709d5c&k=50647>>; Michael Smyth, "Heroes invited to Victoria, then stuck with tab" *The Province* (24 September 2006), online: <http://www.canada.com/theprovince/news/story.html?id=a27824af-48cf-46f0-b97a-465e84e12e01&k=40601>>; Michael Smyth, "Hawkair flies to the rescue of Hartley Bay heroes" *The Province* (29 September 2006), online: <http://www.canada.com/theprovince/news/story.html?id=a998cdde-770f-4f82-9333-2145ca423fc3&k=14028>>; Jack Knox, "Leaking of sunken ferry's fuel is source of much worry" *Times Colonist* (19 March 2007), online: <http://www.canada.com/victoriatimescolonist/story.html?id=67a07419-e9da-4d7e-afcd-7bc8d9e52ae1&k=20415>>; BC Ferries has since released a divisional inquiry into the matter to find out the reason for the incident. The report chalks the fault up to human error by failure "to maintain a proper lookout by all available means", and "casual watchstanding behavior" resulting in missing a critical route change 14 minutes before the crash. BC Ferries, "Divisional Inquiry #815-06-01: Queen of the North Grounding and Sinking" (March 26, 2007) online: http://www.bcferries.com/files/AboutBCF/815-06-01_DI_QON_Grounding.pdf>; See also BC Ferries, "Divisional Inquiry #815-06-01 ADDENDUM: Queen of the North Grounding and Sinking" (October 2, 2007) online: http://www.bcferries.com/files/PDFs/Addendum_to_Divisional_Inquiry_Queen_of_the_North.pdf>; Cindy Harnett, "Queen of the North should be drug tested: BC Ferries" *CanWest News Service* (18 October 2007), online: <http://queen-of-the-north-news.newslib.com/story/7588-116/>> "Sex may have sunk BC Ferry" *CanWest News Service* (8 February 2007), online: <http://www.canada.com/cityguides/winnipeg/story.html?id=c883f2b0-9c54-4331-822f-ba432cbd7e4f&k=720>>; Cindy E. Harnett, "Ruling stalls lawsuit in Queen of the North sinking" *Times Colonist* (18 July 2007), online: <http://queen-of-the-north-news.newslib.com/story/7588-104/>>; Scott Sutherland, "Queen of the North to stay sunk" *The National* (8 June 2007), online: <http://queen-of-the-north-news.newslib.com/story/7588-94/>>.

What is even more outrageous than these ridiculous oversights is that the *Queen* is still submerged in 425 metres of water. BC Ferries has confirmed that it now will remain, citing even more environmental damage will follow if attempts are made to have it raised. After the incident members of the community visited the site regularly only to smell fumes and see the ominous bubbling from the remnants of the 150,000 litres of diesel amongst other fuels and oils from the ship and onboard vehicles threatening the surrounding ecosystem, their livelihood and chief source of food. The community did not harvest seaweed this year and remains fearful of the mussels, clams and shellfish harvested from around the site now declared to be a “toxic time bomb” by the community.

REFLECTIONS

This episode is all too typical of the Canadian response to honour Aboriginal contributions to our national character. What is unfortunate is the effect this has on the struggle to cope with such a lack of recognition and respect. I cannot help but think that the Chief's comment, though glossed in humour, may be a submission to the hopelessness of having to watch helplessly as Canada allows another example of Aboriginal heroism to fade into obscurity. With history as our guide, however, expect Canada to invoke the legal whiplash to further disrespect the community's selfless efforts.

Despite the accolades received by Hartley Bay, Aboriginal leaders and heroes' attempts to elevate this country's conceptions of justice beyond traditional English-French cultures of domination have been rewarded with martyrdom, neglect and wilful blindness. The arguments for Aboriginal sovereignty, rights and status have not changed since they were first spoken and acted upon by these leaders. Thus, the situation has become one where Aboriginals are forced to wait patiently while Canadians and the government come to grips with the realization that these leaders' enduring struggle against injustice may have given them some notion of what real justice looks like. What is even more frustrating is that solutions are dormant within the laws themselves. If the government could just recoil the legal whiplash and allow Aboriginals the opportunity to restore the damage that has been done to the legacies of their leadership along with the initial spirit of the laws they influenced, reconciliation would be a great deal more realistic.

Throughout this paper I have tried to put forth the notion that Canadians and the government should strive to accept, endorse and respect Aboriginal contributions to our legal framework. These contributions have been essential to the evolution and formation of this country. Continuing to invoke the legal whiplash to mitigate and malign these contributions not only prevents a substantive recognition of what it means to be Aboriginal, but also what it means to be Canadian.

I believe that, for the most part, the law emanates from the life that we give to it. Sometimes, however, I also believe that the law breathes with a life of its own in order to serve a purpose higher than what we may be prepared for. In these cases, there is always a tension between what the law is trying to tell us and how we interpret this message to suit our purposes in the moment. When the law was exposed to the visions of Pontiac, Riel and Harper, it immediately responded to capture their spirits and dedication to justice. Unfortunately, political agendas within the structures of power, guided by the Kilmicka constraint, have forced each to bear the scars of Canada's propensity to twist the law to suit colonial machinations. Additionally, the ambivalence espoused by Canadians, who have failed to credit the Aboriginal struggle's influence on their morality, has assisted the legal whiplash by allowing the state to continue sabotaging genuine Aboriginal contributions to our legal framework and consciousness.

It is difficult to stay upbeat and positive when the government champions its intent to rec-

oncle its relationship with Aboriginals. Without the political will to recoil the legal whiplash and free the legacies of these Aboriginal leaders from the shadows of the laws they influenced that were subsequently corrupted to promote colonial objectives, there can be no reconciliation: the "stain will remain" and there will always be an animosity dividing Aboriginals, Canadians and the government.

Of course, I could blame this on the assertion of Crown sovereignty, but what if the problem is even more insidious? What if the internalization of colonialism has pervaded our society to the point where we are just too far gone? What if it has also begun to breathe with a life of its own, working consciously through the ambivalence of Canadians and the good intentions of legislators and the judiciary to dim the legacies of Aboriginal leaders: painting pictures of their inevitable subordination and the futility in challenging state supremacy with the banner of justice as the backdrop?

This is one view. It does explain how the effects of the legal whiplash have endured and how these Aboriginal leaders have failed to receive the recognition that they deserve. The intent is to corrupt the ambitions of future generations and create a culture of submission under the looming threat of the legal whiplash. I believe that, right now, Aboriginals are going through a major recovery period in the wake of the historical maltreatment that has done major damage to families, communities and their culture. Those who are struggling to hold on need to look up to the visions and teachings of our traditional leaders in order to work towards piecing back together that which has been lost. As long as these leaders' legacies continue to be marred by the legal whiplash, this becomes more and more difficult with successive generations who have little to look forward to and no one to look up to.

What this view does not explain, however, is why Aboriginals, such as the Gita'gat, continue working to assist Canadians and shape the legal framework if they know that their efforts will be hardly rewarded – maybe even punished! The adage that 'kindness is its own reward' just does not seem to accurately expound the depths of Aboriginal altruism and the capacity to tolerate generations of ignorance to their own detriment. Instead, I have found more solace in the belief that the years of abuse under a colonial regime have done nothing to stifle the inherent goodness and drive to assist those in need, regardless of the consequences inherent and central to the Aboriginal ethic. I believe these were the guiding principles that Aboriginal leaders sought to help form the basis of the relationship between their peoples, Canadians and the government. These are the principles that have been damaged by the legal whiplash; these are the principles Canada will recover once it is recoiled.

BOOK REVIEW

THE FIRST WOMEN LAWYERS

BY MARY JANE MOSSMAN

Reviewed By Nicole Bermbach*

CITED: (2008) 13 Appeal 90-94

In 2006 there was an equal number of men and women in the first year class at the Faculty of Law at the University of Victoria. This was notable as women had outnumbered men for the previous few years. Aside from superficial interest, I have never paid much attention to the gender composition of any of my classes or programs. In deciding to go to law school, I worried about my academic performance and whether I would make a good lawyer. Gender never entered the picture. This does not mean gender is no longer a basis of inequality in society in general or the legal profession in particular or that I am unaffected by sex-specific attitudes and behaviours. Gender remains a live issue; however, growing up in the late twentieth century, there was nothing remarkable to me about women in university, just as there was nothing unusual about having a female doctor or professor. It turns out I am wrong: there is much to be remarked on.

The story of the entry of women into the legal professions is told in Mary Jane Mossman's book, *The First Women Lawyers*.¹ Her book compares women's experiences in North American, Europe, India and Australasia from the later half of the nineteenth through the early twentieth century. In chronicling women's emergence as legal professionals the book also charts the evolution of law as a profession, the increasing access for women to higher education, and the movement of women out of the private sphere and into the public.

The First Women Lawyers is divided into eight chapters. An introduction and conclusion serve as bookends for the six substantive chapters; each of these six chapters concentrates on the entry of women into the legal professions in a different geographical location. The first two chapters focus on North America and detail the admittance of women to the bar in the United States and Canada. The next chapter describes women in the law in the United Kingdom and the following two chapters deal with countries within the British Empire: New Zealand and India. The focus of the penultimate chapter is women's entry into the legal professions on the European continent.

The author, Mary Jane Mossman, is a Professor of Law at Osgoode Hall Law School of York University. *The First Women Lawyers* is the work of a scholar and not surprisingly the book is thorough and well-researched. The author draws heavily on secondary sources as well as origi-

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1 Mary Jane Mossman, *The First Women Lawyers: A Comparative Study of Gender, the Law, and the Legal Professions* (Portland, OR: Hart Publishing, 2006). The term "legal professions" reflects Mossman's adoption of "a wide ranging definition of the term 'lawyer' to encompass not only those women who gained formal admission to the legal professions, but also others who were engaged in legal work without achieving the status of formal admission", at 9.

nal documents. This means the text is heavily footnoted, which may be a little overwhelming to some readers, myself included. After the first chapter I became more selective in my attention to footnotes, pausing to only to read those that provided more than attribution. Also a little overwhelming are quotes in French with no translation provided. The footnotes and French, though daunting, are no deterrence to understanding and enjoying the book. Despite being dense with information, *The First Women Lawyers* is easy to read.

The First Women Lawyers is well-written, interesting and engaging. It is filled with anecdotes I want to share, the kind of tidbits you and a friend can shake your heads over, marveling, "Can you believe that?" For example, there is something incongruous about Queen Victoria being beside herself with fury over the "mad, wicked, folly" of Women's Rights.² But *The First Women Lawyers* is not simply a compendium of historical anecdotes. It tells the stories of the first women in the legal professions: the story of women's entry into public life, into areas that were once the sole domain of men, such as politics, paid employment, and business. That I can dismiss Queen Victoria's views as ironic and ridiculous reveals the dramatic change in the status of women in the last 100 years.

The latter half of the nineteenth century saw the emergence of women from the traditional, private sphere of the home into the public arenas of paid work and politics. Changes in social and economic realities for women led to calls for access to education, admittance to professions, and recognition of civil rights. It is in this context that women sought to become lawyers. In documenting the struggles of the first women lawyers, Mossman's book provides the reader with a sense of the development of the legal profession, the interplay between the suffrage movement and women's attempts to gain entry to educational institutions and professional organizations, and the social and economic conditions of women at the turn of the century.

In the chapters on the American and Canadian experiences, Mossman provides the reader with a great deal of information in a way that is fairly easy to follow and not overwhelming. These chapters are, roughly speaking, organized chronologically and read like surveys of the movement of women into the law in these two locales. These chapters are quite distinct from the three that follow. Unlike their predecessors, the chapters on the United Kingdom, New Zealand, and India centre on individual women and their attempts to work as legal professionals. In following the careers of these women in their social, economic, and political contexts, common experiences are identified and issues particular to an individual or region are highlighted.

The chapter on women in the law in Europe is particularly interesting. Unlike the chapters on the United Kingdom, New Zealand, and India, it is not focused on a single woman; however, a single individual dominates the chapter. That individual is Louis Frank: a Belgian barrister, a staunch supporter of women's rights, and a man. Frank devoted much of his career to lobbying for women's admittance to the bar. He published extensively on the subject and in 1892, along with Marie Popelin,³ established the "first feminist organization in Belgium".⁴ Frank's presence is felt throughout the book: he corresponded with many, if not most, of the women involved in the legal professions throughout the world in the later half of the nineteenth century as research for his comprehensive treatise on women in the legal professions.⁵

I was curious about the noticeable difference between the chapters on the United States,

2 C. Holcombe, *Victorian Ladies at Work: Middle-class Working Women in England and Wales 1800-1914* (Hamden, CT: Archon Books, 1973) at 9, citing M. Cole, *Women of To-day* (London: Thomas and Nelson, 1946) at 150-51, cited in Mossman, *supra* note 1 at 148.

3 In 1889, Popelin was unsuccessful in her application to take the oath to become an *avocate* in Belgium. Frank himself appeared before the Court of Appeals on her behalf. Mossman, *supra* note 1 at 252.

4 F. De Bueger-Van Lierde, "A L'Origine du Mouvement Feministe en Belgique: 'L'Affaire Popelin'". (1972) 50 *Revue Belge de Philologie et d'Histoire* 1128 at 1137, cited in Mossman, *supra* note 1 at 257.

5 *La Femme-Avocat*, published in 1898.

Canada, and Europe and those on the U.K., New Zealand, and India. It was not clear whether the difference in strategy was due to differences in the availability of particular types of information⁶ or was a choice on the part of the author to vary how to present the story of early female lawyers. Another aspect of the study that was not explicitly discussed that I was curious about was the lack of “romantic attachments” of the women. I noted that most of the central characters remained unmarried and childless and the few that did marry ended up leaving the profession.

In examining the entry of women into the legal professions, *The First Women Lawyers* describes the prevailing state of the legal profession at the turn of the nineteenth century in various locations. In common law jurisdictions, beginning in the late 1800s, there was a greater emphasis on university education in the training of legal professionals.⁷ This reflected a shift away from the apprenticeship model in which, as an early nineteenth century Saint John law student noted,

law students needed only pay an entrance fee, take a desk in a barrister's office, and be registered in the 'Student's Book;' and then, so long as the student could read and write, and had 'walked in and out of an office door for four or five years,' he would be enrolled 'as a Lawyer.'⁸

Though a law degree was not required for admission to the bar in the late nineteenth and early twentieth centuries, an increasing number of lawyers in Canada obtained their LL.B. before going on to practice. The relationship between university education and legal practice became problematic as women were admitted to law schools, finished their degrees, and were then statutorily excluded from membership to the bar on the basis of their gender.

Across the various jurisdictions studied, law was viewed as a “gentleman's profession”—the designation already precluding the presence of women, despite the use of the ostensibly gender-neutral language of “persons” in most of the regulations governing admittance to the bar. The response of a New Brunswick court in 1905 to the application by Mabel Penery French is typical of the response of courts in various jurisdictions. The New Brunswick court, in considering the provincial *Interpretation Act*, which defined “person” as anyone who in “the context is capable of applying”, determined that since women had never been lawyers the legislature must never have intended that women be included as “persons” for the purpose of the bar statute.

Often judges that relied on statutory interpretation to deny women's applications to practice law made it clear that their decision did not reflect their personal views on the matter; rather, they were merely deferring to the legislature: if women wanted to be lawyers, it was a matter best addressed by elected officials. Other courts relied less on interpretation of statute and more on what they considered to be the moral reasons to keep men and women in their separate and distinct roles. As Justice Saint-Pierre stated in his refusal to admit Annie MacDonald Langstaff to the bar in Québec,

I would put within the range of possibilities though by no means a commendable one, the admission of a women to the profession of solicitor or that of *avoué*, but I hold that to admit a woman and more particularly a married woman as a *barrister*, that is to say, a *person who pleads cases at the bar before judges or juries in open court and in the presence of the pub-*

6 For example, the first woman lawyer in India, Cornelia Sorabji, had written an autobiography.

7 The author notes that in civil law jurisdictions, there was already a prominent role for university education in professional development.

8 D. G. Bell, *Legal Education in New Brunswick: A History* (Fredricton: University of New Brunswick, 1992) at 19, cited in Mossman, *supra* note 1 at 75.

lic, would be nothing short of a direct infringement upon public order and a manifest violation of the law of good morals and public decency.⁹

These decisions reveal not only views about what sort of person should practice law, but also prevalent beliefs about the proper role of women and the fears around allowing women to operate outside that role.

Though many men (and women) adhered to gender norms that defined women as the delicate sex, not all male lawyers in the late nineteenth and early twentieth century were opposed to women practicing law. Throughout *The First Women Lawyers* are examples of male practitioners who supported women's efforts to enter to profession. Louis Frank, who championed women's rights, including the right to practice law, is just one example. Indeed, the support of male lawyers, and perhaps more importantly male legislators, was instrumental in bringing about the necessary changes to legislation which made it possible for women to become lawyers.

Mossman's comparative strategy of examining a particular phenomenon over a prescribed time frame in six different locales highlights similarities in the process of women's entry into the legal professions. At the same time, the author draws attention to differences in women's experiences as a function of their personal circumstances and cultural context. For example, in New Zealand, when Ethel Benjamin, that country's first woman lawyer, applied for admission to the bar women had already gained the vote and legislation had already been enacted to allow women to become lawyers. This is in contrast to the other jurisdictions where women had to apply to the courts (mostly unsuccessfully) to claim eligibility to practice as lawyers. Despite the relative ease with which Miss Benjamin attained the status of lawyer she, like many of her colleagues in other locations, had difficulty establishing and maintaining her practice.

In telling the story of the first women lawyers the focus is necessarily on gender; however, gender is not the only factor that served as a barrier to entrance to the legal professions. For a number of women, their religion added another obstacle. As an early Canadian lawyer reported,

Oh yes, you never walked inside a non-Jewish place, you just didn't. It was as if there was a big sign outside. I couldn't get a job when I graduated, I went into practice on my own because I couldn't get a job anywhere. I was Jewish and I was a woman.¹⁰

In some cases, religious affiliation assisted women. In the case of Cornelia Sorabji, the first female lawyer in India, that she was a Christian provided her with an opportunity to connect with British administrators in India and distinguished her as a "civilised Indian woman."¹¹ For many women, factors such as race, religion and age played a large role, sometimes positive, sometimes negative, in their struggle to achieve their career aspirations.

One of the themes highlighted in the book that I found most compelling was identity. How did these women lawyers position themselves in relation to their gender and their profession? The late nineteenth century was a time of significant change in the status of women. Though some of the first women lawyers were heavily involved in women's rights movements, others were not. Indeed some, such as Cornelia Sorabji, even showed distaste for such "women's

9 *Langstaff v Bar of Québec* (1915) 47 Rappports Judiciaires de Québec 131 (CS) at 139, cited in Mossman, *supra* note 1 at 95 [emphasis in original].

10 C. Morgan, "An Embarrassingly and Severely Masculine Atmosphere: Women, Gender and the Legal Profession at Osgoode Hall, 1920s-1960s" (1996) 11 Canadian Journal of Women and the Law 19 at 33, cited in Mossman, *supra* note 1 at 111.

11 Mossman, *supra* note 1 at 201.

rights women".¹² Regardless of their views on women's rights, the perceived objective, merit-based standards of professional ideology may have led some women to identify themselves as professionals first and women second.¹³ Such an ideology encouraged female lawyers to see a "community of interest between themselves and professional men and a gulf between themselves and non-professional women".¹⁴

What animates the book are the first women lawyers. It is their stories that engage the reader. For this reason, I found the chapters that followed individual women more coherent and absorbing. These chapters contain "asides" or details peripheral to "law", and provide a more complete sense of not only the person herself, but also the time and place in which she acted. For example, Eliza Orme, the focus of the chapter on the United Kingdom, was appointed a Lady Assistant Commissioner and in this capacity prepared reports for a Royal Commission on Labour. In detailing Orme's work with the Commission, Mossman gives the reader a glimpse of the overall economic and working conditions of women in Britain at the end of the nineteenth century.

The First Women Lawyers has particular relevance for law students. Not only does it address the development of the profession and the role of the judiciary and legislature in social change, but it reveals the ways in which gender can be a basis for exclusion. The ubiquity of women lawyers belies the fact that the inclusion of women is a relatively recent development in the profession, achieved through the efforts of numerous women and men. Reading *The First Women Lawyers*, I better appreciated the struggles of those who went before me and felt a sense of honour and pride in their courage and accomplishments. The book also brought forward issues of identity. I found myself reflecting on my evolving sense of what it means to be a lawyer (both ideal and real) and, in particular, a female lawyer, and the extent to which I fit with these conceptions.

The First Women Lawyers is a comparative and historical study of gender, law, and the legal professions. Not only does it track the development of law as a profession from the mid-nineteenth through the early twentieth century but, more importantly, it calls attention to the fact that had I been sitting in the first year class of a Canadian law school 100 years ago I would have been able to count the number of female peers on one hand. Reading *The First Women Lawyers*, I experienced the evolution of law and the legal professions and realized the need to view this evolution in the context of existing social, political and economic conditions. There is much to remark on when considering that in the space of a hundred years the opening salutation for an incoming law school class has gone from "Lady and Gentlemen" to "Welcome students".

12 A. Burton, *At the Heart of the Empire: Indian and the Colonial Encounter in Late Victorian Britain* (Berkeley: University of California Press, 1998) at 114, cited in Mossman, *supra* note 1 at 237.

13 N.F. Cott, *The Grounding of Modern Feminism* (New Haven & London: Yale University Press, 1987) at 237, cited in Mossman, *supra* note 1 at 53.

14 Cott, *ibid.* at 233-4.

BOOK REVIEW

GLOBAL BIOPIRACY: PATENTS, PLANTS, AND INDIGENOUS KNOWLEDGE

BY IKECHI MGBEOJI

Reviewed By Christopher Peng*

CITED: (2008) 13 Appeal 95-98

Legal control and ownership of plants and traditional (indigenous) knowledge of the uses of plants (TKUP) is often a vexing issue, particularly at the international level, because of the conflicting interests of states or groups of states. The most widely used form of juridical control of plants and TKUP is the patent system, which originated in Europe. This book rethinks the role of international law and legal concepts, the major patent systems of the world, and international agricultural institutions as they affect legal ownership and control of plants and TKUP.¹

Two important aspects of property law are the rights given to property owners and the eligible subject matter to which those rights may apply. These aspects of property law vary from jurisdiction to jurisdiction. Some cultures emphasize the importance of private ownership by granting a broad scope of rights to a large variety of subject matter. In other cultures, the concept of private ownership is alien because property is held communally.² Given these types of fundamental differences, conflicts are bound to arise where there is increasing interaction between cultures.

Global Biopiracy examines a very specific area of property law where tension between different legal regimes exists. It discusses how patent and plant breeder's rights are used by the more developed countries (referred to as states of the North) to misappropriate the plants and TKUP from less developed countries (referred to as states of the South).

Global Biopiracy provides a very detailed and thorough explanation of the development of the modern patent system and its effect on plants and TKUP. To accomplish this, Ikechi Mgbeoji considers evidence from a variety of different disciplinary perspectives. For example, he considers legal perspectives when he discusses the international law concept of the Common Heritage of Mankind (CHM),³ political perspectives when he discusses the backdrop against which the Trade-Related Aspects of Intellectual Property Rights agreement was included in the 1994 amendment to the general World Trade Organization agreement, anthropological perspectives

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1 Ikechi Mgbeoji, *Global Biopiracy: Patents, Plants, and Indigenous Knowledge*, (Vancouver: UBC Press, 2006) at xi [*Global Biopiracy*].

2 For example, Aboriginal title in Canada.

3 See generally John Currie, *Public International Law*, (Toronto: Irwin Law, 2001) at 230.

when he discusses religious and philosophical conceptions of plants and economic perspectives when he discusses the effect that modern consumerism has on the diversity of plant species.

Ikechi Mgbeoji is currently an associate professor at the Osgoode Hall Law School at York University. Before moving to Osgoode, he taught at the Faculty of Law at the University of British Columbia. For five years, he was an attorney with a Nigerian law firm practicing in commercial and intellectual property law litigation. His teaching and research interests are in patent law, trademarks, copyrights, trade secrets, international law on the use of force, international environmental law, biotechnology and law, comparative intellectual property law, indigenous peoples and anthropology.⁴

It is clear from the outset that this book is very well organized. The first eight pages of the introductory chapter include a detailed roadmap of the entire book. I found this helpful not only to get a sense of the direction of the book before reading it but also because it was something I could refer back to while I was reading the book to see where it was going.

In the introduction, Mgbeoji states that “[t]he main objective is to contribute to a more transparent and open debate, free from the obfuscation and technical shenanigans that have hampered an appreciation of the global forces at play in the appropriation of indigenous peoples knowledge.”⁵

While the book is listed as 311 pages long, the last 102 pages are composed of footnotes and a selected bibliography. The structure of the arguments is excellent and Mgbeoji’s writing style is clear and concise. The one factor which slightly hinders this book from achieving its objective is its sometimes overly negative tone. Mgbeoji makes it clear from the outset that his intention is to critique the patent system: “it is not enough to analyze what the legal norms of the patent system seek to protect; what they neglect to protect is equally relevant. In short the patent system must be thoroughly interrogated and its intellectual integrity should not be presumed.”⁶ While there is nothing wrong with this position, it struck me right from the beginning of the book that there was a strong, consistently negative tone towards the modern patent regime. This was especially evident during his discussion of the origins of the patent system where he criticized almost every aspect of it. I found that this position made me automatically wary of his arguments, and made me read carefully to ensure that this apparent bias did not affect the reasoning in his arguments. While I did not find that any of the arguments were advanced in a biased manner, I think that his strong position made me less receptive than I otherwise could have been.

In the second chapter entitled “Patents, Indigenous and Traditional Knowledge, and Biopiracy”, Mgbeoji discusses the term “biopiracy”, the origin and development of the patent system and the current international regime with respect to patents. Mgbeoji defines “biopiracy” as “the unauthorized commercial use of biological resources and/or associated traditional knowledge, or the patenting of spurious inventions based on such knowledge, without compensation.”⁷

Mgbeoji also provides a good explanation of two relevant areas of law. First, Mgbeoji discusses various aspects of the patent system including its origin, underlying philosophies and theories, diffusion and colonial migration, historical evolution and development and some of its implications with respect to biopiracy. This discussion would serve as a good introduction for anyone studying patent or intellectual property law. Second, Mgbeoji presents the relevant

4 “Ikechi Mgbeoji” (January 22, 2008), online: Osgoode Hall Law School <http://www.osgoode.yorku.ca/faculty/Mgbeoji_Ikechi.html>.

5 *Global Biopiracy*, *supra* note 1 at 1.

6 *Ibid.* at 13.

7 *Ibid.* at 13.

international law principles. Most importantly, it is made clear that there is not an international patent system, only “a multiplicity of international, regional, multilateral, and bilateral agreements seeking to harmonize the process of granting patents.”⁸

In the third chapter entitled “Implications of Biopiracy for Biological and Cultural Diversity”, there is an interesting discussion of how different societies view and value plants and TKUP as well as some of the causes of contemporary extinction of plant species. Here, Mgbeoji does a good job illustrating that the patent regimes of the states of the North are highly reflective of their cultural values.

Continuing in the fourth chapter entitled “The Appropriative Aspects of Biopiracy”, there is detailed discussion of the factors central to the appropriative nature of biopiracy. Mgbeoji sets out three main factors: sociocultural, mechanisms by which the states of the North have established and the patent system. The first two factors are discussed in this chapter while the patent system is taken up in the fifth chapter.

With respect to the first factor, Mgbeoji provides a persuasive argument that racial and gender discrimination has denied the validity of “the intellectual input of traditional farmers and breeders, particularly women, in the improvement of plants and the creation of TKUP”.⁹ To support this argument, he provides examples of how racial and gender discrimination have led the states of the North to disregard the existing cultures when “discovering” plant products such as quinine and stone seeds.

With respect to the second factor, Mgbeoji argues that the evidence supports that the states of the North have established international agricultural research centres as research institutions and gene banks for the South's plant genetic resources to facilitate the misappropriation of plants and TKUP. Mgbeoji also discusses the historical development of institutional misappropriation dating back to colonialism, the attempts to justify the misappropriation by using the international law concept of CHM and the role of International Agricultural Research Centres with a focus on the Consultative Group on International Agricultural Research. This section neatly illustrates how modern appropriation of plants and TKUP is akin to colonialism.

In the fifth chapter entitled “Patent Regimes and Biopiracy”, Mgbeoji examines the appropriative nature of patents and plant breeder's rights. This chapter illustrates exactly how the patent system has been manipulated to facilitate biopiracy. In the first part of this chapter, Mgbeoji looks at some of the common features of most patent systems including novelty, utility and industrial application. Mgbeoji notes that there is a lack of a generally agreed upon international standard for the requirements of novelty and utility which has allowed states of the North to determine the nature of these requirements in a manner that facilitates the appropriation of plants and TKUP. Mgbeoji further argues that the requirement for industrial application creates an unfavourable barrier for the protection of plants and TKUP because states of the South often do not consider industrial applications important.

Mgbeoji brings his arguments together in the conclusion of the book when discusses “some of the consequences of the erosion and appropriation of plant life forms and TKUP by both international institutions ... and the patent systems of powerful states.”¹⁰ The consequences he identifies include global food security, health and environmental integrity, the potential application of the precautionary principle, human rights and the crisis of development in the Third World. Finally, Mgbeoji concludes that all affected states must come together to understand each others values and interests and proceed in a manner sensitive to these interests.

8 *Ibid.* at 42.

9 *Ibid.* at 87.

10 *Ibid.* at 179.

This book sets out a very thorough and clear argument that patents and plant breeder's rights have the effect of allowing states of the North to misappropriate the plants and TKUP of the states of the South. *Global Biopiracy* accomplishes this by providing a substantial amount of evidence from a variety of sources. The biopiracy of plants and TKUP is a complex issue with numerous consequences and a satisfactory solution to it is likely to be extremely complicated. Mgbeoji does not attempt to provide a solution to the problem but rather attempts to "to contribute to a more transparent and open debate"¹¹ and to that end, this book is absolutely successful.

11 *Ibid.* at 1.

BOOK REVIEW

LAWYERS GONE BAD: MONEY, SEX AND MADNESS IN CANADA'S LEGAL PROFESSION

BY PHILIP SLAYTON

Reviewed By Julia Renouf*

CITED: (2008) 13 Appeal 99-101

I always said that I would never become a lawyer, or worse, marry a lawyer. I believed that lawyers were self-important, immoral workaholics, that lawyers bent the truth all day long so that even when they were out of the office they didn't really know what was right and what was wrong. I believed that lawyers cared more about their potential liability than another person's potential injury. I ended up going to law school, but I try my best to take an outside perspective, though I often fall astray. I see now only in shades of gray. My non-law friends often point out, much to my embarrassment and to their annoyance, how quick I am to focus on the legal issues in their personal crises.

So I was excited with all the hype created this past summer by the *Maclean's* issue with the headline "Lawyers are rats",¹ which featured an interview with Philip Slayton regarding his then upcoming book *Lawyers Gone Bad*.² I laughed when the Canadian Bar Association delivered its overzealous response,³ which only confirmed my opinion that lawyers don't respond well to criticism. I looked forward to reading the book. Unfortunately, I was sorely disappointed. Instead of being a thoughtful analysis of potential problems with Canada's legal system and its allowance (even encouragement) of problematic practitioners, the book is instead a series of sensationalist stories. The accounts of "lawyers gone bad" are choppy and hard to follow. The stories are one-sided. Slayton writes like a gossip columnist, devoting pages to rumours, and gives the explanations of the fallen lawyers only a line or two. These explanations are responded to in a mocking tone accompanied by a description of his subject's declining appearance and living conditions. His style is reminiscent of Rita Skeeter.⁴

In this book Slayton delivers fourteen stories about twenty different lawyers in Canada who have behaved contrary to legal ethics. Most of the instances of wrongdoing were proven through criminal proceedings and/or disciplinary proceedings under the particular provincial bar though some of the wrongs were merely alleged. The misdeeds these lawyers committed are

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1 Kate Fillion. Lawyers are rats. A top legal scholar exposes the corruption of his profession. *MacLean's Magazine* (26 July 2007), online: Macleans.ca <http://www.macleans.ca/article.jsp?content=20070726_161005_9580>.

2 Philip Slayton, *Lawyers Gone Bad* (Toronto: Viking Canada, 2007).

3 CBA Press Release, "CBA condemns unfair characterization of lawyers in *Maclean's* magazine" (July 26, 2007).

4 Rita Skeeter, notorious journalist in the Harry Potter series, is known for bending the truth and taking quotes out of context. See J. K. Rowling, *Harry Potter and the Goblet of Fire* (Vancouver: Raincoast Books, 2000).

varied. Fraud and over-billing are common crimes in these stories. More outrageous is the story of Ingrid Chen, a Winnipeg lawyer who sometimes broke the law to assist clients immigrating to Canada. When one client did not pay up, she conspired with the Mob to injure him.

Many of these lawyers seem to be suffering from mental illness. For example, Marvin Singleton has spent the last three and a half years in prison (the last two in maximum security) in the United States to avoid extradition to Canada where he faces charges for fraud and theft. He says that the Canadian attempt to extradite him “was a politically-charged opportunity to bait in Canada an individual perceived as an American”.⁵ It is a story of a person likely suffering from paranoia. Agnew Johnston’s troubles began when after a series of personal losses. He became depressed and an alcoholic, and soon after he began consorting with underage prostitutes.

Mostly, these are stories of downfalls, where things go from bad to worse. Michael Bomek was convicted of sexually assaulting men who were his clients. After his time in prison he was found to be selling drugs from the hot dog stand he operated. Most recently, he was convicted of sex crimes involving children. Martin Pilzmaker committed suicide after being charged with 57 counts of conspiracy, fraud, and other charges.

The author, Philip Slayton, graduated from Oxford University as a Rhodes Scholar and subsequently clerked for the Supreme Court of Canada. He then spent thirteen years as a legal academic teaching at McGill Law School and was Dean of Law at the University of Western Ontario. In 1983 he joined the Bay Street firm, Blake Cassels & Graydon, where he practiced until 2000.

You can’t take the lawyer out of Slayton. Besides writing the book much like a legal memo, he has biases and opinions that call out his former profession. Early on in discussing how lawyers sometimes cross moral boundaries, instead of focusing on why the conduct is wrong or hurtful, his main concern seems that they were caught, noting that some lawyers “cheat despite the fact that a law society may disbar a member found to have overbilled.”⁶ Slayton makes it seem as though the greater evil is lack of intelligence rather than lack of ethics. He writes of one lawyer, “he was slandered and vilified, described as unethical, devious and dishonest and called a liar, a crook and a dangerous corrupter. The final insult: Pilzmaker was labelled “absolutely stupid.”⁷

In reading the book, because of the way Slayton writes about them, I frequently found myself feeling more sympathy for the criminals who are featured than I did for the public of whom they took advantage. Bruce McLeod, a real estate con-artist, was convicted of fraud and sentenced to five years in prison. Slayton quotes a prosecutor who says that McLeod didn’t do so well in prison. A few pages later, Slayton confronts McLeod with that rumour and McLeod denies it. He then seems to mock McLeod, who tells Slayton the next day that his prison guard will attest that things went well in prison.

The most disappointing aspect of this book is that Slayton does have a point; he does have something to say, but the way he brings it across detracts from his message of reform. In the introduction, Slayton discusses some of problems with Canada’s legal system. He explores findings that “lawyers suffer from depression, anxiety, hostility, paranoia, social alienation and isolation, obsessive-compulsiveness, and interpersonal sensitivity at alarming rates.”⁸ He looks at the causes of these problems, such as how students are taught in law school that it is not their job to judge their clients, but to assist them in achieving their objectives by any means

5 Slayton, *supra* note 2 at 200.

6 *Ibid.* at 8.

7 *Ibid.* at 29.

8 Patrick Schiltz, “Those Unhappy, Unhealthy Lawyers,” *Notre Dame Magazine* (Autumn 1999), online: *Notre Dame Magazine* <<http://www.nd.edu/~ndmag/legl2f99.htm>> cited in *Ibid.* at 7.

legally possible. He presents an explanation by Martin Seligman, who in *Authentic Happiness* says that lawyers become pessimists, viewing bad events as “pervasive, permanent, and uncontrollable, rather than local, temporary and changeable.”⁹ Seligman adds that “if you don’t have this prudence to begin with, law school will teach it to you.”¹⁰

Slayton asks the right questions, such as whether is it the people who choose to go into law school who bring with them these disorders, or if it is the profession that leads to them. He examines the effect of allowing law firms to operate as limited liability partnerships, which he argues results in prudent lawyers offering less collaboration and oversight to other members of their firm than in the case of a general partnership. But, at the same time as stating that there are serious systematic problems, he takes the easy way out, and says that these are just a few case studies and that most lawyers are upstanding citizens.

Unfortunately, the book does not fulfill the potential of the introduction. Mr. Slayton seems to write off many of the behaviours in the book not as systematic, but as psychopathic. Instead of returning to the studies and analyses mentioned in the introduction, the remainder of the book only really focuses on the need for an independent governing society.

Despite its many shortcomings, good does come from “Lawyers Gone Bad”. Not least is that the short sensationalist stories make for an entertaining and interesting read. The book also engages us in debate. Reading this book might encourage clients to question their lawyer’s work and billing practices, and to report problematic conduct to law societies. It may also encourage other lawyers to keep watch of their colleagues.

More specifically, this book challenges the make-up of the disciplinary bodies governing lawyers. Throughout the book, Slayton focuses on the disciplinary actions of law societies. He demonstrates how there can be very different consequences for similar crimes (much like our judicial system). He also demonstrates how the law societies do not always appropriately respond to the needs of the public. For example, when Christina Finney complained about lawyer Eric Belhassen in 1990 to the Quebec Bar Association, despite the numerous investigations and reprimands directed at him between 1979 and 1990, she was told that he was a lawyer in good standing and that she should settle with him. In the last chapter, Slayton focuses on law society reform. He looks at a recent report on the British system which recommends that a new independent body be created to investigate complaints against lawyers.¹¹ The proposed system would focus on the consumers of legal services rather than its providers. Slayton argues it is time for similar reforms in Canada.¹²

This book was an important one to write, but it did not meet its potential. Slayton’s message that the legal system requires reform is necessary, yet the way it is written detracts from the message. Throughout the book, I found myself questioning his integrity, which undermined the truth of his content. At the end of *Lawyers Gone Bad*, the reader is left with a different message: the lawyers profiled in this book are not the only ones that are dishonest, Slayton implies, just those stupid enough to get caught.

9 Martin Seligman, *Authentic Happiness* (New York: Free Press, 2002) at 178 cited in *supra* note 2 at 7.

10 *Ibid.*

11 *Supra* note 2 at 238. *Report of the Review of the Regulatory Framework for Legal Services in England and Wales*, (Legal Services Review, December, 2004), Legal Services Review online: <<http://www.legal-services-review.org.uk/content/report/index.htm>>.

12 *Supra* note 2 at 239.

BOOK REVIEW

LAWYERS GONE BAD: MONEY, SEX AND MADNESS IN CANADA'S LEGAL PROFESSION

BY PHILIP SLAYTON

Reviewed By Katrina Edgerton-McGhan*

CITED: (2008) 13 Appeal 102-104

I am having lunch with a friend over the workweek and wander by a newsstand in Calgary's TD Square. The controversial July 26, 2007 issue of *Maclean's* magazine which features an interview with Philip Slayton, author of *Lawyers Gone Bad*¹, is front and centre at the newsstand. I pause the lunch date to hustle in and purchase the magazine. The newsstand saleswomen start to laugh, and one says, "so which one of you is the rat... er, lawyer?" My friend points at me and I furiously attempt to avoid eye contact with anyone. "Which one are you?" asks the other saleswoman as they lean over the magazine. They have three options to choose from underneath the headline: "I pad my bills"; "I take bribes"; or "I sleep with my clients".

"She's that one, isn't she?" asks the saleswoman of my friend, stabbing her finger at the cover. "Or is she this one?" My friend laughs awkwardly, the saleswomen laugh hysterically as I continue to stare at the ground.

I did not start reading this book without lingering irritation from the above experience. Nor did I start reading it without pre-existing doubt as to its quality given the author's outrageously smug *Maclean's* interview (Journalist: Did you pad your bills? Mr. Slayton: I was part of the legal culture of the time and I did what it demanded".² As Warren Kinsella so accurately puts it, "Uh huh. Pot, Kettle, Black."³). However, even if I had approached this book welcomingly, I would still have been seriously disappointed by the time I was halfway through the first chapter.

Lawyers Gone Bad opens by hypothesizing why lawyers Go Bad. The book then tells the story of several lawyers in the last few decades who have Gone Bad, and concludes with a short critique the self-regulation of the profession and lack of access to justice.

The problems with this book are clear from the first chapter. Stylistically, it is poorly organized and disjointed. Substantively, it is rife with sensationalist exaggeration that borders

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1 Kate Fillion. Lawyers are rats. A top legal scholar exposes the corruption of his profession. *MacLean's Magazine* (26 July 2007), online: Macleans.ca. <http://www.macleans.ca/article.jsp?content=20070726_161005_9580> [*Lawyers are Rats*].

2 *Ibid.*

3 Warren Kinsella. "The Rats Fight Back: Lawyers now have a Chance to Change Perceptions about their Profession", Editorial, *National Post* (16 August 2007), online: Nationalpost.com <<http://www.nationalpost.com/opinion/columnists/story.html?id=bfb0717d-eabe-4716-94da-aa2e34c9d8c4&k=4220&p=1>>.

on misrepresentation. It poses no meaningful questions, nor does it provide any meaningful answers. Moreover, if the lurid details are removed, the book is boring. Chapter after chapter Mr. Slayton tells essentially the same story: a lawyer who oftentimes has mental health and substance abuse problems does something very Bad, is caught, disbarred, and often imprisoned.

In the first chapter, Mr. Slayton offers many reasons as to why lawyers Go Bad: greed, sex, status, power, psychopathy, learned pessimism, arrogance, and the symbiotic lawyer-client relationship. He lambastes self-regulation, limited liability partnerships, billable hours, and the rise of the national firm as general problems with the legal profession. These reasons are then loosely connected to why lawyers Go Bad. These points are neither well developed nor well argued.

Mr. Slayton writes that he often defended the persons he now exposes, yet the stories he tells evidence a lack of concern for these same people. He speaks of our fascination with downfall, failure and scandal, and then panders to this by portraying that failure and scandal in the most salacious way possible. For example, when speaking about Martin Pilzmaker, a lawyer implicated in fraudulent billing and immigration practices, he described Mr. Pilzmaker's completion of suicide as follows: "Pilzmaker, a flashy outsider, killed himself in a cheap hotel room shortly after he had been disbarred and just before his trial on multiple criminal charges was about to proceed."⁴ When Richard Shead, a tax lawyer implicated in a mortgage fraud scheme, told Mr. Slayton that he did not want to participate in the book out of privacy concerns for his wife and family, Slayton published the conversation along with a follow-up email that Mr. Shead sent, again requesting privacy for the sake of his children. Mr. Shead was in fact imprisoned and disbarred, making one wonder what objective is met by Slayton's further publicity of the matter.

If the salaciousness and lack of concern were not enough to make this book untenable, Mr. Slayton at times manipulates the facts to prove points about the failings of the legal system. A good illustration of this is his use of the *Strother*⁵ case. Mr. Slayton selected the *Strother* case to illustrate that tax shelters "... deprive ... the public purse of tax revenue and raise ... fundamental questions about the responsibilities of lawyers and accountants to the society in which they live, work, and play."⁶ The *Strother* case, aside from the fact that the dispute was in the context of tax shelter sales, had no substantive comment on the propriety or impropriety of tax shelters. It was about breach of fiduciary duty in the context of retainers. Its use to illustrate his point about tax shelters is inappropriate.

Lawyers Gone Bad does raise current issues about the conditions of lawyers working in private practice. Mental health concerns, substance use/abuse, long hours, billable hours targets, and the feelings of inability to control one's own life are real concerns for lawyers in private practice. Slayton, however, does not confine these concerns to private practice in predominantly urban contexts. Instead, the book seems to presume that all lawyers practice in that fashion and face like challenges. The non-lawyer reading this book is exposed to a small segment of lawyers who are treated as if they comprise the entirety of the legal profession.

Mr. Slayton also criticizes the self-regulating nature of the profession. What a reader can infer from the book, however, is that lawyers *Gone Bad* are faced with serious consequences. In each case, with the exception of *Strothers*, the lawyers were met with harsh consequences such as disbarment by the law society and prison time. If Slayton truly wrote *Lawyers Gone Bad* to prove the inadequacy of self-regulation, he proved just the opposite. If he wrote it for

4 *Lawyers Gone Bad*, *supra*, note 1 at 25.

5 At SCC: *Strother v. 3464920 Canada Inc.*, 2007 SCC 24; At BCCA: *3464920 Canada Inc. v Strother* 2005 BCCA 35 add'l reasons *3464920 Canada Inc. v Strother*, 2005 BCCA 385; At BCSC: *3464920 Canada Inc. v Strother*, 2002 BCSC 1179

6 *Lawyers Gone Bad*, *supra*, note 1 at 85.

some other purpose, such as to explain why some (although he does not present it as “some”) lawyers Go Bad, he provided little insight on that point.

Why any member of a given profession Goes Bad is a complex question with answers that are often both individualized and systemic. In this book, some of the subjects are profoundly mentally ill, as was the case with Mr. Pilzmaker. Some seem to be incompetent and make costly mistakes, such as Martin Warrick, a conveyancing lawyer who was disbarred after being implicated in real estate fraud. Sometimes it seems to be a combination of many things. It is likely that one cannot ever provide a cohesive explanation for why members of a profession Go Bad, but this does not dissuade Mr. Slayton from attempting, and failing, to achieve this end. Perhaps the one thing we can take from this book, despite Mr. Slayton’s intentions to the contrary, is that the machinery of self-regulation when lawyers Go Bad is in sound working order.

Lawyers Gone Bad is a bad book that did not deserve the publicity that it received. Members of the legal profession, myself included, do not deserve the humiliation and scorn as a result of Mr. Slayton’s anecdotes of a few lawyers who have shirked their duty to the public.

BOOK REVIEW

SUPERCAPITALISM: THE TRANSFORMATION OF BUSINESS, DEMOCRACY, AND EVERYDAY LIFE

BY ROBERT B. REICH

Reviewed By Rebecca L. Lewis*

CITED: (2008) 13 Appeal 105-108

On one of my voyages across the Strait of Georgia, I came across the review “The Good Company” in the Business section of the September 8th – 14th issue of *The Economist*, a review of the book *Supercapitalism* by Robert B. Reich. The review highlighted the book’s focus on corporate social responsibility. Reich formerly held the view that social responsibility and profits converged over the long term; however, the book outlines the author’s shift in view that corporate social responsibility, as commonly defined by the public, no longer exists in the contemporary economic realm. This review tickled my curiosity and I decided to see exactly how and why Robert Reich came to his conclusions in his new book *Supercapitalism*.

Robert B. Reich is a professor of public policy at the Goldman School of Public Policy at the University of California at Berkley. He served as the Secretary of Labor in the Clinton administration from 1993 – 1997. In 2003, Reich was honoured with the Václav Havel Foundation Prize for pioneering work in economic and social thought. *Supercapitalism*, his eleventh book, embodies his view of the ever changing American society, its economy and the nation’s democracy.

Supercapitalism consists of a brief introduction and six substantive chapters (the sixth serving somewhat as a conclusion of Reich’s opinions). The first two chapters focus on the history of the economy and democracy, and its evolution over the nineteenth and twentieth centuries. Following this in depth account of the journey towards the twenty-first century, the third chapter illustrates the conflict Americans must now face in their different roles as consumers/investors and concerned citizens. Chapter four of the book outlines how the changes in the economy are affecting democracy. This is where Reich focuses on the influence “super corporations” are having on the policies adopted by the American government. Chapter five, the focus of the review in *The Economist*, is where Reich challenges the continued existence of corporate social responsibility. The book concludes with a chapter Reich refers to as a “guide” through this new era of “supercapitalism”. This chapter acts less as a guide and more as a summary of his views from earlier chapters.

Overall, *Supercapitalism* is a well thought out work that provides the reader with valuable information and illuminates some important issues affecting American society. It is well written.

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Coming from a non-economic academic background, I found the first few chapters provided me with the knowledge required to understand Reich's proposed "Supercapitalism" model.

Reich starts the book by outlining Milton Friedman's position that free markets are a necessary precondition to political freedom and sustainable democracy.¹ This starting point sets the stage for the presentation of his position that the dramatic increase in the free markets in today's global economy has actually led to a decrease in democracy. The paradox Reich presents is that people now experience more savings and profits as consumers and investors; however, this betterment comes at the price of decreased power of democracy. Increased competition among large corporations forced firms to lower prices in order to raise profits. This resulted in increased pressure by these corporations on the government to aid in corporate endeavours. As a result, Reich argues that Friedman's democratic capitalism no longer exists in our current society.

The story begins in the 1800s when large corporations were monopolizing entire industries in the United States.² Reich lays out the developments in the American economy, highlighting the triumphs of capitalism on a global scale. Reich acknowledges a time when oligopolies controlled the consumer market and a democratic capitalist economy was sustained for decades. During this era, although consumer choice was restricted, citizens were comfortable with this stable system. Moving forward, by the 1930s, unions were powerful entities and compromises were struck between employees and employers. For many years, employees were content with shopping at the corporations which provided them with fair and stable employment. Corporations were run by "corporate statesmen" who considered it their position to balance the profit margins of the corporation with the social responsibility the citizens demanded. It appeared that, in what Reich describes as the "not quite golden age", there was compatibility between democracy and capitalism. However, this lack of competition and forced compromise of the corporations made it not quite golden for their profits.

As Reich moves along the timeline into the era he describes as the "road to supercapitalism", he highlights the shift in power from the large corporations to the consumers and investors. There were no longer strong oligopolies dominating industries and globalization was increasing at a phenomenal rate. The author argues that due to these economic changes consumers were able to find increasingly lower prices, forcing companies to compete for their piece of the consumer pie. The increased liquidity in the free markets forced corporations to increase returns or investors would simply change their investment portfolios. In almost all industries these elements acted as catalysts that took us from a balanced system into an era of "supercapitalism".

According to Reich, this era brought about conflicting world views in each individual. Economically, as consumers we want the best possible price and as an investor we want the greatest returns on our investments. The opposing mind is that of a citizen who does not want to see the social consequences that flow from our actions as a consumer/investor.³

Reich uses Wal-Mart as the exemplar of this phenomenon.⁴ Consumers seek out the lowest price, which Wal-Mart is able to provide by pressuring suppliers to offer goods at lower prices. This pressure forces suppliers to cut costs and the common mechanism is drastic reduction in employees' wages. As a result, millions of people shop at Wal-Mart. To maintain high profits margins, Wal-Mart also minimizes its employees' wages and has minimal benefits packages

1 Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962: 2002 ed.) at 10 as cited in Robert B. Reich, *Supercapitalism* (New York: Alfred A. Knopf: 2007) at 3.

2 *Supercapitalism*, *ibid.* at 16.

3 *Ibid.* at 89.

4 *Ibid.* Chapter 3.

for its workers. The effect of this high return to investors was investment in the corporation by almost all pensions and mutual funds. The prices Wal-Mart offered played strongly to our consumer mind; however, the social consequences go to the heart of our role as a citizen. Even though Wal-Mart is the largest retailer and employer in the world, it “has become the poster child for all that’s wrong with American capitalism”.⁵ Wal-Mart is one of the most criticized corporations in the free markets. To challenge his readers, Reich offers the following passage.

Isn’t Wal-Mart really being excoriated for our sins? After all, it is not as if Wal-Mart’s founder, Sam Walton, and his successors created the world’s largest retailer by putting a gun to our heads and forcing us to shop there or invest any of our retirement savings in the firm.⁶

It seems that the citizen has taken the backseat to the consumer and investor within us. As a consequence, decisions made by corporations must now reflect only what gets the best bottom dollar for its shareholders and consumers.

One of the effects of increased corporate competition is an increased interaction between large corporations and democracy. Chapter four focuses on the influx of corporate dollars into Washington and how this affects the decisions made by all political actors. In order to get the best returns, corporations lobby the government to pass bills and policies to protect the corporate interests or inhibit the interests of competing corporations. According to Reich, corporations appear to be representing public interests through their increased interest in democracy but every policy change the corporate lobbyists advocate for has a competitive undertone. As Reich asserts, it seems that “our voices as citizens – as opposed to our voices as consumers and investors – are being drowned out” by this corporate interference.⁷

In the fifth chapter of the book, Reich asserts that corporations are no longer truly socially responsible. In the past, the corporate statesmen were “balancing” the interests of the citizen and the consumer/investor. Now, corporations merely placate the internal “citizen’s” conflicts through their claims of “socially responsibility”.

Reich supports his reasoning by examining where many different corporations are investing their social efforts. He explodes the idea of any corporation acting social responsible for any reason other than corporate gain. Reich returns to Wal-Mart. Here, the corporation claimed to be making environmentally sound decisions by using “green” packaging, launching recycling programs for shopping bags and other items filling landfills that were directly related to the corporation and even planting trees in their parking lots. Wal-Mart appeared to be making socially responsible decisions in order to offset some of the adverse affects it had on the environment. However, this “green” packing was cheaper than the old packaging. Additionally, the small cost and effects of these recycling and sustainability actions served to increase the goodwill of the company and led to overall increased returns for the shareholders.

Another corporation Reich examined was Ben & Jerry’s, the ice-cream company. Ben & Jerry’s was traditionally known for their dedication to social responsibility through their efforts to save the tropical rainforests.⁸ This campaign was a useful marketing tool to increase the sales of ice-cream because the citizen in us wants to support a company that is working to improve the world on a global level. However, Reich argues that if the Ben & Jerry’s Corporation were truly socially responsible they ought to be addressing the issue of obesity which is plaguing the American society and may be directly linked to their product. These are just two of the many

5 *Ibid.* at 89.

6 *Ibid.* at 90.

7 *Ibid.* at 163.

8 *Ibid.* at 195.

examples Reich offers in this chapter to discredit the many corporations that claim to be socially responsible during the “supercapitalism” era. He seems to see the current model of “social responsibility” as merely coinciding with increased profits or as a tool used in a successful marketing scheme.

The question that remains is: what is the problem with this convergence of profits and ethics? Though we would like for corporations to return to the times of the corporate statesmen, with the contemporary economic model that is not an option. What we do see is companies doing things that are making some difference (though minor) and this is still better than the corporations who are making no contributions to improve society or global welfare.

Overall, Reich paints a very negative picture of the current role that corporations are playing in the development of public policy and their use of social responsibility as a marketing tool. Though he is quick to criticise, he challenges us to consider whether this is actually the fault of the corporation. Reich argues that the corporations are simply playing by the rules made for them by the governments that we as citizens have elected. If the citizen in us is so appalled by the effects these large corporations are having on society, we need to advocate for a change in the regulation of these corporations. Reich concludes that before corporations will make any changes to their corporate models, the rules by which they are bound must be changed.

Reich offers cogent evidence for all his claims regarding the development of the American economy. Throughout the entire book, all the examples of the different corporations' behaviour is clearly outlined to the reader and referenced. As a reader with limited knowledge of economic arguments, this evidence made it very easy to agree with his position. The evidence offered makes it easy for the reader to follow the historical journey and understand most of the arguments put forward. This book is accessible to readers regardless of their academic background.

Supercapitalism opened my eyes to some critical events in the economic history of North America and even abroad. Reich's arguments challenged me to evaluate my own consumer decisions including things as small as my daily Americano. I do not know whether other economists would find Reich's propositions academically sound and well reasoned. Regardless, I find that any book that stops me as a reader and forces me to evaluate my own actions is worth reading. If the issues and arguments presented in the book are things I should be considering, I can't help but wonder if there are many people in our society that ought to be doing the same. As outlined in his book, Wal-Mart is the world's largest retailer and employer and exists in almost every investment portfolio. On the flip side, it is also one of the most criticized corporations existing in the free markets. Before we blame corporations, we should first look at our own actions.

BOOK REVIEW

THE LAST WORD: MEDIA COVERAGE OF THE SUPREME COURT OF CANADA

BY FLORIAN SAUVAGEAU, DAVID SCHNEIDERMAN, AND DAVID TARAS

Reviewed By Michael James*

CITED: (2008) 13 Appeal 109-112

The public often perceives the law as inscrutable. In *The Trial*, Franz Kafka tells the parable of a man from the country who comes before the law, desiring admittance. The imposing doorkeeper tells him that he cannot be admitted now, but adds that it may be possible later. The man from the country is surprised, thinking the law should be accessible to all. Nevertheless, he takes up a stool and sits and waits for years. When his life is nearly spent, he beckons the doorkeeper, asking why no others have come. As he dies, the man hears the doorkeeper's reply: "No one but you could gain admittance through this door, since this door was intended for you. I am now going to shut it."¹ Though the parable admits of many interpretations, a key point that Kafka raises is that there is a wall separating the public from the law.

Today, journalists are the doorkeepers to the law. *The Last Word: Media Coverage of the Supreme Court of Canada*,² written by Florian Sauvageau, David Schneiderman, and David Taras, considers the relationship between the Canadian news media and the Supreme Court of Canada. Unlike Kafka's doorkeeper, journalists have the job of transmitting and interpreting the law's judgments to the world outside the legal profession. *The Last Word* ably scrutinises that considerable power and how it is wielded.

The authors come from different universities and backgrounds: Sauvageau is a Professor of Communications at Laval; Schneiderman is an Associate Professor of Law at Toronto; Taras is a Professor in the Faculty of Communication and Culture at Calgary. Rather than a strictly legal work, the book is written from a legally-informed social sciences perspective. Eschewing the deferential tone favoured by some legal commentators, the authors deal critically with both the media and the court.³

The authors of *The Last Word* set themselves two principal tasks: to describe Supreme Court reporting and to examine the relationship between the court and journalists. To these ends, they survey and analyse coverage of Supreme Court judgments. The book opens with a vignette personifying the pressures of reporting on the court as a television journalist. Following

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1 Franz Kafka, *The Trial*, trans. by Willa & Edwin Muir (New York: Schocken Books, 1995) at 213-215.

2 Florian Sauvageau, David Schneiderman & David Taras, *The Last Word: Media Coverage of the Supreme Court of Canada* (Vancouver: UBC Press, 2006) ["*The Last Word*"].

3 For example: the authors refer to 'the court' without capitalisation, in contrast to its rendering in legal works (i.e. 'the Court').

an introduction to the court-media relationship, the authors look generally at one year (September 2000 to September 2001) in the life of the court.⁴ The next four chapters each delve in detail into a different decision: *Vriend*⁵ (1998), the *Québec Secession Reference*⁶ (1998), *Marshall*⁷ (1999), and *Sharpe*⁸ (2001). They chose these cases not only because they represent critical issues, but also because they speak forcefully to the legitimacy and integrity of the Supreme Court.

Their methodology is both quantitative and qualitative – they consider frequency and manner of coverage. Relevant social science literature provides context, but the focus of the analysis lies in newspaper and televised news reporting. The authors surveyed the two major English national dailies (the *Globe and Mail* and the *National Post*), several major French newspapers (*Le Devoir*, *La Presse*, and *Le Journal de Montréal*), the *Toronto Sun* and other local papers, and the major English and French national television newscasts (CBC, CTV, Radio-Canada and TVA). Tallying all the stories, editorials and commentaries that deal with the Supreme Court and its judgments is no mean task; altogether, it is a collection of an impressive array of media reports. The authors give the data some necessary order by categorising the reporting: by specific subject matter, by how the news is framed, and by tone.

What emerges, *The Last Word* argues, is that media coverage of the Supreme Court is seriously wanting. In the 25 years since the *Charter* came into effect, the Supreme Court has been thrust into a crucial and extremely influential role in Canadian democratic life. While the court has opened itself to the media to a greater extent than ever before and the media spotlight on it has brightened, the authors conclude that it is yet far too dim and poorly aimed. With comprehensive and lucid analysis, they argue that the very nature of news reporting too often lends itself to “highly abbreviated, sporadic, sensationalized, and intensely political coverage”⁹ of the Supreme Court and its decisions.

A recurring theme in the work is a criticism of framing. The media rely on ‘strategic’, as opposed to ‘issue’, framing: stories are most often told in terms of winners and losers, rather than by presenting the reasons behind judgments that usually give something to both sides. A striking example is the coverage of the *Québec Secession Reference*. This was probably the most important decision in the history of the Supreme Court, not the least for deciding whether and under what conditions Québec might leave Confederation. Though the decision received wide acclaim, the court and its judgement quickly faded from media consideration. The authors found that reporting focussed instead on portraying political actors in battle: federalist vs. sovereigntist.

The authors clearly demonstrate this tendency throughout their analysis of the other three cases. In *Marshall*, the Supreme Court found the Mi’kmaq to have a limited treaty right to fish. The authors found that the abiding media image was of combat between Aboriginal and non-Aboriginal fishers. Though the use of visuals in *The Last Word* is sparing, several images are effective in showing how the media sometimes frame a story. In the *Marshall* chapter there is a picture of a Mi’kmaq man, framed by a broken window, holding aloft a Warrior Society flag. The authors also found that the first sources quoted in a story were often Aboriginal speakers, portrayed in an aggressive, negative light.

4 Their reasons for choosing that particular year: several emotionally-charged, high-profile cases (e.g. *Latimer* and *Sharpe*); a new chief justice in Beverley McLachlin; and the 125th anniversary of the court -- though they ironically note that the last point was observed by few news organisations and sparingly at that.

5 *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385 [“*Vriend*”].

6 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 [“*Québec Secession Reference*”].

7 *R. v. Marshall*, [1999] 3 S.C.R. 456, 179 D.L.R. (4th) 193 [“*Marshall*”].

8 *R. v. Sharpe*, [2001] 1 S.C.R. 45, 194 D.L.R. (4th) 1 [“*Sharpe*”].

9 *The Last Word*, *supra* note 2 at 236.

If the media tend to focus on the opposite poles of an issue, it is perhaps unavoidable that the authors of *The Last Word* must follow suit. The data suggest that the majority of media reporting in all four cases treated the judgments, the relevant figures and actors, and the Supreme Court as an institution neutrally. Nevertheless, the articles that the authors considered in detail and quoted from greatly over-represent both the positive and negative extremes. Noteworthy examples are focussing on negative treatments of the Supreme Court by Alberta media in the wake of the *Vriend* decision (that read-in sexual orientation as a prohibited ground of discrimination in that province) and on praise of the court in *Sharpe* (for carving out narrow exceptions to child pornography prohibitions). While broad, these were still minority trends. Admittedly, if the book were simply a litany of neutral commentary it might bore to extremes. However, by so concentrating their analysis, the authors distort to some degree the impression that their survey results otherwise make: the media by and large maintain a neutral stance.

Whenever the media take a stance at all, that is. As the authors wryly put it: “The irony is that the journalists who cover the court almost never write about it.”¹⁰ In their survey of a year in the life of the Supreme Court, they found media coverage dominated by few decisions: cases that carried great general interest like *Latimer* and *Sharpe*, that had celebrity villains (or heroes), and especially that attracted the attention of politicians. The authors posit that the importance of the latter point stems from the fact that almost all journalists who cover the Supreme Court do so as a minor adjunct to the Parliament Hill beat. Ottawa bureau reporters are attuned to political themes, always looking for the pithy quote that is the foundation of political news. When they can't find it in the Supreme Court building, they often turn to the foyer outside the House of Commons where they unerringly can.

Though journalists bear the brunt of criticism for the dominance of political frames in court reporting, the Supreme Court and its decisions are not beyond reproach. Of the four cases, *Marshall* leaps out as an instance where the authors (and many other legal commentators) find the Supreme Court to have stumbled badly. That case involved two decisions two months apart. The later decision was in effect a ‘clarification’ of the earlier ruling. This was a “stunning departure”¹¹ from the judicial convention of speaking only through decisions. Media coverage of the mayhem resulting from the first decision was particularly critical of the court, labelling it removed and unaccountable. The second *Marshall* decision¹² was damage control. The authors conclude that the Supreme Court was responding to political pressure: it appeared to be playing to public opinion.

Though the ‘clarification’ quenched the fires, the authors wonder at the long-term harm of drawing back the judicial curtains and passing through into the political fray. They argue that the Supreme Court is an inherently political institution. One of the more intriguing findings of *The Last Word* is what may be termed an Openness Paradox: the more the Supreme Court engages with the media and tries to navigate political currents, the greater it risks foundering and losing its aura of credibility, respect, prestige, and most of all impartiality. The court has traditionally adopted a reserved attitude to media engagement. The authors track the court's transformation by noting in particular the creation of an office specifically tasked with media relations. While this and other measures have led to better coverage of late,¹³ the authors conclude that the Supreme Court will continue to face criticism the further it wades into coverage and controversy.

The authors also conclude that more legal training of journalists is necessary to avoid mis-

10 *The Last Word*, *supra* note 2 at 228.

11 *Ibid.* at 137.

12 *R. v. Marshall*, [1999] 3 S.C.R. 533, 179 D.L.R. (4th) 193.

13 Contrast the *Québec Secession Reference* with a humorous 1970s headline from the venerable *Globe and Mail*: ‘Supreme Court against beards and kitchens’.

representing what a decision actually says. However, they strongly imply that the Supreme Court needs to write clearer judgments. Contrast the chaos following *Marshall* with the great praise of *Québec Secession Reference*. While many Mi'kmaq and non-Aboriginal fishers and many in the media misinterpreted what the Supreme Court actually said, the authors ascribe some of the blame to loose language about treaty rights. Regarding the *Reference* case, former Justice Iacobucci thought the court did a great job by producing a clear and easy-to-read decision and the media did a great job reporting it.

Nevertheless, scrutiny of the Supreme Court is unlikely to abate any time soon. *The Last Word* notes the close examination of the appointments of Justices Abella and Charron; recently, the examination got closer yet. Coached by a noted constitutional law scholar who moderated the carefully-controlled event, appointee Marshall Rothstein appeared before an *ad hoc* parliamentary panel in 2006. While MPs could ask questions, they were admonished to limit their range of inquiry. When asked what he thought of the process, Rothstein replied that it reminded him of something Zhou Enlai once said: asked what he thought about the French Revolution, the Chinese Premier is said to have replied that "it's too soon to say."

The Last Word is appropriately titled. In the final analysis it is journalists who have the last word: they are the doorkeepers to the law. Perhaps the title also echoes the comments of Justice Iacobucci in *Vriend*: in the relationship of dialogue between Parliament and the Supreme Court, it is the legislature that has "the final word".¹⁴ Sauvageau, Schneiderman and Taras argue that the media are the filters through which the Supreme Court is seen and heard. Through deep and broad analysis of that translation, *The Last Word* speaks to the need for more and better reporting of the Supreme Court and its judgments. It is a fascinating read, sound in its research and unrelenting in its conclusions.

14 *Vriend*, *supra* note 5 at para. 137.