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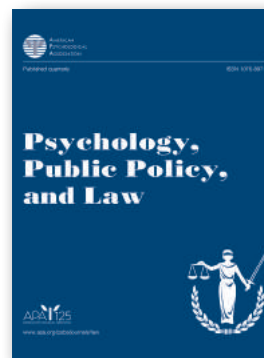
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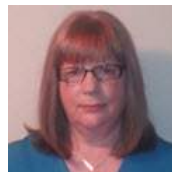
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See edition, and  
edition.  
**editor**, n. [1. éditeur] 2.  
& -or. 1. One who edits  
for publication; one who  
edition. 2. One who directs  
the publication of a newspaper  
editorial (1), adj. [1. éditorial]

## III From the Editor / De la rédactrice

It is the end of term and I have just finished marking the final assignments for a course on Legal Literature and Librarianship, that Features Editor, John Bolan and I teach at the iSchool at the University of Toronto. The criterion for our final assignment is fairly simple – the students are to write “a substantial research paper on any topic relating to law librarianship.” I have often said that the teaching relationship is reciprocal and I learn as much from my students as I teach them; I have said this so often in fact, that I must sound like a broken record by now. Each year the students write on an extensive range of topics and this year was no exception; I have read papers on diversity in law librarianship, artificial intelligence and law libraries, prison law libraries, e-resources, open access, and more. This year, my eyes have been opened to a variety of ideas and issues that have been presented in ways that have surprised and energized me. John and I encourage students to submit the best of those papers to the Canadian Law Library Review so you too will get the benefit of reading about these new ideas and concepts sometime in the future.

One of the feature articles in this issue was originally a paper presented to our class. Michelle Thompson’s *Legal Research Blogs in Canada: Uses, Limitations & Preservation Concerns*. Legal research blogs have become a valuable source of authoritative legal analysis even to the extent that some have been cited in traditional academic writing as well as in the courts. Blogs are also being used as a publication medium to enhance individual and institutional academic reputation. Because blogs are a new and disruptive and yet ephemeral source of information, law librarians have a role to play in evaluating, archiving and preserving this new material in ways that have not been done in the past.

Michelle’s article provides some background and guidance as to how we might go about doing just that.

While Michelle is a relative newcomer to the profession, Nancy McCormack is a veteran who has been widely published and is the winner of numerous awards. This issue features her article, *When Canadian Courts Cite the Major Philosophers: Who Cites Whom in Canadian Case Law*. We can’t personally escape philosophy even when we are not thinking about it. We all have personal philosophies that influence our political and personal decisions and beliefs. The influence of philosophy in our legal system and consequently on our daily lives cannot be denied. As Nancy has noted, John Stuart Mill’s using the word “person” as a generic term that included both sexes was influential in the famous “Person’s Case” (*Edwards v AG Canada*). Who knows? Without John Stuart Mill we might still have an all male Senate. Nancy’s article is an in-depth survey of how the major philosophers have been cited in the courts and their consequential impact on the society in which we live.

This is what I love about the Canadian Law Library Review. There is a place for the practical and the highly academic side-by-side; both are equally interesting and valuable. I hope to see you all in Ottawa at the conference. With any luck the tulips will be out and we can enjoy that first taste of spring. Enjoy!

EDITOR  
SUSAN BARKER



C'est la fin de session, et je viens de finir de corriger les travaux finaux d'un cours sur la littérature juridique et la bibliothéconomie que John Bolan, rédacteur aux articles de fond, et moi enseignons à l'iSchool de l'Université de Toronto. Le critère du travail final est assez simple : les étudiants devaient rédiger un rapport de recherche substantiel sur un sujet quelconque relatif à la bibliothéconomie juridique. J'ai souvent dit que la relation d'enseignement allait dans les deux sens : j'apprends autant de mes étudiants que ce qu'ils apprennent de moi. Je l'ai dit tellement de fois, en fait, que je dois maintenant sonner comme un disque rayé. Tous les ans, les étudiants choisissent des sujets de rédaction excessivement variés, et il en fut de même cette année aussi. J'ai lu des rapports de recherche sur la diversité dans la bibliothéconomie juridique, l'intelligence artificielle et les bibliothèques de droit, les bibliothèques de droit dans les prisons, les ressources électroniques, le libre accès et quoi d'autre encore. Cette année, j'ai été exposée à une foule d'idées et de thèmes, et l'angle sous lequel ils ont été présentés m'a surprise et exaltée. John et moi incitons les étudiants à soumettre les meilleurs de ces rapports de recherche à la *Revue canadienne des bibliothèques de droit* pour que vous aussi puissiez tirer les avantages de lire sur ces nouvelles idées et ces nouveaux concepts dans un certain avenir.

L'un des articles de fond du présent numéro était, à l'origine, un document présenté dans notre classe. Il s'agit de *Legal Research Blogs in Canada: Uses, Limitations & Preservation Concerns*, de Michelle Thompson. Les blogues de recherche juridique sont devenus une source précieuse d'analyses juridiques faisant autorité, au point même où certains ont été cités dans des travaux universitaires traditionnels et dans les tribunaux. Les blogues servent aussi de plateforme de publication pour faire mousser la réputation d'établissements universitaires et de leurs membres. Ces médias étant une source d'informations à la fois nouvelle, dérangeante, mais aussi éphémère, les bibliothécaires de droit sont mainte-

ant appelés à évaluer, à archiver et à préserver ce nouveau matériel comme ils ne l'ont encore jamais fait. L'article de M<sup>me</sup> Thompson présente un cadre général et des indications sur la façon dont nous pourrions nous y prendre pour assumer ces fonctions.

M<sup>me</sup> Thompson est peut-être relativement nouvelle dans le métier, mais Nancy McCormack est une chevronnée ayant été largement publiée et ayant remporté de nombreux prix. Nous vous présentons dans ce numéro son article intitulé : *When Canadian Courts Cite the Major Philosophers: Who Cites Whom in Canadian Case Law*. Dans notre vie personnelle, nous ne pouvons pas échapper à la philosophie, même quand nous n'y pensons pas. Nous avons tous nos propres philosophies qui influencent nos décisions et nos croyances politiques et personnelles. Nul ne peut nier l'influence qu'exerce la philosophie dans notre système juridique et, par conséquent, dans notre vie quotidienne. Comme M<sup>me</sup> McCormack le souligne, l'emploi par John Stuart Mill du terme « personne » en tant que générique désignant autant les hommes que les femmes dans la célèbre affaire « personne » (*Edwards c. A.G. of Canada*) a eu une grande influence. Qui sait? Si ce n'était de John Stuart Mill, il n'y aurait encore peut-être que des hommes au Sénat. L'article de M<sup>me</sup> McCormack sonde en profondeur la manière dont les grands philosophes ont été cités dans les tribunaux et les répercussions qui en ont découlé sur la société dans laquelle nous vivons.

C'est ce que j'aime de la *Revue canadienne des bibliothèques de droit*. Les textes pragmatiques et les textes hautement théoriques ont leur place côte à côte, et ils sont aussi intéressants et utiles les uns que les autres.

Au plaisir de vous voir tous au congrès à Ottawa! Avec un peu de chance, les tulipes seront en fleur, et nous aurons enfin notre première bouffée de printemps. Bonne lecture!

RÉDACTRICE  
SUSAN BARKER



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## III President's Message / Le mot de la présidente

Well, shut the front door! Just when I think the legal industry may be overlooking our potential to effect change, suddenly we are becoming the belles of the ball. The companies working with information technologies – such as machine learning and artificial intelligence – suddenly realize their real “in” with the legal industry is to work with the law library types. And law schools looking to develop curricula in legal technology and innovation are starting to recognize the need for diverse players to come together to disrupt the status quo.

Our fit with legal information projects is an appropriate one. It's great talking with legal tech start-up companies when they suddenly realize members of CALL/ACBD are a target audience, and their best way to get in front of law firms, law schools, and other key potential customers is to talk with us first. More than one legal tech start-up executive has told me that those of us in law libraries “get it” – we get what they are trying to do. We are able to give them solid, critical advice on how to better develop their products.

It's nice to suddenly be appreciated. And it is an appropriate role for us – one that I hope the wider community will start to realize as well. Even if we are not sitting on the customer side, we have a role to play on the vendor side as user experience researchers, product testers, and product developers. We have the smarts and experience to put a system through its paces to see where the weaknesses are and push for improvements. We also have a role in education – teaching digital literacy skills, sharing our knowledge of technology, running hackathons, and leading the way.

I'm proud whenever I hear a vendor partnering with our fellow members, whether through an official CALL/ACBD relationship, or via private partnerships with our employer organizations. It's a role we should be able to expand to ensure they get the product they are hoping to develop, and we get the products our organizations need to make them successful. And along the way our roles and reputations are further solidified.

If we are going to be put out of work by robots (I say only partially in jest), wouldn't we want to be the ones to build them? Or at least have a say in the matter?

As my term as CALL/ACBD President comes to a close, I can see that we have broadened our skills sets, expanded our knowledge, and exponentially increased our potential compared to the situation just a few short years ago. Let's keep it going, and continue to lead the way to better serve our clients, their clients, and the public.

**PRESIDENT  
CONNIE CROSBY**





Je n'arrive pas à y croire! À peine me disais-je que l'industrie juridique semblait perdre de vue notre potentiel à opérer des changements que, soudain, nous sommes devenus la coqueluche. Les entreprises œuvrant dans le domaine des technologies de l'information – comme l'apprentissage machine et l'intelligence artificielle – comprennent tout à coup que leur véritable moyen de « percer » dans l'industrie juridique consiste à collaborer avec les bibliothécaires de droit. Et les écoles de droit qui souhaitent créer un programme d'études en technologie juridique et en innovation commencent à voir qu'il leur faudra réunir divers intervenants afin de rompre le statu quo.

Nous cadrons parfaitement dans les projets d'information juridique. C'est merveilleux de discuter avec de jeunes entreprises en technologie juridique lorsqu'elles se rendent soudain compte que les membres de l'ACBD/CALL font partie de leur public cible et que le meilleur moyen pour elles d'aller au-devant des cabinets d'avocats, des écoles de droit et d'autres grands clients potentiels, c'est de parler avec nous en premier lieu. Plus d'un directeur de jeune entreprise en technologie juridique m'a dit que, dans les bibliothèques de droit, « nous l'avons, l'affaire », dans le sens où nous comprenons ce que ces entreprises tentent d'accomplir. Nous sommes capables de leur donner des conseils judiciaires et essentiels sur la manière de mieux développer leurs produits.

C'est bien d'être soudainement appréciés. Il s'agit là d'un rôle parfait pour nous, et j'espère que la communauté en général commencera également à s'en apercevoir. Même si nous ne nous situons pas du côté des clients, nous avons un rôle à jouer auprès des fournisseurs, nous qui sommes des chercheurs sur l'expérience utilisateur ainsi que des testeurs et des développeurs de produits. Nous avons l'intelligence et l'expérience nécessaires pour mettre à l'épreuve un système afin de déceler ses points faibles et de solliciter des

améliorations. Nous avons aussi un rôle à jouer en éducation, c'est-à-dire celui d'enseigner des compétences en littératie numérique, de transmettre nos connaissances en technologie, d'organiser des marathons de programmation et de montrer la voie à suivre.

Je me sens fière chaque fois que j'entends qu'un fournisseur a conclu un partenariat avec l'un de nos membres, que ce soit dans le cadre d'une relation officielle avec l'ACBD/CALL ou sous forme de partenariat privé avec les organisations qui nous emploient. Nous devrions pouvoir donner de l'ampleur à ce rôle que nous assumons, pour veiller à ce que ces entreprises obtiennent le produit qu'elles espéraient mettre au point et à ce que nous en tirions les produits dont nos organisations ont besoin pour réussir. Et, en cours de processus, nous consolidons notre rôle et notre réputation.

Tant qu'à être remplacés par des robots (et je plaisante à moitié en disant cela), ne voudrions-nous pas être ceux qui les ont construits? Ou, à tout le moins, avoir notre mot à dire sur la question?

Mon mandat de présidente de l'ACBD/CALL arrive à son terme et, si je compare notre réalité à la situation qui prévalait il y a à peine quelques années de cela, je constate que nous avons élargi nos compétences, accru nos connaissances et haussé notre potentiel de manière exponentielle. Poursuivons sur cette lancée et continuons à montrer la voie pour mieux servir nos clients, leurs clients et le public.

**PRÉSIDENTE  
CONNIE CROSBY**

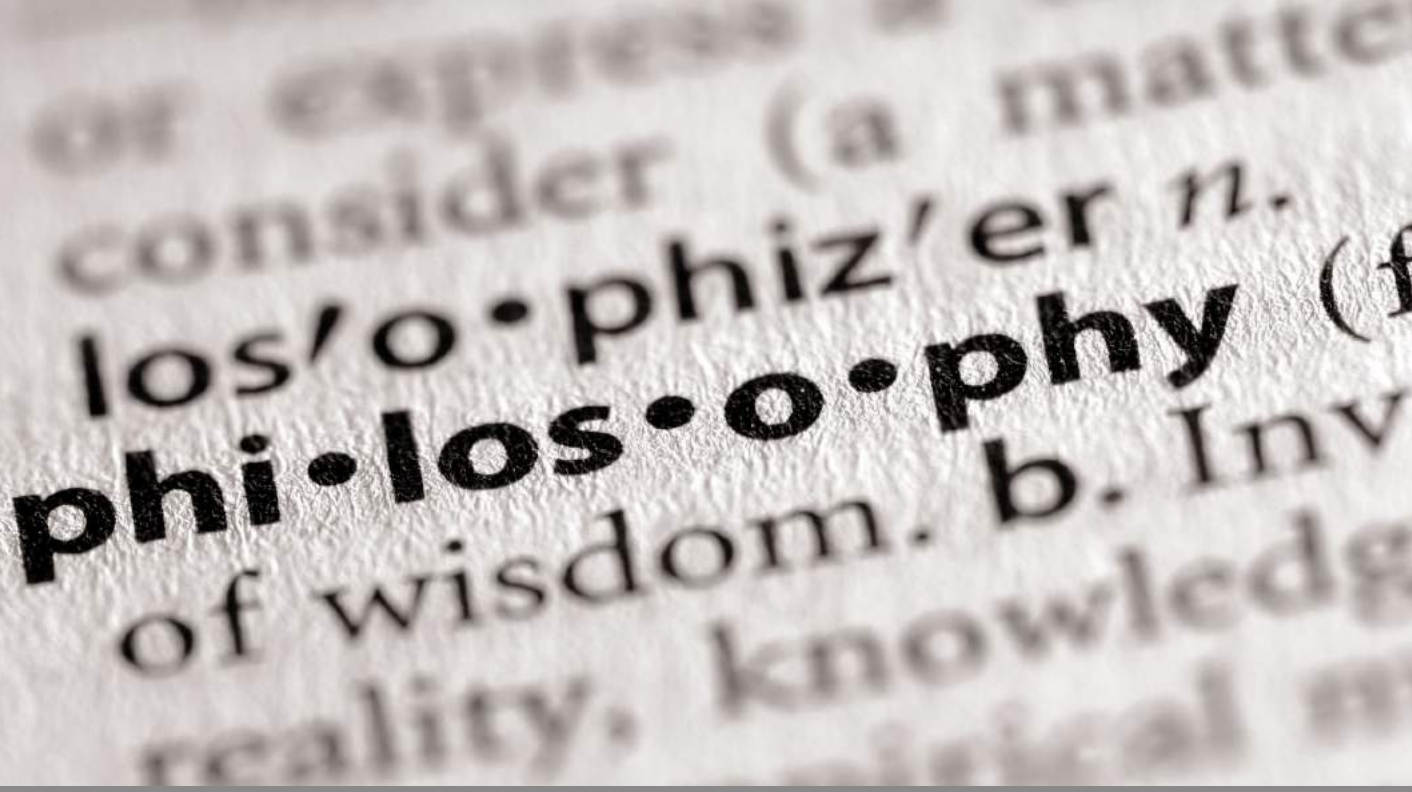


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## III When Canadian Courts cite the Major Philosophers: Who Cites Whom in Canadian Caselaw\*

By Nancy McCormack\*\*

### Abstract

*This paper discusses the results of a search of Canadian case law from 1860 to 2016 to determine which major philosophers (born before 1900) were cited most and least often (or never), as well as which judges and courts cited them. The survey indicates that judges from every level of the Canadian courts have, over the years, made explicit references to major philosophic figures in their decisions. Many of the citations deal with eminently practical matters, but the courts have also thought it beneficial to call upon the philosophers for a variety of more strictly “philosophic” notions, for example, Thomas Aquinas on the doctrine of free will, and Bertrand Russell on logical constructions. Who cites whom and in what context and jurisdiction is set out in detail.*

### Sommaire

*Cet article traite des résultats d'une recherche menée sur la jurisprudence canadienne de 1860 à 2016 pour déterminer quels grands philosophes (nés avant 1900) ont été cités le plus souvent et le moins souvent (ou jamais), ainsi que les juges et les tribunaux qui les ont cités. L'enquête indique que les juges de tous les niveaux des tribunaux canadiens ont, au cours des années, fait des références explicites à d'importantes personnalités philosophiques dans leurs décisions. Beaucoup de décisions traitent de questions*

*éminemment pratiques, mais les tribunaux ont également jugé utile d'inviter les philosophes pour une variété de notions strictement «philosophiques», telles que Thomas d'Aquin sur la doctrine du libre arbitre et Bertrand Russell sur les principes logiques de la construction. Qui cite qui et dans quel contexte et quelle juridiction est expliqué en détail.*

You can't do without philosophy, since everything has its hidden meaning which we must know.

Maxim Gorky

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals.

Benjamin N. Cardozo

### Introduction

Professor of Jurisprudence, Brian Leiter<sup>1</sup>, argues that even though economics, psychology, and history play a large role in the study of law today, philosophy has been an integral part of the academic discipline for a much longer time. At the University of Chicago where Leiter works, for example,

a course on "Jurisprudence" (the philosophy of law) was amongst the small group of courses offered in the year the university's law school opened more than a century ago. Leiter also notes that, during the 1930s, the University of Chicago hired, as one of its new faculty members, a PhD in Philosophy even though he lacked a degree in law. Clearly, the implication was that someone well versed in Philosophy could, even without legal training, find his way in the discipline of law.

To anyone for whom the centrality of philosophy to law might seem puzzling, Leiter explains,

Law is, first and foremost, a discursive discipline: lawyers and judges live in the domain of reasons and meanings. We interpret statutes and cases, articulate rules to guide behavior, and then argue about their import in particular cases. Judges write opinions, in which they give reasons for their conclusions. Lawyers offer arguments to persuade judges. Even lawyers who never argue cases in court still deal continuously with rules, their meanings and entailments.<sup>2</sup>

Law's key teaching method – "the Socratic method" – has, of course, its origins in philosophy. Leiter notes, too, that Jurisprudence is a mandatory course for law students at Oxford and certain other British law schools as well as for most students studying Law in Europe and South America. In the U.S., at the University of Chicago, 10% of the first year class in 2015 either majored in Philosophy or had an advanced degree in the discipline.<sup>3</sup> Law professors across the U.S. have discussed the idea of making the subject a mandatory course.<sup>4</sup> Also, a number of legal journals<sup>5</sup> are devoted exclusively to publishing scholarly articles on the subject of law and philosophy.

The affinities between the two, says Leiter, are deep. Both disciplines are about thinking (although some claim that philosophy involves thinking in slow motion while lawyering is thinking at top speed). Law has developed in large part due to philosophical inquiry, and the study of philosophy remains just as relevant today. As Leiter explains, his students, over decades of teaching have found jurisprudence to be "one of the most 'practical' of courses, not because it taught them legal rules, but because it helped them understand legal reasoning and how judges decide cases, as well as bringing out into the open the implicit jurisprudential premises of both jurists and scholars."<sup>6</sup>

In Canada, this connection between philosophy and law is borne out by the biographies of certain adjudicators. Supreme Court Justice William R. McIntyre, for example, was said to have been profoundly influenced by a jurisprudence course he took while studying law at Saskatchewan. The course in question covered the history of Western legal thought and philosophers such as Plato, Aquinas, Hobbes, and Mill. It gave McIntyre a life-long interest in the subject in general and a particular fondness for Kant's *Critique of Pure Reason*.<sup>7</sup>

Given this deep affinity between philosophy and law, one might expect to see explicit references to the major philosophers in the decisions written by judges.<sup>8</sup> This study discusses the extent to which this is true. It looks at which philosophers are cited by the courts, the specific judges who cite them most, and the context in which they are cited. The results of the study indicate that the ideas and language of many of the major philosophers appear in caselaw at every level in the Canadian courts. However, the philosophers referred to most frequently, and the contexts in which they arise may surprise some readers.

## Method

### A. Who are the "Major Philosophers"?

While a "Method" section is generally reserved for empirical works in the social and hard sciences, the various decisions made in the collection of information underlying this paper require some explanation and a few self-imposed restrictions.

First and foremost, a study that looks for the explicit mention of the names of the "major philosophers" cannot begin without a list of such names. To compile as uncontroversial a list as possible, various anthologies of philosophic works<sup>9</sup> were consulted. In these anthologies, there was general agreement as to the important status of certain figures – those considered the "greats" represented an array of historical periods including the Ancient (pre-Socratic, Socratic, Hellenistic, Roman), Medieval, Renaissance, Age of Reason, Age of Enlightenment, and Modern. The recurring names were: Heraclitus, Parmenides, Empedocles, Anaxagoras, Protagoras, Epicurus, Zeno of Citium, Confucius, Socrates, Plato, Aristotle, Plotinus, Epictetus, Maimonides, Saint Augustine, Gregory the Great, John the Scot, Avicenna, Averroes, Thomas Aquinas, Roger Bacon, William of Occam, Machiavelli, Desiderius Erasmus, Sir Thomas More, John Calvin, Francis Bacon, Hugo Grotius, Thomas Hobbes, Rene Descartes, Baruch Spinoza, Leibnitz, Voltaire, Locke, Berkeley, Hume, Rousseau, Adam Smith, Kant, William Paley, Hegel, Schopenhauer, Nietzsche, Bentham, Mill, Kierkegaard, Marx, Bergson, Alfred North Whitehead, William James, John Dewey, Bertrand Russell, and Ludwig Wittgenstein.

The philosophers named have certain things in common: their works and/or ideas have stood the test of time, and their appeal has extended beyond geographic locale, nationality and language.<sup>10</sup>

As for the self-imposed restrictions in this study: (i) philosophers born after 1900 were not included in this paper (A subsequent study will examine the place of more contemporary figures in Canadian judgments.); and (ii) individuals whose ideas, while important to the study of law, are not generally considered or described as "philosophers," were left out. These include such eminent figures as physician, poet, professor, and essayist Oliver Wendell Holmes, sociologist of law Eugen Ehrlich, and jurist and historian Friedrich Carl von Savigny.<sup>11</sup>

## B. Conducting the Search

The names of the philosophers thus compiled were searched in the WestlawNext Canadian cases database. Most were searched both using both their full names (e.g., “Thomas Aquinas,” “Aquinas, Thomas”) and then their surnames only (e.g., Aquinas). In some situations, however, the search for specific surnames retrieved thousands of cases (e.g., “Smith,” “James,” “Bacon,” “Mill”) because the accused, litigants, judges, witnesses, other individuals, or even things (e.g., bacon, mill) mentioned in the case shared the same name. In those cases where it simply was not possible to search using the last name only, full names (e.g., “John Locke,” “Locke, John,”)<sup>12</sup> were used and the cases retrieved were then read to determine if the philosopher in question had been cited.<sup>13</sup>

Cases were included in this study only when a philosopher was quoted directly or was discussed in the context of his ideas.<sup>14</sup> Those with a passing or irrelevant mention<sup>15</sup> not involving direct quotations or ideas (e.g., “Defence submits that such “mind gymnastics” would require a group of Aristotles or of Thomas Aquinas to sit on the jury in order to understand the evidence”)<sup>16</sup> were not included. Cases which cited academic papers in which a philosopher is mentioned in the title but not discussed in the body of the case (e.g., “E. K. Banakas discussed this issue in ‘Tort Damages and the Decline of Fault Liability: Plato Overruled, But Full Marks to Aristotle!’, [1985] Cambridge L.J. 195, at p. 197”) were also omitted.<sup>17</sup>

Cases which cited selections from other cases in which a philosopher’s ideas were discussed or words were quoted directly were included. Privy Council cases which dealt with final appeals for Canada were part of the study. Tribunal decisions were not included. Only cases in English<sup>18</sup> were surveyed.

From these searches, a database of 543 citations<sup>19</sup> was compiled dating from 1860 to 2016.<sup>20</sup> The database offers a unique and compelling perspective on the frequency with which these major philosophers are cited in Canadian court decisions, the contexts in which they are cited, and the judges doing the citing. The findings are discussed below.

## Discussion

### Areas of Law in which Philosophers are Cited

In *Law’s Empire*, Ronald Dworkin writes that in “constitutional theory philosophy is closer to the surface of the argument, and, if the theory is good, explicit in it.” In Canada, Southin J. in the British Columbia Supreme Court noted in 1986 that “the proclamation of the Charter [of Rights and Freedoms] by a process worthy of an alchemist, has transformed judges from lawyers into philosopher kings...”<sup>21</sup> In light of these views, one might expect that the explicit mention of philosophers would occur most frequently in the context of constitutional law.

What this study indicates, however, is that judges cited philosophers most often in criminal cases,<sup>22</sup> and only secondly in constitutional law cases.<sup>23</sup> Quantitatively, the third largest category was in “Civil Practice and Procedure.” To assess the area of law for each case, the main subject heading assigned to each case by Carswell was used.

### Major Philosophers Most Often Cited

...it is not for the judiciary to permit the doctrine of utilitarianism to be used as a makeweight in the scales of justice...

*Stephens v. Richmond Hill (Village)*, [1955] 4 D.L.R. 572, [1955] O.R. 806 (Ont. HCJ)

In Canadian case law, two Modern philosophers – specifically, two Utilitarians – John Stuart Mill and Jeremy Bentham, are overwhelmingly the most cited.

### John Stuart Mill

John Stuart Mill (1806-1873) is best known for his seminal work, *On Liberty*, in which he discusses the “nature and limits of the power which can be legitimately exercised by society over the individual”<sup>25</sup> and “the struggle between Liberty and Authority”<sup>26</sup> – a subject that goes to the very heart of government and, of course, the courts themselves.

In Canadian cases, however, he is cited most often on a less lofty matter: his distinction between direct and indirect taxes. In *Principles of Political Economy with some of their Applications to Social Philosophy*<sup>27</sup> Mill writes,

Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs. The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.<sup>28</sup>

This passage from Mill’s book, first published in 1848, is quoted verbatim in *Lambe v. North British & Mercantile Fire & Life Insurance Co.*<sup>29</sup> (1887), a case in which four Quebec Queen’s Bench decisions were appealed and heard together by the Privy Council. The facts involved a number of incorporated companies which refused to pay a tax imposed by the Quebec Legislature.<sup>30</sup>

The issue before the court was whether the province had the power to pass an 1882 statute entitled “An Act to impose certain direct taxes on certain commercial corporations” under its powers of “direct taxation” in s. 92 of the *British North America Act of 1867* – Canada’s founding constitutional statute. Section 92 gives the provincial legislatures the



power to make laws having to do with specific matters including "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes." The Quebec legislature, in its 1882 statute, imposed a tax on commercial corporations (i.e., banks, insurance companies) within the province but, several of those companies argued that the subject matter of the statute belonged to those powers set out for the federal government under section 91 rather than the provincial government under section 92.

The Court, in *Lambe*, first attempted to reach a conclusion about the meaning of the words "direct taxation" and in doing so, cited John Stuart Mill's definition. After some discussion about the various elements of the definition, the Court indicated that it would

take Mill's definition above quoted as a fair basis for testing the character of the tax in question, not only because it is chosen by the appellant's counsel, nor only because it is that of an eminent writer, nor with the intention that it should be considered a binding legal definition, but because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious *indicia* of direct and indirect taxation, which is a common understanding, and is likely to have been present in the minds of those who passed the Federation Act.<sup>31</sup>

Ultimately, the Court held that the legislation was *intra vires* the province. Banks and insurance companies carrying on business could be directly taxed within the province; the power to tax them was not restricted by the powers of the federal government set out in section 91.

Although the suitability of Mill's definition for a more complex, modern world was questioned in at least one subsequent case,<sup>32</sup> his views on taxation have nonetheless appeared in three other Privy Council cases<sup>33</sup> and nineteen subsequent Supreme Court of Canada cases.<sup>34</sup> He has been cited on taxation more than a hundred times in cases over the years. Mill was, indeed, rarely cited in a non-taxation context at the highest courts until the last few decades. One early and notable exception is the "*persons*" case.<sup>35</sup> Here, the Privy Council considered the meaning of the word "persons" s. 24 in the *British North America Act*, 1867:

The governor general shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon qualified *persons* to the Senate; and, subject to the provisions of this Act, every person so summoned shall become and be a member of the Senate and a senator. [emphasis added]

The question was whether "persons" included women, i.e., whether women were eligible to become members of the Senate of Canada. The Privy Council explained that other sections of the *British North America Act*, 1867 made a distinction between "persons" and "males." Parliament, if it had wanted to make that distinction in s. 24, could have done so. The Privy Council also noted that on

May 20, 1867, [when] the Representation of the People Bill [a bill further extending the suffrage in Britain] came before a committee of the House of Commons, John Stuart Mill moved an amendment to secure women's suffrage and the amendment proposed was to leave out the word 'man' in order to insert the word 'person' instead thereof. See Hansard, 3rd series, vol. 187, column 817.

The mention of Mill's name was persuasive. Mill himself had been a member of the United Kingdom Parliament from 1865 to 1868 and had spoken on several occasions on the matter of women's suffrage. Given his advocacy of the equality of women,<sup>36</sup> his use of the word "person" implied the word was intended to include both sexes.

Not until almost 100 years later in 1986 was Mill again cited by Canada's highest courts for something other than his work on taxation. Mill's important philosophic work, *On Liberty*, appears in *R. v. Jones*,<sup>37</sup> a Supreme Court of Canada case involving an Alberta fundamentalist pastor who not only refused to send his children to school, but also refused to seek the exemption permitted by the government for children being educated at home or attending an approved private school. The pastor was charged with being a "truant parent" under s. 180 of the Alberta School Act,<sup>38</sup> and one consequence of a finding of guilt was the loss of physical liberty for the non-payment of fines.

The pastor argued that his rights under section s. 2(a), freedom of conscience and religion, and s. 7, the right to liberty, had been violated. The majority disagreed, but Wilson J. dissents in part on the matter of the appellant's section 7 rights. In doing so, she cites John Stuart Mill, who advocated

"pursuing our own good in our own way". This, he believed, we should be free to do "so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it". He added: Each is the proper guardian of his own health, whether bodily or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest."<sup>39</sup>

The Alberta *School Act* required that the pastor obtain a certificate from the authorities as proof that he was adequately educating his children. No other evidence aside from the certificate was allowed, thus restricting the pastor's ability to adequately state his case. For Wilson J., this evidentiary limitation impaired his liberty interests and infringed on his section 7 rights.

In subsequent years, the Supreme Court of Canada cites Mill on a number of different matters. These include freedom of the individual ("pursuing our own good in our own way"),<sup>40</sup> the harm principle ("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"),<sup>41</sup> and the notion that one generation's truth is



another generation's fallacy ("...many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present").<sup>42</sup> Mill is also cited on the importance of freedom of association ("if public spirit, generous sentiments, or true justice and equality are desired, association, not isolation, of interests, is the school in which these excellences are nurtured"),<sup>43</sup> and on the vulnerability of groups lacking in political power ("in the absence of its natural defenders, the interests of the excluded is always in danger of being overlooked...").<sup>44</sup>

On the matter of freedom of expression, even in the form of picketing by a Union, Mill's words become a touchstone in the courts. He wrote: "If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."<sup>45</sup> This pronouncement appears verbatim in *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*,<sup>46</sup> for example. There, McIntyre J., writing for the majority, cites Mill's words in holding that peaceful picketing by a Union is an exercise of the right of freedom of expression protected by the Charter.

As for the matter of freedom of expression in publications, Cory J., in *Edmonton Journal (The) v. Alberta (Attorney General)*,<sup>47</sup> cites Mill's words to support his conclusion that an Act which prohibits the press from reporting on certain court proceedings infringes on the right to freedom of expression. In *Thomson Newspapers Co. v. Canada (Attorney General)*,<sup>48</sup> Gonthier J., cites the passage from Mill in a decision involving an Act which prohibited the press from reporting on opinion survey results during the final three days of an election campaign. The majority of the court here concluded that the Act restricted freedom of expression. Finally, in *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*,<sup>49</sup> Mill is cited again in the context of the importance of books to the expression of ideas, and which must be treated differently than other goods which cross a border between two countries.

In the past, then, Mill has been overwhelmingly cited in the Canadian courts for his distinction between direct and indirect taxes. But more recently, he has become increasingly popular, particularly with the Supreme Court of Canada, for his views on a variety of other topical matters including freedom of the individual, freedom of association, and, of course, freedom of speech.

## Jeremy Bentham

Another Utilitarian, Jeremy Bentham (1748-1832), is the next most frequently cited philosopher in the Canadian courts. Bentham was trained as a lawyer who, although he chose not to practice, wrote extensively on legal issues in addition to a variety of related topics including the courts, ethics, political theory, economics, prisons, education, and government. He is cited over 100 times by Canadian courts, appearing in some of the earliest Canadian cases – his "Rationale of Judicial Evidence," for example, is mentioned

in Canadian case law in 1861.<sup>50</sup>

In Canada, Bentham is cited almost exclusively for his comments on the law. First and foremost, he was no advocate of the common law. From his perspective, as the Court in *Bobyk v. Bobyk* observed,

the common law has operated not through prior restraint but by punishing past action . . . the process is that followed in training a dog: one lets it do what it wants and then hits it on the head when it has done wrong.<sup>51</sup>

He also rejected the right to silence/rule against self-incrimination, calling it "one of the most pernicious and irrational rules that ever found its way into the human mind..."<sup>52</sup> He considered it a general duty for everyone to give whatever testimony they were capable of giving. Exemptions to this rule must be the exceptions. He writes:

Are men of the first rank and consideration, are men high in office, men whose time is not less valuable to the public than to themselves, – are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, – they and everybody! What if, instead of parties, they were witnesses? Upon business of other people's, everybody is obliged to attend, and nobody complains of it. Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly.<sup>53</sup>

Canadian cases also cite Bentham on a variety of other legal topics including general deterrence ("Bentham's study, *The Rationale of Punishment* (1811), is an elaboration of Beccaria's *An Essay on Crime and Punishment* (1764). Both works argue that the major purpose for the application of legal sanctions is to achieve general deterrence, that is, to discourage potential offenders from becoming actual offenders ...") and on the fearlessness and impartiality of judges. On this matter the British Columbia Court of Appeal quotes him verbatim:

what cares an English judge for the swords of a hundred barons? Neither fearing nor hoping, hating nor loving, the judge of our days is ready with equal phlegm to administer, upon all occasions, that system, whatever it be, of justice or injustice, which the law has put into his hands.<sup>54</sup>

He is also cited for his views on property law ("Before laws were made there was no property; take away laws and property ceases")<sup>56</sup>, and on directly- and indirectly-intended consequences. Bentham saw a consequence as "directly

intended" when the "prospect of producing it constituted one of the links in the chain of causes by which the person was determined to do the act" and "indirectly intended" where it was "merely in contemplation and likely to ensue."<sup>57</sup> He is also cited on the principles against retroactivity of legislation in criminal cases,<sup>58</sup> and on animal rights ("the question is not, Can they reason?, nor, Can they talk?, but, Can they suffer?")<sup>59</sup>

But the most notable use of Bentham in Canadian cases is for his "open court" principle – the assertion that courts are to be accessible to the public, and that court proceedings be open and transparent. In *Vancouver Sun, Re*, Iacobucci and Arbour JJ. writing for the majority, noted that the Court had emphasized, "on many occasions that the 'open court principle' is a hallmark of a democratic society and applies to all judicial proceedings." "The open court principle" the Court continues,<sup>60</sup>

has long been recognized as a cornerstone of the common law: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*...The right of public access to the courts is "one of principle ... turning, not on convenience, but on necessity": *Scott v. Scott*, [1913] A.C. 417 (U.K. H.L.), *per* Viscount Haldane L.C... "Justice is not a cloistered value": *Ambard v. Attorney General for Trinidad & Tobago*, [1936] A.C. 322 (Trinidad & Tobago P.C.), *per* Lord Atkin..."[P]ublicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity": J.H. Burton, ed., *Bethamiana or, Select Extracts from the Works of Jeremy Bentham* (1843)...<sup>61</sup>

Bentham's comments on this subject, as the Court notes, first appear in 1913 in *Scott v. Scott*,<sup>62</sup> a case in which the House of Lords considered whether a judge had the power to exclude the public from a hearing (undifferentiated from other similar cases heard in open court), and to prevent dissemination of the details of the matter to the public. The case involved a petition filed by the appellant Mrs. Scott, for a declaration that her marriage was void because of her husband's impotence. She had asked the Court to appoint medical inspectors and to hear the petition in camera. A decree of nullity was then obtained.

The question before the House of Lords was the "jurisdiction to hear in camera in nullity proceedings, and of the power of the judge to make an order which not only excludes the public from the hearing, but restrains the parties from afterwards making public the details of what took place."<sup>63</sup> The Earl of Halsbury noted that "the case raises such important issues of law that I am unwilling that there should appear to be any doubt about them. I am of opinion that every Court of justice is open to every subject of the King."<sup>64</sup> Lord Shaw of Dunfermline also weighs in:

It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves

Bentham over and over again. "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity."<sup>65</sup>

Bentham's cogent views have clearly resonated in Canadian courts; they have been cited more than sixty times since 1913.<sup>66</sup>

## Major Philosophers rarely or never cited

Heraclitus, Parmenides, Empedocles, Anaxagoras, Protagoras, Epicurus, Zeno of Citium, Plotinus, Epictetus, Gregory the Great, John the Scot, Avicenna, Averroes, Roger Bacon, John Calvin, Baruch Spinoza, George Berkeley, Henri Bergson, Alfred North Whitehead and Søren Kierkegaard, all named in that earlier list of major philosophers, fill that bill. In the Canadian courts, they have neither been directly quoted nor had their ideas discussed even if mentioned by name. Other important philosophic figures appear only once or twice in Canadian case law, giving their authority to specific matters facing the court, such as: imprecise language (Confucius); secular involvement in religious disputes (Maimonides); and the suitability of individuals to be called to the bar (Karl Marx).

Confucius, for example, is cited only once, for his views on language. Justice L'Heureux-Dubé invokes his name in the Supreme Court of Canada's *R. v. Nette*.<sup>67</sup> The case involved the rephrasing of the standard of causation for culpable homicide set out in *R. v. Smithers*.<sup>68</sup> Dickson J. (as he then was) had described culpable homicide as "a contributing cause of death, outside the *de minimis* range."<sup>69</sup> Lambert J.A., in the B.C. Court of Appeal's ruling in *R. v. Nette*,<sup>70</sup> in an effort to avoid the Latin expression, described the Smithers standard as "a contributing cause that is not trivial or insignificant."<sup>71</sup> Justice Arbour noted that, in explaining the standard to a jury, it might be preferable to re-word the standard of causation using positive terms, for example, a phrase such as a "'significant contributing cause' rather than using expressions phrased in the negative such as 'not a trivial cause' or 'not insignificant'. Latin terms such as '*de minimis*' are rarely helpful."<sup>72</sup>

Justice L'Heureux-Dubé, however, did not agree that an expression stated in the positive (i.e., a "significant contributing cause") meant the same thing as one stated in the negative (i.e., "not a trivial cause"). Language, she commented "is the outward sign of our legal reasoning. The words we use provide a filter through which we view and acknowledge legal concepts." Citing a book on language and the law, she explained that Chinese philosopher Confucius:

"When asked what he would do first if invited to administer a country...replied: 'It would certainly be to correct language'" (p. 8). Confucius added: "If language be not in accordance with the truth of things, affairs cannot be carried on to success".<sup>73</sup> The differences between the various phrasings were substantive, Justice L'Heureux-Dube concluded; they were not merely matters of semantics as the majority of the court believed.

Maimonides, the influential medieval Jewish philosopher, is also cited only once in Canadian case law, a divorce case in 1973, *Morris v. Morris*,<sup>74</sup> which involved orthodox Jews. The wife had applied to the Manitoba Queen's Bench for an order of mandamus requiring her husband, from whom she had been legally divorced, to deliver a "Get" (a bill of divorcement required by the Orthodox Jewish faith in order to spiritually recognize the dissolution of the marriage). The wife in this case wished to remarry according to traditional Jewish practices, but the ex-husband was uncooperative. A rabbinical court which examined the situation had concluded that there must be a religious divorce before she could remarry.

The problem, according to Wilson, J., of the Manitoba Court of Queen's Bench, lay in the fact that secular Courts are generally unwilling to get involved in disputes among adherents of a specific faith regarding the observance of religious beliefs or rituals. If the nature of the dispute is one which goes beyond a religious community to result in consequences temporal in nature, the courts are, however, willing to intervene.

In this instance, a number of rabbis had indicated their support for an order of the Queen's Bench compelling the husband to deliver a Bill of Divorcement. The Court, therefore, included a statement of Jewish law agreed to by both parties and cited Maimonides as an authority, under Jewish law, for rabbinical courts to turn to civil courts for enforcement of their orders when one party has refused to cooperate. Given that the court's intervention was sanctioned by Jewish law, the Court issued the order sought.

A last example shows how the ideological leanings of society at a particular era can influence the courts. In this case, Karl Marx is cited by the BC Court of Appeal in *Martin v. Law Society of British Columbia* a case which began with a refusal by the BC Benchers to admit the appellant, Martin, an admitted Marxist, to the Bar. As the Court noted, "the Benchers came to the conclusion that the Marxist philosophy of law and government, in its essence, is so inimical in theory and practice to our constitutional system and free society, that a person professing them is eo ipso, not a fit and proper person to practise law in this Province, and hence cannot be of "good repute" within the meaning of the *Legal Professions Act*."<sup>75</sup> Counsel for the appellate had argued that Martin had the right to freedom of expression and freedom of thought, but the Court was not persuaded:

For a Communist to talk about personal freedom of action, expression and thought is like the devil talking

about the delights of Heaven. There is no such thing as personal freedom in Soviet Russia, where organized practices of inhumanity, lawlessness, and depersonalization continue to shock the conscience of the civilized world. Moreover, the existence of personal rights in the sense we know them is denied by the Communist philosophy, as their existence was denied by the Nazi doctrinaires who took their political philosophy from *Hegel*, who was also, in so many respects, the inspiration of Karl Marx. Hegel it was who taught the doctrine of progress by antagonism which *Karl Marx* took for his own as a metaphysical support to the deterministic outlook of material revolution, and made it the mainspring of his political philosophy. Karl Marx in his *German Ideology* (4 Marx, Sochineniya 65 (Moscow 1933)) had written: "Only in the *collective* can the individual find the means of giving him the opportunity to develop his inclinations in all directions; in consequence, *personal freedom is possible only in the collective*."<sup>76</sup>

The Court, perhaps not surprisingly in those anti-communist times, concluded that "a Marxist Communist cannot be a loyal Canadian citizen"<sup>77</sup> and upheld the decision by the Law Society of British Columbia to deny Martin admission to the Bar.

### Judges Who Cite Major Philosophers

The 543 citations containing either the wording or ideas of the philosophers named above emanated from only 300 specific judges in their pertinent courts. Some of them may cite only one philosopher in a lifetime of decision writing, while a much smaller number cite philosophers several times (defined here as three or more times in their decisions.) For example while justices of the Supreme Court of Canada cite John Stuart Mill more than any other philosopher, Aristotle is the favourite of the Federal Court and Jeremy Bentham appears most often in Alberta judgments.

This section will begin with the Supreme Court of Canada, move on to the Federal and Tax Courts, then to provinces/territories in alphabetical order.

### Supreme Court of Canada

Supreme Court of Canada justices are well represented amongst those who make more frequent use of philosophers in their opinions.<sup>78</sup> Particularly noteworthy amongst this group are Justices/Chief Justices Thibault, Rinfret,<sup>79</sup> Lyman Duff,<sup>80</sup> Brian Dickson, William Rogers McIntyre, Bertha Wilson, Gérard Vincent La Forest,<sup>81</sup> Claire L'Heureux-Dubé, John Sopinka, Charles Gonthier,<sup>82</sup> Beverly McLachlin,<sup>83</sup> and Frank Iacobucci.

Not surprisingly, many of these judges happen to have a background in philosophy. Lyman Duff, for example, while enrolled at University of Toronto, switched from mathematics to philosophy, "in the belief that it would better prepare him for law."<sup>84</sup> Brian Dickson excelled in jurisprudence at the



Manitoba Law School.<sup>85</sup> William McIntyre developed his lifelong interest in philosophy after a jurisprudence course at the law school in Saskatchewan.<sup>86</sup> Bertha Wilson, during her undergraduate studies in Scotland, took courses in logic and moral philosophy at the general and advanced levels and recalled lectures by John Laird on David Hume which “had a greater influence on her than anyone else at Aberdeen.”<sup>87</sup> Finally, Canada’s current Chief Justice of the Supreme Court, Beverley McLachlin, is reported to have focused on philosophy as well as languages during her undergraduate program.<sup>88</sup>

If any distinctive pattern emerges in the judgments of some of these Supreme Court justices, it is the recurrent citing of John Stuart Mill who appears in thirty-five Supreme Court of Canada cases<sup>89</sup> (whereas, the second most cited philosopher, Aristotle, appears only nine times).<sup>90</sup>

Justice Brian Dickson, for example during the course of his career on the bench, does indeed cite Hegel (“...the entire premise expressed by such thinkers as Kant and Hegel that man is by nature a rational being, and that this rationality finds expression both in the human capacity to overcome the impulses of one’s own will and in the universal right to be free from the imposition of the impulses and will of others”)<sup>91</sup> John Locke,<sup>92</sup> Aristotle,<sup>93</sup> and Voltaire.<sup>94</sup> But his favourite is Mill,<sup>95</sup> on whom he calls for such matters as his distinction between direct and indirect taxes,<sup>96</sup> and on freedom of speech.<sup>97</sup> Most importantly, he invokes Mill’s name in the context of freedom of association. In *Reference re Public Service Employee Relations Act (Alberta)*,<sup>98</sup> the majority holds that provincial legislation prohibiting strikes does not infringe on the freedom of association guaranteed by the Canadian Charter of Rights and Freedoms. Justice Dickson, in his dissenting opinion, makes the case that in the context of labour relations, freedom of association must include the freedom to bargain collectively and to strike, and the fact that one is employed by government rather than another employer is not a sufficient reason for limiting that freedom. As support for an expansive reading of freedom of association, he cites Mill’s words: “if public spirit, generous sentiments, or true justice and equality are desired, association, not isolation, of interests, is the school in which these excellences are nurtured.”<sup>99</sup>

Justice William Rogers McIntyre, in his decisions, cites Bacon<sup>100</sup> and Aristotle.<sup>101</sup> But it is to Mill he also most frequently refers, not only for his distinction between direct and indirect taxes<sup>102</sup> but also for his views on freedom of speech in the labour law case – *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*.<sup>103</sup> Here, the court considered whether secondary picketing by trade union members during a labour dispute was a protected activity under s. 2(b) of the *Canadian Charter of Rights and Freedoms* which guarantees the freedom of expression. The appellants defended the picketing activity under the provisions of s. 2(b) of the Charter, but McIntyre J., in his judgment, noted that freedom of expression was not a product of the Charter, but a notion much older and much more fundamental forming “the basis for the historical development of the political, social and educational

institutions of western society.” He quotes Mill: “All silencing of discussion is an assumption of infallibility.” And, famously: “If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.”<sup>104</sup> McIntyre goes on to comment: “Nothing in the vast literature on this subject reduces the importance of Mill’s words.” By implication, therefore, any attempt to restrain the picketing by the appellants is also a restraint on the exercise of the right of freedom of expression.

Justice Bertha Wilson, in her judgments, cites both Aristotle<sup>105</sup> and Jeremy Bentham,<sup>106</sup> but John Stuart Mill is, for her too, a favourite appearing in multiple decisions.<sup>107</sup> Unsurprisingly, his distinction between direct and indirect taxes appears in one of these decisions: *Air Can. v. B.C.*<sup>108</sup> He is also called upon more than once by Justice Wilson for his views on liberty:

I believe that the framers of the Constitution in guaranteeing “liberty” as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric – to be, in today’s parlance, “his own person” and accountable as such. John Stuart Mill described it as “pursuing our own good in our own way.”<sup>109</sup>

In *Andrews v. Law Society (British Columbia)*,<sup>110</sup> Justice Wilson also refers to Mill in the context of the vulnerability of non-citizens in society, concluding that non-citizens fall into an analogous category to those specifically enumerated in s. 15 of the Charter of Rights and Freedoms.

Justice John Sopinka is one of the exceptions in that he does not employ John Stuart Mill in any of his decisions. Plato and Aristotle, however, are cited for their opposition to suicide (“an offence against the gods or the state”) in the 1993 case *Rodriguez v. British Columbia (Attorney General)*.<sup>111</sup> In that instance, Sue Rodriguez, a woman with a terminal disease, had asked the Supreme Court for the right to a physician-assisted death. Justice Sopinka also discusses Francis Bacon’s views on physician-assisted suicide.

Justice Frank Iacobucci does invoke the name of Mill, not only for his views on taxes,<sup>112</sup> but also for his opinions on freedom of expression.<sup>113</sup> As for Mill’s contention that pursuing one’s own ends necessitates allowing others the freedom to pursue theirs: that view is cited approvingly not only by Justice Iacobucci,<sup>114</sup> but also by several of his colleagues in other Supreme Court decisions.<sup>115</sup>

Justice Iacobucci also cites Bentham<sup>116</sup> in support of the open court principle.<sup>117</sup> He also calls upon Voltaire in *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*,<sup>118</sup> a case involving a Vancouver bookstore which sold gay and lesbian books, magazines and other literature. Customs



legislation in effect at the time required that the importer of material from outside the country (where the bookstore got most of its materials) prove that the material was not obscene. In his dissenting (in part) decision, Justice Iacobucci cites Voltaire's statement – "Liberty of thought is the life of the soul" – to make the case that the application of Customs legislation to expressive materials, and specifically, to books cannot be the same as other goods which cross borders. While the majority held that the onus regarding obscenity should be shifted from the importer to the government, Justice Iacobucci went one step further asserting that there were "grave systemic' flaws in the enforcement of the Customs legislation."

Finally, amongst those justices who resort to the philosophers on several occasions, comes Justice L'Heureux-Dubé. She cites Voltaire twice – once on the limits of rights ("A right taken too far becomes an injustice"), and again, on the matter of freedom of expression ("I do not believe a word that you say, but I will defend with my life your right to say it").<sup>119</sup> Aristotle<sup>120</sup> is called upon on the subject of statutory interpretation and Confucius, as noted earlier, on the necessity to ensure that language is precise in its usage.<sup>121</sup> Like Justice Sopinka, she does not cite John Stuart Mill in any of her decisions.

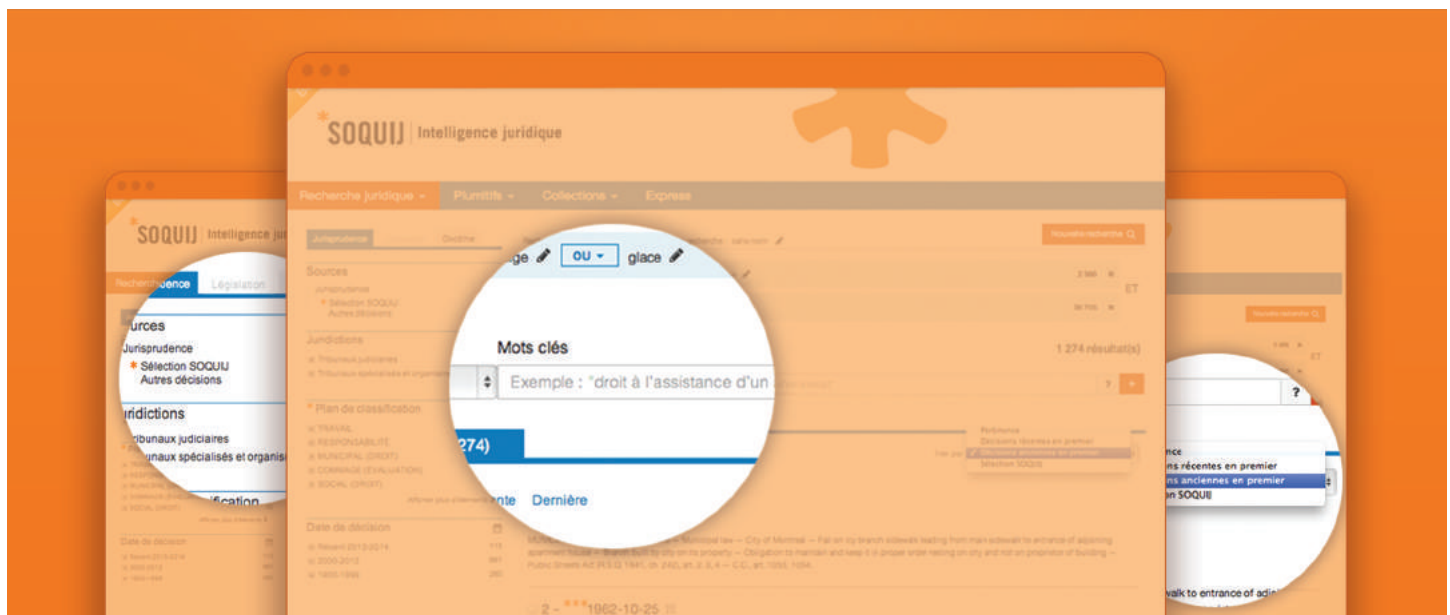
### Federal Court / Tax Court of Canada

Whereas the Supreme Court calls upon John Stuart Mill most frequently, the Federal and Tax courts prefer Aristotle, and they cite him in a variety of contexts.<sup>122</sup> They call upon

him, for instance, in justification of the notion that equality consists of treating equals equally and unequals unequally,<sup>123</sup> for his theories on four kinds of causes ("the material cause, the matter from which something came; the formal cause, the substantial form or essence of a change; the efficient cause, the agent by which a change was brought about; and the final cause, the purpose or end of the change"),<sup>124</sup> for his contention that the degree of precision attainable depends on the subject matter,<sup>125</sup> and for his striking image on natural law – that it has the same force everywhere, just as fire burns in the same way both in Athens and in Persia.<sup>126</sup>

It is noteworthy that former Chief Justice of the Tax Court, Donald Bowman has commented, outside the court, on the importance of philosophy to law. With respect to the widely-held belief that that one must have a background in economics and accounting in order to practice tax law, he has taken a contrary position. Tax law "covers many other disciplines, trusts, contracts, family law, corporate. Its basis lies not in economics or accounting. Its roots lie in philosophy, arts, literature and the humanities."<sup>127</sup>

Consequently, Justice Bowman found room for philosophy in his decisions. Over the years, in addition to citing Aristotle,<sup>128</sup> he turns to Bertrand Russell ("every advance in civilisation has been denounced as unnatural while it was recent"),<sup>129</sup> and John Stuart Mill<sup>130</sup> for his views on direct versus indirect tax. He calls memorably on Rene Descartes in *Radage v. R*,<sup>131</sup> a case in which "Parliament has thrown the court a philosophically loaded package, which it cannot duck."<sup>132</sup> In



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*Radage*, Bowman deals with appeals from assessments in which the appellant's dependent son was denied a disability tax credit under section 118.3 of the *Income Tax Act*. The question before the court was whether the son suffered from a severe and prolonged mental impairment (defined in part by the inability, all or substantially all of the time, to perform the activity of "perceiving, thinking and remembering") within the meaning of sections 118.3 and 118.4.

In his reasoning, Justice Bowman addresses a vital question:

What does "perceiving, thinking and remembering" mean within the context of section 118.4? We use these words every day yet they are not susceptible of easy definition. Thinkers have struggled with the nature of thought since the days of Plato, and indeed before then. Descartes built an elaborate philosophical system, including the proof of the existence of God and of self, on his intuitively certain premise that he thinks: cogito ergo sum. Yet he gives us little assistance concerning what he thinks he is doing when he says cogito.<sup>133</sup>

He then goes on to cite, among other sources, the *Oxford Companion to Philosophy* for its entry on "Thinking" and "Memory." Taking these definitions and descriptions into account, Bowman reaches the conclusion that although the provision could be construed narrowly, thereby shutting out certain individuals who do not squarely fit the language set out in the Act, if the purpose of Parliament was to provide relief to disabled persons, the provisions must be interpreted "liberally, humanely and compassionately."

In addition to Justice Bowman, other Judges in the Federal Court who are noteworthy in their citing of the major philosophers include Justices James K. Hugessen,<sup>134</sup> Barbara Reed,<sup>135</sup> Francis Creighton Muldoon,<sup>136</sup> and Sean J. Harrington.<sup>137</sup>

Justice Sean J. Harrington rivals Bowman in the number of philosophers appearing in his decisions. He not only employs Thomas Hobbes (for his view of life as "nasty, brutish and short")<sup>138</sup> but Voltaire ("An award of solicitor-client costs on a lump sum basis, goes as Voltaire would put it, "pour encourager les autres"),<sup>139</sup> and St. Augustine<sup>140</sup> in the context of the right to be heard as being at the heart of one's sense of justice and fairness. Justice Harrington also cites Thomas Aquinas, Aristotle and John Locke<sup>141</sup> for their views on "virtue as a mean" between two vices, one involving excess, the other deficiency.

One of his most interesting citations involves Francis Bacon in several cases, including *Canada (Attorney General) v. Amnesty International Canada*.<sup>142</sup> This latter case had to do with reports filed with the Military Police Complaints Commission on the conduct of Military Police (MP) in respect of the transfer of detainees in Afghanistan who risked being tortured. The Commission had sought production of documents on policy decisions for the Canadian forces (and therefore Military Police) in Afghanistan. This would

have involved government officials not involved in carrying out policing. But such policy decisions, according to Justice Harrington, were

beyond the reach of the Commission and of this Court. To quote Francis Bacon: "It were infinite for the law to judge the cause of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree."<sup>143</sup>

Harrington noted that Bacon points to a danger inherent in a search for causation in law, in that causation can become a chain with endless links. At some point, some limit in responsibility is necessary and that limit must be the natural, direct or proximate result of an act.<sup>144</sup> In this case, to the extent that the Commission had investigated matters beyond what the Military Police who were subjects of the complaint knew, or had the means of knowing, Harrington J. holds, it had travelled too far along the chain with endless links, i.e., it had acted beyond its jurisdiction. That same problem also appears in *Cameco Corp. v. "MCP Altona" (The)*,<sup>145</sup> a case involving a shipping accident in which Bacon is again cited by Harrington J., using the same principle ("the law does not judge the cause of causes").

## Superior and Provincial Courts

In every jurisdiction but Nunavut, courts of appeal, superior and provincial court judges have cited philosophers as and when they felt the need. In the Maritimes and Quebec (i.e. in decisions written or available in English) however, no specific adjudicators stand out as having cited philosophers in multiple decisions. Mill is cited most often in New Brunswick<sup>146</sup> and Newfoundland,<sup>147</sup> Bentham most often in Nova Scotia, and Prince Edward Island. Both Mill and Bentham are cited in decisions in English available in Quebec. In the Yukon, only Aristotle appears in the case law.<sup>148</sup> In the rest of Canada, a handful of judges in the Superior Courts have referred to the major philosophers in several decisions during the course of their careers. This section looks at those judges and their jurisdictions – Alberta, British Columbia, Manitoba, Ontario, the Northwest Territories, Prince Edward Island and Saskatchewan. It also notes which philosophers are cited most often.

## Alberta

By far the most cited philosopher in Alberta's courts is Jeremy Bentham.<sup>149</sup> He is referred to most often for his open court principle;<sup>150</sup> however, courts have also cited him for his views on animals,<sup>151</sup> on the right to silence,<sup>152</sup> on solicitor/client privilege,<sup>153</sup> on the law's entitlement to the evidence of everyone (both great and small),<sup>154</sup> and on the principles of restraint/deterrence in sentencing.<sup>155</sup> He is also mentioned on the matter of retroactively applying statutes in criminal law cases,<sup>156</sup> and on the law of his own day as advancing primarily the interests of lawyers.<sup>157</sup> Finally, his opinion is quoted in the context of certainty as being essential to the law: "Let there be no authority to shed blood; nor let

sentence be pronounced in any court upon capital cases, except according to a known and certain law. ... Nor should a man be deprived of his life, who did not first know that he was risking it."<sup>158</sup>

Several Alberta judges have cited Bentham as well as other philosophers in their decisions. Justice Frank Ford,<sup>159</sup> for example, was earliest amongst the group of Alberta judges to cite him for his open court principle.<sup>160</sup> He also cites Mill for his distinction between direct and indirect taxes.<sup>161</sup>

Justice Ronald L. Berger<sup>162</sup> also cites Bentham on the open court principle.<sup>163</sup> He makes use of Voltaire, too, in a criminal case in which the court considered whether a publication ban was necessary so that prospective jurors would not hear news which later might be ruled inadmissible.<sup>164</sup> Justice Berger recollects the words of Voltaire to Count d'Argental in 1760: "When we hear news we should always wait for the sacrament of confirmation."<sup>165</sup> For Justice Berger, jurors who are instructed by a judge that they must only consider evidence adduced at trial both appreciate and understand their duty when deciding the fate of the accused. A publication ban was held not to be necessary.

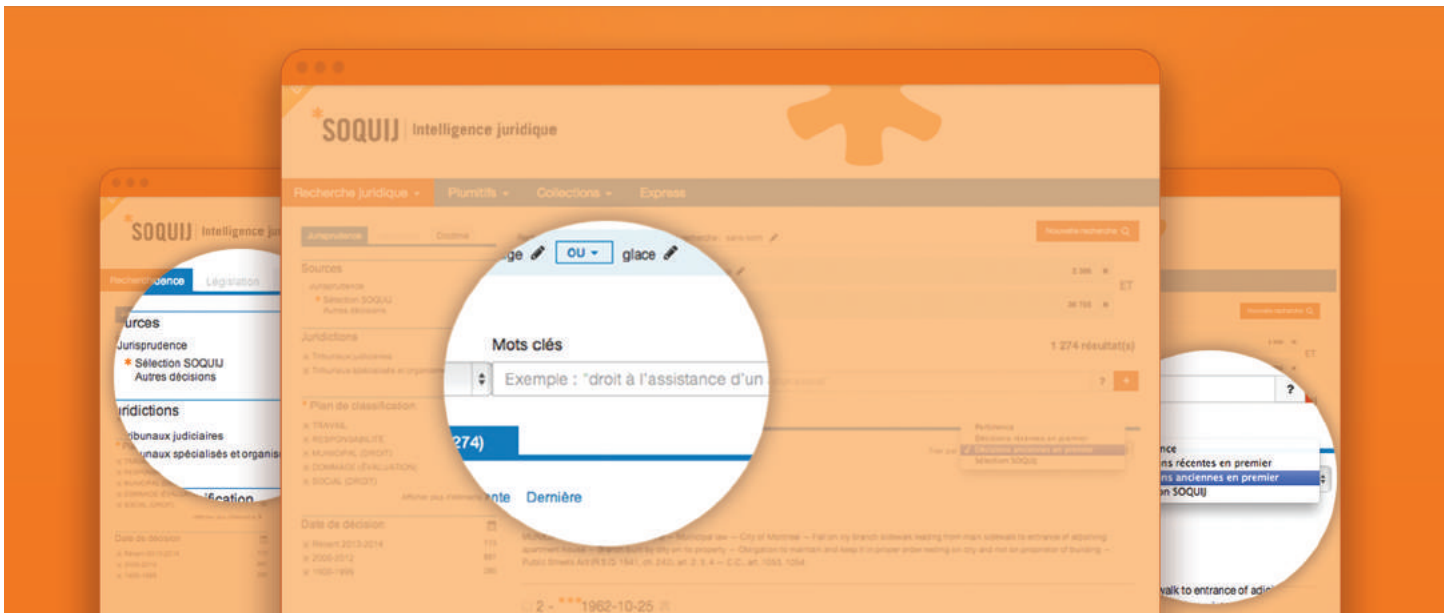
Justice Berger also appeals to Francis Bacon. In *R. v. Hodson*,<sup>166</sup> for example, a case in which the court was asked to determine whether a judge had intervened with dismissive remarks too often during a trial, thereby giving the impression that he had made up his mind on certain key issues, Justice Berger, making the point that judges must

avoid excessive intervention, quotes Bacon: "Patience and gravity of hearing, is an essential part of justice; and an overspeaking judge is no well-tuned cymbal."<sup>167</sup>

Justice Jack Watson,<sup>168</sup> likewise has a similar appreciation of Francis Bacon. He, too, notes in one of his decisions that an "over-speaking" judge is no "well-tuned cymbal."<sup>169</sup> Bacon is also cited for other views, including those on attempted crimes,<sup>170</sup> on certainty as essential to the law,<sup>171</sup> on the law's entitlement to the evidence of the greatest and the lowliest in society,<sup>172</sup> and for the notion that judgment can become "wormwood" and "sour" from delays.<sup>173</sup> Also adduced is Bacon's maxim on interpretation "verba generalia restringuntur ad habitatem rei vel aptitudinem personae (general words should be confined to the character of the thing or the aptitude of the person)."<sup>174</sup> Like his colleagues, Judge Watson makes use of Bentham in several of his opinions.<sup>175</sup>

## British Columbia

In British Columbia, John Stuart Mill is cited most often. Noteworthy amongst these citations are his distinctions between direct and indirect taxes,<sup>176</sup> his discussion of the harm principle,<sup>177</sup> his views on freedom of expression,<sup>178</sup> liberty,<sup>179</sup> and sentencing.<sup>180</sup> Frequent allusions to philosophers are made by three judges in particular: Justice Mary Southin,<sup>181</sup> Justice Robert J. Bauman, and Justice Cornelius O'Halloran of the B.C. Court of Appeal.



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In *Everywoman's Health Centre Soc. (1988) v. Bridges*, Justice Southin considers the arguments put forward by defendants appealing injunction and contempt findings for picketing and intimidation of abortion clinic operators and users. The defendants argued that the court must deny “the plaintiffs the legal protection which, if their business was say, running legal gambling, the law would give them.” Justice Southin compellingly cites a scene from the Robert Bolt play, “A Man For All Seasons,” in which Sir Thomas More attempts to explain to his son-in-law Roper why the law must be obeyed even in controversial moral matters:

ROPER: Then you set Man's law above God's!

MORE: No, far below; but let me draw your attention to a fact – I'm not God. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester. I doubt if there's a man alive who could follow me there, thank God ...

ALICE: [exasperated, pointing after Rich]: While you talk, he's gone?

MORE: And go he should if he was the devil himself until he broke the law!

ROPER: So now you'd give the Devil benefit of law!

MORE: Yes, What would you do? Cut a great road through the law to get after the Devil?

ROPER: I'd cut down every law in England to do that!

MORE: Oh? And when the last law was down, and the Devil turned round on you – where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast – Man's laws, not God's – and if you cut them down – and you're just the man to do it – d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.<sup>182</sup>

In Justice Southin's view, even though the plaintiffs may appear in the eyes of many to be particularly unworthy, “they are entitled to take refuge in the thickets of the law, not for their own sakes but for the sake of all others who claim the protection of the law.”<sup>183</sup>

In other cases, Justice Southin quotes Francis Bacon on delays in the courts and Jeremy Bentham on the neutral and impartial judge.<sup>184</sup> She also cites Aristotle on man as “social animal, formed by nature for living with others', associating with his fellows both to satisfy his desire for social intercourse and to realize common purposes.”<sup>185</sup>

Justice Robert Bauman's familiarity with the philosophers is best illustrated in his treatment of marriage in the 2011 case *Reference re: Section 293 of the Criminal Code of Canada*.<sup>186</sup> Dealing with the constitutionality of the prohibition on polygamy set out in section 293 of *Criminal Code*, Justice Bauman explores the understanding of marriage during the classical civilizations of Greece and Rome and how the support for monogamous marriage “finds its roots in this ancient world.”<sup>187</sup> He cites Plato and Aristotle<sup>188</sup> on their understanding of the private and public goods of marriage,

i.e., that marriage “was as a source of private goods for men, women and children, and of public goods for rulers, citizens and society.”<sup>189</sup> He goes on to consider the philosophers of the early Christian era, especially St. Augustine, who also put emphasis on the private and public goods of marriage discussed by the Greek and Roman philosophers, and also set out in the Bible.<sup>190</sup> Moving then to the medieval views on monogamy and polygamy, Bauman J. cites Thomas Aquinas on those qualities which distinguish humans from other animals and how these characteristics incline “human beings toward monogamy as a means of ensuring paternal certainty and life-long investment in children by both parents. This argument in favour of monogamy served concurrently as a powerful argument against polygamy.”<sup>191</sup>

A single case (discussed earlier) best exemplifies Justice Cornelius O'Halloran's appeal to the authority of philosophy: *Martin v. Law Society of British Columbia*.<sup>192</sup> There, the Benchers of the Law Society of British Columbia refused an application of the appellant for call to the Bar on the grounds that he was not a “fit person” or a “person of good repute” as set out by the *Legal Professions Act*, R.S.B.C. 1936, c. 149 because he had admitted to being a Marxist Communist. Justice O'Halloran, citing Hegel, Thomas Hobbes, John Locke and Karl Marx, comes to the conclusion that Communism is a “pernicious creed” and a “clear danger” to our “Canadian free society.” On the basis that “a Marxist Communist cannot be a loyal Canadian citizen,” O'Halloran decides that the Benchers were correct in not admitting Martin to the Bar, and he dismisses the appeal.

## Manitoba

Mill is the philosopher cited most often in Manitoba.<sup>193</sup> Justice Archibald Kerr Twaddle (Manitoba Court of Appeal, 1985-2007) is notable for citations from Mill (on liberty and on the harm principle)<sup>194</sup> and from Voltaire (“I disapprove of what you say, but I will defend to the death your right to say it”).<sup>195</sup>

## Northwest Territories

Justice Mark Murray de Weerd often advances the views of the philosophers in his decisions. Mill is cited on more<sup>196</sup> than one occasion on the question of freedom of expression, while Bentham's open court principle,<sup>197</sup> and William of Occam, on the “principle of parsimony known as ‘Occam's razor’”<sup>198</sup> along with Aristotle's ideas on man as a social animal<sup>199</sup> are also cited.

In *R. v. Chivers*,<sup>200</sup> a compelling case involving the common law defence of necessity, the accused, who had been beaten by her husband for years, shot him while he slept not long after he had beaten her, sexually abused her, and fired a rifle in her direction. The Court considered an application to determine whether the jury should be given instructions on the issues of self-defence and necessity. Justice De Weerd calls attention to the leading Supreme Court case (*Perka v. R.*).<sup>201</sup> There, Hobbes' Leviathan (first published in 1651) is cited for its view on attaching criminal liability to



actions which, although they violate the law, are the product of necessity:

If a man by the terror of present death, be compelled to do a fact against the Law he is totally Excused; because no Law can oblige a man to abandon his own preservation. And supposing such a Law were obligatory: yet a man would reason thus, if I do it not, I die presently: if I do it, I die afterwards; therefore by doing it, there is time of life gained; Nature therefore compels him to the fact.<sup>202</sup>

Justice de Weerdt concludes that there is, therefore, no need to charge the jury on the common law excuse of necessity in the present case, given that the defence of self-defence (pursuant to s. 37 of the *Criminal Code*) is more than adequate to cover what the accused felt would be an imminent, and quite likely deadly, assault by the deceased on herself and on her small children.

## Ontario

Mill<sup>203</sup> barely edges out Bentham as the philosopher who is cited most often in the Ontario Superior Courts. Judges who advert to philosophers more frequently are Justices Fergus O'Donnell,<sup>204</sup> Paul M. Perell,<sup>205</sup> Robert A. Blair,<sup>206</sup> and Bert MacKinnon.<sup>207</sup>

For example, Justice Fergus O'Donnell, who cites Jeremy Bentham on the open court principle,<sup>208</sup> also refers to Sir Thomas More in the context of a discussion about judges who are obliged to uphold legislation that "may be perceived as 'unwise'".<sup>209</sup> While it may be unwise, he notes, "I do not think that judges going out of bounds is a good idea either, however merciful and just their motivations may be." Like British Columbia's Justice Southin, as mentioned above, he quotes from Robert Bolt's *A Man For All Seasons*:

. . . in which Sir Thomas More's would-be son-in-law told More that he would cut down every law in England if that was what it took to get at the devil, to which More replied that the laws exist to protect everyone and nobody would be safe if they were struck down. The same is true if judges fail to recognize the distinction between a law that may have pointless or regrettable or bad consequences, or even a law that some say has petty or craven political motivations and a law that is unconstitutional. Democracy does not always result in pleasing or even entirely rational or optimally "fair" outcomes, but overstepping democracy's boundaries is a far, far bigger issue than any individual case or defendant.<sup>210</sup>

Justice O'Donnell also cites Aristotle on the defence of necessity ("Praise is indeed not bestowed, but pardon is, when one does a wrongful act under pressure which, in the words of Aristotle... 'overstrains human nature and which no one could withstand'") and, again for his remark that has long since become a cliché: "a single swallow does not a spring-time make."<sup>211</sup>

Justice Perell, also cites Aristotle for his views on virtue as a "golden mean between vices of excesses or deficiencies,"<sup>212</sup> and of useful things which can be used for good or for harm:

...if it is argued that great harm can be done unjustly using the power of words, this objection applies to all good things except virtue, and most of all to the most useful things, like strength, health, wealth, and military strategy; for by using these justly one would do the greatest good and unjustly, the greatest harm."<sup>213</sup>

Mill is quoted for his views on tax,<sup>214</sup> and Russell for his "paradox of set theory of answering the question of who shaves the barber in a town where the law was that those who don't shave themselves are shaved by the barber."<sup>215</sup>

Justice Blair cites St. Augustine, Aristotle, and Plato for their views on marriage in *Halpern v. Toronto (City)*<sup>216</sup> This was the landmark case in which the Court concluded that the common law definition of marriage was a violation of the Canadian Charter.

Finally, Justice MacKinnon cites Bentham twice on the open court principle.<sup>217</sup> He also praises Bentham's view that the public has the right to every man's evidence as he notes in *R. v. Spencer*:

It is a positive rule that there is a general duty to give what testimony one is capable of giving and any exemptions are exceptional. In characteristically colourful language, the great reformer, Jeremy Bentham, described the legal position in 1827...<sup>219</sup>

The right to the evidence of others is a great leveller, as Bentham notes, and in this regard even the great and the mighty may be called upon by the lowliest individuals in society to give that evidence.

## Prince Edward Island

Bentham and Mill are the philosophers most frequently cited. For example, Thane Alexander Campbell, Chief Justice of the Island's Supreme Court from 1943 to 1970 cites Mill for his views on direct and indirect taxes<sup>220</sup> and Bentham for his open court principle.<sup>221</sup> He also refers to Hobbes for his definition of "Judicature."<sup>222</sup>

## Saskatchewan

Once again, the names of Bentham and Mill predominate. Justice Ron Barclay, at the Saskatchewan Queen's Bench from 1986-2010, cited them on multiple occasions: Bentham several times on the open court principle<sup>223</sup> and Mill for his distinction between direct and indirect taxes.<sup>224</sup> In the province as a whole, Mill is again the philosopher cited most often.<sup>225</sup>

## Conclusion

As this survey indicates, judges from every level of the Canadian courts have, over the years, made explicit references to major philosophic figures in their decisions. Many of the citations deal with eminently practical matters, as in the recurring use of Mill for his distinction between direct and indirect taxes, or Bentham on the open court principle. But the courts have also thought it beneficial to call upon the philosophers in a variety of more strictly “philosophic” notions, for example: Thomas Aquinas on the doctrine of free will,<sup>226</sup> Bertrand Russell on theoretical terms as “logical constructions,”<sup>227</sup> Grotius’ theory of international law,<sup>228</sup> William James on religion,<sup>229</sup> Immanuel Kant on self-preservation,<sup>230</sup> Rousseau on the social contract,<sup>231</sup> and Socrates on judicial impartiality.<sup>232</sup>

Yet not all legal experts have noticed any influence of philosophy in the courts’ decisions. Vaughan Black, professor of Law at Dalhousie University in Halifax, went so far as to suggest: “Canadian decision-making, for the most part, remains resolutely unphilosophical.” And it is, indeed, true that the courts’ relationship with philosophy has not been an easy one. Justice Joyal of the Federal Court, for instance, says that judges have “traditionally been called upon to decide issues on the basis of hard facts – the kind of rummage room in which trial judges find their judicial role.” In other words, rather than clarifying, philosophy can only, for some judges, muddy the waters with “what might otherwise be called soft data, i.e. assertions which are not the product of objective inquiry, but are intellectualized observations expressed in esoteric language and reflecting in most instances conflicting ideologies.”<sup>243</sup> Indeed, some judges have openly wondered to what extent they are competent

“to decide between the conflicting views of theologians and philosophers”<sup>235</sup> – especially since professional theologians and philosophers are themselves often at odds.

Therefore, the view that facts, not philosophy, must be a judge’s primary focus, has been stated on numerous occasions.<sup>236</sup> Justice Anderson of the Ontario High Court of Justice, for example, has noted: “A moralist or a philosopher might find subject for comment: as a Judge, all that is open to me is to find the facts and apply the law.”<sup>237</sup> Justice Scollin of the Manitoba Court of Queen’s Bench agrees: “The ideal which is conceived by the philosopher may be sought by the legislator, but must not be imposed by the judge.”<sup>238</sup> Master Funduk, of the Alberta Court of Queen’s Bench, is impatient with the very notion: court judgments “are not some long dead Greek philosopher’s ethereal debate about whether a road runs in only one direction. Court judgments are decisions on disputes between real people, with real facts and real issues.”<sup>239</sup>

Nonetheless, the results of this study indicate that philosophy has indeed had its place the Canadian courts. That thirty-six percent of the citations noted here<sup>240</sup> have appeared in cases decided in or since the year 2000 suggests that the trend is perhaps more alive today than it was in the earliest days of our jurisprudence. It is important to point out that this paper has dealt only with explicit citations of various major philosophers. Doubtless, a host of judges today are quite aware of the history of philosophy and are well acquainted with its present-day formulations. Their judgments may be imbued with a philosophic understanding, though they make no explicit reference to any particular philosopher, which was surely what was meant by Brian Leiter’s assertion that philosophy is central to the study and practice of law.

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<sup>3</sup> Brian Leiter, “Why Philosophy Has Been Central to Legal Education for More Than a Century” (20 Jan 2014), online: Huff Post College <[http://www.huffingtonpost.com/brian-leiter/why-philosophy-of-law-has\\_b\\_4606305.html](http://www.huffingtonpost.com/brian-leiter/why-philosophy-of-law-has_b_4606305.html)>.

<sup>4</sup> Brian Leiter, “Philosophy students thinking about law school?” (21 October 2015), online: Leiter Reports: A Philosophy Blog <[http://leiterreports.typepad.com/blog/law\\_school\\_updates/](http://leiterreports.typepad.com/blog/law_school_updates/)>.

<sup>5</sup> See Patrick Luff, “Should Jurisprudence Be a Required Law School Course?” (20 May 2011) online: PrawfsBlawg <<http://prawfsblawg.blogs.com/prawfsblawg/2011/05/should-jurisprudence-be-a-required-law-school-course.html>>.

<sup>6</sup> For example, *American Journal of Jurisprudence*; *Australian Journal of Legal Philosophy*; *The Canadian Journal of Law and Jurisprudence*; *Critical Analysis Of Law: An International & Interdisciplinary Law Review*; *Droits: Revue Française De Théorie Juridique*; *International Journal For The Semiotics Of Law*; *International Theory: A Journal Of International Politics, Law And Philosophy*; *Journal Of Law, Philosophy And Culture*; *Jurisprudence*; *Legal Theory*; *Theoretical Inquiries In Law*; *Law And Philosophy*; *UCL Journal of Law and Jurisprudence*.

<sup>7</sup> Brian Leiter, “Why Philosophy Has Been Central to Legal Education for More Than a Century” (20 Jan 2014), online: Huff Post College <[http://www.huffingtonpost.com/brian-leiter/why-philosophy-of-law-has\\_b\\_4606305.html](http://www.huffingtonpost.com/brian-leiter/why-philosophy-of-law-has_b_4606305.html)>.

<sup>8</sup> W.H. McConnell, *William R McIntyre: Paladin of the Common Law* (Montreal: McGill-Queen’s University Press, 2000) at 10.

<sup>9</sup> Some scholars have explicitly asked whether judges themselves are philosophers in addition to exploring the extent to which arguments from philosophy enter into their reasoning in certain types of case. See G Grant Amyot, “A Matter of Philosophical Preference? Political Philosophy and Judicial Reasoning in the *Sauvé Case*” (July 2011) 29 NJCL 1.

<sup>10</sup> See Gideon A Rosen et al, eds, *The Norton Introduction to Philosophy* (New York: W W Norton & Company, Inc, 2015); John Perry, Michael Bratman, & John Martin Fischer, eds, *Introduction to Philosophy: Classical and Contemporary Readings*, 6th ed (Oxford: Oxford UP, 2012); Steven M. Cahn, ed, *Exploring Philosophy: An Introductory Anthology*, 4th ed (New York: Oxford University Press, 2011); Louis Pojman and Lewis Vaughn, eds, *Classics of Philosophy*, 3rd ed (Oxford: Oxford University Press, 2011); John G Cottingham, ed, *Western Philosophy: An Anthology*, 2nd ed (Oxford: Blackwell Publishers, 2007); Bertrand Russell, *The History of Western Philosophy* (New York: Simon & Schuster, 1945).

<sup>11</sup> William Casement, *The Great Canon Controversy: The Battle of Books in Higher Education* (New Brunswick, NJ: Transaction, 1996) at 36: “...a great book endures, it stands the test of time and is read in eras beyond the one in which it was written. It endures because the idea(s) it addresses are expansive across time, rather than particular to a given time frame. Similarly a great book’s appeal extends beyond geographic locale, nationality, language.”

<sup>12</sup> See Clarence Morris, ed, *The Great Legal Philosophers: Selected Readings in Jurisprudence* (Philadelphia, Penn Press, 1971). Although anthologized in this text, these individuals are generally not described as philosophers in other publications.

<sup>13</sup> The first name was also searched within 2 words of the last name in the event that a middle name was used.

<sup>14</sup> While it is possible that some philosophers have slipped through the net, that number would be relatively small given that the courts, at least beyond the Ancient period, generally do refer to philosophers by their full names.

<sup>15</sup> Cases in which a philosopher was mentioned generally in terms of the origins of the law as a whole and not for his/her specific ideas were not included; for example “Originally, it seems that as our law developed from really ancient times, going back to DesCartes and perhaps even before that to Aristotle” (*Broster v Rempel*, 1992 CarswellBC 2544, [1995] BCWLD 2531 (SC)). Cases in which a court was unclear as to which philosopher was responsible for the origins of a specific idea or a quotation were not included; for example: “It is worth remembering, that the concept of the Rule of Law, whatever its origins may have been (Aristotle?), has an international and supranational dimension....”

- (Bacon v Saskatchewan Crop Insurance Corp (1997), 157 Sask R 199, 34 BLR (2d) 39 (SKQB); "As Aristotle (?) said, the word "dog" never bit anyone...." (RJR - MacDonald Inc. v. Canada (Attorney General) 82 DLR (4th) 449 at para 51, 37 CPR (3d) 193 (Qc CA).
- <sup>15</sup> For example: "We cannot say that when one is reading Aristotle or Shakespeare or Dickens or 'Gone With the Wind', or a physician is talking politics or a politician is discussing medicine, he is within his rights, but when he is reading law or medicine or Dale Carnegie or a physician is talking medicine or a politician talking politics, he is violating a restrictive covenant." (*Chudley v Buss*, [1979] 1 WWR 447 (MBQB) citing *Osborne v Talbot* (1951), 78 A 2d 205). Other examples include: "An additional straw may break the proverbial camel's back and, (as reflected in an aphorism dating back to the time of Aristotle), the whole may be greater than the sum of its parts...." (*McLeod v General Motors of Canada Ltd.*, 2014 ONSC 134, 20 MPLR (5th) 13 (Ont SCJ).
- <sup>16</sup> *R v Beausoleil* (1997), 35 WCB (2d) 413, 35 OTC 241 (Ont Gen Div).
- <sup>17</sup> See *British Columbia v Zastowny*, 2008 SCC 4, [2008] 1 SCR 27.
- <sup>18</sup> This includes cases translated from French to English.
- <sup>19</sup> The word "citations" rather than "cases" is used in that a case which discussed three separate philosophers was treated as three citations (i.e., three instances in which a philosopher was mentioned) rather than one case.
- <sup>20</sup> All cases included in the Westlaw database as of February 12, 2016, were searched.
- <sup>21</sup> *Elgaard v Elgaard* (1986), 1 RFL (3d) 256; 2 BCLR (2d) 200 (BCSC).
- <sup>22</sup> One hundred and fifty-one citations (27.8%) appeared in cases which had Criminal Law as their main subject heading.
- <sup>23</sup> One hundred and nine (20%) of philosophers cited were in cases which had "Constitutional Law" as their main subject heading.
- <sup>24</sup> Sixty-six citations (12%) were in cases which had "Civil Practice and Procedure" as their main subject heading.
- <sup>25</sup> John Stuart Mill, *On Liberty*, 2nd ed (Boston: Ticknor and Fields, 1863) at 7.
- <sup>26</sup> *Ibid* at 8.
- <sup>27</sup> John Stuart Mill, *Principles of Political Economy with Some of their applications to Social Philosophy*, vol II (Boston: Charles C. Little & James Brown, 1848) [Pol Ec].
- <sup>28</sup> *Ibid* bk. V, ch. iii., sec. i. at 371.
- <sup>29</sup> *Lambe v North British & Mercantile Fire & Life Insurance Co.* (sub nom. *Bank of Toronto v Lambe*) (1887), [1887] UKPC 32 [Lambe].
- <sup>30</sup> *Ibid*: "The first three appeals were from three decrees of the Court of Queen's Bench (Jan. 23, 1885) reversing decrees of the Superior Court for Lower Canada in the district of Montreal (May 12, 1883); the fourth appeal was from a decree of the Court of Queen's Bench (Jan. 23, 1885) affirming a decree of the Superior Court (May 23, 1884)."
- <sup>31</sup> *Ibid* at para 10.
- <sup>32</sup> See *Halifax (City) v Fairbanks Estate*, [1927] 4 DLR 945, [1928] AC 117 (PC). See also, *Simpsons-Sears Ltd. v New Brunswick (Provincial Secretary)* (1975), 14 NBR (2d) 289 at para 12, 1975 CarswellNB 302 (NB SC): "While in *Bank of Toronto v Lambe* (1887), 12 AC 575, the definition of John Stuart Mill as to the meaning of a 'direct tax' was adopted, even that author later qualified his definition by admitting that sometimes a direct tax could be recouped by the taxpayer in one way or another and still remain direct. MR Mill was the noted writer and authority on economics and the principles of taxation in 1867 but the principles enunciated by Mill, Marshall, Cassell and Adam Smith nearly one hundred years ago would hardly be recognized today as bearing any relation to Professor Samuelson's treatises on the subject. I would seriously doubt if the early writers had any remote conception of the various types of taxes imposed by governments today."
- <sup>33</sup> *Brewers & Maltsters' Assn. (Ontario) v Ontario (Attorney General)*, [1897] UKPC 2 [Brewers].
- <sup>34</sup> *Muir Estate v Manitoba (Provincial Treasurer)* (1915), 51 SCR 428, 23 DLR 811; *Alley v Barthe*, [1920] 60 SCR 1, 54 DLR 89; *Hetherington v Security Export Co.*, [1923] SCR 539, [1923] 3 DLR 519; *McLeod v Windsor (City)*, [1923] SCR 696, [1923] 3 DLR 550; *Manitoba (Attorney General) v Canada (Attorney General)*, [1924] SCR 317, [1924] 3 DLR 203; *Halifax (City) v Fairbanks Estate*, [1926] SCR 349, [1926] 1 DLR 1106; *Rattenbury v British Columbia (Land Settlement Board)*, [1929] SCR 52, [1929] 1 DLR 242; *Charlottetown (City) v Foundation Maritime Ltd.*, [1932] SCR 589, [1932] 3 DLR 353; *Royal Bank v Nova Scotia (Workmen's Compensation Board)*, [1936] SCR 560, [1936] 4 DLR 9; *Atlantic Smoke Shops Ltd. v Conlon*, [1941] SCR 670, [1941] 4 DLR 129; *Esquimalt & Nanaimo Railway v British Columbia (Attorney General)*, [1948] SCR 403; [1949] 3 DLR 343; *Canadian Pacific Railway v Saskatchewan (Attorney General)*, [1952] 2 SCR 231; [1952] 4 DLR 11; *Cairns Construction Ltd. v Saskatchewan*, [1960] SCR 619; 24 DLR (2d) 1; *Canadian Industrial Gas & Oil Ltd. v Saskatchewan*, [1978] 2 SCR 545, 80 DLR (3d) 449; *Canada Trust Co. v British Columbia (Attorney General)*, [1980] 2 SCR 466, 112 DLR (3d) 592; *Mining and Mineral Rights Tax Act, Re*, [1982] 2 SCR 260, 138 DLR (3d) 577; *Allard Contractors Ltd. v Coquitlam (District)*, [1993] 4 SCR 371, 109 DLR (4th) 46; *Reference re Quebec Sales Tax*, [1994] 2 SCR 715, 115 DLR (4th) 449; *Eurig Estate, Re*, [1998] 2 SCR 565, 165 DLR (4th) 1.
- <sup>35</sup> *Edwards v Attorney-General for Canada*, [1930] AC 124, [1930] 1 DLR 98 (PC).
- <sup>36</sup> See for example, John Stuart Mill, *The Subjection of Women* (London: Longmans, Green, Reader & Dyer, 1869).
- <sup>37</sup> *R v Jones* [1986] 2 SCR 284, 31 DLR (4th) 569 [Jones], followed in the same year by *Dolphin Delivery Ltd. v RWDSU, Local 580*, [1986] 2 SCR 573, 33 DLR (4th) 174 [Dolphin Delivery].
- <sup>38</sup> *School Act, RS.A.* 1980, c. S-3, ss. 142(1), 143(1), 180(1).
- <sup>39</sup> *Jones, supra* note 37, at para 26 citing John Stuart Mill, edited by Elizabeth Rapaport, *On Liberty* (Indianapolis: Hackett Publishing Co., 1978) at 12. Part or all of this quotation appears again in *Syndicat Northcrest c. Amselem*, 2004 SCC 47, [2004] 2 SCR 551 (Iacobucci J.) [Syndicat Northcrest]; *B. (R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 122 DLR (4th) 1 (La Forest J. (Gonthier and McLachlin JJ. concurring)); *Reference re ss. 193 & 195.1(1)(c) of Criminal Code (Canada)*, [1990] 1 SCR 1123, 68 Man R (2d) 1 (Lamer J.), *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385 (Wilson J.).
- <sup>40</sup> *Syndicat Northcrest, supra* note 39.
- <sup>41</sup> *R v Malmo-Levine*, 2003 SCC 74, [2003] 3 SCR 571 [Malmo-Levine]. See also *Reference re ss. 193 & 195.1(1)(c) of Criminal Code (Canada)*, [1990] 1 SCR 1123, 68 Man R (2d) 1 at para 49: "As a basis for this view the following summary of the position taken by the English philosopher John Stuart Mill is relied upon (J. Symons, "Orwell's Prophecies: The Limits of Liberty and the Limits of Law" (1984), 9 Dalhousie L.J. 115, at p. 116): The only end for which society is warranted in infringing the liberty of action of any individual, he said, is self protection. Power should be exercised to prevent the individual from doing harm to others, but that is the only part of his conduct for which he should be answerable to society. In every other way he should have freedom."
- <sup>42</sup> *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139, 77 DLR (4th) 385. See also *Edmonton Journal (The) v Alberta (Attorney General)*, [1989] 2 SCR 1326, 64 DLR (4th) 577: "Yet it is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present."
- <sup>43</sup> *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at para 90, 38 DLR (4th) 161.
- <sup>44</sup> *Andrews v Law Society (British Columbia)*, [1989] 1 SCR 143 at para 51, 56 DLR (4th) 1.
- <sup>45</sup> See, for example, *Little Sisters Book & Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120. On the subject of freedom of expression, Mill's views on the "marketplace of ideas", i.e., that from various competing views openly discussed in the "marketplace of ideas" the truth will emerge) also appears in *R v Keegstra*, [1990] 3 SCR 697, 77 Alta LR (2d) 193.
- <sup>46</sup> *Dolphin Delivery, supra* note 37.
- <sup>47</sup> *Edmonton Journal (The) v Alberta (Attorney General)* [1989] 2 SCR 1326 at para 79, 64 DLR (4th) 577.
- <sup>48</sup> *Thomson Newspapers Co. v. Canada (Attorney General)* [1998] 1 SCR 877 at para 28, 159 DLR (4th) 385.
- <sup>49</sup> *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 at para 272, [2000] 2 SCR 1120.
- <sup>50</sup> *Dickson v Pinch*, 11 U.C.C.P. 146 (Upper Canada Court of Common Pleas) [Dickson].
- <sup>51</sup> Bentham's words are paraphrased in *Bobyk v Bobyk*, [1990] WDFL 156, 23 RFL (3d) 459 (ON Dist. Ct.). Bentham himself described it this way "It is the ... judges .... that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it." See *The works of Jeremy Bentham, now first collected; under the superintendence of his executor, John Bowring* (Edinburgh: William Tait, 1838) at p. 235.
- <sup>52</sup> *R v D.*, 1988 CarswellAlta 598; 94 AR 95 (AB Youth Court); *Lindahl Estate v Olsen*, 2004 ABQB 639, [2005] 11 WWR 277 (AB QB).
- <sup>53</sup> *R v Spencer* (1983), 145 DLR (3d) 344; 2 CCC (3d) 526 (Ont CA) citing *The Works of Jeremy Bentham, Draught for the Organisation of Judicial Establishments* (Bowring's ed, 1827, vol IV, p. 320); *R v Kim*, 2003 ABQB 1025, 349 AR 103 (ABQB).
- <sup>54</sup> *R v McGinn* (1989), 49 CCC (3d) 137 at para 59, 75 Sask R 161 (Sask CA).
- <sup>55</sup> *Bennett v British Columbia (Superintendent of Brokers)*, [1994] 3 WWR 687 at para 28, 109 DLR (4th) 717 (BCCA).
- <sup>56</sup> *Saulnier (Receiver of) v Saulnier*, 2006 NSCA 91 at para 26, 271 DLR (4th) 34; *Conway v Simpson*, 2011 MBQB 101 at para 47, 264 Man R (2d) 224 (Manitoba Master); *Cargill Ltd. v Ronald (Trustee of)*, 2006 MBQB 262 at para 41; [2007] 2 WWR 486 (MBQB).
- <sup>57</sup> *R v W. (A.)*, 2012 ONCJ 472 at para 37, 94 CR (6th) 368 (Ont CJ).
- <sup>58</sup> "There is, in my view, no public interest in convicting someone of an act that is considered and declared by Parliament by the time of trial to have social approval and not to be wrong, even if that declaration occurred after the event in question. It is important to remember that the principles against retroactivity that have long applied in criminal cases are related to the Rule of Law. They were intended to protect individuals from abusive state powers. These principles have been embraced, according to Bentham, 'in



- the true spirit of liberty.” *R v Parker*, 2013 ONCJ 195 at para 5, 107 WCB (2d) 10. See also, *R v Vidovic*, 2013 ABPC 310, 576 AR 228
- <sup>59</sup> *Reece v Edmonton (City)*, [2011] 11 WWR 1, 335 DLR (4th) 600 (AB CA) at fn 23 citing Jeremy Bentham, *The Principles of Morals and Legislation* (Amherst, N.Y.: Prometheus, 1988) at 310.
- <sup>60</sup> *Vancouver Sun, Re*, 2004 SCC 43 at para 23, [2004] 2 SCR 332.
- <sup>61</sup> *Ibid* at para 24.
- <sup>62</sup> *Scott v. Scott*, [1913] AC 417 (HL).
- <sup>63</sup> *Ibid* at 432.
- <sup>64</sup> *Ibid* at 440.
- <sup>65</sup> *Ibid* at 477.
- <sup>66</sup> See: *R v Canadian Broadcasting Corp.*, 2013 ONCJ 164, 106 WCB (2d) 87; *R v Dingwell*, 2012 PESC 14, 262 CRR (2d) 1; *R v Sorella*, 2013 QCCS 4734; 111 WCB (2d) 210; *Wood (Litigation Guardian of) v Wood*, 2013 PESC 11; 1047 APR 298; *R v Gingras*, 2012 BCSC 230, 252 CRR (2d) 32; *R v Stobbe*, 2011 MBQB 293, 277 Man R (2d) 65; *Société Radio-Canada c. Québec (Procureur général)*, 2011 SCC 2, [2011] 1 SCR 19; *L'Évêque Catholique Romain de Bathurst v New Brunswick (Attorney General)*, 2010 NBQB 372, 371 NBR (2d) 102; *Canadian Broadcasting Corp. v Canada (Attorney General)*, 2009 NSSC 400; 286 NSR (2d) 186; *R v Casement*, 2009 SKQB 105, 330 Sask R 274; *Brunswick News Inc. v New Brunswick (Attorney General)*, 2008 NBQB 289, 297 DLR (4th) 38; *John Doe, Re*, 2005 NLTD 214, 253 Nfld & PEIR 141; *Loveridge v British Columbia*, 2005 BCSC 1068, 52 BCLR (4th) 178; *Canada (Minister of Citizenship & Immigration) v Mahjoub*, 2004 FC 1028, 260 FTR 226 (Eng.); *Makowsky (Guardian ad litem of) v Jaron*, 2004 BCSC 2 26 BCLR (4th) 297; *Phillips v Vancouver Sun*, 2004 BCCA 14, 238 DLR (4th) 167; *Tadros v College of Physicians & Surgeons (Ontario)*, (2004) 188 OAC 238 (Ont SC (Div Ct)); *R v Angel Acres Recreation & Festival Property Ltd.*, 2004 BCPC 224; *John Deere Ltd. v Long Tractor Inc.*, 2003 SKQB 24, 229 Sask R 268; *R v Quintal*, 2003 ABPC 79, 18 Alta LR (4th) 155; *Calgary Herald Group Inc. v Alberta (Director of Child Welfare)*, 2002 ABPC 167, 9 Alta LR (4th) 345; *Phillips v Vancouver Sun*, 2002 BCSC 1169, 55 WCB (2d) 177; *Potash Corp. of Saskatchewan Inc. v Barton*, 2002 SKQB 301, 219 DLR (4th) 513; *R v Schoendorfer*, 2002 ABPC 25, 1 Alta LR (4th) 282; *Archer v Orange Benevolent Society*, 2001 SKQB 557, 214 Sask R 280; *R v Ellard*, 2001 BCSC 470, 49 WCB (2d) 499; *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1996] 3 SCR 480, 139 DLR (4th) 385; *R v Joudrie*, [1996] 7 WWR 438, 39 Alta LR (3d) 436 (ABQB); *Mitchell v Intercontinental Packers Ltd.*, [1996] 7 WWR 658; 145 Sask R 107 (Sask QB); *Roseland Farms Ltd. v R*, [1996] 1 CTC 176, 191 NR 214 (FCA); *R v Haynes*, [1996] BCWLD 029, 1995 CarswellBC 2442 (BCSC); *R v Warren*, [1995] 3 WWR 379, 122 DLR (4th) 698 (NWT SC); *Oxychem Canada inc. c. SKW Canada inc.*, 1993 CarswellQue 1564; J.E. 93-1812; EYB 1993-74784 (Cour supérieure du Québec); *John Doe v Canadian Broadcasting Corp.*, [1994] 2 WWR 666; 86 BCLR (2d) 202 (BCSC); *McCain v McCain Foods Group Inc.* (1993), 189 NBR (2d) 169; 482 APR 169 (NB QB); *Leader-Post (The) v Neuls*, [1993] 3 WWR 538; 107 Sask R 58 (Sask QB); *Ed Miller Sales & Rentals Ltd. v Caterpillar Tractor Co.*, [1991] 3 WWR 72, 78 Alta LR (2d) 224 (ABQB); *Gateway Realty Ltd. v Arton Holdings Ltd.* (1990) 263 APR 39; 98 NSR (2d) 39 (NS SC (TD)); *R v Den Hollander*, [1989] NWTR 343; 8 WCB (2d) 204 (NWT SC); *Vickery v Nova Scotia (Prothonotary, Supreme Court)* (1989), 233 APR 126, 91 NSR (2d) 126 (NSSC); *Atwal v Canada*, [1988] 1 FC 107, 28 Admin. LR 92 (FCA); *R v Strzelecki* (1988), 6 WCB (2d) 362 (BC Cnty Ct.); *London Free Press Printing Co. v Ontario (Attorney General)* (1988), 66 OR (2d) 693; 6 WCB (2d) 85 (Ont. SC); *Vickery v Nova Scotia (Prothonotary, Supreme Court)* (1988), 222 APR 29, 87 NSR (2d) 29 (NS SC (TD)); *Atwal v Canada*, [1987] 2 FC 309; 78 NR 292 (FCTD); *Ross v Prince Edward Island (Registrar of Supreme Court, Family Division)* (1985), 168 APR 248, 56 Nfld & PEIR 248 (PEISC); *Lortie c. R.*, [1985] C.A. 451; 21 CCC (3d) 436 (Qc CA); *Pacific Press Ltd. v Vickers & Palmer*, [1985] 3 WWR 75, 60 BCLR 91 (BC CA); *Global Communications Ltd. v Canada (Attorney General)* (1984), 44 OR (2d) 609; 5 DLR (4th) 634 (Ont. SC); *R v Canadian Newspapers Co.* (1984), 31 Man R (2d) 187, 16 CCC (3d) 495 (MBCA); *R v S. (M.)* [1985] WDFL 252, 1984 CarswellOnt 1929 (Ont. Prov Ct); *R v Southam Inc.*, 1983 CarswellOnt 3726 (Ont. CA); s. 12 (1) of the *Juvenile Delinquents Act (Canada)*, *Re* (1983), 146 DLR (3d) 408, 41 OR (2d) 113 (Ont. SC); *Solomon v McLaughlin*, [1982] 4 WWR 415; 137 DLR (3d) 83 (ABQB); *MacIntyre v Nova Scotia (Attorney General)*, [1982] 1 SCR 175, 132 DLR (3d) 385; *MacIntyre v Nova Scotia (Attorney General)* (1980), 110 DLR (3d) 289; 38 NSR (2d) 633 (NS CA); *Wisconsin (State) v Armstrong*, [1972] 3 OR 229; 7 CCC (2d) 331 (Ont. HCJ); *Brown v R*, [1970] 3 CCC 30; 6 CR NS. 107 (Qc QB [Appeal Side]); *McCarvill v Jones* (1961), 30 DLR (2d) 316; 36 WWR 337 (BCCA); *Walters v Phillips*, [1955] 3 DLR 840, 15 WWR 104 (Man CA); *Snell v Haywood*, [1947] 1 WWR 790, [1947] 3 DLR 586, [1947] CTC 406, 88 CCC 213 (ABSC); *F. Re*, [1945] 3 WWR 31, [1945] 4 DLR 702 (BCSC); *Reference re Legal Professions Act, R.S.B.C. 1936 (British Columbia)* (1945), 62 BCR 1 (Man CA); *R v Boak*, [1925] 2 WWR 40; [1925] 2 DLR 803 (BCCA).
- <sup>67</sup> *R v Nette*, 2001 SCC 78, [2001] 3 SCR 488 [Nette, SCR].
- <sup>68</sup> *R. v. Smithers* (1977), [1978] 1 SCR 506.
- <sup>69</sup> *Ibid* at 519.
- <sup>70</sup> *R. v. Nette*, 1999 BCCA 743, 131 B.C.A.C 104 (BCCA).
- <sup>71</sup> *Ibid* at para 29.
- <sup>72</sup> *Nette* SCR, *supra* note 67 at para 71.
- <sup>73</sup> Cited in Dennis R Klinck, *The Word of the Law* (Ottawa: Carlton University Press, 1992).
- <sup>74</sup> *Morris v. Morris*, [1973] 3 WWR 526, 36 DLR (3d) 447 (MBQB).
- <sup>75</sup> *Martin v Law Society of British Columbia*, 1950 CarswellBC 168, [1950] 3 DLR 173 (BCCA) (Sloan C.J.B.C.) at 175-176 [Martin].
- <sup>76</sup> *Ibid* at 179 (O'Halloran JA).
- <sup>77</sup> *Ibid* at 190 (BCCA) (O'Halloran JA)
- <sup>78</sup> Of the 543 citations, 74 appeared in Supreme Court of Canada cases or 13.6% of the entire group.
- <sup>79</sup> Citing Adam Smith in *Reference re Validity of s. 5(a) of Dairy Industry Act (Canada)*, (*Margarine Case*), [1949] SCR 1, [1949] 1 DLR 433, and John Stuart Mill in *Canadian Pacific Railway v Saskatchewan (Attorney General)*, [1952] 2 SCR 231; [1952] 4 DLR 11 and *Atlantic Smoke Shops Ltd. v Conlon*, [1941] SCR 670, [1941] 4 DLR 129.
- <sup>80</sup> Citing Grotius in *Powers of Ottawa & Rockcliffe Park to Levy Rates on Foreign Legations & High Commissioners' Residences, Re*, [1943] SCR 208, [1943] 2 DLR 481 and John Stuart Mill in *Hetherington v Security Export Co.*, [1923] SCR 539, [1923] 3 DLR 519 and *McLeod v Windsor (City)*, [1923] SCR 696, [1923] 3 DLR 550.
- <sup>81</sup> La Forest J. cites Grotius in *R v Finta*, [1994] 1 SCR 701, 112 DLR (4th) 513, Jeremy Bentham in *Canadian Broadcasting Corp. v New Brunswick (Attorney General)*, [1996] 3 SCR 480, 139 DLR (4th) 385, Sir Thomas More in *M. (K.) v M. (H.)*, [1992] 3 SCR 6, 96 DLR (4th) 289, and John Stuart Mill in *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139, 77 DLR (4th) 385 and in *B. (R.) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 122 DLR (4th) 1.
- <sup>82</sup> Citing John Stuart Mill (on taxes) in *Reference re Quebec Sales Tax*, [1994] 2 SCR 715, 115 DLR (4th) 449 and on freedom of expression in *Thomson Newspapers Co. v Canada (Attorney General)*, [1998] 1 SCR 877, 159 DLR (4th) 385. Gonthier J. also cites Immanuel Kant in *Lakeside Colony of Hutterian Brethren v Hofer*, [1992] 3 SCR 165, 97 DLR (4th) 17.
- <sup>83</sup> McLachlin has cited Plato in *R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45, 194 DLR (4th) 1; Hegel in *R v Creighton*, [1993] 3 SCR 346, 105 DLR (4th) 632; and Aristotle in *R v Chaulk*, [1990] 3 SCR 1303, 69 Man R (2d) 161.
- <sup>84</sup> David Ricardo Williams, *Duff: A Life in the Law* (Vancouver: University of British Columbia Press, 1984) at 18.
- <sup>85</sup> Robert J. Sharpe and Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003) at 43.
- <sup>86</sup> W.H. McConnell, *William R McIntrye: Paladin of the Common Law* (Montreal: McGill-Queen's University Press, 2000) at 10.
- <sup>87</sup> Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001) at 15.
- <sup>88</sup> Joseph Breaun, "Conscious objectivity: That's how the chief justice defines the top court's role. Harper might beg to differ" (23 May 2015) *National Post*, online: <http://news.nationalpost.com/news/canada/conscious-objectivity-thats-how-the-chief-justice-defines-the-top-courts-role-harper-might-beg-to-differ>
- <sup>89</sup> *Muir Estate v Manitoba (Provincial Treasurer)* (1915), 51 SCR 428; 8 WWR 1226; *Alleyn v Barthe*, [1920] 1 WWR 952; *Hetherington v Security Export Co.*, [1923] 3 DLR 519; [1923] SCR 539; *McLeod v Windsor (City)*, [1923] 3 DLR 550; [1923] SCR 696; *Manitoba (Attorney General) v Canada (Attorney General)*, [1924] 3 DLR 203; [1924] SCR 317; *Halifax (City) v Fairbanks Estate*, [1926] 1 DLR 1106, [1926] SCR 349; *Rattenbury v British Columbia (Land Settlement Board)*, [1929] 1 DLR 242, [1929] SCR 52; *Royal Bank v Nova Scotia (Workmen's Compensation Board)*, [1936] SCR 560; *Esquimalt & Nanaimo Railway v British Columbia (Attorney General)*, [1948] SCR 403, [1949] 3 DLR 343; *Canadian Industrial Gas & Oil Ltd. v Saskatchewan*, [1977] 6 WWR 607; [1978] 2 SCR 545; *Canada Trust Co. v British Columbia (Attorney General)*, [1980] 2 SCR 466, [1980] 5 WWR 591; *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313, 38 DLR (4th) 161; *Edmonton Journal (The) v Alberta (Attorney General)*, [1989] 2 SCR 1326, 64 DLR (4th) 577; *Allard Contractors Ltd. v Coquitlam (District)*, [1993] 4 SCR 371, 109 DLR (4th) 46; *Little Sisters Book & Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120; *R v Malmo-Levine*, 2003 SCC 74, [2003] 3 SCR 571; *Syndicat Northcrest c. Amselem*, [2004] 2 SCR 551, 241 DLR (4th) 1; *R v Keegstra*, [1990] 3 SCR 697, 77 Alta LR (2d) 193; *Reference re Quebec Sales Tax*, [1994] 2 SCR 715, 115 DLR (4th) 449; *Thomson Newspapers Co. v Canada (Attorney General)*, [1998] 1 SCR 877, 159 DLR (4th) 385; *Ontario Home Builders' Assn. v York Region Board of Education*, [1996] 2 SCR 929, 137 DLR (4th) 449; *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139, 77 DLR (4th) 385; *B. (R.) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 122 DLR (4th) 1; *Reference re ss. 193 & 195.1(1)(c) of Criminal Code (Canada)*, [1990] 1 SCR 1123, [1990] 4 WWR 481; *Eurig Estate, Re*, [1998] 2 SCR 565, 165 DLR (4th) 1; *Mining and Mineral Rights Tax Act, Re*, [1982] 2 SCR 260, 138 DLR (3d) 577; *Cairns Construction Ltd. v Saskatchewan*, [1960] SCR 619; 24 DLR (2d) 1; *Dolphin Delivery Ltd. v RW.D.S.U., Local 580*, [1986] 2 SCR 573, 33 DLR (4th) 174; *Canadian Pacific Railway v Saskatchewan (Attorney General)*, [1952] 2 SCR 231, [1952] 4 DLR 11; *Atlantic Smoke Shops Ltd. v Conlon*, [1941] 4 DLR 129, [1941] SCR 670; *Charlottetown (City) v Foundation Maritime Ltd.*, [1932] 3 DLR 353; [1932] SCR 589; *Andrews v Law Society (British Columbia)*, [1989] 1 SCR 143, 56 DLR (4th) 1; *Air Can. v B.C.*, [1989] 1 SCR 1161, 59 DLR (4th) 161; *R v Jones*, [1986] 2 SCR 284, 31 DLR (4th) 569; *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385.
- <sup>90</sup> *R v Hibbert*, [1995] 2 SCR 973, 84 OAC 161; 2747-3174 *Québec Inc. c. Québec (Régie des permis d'alcool)*, [1996] 3 SCR 919, 140 DLR (4th) 577; *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313, 38 DLR (4th) 161; *R v Chaulk*, [1990] 3 SCR 1303, 69 Man R (2d) 161; *Fraser v Ontario (Attorney General)*,

- 2011 SCC 20, [2011] 2 SCR 3; *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519; 107 DLR (4th) 342; *Lavigne v O.P.S.E.U.*, [1991] 2 SCR 211, 81 DLR (4th) 545; *Perka v R*, [1984] 2 SCR 232, 13 DLR (4th) 1; *Dunmore v Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016.
- <sup>91</sup> "Hegel's theory of needs and reciprocal obligations as the constituent elements of a civil society": *MacDonald v Montreal (City)*, [1986] 1 SCR 460, 27 DLR (4th) 321; "...the entire premise expressed by such thinkers as Kant and Hegel that man is by nature a rational being, and that this rationality finds expression both in the human capacity to overcome the impulses of one's own will and in the universal right to be free from the imposition of the impulses and will of others": *Perka v R*, [1984] 2 SCR 232, 13 DLR (4th) 1.
- <sup>92</sup> "As John Locke once said, 'A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society': *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867*, [1985] 1 SCR 721, 19 DLR (4th) 1.
- <sup>93</sup> "Aristotle, *Ethics* (Book III, 1110 a), discusses the jettisoning of cargo from a ship in distress and remarks that 'any sensible man does so' to secure the safety of himself and his crew": *Perka v R*, [1984] 2 SCR 232, 13 DLR (4th) 1.
- <sup>94</sup> "...the Judge said 'Why not? Didn't Voltaire? He disagreed but he would give his life to protect them, let them say it': *R v Prairie Schooner News Ltd.* (1970), 1 CCC (2d) 251, 75 WWR 585 (MBCA).
- <sup>95</sup> *Canadian Industrial Gas & Oil Ltd. v Saskatchewan*, [1978] 2 SCR 545, 80 DLR (3d) 449; *Canada Trust Co. v British Columbia (Attorney General)*, [1980] 2 SCR 466, 112 DLR (3d) 592.
- <sup>96</sup> See *Bank of Toronto v Lambe* (1887), 12 App. Cas. 575, 4 Cart. 7, 56 L.J.P.C. 87.
- <sup>97</sup> "Invoking John Stuart Mill's 'marketplace of ideas,' Kerans J.A. decided in the affirmative, stating that 's. 2(b) should be understood as protecting both innocent error and imprudent speech' (p 164). As s 319(2) did neither, he held that it infringes s. 2(b) of the Charter": *R v Keegstra*, [1990] 3 SCR 697, 77 Alta LR (2d) 193.
- <sup>98</sup> *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313, 38 DLR (4th) 161.
- <sup>99</sup> *Ibid* at para 90.
- <sup>100</sup> *R v Ancio*, [1984] 1 SCR 225, 6 DLR (4th) 577 considered the mental element required for proof of the crime of attempted murder McIntyre J. explains that some of the confusion surrounding the mental element necessary to found a conviction for attempted murder is due to the fact that it is assumed to be the same mental element required to found a conviction for murder. The history of those two crimes, however, are quite distinct in that mental elements for murder first appear in 13th and 14th century statutes, while attempted offences were, up to and during the start of the 17th century, generally not viewed as crimes. It was Bacon who, as Attorney General at the time, argued in *Case of Duels* (1615), 2 State TR 1033 that they should be treated as such: "For the Capacity of this Court, I take this to be a ground infallible: that wheresoever an offence is capital, or matter of felony, though it be not acted, there the combination or practice tending to that offence is punishable in this court as a high misdemeanor. So practice to impose, though it took no effect; waylaying to murder, though it took no effect; and the like; have been adjudged heinous misdemeanors punishable in this court. Nay, inceptions and preparations in inferior crimes, that are not capital, as suborning and preparing of witnesses that were never deposed, or deposed nothing material, have likewise been censured in this court, as appeareth by the decree in *Garnon's Case*." While the Court in that case agreed with Bacon, more time would pass before the existence of the offence of attempted murder would be firmly established. Nonetheless, the history of criminal attempt which begins, in part, with Bacon, is that both in the common law and in statute, the offence is separate and distinct from the crime alleged to be attempted.
- <sup>101</sup> McIntyre J. in the context of freedom of association cites Aristotle's views of man as a "social animal, formed by nature for living with others." See *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313, 38 DLR (4th) 161.
- <sup>102</sup> *R v Churchill*, 1972 CarswellBC 993 (BCSC)
- <sup>103</sup> *Dolphin Delivery*, *supra* note 37.
- <sup>104</sup> *Ibid*.
- <sup>105</sup> Aristotle appears in the context of freedom of association in *Lavigne v O.P.S.E.U.*, [1991] 2 SCR 211, 81 DLR (4th) 545.
- <sup>106</sup> Bentham is cited on the open court principle: "The advantages of publicity are neither inconsiderable nor unobvious. In the character of a security, it operates in the first place upon the deponent, and, in a way not less important ... upon the judge." *Edmonton Journal (The) v Alberta (Attorney General)*, [1989] 2 SCR 1326 at para 16, 64 DLR (4th) 577.
- <sup>107</sup> *Air Can. v B.C.*, [1989] 1 SCR 1161, 59 DLR (4th) 161; *Andrews v Law Society (British Columbia)*, [1989] 1 SCR 143, 56 DLR (4th) 1; *R v Jones*, [1986] 2 SCR 284, 31 DLR (4th) 569; *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385.
- <sup>108</sup> *Air Can v B.C.*, [1989] 1 SCR 1161, 59 DLR (4th) 161.
- <sup>109</sup> *R v Jones*, [1986] 2 SCR 284, 31 DLR (4th) 569 at para 26. See also *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385.
- <sup>110</sup> *Andrews v Law Society (British Columbia)*, [1989] 1 SCR 143, 56 DLR (4th) 1.
- <sup>111</sup> *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 107 DLR (4th) 342.
- <sup>112</sup> "John Stuart Mill himself, following Adam Smith, Ricardo and James Mill, said that a tax on rents falls wholly on the landlord and cannot be transferred to any one else. "It merely takes so much from the landlord and transfers it to the State" (*Political Economy*, vol. ii., p. 416)": *Ontario Home Builders' Assn. v York Region Board of Education*, [1996] 2 SCR 929, 137 DLR (4th) 449 at para 45, 35 MPLR (2d) 1; "Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another": *Allard Contractors Ltd. v Coquitlam (District)*, [1993] 4 SCR 371 at para 47, 109 DLR (4th) 46.
- <sup>113</sup> *Allard Contractors Ltd. v Coquitlam (District)*, [1993] 4 SCR 371, 109 DLR (4th) 46; *Little Sisters Book & Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para 272, [2000] 2 SCR 1120: "Cory J [in *Edmonton Journal v Alberta (Attorney General)*], [1989] 2 SCR 1326] went on to cite the following passage from John Stuart Mill, "On Liberty" in *On Liberty and Considerations on Representative Government* (1946), at p 14: If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."
- <sup>114</sup> "...we live in a society of individuals in which we must always take the rights of others into account. In the words of John Stuart Mill: "The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it": J. S. Mill, *On Liberty and Considerations on Representative Government* (1946), at p 11. In the real world, oftentimes the fundamental rights of individuals will conflict or compete with one another": *Syndicat Northcrest c. Amselem*, 2004 SCC 47 at para 61, [2004] 2 SCR 551.
- <sup>115</sup> *B (R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 122 DLR (4th) 1; *Lavigne v OPSEU*, [1991] 2 SCR 211, 81 DLR (4th) 545; *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385.
- <sup>116</sup> *Vancouver Sun, Re*, 2004 SCC 43, [2004] 2 SCR 332, involved the Air India Flight 182 bombing and an *in camera* judicial investigative hearing at the BC Supreme Court hearing which followed. A Vancouver Sun editor, alerted to the fact that proceedings were taking place attempted to enter the courtroom but was denied access. The question, on appeal, was the level of secrecy required to merit a successful application for and conduct of a judicial investigative hearing pursuant to s. 83.28 of the *Criminal Code* which allowed for an *in camera* gathering of information in relation to a terrorism offence. Iacobucci and Arbour JJ cite Bentham's lines in favour of open court proceedings: "[P]ublicity is the very soul of justice. It is the keener spur to exertion, and the surest of all guards against improbity" on their way to concluding that the level of secrecy imposed on the proceedings in this case was unnecessary.
- <sup>117</sup> Bentham's words not only appear in *Vancouver Sun, Re* but are also cited in several additional Supreme Court of Canada cases: *MacIntyre v Nova Scotia (Attorney General)*, [1982] 1 SCR 175, 132 DLR (3d) 385; *Canadian Broadcasting Corp. v New Brunswick (Attorney General)*, [1996] 3 SCR 480, 139 DLR (4th) 385; *Application to proceed in camera, Re*, 2007 SCC 43, [2007] 3 SCR 253; *Société Radio-Canada c. Québec (Procureur general)*, 2011 SCC 2, [2011] 1 SCR 19, 328 DLR (4th) 34.
- <sup>118</sup> "Books are different from other goods crossing the border. As Voltaire noted, 'Liberty of thought is the life of the soul': Essay on Epic Poetry (1727)": *Little Sisters Book & Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120 para 272, 150 CCC (3d) 1.
- <sup>119</sup> "Voltaire, paraphrasing the Latin maxim *Summum jus summa injuria*, is quoted as saying...A right taken too far becomes an injustice": *Banque nationale du Canada c. Houle*, [1990] 3 SCR 122 at para 35, 74 DLR (4th) 577; "Freedom of expression and the press is considered to be the foundation of individual liberty in Western democratic theory. It has been characterized as '... the matrix, the indispensable condition of nearly every other form of freedom'. It is a freedom that has evoked passionate statements for centuries such as Milton's *Areopagitica* to Voltaire's famous cry: 'I do not believe a word that you say, but I will defend with my life your right to say it'": *Lortie c. R*, 21 CCC (3d) 436 at para 37, 46 CR (3d) 322 (Qc C).
- <sup>120</sup> "Eskridge has stated the following, *supra*, at p 50: Aristotle urged that application of general statutes to unanticipated cases requires the interpreter to "correct the omission" – to say what the legislator would have said had he been present, and would have put into law if he had known": *2747-3174 Québec Inc. c Québec (Régie des permis d'alcool)*, [1996] 3 SCR 919 at para 173, 140 DLR (4th) 577.
- <sup>121</sup> *R v Nette*, 2001 SCC 78, [2001] 3 SCR 488.
- <sup>122</sup> *Manning Timber Products Ltd v Minister of National Revenue*, [1951] Ex CR 338, [1951] CTC 274 (Exchequer Ct); *Smith, Kline & French Laboratories Ltd. v Canada (Attorney General)*, [1987] 2 FC 359, 34 DLR (4th) 584 (FCA); *Canada (Director of Investigation & Research) v Air Canada*, [1994] 1 FC 154, 104 DLR (4th) 129 (FCA); *Lim v R*, [2000] GSTC 1, 2000 GTC 709 (TCC [Informal Procedure]); *Merck Frosst Canada & Co. v Canada (Minister of Health)*, 2004 FC 959, [2005] 1 FCR 587 (FC); *Watts v R*, 2004 TCC 535, [2005] 2 CTC 2384, 2004 DTC 3111 (TCC [Informal Procedure]); *Ewert v Canada (Attorney General)*, 2007 FC 13, 306 FTR 234 (Eng.) (FC); *Reynolds Consumer Products Inc. v P.R.S. Mediterranean Ltd.*, 2012 FC 824, 414 FTR 301 (Eng) (FC); *Taleb v Canada (Minister of Citizenship & Immigration)*, 2012 FC 384, 407 FTR 185 (Eng) (FC); *Bazaid v Canada (Minister of Citizenship and Immigration)*, 2013 FC 17, [2013] FCJ No. 39 (FC).
- <sup>123</sup> *Smith, Kline & French Laboratories Ltd. v Canada (Attorney General)*, [1987] 2 FC 359, 34 DLR (4th) 584 (FCA).
- <sup>124</sup> *Canada (Director of Investigation & Research) v Air Canada*, [1994] 1 FC 154, 104 DLR (4th) 129 (FCA).



- <sup>125</sup> *Lim v R*, [2000] GSTC 1, 2000 GTC 709 (TCC [Informal Procedure]); *Watts v R*, 2004 TCC 535, [2005] 2 CTC 2384, 2004 DTC 3111 (TCC [Informal Procedure]).
- <sup>126</sup> *Bazaid v Canada (Minister of Citizenship and Immigration)*, 2013 FC 17, [2013] FCJ No. 39 (FC).
- <sup>127</sup> In 2011, at the start of the Bowman Cup (a tax litigation moot court competition), Bowman spoke to students on this matter "Law is a learned profession," he noted, "It requires knowledge of the arts, humanities, classics, literature." He continued: "Words, after all, are our only tools. We don't have stethoscopes, we don't have shovels, we don't have slide rules." See Drew Hasselback, "Donald Bowman, former top tax judge, holds court with students" (15 March 2011) online: *Financial Post* < <http://business.financialpost.com/legal-post/donald-bowman-former-top-tax-judge-holds-court-with-students>.>
- <sup>128</sup> Aristotle long ago pointed out that the degree of precision that is attainable depends on the subject matter": *Watts v R*, 2004 TCC 535, [2005] 2 CTC 2384, 2004 DTC 3111 (TCC [Informal Procedure]); See also *Lim v R*, [2000] GSTC 1, 2000 GTC 709 (TCC [Informal Procedure]).
- <sup>129</sup> "At the risk of intruding a jarring note into the response to the appeal (and the critics) I am obliged by my opinion to offer a dissenting view from that reached by the majority of this Court. I can derive a measure of comfort from Bertrand Russell's assurance that every advance in civilisation has been denounced as unnatural while it was recent": *Gifford v R*, [2001] 2 CTC 2162, 2001 DTC 168 (TCC [Informal Procedure]) citing *Steele v Deputy Commissioner of Taxation*, 161 ALR 201, [1999] HCA 7 (Australia HC).
- <sup>130</sup> *J.A. Porter Holdings (Lucknow) Ltd. v Canada*, [1996] GSTC 25; 4 GTC 3060 (TCC [Informal Procedure]).
- <sup>131</sup> *Radage v. R.*, [1996] 3 CTC 2510, 96 DTC 1615 (TCC).
- <sup>132</sup> *Ibid* at para 24.
- <sup>133</sup> *Ibid*.
- <sup>134</sup> Appointed to the Superior Court of Quebec in 1972, and serving on the Federal Court of Appeal from 1983 - 2008. Hugessen JA cites Aristotle in *Canada (Director of Investigation & Research) v Air Canada*, [1994] 1 FC 154, 104 DLR (4th) 129 (FCA) and *Smith, Kline & French Laboratories Ltd. v Canada (Attorney General)*, [1987] 2 FC 359, 34 DLR (4th) 584 (FCA). Voltaire is cited in *Belczowski v R*, [1992] 2 FC 440, 90 DLR (4th) 330 (FCA).
- <sup>135</sup> Justice of the Federal Court, Trial Division, from 1983 to 2000. St. Augustine is cited in *Gough v Canada (National Parole Board)*, [1991] 2 FC 117, 40 FTR 91; Hegel, Rene Descartes, John Locke and Plato appear in *Apple Computer Inc. v Mackintosh Computers Ltd*, [1987] 1 FC 173, 28 DLR (4th) 178 (F TD); John Stuart Mill is cited in *Saugeen Indian Band v R*, [1989] 3 FC 186, 24 FTR 1 (FCTD).
- <sup>136</sup> Justice of the Federal Court, Trial Division, from 1983 to 2001. Plato is cited in *Drescher v R*, 1985 CarswellNat 1553; 30 ACWS (2d) 247 (FCTD) and in *Fibreco Pulp Inc. v R*, [1994] 2 CTC 114, 78 FTR 161 (FCTD). Voltaire appears in *Vanguard Coatings & Chemicals Ltd. v Minister of National Revenue*, [1986] 2 CTC 431, [1987] 1 FC 367 (FCTD).
- <sup>137</sup> Appointed Judge of the Federal Court and ex officio member of the Federal Court of Appeal, 16th September, 2003.
- <sup>138</sup> *Merck Frost Canada & Co. v Canada (Minister of Health)*, 2004 FC 959, [2005] 1 FCR 587 (FC).
- <sup>139</sup> "An award of lump sum costs would deprive the defendants of the opportunity of testing the amounts claimed. However, the draft bill of costs accompanying the motion is extremely well detailed and what happened, including examinations for discovery, objections, rulings and the trial, is already in the record. Microsoft argues that it is the principle which is important here. It wants a clear message that the Court will not sanction cavalier disregard of intellectual property rights. An award of solicitor-client costs on a lump sum basis, goes as Voltaire would put it, "pour encourager les autres": *Microsoft Corp. v 9038-3746 Quebec Inc.*, 2007 FC 659 at para 30, 315 FTR 217 (Eng.); "Apparently Voltaire never said: Je ne suis pas d'accord avec ce que vous dites, mais je me battraï pour que vous ayez le droit de le dire. It may be that the phrase was invented by his English biographer, Evelyn Beatrice Hall, who wrote: I disapprove of what you say, but I will defend to the death your right to say it": *Sloan v Canada (Commissioner of Canada Elections)*, 2009 FC 1264 at para 1, 3 Admin LR (5th) 230 (FC).
- <sup>140</sup> "Perhaps there are those who have to be reminded that the right to be heard is at the heart of our sense of justice and fairness....That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's Medea, enshrined in the scriptures, mentioned by St. Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden. [Footnotes omitted] de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th ed) (London: Sweet & Maxwell, 1995), pp 378-379": *Matondo v Canada (Minister of Citizenship & Immigration)*, 2005 FC 416 at para 18; 44 Imm LR (3d) 225 (FC).
- <sup>141</sup> "These cases warn us that a balance must be struck taking into account the consumer who may be interested in the wares in question, and the quality of the wares themselves. The balance to be struck is akin to the "virtue is a mean" philosophy of Aristotle, Thomas Aquinas and John Locke or, if you prefer, Goldilocks' porridge which was neither too hot nor too cold.": *Reynolds Consumer Products Inc. v P.R.S. Mediterranean Ltd.*, 2012 FC 824; 414 FTR 301 (Eng) (FC). See also *Merck Frost Canada & Co. v Canada (Minister of Health)*, 2004 FC 959, [2005] 1 FCR 587 (FC); "All this talk of striking a balance brings back thoughts of Philosophy 101 and Aristotle's "virtue is a mean". Perhaps more thought should be given to Thomas Hobbes who said that life was "nasty, brutish and short". Life is not as nasty, not as brutish and not as short for countless Canadians and people worldwide thanks to modern wonder-drugs."
- <sup>142</sup> *Canada (Attorney General) v Amnesty International Canada*, 2009 FC 918, [2010] 4 FCR 182 (FC). See also *Société Telus Communications v Peracom Inc.*, 2011 2011 FC 494, 389 FTR 196 (FC) and *Cameco Corp. v "MCP Altona" (The)*, 2013 FC 23, 425 FTR 80 (FC).
- <sup>143</sup> *Canada (Attorney General) v Amnesty International Canada*, 2009 FC 918 at para 62, [2010] 4 FCR 182 (FC); *Société Telus Communications v Peracom Inc.*, 2011 FC 494 at para 46, 389 FTR 196 (Eng) (FC).
- <sup>144</sup> Discussed in *Pegram v Stortz*, 1888 So. 485 (Supreme Court West Virginia).
- <sup>145</sup> *Cameco Corp. v "MCP Altona" (The)*, 2013 FC 23, 425 FTR 80 (FC).
- <sup>146</sup> *New Brunswick (Workmen's Compensation Board) v Bathurst Co.*, [1923] 4 DLR 84, (1923) 50 NBR 246 (NBSC); *Simpsons-Sears Ltd. v New Brunswick (Provincial Secretary)* (1975), 14 NBR (2d) 289, 1975 CarswellNB 302 (NBSC); *Simpsons-Sears Ltd. v New Brunswick (Provincial Secretary)* (1976), 14 NBR (2d) 631; 71 DLR (3d) 717 (NBCA); *W.H. Violette Ltd. v New Brunswick (Provincial Secretary)* (1978), 23 NBR (2d) 384, 44 APR 384 (NB QB); *New Brunswick (Minister of Finance) v Simpsons-Sears Ltd.* (1979), 27 NBR (2d) 652; 60 APR 652 (NBQB); *R. c. Breault*, 2001 NBCA 16, 198 DLR (4th) 669 (NBCA); *Kingstreet Investments Ltd. v New Brunswick (Department of Finance)*, 2004 NBQB 84, 236 DLR (4th) 733 (NBQB);
- <sup>147</sup> *Newfoundland (Attorney General) v Avalon Telephone Co.* (1961), 33 DLR (2d) 402; 47 MPR 165 (NL SC); *Mining & Mineral Rights Tax Act, Re* (1980), 115 DLR (3d) 482; 28 Nfld & PEIR 361 (NLSC); *Canadian National Railway v Newfoundland* (1982), 101 APR 155; 36 Nfld & PEIR 155 (NL District Court); *A.J. Candow Ltd. v Corner Brook (City)* (1982), 104 APR 405, 138 DLR (3d) 324 (NLSC); *A.J. Candow Ltd. v Corner Brook (City)* (1983), 122 APR 259; 147 DLR (3d) 165 (NLCA); *Harbour Grace (Town) v Community Cable Ltd.* (1989), 246 APR 201; 79 Nfld & PEIR 201 (NL SC); *ACE-Atlantic Container Express Inc., Re* (1992), 100 Nfld & PEIR 271, 92 DLR (4th) 581 (NLCA); *Harbour Grace (Town) v Community Cable Ltd.* (1993), 103 Nfld & PEIR 1, 37 ACWS (3d) 1196 (NLCA).
- <sup>148</sup> *R v Hunziker*, 2000 YTTC 511, 3 MVR (4th) 89, 47 WCB (2d) 553.
- <sup>149</sup> Bentham appears in: *R v Neff*, [1947] 1 WWR 640, 88 CCC 199 (ABSC); *Snell v Haywood*, [1947] 1 WWR 790; [1947] 3 DLR 586 (ABSC); *Solomon v McLaughlin*, [1982] 4 WWR 415; 137 DLR (3d) 83 (ABQB); *R v D.* (1988), 94 AR 95, 1988 CarswellAlta 598 (ABYC); *Ed Miller Sales & Rentals Ltd. v Caterpillar Tractor Co.*, [1991] 3 WWR 72, 78 Alta LR (2d) 224 (ABQB); *R v Joudrie*, [1996] 7 WWR 438, 86 AR 313 (ABQB); *Federation of Law Societies of Canada v Canada (Attorney General)*, 2001 CarswellAlta 1854; [2001] AJ No. 1697 (ABQB [In Chambers]); *R v Schoendorfer*, 2002 ABPC 25, 1 Alta LR (4th) 282; *R v Kim*, 2003 ABQB 1025, 349 AR 103 (AB QB); *R v Ticknovich*, 2003 ABQB 597, 353 AR 8 (AB QB); *R v Quintal*, 2003 ABPC 79, 18 Alta LR (4th) 155; *MacKenzie v First Marathon Securities Ltd.*, 2004 ABQB 300, [2004] AJ No. 454; *Lindahl Estate v Olsen*, 2004 ABQB 639, 360 AR 310; 48 Alta LR (4th) 40; *R v Law*, 2007 ABCA 203, 80 Alta LR (4th) 16; *Alberta (Market Surveillance Administrator) v ENMAX Energy Corp.*, 2008 ABQB 54, 438 AR 359; *Reece v Edmonton (City)*, 2011 ABCA 238, 335 DLR (4th) 600; *R v Serdyuk*, 2012 ABCA 205, 68 Alta LR (5th) 152; *R v Vidovic*, 2013 ABPC 310, 576 AR 228.
- <sup>150</sup> *R v Neff*, [1947] 1 WWR 640, 88 CCC 199 (ABSC); *Solomon v McLaughlin*, [1982] 4 WWR 415; 137 DLR (3d) 83 (ABQB); *Ed Miller Sales & Rentals Ltd. v Caterpillar Tractor Co.*, [1991] 3 WWR 72, 78 Alta LR (2d) 224 (ABQB); *R v Joudrie*, [1996] 7 WWR 438, 86 AR 313 (ABQB); *R v Schoendorfer*, 2002 ABPC 25, 1 Alta LR (4th) 282; *R v Quintal*, 2003 ABPC 79, 18 Alta LR (4th) 155; *Market Surveillance Administrator v ENMAX Energy Corp.*, 2008 ABQB 54, 438 AR 359.
- <sup>151</sup> *Reece v Edmonton (City)*, 2011 ABCA 238, 335 DLR (4th) 600.
- <sup>152</sup> *R v D.* (1988), 94 AR 95, 1988 CarswellAlta 598 (AB YC); *Lindahl Estate v Olsen*, 2004 ABQB 639, 360 AR 310.
- <sup>153</sup> *Federation of Law Societies of Canada v Canada (Attorney General)*, 2001 CarswellAlta 1854; [2001] AJ No. 1697 (AB QB [In Chambers]).
- <sup>154</sup> *R v Kim*, 2003 ABQB 1025, 349 AR 103.
- <sup>155</sup> *R v Law*, 2007 ABCA 203, 80 Alta LR (4th) 16.
- <sup>156</sup> *R v Vidovic*, 2013 ABPC 310, 576 AR 228.
- <sup>157</sup> *MacKenzie v First Marathon Securities Ltd.*, 2004 ABQB 300, [2004] AJ No. 454.
- <sup>158</sup> *R v Serdyuk*, 2012 ABCA 205, 68 Alta LR (5th) 152
- <sup>159</sup> Frank Ford was appointed to the Supreme Court of Alberta in 1926, and the Appellate Division from 1936 to 1954: University of Alberta, Frank Ford (1941–1946), online: <<http://www.ualbertacentennial.ca/organization/chancellors/ford.html>>
- <sup>160</sup> *R v Neff*, [1947] 1 WWR 640; [1947] CTC 392 (ABSC); *Snell v Haywood*, [1947] 1 WWR 790; [1947] 3 DLR 586 (ABSC Appellate Div).
- <sup>161</sup> *Alberta (Provincial Treasurer) v Kerr*, [1932] 2 WWR 705; [1933] 1 DLR 88 (ABSC).
- <sup>162</sup> Formerly of the Queen's Bench and, as of 1996, of the Court of Appeal.
- <sup>163</sup> *Ed Miller Sales & Rentals Ltd. v Caterpillar Tractor Co.*, [1991] 3 WWR 72, 78 Alta LR (2d) 224 (ABQB)
- <sup>164</sup> *Edmonton (City) v Kara* (1995), 164 AR 64, 26 Alta LR (3d) 28 (ABQB). See also *R v White*, 2005 ABCA 435, 376 AR 63 (ABCA In Chambers).
- <sup>165</sup> *Ibid* at para 15.
- <sup>166</sup> *R v Hodson* (2001), 44 CR (5th) 71, 92 Alta LR (3d) 262; 281 AR 76 (ABCA).
- <sup>167</sup> *Ibid* at para 57.



- <sup>168</sup> Of the Alberta Queen's Bench and, as of 2006, the Alberta Court of Appeal.
- <sup>169</sup> *R v Trang*, 2002 ABQB 1130, 17 Alta LR (4th) 358.
- <sup>170</sup> "Sir Francis Bacon, the Attorney General, contended to a Court consisting of the Archbishop of Canterbury, the Lord Chancellor Lord Ellesmere, the Lord Chief Justice Sir Edward Coke and the Lord Chief Justice Hobart, that the wisest method of prevention of duelling was "to nip the practice .... in the head" by punishing "all the acts of preparation": *R v Ticknovich*, 2003 ABQB 854, 343 AR 243.
- <sup>171</sup> "Let there be no authority to shed blood; nor let sentence be pronounced in any court upon capital cases, except according to a known and certain law. ... Nor should a man be deprived of his life, who did not first know that he was risking it": *R v Serdyuk*, 2012 ABCA 205, [2012] 12 WWR 696.
- <sup>172</sup> "*R v Abdullah*, 2010 MBCA 79 at paras 34 to 37, 259 CCC (3d) 193 (Man CA)...is essentially authority for the Jeremy Bentham notion that the Courts are entitled to everyone's evidence": *R v A. (N.)*, 2015 NWTCA 8, [2016] 1 WWR 677.
- <sup>173</sup> *Spinks v Alberta (Law Enforcement Review Board)*, 2009 ABCA 405, [2010] AWLD 243.
- <sup>174</sup> *Sinclair v South Trail Shell (1987)*, 2002 ABQB 378 at para 48, 1 Alta LR (4th) 135.
- <sup>175</sup> *Lindahl Estate v Olsen*, 2004 ABQB 639, [2005] 11 WWR 277; *MacKenzie v First Marathon Securities Ltd.*, 2004 ABQB 300, [2004] AJ No. 454; *R v Kim*, 2003 ABQB 1025, 349 AR 103; *R v Ticknovich*, 2003 ABQB 597, 353 AR 8; *Federation of Law Societies of Canada v Canada (Attorney General)*, 2001 CarswellAlta 1854; [2001] AJ No. 1697 (ABQB [In Chambers]); *R v Serdyuk*, 2012 ABCA 205, 68 Alta LR (5th) 152, *R v Law*, 2007 ABCA 203, 80 Alta LR (4th) 16.
- <sup>176</sup> *British Columbia (Attorney General) v Canadian Pacific Railway*, [1926] 3 WWR 154, [1926] 4 DLR 147 (BCCA); *British Columbia (Attorney General) v Canadian Pacific Railway*, [1926] 1 WWR 837; [1926] 2 DLR 674 (BCSC); *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd.*, [1932] 2 WWR 41, [1932] 2 DLR 277 (BCCA); *British Columbia (Attorney General) v Kingcome Navigation Co.*, [1933] 3 DLR 364; 47 BCR 114 (BCCA); *Col v British Columbia (Attorney General)*, [1934] 2 WWR 481; [1934] 3 DLR 488; 48 BCR 171 (BCCA); *R v Churchill*, 1972 CarswellBC 993 (BCCA); *Coquitlam (District) v LaFarge Concrete Ltd.*, [1972] 3 WWR 539, 1972 CarswellBC 87 (BCSC); *Reference re Coloured Gasoline Tax Act (British Columbia)*, 1976 CarswellBC 251; [1976] 6 WWR 315 (BCSC); *Marine Petrobulk Ltd. v British Columbia*, [1985] 4 WWR 663, 18 DLR (4th) 451 (BCCA); *Cevaxs Corp. v British Columbia* (1988), 1 T.S.T. 3014, 2 T.C.T. 4012, 31 BCLR (2d) 80 (BCSC); *Allard Contractors Ltd. v Coquitlam (District)* (1988), 31 BCLR (2d) 309; 40 MPLR 96 (BCSC); *Dow Chemical Canada Inc. v British Columbia* (1992), 13 B.C.AC 122, 91 DLR (4th) 570 (BCCA); *Canadian Bar Assn. v British Columbia (Attorney General)* (1994), 91 BCLR (2d) 207, 2 GTC 7140 (BCSC); *661881 BC Ltd. v British Columbia*, 2009 BCSC 1197, [2010] 1 CTC 221 (BCSC); *Nanaimo Immigrant Settlement Society v British Columbia*, 2004 BCCA 410, 242 DLR (4th) 394
- <sup>177</sup> *R v Malmo-Levine*, 2000 BCCA 335, 138 B.C.AC 218.
- <sup>178</sup> *Little Sisters Book & Art Emporium v Canada (Minister of Justice)*, [1999] 12 WWR 445, 160 DLR (4th) 385 (BCCA).
- <sup>179</sup> *R v Robertson*, 1987 CarswellBC 1753; 2 WCB (2d) 131 (BC County Court); *R v Caine*, 1998 CarswellBC 3416, [1998] B.C.J. No. 885 (BC Prov Ct); *R v Graf*, 1988 CarswellBC 1331, 42 CRR 146 (BC Prov Ct); *Rodriguez v British Columbia (Attorney General)*, [1993] 3 WWR 553, 76 BCLR (2d) 145 (BCCA); *R v Celebrity Enterprises Ltd.*, 1977 CarswellBC 363; [1977] 4 WWR 144 (BC County Court)
- <sup>180</sup> *R v Greeley*, 1980 CarswellBC 774, 4 WCB 445 (BC County Court).
- <sup>181</sup> Appointed to the Supreme Court of British Columbia in 1985 and the British Columbia Court of Appeal in 1988.
- <sup>182</sup> Robert Bolt "A Man For All Seasons cited in *Everywoman's Health Centre Soc. (1988) v Bridges* (1990), 54 BCLR (2d) 273 at para 77, 78 DLR (4th) 529 (BCCA).
- <sup>183</sup> *Ibid* at para 78. Since appearing here, the passage has also been quoted or discussed in *R v Hundert*, 2010 ONCJ 343, 2010 CarswellOnt 11142, and *R v Novielli*, 2015 ONCJ 192, 322 CCC (3d) 239.
- <sup>184</sup> Southin J.A. cites Francis Bacon: "There be (saith the Scripture) that turn judgment into wormwood [Amos v 7]; and surely there be also, that turn it into vinegar; for injustice maketh it bitter, and delays make it sour" (*Haldorson v Coquitlam (City)*, 2000 BCCA 484 at para 7, 141 B.C.AC 295 [In Chambers]) and Jeremy Bentham: "what cares an English judge for the swords of a hundred barons? Neither fearing nor hoping, hating nor loving, the judge of our days is ready with equal phlegm to administer, upon all occasions, that system, whatever it be, of justice or injustice, which the law has put into his hands" (*Bennett v British Columbia (Superintendent of Brokers)*, [1994] 3 WWR 687, 109 DLR (4th) 717 (BCCA) at para 28).
- <sup>185</sup> *R v S (M)* (1997), 111 CCC (3d) 467, 84 BCAC 104 (BCCA) at para 25.
- <sup>186</sup> *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, 279 CCC (3d) 1. Bauman C.JBC also cites Jeremy Bentham on the open court principle in a related proceeding: *Reference re Criminal Code, s 293*, 2010 BCSC 1351, 14 BCLR (5th) 131.
- <sup>187</sup> *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at para 170, 279 CCC (3d) 1.
- <sup>188</sup> "The function of marriage as described by classical philosophers - including Plato, Aristotle, Cicero, Musonius, Hierocles and Plutarch - was as a source of private goods for men, women and children, and of public goods for rulers, citizens and society. Privately, marriage offered mutual love, companionship and support to each spouse, as well as protection from sexual temptation. It was also the principal vehicle for the production of legitimate children who would serve as heirs to the family property, name, and lineage. Marriage was viewed, as well, as a critical source of public good. The mutuality inherent in the dyadic structure habituated children to notions of equality and other important norms of citizenship. As DR Witte elaborated: That notion [of mutuality] is considered to be critical for the state because it creates balance, it creates structure, it creates ballast for the polity, and with that balance produces children who are habituated as the Stoics say, especially Ulpian, habituated to the norms of citizenship. Are capable of seeing how authority and liberty can properly be balanced, how equality and charity can properly be balanced. Recognizing how a healthy polity can work. The thought is that this is the first school of justice, as Aristotle calls it, and therefore the household in this structure is a source of goods for the state." *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at para 172, 279 CCC (3d) 1, 28 BCLR (5th).
- <sup>189</sup> *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, 279 CCC (3d) 1.
- <sup>190</sup> "St. Augustine repeated the many private and public goods of marriage recited by the Greeks and Romans and illustrated in the Bible. DR Witte summarized some of his writings as follows (at para 21):...Like Aristotle, the Stoics, and the Roman jurists, Augustine called marriage "the first natural bond of human society", "the first step in the organization of men", the "first school" of justice, virtue, and order - a veritable "seedbed of the republic". When marriage is properly formed by "a publicly attested contract", Augustine wrote, it provides a disciplined and "orderly lifestyle" that anticipates and "ministers to the ordered agreement concerning command and agreement among citizens." *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at para 190, 279 CCC (3d) 1.
- <sup>191</sup> *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, 279 CCC (3d) 1, 28 BCLR (5th) 96: "...the work of Catholic philosopher, Thomas Aquinas (1225 - 1274), was of particularly enduring importance. Foreshadowing the insights of modern evolutionary scientists, Aquinas highlighted three unique qualities that distinguish human beings from other animals: (1) human beings produce fragile offspring that are dependent upon their parents for many years; (2) human beings do not have a mating season and are constantly desirous of love and its expressions in sexual form; and, (3) human males have to be induced to care for their offspring. While a mother is bonded to her child naturally through a long pregnancy and nursing, a father bonds to his child only if he is assured of his paternity. Aquinas reasoned that given these characteristics, nature inclined human beings toward monogamy as a means of ensuring paternal certainty and life-long investment in children by both parents. This argument in favour of monogamy served concurrently as a powerful argument against polygamy. Aquinas overlaid such natural law arguments in favour of monogamous marriage with moral arguments from natural justice based on appeals to the dignity and the inherent worth of persons. Aquinas rejected polyandry as unjust to children. A woman who had sex with several husbands removed the likelihood that her children clearly belong to any one husband. This undermined paternal certainty and the consequent paternal investment in the children's care. The children would suffer from neglect, as the wife would be overburdened in simultaneously trying to care for them and tend to her multiple husbands. Aquinas also rejected polygyny as unjust to wives and children. Polygyny went against the moral requirement of mutuality and equality between husband and wife. Instead, wives were reduced to slaves and set in perennial competition with each other for resources and access to their shared husband. Children were denied their father's full resources and attention, as both were dissipated over a series of children born to a series of wives. Aquinas supplemented these arguments based on natural law and natural justice with theological arguments about marriage. These elaborated and expanded upon Augustinian notions of fidelity, children and sacrament as the goods attending monogamous marriage." *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at paras 194-200, 279 CCC (3d) 1.
- <sup>192</sup> *Martin v. Law Society of British Columbia*, 1950 CarswellBC 168, [1950] 3 DLR 173 (BCCA).
- <sup>193</sup> *Farmers & Traders Loan Co. v Conklin* (1884), 1 Man R 181, 1884 CarswellMan 4 (MBQB); *Brandon (City) v Manitoba (Municipal Commissioner)*, [1931] 2 WWR 65, [1931] 3 DLR 397 (MBKB); *Brandon (City) v Manitoba (Municipal Commissioner)*, [1931] 3 WWR 225; [1931] 4 DLR 830 (MBCA); *Reference re ss. 193 & 195.1(1)(c) of Criminal Code (Canada)*, [1987] 6 WWR 289, 49 Man R (2d) 1 (MBCA); *Simplot Chemical Co. v Manitoba*, [1987] CLD 925, 47 Man R (2d) 167 (MBQB); *Metropolitan Stores (MTS) Ltd. v Manitoba Food & Commercial Workers, Local 832*, [1988] 5 WWR 544, 54 Man R (2d) 81 (MBQB); *R v Butler*, [1991] 1 WWR 97, 73 Man R (2d) 197 (MBCA); *R v Campbell*, [1997] 2 WWR 195, 142 DLR (4th) 496 (MBCA).
- <sup>194</sup> *R v Butler*, [1991] 1 WWR 97, 73 Man R (2d) 197 (MBCA); *R v Campbell* (1996), 113 Man R (2d) 288, 42 DLR (4th) (MBCA).
- <sup>195</sup> *R v Myrrmidon Inc.*, [1988] 5 WWR 385, 52 Man R (2d) 303 (MBCA).
- <sup>196</sup> *Northwest Territories (Workers Compensation Board) v Schott*, 1993 CarswellNWT 27, [1993] NWTR 294 (NWT SC); *Clemmey v Stanton Yellowknife Hospital*, 1990 CarswellNWT 10, [1990] NWTR 76 (NWT SC).
- <sup>197</sup> *R v Warren*, [1995] 3 WWR 379, 122 DLR (4th) 698 (NWT SC).

- <sup>198</sup> *F (L) v M. (AJ)*, 1989 CarswellNWT 18, [1989] NWTR 193 (NWT SC).
- <sup>199</sup> *Miller v Northwest Territories (Commissioner)*, [1988] 4 WWR 456, 51 DLR (4th) 292 (NWT SC).
- <sup>200</sup> *R v Chivers*, [1988] NWTR 124, 1987 CarswellNWT 42 (NWT SC).
- <sup>201</sup> *Perka v R*, [1984] 2 SCR 232, 13 DLR (4th) 1.
- <sup>202</sup> *R v Chivers*, [1988] NWTR 124 at para 10, 1987 CarswellNWT 42 (NWT SC).
- <sup>203</sup> *R v Taylor*, 1875 CarswellOnt 132, 36 U.C.Q.B. 183 (UCQB); *Treasurer of Ontario v Canada Life Assurance Co.* (1915), 22 DLR 428, 33 OLR 433 (Ont SC); *A.-G. Ontario v Baby*, [1926] 3 DLR 928; 59 OLR 181 (Ont SC); *McLeod v Windsor (City)* (1924), 57 OLR 15; [1925] 3 DLR 89 (Ont SC, App. Div); *Erie Beach Co. Ltd. v A.-G. Ont.*, [1929] 2 DLR 754; 63 OLR 469 (Ont. CA); *National Trust Co. Ltd. & Toronto, Re*, [1931] 4 DLR 355, [1931] OR 496 (Ont CA); *Ontario (Attorney General) v National Trust Co.*, [1931] 1 DLR 354; 66 OLR 163 (ON SC); *Nickel Rim Mines Ltd. v Ontario (Attorney General)*, 1965 CarswellOnt 616, 53 DLR (2d) 290 (Ont. CA); *Nickel Rim Mines Ltd. v Ontario (Attorney General)*, 1965 CarswellOnt 223; [1966] 1 OR 345 (Ont. HCJ); *B. (S.M.) v Children's Aid Society of Metropolitan Toronto*, 1983 CarswellOnt 319; 36 RFL (2d) 80 (Ont PC); *R v Kopyto* (1987), 24 OAC 81, 47 DLR (4th) 213 (Ont. CA); *R v Zundel* (1987), 18 OAC 161, 35 DLR (4th) 338 (Ont. CA); *R v Andrews* (1988), 28 OAC 161 (Ont. CA); *Rheume v Ontario (Attorney General)* (1989), 63 DLR (4th) 241; 70 OR (2d) 602 (Ont. HCJ); *Canada Trust Co. v Ontario (Human Rights Commission)* (1990), 69 DLR (4th) 321; 74 OR (2d) 481 (Ont. CA); *Leroux v Co-operators General Insurance Co.* (1991), 4 OR (3d) 609, 83 DLR (4th) 694 (Ont. CA); *Hernandez v Palmer* (1992), 15 C.C.L.I. (2d) 187, 46 MVR (2d) 26 (Ont. Gen Div); *Girgenti v Ontario Regional Assessment Commissioner, Region 12* (1993), 100 DLR (4th) 488; 38 ACWS (3d) 12 (Ont. Gen Div); *Ontario Home Builders' Assn. v York Region Board of Education* (1993), 103 DLR (4th) 55, 13 OR (3d) 493 (Ont. Gen Div); *Ontario (Attorney General) v Dieleman* (1994), 117 DLR (4th) 449, 20 OR (3d) 229 (Ont. Gen Div); *Air Canada v Ontario (Minister of Revenue)* (1995), 123 DLR (4th) 715; 22 OR (3d) 611 (Ont. Gen Div); *Great-West Life Assurance Co. v Toronto Hydro*, 1995 CarswellOnt 2330; [1995] OJ No. 221 (Ont. Gen Div); *Ontario Private Campground Assn. v Harvey (Township)* (1997), 146 DLR (4th) 347, 33 OR (3d) 578 (Ont. CJ); *Urban Outdoor Trans Ad v Scarborough (City)* (1999), 2 MPLR (3d) 11, 43 OR (3d) 673; (Ont. Sup Ct J); *Roneson Enterprises Inc. v Ontario (Minister of Finance)*, 2004 CarswellOnt 6572; 2005 GTC 1456 (Ont. Sup Ct J); *Fraser v Canada (Attorney General)*, [2005] OTC 1127, 51 Imm. L.R. (3d) 101 (Ont. SCJ); *Sun Microsystems of Canada Inc. v Ontario (Minister of Finance)*, 2007 CarswellOnt 980, [2008] 2 CTC 195 (Ont. Sup Ct J); *R v Badesha*, 2008 ONCJ 94, 168 CRR (2d) 164 (Ont. Ct J); *Payne v Windsor (City)*, 2011 ONSC 5123, 89 MPLR (4th) 251 (Ont. Sup Ct J); *Sorbara v Canada (Attorney General)* (2008), 304 DLR (4th) 470, 93 OR (3d) 241 (Ont. SCJ); *Pattison Outdoor Advertising LP v Toronto (City)*, 2011 ONSC 537, 81 MPLR (4th) 1; *Pattison Outdoor Advertising LP v Toronto (City)*, 2012 ONCA 212, 348 DLR (4th) 288; *R v Morano*, 2014 ONCJ 79, 112 WCB (2d) 292; *Frank v Canada (Attorney General)*, 2015 ONCA 536, 126 OR (3d) 321;
- <sup>204</sup> Appointed to the Ontario Court of Justice in 2009.
- <sup>205</sup> Appointed to the Superior Court of Justice in Ontario in 2005.
- <sup>206</sup> Regional Senior Justice for the Toronto Region of the Superior Court of Justice from 1999-2005. Appointed to the Court of Appeal for Ontario in 2005.
- <sup>207</sup> Associate Chief Justice, Court of Appeal for Ontario (1974-1987).
- <sup>208</sup> *R v Canadian Broadcasting Corp.*, 2013 ONCJ 164; [2013] OJ No. 1447.
- <sup>209</sup> *R v Novielli*, 2015 ONCJ 192 at para 36, 322 CCC (3d) 239.
- <sup>210</sup> *R v Novielli*, 2015 ONCJ 192 at para 37, 322 CCC (3d) 239.
- <sup>211</sup> *R v Van*, 2014 ONCJ 232 at para 22, 2014 CarswellOnt 6580, [2014] OJ No. 2388, 113 WCB (2d) 460. Aristotle also appears in *R v Wagner*, 2015 ONCJ 66, [2015] OJ No. 706, 119 WCB (2d) 605.
- <sup>212</sup> *M. (G.) v Alter*, 2008 CarswellOnt 5252 at para 34, [2008] OJ No. 3493 (Ct J).
- <sup>213</sup> *Rakowski v Malagerio* (2007), 84 OR (3d) 696, 28 B.L.R. (4th) 126 (Ont. Sup Ct J) at para 45.
- <sup>214</sup> *Sorbara v Canada (Attorney General)*, [2008] GSTC 210, 304 DLR (4th) 470 (Ont. Sup Ct J).
- <sup>215</sup> *Robinson v Medtronic Inc.* (2009), 80 CPC (6th) 87, 2009 CarswellOnt 6337 (Ont. Sup Ct J) at para 141.
- <sup>216</sup> *Halpern v Toronto* (2002), 60 O.R. (3d) 321, 215 D.L.R. (4th) 223 (Ont. Div. Ct).
- <sup>217</sup> *R v Southam Inc.*, [1983] WDFL 673; [1983] WDFL 678 (Ont. CA); s. 12 (1) of the *Juvenile Delinquents Act (Canada)*, *Re* (1983), 146 DLR (3d) 408, 41 OR (2d) 113 (ON SC).
- <sup>218</sup> *R v Spencer* (1983), 145 DLR (3d) 344, 2 CCC (3d) 526; 31 CPC 162 (Ont. CA).
- <sup>219</sup> *Ibid* at para 27.
- <sup>220</sup> *Prince Edward Island Potato Marketing Board v Sunny Isle Farms Ltd.* (1969), 7 DLR (3d) 263 (PEI SC in Banco).
- <sup>221</sup> *Mills v Mills* (1946), 19 MPR 154 (PEI Court of Divorce).
- <sup>222</sup> *Reference re Divorce Act (Prince Edward Island)*, [1952] 2 DLR 513, 29 MPR 120 (PEISC)
- <sup>223</sup> *Leader-Post (The) v Neuls*, [1993] 3 WWR 538; 107 Sask R 58 (SKQB); *Archer v Orange Benevolent Society*, 2001 SKQB 557, [2002] 3 WWR 317; *John Deere Ltd. v Long Tractor Inc.*, 2003 SKQB 24, [2003] 5 WWR 156.
- <sup>224</sup> *Voigts v Saskatchewan Government Insurance*, [1993] 6 WWR 329, 102 DLR (4th) 593 (SKQB); *Canadian Broadcasting Corp. v Saskatchewan (Minister of Finance)*, [1999] 2 WWR 340; 170 Sask R 109 (Sask QB).
- <sup>225</sup> *Hudson's Bay Co. v Bratt's Lake (Rural Municipality No. 129)*, [1918] 2 WWR 962; 11 Sask. L.R. 357 (Sask SC); *Clarke v Moose Jaw (City)*, 1922 CarswellSask 172; [1922] 3 WWR 444 (Sask District Court); *Clarke v Moose Jaw (City)*, [1923] 1 WWR 1126, [1923] 2 DLR 216 (Sask CA); *R v Gebhardt*, [1926] 2 WWR 235; [1926] 2 DLR 950 (Sask CA); *Canadian Pacific Railway v Saskatchewan (Attorney General)*, [1951] 4 DLR 21, 2 WWR (N.S.) 424 (SKCA); *Canadian Pacific Railway v Saskatchewan (Attorney General)*, [1951] 3 DLR 362, 1 WWR (N.S.) 193 (SKKB); *Cairns Construction Ltd. v Saskatchewan* (1957), 22 WWR 193, 9 DLR (2d) 721 (Sask QB); *Canadian Industrial Gas & Oil Ltd. v Saskatchewan*, 1974 CarswellSask 126, [1975] 2 WWR 481 (Sask QB); *Canadian Industrial Gas & Oil Ltd. v Saskatchewan*, [1976] 2 WWR 356, 65 DLR (3d) 79 (SKCA); *Massey-Ferguson Industries Ltd. v Saskatchewan*, [1979] 1 WWR 97, 92 DLR (3d) 161 (Sask QB); *Massey-Ferguson Industries Ltd. v Saskatchewan*, [1980] 6 WWR 604, 115 DLR (3d) 47 (Sask CA); *Voigts v Saskatchewan Government Insurance*, [1993] 6 WWR 329, 102 DLR (4th) 593 (Sask QB); *Canadian Broadcasting Corp. v Saskatchewan (Minister of Finance)*, [1999] 2 WWR 340, 170 Sask R 109 (Sask QB); *Helquist v Owens*, 2006 SKCA 41, 267 DLR (4th) 733.
- <sup>226</sup> *R v T. (B.H.)*, 1998 ABPC 13, 37 WCB (2d) 452 (ABPC).
- <sup>227</sup> *Petro-Canada v Canada-Newfoundland Offshore Petroleum Board* (1995), 133 Nfld & PEIR 91, 127 DLR (4th) 483 (NLSC (TD)).
- <sup>228</sup> *R v Finta*, [1994] 1 SCR 701, 112 DLR (4th) 513.
- <sup>229</sup> *R v Kharaghani*, 2011 ONSC 836, 268 CCC (3d) 51 (Ont. SC).
- <sup>230</sup> *Perka v R* (1984), [1984] 2 SCR 232, 13 DLR (4th) 1.
- <sup>231</sup> *Frank v Canada (Attorney General)*, 2015 ONCA 536, 126 OR (3d) 321 (Ont. CA).
- <sup>232</sup> *Robinson v Lepage*, 2015 ONSC 3128, 2015 CarswellOnt 7100 (Ont. Div. Ct).
- <sup>233</sup> Donalee Moulton, "Lawyers reduced to stage managers of expert witnesses: law prof" (October 15, 1999) 19:22 *The Lawyers Weekly* citing Vaughan Black, professor of Law at Dalhousie University in Halifax.
- <sup>234</sup> *Canada v Heritage Front*, [1994] 1 FC 203, 68 FTR 161 (FCTD)
- <sup>235</sup> *McKay v Essex Area Health Authority*, [1982] Q.B. 1166, [1982] 2 All E.R. 771 (Eng. C.A.) cited by *Jones (Guardian ad litem of) v Rostvig* (1999), 44 C.C.L.T. (2d) 313, 7 B.C.T.C. 188 (BC SC) and *Lacroix (Litigation Guardian of) v Dominique*, 2001 MBCA 122, 202 DLR (4th) 121 (MBCA).
- <sup>236</sup> As Douglas J. of the Supreme Court of the United States once noted "We are judges, not literary experts or historians or philosophers." See concurring judgment in the United States "Fanny Hill" case, *Memoirs of a Woman of Pleasure v Attorney General of Massachusetts* (1966), 86 S.Ct. 975 at 981 cited in *R v Cameron*, [1966] 2 OR 777, 58 DLR (2d) 486 (Ont. CA). See also, *R v Hadwen*, 2003 SKPC 66, [2003] 8 WWR 122 (Sask. Prov. Ct.) in which Orr Prov. J. of the Saskatchewan Provincial Court comments, "Judges must not pretend to be legislators, or social philosopher-kings...".
- <sup>237</sup> *Lilles v Lilles*, 1979 CarswellOnt 146 at para 19, 2 FLRAC 132 (Ont. HCJ). See also *Little Sisters Book & Art Emporium v Canada (Minister of Justice)* (1996), 131 DLR (4th) 486 at para 1, 18 BCLR (3d) 241 (BCSC): "The Court's function, though, is not to attempt to resolve that tension as a philosopher or political scientist might, not to decide whether censorship by the state is a good thing or bad. Rather, the Court must determine the legal and factual issues presented by the parties to this action, which questions the constitutional validity of the customs legislation by which Parliament prohibits the importation of obscene material into Canada."
- <sup>238</sup> *Thwaites v Health Sciences Centre Psychiatric Facility* (1987), 33 DLR (4th) 549 at para 18, [1987] 1 WWR 468, (MBQB).
- <sup>239</sup> *Fulton v Globe & Mail (The)*, [1997] 3 WWR 200, 194 AR 254 (AB QB).
- <sup>240</sup> 197 out of 543 citations.





# III Legal Research Blogs in Canada: Uses, Limitations & Preservation Concerns\*

By Michelle Thompson\*\*

## Abstract

*This discussion paper examines the ethical and practical limitations of blogs as legal research sources as well as their increasing use by legal professionals. The innovative approach of respected bloggers challenges more traditional scholarship. Legal research blogs authored by law professionals can be an important part of law librarians' collections and must therefore be preserved. As such, several strategies for acquiring, archiving and preserving them will also be discussed.*

*Cet article examine les limites éthiques et pratiques des blogs en tant que sources pour des recherches juridiques ainsi que leur utilisation croissante par les professionnels du droit. Ayant émergé parmi les médias de publication perturbateurs, l'approche innovante de blogueurs respectés conteste une recherche plus traditionnelle. Les blogues de recherche juridique rédigés par des professionnels du droit peuvent constituer une partie importante des collections des bibliothécaires de droit et doivent donc être conservés. Ainsi, plusieurs stratégies pour l'acquisition, l'archivage et la préservation seront également discutées.*

## Law Blogs as Publication Media

Law blogs started as places where law school faculty could post informal, personal views on court decisions and other legal issues. However, in recent years, these blogs have gradually gained recognition and readership. Today they provide a publication medium for the rapid dissemination of legal analysis and discoveries and are having an impact on traditional legal literature by reducing to some extent the role of law reviews.<sup>1</sup> Law blogs emerged about 15 years ago when faculty members sought to leverage new technology to reach a wider audience. They are often read by lawyers, law academics, law clerks and even judges as an alternative to traditional case commentary, access to which is hampered by a slow publication process. Blog pages allow authors to publish written commentary about the law using little editing. The Canadian law blog directory, [lawblogs.ca](http://www.lawblogs.ca), lists a total of 365 legal blogs in Canada, most of which are published in Ontario (255) and BC (93).<sup>2</sup> Only a portion of these are written by law faculty and or judges.<sup>3</sup> Law faculty blogs usually centre on tangible legal issues, either taking a neutral perspective or a specific point of view in their analysis.

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<sup>1</sup>J Robert Brown, "Law Faculty Blogs and Disruptive Innovation" (2012) 1:3 J of Law 526 [Brown].

<sup>2</sup>Lawblogs.ca, "About Lawblogs.ca", online: <<http://www.lawblogs.ca/>>

<sup>3</sup>Lee F Peoples, "The Citation of Blogs in Judicial Opinions" (2010) 13 Tul J of Tech & Int Prop 39-40. [Peoples]



Many scholars distinguish between formal and informal communication in legal scholarship, categorizing legal blogs as the latter and arguing that this new format has increased informal communication in the legal domain and shifted publication platforms from the private to the public.<sup>4</sup> Law professors frequently manage their own legal blogs and publish somewhat shorter informal online posts containing fewer footnotes than are normally seen in academic writing. These posts usually cover poorly represented topics and involve interactions with an online community, at times anonymous, which provides instant feedback to the author.<sup>5</sup>

Brown argues there are two types of law blogs: empire and captive blogs.<sup>6</sup> Empire law blogs foster online author communities, providing members with administrative support for blog development and generating advertising revenue which is then shared with contributors. These blogs generally have a common philosophy and publication standards, and focus on the needs of law professors.<sup>7</sup> *Jurisdynamics Network* is an example of an empire law blog. Managed by Jim Chen, a legal expert on regulations and economics who provides his biographical information and publications list on the main page, the site is independent and features contributions from member blogs world-wide. It focuses on topics and methodological tools relevant to the interactions between law, society and technological change.<sup>8</sup> Captive blogs on the other hand, are supported by law schools where faculty members work and report on scholarly activities rather than provide legal analysis. They tend to be managed by administrators rather than scholars and rely on contributions and commentary from faculty. They are sometimes less rich in legal content and may lack currency.<sup>9</sup> For instance, the McGill Law Library Blog is moderated by a law librarian.<sup>10</sup>

## Law Blogs as Disruptive Innovation

Yu and Hang define disruptive innovation as the introduction of a new technology which can broaden a particular market while disrupting an existing technology.<sup>11</sup> Initially the innovation may be considered inferior but over time, as technology improves, it displaces the standard.<sup>12</sup> Traditional legal scholarship is often criticized for being too abstract, too theoretical or not relevant enough to legal practice. In addition, the publication process tends to be slow and often relegated to a small elite group of legal scholars as its readers. Blogs on the other hand have been shown to reach a wider audience. They can involve conversations, debates, analysis and what Plotin calls “pre-scholarship.”<sup>13</sup> In the last decade, the rising popularity of law blogs has changed how faculty reputations are determined, allowing newer faculty members to increase their visibility in academia by publishing outside of the traditional law journal paradigm.. This in turn has had an impact on law school rankings. In the past, the reputation of faculty members was measured by the frequency and quality of law review articles published. Brown argues that in lesser-known

law schools there tends to be a smaller number of influential academic authors, in part due to the lack of peer review and of a process of blind submission to publishers.<sup>14</sup> Since most articles are selected based on the author’s reputation, and since publishers often choose candidates from their own academic institutions, other candidates are faced with a bias during the selection process.<sup>15</sup> Law blogs allow these younger authors to increase both awareness of their law school and readership of their work, often thanks to the citation of their posts. In 2013, Canada saw its third citation of a legal blog in *Herbison v Canada* when the judge cited a post from Alison Woolley, law faculty member from the University of Calgary.<sup>16</sup> She was named one of Canadian Lawyer’s Top 25 Most Influential changemakers in 2015.<sup>17</sup>

## Blogs as Legal Information Sources

In the US where legal blog citations are becoming more common, cited posts are almost exclusively used as secondary sources to support legal analysis and reasoning in a judicial decision.<sup>18</sup> For instance, a post from Sentencing Law & Policy was cited in 2004 in *Blakely v Washington* and this ruling would influence sentencing guidelines in American courts.<sup>19</sup> This example illustrates how informal sources can become usable, acceptable and authoritative. Peoples argues they should be used as food for thought and seen as a secondary authority when analytical rigor is used in the writing process.<sup>20</sup>

It’s clear that courts are increasingly using legal blog posts as sources of information and legal discussion to support their judicial reasoning and analysis. *The American law blog Sentencing Law & Policy* has certainly emerged as an authoritative source as it has been cited 33 times in judicial opinions as of 2012.<sup>21</sup> It should also be noted that many contributors are leading authorities on sentencing laws in the US who regularly publish scholarly works and are affiliated with recognized institutions. For example, Douglas Berman blog *Sentencing law & Policy* is rich in biographical details and provides links to key institutions, legal projects and guidelines, adding to the usefulness of the web page.<sup>22</sup> Berman’s position of authority seems to have played a role in increasing readership, thus increasing the visibility of his posts. However, most blogs in Canada have not yet seen this level of success.

As a publication medium, blogs not only facilitate interactions between author and reader, but also between reader and reader. They encourage exchanges of ideas and can influence public perception of legal issues and cases. Having a pulse on what the public thinks about a case can help determine the direction a particular case will take, either hurting a person’s image or uncovering errors in judicial judgments. In *Kennedy v. Louisiana*, a judge failed to consider a law related to the use of the death penalty as punishment

<sup>4</sup>Stephanie Plotin, “Legal Scholarship, Electronic Publishing and Open Access: Transformation or Steadfast Stagnation?” (2009) 101:1 Law Libr J 53.[Plotin]

<sup>5</sup>*Ibid* at 54.

<sup>6</sup>Brown, *supra* note 1.

<sup>7</sup>*Ibid* at 528.

<sup>8</sup>Jim Chen, “Your Host”, Jurisdynamics (blog), online: <<http://jurisdynamics.blogspot.ca>>.

<sup>9</sup>Brown, *supra* note 1 at 530.

<sup>10</sup>McGill University, “About”, McGill Library: Law Library Blog (blog), online: <<http://blogs.library.mcgill.ca/lawlibrary/about/>>.

<sup>11</sup>Dan Yu & Chang C Hang, “A Reflective Review of Disruptive Innovation Theory” (2010) 12:4 Int’l J Management Reviews 436.

<sup>12</sup>*Ibid* at 436.

<sup>13</sup>Plotin, *supra* note 4.

<sup>14</sup>Brown, *supra* note 1.

<sup>15</sup>*Ibid* at 545.

<sup>16</sup>Nate Russell, “The Third Case to Cite a Law Blog for Legal Analysis in Canada” ABLaw.ca (blog), online: <<http://ablaw.ca/>>; *Herbison v Canada*, 2013 BCSC 2020 (CanLII).

<sup>17</sup>University of Calgary, “Faculty of Law: Faculty Members and Academics”, online: <[http://law.ucalgary.ca/law\\_uni-tis/profiles/alice-woolley](http://law.ucalgary.ca/law_uni-tis/profiles/alice-woolley)>.

<sup>18</sup>Peoples, *supra* note 3.

<sup>19</sup>*Blakely v Washington*, 542 US 296 (2004).; Peoples, *supra* note 3.

<sup>20</sup>*Ibid* at 51.

<sup>21</sup>*Ibid* at 45.

<sup>22</sup>Douglas Berman, “Blog Owner”, Sentencing Law & Policy: An affiliate of the Law Professor Blogs Network. (blog), online: <<http://sentencing.typepad.com/>>.

for child rape.<sup>23</sup> One blogger published a post related to the revised *Uniform Code of Military Justice* which had been in effect when the judicial decision was made. This revelation led to a rehearing in the Louisiana Court.<sup>24</sup>

Traditional law reviews in Canada are now citing law blogs in their articles. For example, The Parliamentarian has been cited in the *Journal of Parliamentary and Political Law*, the *Review of Constitutional Studies* and the *National Journal of Constitutional Law*.<sup>25</sup> This increase in the popularity of blog citations suggests that law blogs have gained recognition as a valid source of legal analysis, in part because of their user-friendly dissemination method. They provide rapid, brief, light, engaging and accessible information about current legal topics. American blogger Eugene Volokh of *The Volokh Conspiracy* suggests that blogs supply the space for discussing “micro-discoveries” which he defines as significant ideas too small to turn into articles.<sup>26</sup> In addition, some law blog sites act as useful information hubs, listing other blogs according to legal specialties or geographic location and providing a date stamp for currency. Lawblogs.ca markets itself as an open directory for blogging lawyers, law librarians, paralegals and other professionals in Canada. Users can browse by law area, province, category, and currency, or simply access the A-Z list.<sup>27</sup>

### Ethical Concerns for Law Librarians

The use of blog citations in judicial opinions raises ethical questions in terms of how law librarians select legal resources and how they're used by the legal professional. Citing discussion of the law is appropriate, as is using a respected scholar's post about a legal issue, particularly if that same individual writes a legal treatise and law review article in the print world.<sup>28</sup> However, Brown argues that blog commentary doesn't always offer quality analysis, at times reflecting opinions on topics outside of the author's expertise. Moreover, the pressure to publish posts frequently can lead to errors.<sup>29</sup> Brown states that critics have concerns about how legal blogs might influence the outcome of an active case if judges are reading them.<sup>30</sup> Because of the impermanent nature of blog publications, for example frequent changes in authorship and eroding of currency if updates are not made, those who use of legal blogs as secondary sources should ensure that citation links remain traceable by future readers. Posts can be difficult to locate as they get buried in the blog's archive and this challenge highlights the need for developing preservation strategies when it comes to citations and archiving.

In the US, some attorneys have been criticised or disciplined for making statements about judges on their law blogs. For example, in Florida, attorney Sean Conway wrote on his *JAABlog* about Judge Aleman pressuring defendants and called her unfit for her position. He was reprimanded

and fined \$1,200 by the Bar. These types of events have led courts to develop policies and ethical codes restricting attorney criticism in order to maintain public confidence in the judicial system's impartiality and protect the public from unprofessional lawyers. Liegel states that some view this as being in conflict with the right to free speech; however, statements about judges create distrust of the legal system rather than advancing public discussion.<sup>31</sup> This debate highlights the importance of bloggers adopting an appropriate writing style and providing information first and foremost for the public good.

The fact that law blogs are inexpensive, unregulated, open access and brief forms of legal discourse raises the question of quality of information and analysis. Engsborg argues that whether a blog meets the definition of scholarship (well researched, thoughtful ideas that use specialized vocabulary) or not, law blogs are essentially an “unruly heap of buzzing conversation...virtual form of the 18<sup>th</sup> century coffee house.”<sup>32</sup> He adds that this emerging format is a re-emergence of the brief, ephemeral pamphlet and newspaper and erodes copyright and mediated legal scholarship.<sup>33</sup>

Still, the management of born digital archival data such as blog posts can be challenging due to the need for frequent upgrades in technology, memory space requirements, potential data corruption and a lack of technical training on the part of site administrators. Digital records are equally at risk of obsolescence as their print and analogue counterparts and require a significant investment in technological infrastructure such as an information technology system that makes possible data migration and aggregation as well as information retrieval.<sup>34</sup> Law librarians are responsible for keeping track of trending topics and can provide a communal space where ideas are shared and interactions among patrons, and not just with reading materials, can happen. In addition to maintaining the print library system through acquisitions, cataloguing, preservation and conservation, law librarians must ensure that materials remain accessible while also navigating a shift from repository to communal space. Blogs facilitate discussions and thus are having an impact on the legal profession and law librarianship.<sup>35</sup> Some existing tools can help with this work. The Bluebook system for citing legal sources states in section 18.2.2 that “internet citation should include information designed to facilitate the clearest path of access to the cited reference.”<sup>36</sup> The rule states that author information must be included when available including users making specific posts or comments. A date and timestamp must also be provided as well as a URL pointing readers directly to the source.<sup>37</sup> *The Canadian Guide to Uniform Legal Citation* (section 6.22.3) states that materials found online should be cited according to the traditional form of citing online materials: indicating the author, blog post title, date of publication, blog site name, and a link to the page.<sup>38</sup>

<sup>23</sup>Kennedy v Louisiana, 554 US 407 (2008).

<sup>24</sup>Peoples, *supra* note 3.

<sup>25</sup>James Bowden, “Citations of my Work”, The Parliamentarian (2016) taken from <https://parliamentum.org/about/citations-of-my-work/> (accessed Oct. 27, 2016).

<sup>26</sup>Eugene Volokh, “Scholarship, Blogging, and Tradeoffs: On Discovering, Disseminating, and Doing” (2006) 84 Wash U LR 1096.

<sup>27</sup>Stem Legal Web Enterprises, Law Blogs.ca. online: <<http://www.lawblogs.ca/canadian-legal-history-blog/>>.

<sup>28</sup>Peoples, *supra* note 3.

<sup>29</sup>Brown, *supra* note 1.

<sup>30</sup>*Ibid* at 542.

<sup>31</sup>Brian G Liegel, “A Higher Bar: The Search for Restrictions on Attorney Criticism of Judges on Blogs” (2014) 27

Georgetown J of Leg Eth 689.

<sup>32</sup>Mark Engsborg, “The Coffee House Effect: Books, Blogs and Legal Scholarship” (2011) 19:1 Austral LL 8 [Engsborg].

<sup>33</sup>*Ibid* at 9.

<sup>34</sup>Lisa Cliggett, “Qualitative Data Archiving in the Digital Age: Strategies for Data Preservation and Sharing” (2013) 18 The Qualitative Report 1.

<sup>35</sup>Engsborg, *supra* note 36 at 10.

<sup>36</sup>Columbia Law Review Association, Harvard Law Review Association, University of Pennsylvania Law Review & Yale Law Journal Company. The bluebook: A Uniform System of Citation.. 20th ed. (Cambridge, MA: Harvard Law Review Association 2015), at para 18 s 2 [Bluebook].

<sup>37</sup>*Ibid* at para 18 s 2.

<sup>38</sup>The Canadian Guide to Uniform Legal Citation, 8th ed (Toronto: Carswell, 2014).

## Archival Concerns and Strategies

Peoples recommends using permalinks when archiving blog posts because of their permanent nature. He uses the term “link rot” to describe URL links which with time can disappear as web sites become inactive or are moved. He argues that the most stable electronic location should be used in the citation and adds that the Bluebook suggests printing or downloading copies of electronic sources with an “explanation” when old versions have been cited in the past.<sup>39</sup>

Blog preservation happens in two stages, the first involves the active creation stage when authors write and edit their posts, sometimes after they have already been cited. The original record is therefore impermanent (open to modification or re-posting) and can become unavailable to those looking to use it as a source. The structure of the webpage and the quality of information management can help improve the preservation of individual posts. For instance, using a publishing site like Wordpress or Eblogger, that creates a time stamp for each post and allows the blogger to maintain an archive on the main page, can make information retrieval easier. The second stage of blog preservation is the archival stage. Once posts have been published and cited, repositories like research libraries can develop strategies for digital archiving of relevant blogs and blog posts. Popular legal databases like LexisNexis and Westlaw present a challenge for legal researchers in terms of searching capability when it comes to blog posts. URLs are often copied incorrectly or include spacing in their original form, making them a challenge to copy or access. Additionally, Westlaw doesn't include hyperlinks and LexisNexis' links don't always work.<sup>40</sup>

Several strategies used in digital preservation can ensure blogs are effectively preserved for future use as secondary legal resources. First, the authors themselves can create an ‘archive’ section on their main blog page to store posts cited in judicial opinions. This allows readers to easily access important information. Second, authors can collaborate with law libraries and other repositories dealing with legal information to ensure important posts and blog sites are captured at the time when a blog becomes inactive. Third, researchers (and law librarians) can consider searching the Internet Archive's *Wayback Machine* when blogs have already become inactive and link rot becomes apparent. Fourth, law librarians and other preservationists can save a screen grab of important posts at the time when they are cited. And lastly, authors can modify the way blogs are cited to include specific posts rather than the webpage as well as document the time and date the post was accessed. This would allow researchers to easily trace the information in a digital archive.

Law librarians have a responsibility to develop blog collections and ensure continued access to the original publication cited in law reviews and court judgments. In addition, the legal analysis and commentary in law blogs has become a legitimate source of information and is valued by legal professionals.<sup>41</sup> In Canada, legal databases like LexisNexis and Westlaw have not been adequate tools for indexing or accessing full text versions of blogs. Young argues that this is due to the high volume of content in blogs and the lack of description done at the time of indexing. In Australia, the National Library developed the PANDORA project to meet the need for blog preservation. In the UK, the University of London's Computer Centre has established the ArchivePress to meet this challenge.<sup>42</sup> Both strategies have had little success, according to Young. PANDORA archived 531 titles but only included small sections of each blog, while ArchivePress used RSS feeds to archive portions of blogs considered important rather than the entire blog.<sup>43</sup> In the US, the Law Library of Congress focuses on the process of authenticating digital legal materials by assessing whether it is altered, preserving it in electronic (Wayback Machine) or print form (paper copy) and by making it accessible for public use on a permanent basis.<sup>44</sup> Young states that over 100 blogs have been collected and are searchable by key word, title or subject, making this a viable model for managing blog collections in terms of easy information retrieval by researchers.<sup>45</sup> In general, however, these programs show that there is a need for a more robust archival strategy that would capture the entire blog's content which is difficult due to the impermanence of blogs. For example, as technology evolves, new platforms emerge and older sites become obsolete and most authors and administrators lack the technical knowledge to transfer old posts or at the very least, digitally archive them.

*Forever*, open source software that launched on April 7<sup>th</sup>, 2016, could serve as a potential solution to law librarians' blog preservation issue. The program is intended to aggregate, preserve, manage and disseminate blogs and is designed to preserve the content, layout, comments, metadata and links of the blog.<sup>46</sup> This “digital scrapbooking” model is marketed to bloggers, however archival repositories working to build their blog collections could also find it useful.<sup>47</sup> Young proposes additional strategies for blog archiving including selecting relevant blogs, obtaining permission from authors to archive, aggregating/harvesting digital content, processing and cataloguing information using metadata, developing policies for end-user retrieval and access, identifying tools for implementing these steps and considering copyright issues related to individual posts.<sup>48</sup>

Law librarians' professional roles are evolving to accommodate new forms of information and technology. As an in-

<sup>39</sup>Peoples, *supra* note 3; Bluebook, *supra* note 37.

<sup>40</sup>*Ibid* at 69.

<sup>41</sup>Caroline Young, “Oh My Blawg! Who Will Save the Legal Blogs?” (2013) 105:4 Law Libr J 493 [Young].

<sup>42</sup>*Ibid* at 494.

<sup>43</sup>*Ibid* at 495.

<sup>44</sup>Library of Congress, “Official, Authenticated, Preserved and Accessible: The Uniform Electronic Legal Material Act”, online: <<https://blogs.loc.gov/law/2013/04/official-authenticated-preserved-and-accessible-the-uniform-electronic-legal-material-act/>>.

<sup>45</sup>Young, *supra* note 43 at 495.

<sup>46</sup>*Ibid* at 496.

<sup>47</sup>Forever, “Press release: Forever Acquires Digital Scrapbook Training Company, Announces Launch of ‘Forever Australia’ As Its First International Entity”, (April 7, 2016), online: <<https://blog.forever.com/forever-acquires-digital-scrapbook-training-company-pixels2pages/>>.

<sup>48</sup>Young, *supra* note 43 at 497.



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ternet-based source of legal information and analysis, law blogs present a challenge in terms of ensuring their publications are relevant and authentic. Nevertheless, blogs provide a promising platform for publishing outside the traditional system. As curators of collections that are increasingly digital-born, law librarians can now facilitate access to materials through portable technology.<sup>49</sup> Blogs fit into this new form of information sharing nicely and can even be used by law libraries to share opinions, discuss issues and obtain feedback from users. As readership of digital materials increases, this knowledge format must be properly managed, preserved, cited and shared.

## Conclusion

In the last decade, legal blog collections have emerged as a valuable part of legal research materials. Nonetheless, established databases like Westlaw and LexisNexis continue to have limitations when it comes to indexing blog posts. Although these blogs can vary in authorship, quality and usefulness they are increasingly cited in scholarly and jurisprudential writing and their value is becoming more and more apparent. This informal publication medium is now fre-

quently read and cited by respected scholars and law professionals. Legal blogs are finding their way into the judicial decision-making process. They provide commentary and legal analysis and a sense of current public sentiment and relevant legal guidelines related to cases. Canadian websites like CANLII and legal indices like the ICLL can play a role in redirecting legal researchers to established online archives like *Wayback Machine*. While this digital archive doesn't necessarily capture all the important elements of the blog, it captures many important blog posts. A collaborative approach between law faculty and law librarians would go a long way in facilitating future archival projects as stakeholders inform each other's work and a common strategy is found both at the creation stage and the archival stage. While legal librarians continue to examine the question of digital preservation in law libraries, they can learn from other repositories' strategies already in place around the world and leverage new software platforms like *Forever*. The responsibility of preserving legal blog content is both the author's and the information professional's and the first step to recognizing and capturing authoritative authorship outside the formal law review publication system is to discuss this at the national level.

<sup>49</sup>Jordon Steele & Ed Greenlee, "Thinking, Writing, Sharing, Blogging: Lessons Learned from Implementing a Law Library Blog" (2011) 103:1 Law Libr J 120.



## III Reviews / Recensions

Edited by Kim Clarke and Nancy McCormack

***Acoustic Jurisprudence: Listening to the Trial of Simon Bikindi.* By James E.K. Parker. Oxford: Oxford University Press, 2015. x, 251 p. Includes bibliographic references and index. ISBN 978-0-19-873580-9 (hardcover) \$98.50.**

In *Acoustic Jurisprudence*, James Parker provides a valuable contribution to the study of law and sound by examining how the International Criminal Tribunal for Rwanda (ICTR) determined a musician's culpability for acts of genocide. The case studied in this book is that of Simon Bikindi, a Rwandan musician accused of inciting genocide with his music. The trial took place at the ICTR between September 2006 and December 2008. Bikindi's songs contained virulent anti-Tutsi lyrics and had been played repeatedly on Radio Rwanda in the early 1990s at the time of the Rwandan genocide. Although he was brought to trial because of his music, his ultimate conviction rested on several statements he was found to have made over a loudspeaker by the side of the road in 1994.

Parker's main criticism of the tribunal is that it failed to ask certain critical questions about the sound-law relationship. He contends that conventional legal analysis is unequipped to deal with questions of sound in general, and consequently he advocates for a shift in the way in which jurists view the relationship between sound and law. His main argument is for the development of an acoustic jurisprudence, or in Parker's own words, "...an orientation towards law and the practice of judgment attuned to questions of sound and listening" (p 2).

This book has four parts. In part 1, *Acoustic Jurisprudence*, Parker reviews historical and contemporary approaches to the sound-law relationship, thus setting the scene for the analysis that follows. Following this, he provides an overview of the Rwandan genocide, the establishment of the ICTR by the United Nations, and the Bikindi trial. After setting the context in part 1, Parker moves on to analyze the substance of the trial. There are two threads to his analysis. The first thread can be described as sonic imagination, which refers to the way in which the ICTR "...thought about acoustics for the purposes of judgment, the diverse techniques by which it made the acoustic amenable to legal analysis, the language it used, its assumptions and blind spots" (p 7). The second thread of analysis is the judicial soundscape, which pertains to the way that "...sound operated in the courtroom, what juridical work it did, the techniques by means of which it was used, ignored, co-opted, or otherwise perceived" (p 7). Both threads are woven throughout the remaining three parts of the book.

In part 2, *Song*, Parker examines the theories of music that were presented during the trial and the impact these theories had on the Tribunal's decision. He critically examines the way in which music was brought into the courtroom as evidence, and how the music was heard and understood by the court.

In part 3, *Speech*, Parker analyzes the concept of 'voice' as the Tribunal understood it, and he offers an alternative critical approach based upon the works of scholars such as Shoshana Felman, Judith Butler, and Julia Kristeva. He also recounts the various roles played by voice within the judicial soundscape of the trial.

Part 4, Sound, is concerned with how the Tribunal conceived of the role of the radio during the Rwandan genocide. Parker criticizes the Tribunal's conceptualization of the radio as a simple broadcasting tool, and instead offers a more nuanced view that considers the radio's role in contextualizing, shaping and framing the listening experience for Rwandan listeners.

While reading, I anticipated that Parker would at some point offer an alternative account of Bikindi's songs and their role in the genocide. To my initial disappointment, he did not provide such an account. However, on reflection, I believe this was a wise decision. To offer an alternative account of Bikindi's music may have detracted from the focus of Parker's work, which was to provide a rationale and framework for the development of an acoustic jurisprudence. In my estimation, he was successful in this project. He not only developed a vocabulary to describe an acoustic jurisprudence, he also developed a workable set of methods that could be employed by jurists in future cases containing acoustic dimensions.

*Acoustic Jurisprudence* is uniquely positioned as the first in-depth study of Simon Bikindi's trial. As such, it would make a valuable addition to any library with a collection focused on international criminal law. Furthermore, and perhaps more importantly, this is the first modern work of legal scholarship to address the relationship between sound and law. As the dimension of sound touches upon just about every area of law, this book would make a valuable addition to any law library.

REVIEWED BY  
LESLIE TAYLOR

Reference/Technical Services Librarian  
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***The Business of Innovation: Intellectual Property Transactions and Strategies in the New Economy.* By Martin P.J. Kratz, and Kevin L. Laroche (eds). Toronto: Carswell, 2016. xxi, 321 p. ISBN: 978-0-7798-7239-8 (softcover) \$149.00.**

The *Business of Innovation* is an in-depth guide to the practical side of monetizing intellectual property. The book has 14 chapters, each written by a different author with expertise in that particular area. The advice provided is generally very practical in that it explicitly sets out what readers should be looking at and the steps required to do certain things.

The book begins with a discussion of the business importance of intellectual property. Intellectual property is not just a source of income, but also serves as a way of strategically blocking competitors. Chapter 2 includes useful information about creating non-disclosure agreements (NDAs), but it would have been helpful to include an annotated sample of an NDA. Likewise, although the section on business

assessment is clearly and concisely written, more information about invention disclosure would have been helpful, e.g., when do inventions thought up by employees belong to the organization?

The book moves on to discuss intellectual property asset transactions. The use of diagrams makes it easier to understand the interrelationship between licensor, licensee, and other parties, particularly when discussing more complex transactions, like asset-backed securitization transactions. Also helpful is the use of real life examples, such as Bowie bonds, since it makes it much easier to understand how the process works and why someone would choose that particular transaction type (for example, in the case of David Bowie, a one-time payment was desirable for tax reasons).

Chapter 4 covers intellectual property due diligence. There are a number of reasons for due diligence, particularly when it comes to major transactions. The author points out what isn't going to turn up in external reviews (e.g. pending patent applications are generally confidential) and what can lead to omissions (eg misspellings), and considerations when limiting searches. The chapter finishes by noting that a "well-crafted intellectual property due diligence report can ... enable the client to assume responsibility for the ongoing care and protection of the intellectual property."

The next few chapters deal with specific aspects of intellectual property transactions: valuation (Chapter 6), taking and enforcing security (Chapter 7), taxation (Chapter 8) and accounting (Chapter 9). The overview of valuation is very clearly written and includes a discussion of the pros and cons of the various approaches. Chapter 7 covers the criteria used to evaluate intellectual property as intangible collateral, how to set up security interests (including the issue of multiple jurisdictions), the relevant federal statutes, and what the various remedies for lenders are. Chapter 9 explains the challenges with accounting for intangible assets, referring readers to the relevant portions of the CPA Canada Handbook.

Chapter 10 discusses insuring against litigation-based transaction risk. Managing intellectual property infringement falls into two categories: preventing others from infringing your rights and ensuring you don't infringe someone else's rights. It is important to minimize these risks given the high costs of intellectual property litigation. The author notes that although no Canadian insurer offers insurance against such litigation, Canadian companies can obtain this insurance through U.S. underwriters. The chapter discusses key elements of insurance policies as well as the pluses and minuses of three commonly available insurance policies.

The book then moves on to discuss intellectual property rights relating to specific types of organizations: universities (Chapter 11) and government (Chapter 12). Both these types of organization have specific needs; for example, the goal of university intellectual property management is not the same as it would be for a commercial organization. While universities want to benefit from licensing their research,



they also have public policy concerns, particularly when that research was sponsored by public funds. The author looks at challenges specific to universities: licensing intellectual property rights from a university, providing intellectual property to a university for research purposes, and the importance for universities to be able to publish research results.

The chapter on technology transfer and government starts off with a discussion of understanding government culture and how it affects technology transfer. The author notes that while in corporations everything is allowed unless specifically prohibited, in government it is the other way around. There is also a conflict between transparency and confidentiality. The author discusses various special considerations when drafting technology transfer contracts with the government, not least ensuring you are referring to the correct legal entity.

The next chapter deals with public policy options to encourage innovation. Generally incentives fall into one of two categories: either directly subsidizing research and development (R&D) or offering favorable tax treatment. There is an overview of R&D incentives in a range of other countries, both front-end and back-end. The book wraps up with a discussion of commercial value and patent validity. A patent has no commercial value if it is not valid, and accordingly most patent litigation focuses on patent validity. This chapter looks at the kinds of arguments made by those arguing a patent is invalid.

Because the chapters were written by different authors, a number of the chapters start off with an overview of IP law. I would have preferred to see a discussion of the various types of intellectual property and their general legal considerations right at the start of the book, rather than revisiting this information multiple times over the course of the book. It would also allow intellectual property lawyers (who, it is assumed, are the target audience for this book) to skip over that chapter and head straight to the information that they need. I would have also appreciated a list of all the abbreviations used (e.g. CRA, DCF, VIU) as well as a glossary.

*The Business of Innovation* is a well-written and clearly laid out guide to the subject. I would recommend it for any law library with an intellectual property collection.

**REVIEWED BY**  
**SUSANNAH TREDWELL**  
Manager of Library Services  
DLA Piper (Canada) LLP

***Citizen Journalists: Newer Media, Republican Moments and the Constitution.* By Ian Cram. Cheltenham, U.K.: Edward Elgar, 2015. Xi, 195 p. Includes tables, bibliographic references and index. ISBN 978-1783472697 (hardcover) \$110.00.**

*Citizen Journalists: Newer Media, Republican Moments and the Constitution* is a timely book. In a way, that might be its biggest fault – that the book covers a subject that is continually evolving and has so recently played a large part in world politics. Published in 2015, the book covers much of the political and social implications of citizen journalism, but occasionally falls short of addressing some of the issues recently associated with this movement. As an example, the development of “fake news” and its implications for society are eventually discussed by the author, but the book is written too early to give the subject the weight it deserves today.

Indeed, the book may cause readers some frustration as they wait for certain questions or arguments to be addressed. Patience is key here, however, as Cram leaves little left unacknowledged.

In Chapter 2 (by far the book’s most compelling chapter), the author paints a decidedly idealized portrait of citizen journalism. Cram emphasizes how this new model of communication escapes being filtered by the elite when citizen journalists report on stories which traditional media is either unable to or unwilling to cover. Further into Chapter 2, however, Cram does concede that we are not witnessing a cyber-utopia and dives into the negative side of citizen information sharing, pointing out the inherent flaws in this utopian vision of freedom of information.

It is only a quarter of the way into the book that the reader remembers this is a law book. Up to this point, in presenting the political theory and background related to the topic, the book reads more like a political science or communications text. Cram does eventually discuss legal issues, however, focusing primarily on U.S. law and darting occasionally over to the United Kingdom and other countries for comparison.

In Chapter 3, Cram probes the idea of freedom of speech, outlining how British and American courts have recognized, or failed to recognize, free speech when it is controversial or offensive in some way. Here again, the idea of misinformation or false statements comes up, but seems only to be mentioned in passing. The right to anonymity is raised in the context of British law and how statements made online interact with the author’s right to remain anonymous. This chapter gets somewhat bogged down, periodically, by the discussions of freedom of speech and hate speech, which pose some complex questions. Is a random person’s Twitter comment about wanting to blow up an airport considered “citizen journalism?” Is a person seeking others on Facebook to help kill a minority group a “citizen journalist?” Granted, a discussion of freedom of speech is necessary when examining journalism, but occasionally the chapter seems to offer up examples that veer far away from what the reader might consider as “journalism.”

Chapter 4 is more focused, and it addresses the questions of the previous chapter, with a discussion about what is actually meant by “the press.” This needs to be defined, according to the author, in order to apply laws and rights to those individuals. Cram asks, “Should... irregular, unplanned, unpaid and non-professional acts of news dissemination entitle their creators to claim the benefits (whatever they may be) of free standing press clauses?” This chapter offers a detailed look at the United States’ first amendment “freedom of the press,” and compares it with how the U.K. and other countries address this issue. It also offers arguments for both an inclusive and exclusive definition of “the press,” and how these definitions have helped to shape law.

Finally, a whole chapter is devoted to the question of juries, and how the ease of access to the internet has affected the courts’ abilities to regulate biases of juries during trials and the regulatory responses to the “googling juror.” This chapter lays out specific instances where access to information and access to misinformation can affect a trial process, which further illustrates problems associated with citizen journalism.

Overall, the book meets its goal in setting out how digital communications and the rise of the citizen journalist have altered the landscape of the media and political engagement in general. Anyone interested in the subject will certainly find *Citizen Journalists* a fascinating and informative read.

REVIEWED BY  
**EMILY LANDRIAULT**

Brian Dickson Law Library  
University of Ottawa  
Ottawa, ON

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***Handling Provincial Offence Cases in Ontario 2016.***  
By John P. Allen and Justice Rick Libman. Thomson Reuters Canada Limited, 2016. 642 p. ISBN 978-0-7798-7070-7 (softcover) \$111.00.

*Handling Provincial Offence Cases in Ontario* is a comprehensive and practical publication that should be carried in every practitioner’s briefcase. This handbook includes everything you need in order to understand the process of matters prosecuted under the Provincial Offences Act. It is written as a manual that discusses each stage in the process and sets out relevant case law.

The authors, Justice Libman and John P. Allen, explain the process in a clear way that can be easily understood by the lay person, as well as students and advocates. The book is written using everyday, natural language, and the font throughout is easy on the eyes.

The book is logically organized from the issuing of a ticket to the completion of the trial. The roles and responsibilities of the Justice, Prosecutors and the Defence Advocate are clearly outlined.

*The Rules of Professional Conduct* are included, as these apply also to matters under the Provincial Offences Act which is, itself, included. The history of the Act is explained as are various types of offences and relevant case law. There is a handy checklist that is very useful for those new to this area, and serves as a useful reminder for the seasoned advocate.

Also covered are common offences and defences. Procedural issues that often arise are explained in a way that is easy to understand, as are the differences between mens rea, strict liability and absolute liability offences.

The section on trials illuminates this complicated process. The book explains the how and the why of pre-trial applications, such as publication bans and excluding witnesses. It addresses filing deadlines and the importance of keeping them. It simplifies the rules of evidence without minimizing them, illustrates the various forms that evidence can take, and defines the rights of an accused person, as guaranteed by the *Canadian Charter of Rights and Freedoms*, including the right to counsel and the right to silence.

The readers’ attention is also drawn to special proceedings. The authors explain the differential treatment with young persons, as required by law, as well as the bail process and how a hearing is to be conducted.

A section on sentencing itemizes the options available under the *Provincial Offences Act*. Submissions on sentencing are often enhanced with case law. This book includes many useful cases on sentencing options.

Also included is information on appeals. The authors describe the procedure for the appeal process and help the reader navigate through the process.

I found the inclusion of common forms to be very helpful. These include the offence forms, the court forms, appeal forms and probation orders. The handbook also has an alphabetized list of the Provincial Offences Courts in Ontario, along with their physical addresses, telephone numbers, facsimile numbers and their email addresses. The Index was easy to follow.

I would recommend the purchase of this book to the lay person, students and colleagues. It is so comprehensive that it is probably the only book you would need.

REVIEWED BY  
**BOBBIE A. WALKER,**  
Certified by the Law Society  
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***The Intellectual Property Regulatory Complex: Overcoming Barriers to Innovation in Agricultural Genomics.* Emily Marden, R. Nelson Godfrey, and Rachael Manion. Vancouver: UBC Press, 2016. xv, 255 p. Includes index. ISBN 978-0-7748-3178-9 (bound) \$65.00.**

We're in a horrible fix. We have centuries of agricultural knowledge behind us, and yet one billion of us go hungry every night. This book proposes that part of the solution to this predicament is to breed more nutritious, resilient, and higher-yielding crops, and that such efforts are continuously thwarted by the legal complex which is the book's namesake. *The Intellectual Property-Regulatory Complex* consists of eight differently-authored chapters, each with a different approach to the problem, but all assuming that agricultural genomics, properly regulated, can be of great social benefit.

What exactly is the IP-Regulatory Complex? According to the book's editors in the Introduction, agriculture is subject to two legal systems that are typically looked at distinctly: intellectual property, which protects and encourages innovation, and regulatory approvals, which aim to regulate human health and safety. The authors propose that these two systems collectively impact the agricultural industry and genomics research, and cannot be properly understood in mutual isolation. Taking such a global view is both ambitious and laudable. Unsurprisingly, the book does not provide a simple solution to the incredibly complex legal problems it identifies, but it does provide a rigorous and fertile discussion for anyone who is interested.

Aside from the above, it is difficult to generalize about the book's content. After reading each of the eight papers, I get a sense that over the past century, farming and plant breeding, historically the same occupation, have diverged to the point where breeding new crop varieties is the privilege of a few large companies, which alone can afford the expensive trials of obtaining regulatory approvals for new crops, and which guard their inventions with IP protection in various forms. Given the expense of obtaining approvals and IP protections, these international corporations develop a small number of varieties for mass distribution, which tends to create a monoculture and threaten diversity, and thus long-term health and safety.

National interests and farmers' advocacy groups resist this tendency by forming international collectives and treaties to protect their rights, while small farmers, particularly in developing nations, invent ways, including "stealth seeds," that can take advantage of genetic innovations while avoiding the consequences of IP protections. But presently, big agribusiness, with the help of national legislators and international trade organizations, is aggressively expanding their increasingly pervasive and rigid system of IP protections.

Not all of the authors would agree with the above characterization as such, and none would put it so bluntly, but that is my reading. It is a difficult book because of the complexity of the issues, and because of the technical language and political shorthand the authors often use,

which may be advantageous to experts, but can also obscure meaning.

One example would be Sarah Hartley's piece on *The Treatment of Social and Ethical Concerns in Regulatory Responses to Agricultural Biotechnology*. Hartley capably argues that a "scientific" agenda has suppressed public consultation on "social and ethical issues." She uses the latter phrase dozens of times without mentioning what those issues are. In a single paragraph mid-way through the chapter, she makes a quick reference to corporate control of the agricultural sector and the impact of big agribusiness on small farmers, which means the issues she vaguely alludes to throughout are actually economic in nature.

Hartley, and the authors of the book generally, seem unable to write the word capitalism, despite its key role in what is happening in world agriculture. This is of course a rule of polite discourse – avoid politically-charged words – but I for one would have found the book as a whole, and particularly the chapters most sympathetic to the world's farmers and food consumers, more arresting and convincing if they were able to name and discuss (a little) the economic elephant in the laboratory, so to speak.

But this is really a book about agricultural law. As such, my reading into it an underlying battle between human survival and big money may be reductive. At least a couple of the papers place the balance of hope in genomic "innovators" (i.e., large companies such as Monsanto) to lead the way to a better fed world.

If you find this book to be a bit bleak, as I did, try jumping to the final chapter for a ray of hope, where Rochelle Cooper Dreyfuss proposes a new approach to legislation based on the European concept of *acquis*, or the accumulated body of long-standing doctrines, practices and norms that are embodied in national laws. Dreyfuss maintains that invoking the *acquis* in the international IP context would result in a better balance of public and private interests and a more robust, flexible legislative regime for agricultural innovation.

This book boldly defines a new topic in international law. It will, hopefully, find its way into all of Canada's major legal libraries.

REVIEWED BY  
**KEN FOX**, Reference Librarian  
Law Society of Saskatchewan Library



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**Law and Mind: Mental Health Law and Policy in Canada.** By Jennifer A. Chandler and Colleen M. Flood. LexisNexis Canada, 2016. 495 p. Includes table of contents, table of cases, and index. ISBN 978-0-433-48668-8 (softcover) \$130.00.

There is a paucity of Canadian textbooks dedicated to mental health issues under civil or criminal law, notwithstanding that one in five Canadians is coping with mental health problems or addiction at any one time. The authors of *Law and Mind: Mental Health Law and Policy in Canada* point out that mental health is an issue for people around the world, and mental health problems touch all demographic groups. It can affect physical health (or vice versa), and the cause or causes may be complex or unknown. Factors such as poverty, or other social factors, may increase the risk of mental illness, which in turn can lead to social marginalization, stigma, and discrimination, and contribute to further health issues.

Mental health law touches on nearly all other areas of law because the people who are affected will be navigating their lives, as all people do, according to the legal system of the society. In the last 15 years, however, there has been an evolution in both the civil and criminal law in the area of mental health.

The book contains 19 chapters, each written by a separate contributor. The first two chapters are written by the co-

editors, respectively, Professor Jennifer Chandler, University of Ottawa Faculty of Law, and Colleen Flood, Director, Ottawa Centre for Health Law, Policy and Ethics. Even though the chapters stand alone, these two chapters should be read before the other chapters, as they summarize the history of and complex social system surrounding mental health law, as well as the overlapping issues under both civil and criminal law, and the effect of policy and role of government on all persons involved in our system.

In Chapter 1, Professor Chandler describes the scope of the book. She also sets out three themes that arise in the book, namely the contested and changing concepts of mental health and illness, the evolution of mental health care and mental health law in Canada, and the gradual rise of human rights law to protect people from discrimination including mental health disability.

Professor Chandler points out society has pathologized conditions that are not illness. She notes: "psychiatry and medical approach can be taken too far...psychiatry... expanding, and normal shrinking." One well known example is homosexuality which was historically treated as an illness and was not removed from the Diagnostic and Statistical Manual of Mental Disorders until 1973. It was also considered a crime in this country and was not effectively decriminalized until 1995.

In Chapter 2, then, Flood and her chapter 2 co-author, Bryan Thomas, make a strong case that our society has failed our population on mental health issues. Society, they assert, needs to eliminate “the shadows that allow inequity and stigma to flourish.”

The chapters (3-19) which follow focus on specific issues under the themes within the complex system of government and law, respectively and more particularly and from the point of view of the particular author’s knowledge and expertise. Areas covered include the *UN Convention on Rights of Persons with Disabilities*, consent, hospitalization, community treatment orders, privacy, malpractice, the criminal justice system and mental health services in Canada corrections. Other chapters focus on the mental health of specific segments of our society, including elders, children, indigenous people and refugees.

The index to the book is detailed and very usable, while the Table of Cases offers an easy guide to the page in this text where a case is cited. My suggestion for the next edition is to add a Bibliography listing research papers referred to in the book.

*Law and Mind: Mental Health Law and Policy in Canada* is a significant contribution, and will be useful to families and individuals involved in the health care system. For over 12 years, lawyers have consulted related key works such as *A Guide to Consent & Capacity Law in Ontario*, by D. Hiltz and A. Szigeti. Those authors dedicated their book as follows: “For families and individuals who live courageously with mental illness, the good doctors who try to give them what they need and the dedicated lawyers who try to get them what they want.” I believe those words apply to the book reviewed here as well. And I would add “...and what is their right. And for the good government, our health care system, advocates, medical researchers, and legal scholars, who are trying their best to move forward together to provide the public the best and affordable treatments, and support the search for causes, cures, best treatments, and all without bias and discrimination.”

The book is highly recommended for students, practitioners and academics and will serve as a basis for understanding areas requiring law reform and policy changes. The book should be compulsory reading for all advanced undergraduate or graduate studies including law, sociology, health care sciences, political science, administration, general liberal arts or science.

**REVIEWED BY  
WILLA M. B. VORONEY,  
B.Sc., LL.B**

***The Law of Declaratory Judgments.* By Lazar Sarna. 4th ed. Toronto: Thomson Reuters, 2016. lxxxi, 423 p. Includes table of cases, related statutes, precedents, bibliography and index. ISBN 978-0-7798-7248-0 (hardcover) \$256.00.**

This book is all about DJs. No, not “disc jockeys” but “declaratory judgments.” This is a specialized textbook that applies to a wide variety of practice areas. It is clear that the fourth edition has been substantially reorganized and expanded. Aside from the obvious fact that 50 pages have been added to the book, numerous subheadings have been added, particularly in chapters 4 (Jurisdiction), 5 (Practice and Procedure), 6 (Statutes and Orders in Council), 11 (Property) and 14 (Judgments). Chapter 3, on the subject of “Discretion”, has also been substantially reorganized.

One of the biggest changes in the content of the text is the discussion of article 142 of the Quebec Code of Civil Procedure, which reformulated the declaratory power in that province in 2016. Given that the author practices in Quebec, there are many sections throughout the text that address the unique laws applicable in that jurisdiction. It does, however, fully address the common law, as well.

The author also comments on a number of recent cases, including *Mounted Police Association of Ontario v Canada (Attorney General)*, [2015] 1 SCR 3, 2015 SCC 1; *Hryniak v Mauldin*, [2014] 1 SCR 87, 2014 SCC 7; *SL v Commission scolaire des Chênes*, [2012] 1 SCR 235, 2012 SCC 7; and *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44, 2010 SCC 3; as well as recent appellate cases from various provinces.

In my opinion, a number of pages are wasted by including related statutes and the American Uniform Declaratory Judgments Act as appendices. Those materials may easily be found online and, of course, are subject to change.

Perhaps the most useful addition to the fourth edition is the “Summary Checklist for Precedents” included at the start of Appendix B. It provides a helpful half-page list for counsel preparing applications for declaratory relief. However, I note that the two new precedents added to the fourth edition (regarding contractual and administrative matters) are both American. Oddly, the new material in the Appendix is underlined, as though still presented in “track changes” mode. As well, the final precedent continues to be offered solely in French. In fact, all of the precedents are only available in one language. It should also be understood that the precedents are taken from specific cases; they are not blank forms intended for counsel to simply fill in. Instead, they illustrate how declaratory relief was sought in other cases.

This publication is the Canadian equivalent to Jeremy Woolf’s *Zamir and Woolf: The Declaratory Judgment*, 4th ed (London, UK: Sweet & Maxwell, 2011). The only other Canadian texts on this point are the now dated Quebec-focused text by Danielle Grenier and Marie Paré, *La requête en jugement déclaratoire en droit public québécois*, 2nd ed (Cowansville:

Éditions Yvon Blais, 1999) and Edwin Upenieks and Robert J Van Kessel's *Enforcing Judgments and Orders*, 2nd ed (Markham: LexisNexis Canada, 2016). However, *Enforcing Judgments* only spends one chapter discussing declaratory judgments, so clearly it does not cover the subject in the same amount of detail as Sarna's text. It does, however, contain an appendix relating to actions for declaratory and injunctive relief.

Libraries that have previously purchased Sarna's text on declaratory judgments will want to purchase the latest edition, in order to ensure that their coverage of this topic is up-to-date. The law in this area has changed substantially since the third edition was published in 2007. Libraries serving civil litigators, constitutional law specialists, public interest lawyers or others interested in obtaining declaratory relief may find this to be a useful additional resource for their collections.

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REVIEWED BY  
**MELANIE R. BUECKERT**  
Legal Research Counsel  
Manitoba Court of Appeal

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***Pocket Ontario OH&S Guide to Violence and Harassment.* By Dilys Robertson. Toronto, ON.: Thomson Reuters, 2016. iii, 10 p. ISBN 978-0-7798-7306-7 (softcover coil/spiral) \$11.00.**

*The Pocket Ontario OH&S Guide to Violence and Harassment* is Dilys Robertson's adaptation of her own Ontario Occupational Health and Safety Act: Quick Reference 2016. It is one of four guides created by Robertson, with each focusing on a different topic covered in the Occupational Health and Safety Act. This guide looks solely at violence and harassment as dictated in the Act, also factoring in the amendments made by the Sexual Violence and Harassment Action Plan Act effective September 8, 2016.

The quick-read guide is divided into four sections as outlined in the Table of Contents. The first section, "Overview" summarizes the Occupational Health and Safety Act, the violence and harassment provisions within the Act, and defines some relevant terms including "violence," "harassment," "domestic violence," and "bullying" as they are applied in the Act.

The second section, "Requirements Relating to Violence and Harassment under the Occupational Health and Safety Act" consists of a chart of violence and harassment program requirements for workplaces governed under the Act. It cites the appropriate sections and subsections.

The third section, "Ministry of Labour Guidelines" is not so much a list of the actual guidelines, but rather, a reference list to four resources published by the Ontario Ministry of Labour. These describe proper workplace violence and harassment policy and practice.

The fourth and final section, "Compliance Checklist" is a bulleted series of eleven "yes-or-no" questions directed to violence and harassment policy implementers. The purpose is to verify whether or not a workplace's policy is compliant with the Act.

All in all, the *Pocket Ontario OH&S Guide to Violence and Harassment* is a decent supplement, but by no means a replacement for the full-text of the Occupational Health and Safety Act. It may be useful for human resources professionals, workplace policy implementers, or others who could potentially refer specifically to the violence and harassment provisions within the Act on a somewhat regular basis.

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REVIEWED BY  
**MEGAN SIU**  
Community Development & Education Specialist  
Centre for Public Legal Education Alberta (CPLEA)

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***Power of Persuasion: Essays by a Very Public Lawyer.* Sir Louis Blom-Cooper. Oxford: Hart Publishing, 2015. xvi, 374 p. With a Foreword by The Right Honourable Lord Dyson. ISBN 978-1-849468169 (bound) \$60.00.**

The author of *Power of Persuasion: Essays by a Very Public Lawyer*, Sir Louis Blom-Cooper QC, is a British barrister specialising in public and administrative law. He has been a leader in the field of public law for many years and has been at the forefront of administrative law throughout its modern development. He has held an academic appointment at the University of London from 1962 to 1984 and written extensively on all areas of law.

Blom-Cooper is, to say the least, an impressive figure. He served as chair of the Mental Health Act Commission, as a judge in the Court of Appeal of Jersey and of Guernsey, and has been a Bencher of the Middle Temple since 1978. He chaired over twelve Inquiries including those dealing with child abuse and mental health, advocating for innovation in penal reform. He sat as a Deputy High Court Judge on housing and judicial review cases. He was appointed by the Secretary of State for Northern Ireland as the first Independent Commissioner for the Holding Centres and was later called to the Bar of Northern Ireland and granted Silk in Northern Ireland.

In this learned legal memoir, Blom-Cooper presents a collection of essays which bring us through the different stages of this varied and interesting career. His belief in the power of persuasion and advocacy serves to seamlessly link the essays presented.

Essays are grouped into five sections: public law, judicial and judicious review, crime and justice, penal affairs, media law and miscellany. Subjects covered include the development of separation of powers, consideration of reform to the law of homicide, the role of jury trial in our justice system, and the proper development of media law and regulation. Blom-



Cooper is interested in how the law can help frame a good and just society, and his lively writing includes anecdotes, sources, cases and personal accounts derived from conversations and discussions.

The essays cover a lot of ground and serve to promote discussion and reflection. For example, the history of maximum penalties, presented in the essay on Penal Affairs, details how attempts were made to move penal policy forward, not always successfully. Comparisons between the British and American systems remind the reader of how the law has evolved differently, but how one is able to learn from both approaches.

In the final section, entitled Miscellany, Blom-Cooper turns to a reflection of two of his judicial heroes, Lord Reid and Lord Bingham. It's great fun to read about the work and exploits of these highly respected and well-known legal colleagues. These reflections, however, also reveal the intricacies and

dedication of those individuals who have chosen this to make this their profession.

This book is recommended for all academic law library collections, and will appeal to scholars and to those looking for insight on various legal topics. Although the lay person might be challenged by the depth of the legal arguments presented, the book will keep that person engaged. Law students and practitioners, no doubt, will be drawn to the stories and to the absorbing history recounted. This collection should be of greatest interest, though, to advocates who strive to persuade and to advance the state of the law as well as the legal profession.

REVIEWED BY

**MARGO JESKE**

Director, Brian Dickson Law Library

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## Call for Submissions

*Canadian Law Library Review/Revue canadienne des bibliothèques de droit*, the official publication of the Canadian Association of Law Libraries, publishes news, developments, articles, reports and reviews of interest to its members. Surveys and statistical reviews prepared by the Association's Committees and Special Interest Groups, regional items and the proceedings of the Association's annual conference are also published.

Contributions are invited from all CALL members and others in the library and legal communities. Bibliographic information on relevant publications, especially government documents and material not widely publicized, is requested. Items may be in English or French. Full length articles should be submitted to the Features Editor and book reviews to the Book Review Editor. All other items should be sent directly to the Editor. Prior to publication, all submissions are subject to review and editing by members of the Editorial Board or independent subject specialists; the final decision to publish rests with the Editorial Board. If requested, articles will undergo independent peer review. Items will be chosen on their relevance to the field of law librarianship. For copies of the Style Guide please consult the CALL website at <<http://www.callacbd.ca>>.

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*Canadian Law Library Review/Revue canadienne des bibliothèques de droit*, l'organe officiel de l'Association canadienne des bibliothèques de droit, publie des informations, des nouveautés, des articles, des rapports et des recensions susceptibles d'intéresser ses membres. Des enquêtes et des relèves statistiques préparés par les divers comités de l'Association et par les groupes d'intérêt spécial, des nouvelles d'intérêt régional et les procès-verbaux du congrès annuel de l'Association sont également publiés.

Tous les membres de l'ACBD ainsi que toute autre personne intéressée à la bibliothéconomie et faisant partie du monde juridique sont invités à soumettre des articles. La revue sollicite également des commentaires bibliographiques d'ouvrages de nature juridique et plus particulièrement de publications officielles et de documents peu diffusés. Les contributions peuvent être soumises en français ou en anglais. Les articles de fond doivent être envoyés à la personne responsable des recensions. Avant d'être publiés, tous les textes seront revus par des membres du Comité de rédaction ou par des spécialistes de l'extérieur. La décision finale de publier relève toutefois du Comité de rédaction. Les articles pourront, sur demande, faire l'objet d'un examen indépendant par des pairs. La priorité sera accordée aux textes se rapportant à la bibliothéconomie juridique. Pour obtenir des exemplaires du Protocole de rédaction, visitez le site web de l'ACBD au <<http://www.callacbd.ca>>.

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## III Bibliographic Notes / Chronique bibliographique

By Susan Jones

**Caroline L. Osborne, "The Legal Research Plan and the Research Log: An Examination of the Role of the Research Plan and Research Log in the Research Process" (2016) 35:3 Legal Reference Services Quarterly 179-194.**

Many new legal researchers, particularly students and new associates, begin their research by diving headlong into the task, whether that's by turning on the computer or cracking open the books. What's missing in this approach is any forethought and planning which, according to the author of this article, is key to conducting effective and efficient research that produces a quality, reliable end-product. In this article, Caroline L. Osborne, Assistant Dean for Legal Information Services and Professor of Legal Research at Washington and Lee University School of Law in Lexington, Virginia, advocates for the use of legal research plans. She begins by providing a brief definition of a legal research plan and offering a few general comments on what it might look like. She then goes on to outline the five common elements of any legal research plan, explain the importance of the research log to the legal research process, and finally, share a few of the benefits of using a legal research plan.

Most readers probably understand what's meant by a legal research plan, but the author does provide a brief definition of a plan as "a strategy for finding information on an identified topic." She then goes on to define strategy as "the planning or conducting of an operation." Legal research plans are useful to everyone from the novice to the expert, but the plan might look different depending on the researcher's experience and expertise. A legal research plan doesn't have

to be written down, but it's the author's opinion that only the most experienced lawyers can mentally develop a complete, well-formed plan. For this reason, the author recommends committing the research plan to writing, whether it's a few notes scribbled on a scrap of paper or a detailed, typewritten plan. As for the level of detail required for a legal research plan, that really depends on the experience of the researcher and the complexity of the research question. As the author notes, a partner with 40 years of experience probably requires a less-detailed plan than a law student or new associate.

When discussing what a legal research plan looks like, the author devotes a large part of her article to outlining the five common elements of any plan. The first common element is the identification of the legally relevant facts, both known and unknown. When presented with their problem, researchers should sift through all of the available facts to identify those that are legally relevant to the question at hand. At the same time, they should also identify those facts that are needed, but not known. The identification of the relevant facts is a key step in the development of a legal research plan because a firm understanding of the facts will help researchers to spot potential areas of research.

The second common element in any legal research plan is the statement of the legal issue(s). This idea is also called formulation of the question and refers to the identification of the legal issues to be researched. This is an important step in the research process because it gives researchers some idea of the extent of the research involved. To help in the development of the issue statement, the author

suggests that researchers consider a few questions: Civil or criminal law? Federal or state law? Who, what, when, where, and why? What relief is sought? Identification of the issue usually requires some familiarity with the area of law associated with the matter at hand. It's important to note, too, that identification of the legal issue is a work-in-progress. Throughout the research process, the issue may change or need to be refined. The goal in this step of the process is to create a first draft of what will ultimately become the finely-honed question in the final memo or brief.

The third common element of any legal research plan is the identification of the appropriate jurisdiction. This step in the process is essential for focussing the researcher's attention, narrowing the scope of relevant information, and finding the most persuasive, authoritative case law. If there are multiple issues involved, researchers should consider each issue separately as more than one jurisdiction may be implicated. Practically-speaking, the identification of the jurisdiction usually just appears as a phrase in the plan.

The fourth common element is the identification of the useful resources and their order of intended use. Creating a list of the resources most likely to produce relevant information not only helps researchers to plan their research, but to identify which resources are readily available and those that may need to be obtained through interlibrary loan. When selecting resources, researchers should consider the complexity of the issues and their own knowledge of the area of law involved. When it comes to evaluating those resources, researchers should consider cost, efficiency, availability, content, coverage, currency, and credibility. The author notes that thorough and efficient research generally requires the use of online and print resources. Contrary to the belief of many students and new associates, not everything is available online and some types of research are easier to conduct in print (e.g., historical statutory research). Furthermore, the tables of contents and indexes in print resources are particularly useful for researchers who are unfamiliar with an area of law. When developing a list of useful resources, researchers should also take note of a resource's updating tools, including pocket parts, replacement pages, supplements, and citators. Similar to the statement of the legal issue, the identification of resources is an evolving process. In fact, according to the author, this is the most fluid element of the planning process. It's common to return to this step of the plan as researchers learn more and better understand the issues involved.

The fifth and final element of any legal research plan is the identification of search terms. This step, which the author identifies as the most difficult one, helps researchers develop efficient and effective searches. When creating a list of search terms, researchers should consider synonyms, antonyms, truncated terms, and phrases. To this end, the author offers a few helpful tips for generating keywords. First, she refers to Christina Kunz's "hub and spoke" approach, which involves choosing one word or phrase as the hub, then identifying synonyms and other related terms as the spokes of the hub. The author also suggests using a

good dictionary and thesaurus. Finally, researchers may not think about secondary sources in this step of the process, but the tables of contents and indexing in those resources are very useful in trying to understand legal concepts and in identifying search terms. At this step of the planning process, some researchers will also write out their search strategies, which is particularly useful when using Boolean operators and other connectors. Writing or typing them out helps researchers understand what they're telling a database to do and makes it easier for them to see when they may need to refine their search strategies.

Once the legal research plan has been formulated, it's time to implement or execute the plan. During the implementation phase, new issues and questions may arise and the plan may need to be revised. For this reason, the author recommends that researchers take detailed notes throughout the execution of the plan. One way for researchers to record their efforts is with a research log, which is simply a complete list of the resources they consulted and their notes about what they found. In the article, the author provides an illustration of a simple research log in table format that captures the date information was accessed, a citation to the source of information, location of the information, brief summary of the information, currency of the information, and whether the information still represents good law. Even this minimal amount of information is useful, but researchers may want to include other details, too, including author, title, edition, year of publication, and call number of a resource; words and phrases; database name or identifier; names of organizations and institutions specializing in the relevant area of law; well-known works on the topic and authors writing in the relevant area; and Library of Congress subject headings. With a comprehensive log in hand, researchers can avoid duplicating their efforts and ensure they've consulted all the relevant resources.

At this point, some people may be thinking that preparing a legal research plan is a lot of work, and while that may be true in some cases, it's work that comes with rewards. One of the greatest benefits of a legal research plan is that researchers are more likely to carry out their work efficiently and accurately with a well thought-out strategy at hand. Starting the research process by turning on a computer and typing random terms into Google or the one-size-fits-all search box of an online database is an inefficient and costly approach that can result in inaccurate and incomplete results. Yet, it's the approach frequently used by students and new associates. Students' and lawyers' time is valuable, but thinking through a research project in an organized and methodical manner is time well-spent and reduces the chance that vital and relevant information will be missed. Another benefit of an organized and systematic approach to legal research is that it informs the legal writing process. And if you think legal research plans are only for complicated research questions, think again. According to the author, a legal research plan benefits the quick research problem that a senior partner expects to be answered in a couple of hours just as much as it does any complex ones.



In conclusion, a legal research plan is key to efficient and effective research for both quick research questions and multi-issue, complex projects. Researchers should create a plan that suits their project, style, and experience, but regardless of the form, all should address the identification of facts, issues, jurisdiction, resources, and search terms. For examples of research plans – including a flow chart plan, checklist plan, and quick-version plan – consult the illustrations in the author's article. Throughout this piece, the author also references other articles that may be of interest to readers who want to learn more on this topic, including articles with tips for starting the research process, how to overcome research obstacles, and note-taking in the legal research process.

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**Aditi Bandyopadhyay & Mary Kate Boyd-Byrnes, "Is the Need for Mediated Reference Service in Academic Libraries Fading Away in the Digital Environment?" (2016) 44:4 Reference Services Review 596-626.**

The abundance of readily-accessible information online has had a significant impact on libraries, and some people – citing declining reference statistics – have questioned whether there's a continued need for mediated reference service in today's digital environment. This is the question addressed by authors Aditi Bandyopadhyay, Associate Professor at the University Libraries at Adelphi University in Garden City, New York and Mary Kate Boyd-Byrnes, Associate Professor at the University Libraries at Long Island University in Brookville, New York. In this article, the authors review the scholarly literature to consider the transformation of reference service in academic libraries; the effects of library instruction, supplemental digital resources, and embedded librarianship on reference transactions; and the current trends in reference transactions and reference staffing. Then, through a series of reflective questions and with reference to the published literature, the authors determine whether mediated reference service in academic libraries has a future in today's digital environment. Although the article focuses on academic libraries, many of the authors' conclusions will be of interest to anyone providing reference service and to those who want to demonstrate why professional librarians' skills, knowledge, and expertise are not only needed, but are a necessity, in today's technology-driven environment.

To begin, the authors consider the transformation of reference service in academic libraries. Traditionally, librarians acted as intermediaries, connecting users to the library's collections and resources and guiding them to the trusted sources of information based on their specific needs. Librarians' intermediary role began to change, however, as information moved online, databases became remotely available, government and other forms of reliable information became freely accessible, and Google became the preferred method of searching for students and faculty. With information now available at their fingertips, and from any location and at any time, it wasn't necessary for users to visit the bricks-

and-mortar library. These changes in access to resources, along with budget constraints and declining reference statistics, forced libraries to adapt their reference service to respond to the new needs of users. In the last ten years, these adjustments have included roving reference service, consolidated public service desks, tiered reference service, "on-call" models of reference service, virtual reference service, and supplemental digital resources. Even with this transformation in reference service, the authors point out that the primary job of reference librarians hasn't changed – that is, to help users find what they need. But in today's technology-driven environment, reference librarians may now also serve as teacher, instructional designer, research assistant, collection specialist, data curator, communications expert, marketing consultant, program supervisor, project manager, and Web developer.

The authors also reviewed the published literature to consider the effects of library instruction, supplemental digital resources, and embedded librarianship on reference transactions. Librarians have always provided instruction in some form or another, but with the recognition of the importance of information literacy to the development of critical thinking skills in the 1990s, there was a new interest in library instruction at academic institutions. This was also the time when the World Wide Web was emerging and with so much information available online, it was more important than ever to educate students about the critical evaluation and interpretation of information. Reference librarians continued to help people use resources, but now they were also teaching them how to find reliable and authoritative information on their own. So what's the impact of library instruction on reference transactions? According to the literature surveyed by the authors, opinions are divided on this question. Some view information literacy instruction as a form of self-help and believe it could be one of the reasons for the reported decline in reference transactions. Others, however, believe library instruction has a positive impact on reference transactions since students who receive instruction are more likely to seek assistance at the reference desk. The authors offer their own personal observations on this question, noting that formal library instruction sessions help students make connections with librarians, understand what resources and services the library has to offer, and develop a level of comfort with the library and its staff. But the authors have also witnessed how the lack of library instruction creates a need for reference service, too. They often answer the same question repeatedly when multiple students approach the reference desk for help with the same course assignment.

When it comes to the supplemental digital resources created by librarians (e.g., online tutorials, instructional videos, online research guides), the impact isn't clear from the literature and the authors suggest this is an area that requires further study to better understand their effect on reference service. The authors identify embedded librarianship as another area in need of further research. Integrating librarians into classrooms, online courses, and other spaces is a trend that's still evolving, but what literature is available on this

topic suggests that embedded librarianship has a positive impact on reference transactions.

As part of their literature review, the authors examined what was reported about the current trends in reference transactions in academia. One of those trends is the reported decline in reference transactions. Students and faculty no longer feel the need to visit the library in person to seek assistance in finding ready reference or factual information. They're also content to look for scholarly literature on their own, either by accessing the library's resources remotely or, more likely, by using Google or Google Scholar. In this era of declining reference statistics, librarians have reported receiving more complex, labour-intensive questions that require a good understanding of the breadth of resources available and that can only be answered by consulting multiple sources. However, it's a claim that's not borne out in the literature, which suggests that most reference questions are simple, directional, or policy-related and don't require the skill, expertise, and knowledge of a reference librarian to answer. Again, the authors offer their own observations on this point. In their experience, many students who seek their assistance have difficulty in effectively communicating what they need. Very often, their seemingly basic questions can turn into multi-faceted, time-consuming queries following a thorough reference interview by a librarian.

Another current trend in reference transactions reported in the literature is the rise in popularity of individual research consultations with reference librarians. The studies reviewed by the authors show that these consultations are valued by students for providing guidance, building confidence, finding resources, developing search strategies, locating authoritative information, navigating websites, and reducing library anxiety and technology-induced stress. The authors themselves also report the positive impact of individual research consultations at their respective institutions, noting this type of reference service is in high demand.

The other current trend in reference transactions discussed by the authors is virtual reference service provided through chat, texting, Instant Messaging, and social networks. This type of reference service has become important in reaching distance learners and users who can't or won't visit the library in person. One study reports that 85 per cent of academic libraries are using some form of virtual reference service, but the published literature also suggests that the success of these efforts is mixed. Many studies discuss the common problems with providing virtual reference service, including staffing, funding, and the challenges of conducting a proper reference interview. Low usage of the service is reported in many studies, too, although the authors identify a few studies showing that virtual reference service significantly increased the number of reference transactions. At one of the author's own libraries, the virtual reference service implemented a year-and-a-half ago was still used infrequently. Moreover, many of the queries were instructional ones and necessitated speaking to the user by telephone to have a meaningful discussion about the research process.

The authors close off the first half of their article with a discussion of the current trends in staffing reference services. The decline in reference transactions, along with significant budget cuts in many libraries, have had an effect on reference service staffing. Following the reports about the nature of the questions at reference desks—that they're mostly basic, directional, and policy-related—some academic libraries have implemented tiered reference service. In this model of service delivery, paraprofessionals and trained student assistants staff the reference desk; respond to the basic, directional, and policy-related questions; and refer any other queries to reference librarians. It's meant to be a more cost-effective means of providing reference service that allows professional librarians to spend more of their time teaching and attending to other responsibilities. However, it's a service model that presents many challenges. As noted in the literature, some types of questions are difficult to assign to a staffing level. These include questions about the library catalogue and database searching, or questions that require a good understanding and familiarity with the range of library resources available. Tiered reference service also requires a lot of training for those on the front line. Students, especially, may need significant training to prepare them to serve as the first point of contact for users. It's training that's best provided by reference librarians, which is both time-consuming and adds to their workload. Also of concern is the high turnover of student workers as they graduate and move on, worries about the quality of service, and unease about whether questions are being appropriately referred to reference librarians.

In the second half of their article, the authors consider, through a series of seven reflective questions, whether mediated reference service in academic libraries has a future in today's digital environment. The first question they consider is whether reference is a rigid service. The published literature shows that reference service in academic libraries isn't rigid, but responsive to change. Many libraries have expanded their reference service to include new initiatives to reach and interact with users, including roving reference service, more instruction sessions, supplemental digital resources, embedded librarianship programs, virtual and tiered reference service, and consolidated public service desks.

The second question the authors consider is whether reference transactions are decreasing in all types of institutes. The literature reviewed by the authors suggests this question doesn't lend itself to a clear yes or no response. Although many studies support the claim that reference transactions are declining, the authors point to other studies that say otherwise. When looking behind the studies reporting a decline, many of the libraries surveyed turn out to be research libraries. There are other studies that focus on masters' degree-granting institutions in which libraries report no decline, or in some cases, an increase in reference transactions. All of this is to say that the decline in reference transactions reported in the library literature may not represent the experience of all academic libraries. For this reason, one researcher suggests that libraries investigate

the reasons behind the increase in reference transactions at some institutions before deciding to remove librarians from their own reference desks.

The third question addressed by the authors is whether traditional reference desk service matters anymore. The studies reviewed by the authors come down on both sides of this question, but yes, the traditional reference desk and the service offered from it matter very much in some libraries. When studies asked librarians why they continue to provide service from a reference desk, they mentioned the teachable moments it offers, their responsibility to provide professional service, and the pride they take in offering that level of service to students. But as important and valuable as the traditional reference desk is to some librarians, there isn't a one-size-fits-all approach to reference service. The author of one study suggests that libraries focus on the quality of the service they provide, and take a holistic approach to reference service that considers the needs of students, faculty, and librarians.

The fourth question posed by the authors is whether technology is replacing librarians in academic libraries. As the author of one study proclaims, technology enhances what librarians do, but it will never become a substitute for person-to-person reference service. Behind all the technology-based reference service – email, chat, Instant Messaging, social media – are librarians. And if they're not librarians, they've been trained by librarians. What's more, several studies show that many of the questions received through technology-based services are complex and require the skill, knowledge, and experience of a librarian to answer.

The fifth question the authors consider is whether digital resources are always easy to use. Few online resources can be used effectively and to their best advantage without some type of training, and librarians play an important role in that respect. Every database is different, with different search templates and search syntax, and they're always changing with the implementation of new features and options and the addition of new content. Library users have varying skill levels when it comes to using digital resources and there will likely always be a need for training. Furthermore, the literature reviewed by the authors shows the enrollment of first-generation university students, distance education students, and older students is on the rise and these user groups may face challenges in terms of access to technology and information literacy.

The sixth question considers what's special about mediated reference services. The literature surveyed by the authors demonstrates that human-to-human interaction is still valued by library users. In one study, almost 70 per cent of first-year university students preferred face-to-face reference service to virtual or voice-only options. In another study, students offered several reasons for favouring face-to-face contact with a librarian during research consultations, including librarians' immediate responses to their questions; their assistance in navigating large websites; their expertise, experience, and opinions; their guidance through the research process; and their selection of reliable, credible resources. Interestingly,

students also reported valuing the opportunity to establish a relationship with librarians, as well as deriving comfort and confidence from the person-to-person contact.

The seventh and final question considered by the authors is whether reference librarians or human-mediated reference service are needed in today's academic libraries. The library literature shows that the need and importance of mediated reference service continues in today's digital environment. One study recounts the complaints from students when reference librarians were removed from the reference desk in favour of an on-call model of reference service. In another case, a library took a second look at its decision to move to a tiered reference model because the complexity of the questions received through its chat reference service required an understanding of the research process and the available resources that went beyond what was expected of student assistants and paraprofessionals. Technology has made it much easier for users to find information on their own, but it hasn't turned them into expert researchers. Reference librarians are still needed to help users understand how to select reliable and authoritative resources, how to critically evaluate the information they've found, how to determine if the information is relevant to their assignment, and how to use that information ethically and responsibly.

As the authors ably point out in the conclusion to their article, there's no technology that can match humans when it comes to logical thinking, critical interpretation and synthesis of information, and information's contextual application. The digital environment has certainly made it easier to access information, but the number of resources available can be overwhelming. And while it may be easy to access information and resources, users still need guidance to learn how to use those resources to their best advantage, how to identify the credible sources of information, and how to determine if what they find is relevant to their purpose. For all these reasons, mediated reference service continues to play a vital and important role in academic libraries, despite the increasingly technology-driven environment in which we work today. Of interest to some readers will be the authors' suggestions for future research, including looking at what, besides technology, may be holding users back from seeking the assistance of reference librarians; how changes in course offerings and types of assignments affect reference transactions and library instruction; what supplemental digital resources students are using and their impact on reference transactions; and embedded librarianship and its effect on reference transactions. Finally, the authors include an extensive bibliography of the scholarship referenced and discussed in their article.





## III News from Further Afield / Nouvelles de l'étranger

### Notes from the UK

#### London Calling!

By Jackie Fishleigh\*

Hi folks,

#### Terrorist attack on Westminster

I am writing this on the day of the funeral for Police Constable Keith Palmer, who was guarding the Houses of Parliament on the 22<sup>nd</sup> March when he was stabbed by Khalid Masood. Five thousand police officers lined the streets for the cortege which went through the gates of Westminster where PC Palmer was killed and on to Southwark Cathedral, where the funeral took place.

The attack itself was a shocking event in the heart of London, which, although it lasted just 90 seconds, left the following in its wake:

- Mother-of-two Aysha Frade, US tourist Kurt Cochran and retired window cleaner Leslie Rhodes died after Masood drove his car into people on Westminster Bridge.

- Romanian tourist Andreea Cristea was knocked into the Thames from the bridge. Although she was pulled onto a passing boat, her injuries were severe. She died just over two weeks later.

- Moments after the bridge attack, PC Keith Palmer, 48, was stabbed to death outside the Houses of Parliament.

- People from 11 countries were among the dead and 50 injured.

- As of 7th April, six people remained in hospital.

About 10 years ago I attended an event at the House of Lords. Representatives from BIALL were invited to a St Patrick's Day ("Ulster fry") breakfast near the terrace by the river. It was an important day for me and so I recall being surprised how low key the security was: a couple of policemen were at a side entrance and then an elderly member of staff welcomed us into the cloakroom. Since then I'm sure security has been tightened but I doubt it will ever become like Fort Knox because the very nature of our parliament includes an element of openness and transparency, with MPs appearing out of cars and even from the nearby tube station as they go to work for their constituents.

Indeed the next day the following fake sign appeared at a London Underground station:

"All terrorists are politely reminded that THIS IS LONDON and whatever you do to us we will drink tea and jolly well carry on thank you."

#### Brexit and the triggering of Article 50 (of the Lisbon Treaty)

I hope you will forgive me for devoting the rest of this column to "our" highly contentious exit from the European Union. In fact, I am grateful for the opportunity to write about this without fear of upsetting/annoying/boring those who voted leave AND those who are sick of talking/hearing about it!

The triggering of Article 50 on the 29<sup>th</sup> March this year took effect by a formal letter, in which the UK announced its intention to leave the EU in 2 years' time. The historic message was conveyed on the Eurostar train from London to Brussels in a secure carriage and then hand-delivered to EU president Donald Tusk by Britain's EU ambassador, Sir Timothy Barrow. For Europhiles it was a traumatic day, while for Leave voters a source of some happiness/satisfaction. I didn't see much in the way of celebration or gloating. I think those who wanted to "take back control" of our borders etc are aware of how profoundly upset we so called Remoaners (remainers) genuinely are.

The four nations of the UK are deeply split among themselves and the entire episode has been painful for many and still is.

The Scottish independence referendum in 2014 was more polarising than Brexit and, even bitterly divided families. One of the unintended but not unforeseen consequences of the referendum is the renewed call for an independence referendum north of the Border. Although it was described as a once in a generation event, First Minister Nicola Sturgeon and the Scottish Parliament are now asking a reluctant Theresa May for a second bite at the cherry. Meanwhile the situation in Ireland is even more fragile. Any restoration of hard borders between Eire, which is an enthusiastic EU member, and Northern Ireland, which voted strongly to remain, could potentially jeopardise the peace process and the historic Good Friday Agreement. The latter was reached in multi-party negotiations and signed on 10 April 1998.

On brighter days I can see three ways of looking at the whole mess that make it appear slightly less than just an "enormous mistake," which is how my good friend Natalie describes it. She is a lecturer in International Relations and has had a book published on Turkey and the EU.

My first positive is that unlike in many European countries, here in the UK we do not have any popular extreme right wing political parties. So that is something to celebrate. If alt-right parties seize power in France, Germany or Italy I may feel glad we have escaped. The referendum really wasn't a party political issue here at all.

Secondly it could be seen as a "correction." The UK has always had an extremely chequered relationship with the European Communities (EC) as it was called back in early 1970s when we joined. Being an island with strong ties to the US and the Commonwealth, we have always been somewhat set apart from the Continent on many levels. Now after nearly 45 years of belonging in the European club, it seems that for many it has all got to the stage where they can no longer cope with its influence and have to break out.

Thirdly, given the unpredictable world in which we now live, perhaps, just perhaps, if we are very lucky things may work out ok!

Having said that, I simply do not believe that, as long as we smile, invoke the bull dog spirit and work our socks off, that

we will get great trade deals and prosper. As I have said in this column previously, if you are in the biggest trading block in the world i.e. the EU single market, why, oh why would you want to leave? We have been warned that Canada has taken more than 7 years and counting to get a trade deal with the EU. Won't we just seem desperate and treacherous when we look for alternative trading partners? Even more so with our 2 year deadline hanging over us?

I'll end with two self-penned limericks. The first was written in the run up to Christmas 2016, the second one is only weeks' old:

### Remainers' Lament Limerick

In June, we had an ill-considered referendum  
It's contentious, so I hesitate to mention  
But it really gets my goat  
That despite a very narrow vote  
We're leaving, jeopardising all our futures and my pension.

### Remainers' Lament Limerick – Part Two

In March, Article 50 was finally triggered  
The wretched letter was taken to that nice Mr Tusk and delivered  
It seems that the Euro-whingers have won  
But I'm not sure we're quite done...  
Despite anger in Edinburgh, Belfast, Gibraltar and even a wobble in Wales....May has just bludgeoned and dithered.

There is now a battle over Gibraltar, which voted by over 80% to stay in the EU. Although it only has about 30,000 residents it is extremely close geographically to Spain and of great strategic importance to the UK. Our PM Theresa May has just added Gibraltar to her list of "bargaining chips," along with UK citizens in the rest of the EU and EU citizens currently resident in the UK.

The "wobble in Wales" refers to the recent comment of Carwyn Jones, the First Minister who said that although Wales voted to leave the EU, the Welsh did not vote for job losses and a weakened economy.

How things will play out over the next two years nobody can really be sure. I am crossing my fingers that a chain of events will gradually unfold that may temper the referendum result or at least ameliorate the fall-out.

With very best wishes.

Until next time!

JACKIE

## Letter from Australia

By Margaret Hutchison\*\*

Greetings again,

It's been what's known as an "angry" summer here in Australia. This has been hottest summer on record, with 45.8 degrees in Sydney, record floods in northern New South Wales and Queensland, massive bushfires in Tasmania and New South Wales, and cyclones & tornadoes throughout.

Autumn is slowly coming, the trees are starting to turn but they might just drop their leaves because of stress from the heat and Australia is coming to life again. Unfortunately not due to zombies or euthanasia as promised last time.

Western Australia (WA) just had a state election and the Liberal and National parties who shared power (but not a coalition) have lost it in a massive swing to the Labor Party. This is mostly due to state issues, such as the end of the mining boom resulting in high unemployment, government over-spending, voter fatigue (with the government having been in power for over eight years) and a controversial preference deal with Pauline Hanson's One Nation Party.

WA has also been in the news for other reasons. One is the implications resulting from the decision in *McGlade v Native Title Registrar* [2017] FCAFC 10.

For many years, the State of Western Australia had been negotiating an alternative settlement arrangement to resolve the numerous overlapping native title claims that cover the Perth Central Business District (CBD), metropolitan area, and the South West of Western Australia. Those negotiations ultimately resulted in a commercial deal being struck with the native title claimants, in which the traditional owners would agree that native title does not exist in the South West of WA, in exchange for a significant package of financial and non-financial benefits.

A condition essential to the completion of the deal was the registration of a series of settlement Indigenous Land Use Agreements (ILUAs). Six ILUAs were negotiated and executed pursuant to resolutions made at authorisation meetings in early 2015, and the State applied to the National Native Title Tribunal (NNTT) for their registration.

Although the ILUAs had been signed in conformity with the relevant meeting resolutions, not all persons who jointly made up the registered native title claimant in each claim had executed the agreements, either because they were deceased or for other reasons. In the case of one ILUA, a person did not sign the agreement until after it was lodged for registration. When the proposed registration of those ILUAs made public by the NNTT, a number of people made formal objections about the registration of four of the ILUAs.

The Full Court's decision in this case declares what has been heavily relied on over the last six years as settled law in relation to who needs to sign an ILUA on behalf of native title parties to be incorrect.

Under section 24CA of the Native Title Act an agreement will be an ILUA if it meets certain requirements, one of which is that all persons in the "native title group" for an area are parties to any ILUA in that area, as set out in section 24CD. The section defines the "native title group" for an area to include "all registered native title claimants" in relation to the area.

The individuals authorised by a native title claim group to jointly comprise the "applicant" for a registered native title claim over an area also jointly comprise the registered claimant for that area (sections 253 and 61(2) of the NTA).

However, in *2010 QGC Pty Limited v Bygrave (No 2)* [2010] FCA 1019, Justice Reeves decided that section 24CD did not mean that every individual comprising each registered claimant for an area was a mandatory party to any ILUA to be made over that area, or that such individuals were required to assent to or sign the ILUA. All section 24CD required was that one or more of the individuals comprising each registered claimant for the area be named as a party to the ILUA.

In the ensuing six years, the National Native Title Tribunal has registered many ILUAs in reliance upon *Bygrave 2* - that is, in circumstances where not every person who makes up the registered claimant has executed the ILUA. *McGlade* is the first Full Federal Court decision to consider the correctness of *Bygrave 2*.

### The Full Court decided that:

- in order for an agreement over a registered claim area to qualify as an ILUA under section 24CA, all individual members of each registered claimant for the area would have to sign the agreement;
- contrary to previous thinking, the authorising group does not have power to direct the registered claimant to act in any way other than unanimously;
- if any member of the registered claimant does not sign, the only way the agreement could become an ILUA would be for the non-signing member (or members) of the registered claimant to be relieved of their post using the process in section 66B of the NTA (involving a claim group authorisation and Federal Court application); and
- a section 66B application to dismiss non-signing members will be needed before an agreement can be considered to be an ILUA, even if the reason they have not signed is that they are dead!

In light of the *McGlade* decision, governments, resources proponents, pastoralists and others who have relied on registered ILUAs to validate their future acts have to review their agreements to determine how many of them were registered, on the strength of *Bygrave 2*, notwithstanding the absence of a "full set" of registered claimant signatures.

The consequence of the Full Court's decision is that future acts contained in any agreements with "missing" signatures may be invalid. In other words, the validity of the grant of



mining and petroleum tenements and other interests that had been validated through the ILUA registration process is now at risk.

Further, the ramifications of the decision are likely to extend beyond ILUAs. It appears that in all circumstances, including with respect to making right to negotiate, cultural heritage and other agreements, instructing lawyers or taking steps in a native title claim, and despite any direction to the contrary that may be given by the claim group, the individuals who comprise an applicant or a registered claimant will be required to act unanimously.

The Commonwealth Government is moving to confirm the validity of more than 120 ILUAs that were registered despite not all members of the registered native title claimant having executed the agreement.

The Commonwealth has indicated that it will also ensure that ILUAs lodged for registration both before and after the recent decision without all members of the registered claimant having signed the agreement may be considered for registration. The *McGlade* decision cast real doubt on the validity of numerous mining and petroleum tenements and other interests granted in reliance on the ILUA registration process.

The Federal Attorney-General has announced that the Commonwealth will introduce legislation "urgently" to reverse the effect of the decision in *McGlade* and legislatively reinstate the Federal Court's decision in *QGC Pty Limited v Bygrave (No. 2)* [2010] FCA 1019.

This of course, is not the end of the matter as the case was heard by the Full Bench of the Federal Court and an appeal is likely to the High Court in the next few months.

Last month saw the reasons for judgment handed down for the case of Senator Culleton, the former One Nation Senator from Western Australia. The High Court, sitting as the Court of Disputed Returns, held that Mr. Culleton was convicted at the date of the 2016 election, and that the subsequent annulment of the conviction had no effect so he was ineligible to sit as a Senator. The Court held that the resulting vacancy should be filled by a special count of the ballot papers so now his replacement Senator for Western Australia representing Pauline Hanson's One Nation Party is his brother-in-law, Peter Georgiou.

The other matter from the last election concerning Senator Day from South Australia has been heard but the judgment has been reserved.

That sitting, a fortnight earlier, saw the swearing-in of Chief Justice Susan Kiefel as the first female Chief Justice. There are female Chief Justices in several states and of the Family Court but Chief Justice Kiefel is the first female Chief Justice of the High Court. A stand out point was when she handed her commission of office to the most senior of the puisne judges, Justice Virginia Bell. Another first was that the swearing in ceremony was broadcast live on the Australian Broadcasting Corporation's News 24 channel. That af-

ternoon, James Edelman was sworn in as Chief Justice Kiefel's replacement. Between the two swearing in ceremonies and the senior/Queens Counsel ceremony the next day, the entire menu of canapés of the caterers was offered around.

To finish, some photos of the Canberra Balloon Festival last weekend, there were hundreds of people there although the fog rose and the balloons couldn't lift off. The humming bird and the Smurf are guest balloons this year.



And just to prove Canberra really isn't a good sheep paddock ruined, as it has been described in the past, a photobombing merino from the Royal Canberra Show!



Until next time,  
MARGARET

## The U.S. Legal Landscape: News From Across the Border

By Julienne E. Grant\*\*\*

I've been putting off writing this column because I truly didn't know where to begin. How can I explain the dismal state of my own country to a foreign audience? After contemplating this for a while, I decided to let the headlines speak for themselves. Here's a smattering of them from the March 16, 2017 CNN app: "Trump changes story after wiretap claim," "Did Trump mistakenly leak CIA intel?," "2<sup>nd</sup> federal judge blocks Trump's new travel ban," "Meals on Wheels could take funding hit in Trump budget," "Leahy: Can't run presidency with air quotes," and "Poll: 55% of voters disapprove of Trump's handling of health care." You get the idea.

We are only into the 3<sup>rd</sup> month of the Trump presidency, and the nation is cloaked in a general sense of dread. We're exhausted and worn down from hyperbolic tweets, political turmoil, poorly conceived executive orders, Mar-a-Lago, and Kellyanne Conway's babble. What do Americans do when the going gets tough? We turn to humor. Political satire has made a striking comeback in the US; it's brash, edgy, and rip-roaringly funny. Saturday Night Live (SNL) has its highest viewer ratings in over 20 years<sup>1</sup> and with good reason. Lampooning the new President, AG Jeff Sessions, WH Press Secretary Sean Spicer, and the older Trump kids, SNL has hit the comedy jackpot. In the dark days of Chicago's winter, I have sought solace with my iPad to watch snippets of these hilarious sketches.<sup>2</sup>

On a more serious note, though, I return to the matter at hand, which is reporting on US legal developments over the past three months, and there are a lot of them. The Trump presidency receives so much international attention that I didn't think it warranted much space here, although I couldn't help but include a few law-related tidbits. The ABA Journal named its top legal stories for 2016, and 2017 ushered in an array of new state laws. SCOTUS will hear some compelling cases this spring and may even have a 9th Justice by the end of the term. There's also law school and firm news, as well as a fiery incident in a Miami courtroom. As the world turns.

### The ABA Journal's Top Legal Stories of 2016

In late December 2016, the ABA Journal published its list of the top legal stories of the year.<sup>3</sup> At number one was unsurprisingly Donald J. Trump's "shocking" win, followed by Justice Scalia's death at number two. In 3<sup>rd</sup> and 4<sup>th</sup> places respectively were Russia's hacking of the US presidential election and the "Panama Papers." Coming in at number five was a near-record year for M & As. In 6<sup>th</sup> place was the Brexit vote, followed by "police shootings and civil unrest" at number seven. Hulk Hogan's \$140 million win (\$31 million settlement) over Gawker for violating his privacy rights and intentional infliction of emotional distress (I remember this tort well from my law school days – "extreme and outrageous conduct") fell in at number eight. North Carolina's

transgender restroom law controversy earned 9<sup>th</sup> place, and China's crackdown on NGOs and human rights lawyers rounded out the list. Honorable mention went to FBI Director James Comey whose schizophrenic treatment of Hillary Clinton's private email server was blamed by some circles for Clinton's loss of the presidential election. Personally, I would have switched the placements of the Hulk Hogan and James Comey stories, but whatever.

### New State Laws: the Pirogue is not a Pierogi

A January 2 article in the Christian Science Monitor reported on new state laws effective on January 1.<sup>4</sup> California, Massachusetts, and Nevada are now on the growing list of states permitting the recreational use of marijuana. (Getting high in Maine also became legal, beginning on January 30 after a ballot recount on Dec. 21, 2016.) Nineteen states raised their minimum wage, including Alaska, Arizona, New York, Ohio, Vermont, and Washington. The concealed carry of loaded guns without registration or training is newly allowed in Idaho, Mississippi, Missouri, and West Virginia. In Washington, law enforcement and citizens can now utilize extreme protection orders to keep firearms away from people who are deemed dangerous to others or themselves.

Here in Illinois, 192 new laws hit the books on January 1. According to the Chicago Daily Law Bulletin,<sup>5</sup> Illinois may be the first state in the US to require hairstylists to receive training to detect domestic abuse. Illinois is now the first Midwest state to provide legal protection for housekeepers, nannies, and home caregivers. The law shields them against sexual harassment, guarantees payment of at least the minimum wage, and requires a minimum of one day off each week. An article in the local Elgin Courier-News<sup>6</sup> described a new law that permits Illinois police K-9 handlers to get first dibs on adopting their retiring pups. And finally (drum roll) on a lighter note, Illinois has a new state artifact – a Native American canoe called the *piroque*. Apparently, some Illinois lawmakers initially confused this with the pierogi, a Polish dumpling well-known in these parts.

### SCOTUS News

Law360 summarized SCOTUS Chief Justice John Roberts' [Year-End Report on the Federal Judiciary](#) after it was released in late December 2016.<sup>7</sup> According to the Report, there were fewer cases filed in SCOTUS during the 2016 term than in the previous one. Specifically, in the year ending on September 30, 2016, eight percent fewer cases were filed than during the 2015 term: 6,475 cases, down from 7,033. These figures are indicative of a steady decline in SCOTUS filings; there were 8,159 filings, for example, in the 2009 term. This downward trend, however, contrasts with the proliferation of filings in the federal district and appellate circuit courts. District courts saw a five percent increase this past term, while circuit court filings were up by 15 percent. In the Report, Justice Roberts noted that the typical federal district court judge manages more than 500 cases concurrently, and he lauded those judges for the vital role they play in the national judiciary.

SCOTUS returned to work on January 9, still awaiting a new colleague to be seated on the bench. On January 11, the eight Justices heard arguments in [Endrew F. v. Douglas County School District](#). In that case, the Justices were asked to decide the appropriate level of educational benefits that school districts must confer to disabled children to comply with the [Individuals with Disabilities Education Act](#) (IDEA). On January 18, the Court heard [Lee v. Tam](#), a case mentioned in my last column. That case involved a challenge to the US Patent and Trademark Office's denial of a request to trademark the name of an Asian-American rock band, The Slants. The Office claimed that the name was disparaging to people of Asian descent and denied the trademark based on section 2(a) of the [Lanham Act](#). That section precludes the registration of trademarks that disparage people, institutions, beliefs, or national symbols. The Oregon-based band posited that the denial was an infringement of its First Amendment right to free speech.

According to a Chicago Daily Law Bulletin article, the Justices seemed somewhat perplexed during oral arguments on where to draw the line on sanctioning ethnic and racial slurs.<sup>8</sup> Justices Kagan, Breyer, Kennedy, Sotomayor, and Ginsburg all had views about the matter, pressing the band's attorney who argued that the First Amendment should permit trademark approval of almost any expression. The Court's opinion, expected in June, will also have an impact on litigation involving the Washington Redskins football team; the trademark for its team name was revoked in 2014 on the grounds that it disparages Native Americans.

Other SCOTUS First Amendment cases on this year's docket are [Expressions Hair Design v. Schneiderman](#) (oral argument, Jan. 10, 2017) and [Trinity Lutheran Church of Columbia v. Pauley](#) (oral argument, April 19, 2017). The former involves a merchant's description of a credit card "surcharge," and the latter whether Missouri violated the First Amendment's free exercise clause, as well as equal protection, by financing rubber playground surfacing at public and secular private schools, but not at religious schools. Another SCOTUS opinion to watch for is [Hernández v. Mesa](#) (oral argument, Feb. 21), which examines whether the Fourth Amendment's prohibition of the use of unjustified lethal force applies outside of US borders. Although some of the facts are disputed, the focus of the case is the death of a young Mexican boy at the hands of a US border control agent. Also noteworthy is the Court's decision to remand [Gloucester County School Board v. G.G.](#) to the 4th Circuit appeals court. SCOTUS made the decision in the wake of the Trump administration's rescission of the Obama-era guidance on the protection of transgender students. Check the [SCOTUSblog](#) for up-to-date SCOTUS developments.

In other SCOTUS news, Justice Ginsburg continues to inspire. The ABA Journal reported that an 8-year-old-girl from Columbus, Maryland dressed up as Justice Ginsburg for her school's superhero day.<sup>9</sup> Michelle Threefoot's [get-up](#) went viral online, and Justice Ginsburg saw it. Subsequently, the young Ms. Threefoot received a handwritten letter from the Justice herself, and Michelle was apparently quite thrilled. Speaking of Justice Ginsburg, I would love to be a "fly on the wall" when she first meets her new conservative colleague, who will likely be Judge Neil Gorsuch (see below).

Finally, worth mentioning here is the UC Berkeley School of Law Library's recently introduced online initiative to address "link rot" as it pertains to SCOTUS cases. The [US Supreme Court Web Citations](#) site captures web resources cited by SCOTUS. The tool's purpose is to minimize the disappearance of these links, and it attempts to provide snapshots of them as soon as possible after a decision is released.

### Nomination of Judge Neil Gorsuch for SCOTUS

President Trump wasted little time fulfilling a campaign promise to nominate a conservative for the SCOTUS vacancy by selecting Judge Neil Gorsuch. President Obama had nominated Judge Merrick B. Garland to fill the post, but Senate Republicans refused to give Judge Garland a hearing. Word is that Judge Gorsuch's first phone call after learning of his nomination was to Judge Garland.<sup>10</sup>

Judge Gorsuch is 49 and serves on the Denver-based US Court of Appeals for the 10th Circuit. He earned his undergraduate degree from Columbia, his law degree from Harvard, and a Ph.D. from Oxford. According to a New York Times piece, "An examination of his early formative years finds that he swam in the liberal waters of Columbia and Harvard and rebelled against the dominant thinking to develop a fully formed conservative philosophy that has propelled him to the threshold of the Supreme Court."<sup>11</sup> Indeed, his conservative views seemingly match the ideological void created by Justice Scalia's absence on the Court.

Predictably, GOP Senators were thrilled with the nomination, while Democrats are still seething over the Merrick Garland fiasco. Oregon Senator Jeff Merkley stated, "This is a stolen seat being filled by an illegitimate and extreme nominee, and I will do everything in my power to stand up against this assault on the court."<sup>12</sup> Other Democrats have taken a more "wait and see" approach. Various conservative groups, including the National Rifle Association, have endorsed the nomination, while the Center for Reproductive Rights, the National Women's Law Center, and Physicians for Reproductive Health are unsurprisingly opposed.<sup>13</sup> The ABA

<sup>1</sup>Molly Driscoll, "SNL set for first-ever episodes that are actually live across America after record-setting season," Christian Science Monitor (March 17, 2017), <http://www.csmonitor.com/The-Culture/TV/2017/0317/SNL-set-for-first-ever-episodes-that-are-actually-live-across-America-after-record-setting-season>.

<sup>2</sup>If you haven't seen Melissa McCarthy's depiction of WH Press Secretary Sean Spicer, you're missing out: <https://www.youtube.com/watch?v=fbh3XcNzGU> (Feb. 12, 2017).

<sup>3</sup>Victor Li, "The top legal stories of 2016," ABA Journal (Dec. 23, 2016), [http://www.abajournal.com/news/article/the\\_top\\_legal\\_stories\\_of\\_2016\\_do\\_you\\_have\\_others](http://www.abajournal.com/news/article/the_top_legal_stories_of_2016_do_you_have_others).

<sup>4</sup>J Walker Glascock, "Do new 2017 state laws hint at momentum for federal changes as well?," Christian Science Monitor (Jan. 2, 2017), <http://www.csmonitor.com/USA/2017/0102/Do-new-2017-state-laws-hint-at-momentum-for-federal-changes-as-well>.

<sup>5</sup>Sophia Tareen, "Nearly 200 new state laws take effect," Ch. Daily L. Bull (Jan. 3, 2017) at 1, 6.

<sup>6</sup>Gloria Casas, "Hundreds of new laws take effect for 2017," Elgin Courier-News (Jan. 2, 2017), <http://www.chicagotribune.com/suburbs/elgin-courier-news/news/ct-ecn-2017-new-laws-st-0102-20170102-story.html>.

<sup>7</sup>Kali Hays, "High Court Had Fewer Cases in '16 While District Loads Grew," Law360 (Jan. 3, 2017).



is officially neutral, but its Standing Committee on the Federal Judiciary has rated Judge Gorsuch as “well qualified,” which is the highest rating the Committee confers.<sup>14</sup> Law360 published an interesting collection of various attorneys’ views on Judge Gorsuch that were generally favorable, with several emphasizing his apparently exceptional writing skills and the geographic diversity he would bring to the Court.<sup>15</sup> By the time this column is published, the Senate will likely have made its decision. I predict some fireworks with the hearings, but I have to think that Judge Gorsuch will receive the constitutionally required advice and consent of the Senate. Although his ideology is too far to the right for Democrats, he has stellar credentials that will be hard to reject. For more on Judge Gorsuch, see the online “[Neil Gorsuch Project](#),” compiled by the Arthur J. Morris Law Library at the University of Virginia.

### Law School News

The Winter 2017 edition of *The National Jurist* included its list of the “Most influential people in legal education 2016.”<sup>16</sup> At the top of the list was Erwin Chemerinsky, Dean, University of California, Irvine School of Law, who is a highly influential and prolific constitutional law scholar. Others on the list of 25 include Eugene Volokh (No. 7), Marc Miller (No. 8), and a trio of Georgetown Law Center faculty (No. 16). UCLA Professor Volokh is a First Amendment scholar and administrator/contributor of [The Volokh Conspiracy](#) blog. Marc Miller is Dean of the University of Arizona James E. Rogers College of Law, which was the first US law school to allow entering students to submit GRE scores instead of LSAT results. (Harvard Law has also announced that it will accept GRE scores starting this fall). Georgetown Professor Peter Edelman, Vice Dean Jane Aiken, and Dean William Treanor spearheaded the creation of the D.C. Affordable Law Firm (DCALF) (a “low bono” law firm) in December 2015. DCALF employs six Georgetown Law graduates who provide services to those who don’t qualify for legal aid, but can’t afford lawyers.

On March 14, US News & World Report released its annual (2018) rankings of US law schools.<sup>17</sup> Yale ranked number one, as in all past years, followed by Stanford, which had tied for second last year with Harvard. Harvard dropped to third in this year’s rankings. The University of Chicago remained in 4th place, while Columbia dropped to 5<sup>th</sup>, after tying last year for 4th with Chicago. The other top 10 spots are held by NYU (6<sup>th</sup>), Penn (7<sup>th</sup>), Michigan and the University of Virginia (tied for 8<sup>th</sup>), and Duke and Northwestern (tied for 10<sup>th</sup>). Duke jumped up one spot from last year, and Northwestern two. The University of California – Berkeley dropped four spots from last year to number 12.

### Law Firm News

In early January, Law360 named its annual practice groups of the year for 2016.<sup>18</sup> There were 157 winning groups spread across 34 practice areas, based on the criteria of litigation victories and large deal closings. Three firms racked up victories in seven areas and earned “Firm of the Year” honors. Mayer Brown was tops in the appellate, banking, class action, food & beverage, life sciences, technology, and transportation categories. Skadden Arps beat out the competition in the areas of bankruptcy, capital markets, international arbitration, M & A, real estate, sports, and tax. The third winning firm was King & Spalding scoring the highest marks in international arbitration, international trade, life sciences, privacy, product liability, and white collar.

Law360 also published a list in January of “What Will Keep Law Firm Leaders Up At Night In 2017.”<sup>19</sup> According to the article, challenges facing firms this year include a flat demand for legal services, coupled with high cost pressures. Relatedly, an increasing volume of legal work is moving in-house, so law firms face the challenge of convincing clients to retain outside counsel. The recruitment of a more diverse workforce is another issue facing firms in 2017. And unsurprisingly, the new Trump administration poses challenges as firms attempt to anticipate their clients’ needs in an evolving and uncertain legal landscape.

Another January Law360 article, reporting on the National Association for Law Placement’s annual diversity report, indicated that women and black associates made small gains quantitatively at major US law firms in 2016, compared with the previous year.<sup>20</sup> These figures, however, are still lower than pre-2009 levels. Also noteworthy is a New York City Bar Association report showing “that one in four New York firms has no women on its management committee, and one in eight has no female practice group leaders.”<sup>21</sup> The same report indicated that among female partners in responding law firms, 85.2 percent were Caucasian, 7 percent were Asian or Pacific Islander, 3.6 percent were black, and only 2.5 percent were Hispanic.

### The Trump Presidency: See You in Court & How to Alienate the Legal Profession (and Your Sister)

In his role as US President, “The Donald” is already the defendant in a [number of lawsuits](#). In January, several prominent law professors (including Harvard’s Lawrence Tribe and UC Irvine’s Erwin Chemerinsky) joined Citizens for Responsibility and Ethics in Washington (CREW) in a suit alleging the President is violating the Constitution’s [emoluments clause](#). The clause is found in Article I, section 9, and essentially precludes US government officers from garnering economic benefits from foreign governments without Congressional approval. The [complaint](#) was filed

<sup>14</sup>Sam Hananel, “Offensive trademarks challenge court,” *Chi Daily L. Bull.* (Jan. 19, 2017), at 1, 6.

<sup>15</sup>Debra Cassens Weiss, “Ginsburg writes a personal note to an 8-year-old fan,” *ABA Journal* (Jan. 10, 2017), [http://www.abajournal.com/news/article/ginsburg\\_writes\\_a\\_personal\\_note\\_to\\_an\\_8\\_year\\_old\\_fan](http://www.abajournal.com/news/article/ginsburg_writes_a_personal_note_to_an_8_year_old_fan).

<sup>16</sup>Mary Clare Jalonick & Erica Werner, “GOP praises Gorsuch on trip to Hill,” *Chi Daily L. Bull.* (Feb. 1, 2017), at 1.

<sup>17</sup>Adam Liptak et al., “In Fall of Gorsuch’s Mother, a Painful Lesson in Politicking,” *NY Times* (Feb. 4, 2017), <https://www.nytimes.com/2017/02/04/us/politics/neil-gorsuch->

in the US District Court for the Southern District of New York. Meanwhile, NPR reported that two Washington, D.C. restaurateurs have also sued the President, claiming that his presidency is adversely affecting business at their wine bar.<sup>22</sup> More specifically, they claim that Trump's ritzy hotel in D.C. is attracting customers away from other local businesses, including theirs. The plaintiffs seek no monetary damages, but rather ask the President to divest his ownership interest or close the hotel. The [lawsuit](#) was filed in D.C. Superior Court on March 9.

President Trump is also not terribly popular with the legal community at large; specifically, his criticism of federal judges has not gone over well with the ABA. In a February speech to the ABA's House of Delegates, ABA President Linda Klein asserted, "Make no mistake, personal attacks on judges are attacks on our Constitution...Let us be clear. The independence of the judiciary is not up for negotiation."<sup>23</sup> What I find so puzzling is the fact that the President's older sister, [Maryanne Trump Barry](#), served as a federal judge for over 30 years (she is now on inactive status at the 3rd Circuit appeals court). Notwithstanding the inappropriateness of a US President criticizing federal judges, bashing a sibling's professional colleagues in front of a national audience seems absolutely outrageous to me.

### Law Library News: Scalia Papers at Harvard & "A Carnival of Animals" at Yale

According to a February 1 Library of Congress (LoC) press release,<sup>24</sup> Jane Sánchez began serving as the new Law Librarian of Congress on February 5. Ms. Sánchez was previously the head of the Humanities and Social Sciences Division at the LoC. Prior experience includes positions at the US Government Printing Office (USGPO), the US Dept. of Justice (USDOJ), and the Smithsonian Institution Libraries. Ms. Sánchez holds a JD from American University (Washington, D.C.), a graduate degree in library science from Simmons College (Boston), and a B.A. from the University of New Mexico.

A March 6 post on Harvard Law Today<sup>xxv</sup> announced that the family of former SCOTUS Justice Antonin Scalia is donating his papers to the Harvard Law School Library. Justice Scalia received his law degree in 1960 from Harvard, where he also served on the Harvard Law Review. The collection includes materials from his SCOTUS tenure, his time serving on the US Court of Appeals for the D.C. Circuit, and his teaching stints at the Universities of Virginia and Chicago. Materials specific to SCOTUS and the appeals court will be available in 2020, although items pertaining to specific cases will not be opened during the lifetimes of other Justices or judges who participated in those cases. Future announcements about the collection will be posted on the Law Library's blog, [Et Seq.](#)

Meanwhile, Yale's Lillian Goldman Law Library is the recipient of a copy of Englishman Richard Tottel's 1561 edition of *Novae Narrationes*. According to Mike Widener, the Law Library's Rare Book Librarian, the tome "is a collection of model oral pleadings ('narrationes' or 'counts') which initiated litigation, dating from the reign of Edward I in the late 13th century."<sup>26</sup> The book was a bequest from the estate of Professor S.F.C. Milsom (1923-2016) who served as visiting faculty at Yale from 1968-1986. The Law Library is also hosting an exhibit, "Woof, Moo & Grr: A Carnival of Animals in Law Books." The exhibit includes 20 books, dating from as early as 1529, which feature illustrations of animals on the pages of legal literature. The exhibit is open to the public and will close on May 31. Images and texts from this charming exhibition are available for viewing [online](#).

### New Book on the Wrongfully Convicted

[Anatomy of Innocence: Testimonies of the Wrongfully Convicted](#) is a compendium of the moving stories of individuals convicted erroneously – many who spent decades in prison. The stories are told by a select group of mystery and thriller authors, including Lee Child and Sara Paretsky. Laura Caldwell, a professor at Loyola University Chicago's law school, co-edited and contributed to the book. Included in it is a previously unpublished essay by playwright Arthur Miller, along with a contribution by local author/attorney Scott Turow. The book is published by Liveright. Proceeds from sales will benefit Loyola's [Life After Innocence](#) clinic that Professor Caldwell directs.

### Pyrotechnics in the Courtroom: A Lawyer Gets Burned (Along with his Client)

According to the Miami Herald, a lawyer's pants caught on fire during his closing argument in an arson trial on March 8.<sup>27</sup> Witnesses reported seeing smoke escaping from the right pants' pocket of attorney Stephen Gutierrez before he ran to the nearest washroom to address the situation. His client was accused of intentionally setting his own car on fire, but Gutierrez argued that the car had spontaneously combusted. As far as his own pyrotechnical mishap, Gutierrez claimed that an electronic cigarette battery in his pocket spontaneously combusted causing the fire.

A jury convicted Gutierrez's client anyway. Miami-Dade police officers seized several of the singed attorney's e-cigarette batteries as evidence, and the State Attorney's office is now investigating the matter. The presiding circuit court judge expressed skepticism about the incident telling Gutierrez, "I find it highly improbable that during an arson trial, when your defense is spontaneous combustion, that all of a sudden within a minute of your closing argument, your pants start on fire."<sup>28</sup> The judge called the whole incident a "side show" and told Gutierrez that his client may want to change lawyers.

[supreme-court-nominee.html?\\_r=0](#).

<sup>12</sup>Jalonick & Werner, *supra* note 10, at 1.

<sup>13</sup>Andrew Hamm, "Reactions to the Gorsuch nomination," SCOTUSblog (Jan. 31, 2017), <http://www.scotusblog.com/2017/01/reactions-gorsuch-nomination/>.

<sup>14</sup>Lorelei Laird, "ABA rates Supreme Court nominee Neil Gorsuch 'well qualified,'" ABA Journal (March 9, 2017), [http://www.abajournal.com/news/article/aba\\_rates\\_supreme\\_court\\_nominee\\_neil\\_gorsuch\\_well\\_qualified](http://www.abajournal.com/news/article/aba_rates_supreme_court_nominee_neil_gorsuch_well_qualified).

<sup>15</sup>"Attys React to Judge Gorsuch's Supreme Court Nomination," Law360 (Feb. 1, 2017).

## Conclusion

Americans have been watching their own circus side show of sorts the past three months with the transition to the Trump administration. I predicted in my last column that the US was in for a rough ride, and I was right. Despite the madness, however, there have been a few bright spots, including an ensuing renaissance in political satire. Other positives include new fodder for constitutional law profs and scholars, more work for lawyers generally, and a spike in civic engagement (Americans have taken to the streets and

community meetings in droves to express their concerns). One word of advice to all of my Canadian colleagues, however; stay put in Canada – you're definitely better off. As always, if any readers would like to comment on the above, or make suggestions for additional content, please feel free to contact me at [jgrant6@luc.edu](mailto:jgrant6@luc.edu).

<sup>16</sup> Katie Thisdell, "Most influential people in legal education 2016," 26 The National Jurist 18 (Winter 2017).

<sup>17</sup> "Best Grad Schools: Law 2018," US News & World Rep, <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings?int=a1d108>.

<sup>18</sup> Melissa Maleske, "The Firms That Dominated in 2016," Law360 (Jan 9, 2017); Melissa Maleske, "19 Law360 Names Practice Groups Of The Year," Law360 (Jan. 9, 2017).

<sup>19</sup> Melissa Maleske, "What Will Keep Law Firm Leaders Up At Night In 2017," Law360 (Jan. 2, 2017).

<sup>20</sup> Kali Hays, "Women, Minorities Can't Get Foothold in Firms, Report Says," Law360 (Jan. 4, 2017).

<sup>21</sup> Liane Jackson, "Changing Times: Panelists look for ways to remove barriers to advancement for women at large law firms," ABA Journal (Jan. 2017) at 66.

<sup>22</sup> Peter Overby, "D.C. Restaurant Sues Trump, Claiming 'Unfair Competition,'" NPR (March 9, 2017), <http://www.npr.org/sections/thesalt/2017/03/09/519515358/d-c-restaurant-sues-trump-claiming-unfair-competition>.

<sup>23</sup> Terry Carter, "Judicial independence 'not up for negotiation,' ABA president says in speech addressing Trump tweets," ABA Journal (Feb. 6, 2017), [http://www.abajournal.com/news/article/klein\\_the\\_aba\\_must\\_defend\\_the\\_rule\\_of\\_law\\_and\\_the\\_independence\\_of\\_the\\_judic](http://www.abajournal.com/news/article/klein_the_aba_must_defend_the_rule_of_law_and_the_independence_of_the_judic).

<sup>24</sup> Press Release, Library of Congress, Jane Sánchez Named Law Librarian of Congress (Feb. 1, 2017), <https://www.loc.gov/item/prn-17-014/>.

<sup>25</sup> "Scalia family donates late justice's papers to Harvard Law School Library," Harvard Law Today (March 6, 2017), <https://today.law.harvard.edu/scalia-family-donates-late-justices-papers-harvard-law-library/>.

<sup>26</sup> Mike Widener, "The Rare Book Collection opens 2017 with an outstanding gift," Rare Books Blog (Jan. 3, 2017), <http://library.law.yale.edu/news/rare-book-collection-opens-2017-outstanding-gift>.

<sup>27</sup> David Ovalle, "Miami lawyer whose pants caught on fire during arson trial may be off the case," Miami Herald (March 15, 2017), <http://www.miamiherald.com/news/local/community/miami-dade/article138624908.html>. xxviii Id.

\* Jackie Fishleigh, Library and Information Manager, Payne Hicks Beach.

\*\* Margaret Hutchison, Manager of Technical Services and Collection Development at the High Court of Australia .

\*\*\* Julienne Grant is Reference Librarian/Foreign & International Research Specialist at the Law Library, Loyola University Chicago School of Law.

Please note that any and all opinions are those of the authors and do not reflect those of their employers or any professional body with which they are associated.

# CALL/ACBD Research Grant

Perhaps it is time to start thinking about your next research project. The deadline for the 2018 research grant will be March 15, 2018 and the grant will be awarded in May.

The grant can be applied to research assistance, online costs, compensating time off, purchase of software, travel, clerical assistance, etc.

There is no fixed amount for the grant but in the past years the awards have ranged from \$1400.00 to \$4400.00.

The grant comes with some expectations. Research is to be completed within two years of receipt of the award with a progress report submitted to the Committee after one year. The deliverables are a written report, publication or presentation at the CALL/ACBD conference.

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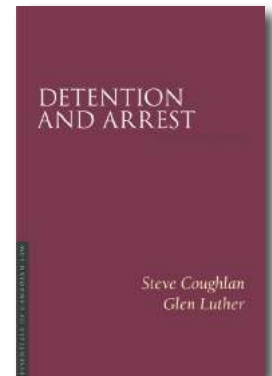
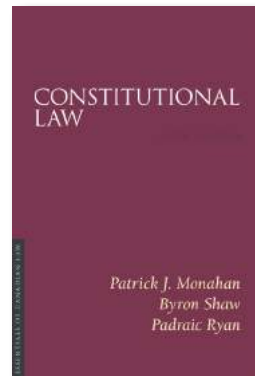
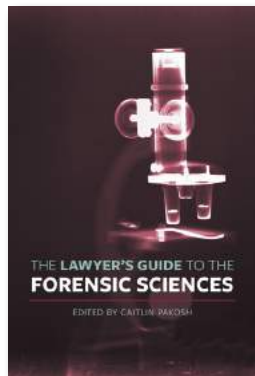
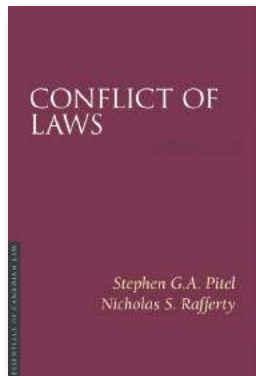
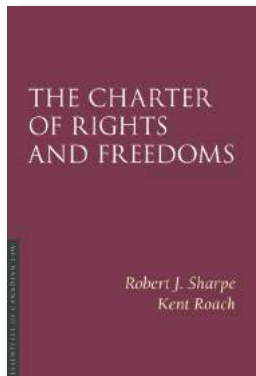
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<http://www.callacbd.ca/Resources/Documents/Awards/Research%20Grant1.pdf>

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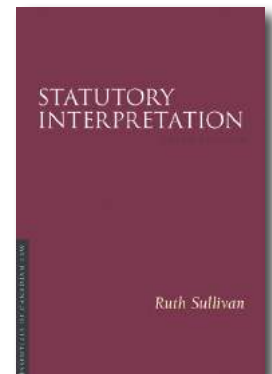
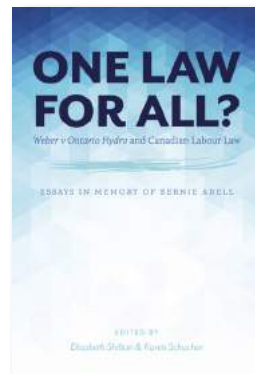
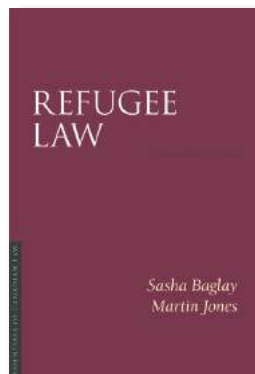
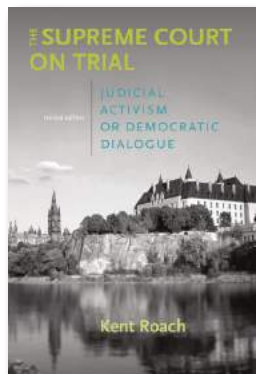
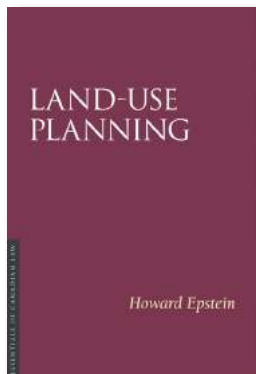
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# CALL/ACBD Research Grant

The CALL/ACBD Research Grant was established in 1996 to provide members with financial assistance to carry out research in areas of interest to members and to the association. The Committee to Promote Research manages the grant process, receiving and evaluating applications and making recommendations to the Executive Board for award of the Research Grant.

*Previous applicants who were not awarded funding are welcome to reapply.*

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