UNIVERSITY OF TORONTO FACULTY OF LAW

nexus

SPRING/SUMMER 2004

The Future of Canada's Capital Markets

COMMENTARIES

RECENT DEVELOPMENTS IN CORPORATE AND SECURITIES LAW

LAST WORD

THE HON. JUSTICE FRANK IACOBUCCI

PLUS

CLASS NOTES

NEW PUBLICATIONS

NEWS IN BRIEF

UNIVERSITY OF TORONTO FACULTY OF LAW

Class Notes *Tell us about yourself.*

In a new section of Nexus, alumni share their personal stories, successes, set-backs, and memories of the law school. These conversations reflect a true community of peers. Here is a snapshot of what you will find on pages 40 – 63.

DO YOU KNOW THESE FACES?









nexus SPRING/SUMMER 2004

Nexus is published by the Faculty of Law, University of Toronto, for alumni, faculty, students, staff and friends of the law school.

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MESSAGE FROM THE DEAN

Over the years, I have bristled – ever so slightly – when prospective students (or others) characterize the Faculty as the "corporate law school."

Typically, I react by describing – in far too much detail – the rich array of other intellectual activities at the Faculty. I underscore our expertise in, and commitment to, legal theory, international law, human rights, criminal and constitutional law, family law and so on. I talk about the many innovative teaching and clinical options at the Faculty that have little to do with corporate law. Then, to drive home the point, I may recite statistics on the broad spectrum of practice settings in which our students work, emphasizing that while many of our graduates are outstanding corporate lawyers and regulators, most choose careers that are distinctively non-corporate in nature.

And yet, perhaps I protest too much. In my zeal to communicate the diversity of our program, perhaps I inadvertently depreciate what is, by any measure, one of the great intellectual strengths of our Faculty.

Since its foundation, the Faculty has taken corporate law seriously. While others have dismissed or side-stepped this area of scholarly inquiry, we have sought to mount an academic and teaching program that befits the corporation's status as one of society's most important institutions.

The corporation is the principal engine of the modern capitalist economy. It creates societal wealth. It produces the goods and services that consumers value. It employs citizens, and provides them with financial security. And, either directly or indirectly, its activities are responsible for funding the modern welfare state.

That is not to say that the corporation is without flaws. The corporate form, with its emphasis on separate legal personality, can attenuate norms of individual responsibility, and promote excessively risky forms of behaviour through group misconduct. The corporation can wield excessive economic power that may jeopardize the regulatory goals of the state (particularly where corporations can migrate easily in response to regulatory differences). The corporation's principals may cause it to take actions which promote their interests at the expense of society as a whole. If left unchecked, concentrated corporate power can subvert democracy.

Can we have our cake and eat it too? Can we preserve the corporation's capacity for wealth and job creation, but avoid the various social costs that can sometimes attend these activities? If so, what are the appropriate institutional arrangements that will produce these ends? What is the optimal balance to be struck among law, institutions and markets in this area?

These are all difficult questions that defy stock answers. Yet, over the years, these are questions that have fuelled the scholarly imaginations of numerous professors at the Faculty, whose insights and analyses have contributed to the Faculty's well earned reputation in this field.

Commencing with the pioneering work of Jacob Ziegel, Frank Iacobucci and David Johnstone, scholars at the Faculty have linked Canadian corporate and securities law with regulatory and doctrinal developments throughout the world.

Then, led by Michael Trebilcock and Jeff MacIntosh, the Faculty's scholarship grew to incorporate insights drawn from economics and finance. Michael's work on the economic rationale for the limited liability corporation continues to stand as a classic in the field. Jeff's work on minority shareholder rights, on securities regulation, and, as of late, on the regulation of venture capital is without peer, and has been instrumental in creating a distinctive corpus of Canadian corporate law scholarship.

Following in these tracks is the very innovative work of Edward Iacobucci (yes, Frank's son) who in a very short time has established himself as one of the most innovative young law and economics scholars in North America and whose work touches takeovers, concentrated ownership, and directorial duties. Further complementing and enriching our scholarship and teaching activities in this area are two new colleagues, Doug Harris and Ian Lee. Both Doug and Ian have had extensive experience in practice (as well as stellar academic records from Toronto and Harvard) and are, accordingly, able to integrate practice and theory with ease.

Beyond this group of scholars is an even larger group of graduates of the Faculty (Anita Anand, Douglas Cumming, Ron Davis, Mark Gillen, Poonam Puri, Janis Sarra, and George Triantis all come to mind) who teach corporate law in other North American law schools, but are nevertheless very much a part of our extended intellectual community and active participants in our corporate law conversation.

One cannot help but take enormous pride in the influence that our ideas have had on the way in which the corporation is supported, regulated, and constrained in this country. It is through the activities of our faculty and students (past and present) that Canada has developed many innovative regulatory approaches and institutional arrangements that are the model for reforms throughout the world.

Continuing to promote an intellectual and teaching environment in which the corporation receives close and critical scrutiny is a goal that is clearly worthy of pursuit, and constitutes a very powerful way in which the Faculty vindicates its academic mission.

And so, I am proud to acknowledge that we are one of the leading sites for corporate law scholarship and teaching – but, of course, we are so much more.

Ronald J. Daniels '86
Dean

nexus
SPRING / SUMMER 2004

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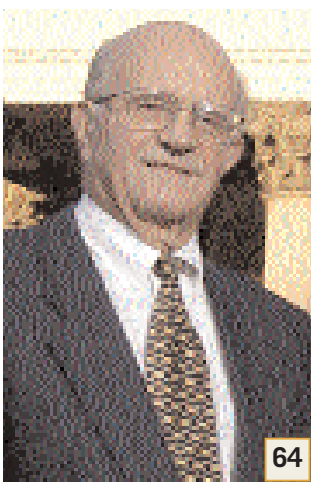
ON THE COVER

The corner of King and Bay Streets in downtown Toronto is the epicenter of Canada's capital markets, at the crossroads of the Toronto Stock Exchange and the nation's major banks and brokerage houses. Like Wall Street in the United States, this landmark symbolizes the vitality of economic and financial activity in our country, where approximately one half of all working Canadians are directly and indirectly invested in the equities market.



COMMENTARIES

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FROM THE editor

JANE KIDNER,
ASSISTANT DEAN,
EXTERNAL RELATIONS

Over the past several years we've seen corporate and securities law issues take centre stage in the public sphere. Breaking news of Enron-style financial scandals, "celebrity" insider trading, and controversial executive compensation have raised legal and policy issues of national and international importance. The law school's faculty members with expertise in this area are taking a lead role in their academic research, public advocacy, and scholarship – analyzing trends, developing solutions, chairing policy committees, and providing expert opinions and commentaries for national and city newspapers across Canada.

In this issue of Nexus faculty members Jeff MacIntosh, Doug Harris, Ed Iacobucci and Ian Lee offer articles on some of the most topical issues today, including securities law, capital markets regulation, directors' liabilities to creditors, and insider trading. Distinguished alumni David Brown, Chair, Ontario Securities Commission, and Ed Waitzer, former Chair, Ontario Securities Commission, provide their unique take on the regulation and evolution of Canada's capital markets. Their commentaries are found on pages 14 and 15. Rounding out the issue are perspectives by Professor *Emeritus,* Jacob Ziegel, and Capital Markets Institute Executive Director, Lisa Porlier, who identify recent developments in directors' duties and the regulation of credit rating agencies. Finally, the law school owes a debt of gratitude to the Hon. Mr. Justice Frank Iacobucci, who generously gave of his time and expertise to complete this issue with his thoughtful insights offered in the Last Word (page 64).

In a new initiative this issue, we invited each of you to send us your personal and professional "news" for a *Class Notes* section of Nexus. The response was overwhelming. More than 250 of you shared your stories about babies born, books written, marathons run, job promotions, career changes, marriages, grandchildren, traveling and retirement bliss. You wrote with enthusiasm and generosity of spirit about what is most important to you in your lives. The stories demonstrate an eclectic, passionate, accomplished, caring and fun-loving group of people – all of whom just happen to be graduates of this law school. One of my greatest pleasures in producing this issue was the opportunity to converse with, and hear about, the lives of so many of our alumni readers. Thank you for sharing your stories with us.

Finally, a special thanks to all faculty members profiled in this issue for their assistance and patience, in particular Professor Doug Harris, who offered his time and creativity, and was an active (and most appreciated) participant in the editorial process.

Happy summer, and happy reading.

Jane Kidner '92
j.kidner@utoronto.ca
Editor-In-Chief

contributors

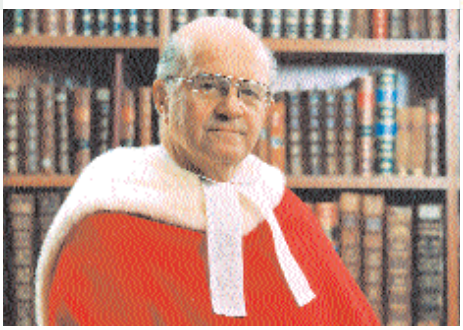
DOUGLAS HARRIS, *B.A. (Toronto), M.A. (Toronto), LL.B. (Toronto), LL.M. (Harvard)* is an Assistant Professor, and the Associate Director of the Capital Markets Institute, a joint initiative of the Faculty of Law and the Rotman School of Management. Between 1994 and 2000, Prof. Harris practiced at Torys in Toronto in the Technology Group, focusing on corporate and securities law for technology companies. His current research relates to domestic and international regulatory competition in capital markets regulation, with a focus on stock exchanges and the venture capital financing of early-stage technology companies.

JEFFREY MACINTOSH, *B.Sc., (M.I.T.), LL.B. (Toronto), LL.M. (Harvard)* holds the Toronto Stock Exchange Chair in Capital Markets Law at the Faculty of Law, University of Toronto, and is a past Associate Director and Director of the Capital Markets Institute at U of T. Prior to joining the university, Prof. MacIntosh served as an assistant professor at Osgoode Hall Law School. He was appointed a John M. Olin Fellow at Yale Law School in 1988-89. Prof. MacIntosh also served as a member of the Ontario Securities Commission Task Force on Small Business Financing. He specializes in Corporation Law, Corporate Finance, Securities Regulation, Venture Capital, and Small Firm Financing.

IAN B. LEE, *B.Com. (Econ.) (Toronto), LL.B. (Toronto), LL.M. (Harvard)* was admitted to the Bar of Ontario in 1997 and to the Bar of New York in 1999. Before joining the law school, Prof. Lee practiced law with Sullivan & Cromwell in Paris and New York, with an emphasis on cross-border corporate finance and merger and acquisition transactions. Prof. Lee served with the Strategy & Plans Directorate of the Privy Council Office (Intergovernmental Affairs).

EDWARD M. IACOBUCCI, *B.A. (Hons.) (Queen's), M.Phil. (Oxon.), LL.B. (Toronto)* joined the Faculty of Law as Assistant Professor in 1998. He was a John M. Olin Visiting Fellow at Columbia University Law School in 2002, and the John M. Olin Visiting Lecturer at the University of Virginia in 1997-98. Iacobucci served as Law Clerk at the Supreme Court of Canada for Mr. Justice John Sopinka in 1996-97.

THE HON. FRANK IACOBUCCI, *Q.C., (LL.D. '89) B.Com. (UBC), LL.B. (UBC), LL.M. (Cambridge), Dip. Int'l L. (Cambridge)* joined Dewey, Ballantine, Bushby, Palmer & Wood of New York, New York in 1964 and specialized in corporate law and related fields until 1967. That year, he joined the law faculty at U of T. He was appointed Associate Dean in 1973, Vice-President, Internal Affairs in 1975, Dean of the Faculty of Law in 1979, and was Vice President and Provost of U of T from 1983 to 1985, at which time he was appointed Deputy Minister of Justice and Deputy Attorney General for Canada. In September 1988 he was appointed Chief Justice of the Federal Court for Canada; and on January 7, 1991 was appointed Judge of the Supreme Court of Canada.



EDWARD WAITZER, *'76 (LL.M. '81)* is the former Chair of the Ontario Securities Commission, where he held two consecutive terms until 1996. He is currently Chair of Stikeman Elliott LLP, and leads the Corporate Governance Group. From 1994 to 1996 Waitzer chaired the Technical Committee of the International Organization of Securities Commissions after serving as Vice Chair of its Executive Committee in 1993.

DAVID A. BROWN, *Q.C., '66* was appointed Chair of the Ontario Securities Commission in 1998, and in 2003 was re-appointed for a second five-year term. He is past Chair of the principal policy-setting body of the International Organization of Securities Commissions and a senior member of the Canadian Securities Administrators. Brown was also a senior corporate law partner for 28 years at Davies Ward & Beck.

JACOB ZIEGEL spent 18 years at U of T's Faculty of Law until his retirement in 1993. He is editor-in-chief of *Canadian Business Law Journal* and convenor of the Annual Workshop on Commercial and Consumer Law. His research interests include commercial and consumer law and insolvency law, both international and domestic, and business organizations law and the judicial administration of justice.

LISA PORLIER is the Executive Director of the Capital Markets Institute. Prior to her appointment she was a Director of Investment Banking at Scotia Capital. Porlier has experience in mergers and acquisitions, public and private financings and corporate finance advisory. She holds a BA (Hons) from Wilfrid Laurier University, an MBA from the Richard Ivey School of Business and is a Chartered Financial Analyst.

letters TO THE EDITOR

I thoroughly enjoyed the issue of Nexus on The Evolution of the Family. It was a wonderful issue, and as a family law practitioner it was a delight to see old friends and to read very new and interesting perspectives on changes in family law today. However, there was a serious oversight in your article on the *Halpern* case. The key practitioner involved in that case was Martha McCarthy. Although she is not an alumnus of the U of T Faculty of Law, Martha played an instrumental role in the ultimate success of that case, yet she was barely mentioned in passing in your article. Martha is not getting the recognition from the profession that she deserves. What she has done has been truly astronomical. She has been at the forefront of a sea-change in family law and in our whole understanding of marriage. She deserved to be profiled in your article.

Sandra Demson '89

As a member of the class of '84, I want to congratulate you on the quality of Nexus. I thoroughly enjoyed reading the Fall/Winter 2003 issue. I was impressed by many of my former classmates, and faculty, who have gone on to do such interesting things. Being on the West coast, I admit that I don't have much of an ongoing relationship with the Faculty of Law. But recently I was reminded of the stimulating intellectual atmosphere of the Faculty and the infectious energy of its students. This past summer, a student of the Faculty worked in my office on a pro bono case for LEAF and the BC Coalition of Persons with Disabilities and the Trial Lawyers' Association of BC. We advanced a novel argument from a feminist perspective relating to privacy rights in the production of documents in civil litigation. The U of T student jumped into the assignment with great enthusiasm and was of invaluable assistance. I thoroughly enjoyed the chance to work with a U of T student.

Susan A. Griffin '84

FROM OUR ARCHIVES

75 YEARS AGO

On October 29, 1929

The stock market crashed, losing $30 billion or 40% of its market value in just two weeks. Known thereafter as "Black Tuesday," it was the beginning of the Great Depression. Back at the law school in 1929, the full-time course in Law at U of T was just starting to flourish, according to the four authors of The University of Toronto Law School: A History 1843-1967. Two degree programs were offered – the Hons B.A in Law (later abolished in 1949), and the LL.B. program (which required students had first studied at Osgoode). That same year, Frederick C. Auld joined the staff as a full-time lecturer teaching Roman Law, Jurisprudence and Principles of English Law.

50 YEARS AGO

On May 6, 1954

Roger Bannister, a 25-year-old British student at Oxford, was the first person to run a mile in less than four minutes at 3:59.4. Students at the U of T Faculty of Law won the T.A. Reed Trophy for university-wide overall athletic achievement. This was a remarkable feat considering that the same players donned three uniforms to play as the soccer team, the hockey team and the basketball team. Dean Cecil Wright attended the games with his two beagle hounds, and thus the team became known as the "Legal Beagles."

25 YEARS AGO

On May 3, 1979

Margaret Thatcher became Prime Minister of Britain and the first woman to hold the highest office in a European country. A play-only portable cassette device called the Sony Walkman® was introduced. It cost $199.95 US, which would be more than $500 today. Closer to home, Martin Friedland ('58), dean of the law school since 1972, handed over the reins to Frank Iacobucci, who would hold this post for the next five years. The Honourable Iacobucci went on to become a Justice of the Supreme Court of Canada in 1991, until his retirement in June of this year.

gone fishing

BY KATHLEEN O'BRIEN

His unmistakable whistling, hearty laugh and distinctive South African accent have graced the halls of Flavelle House for 26 years. But in May, Professor Hudson Janisch, the Osler, Hoskin & Harcourt Chair in Law and Technology, left the law school on a high note.

Janisch's retirement has come too soon for students wanting to learn more about Communications, Administrative and Tort Law. In March, Janisch received one of only five SAC/APUS Undergraduate Teaching Awards at the University of Toronto for 2003-2004. He also received the Alan W. Mewett, Q.C., Award for Excellence in Teaching from the graduating class of 2002.

"Hudson has always taken teaching seriously. He has been a true mentor and friend to me, and I hope that I can live up to his high standards," says SJD student Craig McTaggart, who had Janisch as a teacher and graduate supervisor.

A native of Cape Town, South Africa, and an avid fisherman, Janisch grew up in a country surrounded by the sea. He pursued his legal education to practice "water law," since South Africa suffers from a severe shortage of fresh water. "Water rights in that country raise very difficult legal issues. I was particularly fascinated by that," he recalls. But Janisch says the political situation was intolerable, so he left the country to continue his legal education.

In 1978, then Dean, Martin Friedland, persuaded Janisch to join the Faculty of Law. Since that time, Janisch has touched the lives of thousands of students, appeared before a number of legislative committees, lectured around the world, taught U of T graduate engineers, and has written three books and numerous articles on administrative law and telecommunications. His co-authored book, *Administrative Law: Cases, Text and Materials,* is the most widely used administrative law text in English-speaking Canada.

Janisch is particularly proud to have acted as counsel to the Senate Committee on Communications, which drafted the new Telecommunications Act in 1993. "I helped the transition from a rigid monopoly to a competitive marketplace, giving consumers a far greater choice in telecommunications," he says.

For Janisch, his "incredible joy" these last five years has been supervising an outstanding group of doctoral students from around the world. So much so, that he postponed his retirement to see the last of them successfully complete their studies this year. "We are extremely blessed with the quality of students we have. I leave with very positive memories of the students and the pleasure it's been to be a teacher here."

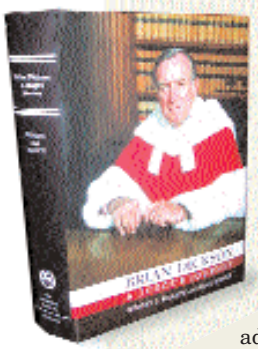
Since wrapping up the school year, Janisch has been busy saying his goodbyes. On April 23 in Ottawa, he was the keynote speaker at the largest gathering of communications lawyers in Canada, and was feted at a celebratory dinner.

Not one to rest, Janisch hopes in retirement to teach a telecommunications seminar at the University of British Columbia and undertake consulting work in telecommunications. In May, Janisch and his wife Alice moved to Sechelt, on the Sunshine Coast in British Columbia. Janisch says the sea attracted him to this community of 7,500 on the Strait of Georgia. "I have a terrific amount of fishing to do."

news IN BRIEF

SHARPE AND ROACH WIN MAJOR BOOK PRIZE

Professor **Kent Roach** and the Honourable Mr. Justice **Robert J. Sharpe** (Ontario Court of Appeal) have been awarded the prestigious **John Wesley Dafoe Book Prize** for 2003 for *Brian Dickson: A Judge's Journey.* The book, which chronicles the life and contributions of former Chief Justice of the Supreme Court, Brian Dickson, was praised by The Dafoe Foundation as "an illuminating account of the responsibilities and workings of the Supreme Court, and a clear explanation of the legal issues and public significance of the cases." The authors recount Dickson's journey through the Depression, World War II, the post war boom, the 1960's, the advent of the Canadian Charter of Rights and Freedoms and the struggles for national unity and justice. "It is especially gratifying to be recognized for this award as Dickson was a great Canadian as well as a great judge. His many accomplishments are an important part of Canadian history," says Prof. Roach. The Dafoe Prize is awarded annually to the book that provides the best contribution to our understanding of Canada. Prof. Roach and Justice Sharpe received the award and total cash prize of $10,000 at the Annual Dafoe Book Prize Dinner on May 17, 2004, in Winnipeg, Manitoba.



New Associate Dean of the Faculty

Professor **Lorne Sossin** has been appointed Associate Dean of the Faculty of Law for a three year term beginning July 1, 2004. In his new role, Prof. Sossin will supervise the J.D. program in addition to special responsibilities for academic program development, teaching allocation and academic appeals. Prof. Sossin joined the Faculty of Law in 2002 after five years as an Assistant Professor at Osgoode Hall Law School and York's Department of Political Science. Prof. Sossin teaches and writes in areas of public law and legal process. His proudest moments since joining the Faculty have been receiving the Alan W. Mewett, Q.C., Award for Excellence in Teaching in 2003 and again in 2004.

PROF. ROACH NAMED ADVISOR TO ARAR INQUIRY

In April, Professor **Kent Roach** was one of five prominent Canadians named to the Federal Government's Advisory Panel for the Policy Review portion of the Arar Inquiry. The Inquiry was set up to investigate and report on the actions of Canadian officials in relation to Maher Arar. A Canadian engineer, Arar was deported to Syria by the United States after being accused by American officials of belonging to the al-Qaeda terrorist network. While in Syria, Arar alleges he was tortured before finally being released in early October 2003, a year after his imprisonment. The Panel's mandate is to recommend a process to review the activities of the Royal Canadian Mounted Police with respect to national security. Prof. Roach is regarded as one of Canada's top experts in criminal law and anti-terrorism issues. His books include *September 11: Consequences for Canada,* 2003 and *The Security of Freedom: Essays on Canada's Anti-terrorism Bill,* 2001, with editors Dean Ronald Daniels and Prof. Patrick Macklem. For more information, visit www.ararcommission.ca.

Kevin Davis Leaves for New York

In September, Kevin Davis will join the law school at New York University. A wonderful colleague and contributor to the Faculty, Kevin's scholarship has been diverse and significant, displaying interests that range from contract law, to charity law, to white-collar crime, and to law and development. He has published widely and his scholarship has attracted attention around the world. As well as the ideas that Kevin put into writing, he has been an especially valuable member of our academic community through his contributions to discussions both in and out of the classroom. "As coordinators of the law and economics workshop, we will suffer his absence acutely," say colleagues Edward Iacobucci and Michael Trebilcock. "Kevin offered rare insights into visitors' presentations, often causing them to rethink important elements of their arguments." Along with his tremendous academic capability, Kevin's friendly and warm demeanour will be missed. "Kevin's recruitment by such an elite institution, and the interest that similar institutions have shown in other colleagues, helps confirm our position as one of the very best law schools in the world," say Iacobucci and Trebilcock. "We can take pride in the calibre of colleagues, but we must continue to look for ways to resist future losses of this kind. In the meantime, we all wish Kevin continued success with his new opportunity."

Faculty Enriched with Four New Professors

Tax law, contracts, legal history and international human rights will all get a boost at the law school, as four new professors join the Faculty this July to teach in these areas. Benjamin Alarie, Angela Fernandez, and Frédéric Mégret will begin their new roles as Assistant Professors, and Ariel Katz will join as Chair, Electronic Commerce, Centre for Innovation Law and Policy.

Recent graduate, **Benjamin Alarie** '02, comes to the Faculty with a wealth of expertise and knowledge in the areas of tax law and policy. His research interests include bringing recent advances in behavioural law and economics to bear on the analysis of the taxation of windfalls and capital gains. Along with David Duff, Alarie will enhance the Faculty's core tax offerings, and will teach first year contracts and an introductory course in tax. Before joining the Faculty, Alarie clerked for Madam Justice Louise Arbour, Supreme Court of Canada. Prior to this position, Alarie was a Graduate Fellow at Yale Law School. In addition to his J.D., Alarie has a B.A. in economics and finance from Wilfrid Laurier University (1999), an M.A. in economics from the University of Toronto (2002), and an LL.M. from Yale Law School (2003).

A native of St. John's, Newfoundland, **Angela Fernandez** will teach contracts and legal history at the Faculty. "I am very much looking forward to getting to know and contributing to this dynamic legal community," she says. Prior to joining the law school, Fernandez was completing her S.J.D. dissertation at Yale Law School on the history of the case method and rival forms of legal education in the late 18th and 19th centuries. Fernandez focuses on 'scribal practices,' reading, book-handling and writing practices that are key to an understanding of how legal knowledge replicates itself over time. She obtained her B.A. from McGill (1995, Gold Medal in Philosophy), M.A. in Philosophy from Queen's University (1996), LL.B. and B.C.L. from McGill (2000), and LL.M. from Yale (2002). Fernandez served as a law clerk to Mr. Justice Michel Bastarache of the Supreme Court of Canada in 2000-2001.

As Chair, Electronic Commerce, Centre for Innovation Law and Policy, Graduate Fellow **Ariel Katz** will strengthen the Faculty's core expertise in technology law. Having received his education and practiced law in Israel, Katz will bring a valuable new perspective to the Faculty. He is currently completing his Doctor of Juridical Science degree on the law and economics of competition law and intellectual property law at U of T. In September, Katz will teach a course in IP and International Trade. Katz obtained his LL.B. and LL.M from the Hebrew University of Jerusalem, and practiced competition law for four years at the Israeli Antitrust Authority before coming to Canada.

An international lawyer from France, **Frédéric Mégret** will be joining the Faculty in July to teach international human rights after a year as Boulton Fellow at McGill University. Mégret has diverse research interests including the role and functioning of international criminal tribunals, the use of force in international law, particularly in the context of the 'war on terrorism,' United Nations' efforts at promoting and protecting human rights, and the jurisprudence of the laws of war. He holds a joint degree from King's College London and the Université de Paris I (Panthéon-Sorbonne), and a Masters in International Law from the Université de Paris I. Mégret is a *lauréat avec les félicitations du jury* of the Institut d'études politiques de Paris where he studied international relations, and is currently completing a Ph.D. program at the Université de Paris I and the Graduate Institute of International Studies of the University of Geneva.

LAW SCHOOL REACHES OUT TO ALUMNI

Are you interested in staying current with the law school's research, but have little time to spare? If that sounds familiar, the Law Alumni Association has a new breakfast speakers' series designed just for you. The bi-monthly event features cutting-edge legal research being undertaken at the law school in an accessible and relaxed format. "We wanted to reach out to alumni who don't normally have time to come to the law school for lectures," says Alumni & Development Assistant Dean, Kate Hilton. "So we decided to take the law school to alumni." The new breakfast series is hosted at various downtown Toronto law firms, and allows busy practitioners the opportunity to meet new professors and learn more about their research and new books over a coffee and light breakfast. The inaugural lecture, "Judicial Appointments in a Free and Democratic Society" was hosted by McCarthy Tetrault LLP on April 23, 2004, and featured Justice Robert Armstrong, Ontario Court of Appeal, and Professors Sujit Choudhry and Lorne Sossin. The next lecture took place on June 18 and featured Professor Kent Roach and the Honourable Mr. Justice Robert Sharpe, who discussed their acclaimed book, *Brian Dickson: A Judge's Journey.*

For more details, visit the Faculty's web site at www.law.utoronto.ca or contact Kate Hilton at k.hilton@utoronto.ca.

PROMOTING LL.M. RESEARCH TO THE PROFESSION

Until now, LL.M. students at the law school have had limited opportunities to connect with members of the Toronto Bar during their studies. The Faculty's Career Development Office and one of Canada's premier law firms hope to remedy that. In April, the CDO and McMillan Binch LLP launched "Theory and Practice – Promoting LL.M. Research to the Profession." The new program aims to bring together the Faculty's LL.M. students, who hail from all parts of the world, and lawyers from McMillan Binch to discuss the latest developments within specific areas of legal theory and practice. These one-hour meetings will allow students to present their theses in progress, and receive feedback from seasoned practitioners in their area of study. Lawyers from McMillan Binch will get a fresh perspective on their area of practice. "We are excited about this innovative program and the opportunity it presents for both students and our lawyers," says Gina Rogakos, Assistant Director of Professional Growth & Management at McMillan Binch.

If you would like more information, please contact Graduate Studies Career Advisor, Ivana Kadic, at ivana.kadic@utoronto.ca.

FACULTY'S DOCTORAL STUDENTS WIN RECORD AMOUNT IN SCHOLARSHIPS

Each year, graduate law students from across Canada and around the world compete for limited scholarship money for their research at the doctoral level. Very few receive the coveted awards. U of T students do consistently well, a reflection of the very high and ever increasing calibre of the students, according to David Dyzenhaus, Associate Dean of the Graduate Program. This past year was no exception, and indeed was the best in recent years, as U of T doctoral students attracted a record $350,000 in external funding. Grants received by U of T's graduate law students included a Trudeau Scholarship (the Faculty's second), two Connaught Fellowships, three Canada Graduate Scholarships (SSHRC's new doctoral fellowship in the amount of $35,000 per year for three years), one SSHRC doctoral fellowship, several Ontario Graduate Scholarships and a Commonwealth Scholarship.

NEW JOINT SEMINARS FOSTER STUDENT INTERACTION

The Faculty welcomes graduate students from around the world who come to pursue a wide variety of subjects in a stimulating intellectual atmosphere. Yet until now there has been little opportunity for them to meet and engage in meaningful intellectual debate with the Faculty's JD students. To remedy this, Dean Ron Daniels and Associate Dean of the Graduate Program, David Dyzenhaus, have created a 12-week joint JD/LLM seminar series on topics including intellectual property (taught by Prof. Abraham Drassinower), corporate governance (taught by Prof. Ed Iacobucci), and responses to terrorism (taught by Prof. Kent Roach and Visiting Professor Stanley Cohen). The new series was launched in January. "LLM students have only a year here," Associate Dean Dyzenhaus says. "These seminars are designed to maximize the opportunity for students to learn from each other as well as from the instructor." The professors, assisted by a senior graduate student, teach the first half of the course, and in the second, students present papers on common topics of interest. "It was great getting to know students who had been in the Israeli army, did forensic work in East Timor or conducted criminal prosecution work with the Canadian government," says Rayner Thwaites, a LLM student from Australia. JD student Christopher Heer could not agree more. "The diverse backgrounds of students in the class resulted in discussions on a wide range of topics. It was a great opportunity to study advanced issues on intellectual property," he says. The new seminars will continue in September 2004.

U of T Law Students Take Top Awards at Competitive Moots

For many years, U of T's competitive moot teams have consistently ranked among the best in the country. This year's teams were no exception. On March 5th and 6th, students Melanie Adams ('05), Steve Penner ('05), Ben Perrin ('05) and Lawrence Taylor ('05) were victorious at the **Securities Moot** in Toronto, placing first for their facta and third overall. On March 19th and 20th, John Adair ('05), Keith Burkhardt ('05), Michael Fishbein ('05) and Sorcha O'Carroll ('05) competed at Chicago's **Niagara Moot.** Although the team did not make it to the finals, they mooted extremely well in the face of some unexpected challenges. U of T students also represented Canada well as one of 96 teams from 81 countries participating in this year's **International Round of the Jessup Moot** in Washington, D.C. from March 28th to April 4th, 2004. The team made it to the run-off rounds, placing in the top 20 teams. For more information on other successful moot teams, visit the Faculty's web site at www.law.utoronto.ca.

Law Students Launch New Academic Journal

A fourth publication has been added to the roster of student-run journals at the Faculty of Law: the *Journal of International Law and International Relations* (JILIR). Co-Editors-in-Chief, Usman Sheikh ('05) and Kevin-Paul Deveau ('05), will publish the inaugural issue in November 2004. A joint initiative with the Munk Centre for International Studies, the JILIR aims to promote critical, informed, and interdisciplinary debate on the interaction between international law and international relations. Content will feature articles, case comments, notes, book reviews and interviews on current issues in international affairs and key theoretical debates. Faculty Advisors Professors Jutta Brunnée and Ron Diebert (Munk Centre) will be assisted by an international advisory board of prominent experts from both fields. This student-run journal joins other University of Toronto, Faculty of Law student publications including the *Law Review,* which was founded in 1942, and the *University of Toronto Journal of Law and Equality* and *University of Toronto Indigenous Law Journal,* both of which were launched in 2002.

Graduates Secure Teaching Positions

U of T Faculty of Law still leads the pack when it comes to the appointment of its graduates as faculty members at universities around the world. The following recent graduates have secured teaching positions at leading Canadian and international law schools.

Heather McLeod-Kilmurray, University of Western Ontario, Faculty of Law

Ariel Katz, University of Toronto, Faculty of Law

Ron Davis, University of British Columbia

Sheila Wildeman, Dalhousie University, Faculty of Law

Ron Levi, University of Toronto, Centre of Criminology

Russ Brown, University of Alberta, Faculty of Law

Neil Craik, University of New Brunswick, Faculty of Law

Jennifer L. Schultz, University of Manitoba, Faculty of Law

Rachael Johnstone, University of Akureyri, Faculty of Law (Iceland)

Adam Parachin, University of Western Ontario

How to Become a Media Expert

Media are increasingly seeking out law professors and lawyers to comment on current legal issues and court rulings. There is no secret to increasing your presence in the media. Whether you are a seasoned law professional, or have only recently been called to the bar, these suggestions can help you get on a journalist's rolodex.

- **Enhance your public profile and media will notice you.** Becoming a member of a local organization, sitting on a panel discussion, or volunteering for a pro bono case will often put you on the media's radar.
- **Be proactive and connect with journalists.** Take note of reporters' names in areas that relate to your work. If you have something interesting to say, call them up and offer comment. This effort will get you noticed, and remembered, by media.
- **Use simple language.** Most editors and reporters don't have a legal background. Take the time to explain legal issues and terms in simple, everyday language. Don't assume they know what a "factum" or "motion" is!
- **Write articles or opinion pieces in trade magazines, industry newsletters, and community newspapers.** As often as possible, tell your side of the story and offer commentary on legal issues. Besides having a regular presence in the media, you will be offering an informed opinion to each news cycle.
- **Ask your public relations department to support your efforts.** Communications professionals can offer you as an expert when media call, and write press releases announcing career advancements, books you have written, and awards or honours you have won.

Uganda, India and South Africa – summer destinations for U of T law students

This May, more than twenty U of T law students packed their bags and boarded planes for far off destinations including Taiwan, Namibia, Uganda, Turkey and Thailand, to name just a few. Once there, they will spend up to four months at a variety of community organizations, institutions and commissions, where they will engage in complex human rights advocacy, conduct legal research, and take on other legal tasks that will protect and promote the human rights of citizens around the world.

These extraordinary and civic-minded students have designed their own internships and received funding from a competitive pool of more than 45 applications. "The internships allow students to see the immediate and direct impact of their work, as well as learn the textbook side of complex human rights work," says Adjunct Professor and International Human Rights Program Director, Noah Novogrodsky. "They complement and enrich the curriculum and invite students to connect their Canadian law school education to issues of global social justice." Many of the organizations provide or assist students in obtaining housing and navigating local culture. In other cases, finding a place to live and a safe way to work is part of the experience.

Last summer, second year student, Aaron Hunter, worked for a small criminal justice reform organization in Dublin, Ireland – the Irish Penal Reform Trust (IPRT). During his two and a half month stay, Aaron conducted field research on sentencing practice in the Dublin Metropolitan District Court, a criminal court dealing with summary offences. "I went to court every day and observed the outcomes of criminal cases and the verbal reasons given by the judge for particular sanctions imposed," says Aaron. "The IPRT suspected, and I confirmed, that sentencing was inconsistent and many defendants were being fined or sent to prison without any explanation for the sentence." Aaron's findings will soon be published in a report and distributed to lawmakers and others in Ireland to promote reform. "I was grateful for the opportunity to do meaningful work," says Aaron. "I felt and still feel as though the work I did could result in some small but real positive change to the criminal justice system in Ireland."

Closer to home, seven students have secured jobs in community organizations here in Toronto, Waterloo and Vancouver as part of the Pro Bono Students Canada Program. Under fellowships funded by the Donner Foundation, they will conduct legal research, provide public legal education, and advocate on behalf of communities in need. The legal work is often intense but has enormous educational benefits.

This summer third year student, John Norquay, will be working at the Refugee Law Office. "This is an extraordinary opportunity to apply what I've learned in the classroom and make a difference to people in need," he says. "I am excited to be in the position to assist newcomers to Canada who not only are unable to afford lawyers, but also find themselves in a foreign legal system." Program Director Pam Shime is thrilled by the increasing number of students interested in doing this kind of work and by the program's success. "Students in the program are serving communities in need in critical ways," she says. "We are building leadership skills, so that we can send a new generation of public-interest minded leaders into our profession."

CHIEF LAW LIBRARIAN RETIRES

After 35 years as a law librarian and more than 20 years of dedicated service to the U of T Faculty of Law as Chief Law Librarian, Ann Rae is completing the final chapter in her career. Her numerous contributions will leave a lasting and positive impact. As a young librarian, Ann had the unique opportunity in the mid-1970's to be seconded to the Library of Congress in Washington, D.C. where she created the "KE" class for the Law of Canada, a standard now used by law libraries throughout North America for classifying Canadian legal materials. With her B.A., B.L.S. and M.L.S. degrees from U of T, Ann progressed through increasingly responsible roles as an academic law librarian at major Canadian law school libraries (York, Victoria and Alberta) before returning to U of T in 1984 as Chief Law Librarian of the Faculty of Law Library.

Ann has worked with five law school Deans – Frank Iacobucci (who hired her), Robert Prichard, Robert Sharpe, Ron Daniels and most recently, Brian Langille, this year's Acting Dean. When she arrived at the law school in March 1984, the Library's collections were just over 123,000 volumes, and it had one computer terminal. Today, the Bora Laskin Law Library has more than 258,000 volumes, and has 88 networked PCs that provide a web-based catalogue accessible anytime, anywhere.

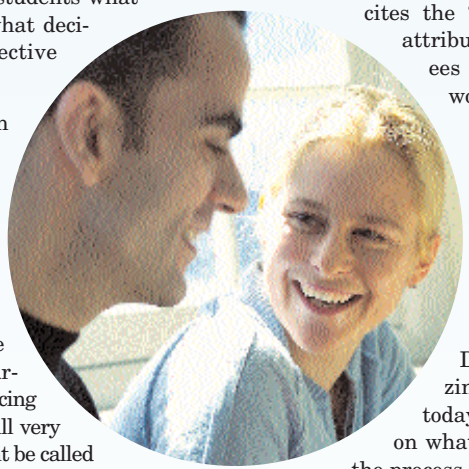
While Ann has a strong interest in the preservation of legal materials in print format, she has been dedicated to the strategic uses of information technologies to further the library's goals. "I am proud of the fact that the Library has taken a leading role among Canadian law libraries in its acquisition of electronic resources, an area that has seen dramatic changes in the last few years," she says. One of Ann's significant contributions – in conjunction with Professor Rebecca Cook, Susan Barker and others at the law school – is the creation and development of the Women's Human Rights Resources web site, which encourages the use of international legal norms and instruments to further women's rights at international, regional and national levels. "We are all in Ann's debt," says Acting Dean Brian Langille. "During her watch the library world saw a revolution occur in information technology which demanded great changes and leadership in managing those changes. It is Ann's great legacy to have provided this leadership and as a result, a revolutionized and relevant library."

Ann, who officially retires on June 30, 2004, will definitely be missed, but remembered every time we reach for a law book classified as KE.

Employment Matters: The Articling Generation and the Generational Divide

BY BONNIE GOLDBERG, Assistant Dean, Career Services

Flexibility, a nurturing work environment, and opportunities for unique experiences within traditional practices – these are three of the top things today's students are looking for in a law career. Ten years ago, the priorities would have looked much different. Generational differences are having a significant impact on career goals, and the articling recruitment of today's law students. To help employers understand what students are looking for, I asked current and former students what values define their career choices and what decisions underlie their choice of prospective employer.



Generation X is defined as adults born between 1965 and 1980. This group is known to be adaptable, straightforward, self-reliant, focused, and pragmatic. They respect competence and skills over seniority. The Generation Y cohort, born between 1981 and 2000, are known to work independently, be techno-literate, desire change, and are civic-minded. The average age of the current first year U of T law student is 25, placing them at the end of the Gen X group, but still very much a part of it. Some of our students might be called "cuspers" sharing characteristics of both generations. While a "Gen X-er" may ask an employer, "What can you do for me?," the more well-known baby boomers (1945-1964) want job security, define themselves by their careers and are driven and eager to please. In contrast, members of the up-and-coming "Y" generation see their careers as offering opportunity and value, and ask their employer to "show me what you can do for me right now." For more information, see for example www.ngenperformance.com

An informal survey of students articling at a national law firm reveals the differences in generational attributes. These budding lawyers recall that they chose their firm because of the people, a supportive but "not stodgy" atmosphere, and a firm culture characterized by a "lack of pretension." One student wanted a nurturing environment "where I can stick to my own personal style and principles." The same questions posed to first-year students at the law school revealed a similar approach to career development, and things they are looking for in future employers:

Students crave work/life balance and to seek out employers who acknowledge this need. During interviews, students will often ask "whether the lawyer has a life outside of work, and how late he stays at the office." These prospective hires state up front that they want to work in "a collegial and non-competitive environment." One U of T law student cites the "humanity" of a firm as its significant attribute: "I want a firm that treats its employees (all of them) like people, and not just workers."

Students are savvier about prospective employers today, and know which questions to ask and information to research. Nancy Stitt ('93), Director, Student Programs at Osler, Hoskin & Harcourt LLP, recalls that just ten years ago, there were no firm web sites, law school Career Development Offices, nor industry magazines to provide as much information as today. "I think I didn't know to focus as much on what was important to me before I went into the process," says Stitt. Daniel Melamed ('86), a partner at Torkin Manes Cohen & Arbus, agrees. "I have had students look up my reported cases before interviews to demonstrate their keen interest in me and my firm."

Students want an employer prepared to offer flexibility and unique experiences. Madam Justice Bonnie Croll ('77), former Assistant Dean and Director of Admissions at the law school, says employers have to be prepared to offer "increased training, exposure to broader opportunities, and accommodate the student's long-term goals." As one U of T law student put it, "I want a firm that will allow me to take a leave of absence for a year to work at the UN… or the opportunity to be transferred to international offices."

Employers keen to recruit students need to highlight the ability for balance, demonstrate that the workplace is supportive, and prove that the firm is defined by a great group of people eager to share experiences and knowledge.

JUDICIAL CLERKSHIPS 2005-2006

While most graduates will spend 2005-2006 articling with a law firm, the government, or for an organization, a number of graduates took a different path and will be clerking at all levels of Canadian courts across the country.

Supreme Court of Canada
Elder Marques (McLachlin C.J.)
Emma Phillips (DesChamps J.)
Sana Halwani
(replacement for Iacobucci, J.)
David Lisson (Binnie, J.)

Ontario Court of Appeal
Amy Salyzyn
Dan Glover
John Adair
Larissa Ruderman

Ontario Superior Court of Justice
Vanessa Emery
Josh Rosensweig
Marcia Walker

Alberta Court of Queen's Bench and Court of Appeal
Aristotle Sarantis (Edmonton)
Matthew Pierce (Edmonton)

Federal Court of Appeal
Anna Huculak
Gabrielle Larocque
Jessica Orkin

Federal Court of Canada
Sorcha O'Carroll
Zoe Sinel

Federal Court, Trial Division
Juda Strawczynski

British Columbia Court of Appeal
Oren Bick

A Major New Challenge for Corporate Directors?

BY PROFESSOR JACOB ZIEGEL

A case argued before the Supreme Court of Canada this spring is sure to cause a stir in the corporate law community. Below Professor Jacob Ziegel comments on the possibilities, and outcomes, of this controversial case.

This spring the Supreme Court of Canada heard argument in what will almost certainly be the most important corporate law case to be decided by the Court in the past twenty-five years. The key issue: whether directors owe a fiduciary duty to the corporation's creditors to protect the creditors' interests when the corporation is insolvent or in the vicinity of insolvency, even though no formal insolvency proceedings have been instituted by or against the corporation.

The duty is not spelled out in the Canada Business Corporations Act (CBCA) or its counterparts at the provincial level. Nor, until this case, had a Canadian court ever imposed such a broad and onerous duty on directors. Nevertheless, Justice Greenberg of the Montreal Bankruptcy Court held at trial in *Re Peoples Department Stores Inc.*[1] that the duty applies to directors of a federally incorporated business corporation. If affirmed by the Supreme Court, the decision could have a dramatic effect on the way corporate business is conducted in Canada, especially by single proprietor or family owned businesses. It will mean either that shareholders will have to inject much more capital into the corporation than is currently the case or shut down the business as soon as it becomes clear that the corporation is in serious financial difficulties.

In *Peoples* case, the directors of Peoples Department Stores were held personally liable in damages for more than four million dollars to Peoples' creditors for decisions that allegedly resulted in Peoples' bankruptcy. Specifically, they were found to have allowed Peoples to enter into a domestic inventory procurement plan with Peoples' parent corporation on terms that were highly disadvantageous to Peoples and that, in the judge's view, were the direct cause of Peoples' eventual bankruptcy.

The Quebec Court of Appeal reversed Greenberg J's judgment, both on the facts and the law[2], and held that the CBCA provisions did not support his finding of a duty of care to creditors. However, the Court of Appeal's judgment on this issue is weak and the focus in the Supreme Court is likely to be on the soundness of the trial judge's reasoning and the persuasiveness of the precedents relied on by him.

Greenberg J. relied for his authority on a line of English, New Zealand and Australian dicta and judgments starting in the mid-1970s. These precedents rested the directors' duty to creditors on the following seemingly simple syllogism. Directors are obliged to act in the best interests of the corporation. So long as the corporation is solvent those interests are the shareholders' interests. However, once the corporation becomes insolvent the shareholders no longer have a stake in the corporation's future, only the corporation's creditors do, and therefore the directors' duty to act in the corporation's best interest must mean the creditors' best interests when the corporation is no longer a viable entity.

Most lawyer economists, and many corporate lawyers, reject the Commonwealth courts' reasoning as contrary to sound economic theory and the common understanding of the business community. They believe the implicit bargain between a corporation and its creditors is that the creditors will protect their own interests and not ill advisedly rely on the directors to do the job for them. They also point to the heavy burden the Commonwealth doctrine imposes on directors on top of the many duties already assigned to them, and the doctrine's incompatibility with the fundamental norms of corporate law embraced by the House of Lords in *Salomon v. Salomon*[3]. In that late nineteenth century seminal case, the House of Lords upheld the separate legal personality of closely held as well as widely held corporations, and decided that it is not permissible to lift the corporate veil to see who are the 'real' owners of an enterprise.

However, there is another school of thought. This is that many creditors, particularly involuntary creditors, are not in a good position to protect themselves and that it is irresponsible for directors to continue to trade when they know, or ought to know, that it's unlikely the corporation will be able to pay its debts. This philosophy finds expression in recent English, Australian and New Zealand insolvency legislation.

Complicating this mix of arguments (and others I haven't mentioned) is the fact that the CBCA and many of the provincial business corporations acts contain a statutory "oppression" remedy. This enures for the benefit of creditors of a corporation as well as its shareholders and enables them to seek relief from directors' conduct that is 'oppressive or unfairly prejudicial' to the complainants' interest. The provisions were not relied on in the *Peoples* case but they are certainly broad enough to include insolvency situations.

Commentators are divided about the impact of these provisions. Some argue that they make the Commonwealth doctrine unnecessary. Others contend that the oppression remedy is the only remedy available to creditors to challenge directors' conduct. Still a third group of analysts believe creditors will be able to invoke the oppression remedy *and* the Commonwealth duty care doctrine if the facts are right. Recent law in Ontario and Alberta appears to support the third view.

The corporate bar across Canada is waiting anxiously to see which of these competing theories receives the Supreme Court's nod. We can also be sure that the Court's decision, when rendered, will be grist to the academic mills for years to come.

1 (2001) 23 Can. Bkcy Rep. (4th) 200 (Que. S.C.).
2 (2003) 224 D.L.R. (4th) 509.
3 [1897] A.C. 22.

The current Chair and a former Chair of the Ontario Securities Commission – David Brown '66 and Ed Waitzer '76 – predict how the regulation of Canada's capital markets will evolve.

Think Global, Act National:

The key to securities regulation today

BY DAVID BROWN, Q.C., '66
Chair, Ontario Securities Commission

The veteran Boston politician Tip O'Neill once said that all politics is local. That may still be true, but the issues involved in regulation are increasingly national or even global.

It wasn't long ago that capital was raised within relatively confined local markets. In Canada, only a few years ago we had five exchanges trading equities. Market participants focused their capital-raising or capital-investing activities within our borders, by and large within a region or even in local communities.

Today, investors can invest anywhere in the world with the click of a mouse. Middle-class retail investors were once the exception; now they are becoming the rule. The exponential growth in the investing class is matched by an increase in financial products, offered by new players who compete across sectors.

Welcome to the new normal, where the default position seems to be set on change.

The new normal is characterized by unprecedented pressure to revise outdated regulations at the cost of severe economic consequences. The new normal is regulators around the world inter-relating on a frequent basis, addressing the need to make domestic solutions compatible with global trends. Until two years ago, the International Organization of Securities Commissions (IOSCO) served mainly as a forum for domestic regulators to report on initiatives they had already taken. Today, IOSCO brings together securities regulators in the major countries to discuss problems at the same time as they are being addressed in local jurisdictions. Local regulators use these international discussions to inform their local decisions, and vice versa.

That is the new normal. We have a regulatory system in Canada struggling to adapt to it.

In Canada securities regulators have traditionally been able to protect investors and the integrity of the markets, and ensure their ability to maintain public confidence, through a system of separate provincial and territorial securities regulators. When the investing and capital-raising activities of Canadians and Canadian entities began to extend beyond regional and even national borders, issuers and market intermediaries needed access to investors across the country. But the time and expense of dealing separately with each and every regulator was prohibitive.

There was a need, at the very least, for securities regulators across Canada to coordinate their activities. In response, the Canadian Securities Administrators (CSA) was created in the early 1990s. It has been a productive exercise. In particular, it has helped to solve the problem of access to securities markets. But is the system as efficient as it must be? Dealing with the challenges of the "new normal" is difficult enough when a country has a national regulator, as does every industrialized country except Canada. With 13 separate regulators, responding quickly is 13 times as difficult.

It is not just a matter of needing national coordination. What is needed is a national perspective. When the provincial and territorial commissions get together, we don't just represent different jurisdictions. We represent distinct standpoints – 13 decision-makers guided by 13 separate sets of policies and politicians.

Ontario, for example, contains a large concentration of national and international firms. These are the players that depend most on a market that is respected globally and responsive to current global issues. Consider the response to the financial reporting scandals in the United States. This was especially important to the large corporate players in Ontario, who need to attract foreign capital. But not all Canadian regulators had the same reason to show an equal degree of interest.

The OSC came forward with three rules, including requiring all issuers to have independent, financially literate audit committees of the board; requiring CEO/CFO certification of all financial statements; and all auditing firms of public companies to be members in good standing of the Canadian Public Accountability Board, the new independent watchdog of auditing practices.

Ultimately the rules were adopted by all of the commissions with the exception of B.C. Indeed, valuable revisions were made during the consultative process. Certainly consultation is important to any regulatory regime. But the process of bringing Canada together on securities regulatory policy is lengthy, expensive and often frustrating. And in today's global economic environment, we must come together more and more frequently and more and more quickly. We have been getting by – but in this day and age, is getting by good enough?

Over the past couple of years, we have seen how easy it is to lose public confidence, and how little real protection is offered by physical borders. Canada's regulators must have the ability to act quickly, act on a national basis, and represent Canada's interests globally. The challenges ahead are great. To meet them, Canada needs a single securities regulator administering a single securities code.

The Emperor Needs Some Honest Weavers:

The Challenge for Canadian Securities Regulation

BY ED WAITZER '76
Former Chair, Ontario Securities Commission

Since 1999 the International Monetary Fund and the World Bank have sent teams to over 100 member countries to assess their financial systems. A common theme that has emerged is the need to improve the governance of the regulatory agencies themselves. Too few operate with sufficient accountability and transparency. Having attempted (unsuccessfully) to achieve sufficient political currency for a national regulator (excepting Quebec) a decade ago and as a relatively detached observer (living in Chile), I wonder whether the current debate (passport system vs. national regulator) may be distracting us from these more immediate issues.

The Canadian Securities Administrators (CSA) is an informal mechanism that became active in the late 60s to facilitate interprovincial uniformity at a time when the Chair of the Ontario Securities Commission (OSC) was, in effect, CEO and staffing was minimal. Regulatory decisions were swift and responsive to market conditions. Accountability was focused and direct.

During the 80s, this objective blurred and the notion of harmonization crept in. The Commissions began to embrace more interventionist regulation and added staff to do so. This trend was exacerbated by conferring rule-making authority and self-funding on several Commissions – leading to the "bulking up" of staff and constraining the ability to focus efforts collectively (or strategically). The sheer volume of (at times inconsistent) initiatives and the complexity of steering them through the CSA in a timely manner induced a sense of resignation (evidenced, for example, by growing disinterest in the "notice and comment" process or the repetitive mantra of the annual "statement of priorities" – both designed to ensure accountability in securities rule-making).

This bureaucratization of the policy making process could not have occurred at a worse time for Canadian capital markets. The globalization of finance is a nemesis of inefficient regulation. Not only is the traditional regulatory paradigm challenged but so too are our capital markets and financial services sector as they (like so much of our country's economy) struggle to identify and maintain their relevance.

My intention is not to question the commitment, sincerity and intelligence of those who work in the various regulatory bodies. Rather, it may be unrealistic to expect internally generated leadership or substantive accountability and performance from such a fragmented and overburdened system.

It isn't clear how either of the structural reforms being mooted are responsive to this concern. Ironically, experience in the European Union (EU) is proffered as support for both. While the EU has enjoyed some success in promoting free movement of people, capital and ideas throughout its internal area, it has also relocated power from national bodies under democratic scrutiny to less accountable bodies – increasing bureaucracy, rigid and expensive standards and the use of cross-regional subsidies to buy assent. In these latter respects the model is not a solution but, rather, creates new types of problems we should be mindful of.

The most immediate challenge for Canadian securities regulation is one of accountability – of staff to Commissions, of Commissions to legislators (and likewise with respect to commercial crime units at all levels). The issue is a lack of focus and performance. Who should formulate directives to the Commissions to work on developing meaningful priorities? How can they be held accountable for achieving specific goals within specific time frames? Addressing such concerns is critical to restoring confidence in the capacity of the system to be responsive and fair.

The globalization of finance is a nemesis of inefficient regulation.

Not only is the traditional regulatory paradigm challenged but so too are our capital markets and financial services sector as they (like so much of our country's economy) struggle to identify and maintain their relevance.

Resignation to sub-optimal performance becomes a vicious cycle – one that is only tolerable because the costs of regulation, while excessive, are of marginal immediate relevance to the industry (and are invisible to consumers) and because there is a deeper, broader, easily-accessible market immediately to the south. If we are to break this syndrome of "regulatory fatigue" and create a new trajectory, it must begin with a commitment to more coordinated, transparent and efficient allocation and use of resources. Such initiatives may assist in beginning to disentangle some of the simpler "knots" in the current regulatory framework and pave the way for bolder initiatives. There can be little to lose and much to gain.

The Most Important Market Player … that we *aren't* regulating

BY LISA PORLIER
Executive Director, Capital Markets Institute

Most of us don't have the time or expertise to research and personally select the stocks and bonds we are going to invest in, choosing instead to rely upon professional investment managers for our RRSP or pension fund investments. But as long as we choose good managers, we can rest assured that our investments are safe. Or can we?

What many people don't realize is that institutional investors rely on someone else to assist them with their job of investing other people's money. And although institutional investors do much of their own research, to a large extent they rely upon credit rating agencies (CRAs) for their information about how good – or bad – an investment risk is. Credit rating agencies distill the vast array of information available to investors in corporate and government debt, essentially opining on the likelihood the company will repay its debt on time. Their ratings influence the pricing of fixed income securities and determine whether many institutional investors (like pension funds and insurance companies) can invest at all.

The accuracy of ratings set by CRAs can be important to how well we do in our RRSP investments. An inaccurate rating could mean the difference between a profit and a loss on your long term RRSP investments.

Despite their importance, CRAs are largely unregulated in Canada. The U.S. Securities and Exchange Commission, the International Organization of Securities Commissions, and the European Commission have proposed significant changes to the way in which credit rating agencies operate and are regulated, based on several key concerns: lack of transparency and appropriate disclosure in the ratings process; absence of competition and barriers to entry in the industry; inappropriate use of inside information; questionable accuracy and quality of ratings; and perceived conflicts of interest.

The Capital Markets Institute (CMI) has launched a project to investigate whether Canadian debt market participants and regulators have the same concerns, and how to act on them. Are changes needed in the operation and regulation of credit rating agencies in Canada? What unique features of the Canadian debt market and regulatory landscape should determine our policy direction?

CMI research will examine the private and public use of ratings. In the public sphere, credit ratings are used in many contexts (including securities and pension legislation) as a proxy for investment quality. In the private sphere, credit ratings are used in many contracts as triggering events for contractual provisions. The rating agencies themselves object to these uses of their ratings, but obviously cannot eliminate them unilaterally. Are these uses appropriate, and, if not, what other criteria might be used instead?

Market participants disagree about the need for government regulation of CRAs over and above market forces that discipline the quality of ratings. We will assess the arguments for and against the various models that may be adopted for CRA regulation, including self-regulation and oversight by independent agencies like securities commissions.

Are changes needed in the operation and regulation of credit rating agencies in Canada? What unique features of the Canadian debt market and regulatory landscape should determine our policy direction?

Finally, we will consider the competitive environment for CRAs in Canada. Many users of credit ratings have noted the lack of competition in both the U.S. and Canadian markets. Should we be actively promoting competition and new entry among CRAs operating in Canada?

The CMI's independent research on each of these important topics will be led by a respected expert in the area. The CMI will also continue its tradition of incorporating the valuable input of market practitioners through plenary sessions, interviews and roundtable discussions. The results of this research will be available to the capital markets community through a conference, CMI publications and the CMI website (www.utcmi.ca) over the coming months.

This research project will support the CMI's mandate to undertake and sponsor policy research to develop a comprehensive capital markets strategy for Canada, developing a clear understanding of the challenges facing the Canadian capital markets, and the institutional tools that must be developed in order to convert those challenges into opportunities to be a leader among the world's small, open capital markets.

how should Canada's capital markets be regulated?

PROFESSOR DOUGLAS HARRIS
PROFESSOR JEFFREY MACINTOSH

There has been a lot of debate in the papers recently about the best regulatory structure for Canada's capital markets. Since the nineteenth century, Canada has had a decentralized system with a number of regulators – one for each province and territory. All of that may soon change.

Some academics and critics of the current structure are calling for a national system, with one regulatory body for all of Canada. Others say we are better off with multiple regulatory bodies. Few can agree on what should be done next. One thing everyone can agree on, however, is that it's an issue of fundamental importance to all Canadians. And whatever is decided, it could have a dramatic impact on job creation, investment, and our standard of living.

Competition among provincial regulators takes us in the opposite direction from the increasing emphasis in virtually every other context on globalization and the need for Canada to develop a national role on the international stage.

– DOUG

Two of the Faculty's professors – Doug Harris and Jeff MacIntosh – have been at the centre of the debate, on opposing sides of the issue.

Doug Harris served as the Research Director for the Wise Persons' Committee to review the structure of securities regulation in Canada (the WPC). The WPC's report, titled *It's Time,* was released in December 2003 along with a companion research volume that Doug edited. The WPC recommended the creation of a single national regulator to replace existing provincial regulators.

Jeff MacIntosh has been a critic of attempts to create a single securities regulator for Canada, and has spoken out in favour of a "passport" system that would retain provincial regulation but permit competition among the provinces.

We talked with Doug and Jeff about this controversial issue, and asked them to comment on the five key areas that are critical to the debate – harmonization; accountability; innovation; competition; and the Canadian context.

IS HARMONIZATION NECESSARY FOR A PASSPORT SYSTEM?

The passport system would require provincial regulators to recognize decisions made by other provincial regulators, with no independent review. A passport system based on regulatory competition explicitly contemplates that the rules will differ among the provinces. How different can the rules be among the provinces for a passport system to work?

DOUG:

Any stable passport system will require a very high degree of harmonization among the participating jurisdictions. It cannot be otherwise, and this requirement will severely limit the extent to which provinces can differentiate themselves to attract firms.

First, what do I mean by a "stable" passport system? A passport system will only offer true "one stop shopping" if there are strict limits on the ability of participating regulators to engage in an independent review of a matter already considered by another regulator. Any significant amount of duplicative review would reduce or eliminate the benefits offered by a passport system.

Why is a high degree of harmonization among the participating jurisdictions necessary for a stable passport system? Consider the example frequently put forth by proponents of the passport system: my Ontario driver's license allows me to drive in any Canadian province. Each province respects the licensing decision made by Ontario.

But how long would we expect that arrangement to last if Ontario sought to reduce the costs associated with accidents caused by young drivers by increasing the minimum driving age to 21? Would Ontario stop 16-year old Manitoba and Quebec drivers at the provincial border? What if British Columbia sought to increase licensing revenues by reducing the minimum driving age to 13? Would 13-year olds be allowed to drive across the border into Alberta?

An unrealistic scenario? Not in securities regulation, where, just as the Ontario Securities Commission introduces stringent governance and auditing requirements based on the U.S. *Sarbanes-Oxley Act,* the British Columbia Securities Commission drafts legislation that eliminates many of the mandatory

requirements of securities regulation in the other Canadian provinces, such as prospectuses and registration of individuals working in the financial services industry. How realistic is it to assume that Ontario will allow free access to Ontario investors for firms or offerings approved under the new B.C. legislation? If Ontario declines to recognize the decisions of the B.C. Commission made under the new B.C. rules, market participants will still be dealing with different regulators applying different rules.

The likely outcomes are that firms either have to deal with multiple regulators, or the provinces adopt rules that do not differ significantly. Either outcome would deprive market participants of the promised benefits of the passport system. The benefit of the WPC model is that it offers true one stop shopping for all market participants.

JEFF:

Let me begin by saying that I believe that the prospect that Canada will ever have a national regulator is, practically speaking, zero. Quebec and B.C. are clearly out, and recent pronouncements by Greg Melchin (Alberta's Revenue Minister) give ample reason to believe that Alberta is out as well. Thus, the only way to ensure that market players have only one regulator (the key shortcoming of the existing system) is to adopt a passport system. For this reason I believe that our focus should be on how to craft a passport system, and not *whether* to do so.

Doug argues that a passport system cannot exist without near uniformity of laws. We have at least two counter-factuals. The first is corporate law, which has functioned on a passport system for over a century. Particularly, prior to reforms of the federal corporate statute in the 1970s (and their subsequent adoption in most provinces), the law of "memorandum" jurisdictions like B.C. was quite different in many key respects from that in the "letters patent" (and articles of incorporation) jurisdictions like Ontario. Similarly, a passport system has prospered in the U.S. despite differences that are in some cases quite radical, as a comparison between Delaware and California law illustrates. These passport systems have remained remarkably stable even though any province or state could at any time have legislated them out of existence, imposing their own corporate law on out-of-jurisdiction corporations (which only a small handful of states do). Given that the distinction between corporate and securities law is an historical artifact without substantive foundation, why would we believe that what has worked so well for corporate law will not work for securities law?

In fact, we already have one example of a well functioning passport system in securities law – that of the European Union. The EU represents 15 different member countries (with 10 new members in the wings). There are harmonizing directives to ensure that minimum standards are met – but these are extraordinarily sparse when compared to the regulatory complexity of any Canadian system. All this was achieved despite enormous differences not merely in the law of the various member countries, but in their very philosophical underpinnings. This is highly indicative of the degree of similarity that is necessary (i.e. not much), particularly if minimum thresholds are agreed upon. ▶

It appears entirely credible that one or more of the smaller provinces might find it worth their while to become the securities law Delaware of the North.

- JEFF

WHICH MODEL OFFERS MORE EFFECTIVE ACCOUNTABILITY?

Accountability is a critical issue in any regulatory structure: who will be responsible for regulatory outcomes, and how?

DOUG:

Under the WPC model, the federal Minister of Finance is accountable to all Canadians for the quality and outcomes of securities regulation. In fact, the accountability of regulators to market participants in the smallest provinces would likely be enhanced under a national regulatory scheme, when compared to the current structure in which the largest provinces (Ontario, Quebec, B.C. and Alberta) dominate the regulatory process with no formal or informal lines of accountability beyond provincial borders.

A national regulator would also be motivated by the national interest. For example, would a national regulator, operating in the national interest and with the ability to speak for the entire Canadian capital market, have been as likely to give Nasdaq speedy approval to operate in Canada without securing any kind of reciprocal access to U.S. markets, as the Quebec government did in 2000?

Advisory panels, service delivery standards and detailed annual reporting under the WPC model would provide capital markets stakeholders a much better opportunity to assess the performance of the single regulator than they now have with respect to provincial regulators. The WPC model incorporates state-of-the-art accountability and transparency mechanisms that provide a significant improvement over any proposed passport model.

Jeff questions whether federal politicians would be truly accountable for securities regulatory outcomes. But where is the accountability under a passport system in which provincial regulators, and the provincial politicians to whom they are accountable, must allow free access to their capital markets to issuers that meet the requirements of other provinces? Furthermore, under an effective passport system, provincial regulators could not have any significant degree of discretion or the ability to opt out in a particular case, thereby insulating them and their political masters from responsibility for regulatory failures that can be blamed on another province's requirements or regulators.

JEFF:

As federal spending scandals multiply faster than neutrons in a fission reactor, the federal government has proven itself the most spendthrift, the most incompetent, and the least accountable of all Canadian governments. This is not surprising; with a budget of $150 billion, it is comparatively easy to hide $100 million in profligate spending. The breadth and depth of the functions assumed by the federal government means that something as seemingly inconsequential to the man-in-the-street as securities regulation will get lost in the shuffle. It is already difficult to get the attention of provincial politicians – but there is substantially less crowding out around provincial cabinet tables and in the ministries of finance than there will be at the federal level.

The proposal of the WPC to admit an advisory committee of provincial finance ministers to the policy making function only makes matters worse, since the federal minister can deflect accountability by blaming his provincial advisors. Similarly, the various provincial ministers will deflect accountability by blaming their provincial counterparts and/or the federal Minister. But in any case, whatever the accountability mechanisms put in place, they can be replicated at the provincial level with greater effect.

It is true that injured parties may reside outside the jurisdiction with authority to regulate. In my view, this problem is more theoretical than practical. It has not proved a problem, for example, in corporate law. Moreover, regulatory lapses will not deprive injured parties of a civil remedy through the courts, providing those with the keenest interest in accountability an important backstop. But in any case, under a passport system, there is a form of market accountability; bad regulation will lead to a loss of business by the regulating jurisdiction. This is precisely what keeps Delaware honest in prescribing corporate law for a plurality of the largest U.S. corporations.

WHICH MODEL PROMISES GREATER REGULATORY INNOVATION?

If Canada's capital markets are to thrive in the global economy, capital markets regulators must develop innovative and responsive regulatory tools to ensure investor protection while promoting market efficiency. What model best supports regulatory innovation?

DOUG:

There is no reason why a single regulator cannot be as responsive and innovative as multiple regulators. Competition among regulators is frequently argued to be a source of regulatory innovation, but it is not the only, or even necessarily the best, source of regulatory innovation.

A single national regulator would have ample incentives to be innovative and responsive as a result of the increasing availability of international options to Canadian investors and firms. Furthermore, the staff of a single national regulator would be drawn from the existing staffs of the provincial commissions, so the people responsible for innovations introduced by the provincial regulators would remain involved in policy development. Having a single national regulator would permit these talented individuals to focus more narrowly on particular areas of policy development because of the larger scale and scope of a national regulator, rather than having to tackle a full range of capital markets issues.

In fact, regulatory competition may actually inhibit certain types of innovation. At a symposium organized by the Capital Markets Institute and the Canadian Foundation for Investor Education in 2002, former SEC commissioner (and strong proponent of regulatory innovation) Steven Wallman argued that jurisdictions competing for market share would be reluctant to experiment with certain types of innovations because of a "free rider" problem. If an innovation is successful, other jurisdictions can easily copy it and rob the innovator of the benefits of the innovation, while sharing none of the costs. If the innovation is unsuccessful, the innovator suffers the consequences alone. A regulator not motivated by protecting its market share can conduct the bold experiment, particularly one that promotes the interests of small investors and threatens the vested interests of managers and controlling shareholders who control the regulatory arbitrage process.

JEFF:

Doug boldly argues that a national regulator is just as likely (or perhaps even *more* likely) to adopt regulatory innovations as a passport system. In my view, this is improbable. The core virtue of any competitive system is the incentive that it supplies for innovation. The heart quails, for example, in imagining what kind of cars we might be driving if the entire North American automobile market was serviced by a single car company operating out of Detroit. A regulatory monopolist, like a monopolist in *any* market, has little incentive to innovate because it does not *have to* innovate to prosper.

In many respects, for example, the Ontario Securities Commission has functioned like a *de facto* national regulator, and its record is telling. It took the OSC many years to mimic regulatory innovations from the U.S., such as the short form prospectus, the shelf prospectus, and disclosure requirements such as management discussion and analysis of financial statements, and the annual information form. Smaller provinces, however, have been very innovative in crafting prospectus exemptions for smaller firms.

The danger of free riders raised by Doug is once again a more theoretical than practical concern. A background study done for the WPC indicates that regulatory innovations introduced by various provinces have quickly spread across the country – but this has not stopped innovation from occurring. Similarly, academic investigations make it clear that Delaware easily surpasses all other states in creating innovative corporate law, *and* that this corporate law routinely spreads to other states. Again, the free rider problem has not stopped Delaware from innovating. Corporations still prefer to incorporate in Delaware, because they get the benefit of these innovations months or years before they would if they were incorporated in other jurisdictions.

Finally, creating innovation is not simply a question of having the right people. It is having the right people embedded in an organizational structure that creates an incentive to innovate. A regulatory monopoly will not do that.

WHAT DOES THE EVIDENCE SHOW ABOUT REGULATORY COMPETITION?

Supporters of regulatory competition point to the U.S. experience with competition among states for incorporations. Delaware is the perennial leader in this contest, as home to a share of public and private corporations vastly disproportionate to its population and economic size. The evidence of whether shareholders of Delaware corporations are better off is a matter of debate.

DOUG:

Delaware is the darling of regulatory competition proponents, who, like Jeff, argue that the tiny state has won a "race to the top" in capturing a dominant share of the U.S. incorporation market by adopting rules that increase shareholder wealth.

But the evidence supporting this characterization of the impact of regulatory competition in the U.S. is mixed. Supporters of regulatory competition frequently cite a 2001 study by NYU law professor Rob Daines that firms incorporated in Delaware have a higher "Tobin's Q" – a valuation measure that is positively associated with firm value. However, Harvard law professor Guhan Subramanian revisited Daines' data in a 2004 study and found that the "Delaware effect" identified by Daines did not occur after 1996, and did not occur for larger firms at any time between 1991 and 2002. Subramanian concludes that "the Delaware effect 'disappears' when examined over time and when examined for firms that are economically meaningful." Similar results have been obtained in other academic studies.

"AS FEDERAL SPENDING SCANDALS MULTIPLY FASTER THAN NEUTRONS IN A FISSION REACTOR, the federal government has proven itself the most spendthrift, the most incompetent, and the least accountable of all Canadian governments." **– JEFF**

"A SINGLE NATIONAL REGULATOR WILL NOT LACK FOR INCENTIVES TO DEVELOP COST EFFECTIVE AND RESPONSIVE REGULATION AS A RESULT OF THE INCREASING ACCESSIBILITY OF OTHER NATIONAL REGULATORY REGIMES." – DOUG

It is not even clear that Delaware is engaged in the type of competition we think it is. The standard account of the competition for incorporations in the U.S. is that Delaware has successfully fought off attacks from other states seeking to provide more attractive rules for corporations. In fact, no other state competes meaningfully with Delaware, other than a firm's home state. That is, the choice made by the vast majority of firms is between incorporating in their home state or Delaware. How much market discipline has state competition really provided in a market where Delaware faces no realistic challenge to its dominance?

Finally, a recent study by two Harvard academics has found that states that offer stronger anti-takeover rules (rules that make it more difficult to displace existing directors and officers) are more successful in retaining in-state firms and in attracting out-of-state incorporations. Law and economics commentators generally agree that anti-takeover rules are detrimental to shareholders, but attractive to directors and officers concerned about losing their positions if the firm is taken over. So it is not clear that regulatory competition in the U.S. incorporation market has been an unambiguous success for shareholders.

All of this suggests that we should not accept uncritically the proposition that regulatory competition leads to the best regulatory outcome. The evidence is mixed, and becomes even more tenuous when we consider how competition in securities regulation might work in practice in Canada.

JEFF:

In 1974, former SEC Commissioner William Cary argued that Delaware shamelessly pandered to corporate managers in order to earn corporate franchise fees. Cary's solution was to federalize U.S. corporate law.

If Cary is right that competition has led to a race-to-the-bottom, then the market should reward a jurisdictional move into Delaware by discounting the firm's share price (in anticipation of managerial defalcation). In fact, precisely the opposite happens. In every single academic study, share prices go up, and not down (and in almost all by a statistically significant amount) when a firm moves into Delaware.

Doug argues that the evidence is "mixed" because in some years Tobin's Q is not higher for Delaware firms than for others. To my knowledge, however, no one has ever shown that Tobin's Q is statistically *lower* in Delaware, for any test period, than in other states. It is thus clear that, viewed in its entirety, the Tobin's Q studies only strengthen the argument that Delaware firms are better run than their counterparts in other states.

Importantly, this occurs even though it is widely acknowledged that Delaware's law accords managers greater freedom than the law of many other states. It is also widely acknowledged that even though shareholders formally approve jurisdictional moves, it is in fact the managers who decide. This is potent evidence that more regulation is not always better regulation; sometimes, managerial freedom operates in the interests of *shareholders*. This should come as no surprise, because every act of regulation results in both benefits *and* costs, and sometimes the costs outweigh the benefits. This is a lesson that Ontario securities regulators have been particularly loath to digest.

Although a number of states have attempted to challenge Delaware's domination of the chartering market, none have succeeded. Tellingly, some of these failures have involved attempts to carve out a corporate law that accords substantially more managerial freedom than Delaware, suggesting that Delaware is close to the optimal cost/benefit mix. But this does not mean that the law has not benefited from competition. As long as there is relatively low cost entry into a market, such that it is "contestable," both economic theory and evidence show that the benefits of competition can be realized even if one firm dominates the market.

HOW WOULD COMPETITION IN SECURITIES REGULATION WORK IN CANADA?

Proponents of the passport system have suggested that the argued-for benefits of regulatory competition realized in the U.S. corporate charter market could be realized in Canada by allowing provinces to "compete" to offer the best securities regulatory rules within a passport system.

DOUG:

The most significant flaw in the regulatory competition story as applied to Canadian provincial securities regulators by Jeff and others is the absence of an essential ingredient of a competitive market: incentives to compete. While Delaware's incentive to compete to attract firms to the state is well-known, the incentives that would motivate competition among provincial securities regulators are less obvious.

The provinces that are the most likely to play a significant role in a competitive structure – B.C., Alberta, Ontario and

Quebec – do not remit their surpluses of revenues over expenses to the provincial government; instead, fee levels are adjusted so that revenues correspond to expenses. So it appears obvious that these provincial regulators do not have the same kinds of financial incentives that operate in Delaware.

The smaller provinces might be able to increase revenues derived from securities regulation by increasing the number of securities transactions they regulate, and collecting fees on those transactions. But this possibility has to be assessed against the reasonable probability of issuers, investors, intermediaries and their advisors (law firms, accounting firms, and others) picking up and moving to P.E.I., or the Yukon, or Nunavut, to take advantage of the competitive regulatory offering from such a province or territory. Becoming a P.E.I. lawyer, or a Yukon or a Nunavut lawyer, is much more difficult than it is to become a Delaware lawyer in the U.S., and so the ability of Toronto, Montreal, Calgary and Vancouver lawyers to add this qualification to their resumes in order to be able to provide securities law opinions would be severely limited.

What else might motivate our provincial regulators to compete? It could be the desire to attract regulated entities in order to justify increasing the size of the regulator's staff and spending, but few capital markets stakeholders, including Jeff, would welcome competition motivated by empire building. Nor is this motivation consistent with my experience of provincial regulators, who reject the notion that they are, or should be, motivated by competition on an individual or institutional level.

It surely stretches international credulity to seek to foster competition among multiple regulators within a capital market that represents less than 3% of the global aggregate. Competition among provincial regulators takes us in the opposite direction from the increasing emphasis in virtually every other context on globalization and the need for Canada to develop a national role on the international stage. A single national regulator will not lack for incentives to develop cost effective and responsive regulation as a result of the increasing accessibility of other national regulatory regimes.

JEFF:

Delaware's tiny size works to its advantage in the corporate chartering competition. Precisely because the chartering business supplies such a large percentage of its annual revenue (about 20%), it can give its corporate clientele a credible commitment to maintain the quality of corporate law. Failure to do so could result in a significant loss of revenue through corporate de-registrations, and this would spell fiscal disaster. While Doug suggests that no jurisdiction in Canada has the same incentive to compete for securities "chartering" business, there are in fact three provinces in Canada that have *smaller* populations than Delaware (P.E.I., New Brunswick, and Newfoundland). Three others (Saskatchewan, Manitoba, and Nova Scotia) have populations only slightly greater. Admittedly, the revenue pie that is up for grabs is smaller than that available to Delaware. However, the smallest province, P.E.I., has a population of only 140,000 (versus Delaware's 800,000). It thus appears entirely credible that one or more of the smaller provinces might find it worth their while to become the securities law Delaware of the North. In fact, once securities law becomes a passport system, this will free up all jurisdictions to genuinely compete for *corporate* law business as well – something that is difficult to do now, because securities law is applied in a manner that overrides corporate law. This would create an additional revenue stream for potential competitors.

> CREATING INNOVATION IS NOT SIMPLY A QUESTION OF HAVING THE RIGHT PEOPLE. IT IS HAVING THE RIGHT PEOPLE EMBEDDED IN AN ORGANIZATIONAL STRUCTURE THAT CREATES AN INCENTIVE TO INNOVATE. – JEFF

In my view, there are also good incentives for larger, but still relatively small provinces like B.C. and Alberta to craft good law. This is because the benefits realized by becoming the "Delaware of the North" are not limited to the direct revenues that could be realized by selling securities law franchises (augmented, perhaps, by selling superior corporate law, as Delaware has done). It has been estimated that the *indirect* revenue realized by Delaware is about half a *billion* dollars per year. These benefits include having a resident cadre of high priced professionals such as lawyers and accountants that minister to Delaware's corporate clientele. I urge every Bay Street corporate lawyer to ponder what it might be like to ply one's trade from a picturesque (and smog free) loft overlooking Charlottetown harbour, only minutes away from a designer beachside home.

When it comes to insider trading in Canada, most of the talk seems to be about its negative effects on investor confidence, and the need to prevent it. The Canadian business press and recent academic studies agree that the incidence of insider trading in Canada is higher than other developed countries. Arturo Bris of Yale's School of Management recently attracted the attention of the Canadian media and regulators with his conclusion that insider trading profits in Canada were the highest among major markets studied.

But the real issue may not be how to prevent insider trading, but whether in fact it ought to be prevented in the first place. Professor Ian Lee notes that for decades most academics have agreed that there is nothing intrinsically wrong or "unfair" about insider trading. Some have even used this to argue that the laws against it are unnecessary. Below, Professor Lee takes another look at this controversial issue.

Insider Trading:
What's so wrong about it, anyway?

PROFESSOR IAN LEE

CANADIAN LAW does not lack for provisions regulating or prohibiting insider trading. Provincial securities laws prohibit, on pain of fine or imprisonment, transactions by corporate insiders with knowledge of material non-public information. Federal and provincial corporations statutes (such as the Canada Business Corporations Act) create civil liability on the part of inside traders to the corporation and to people with whom the inside trader transacted. And federal legislators have recently upped the ante: Bill C-13, which received Royal Assent in March of this year, enacts an indictable offence of "prohibited insider trading," carrying a maximum penalty of 10 years' imprisonment.

Despite federal and provincial laws prohibiting insider trading, and the intuitive sense that many people have of its wrongfulness, the regulation of insider trading presents something of a mystery in academic circles, where a decades-long debate has failed to yield a consensus as to what, if anything, is wrong about insider trading.

In the academy, there is today a consensus on one thing. On both sides of the debate, the issues are framed exclusively in economic terms. Would permitting managers to trade on the basis of inside information provide them with incentives to increase the value of firms? Would it provide stock analysts with incentives to ferret out valuable information? Or would it simply increase the risk of managerial opportunism and cause ordinary investors to desert the market, reducing liquidity and increasing transaction costs? Few scholars on either side think that fairness has anything to do with the debate.

By contrast, I take a different view: in my opinion, fairness is indeed relevant to the insider trading debate – just not in the way that it has been conceived of to-date.

Suppose, for example, that the CEO of a publicly traded company sold stock in her company before a negative earnings announcement. What, if anything, did she do that was wrong?

On one theory that has been influential in the United States, the CEO's knowledge of the impending announcement "belonged" to the corporation, and the CEO committed what amounts to theft by using the corporation's property for her own benefit. Of course, if the basis for the wrongfulness of insider trading is that information is a corporate asset, it would suggest that insider trading should not be prohibited outright; rather, the critical question in a particular case should be whether adequate consent was given by the corporation to the insider's use of that asset. The CEO's employment contract could, in principle, authorize her to make personal use of corporate information just as it might authorize employees as part of their compensation to use other corporate property (for example, a company car) for personal activities. The information-as-property theory cannot, therefore, account for the mandatory nature of the prohibition against insider trading.

There is also an egalitarian view, often reflected in regulators' statements about insider trading but poorly regarded among academics. According to this theory, known as the "equal access" theory, our hypothetical CEO's privileged access to information gave her an unfair advantage in the market compared to other investors. One problem with this view is that the superior informational access that corporate insiders have is not easily differentiated from other sources of inequality in the stock market, such as differences in wealth or financial sophistication.

Moreover, to make sense of the alleged unfairness of insiders' advantage, one needs to conceive of the stock market as a game or a sport – a contest, if you will, for above-average returns. One often hears metaphors like "playing with a stacked deck" or, its opposite, "playing on a level playing field." We deprive insiders of their informational advantage in order to make the stock market game more appealing to outside investors, much as we might handicap a stronger player in a board game, to make the game more enjoyable and worthwhile for other players. Sometimes

the concern for equality of access is couched in terms of "investor confidence": if the contest appears to be unfair, investors will desert the stock market.

Although it is popular to think of the stock market as a sporting event or a casino, I do not subscribe to this view because a market so conceived would be unworthy of the massive commitment of resources that our society makes to it. Many of us remember, no doubt, the extraordinary effort put into reopening the New York Stock Exchange after September 11, 2001. If the stock market is merely a game, that effort was misguided, or even perverse.

If these theories cannot adequately explain the existence of laws that prohibit inside trading, what, then, is the reason for them? I argue that a possible answer lies in a different sense of fairness, drawn from the values that underlie markets as a morally attractive means of resource re-allocation.

The distinctive feature of markets is bilateral voluntariness. Assuming no third-party costs, a bilaterally voluntary transaction makes no one worse off and both parties better off. Indeed, each of the parties is better off in his or her own eyes and not merely according to some external measure of satisfaction. These features of market transactions reveal an important fact about the constitutive values of the market: the market respects individual preferences and it respects individual choice.

THERE IS ALSO AN EGALITARIAN VIEW, OFTEN REFLECTED IN REGULATORS' STATEMENTS ABOUT INSIDER TRADING BUT POORLY REGARDED AMONG ACADEMICS.

Moreover, the market is not a forum for purely atomistic action; it is an institution in which individuals meet in the exercise of their choices. Nor is the market, ideally, a vehicle for the domination of one person by another; it is a framework for voluntary interaction. That markets are, in this sense, a cooperative institution is an idea at least as old as Adam Smith's observation that markets arise out of the fact that "Man has almost constant occasion for the help of his brethren."

These characteristics of markets suggest a normative foundation for markets that incorporates principles of fairness. In a fair market, each participant treats the values of the market – respect for preferences and respect for choice – not simply as values to which he or she alone is entitled, but as values to be respected equally for all those with whom he or she trades.

Familiar principles, such as non-coercion and promise-keeping, can be considered ground rules of a fair market. By refraining from coercion, each party honours the other's freedom of choice – a foundational value of the market. Moreover, in a fair market, each party respects the other party's equal status in the enterprise, for example by not abusing the other party's induced reliance by reneging on a promise. These principles may be seen as necessary in order for the institution built around them to be faithful to the market's vocation as a means of self-interested, yet respectful interaction.

I do not claim that fair ground rules are essential to a system of exchange. It is possible to imagine an exchange system without any ground rules, in which protection from coercion and the enforcement of promises are assured only to the extent that those with the power to establish and enforce the relevant norms perceive them to be to their advantage. However, it may be that a system deviating too far from fair ground rules would not be recognizable as a market.

Nor do I suggest that no one is made worse off by the move from an unfair system to a fair market. Some people may well have been better off in the state of nature – those who could simply take what they want or obtain it through trickery. Still, we have reason to employ markets as one means of resource re-allocation, though some people might prefer otherwise, because we recognize the special value of a system of exchange that respects the autonomy and preferences of each.

On this view of the market, parties act unfairly in pursuing their interests if they fail to respect each other's equal autonomy. An example of such a failure is withholding information from one's trading partner and seeking thereby to profit from his or her informational disadvantage.

Some might suggest that information is a wealth-giving commodity like any other, and that a duty of a more knowledgeable party to share his or her information would be akin to a duty to share wealth. However, this view neglects the special connection between information and decisional autonomy – a connection central to concepts such as informed consent. While it is true, of course, that a duty not to withhold relevant information from one's trading partner imposes a "cost" on the better-informed party, namely the foregone opportunity to profit from the uninformed party's lack of autonomy, this is not the kind of privilege that one party could desire to preserve and still claim to respect the other's autonomy.

To return to the stock market and my hypothetical example, the CEO's withholding of information from parties trading in her company on the opposite side from her was unfair to them because it failed to respect their equality in the transaction. Information was withheld that would have improved their investment decisions as an exercise of their autonomy. Since the CEO presumably owed a concurrent duty to her company not to disclose the information, she should not have traded at all.

I do not claim that a rule against trading while in possession of material non-public information must be absolute. Like many rules grounded in fairness, a prohibition against insider trading might be appropriately qualified where its rigid application would disserve rather than further the interests of fairness or even, perhaps, where adhering to the rules of a fair market would result in intolerable inefficiencies.

Some commentators have also questioned whether the same considerations ought to apply to the "faceless" securities market as apply to markets more generally. However, securities transactions are still market transactions and, as such, are grounded in the values informing the market as a means of resource re-allocation. Fairness requires that each participant regard the values of the market not as being worthy of protection only for himself or herself, but as values to be respected for all of the participants. This kind of equality is not only consistent with the market; it is one of its cornerstones.

EQUAL OPPORTUNITY

Ontario is very different from the United States in how it regulates the sale of controlling shares in large public corporations. Many argue that the Canadian approach (operating under the "Equal Opportunity Rule") is premised on the principle of fairness, and that it exists in order to protect minority shareholders and provide a fair playing ground. Professor Ed Iacobucci disagrees. Fairness, says Professor Iacobucci, is neither an explanation nor a justification for the Equal Opportunity Rule.

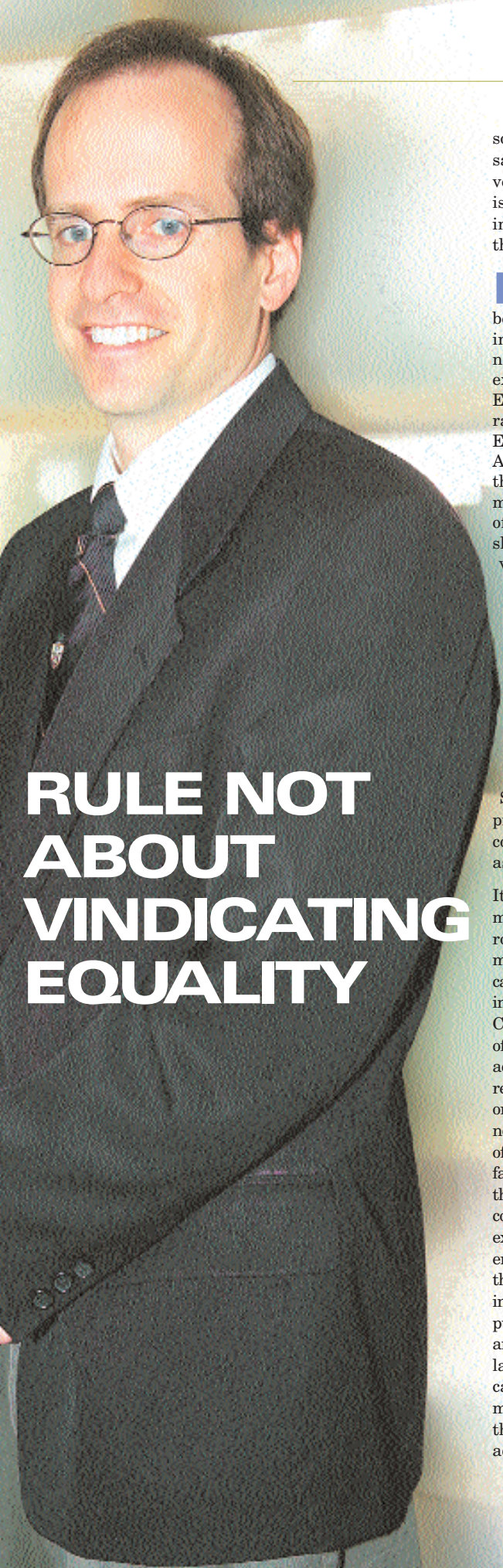
So why the rule? According to Iacobucci the EOR exists not to create a fair environment, but rather to squeeze higher prices out of purchasers when controlling shares are sold.

PROFESSOR ED IACOBUCCI

SUPPOSE that a corporation has a controlling shareholder (that is, a shareholder who is capable by herself of electing the board of directors). Suppose further that the remaining minority shares are traded on the Toronto Stock Exchange. Can a prospective purchaser offer to buy the controlling block of shares at a significant premium relative to the stock exchange price *without* extending the offer to minority shareholders? In the United States and many other parts of the world, the answer is yes. Here in Ontario, in contrast, the so-called "Equal Opportunity Rule", or EOR for short, requires that the purchaser treat *all* shareholders of the acquiree corporation equally. Specifically, under the EOR the purchaser must extend an offer to buy shares at a premium greater than 15% to all target shareholders, including minority shareholders. If more shares are tendered to the offer than the acquiror wishes to purchase, then the acquiror cannot favour the controlling shareholder, but rather must acquire the shares on a pro rata basis. For example, if the acquiror wishes to acquire a controlling shareholder's 50% control block, but 100% of the shares are tendered into the bid, each existing shareholder (including the controller) will ultimately sell half of the shares she has tendered.

This rule even applies where there are multiple classes of shares. The *Ontario Securities Act* establishes that any premium takeover bid within a class of shares must be extended to all members of the class. And although the OSA itself is silent on the question of whether an offer to acquire a block of shares in one class must be extended to a different class of shares, following the *Canadian Tire* case, stock exchange rules were established requiring corporations to adopt a rule of equal treatment even *across* share clauses.

The approach in Ontario contrasts with the rules in the U.S. on sales of control. Securities law governing sales of control only applies in the U.S. where there has been a "tender offer," which, while not precisely defined, would clearly not arise if there were a private offer to acquire a control block of shares from a controlling shareholder. Corporate law in the U.S. will



RULE NOT ABOUT VINDICATING EQUALITY

sometimes intervene to limit private sales of control at a premium, but very rarely. For the most part, there is no requirement of equal treatment in the context of sales of control in the U.S.

Prior to investigating possible explanations of the contrast between the U.S. and Ontario, it is important to be precise about the nature of the contrast: it is not the existence or non-existence of the EOR that is the difference, but rather, in Ontario the approach to the EOR is *mandatory*, while the American approach is optional. In the U.S., there is no legal requirement that an acquiror extend an offer to buy a control block to all shareholders, but this does not prevent corporations from establishing such a rule internally. In Ontario, however, public corporations are *required* to establish an EOR, even across share classes.

The question to be explored, then, is why does Ontario take a mandatory approach while the U.S. takes the optional approach? What is its justification?

Some argue that the EOR exists to promote fairness. However, a more coherent explanation is that it exists as a result of Ontario's self-interest.

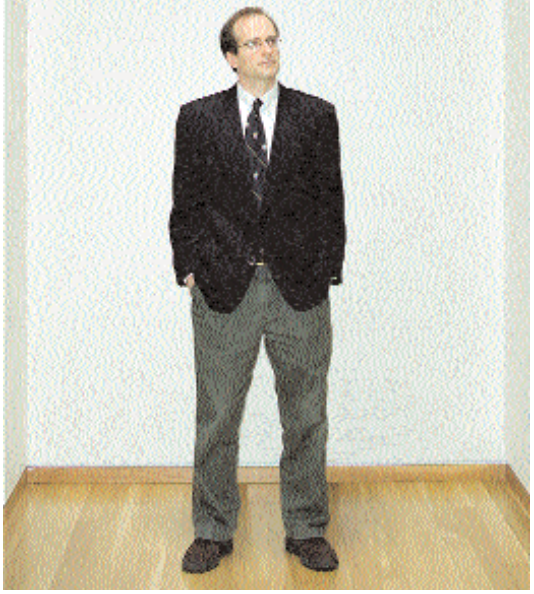
It is helpful in understanding the mandatory EOR to return to the roots of the inter-class equal treatment rule in *Canadian Tire.* In that case the Billes family controlled the voting shares of Canadian Tire Corporation, but there was a large class of non-voting shares. Canadian Tire had adopted a "coattail provision" that required a prospective acquiror of 50% or more of the voting shares to include non-voting shareholders in the offer. An offer was made for 49% of the Billes family shares at an enormous premium; the offer did not technically trigger the coattail provision and the offeror did not extend the bid to non-voting shareholders. Minority shareholders objected and the Ontario Securities Commission invoked its power to make orders in the public interest to enjoin the exclusionary offer from proceeding. It used strong language to characterize the offer, calling it "grossly abusive" of the market and unfair. The fallout from this case led the stock exchanges to adopt an inter-class EOR.

One possible justification for the decision in *Canadian Tire* and the subsequent adoption of new rules by the stock exchanges is that which was offered by the Commission: it is simply unfair for prospective acquirors and sellers of control blocks to exclude minority shareholders from an opportunity to participate in the sale of shares at a premium. The fairness argument is sometimes framed as based on an understanding that the premium for control is a corporate asset and all shareholders should be able to share in the proceeds from its sale. There are a number of reasons why this approach is unsatisfactory as either an explanation or justification of the law.

First, unequal treatment of differently situated agents is not obviously unfair in the corporate or any other context. The shares that form part of a control block are in effect different from other shares in the corporation. Most importantly, the votes that attach to minority shares in electing directors are effectively meaningless – the controlling shareholder's votes decide the outcome of board elections (by definition). Controlling shareholders are able as a consequence to ensure that they remain in control. Control in turn generates benefits that accrue specifically to the controlling shareholder; these are referred to as the "private benefits of control" in the literature. Private benefits could include prestige from being in charge, perhaps particularly for family firms, perquisites, and even profit to the controller from self-dealing that is not fully addressed by securities or corporate law. A controlling shareholder's votes thus are responsible for protecting her access to private benefits, while a minority shareholder's votes are, unless there is a radical restructuring, valueless whether or not they formally come with a vote. Allowing an acquiror to purchase shares that have meaningful votes (and consequent access to private benefits of control) at a price that exceeds the price of shares that do not have meaningful votes simply recognizes the different positions of the two kinds of shares. This hardly seems unfair.

Supporting this analysis, it is noteworthy that the market recognized the different positions of voting and non-voting shareholders in the *Canadian Tire* case. Even prior to the bid emerging, voting shares that traded on the stock exchange traded at a considerable premium to non-voting shares. Given that the dividend rights of the two share classes were essentially similar, and that both publicly traded voting and non-voting shares were not part of the control block itself and thus did not provide direct access to private benefits of control, the only explanation for the different prices was that the market anticipated that in the event of a sale of control, voting shareholders would be able to participate in a sale of control owing to the intra-class EOR found in the OSA, while non-voting shareholders would be excluded from the premium. That is, the market was aware that the coat-tail provision was leaky, to mix metaphors, and did not anticipate an EOR across share classes. It seems peculiar to describe as "unfair" a takeover bid that excluded non-voting shareholders when this is precisely what they anticipated and bargained for.

"Some argue that the EOR exists to promote fairness. However, a more coherent explanation is that it exists as a result of Ontario's self-interest."



Aside from these and other arguments against the "fairness" justification for the EOR, the fact is that the law we observe fails to vindicate "fairness," but rather seems to acknowledge that shareholders should only get what they bargained for. The stock exchange rules only apply to firms listing *after* the rules were adopted. If it were the case that exclusionary offers were simply unfair, then there is no principled reason to have the EOR imposed only on new listings. On the other hand, if there were a sense that shareholders should not get more or less than they bargained for, it would be logical only to apply the EOR across share classes to new listings.

Why did the rules compel newly listed firms to strike a different bargain with minority shareholders than older corporations? Aside from the unconvincing fairness explanation, a number of possible reasons for a mandatory EOR exist, but in my view the only coherent explanation is that the inter-class EOR acts as a useful pre-commitment for the corporation that squeezes a higher price out of acquirors when control is sold. The reasoning supporting this conclusion is as follows. Controlling shareholders realize value from their shareholdings both from their pro rata share of dividends and from private benefits of control, while other shareholders only gain value from their pro rata share of dividends. Controlling shareholders when selling control will require acquirors to compensate them for lost private control benefits. In the absence of the EOR, an acquiror of control can bargain with the controlling shareholder directly, paying her a per share price that compensates her for lost private benefits. In the presence of the EOR, the acquiror still must pay a per share price that compensates the incumbent controller for lost private benefits, but must offer equal consideration to minority shareholders as well. This implies that minority shareholders get a share of the control premium that they would not otherwise get. As a result, having the EOR in place drives up consideration on average when there is a sale of control.

On this view, it should be stressed, the EOR does not make minority shareholders better off on average than they are without the EOR. If no EOR were to exist, then minority shareholders would pay less for their shares; if the EOR did exist, then anticipating participating in the control premium, minority shareholders would pay more for their shares. When a sale of control takes place, minority shareholders would benefit from the EOR, but where such a sale does not take place, minority shareholders would have paid a higher price in anticipation of a premium that never came. On average, minority shareholders are not better or worse off with the EOR. The promoter of the corporation, however, benefits by selling minority shares at a higher price because of greater anticipated extraction of value from future potential acquirors.

This understanding of the EOR can help explain why Ontario has adopted a mandatory rule. Suppose that an acquiror who would increase the value of the corporation could make a take-it-or-leave-it, conditional offer for control of a corporation that has voluntarily adopted the EOR. The buyer would offer to purchase a control block from the incumbent shareholder alone, and exclude other shareholders, on the condition that the corporation abandon equal treatment of the minority. If the acquiror were going to add value, the target confronted with such an offer would rationally agree to jettison the EOR. A *mandatory* rule, however, commits the corporation to sticking to its guns and thus extracting greater value from the acquiror – any acquiror must include the minority in any offer.

Why does Ontario adopt the mandatory EOR but not the U.S.? One reason is that Ontario has a greater incidence of controlling shareholders than the U.S. such that there are more potential beneficiaries of the rule here. Moreover, while the mandatory rule may help Ontario targets, as explained, it hurts acquirors. Indeed, the EOR could hurt acquirors more than it benefits acquirees given that on some occasions a value-maximizing acquiror may not be willing or able to pay a large premium to the target shareholders. To the extent that Ontario corporations are more likely to have an out-of-jurisdiction acquiror than a U.S. firm, however, Ontario institutions would be less concerned about losses to acquirors from the EOR. Rather than demonstrating some idiosyncratic devotion to fairness, the mandatory EOR in Ontario could simply reflect rational self-interest on the part of Ontario regulators and stock exchanges.

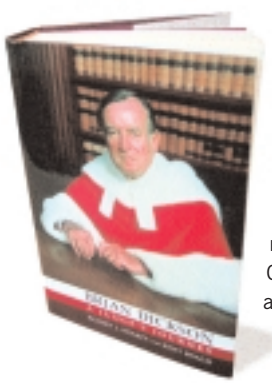
faculty publications

Faculty members maintained their publishing momentum this year with books on topics ranging from the life and accomplishments of former Chief Justice Brian Dickson, to the Hague tribunal for the former Yugoslavia.

BRIAN DICKSON: A JUDGE'S JOURNEY

Professor Kent Roach and Justice Robert J. Sharpe

ISBN: 0-8020-8952-6
Publisher: University of Toronto Press
Suggested retail price: $50 (HC)



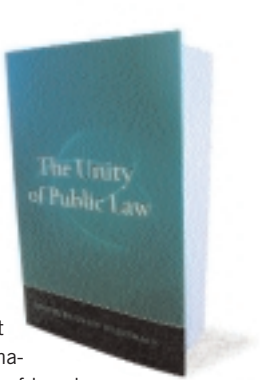
From the publisher: When Brian Dickson was appointed in 1973, the Supreme Court of Canada was preoccupied with run-of-the-mill disputes. By the time he retired as Chief Justice of Canada in 1990, the Court had become a major national institution, very much in the public eye. The Court's decisions, reforming large areas of private and public law under the Charter of Rights, were the subject of intense public interest and concern. Brian Dickson played a leading role in this transformation. Engaging and incisive, *Brian Dickson: A Judge's Journey* traces Dickson's life from a Depression-era boyhood in Saskatchewan, to the battlefields of Normandy, the boardrooms of corporate Canada and high judicial office, and provides an inside look at the work of the Supreme Court during its most crucial period. Dickson's journey was an important part of the evolution of the Canadian judiciary and of Canada itself. Sharpe and Roach have written an accessible biography of one of Canada's greatest legal figures that provides new insights into the work of Canada's highest court.

Selected for the John Wesley Dafoe Book Prize for 2003, the Dafoe Foundation praised the book as "an illuminating account of the responsibilities and workings of the Supreme Court, and a clear explanation of the legal issues and public significance of the cases." The Dafoe Prize is awarded annually to the book that provides the best contribution to our understanding of Canada.

THE UNITY OF PUBLIC LAW

Professor David Dyzenhaus

ISBN: 0-84113-434-1
Publisher: Hart Publishing
Suggested retail price: $109 (HC)



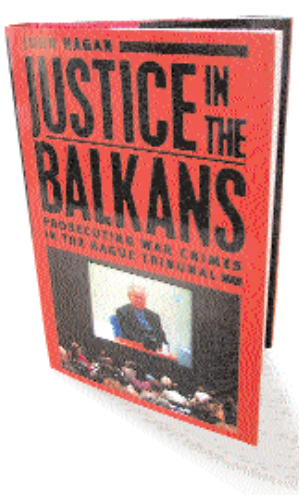
The Unity of Public Law is a collection of papers from an international conference of public lawyers held at the Law Faculty in 2003. The themes from the conference grew out of one of the most significant judgments from the Supreme Court in public law in recent years, *Baker v. Canada.* The decision of the majority, given by Justice Claire L'Heureux-Dubé, raises very important issues in constitutional law, administrative law and public international law, and suggests that there is a unity between these areas of law; hence the title of the book. A book launch was held in London in March, at Matrix Chambers, the leading group of human rights lawyers in the United Kingdom.

JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL

Professor John Hagan

ISBN: 0-226-31228-3
Publisher: The University of Chicago Press
Suggested retail price: $29 (HC)

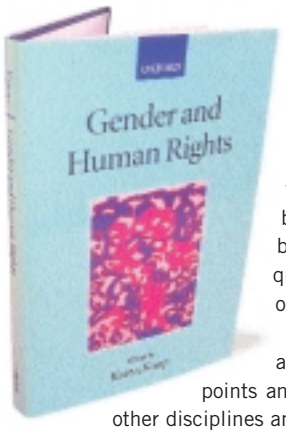
From the publisher: Called a fig leaf for inaction by many at its inception, the International Criminal Tribunal for the Former Yugoslavia has grown from an unfunded U.N. Security Council resolution to an institution with more than 1,000 employees and a $100 million annual budget. With Slobodan Milosevic now on trial and more than forty fellow indictees currently detained, the success of the Hague tribunal has caught many of its former critics by surprise. *Justice in the Balkans* presents a firsthand look at the inner workings of the tribunal as it has moved from an initial period of irrelevance to the first truly effective international court since Nuremberg. Creating an institution that transcends national borders is a challenge fraught with political and organizational difficulties, yet the Hague tribunal has increasingly met these difficulties head-on and overcome them. The chief reason for its success, argues John Hagan, is the people who have shaped it, particularly its charismatic chief prosecutor, Louise Arbour. With drama and immediacy, *Justice in the Balkans* re-creates how Arbour worked with others to turn the tribunal's fortunes around.



GENDER AND HUMAN RIGHTS: THE COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW

Professor Karen Knop *(Editor)*

ISBN: 0-19-926090-7 (HC);
0-19-926091-5 (PB)
Publisher: Oxford University Press
Suggested retail price: $97 (HC);
$56 (PB)



From the publisher: The field of women's international human rights law depends in every aspect on some combination of ideas about feminism, rights, and international society. Yet these ideas and the relationships between them have been examined and questioned much more outside than inside the field. By bringing a variety of vantage points and methodologies from other disciplines and areas of law to bear on gender and human rights, this collection demonstrates the theoretical and practical importance of revisiting the basic concepts, how they work, and how they interact. The collection offers gender perspectives on the fundamentals of women's international human rights from disciplines as diverse as notions of citizenship, queer theory, philosophies of rights, post-colonialism, and migration studies, and from such areas of law as constitutional and humanitarian law.

IT'S TIME: RESEARCH STUDIES PREPARED FOR THE WISE PERSONS' COMMITTEE TO REVIEW THE STRUCTURE OF SECURITIES REGULATION IN CANADA

Professor Doug Harris *(Editor)*

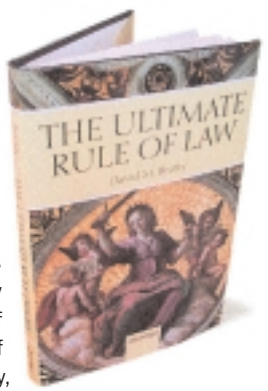
ISBN: 0-662-35619-5
Suggested retail price: Free of charge from the Capital Markets Institute or the Government of Canada.

In December 2003, the Wise Persons' Committee to Review the Structure of Securities Regulation in Canada released its report. Titled *It's Time,* the Committee's report recommended that Canada create a single national securities regulator. Doug Harris served as the Research Director for the Committee, designing and implementing a research program that produced ten major research studies and three constitutional opinions. The research studies and constitutional opinions are published in this 570-page companion volume to the Committee's report, and represent comprehensive and rigorous new work on Canadian and international capital markets by respected independent academics, consulting firms and lawyers from Canada, the United States, Australia and the European Union.

THE ULTIMATE RULE OF LAW

Professor David Beatty

ISBN: 0199269807
Publisher: Oxford University Press
Suggested retail price: $97 (HC)



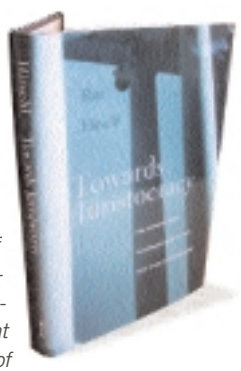
From the publisher: *The Ultimate Rule of Law* addresses the age-old tension between law and politics by examining whether the personal beliefs of judges come into play in adjudicating on issues of religious freedom, sex discrimination, and social and economic rights. Beatty evaluates and compares decisions made by the Supreme Courts of various countries on controversial issues such as government funding of religious schools, abortion, same-sex marriages, women in the military, and rights to basic shelter and live-saving medical treatment. Beatty develops a radical alternative to the conventional view that in deciding these cases judges engage in an essentially interpretative, and thus subjective act, relying ultimately on their personal beliefs and political opinions. His analysis shows that it is possible to apply an impartial and objective method of judicial review, based on the principle of proportionality, which acts as an ultimate rule of law and is fully compatible with the ideals of democracy and popular sovereignty.

TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM

Professor Ran Hirschl *(cross-appointed to the Faculty of Law)*

ISBN: 0-674-01264-X
Publisher: Harvard University Press
Suggested retail price: $64.95 (HC)

Towards Juristocracy draws upon a comprehensive comparative inquiry into the political origins and consequences of the recent constitutional revolutions in Canada, Israel, New Zealand, and South Africa, to challenge the conventional wisdom that the constitutionalization of rights and the establishment of judicial review have benevolent and progressive origins, and significant redistributive, power-diffusing consequences.



"The great bulk of scholarship on judicial review suffers two major shortcomings: it lacks any serious attention to what goes on outside the United States, and, even within the American context, it has been marred by the work of a generation of scholars who came of age during the highly unusual era of the Warren Court. Hirschl's superb treatment remedies both these defects, with results that should be profoundly troubling to all partisans of independent courts and judicial review. It should be mandatory reading for constitutional and democratic theorists the world over, as well as anyone who has a hand in institutional design of new democracies."

– Ian Shapiro, Yale University

faculty NOTES

Each year, the law school is tremendously enriched by our faculty's dedication to their scholarship. From April 2003-2004, professors had a long list of accomplishments that contributed to the academic life of the Faculty.


Brudner


Brunnée


Chapman


Choudhry


Cook


Daniels


Dickens

Alan Brudner

This year, Professor Brudner's new book, *Constitutional Goods,* was accepted for publication by Oxford University Press, and will be published in September 2004. He also developed a new course in Criminal Law Theory, which will begin in 2005. Other activities included the presentation of a paper, "The Liberal Duty to Recognize Cultures," to the Law Faculty of the Universidad Torcuado di Tella in Buenos Aires, Argentina, on August 4, 2003 and an intensive course in Constitutional Theory given to students at the same university from August 4-8, 2003. His professional activities included his editorship of the *University of Toronto Law Journal,* his contributions as consulting editor of the *Canadian Journal of Law and Jurisprudence,* and his persistent annoying of the Kantians in the Law and Philosophy Discussion Group.

Jutta Brunnée

Publications: "Of Sense and Sensibility: International Liability Regimes as a Tool for Environmental Protection," (2004) 53/2 *Int'l & Comp. L. Quarterly* 351-367; "The Kyoto Protocol: A Testing Ground for Compliance Theories?" (2003) 63/3 *Heidelberg Journal of International Law* 255-280; "The Stockholm Declaration and the Structure and Processes of International Environmental Law," in M. H. Nordquist, et al., eds., *The Stockholm Declaration and the Law of the Marine Environment* 67-84 (2003); and "Between Sovereignty, Efficiency and Legitimacy: Lawmaking under Multilateral Environmental Agreements," in O. Okafor & O. Aginam, eds. *Humanizing Our Global Order: Essays in Honour of Ivan Head,* 62-79 (2003). **Workshops & Presentations:** Workshop on "Canada and the Use of Force: Caught Between Multilateralism and Unilateralism," funded by the Center for Foreign Policy Development in Ottawa (with S.J. Toope); "Slouching Towards New Just Wars," Annual Meeting of the International Studies Association, Montreal (2004) (with S.J. Toope); "Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements," conference on *Development of International Law: Alternatives to Treaty-Making,* Max-Planck-Institut für Ausländisches öffentliches Recht und Völkerrecht, Germany (November 2003); "Of Sense and Sensibility: International Liability Regimes as a Tool for Environmental Protection," Annual Meeting of the Canadian Council on International Law, Ottawa (October 2003); and "Interrogating Consent," conference on Interrogating the Treaty and the Future of Treaty Law, Queen Mary University of London, England (October 2003).

Bruce Chapman

In April 2003, Professor Chapman delivered his paper "Functions of Fairness" to the U of T Philosophy Department. He presented "The Rational Actor in Law: Solving the Problem of Credible Commitment" at the 21st World Congress of the IVR in Lund, Sweden in August 2003, and at the September Meeting of the Canadian Law and Economics Association, Toronto. This paper will be published as "Legal Analysis of Economics: Solving the Problem of Rational Commitment" in *Chicago-Kent Law Review* (2004). His paper "Common Knowledge, Communication, and Public Reason" was presented at the Chicago-Kent law school in October 2003, and again at the 2004 meeting of the European Public Choice Society in Berlin in April. This paper will be published in a Symposium issue of *Chicago-Kent Law Review* (2004). Finally, his paper "Economic Analysis of Law and the Value of Efficiency", presented to the U of T Law and Economics Workshop in March 2004, is forthcoming in *Economic Analysis of Law: A European Perspective* (2004). Other published papers include "Rational Choice and Categorical Reason" 151 *University of Pennsylvania Law Review* (2003); and "Private Rationality and Public Reasonableness: The Rational Interactor in Game Theory and the Law", *American Philosophical Association Newsletter* (2004).

Sujit Choudhry

Professor Choudhry continues his research and teaching on constitutional law and theory, and health law and policy. His articles appeared in the *McGill Law Journal,* the *Canadian Medical Association Journal,* the *International Journal of Constitutional Law,* the *Supreme Court Law Review,* the *Osgoode Hall Law Journal,* the *Journal of Medical Ethics,* and *Constitutional Forum Constitutionnel.* He is currently working on a book on the role of law in the constitutional politics of Quebec secession from 1991 to 2000. Prof. Choudhry is also working on two edited volumes, *Redistribution in the Canadian Federation* (with colleagues Jean-François Gaudreault-Desbiens and Lorne Sossin) and *Migration of Constitutional Ideas.* On the public policy side, Prof. Choudhry was the legal consultant to the National Advisory Committee on SARS and Public Health (the Naylor Committee), and recently co-chaired an invitational workshop on redesigning democracy in Ontario with the Democratic Renewal Secretariat of the Province of Ontario. He also organized two conferences, "Making the Mosaic Work" and "Judicial Appointments in a Free and Democratic Society" (with colleagues Lorne Sossin and Lorraine Weinrib). He was an invited speaker at the Privy Council Office in Ottawa as part of the federal government's policy renewal process, and at the Department of Justice in Ottawa and Toronto.

Rebecca Cook

Professor Cook participated in a project, organized by the Human Rights Center of the University of Maastricht, Netherlands, on the design of temporary special measures to foster women's substantive equality under international human rights law. The result was a General Recommendation of the UN Committee on the Elimination of Discrimination against Women, and a chapter in the book, *Temporary Special Measures* (Intersentia, 2003). Her work with the Quebec Native Women's Association resulted in their position paper advocating Canadian ratification of the American Convention on Human Rights. Prof. Cook also collaborated on a project to introduce curriculum on reproductive and sexual health law into Nigerian law faculties. Her book, *Reproductive Health and Human Rights* (Oxford, 2003), co-authored with Professor Bernard Dickens and Mahmoud Fathalla, is now available in Spanish and pending in Portuguese. It is also being introduced into teaching and training by Latin American colleagues. Prof. Cook continues to collaborate with the Centre for Research in Women's Health of the University of Toronto, the Society of Obstetricians and Gynecologists of Canada, and the International Federation of Gynecology and Obstetrics, on ethical, legal and human rights dimensions of women's health. This work has resulted in publications on topics such as emergency contraception and ectopic pregnancy.

Ron Daniels

As a result of Brian Langille's willingness to serve as Acting Dean over the past year, I was fortunate to be able to take a research leave at the Yale Law School where I was Visiting Professor of Law and Coca-Cola World Fund Fellow. During this year, I completed a book with Michael Trebilcock entitled "Government by Voucher" that will be published in the fall. I also worked on several different projects relating to the role of law in the developing world, which resulted in workshop presentations at Yale, Virginia and Michigan law schools. I lectured in Argentina and Italy on law and development. Last spring, I worked with several segments of the Ontario accounting profession on devising a new regulatory regime for public accounting. Recently, the proposed reforms were enacted into law. With the considerable assistance of Michael Trebilcock and Andrew Green, I chaired a task force on the future role of government and submitted more than 50 background studies and two overarching reports to the Ontario government. The theme of this report was "investing in people". Finally, I had a wonderful (and very rejuvenating) experience teaching a course entitled "Law, Institutions and Development" at Yale Law School.

Bernard Dickens

On formal retirement at the end of June 2003, Professor Dickens continued teaching Medical Jurisprudence, but moved the class to the second term in order to accept travel invitations between August and December. With Professor Cook, he went on a conference and lecture tour in Nigeria in August, speaking in Abuja, Enugu, Benin City and Lagos. In September, he attended a conference in Sapporo, Japan, at the University of Hokkaido, and in October, lectured at the University of the Free State, Bloemfontein, South Africa, and a two-week course at the University of Cape Town. In early November, with Professor Cook, he attended and spoke at a meeting of the International Federation of Gynecology and Obstetrics, in Santiago, Chile. Later in November, as a consultant to the UN Population Fund, he went to Tbilisi, Georgia, to work on the new national law in medically assisted reproduction. He left on the morning of the day the (former) government fell, in the "Velvet Revolution," although it was not clear at that time that violence would be avoided. His only international travel in the January term was a meeting in Brussels in March on new infectious diseases, such as SARS and West Nile virus.

Abraham Drassinower

Publications included "A Rights-Based View of the Idea/ Expression Dichotomy in Copyright Law," *Canadian Journal of Law and Jurisprudence;* "Sweat of the Brow, Creativity, and Authorship: On Originality in Canadian Copyright Law," University of Ottawa Law & Technology Journal; "Property, Patents and Ethics: A Comment on Wendy Adams' 'The Myth of Ethical Neutrality'," *Canadian Business Law Journal;* "CCH Canadian Ltd. v. Law Society of Upper Canada: A Primer," *Canadian Law Libraries Review; and Freud's Theory of Culture: Eros, Loss, and Politics* (Lanham, Maryland: Rowman & Littlefield, 2003). This book was reviewed in the *Journal of the American Psychoanalytic Association* (January 2004); *Perspectives on Politics* (March 2004); *Choice Magazine* (November 2003); *Canadian Journal of Political Science* (forthcoming); and *Canadian Journal of Psychoanalysis* (forthcoming). I presented work on intellectual property issues at various conferences and seminars held at Tulane University, Dalhousie University, the University of Ottawa, the University of Montreal, the University of Toronto, and at the Annual Conference of the Canadian Association of Law Libraries.


Drassinower


Duff


Duggan


Dyzenhaus


Flood


Gaudreault-DesBiens


Green

David Duff

Professor Duff was on sabbatical in 2003, during which time he was a Parsons Visitor at the University of Sydney Faculty of Law in June and a Visiting Fellow at the Faculty of Law at Oxford University from September to December. From January to April 2004, Prof. Duff was a Visiting Law Professor at McGill University, where he taught Canadian Income Tax Law and Tax Policy. Prof. Duff wrote several articles including "Tax Treatment of Charitable Contributions in Canada" (forthcoming in the *Osgoode Hall Law Journal);* "Tax Policy and Global Warming" *(Canadian Tax Journal);* and "Interest Deductibility, the Reasonable Expectation of Profit Test, and the Supreme Court of Canada" (forthcoming in Chodikoff and Horvath, eds., *Advocacy and Taxation in Canada).* He also wrote a report on "Benefit Taxes and User Fees in Theory and Practice" for the Ontario Panel on the Role of Government. Prof. Duff also presented his research at many venues including the Fourth Global Environmental Tax Conference in Sydney, Australia in June 2003, the Annual Tax Research Network Conference at Oxford University in September 2003, the London School of Economics in October 2003, and the University of Pennsylvania School of Law in March 2004. He also served as co-editor of the "Current Tax Reading" section of the *Canadian Tax Journal.*

Tony Duggan

Professor Duggan was busy this year as Associate Dean, but still found time to write a number of publications. He published the book, *Canadian Bankruptcy and Insolvency Law: Cases, Text and Materials,* with Jacob S. Ziegel and Thomas W. Telfer (Emond Montgomery Publications Limited Toronto, 2003); and chapters in books including "Commercial Law and the Limits of the Black Letter Approach" in Sarah Worthington (ed.), and *Commercial Law and Commercial Practice* (Hart Publishing, Oxford, 2003), pp 595-614. His journal articles included "The Profits of Conscience: Commercial Equity in the High Court of Australia" (2003) 24 *Australian Bar Review* 150-172 and "The Trumping of Mateship: Unconscionability in the High Court of Australia" (2003) 39 *Canadian Business Law Journal* 275- 284. Recent conference papers include "Commercial Law in the High Court of Australia", presented at the High Court of Australia Centenary Conference, Canberra, October 10-11, 2003, and "Three Unconscionability Cases from a Law and Economics Perspective", presented at the 33rd Annual Workshop on Commercial and Consumer Law, Toronto, October 17 and 18, 2003. As a visiting professor, Prof. Duggan taught "Equity and Commerce" (with Professor Michael Bryan), an intensive course offered as part of the University of Melbourne LL.M program in July 2003. Prof. Duggan is currently acting as a consultant to the Insolvency Institute of Canada's project on Canadian business insolvency law reform.

David Dyzenhaus

My edited collection, *The Unity of Public Law* (Oxford: Hart Publishing), was published and launched at Matrix Chambers in London, England. I gave several talks this year including the Ivan Rand Memorial Lecture at the University of New Brunswick ("The Deep Structure of *Roncarelli v. Duplessis"),* a seminar at New York University Law (" Emerging from Self-Incurred Immaturity"), a paper at the Central European University Conference on "Militant Democracy", ("Constituting the Enemy: A Response to Carl Schmitt"), and a paper at the University of Western Ontario Conference on "Constitutionalism" ("The Unwritten Constitution and the Rule of Law"). Publications this year include: "The Genealogy of Legal Positivism", (2004) 24 *Oxford Journal of Legal Studies,* 39-67; "Humpty Dumpty Rules or the Rule of Law", (2003) 28 *Australian Journal of Legal Philosophy,* 1-30; "Aspiring to the Rule of Law", in T Campbell et al, eds., *Protecting Human Rights: Instruments and Institutions* (Oxford: Oxford University Press, 2003) 195- 209; "The Left and the Question of Law", (2004) 18 *Canadian Journal of Law and Jurisprudence,* 7-30; and "Intimations of Legality Amid the Clash of Arms", (2004) 2 *International Journal of Constitutional Law,* 244-271.

Colleen Flood

In 2003/ 2004, Professor Flood was appointed as both a Canada Research Chair and as an Associate Professor (tenured). Her academic pursuits in health care often find her at the forefront of public debate on important issues, especially the topic of governance in the health care system. With Duncan Sinclair, she prepared a paper on the devolution of management and accountability in health care for the Ontario government's blue-ribbon panel on "Reinventing Government" and she also planned and hosted a workshop on the structure and mandate of the National Health Council. She also organized the 2nd National Health Law Conference, attended by almost 200 health care professionals, academics and decision makers. Prof. Flood authored or co-authored two book chapters and several articles and is currently editing a volume, *Frontiers of Fairness,* based on presentations from the Health Law Conference. She is co-Principal Investigator on a CHSRF-funded research project, *"Defining the Medicare Basket",* examining decision-making processes in the health care system. The project has already produced five working papers and more are in the pipeline (www.law.utoronto.ca/healthlaw/basket/index.html). Prof. Flood also supervised several graduate students, many of whom are supported by the CIHR Training Programme in Health Law and Policy, of which Professor Flood is a co- director.

Jean-François Gaudreault-DesBiens

Prof. Gaudreault-DesBiens presented papers at the 6th International Conference of the International Association of Constitutional Law in Santiago (on implicit constitutional principles); at the 2004 Conference of the American Association of Law Schools, Atlanta (on culture and Canadian legal education); at the Institute for Business Law in Aix-en-Provence (on the revival of institutionalist theories in corporate law); and at McGill University (on greed and corporate law). He also published six articles: "The Canadian Federal Experiment, or Legalism Without Federalism? Toward a Legal Theory of Federalism" in M. Calvo-Garcia & W. Felstiner, eds., *Federalismo / Federalism,* (Madrid: Dyckinson, 2004), pp. 79- 132; "Theorizing Corporate Law in a Mixed Jurisdiction. A Review of Crête and Rousseau's Droit des sociétés par actions", (2004) *Canadian Business Law Journal* 425-468; "Memories", (2003) 19 *Supreme Court Law Review,* 2nd Series, 219- 265; "Les minorités en droit public canadien", (2003-2004) 33 *Revue de droit de l'Université de Sherbrooke* 197-228 (with D. Pinard); "La Charte canadienne des droits et libertés et le fédéralisme: quelques remarques sur les vingt premières années d'une relation ambiguë," (2003) Revue du Barreau. Numéro spécial, 271-310; and "Angoisse identitaire et critique du droit". La "critique juridique identitaire américaine comme objet et source de réflexion théorique", [2003] 50 *Revue interdisciplinaire d'études juridiques* 1-80. He was a visiting professor in the masters and doctoral programs at the Université d'Aix-Marseille III.

Andrew Green

Professor Green joined the Faculty in July 2003. In the Fall of 2003, he was Senior Research Fellow for Ontario's Panel on the Role of Government (Chair, Ron Daniels; Research Director, Michael Trebilcock). The Panel examined the challenges facing Ontario over the next 10 to 15 years and provided recommendations on the role the Ontario government should play in meeting them. Andrew co-wrote the Panel Staff Report *Creating a Human Capital Society in Ontario* with Ron Daniels, Michael Trebilcock and Roy Hrab. He also helped draft the Panel's report, *Investing in People: Creating a Human Capital Society in Ontario,* which was released in April 2004. Andrew began teaching Environmental Law and Introduction to Law and Economics in January 2004. He continued to research the areas of public participation in environmental law and of trade and the environment. Andrew is currently examining how WTO agreements limit the ability of governments to implement commitments under the Kyoto Protocol.


Harris


Iacobucci


Janisch


Johnston


Lee


Lemmens


MacIntosh

Douglas Harris

Doug Harris '92 joined the staff of the Wise Persons' Committee to review the structure of securities regulation in Canada as the Committee's Research Director. Through the summer and fall, Doug managed the production of ten major research studies and three constitutional opinions. The Committee's report, titled *It's Time,* was released in December 2003 along with a 570-page companion research volume that Doug edited. Doug also appeared on CBC Radio and published op-ed pieces in support of the Committee's recommendations. Doug's paper, "The TSX Technology Company Listing Standards as a Response to the 'Hot Issue' Market of 1995-2000" was accepted for presentation at the Eleventh Annual Conference of the Multinational Finance Society to be held in Istanbul, Turkey in July 2004, and at the International Conference on Business, Banking and Finance to be held in Port of Spain, Trinidad in April 2004. Doug and five other colleagues have prepared a fourth edition of the venerable *Cases and Materials on Partnerships and Canadian Business Corporations.* Doug served as Contributing Editor for the project, and the new edition will be published in time for classes in the fall of 2004.

Edward Iacobucci

With co-authors Michael Trebilcock, Ralph Winter and Paul Collins, Professor Iacobucci won the 2003 Purvis Prize for "best work on Canadian economic policy", for *The Law and Economics of Canadian Competition Policy* (University of Toronto Press), as presented by the Canadian Economics Association. His recent research includes: "Toward a Signaling Explanation of the Private Choice of Corporate Law," (forthcoming), *American Law and Economics Review;* "Directors' Duties in Insolvency: Clarifying What Is at Stake" (2003) 39 Can. Bus. L. J. 398; "Economic Deregulation of Network Industries: Managing the Transition to Sustainable Competition," a report submitted to the Ontario Panel on the Future Role of Government (Co-authors Michael Trebilcock and Ralph Winter); and "Insolvency and Corporate Governance," prepared for Industry Canada, Corporate Law Policy Directorate. Prof. Iacobucci's presentations over the past year have included: "National Treatment and Extraterritoriality: Defining the Domains of Trade and Antitrust Policy," (American Enterprise Institute Conference on International Antitrust, and University of California, Berkeley Law School); "Sales of Corporate Control, the Equal Opportunity Rule and Securities Regulation," (American Law and Economics Association Annual Meeting); "Directors' Duties in Insolvency: Clarifying What's at Stake," (Canadian Consumer and Commercial Law Roundtable, U of T); comment on "Developments in International Antitrust" (Competition Policy Roundtable, U of T); and "Takeovers, Takeover Defences and Managerial Incentives," (Queen's University Faculty of Law, and UBC Faculty of Law).

Hudson Janisch

Back from a refreshing sabbatical at UBC last year, I had an excellent final year in full-time teaching prior to my retirement from U of T *(see profile in this issue).* The highlight of this year was a 3-week research and teaching visit to China which involved a short course at Fudan University Law School in Shanghai; interviews with government officials in Beijing and Hong Kong; and lecturing at Hong Kong University of Science and Technology and the Beijing University of Posts and Telecommunications. In recent years, Administrative Law has become a particularly complex and challenging subject, so I was particularly gratified when my students nominated me for, and I received, one of only five university-wide teaching awards sponsored by the Students Administrative Council (SAC). In February 2004, I was invited to lecture on communications law at Columbia Law School. During the year I published two major articles, "Fairness and Transparency in Telecommunications Regulation" 16 CJALP 227 (Oct. 2003) and "Telecommunications in Turmoil: New Legal, Regulatory and Policy Challenges," 37 UBC L. Rev. 1 (Spring, 2004) along with a shorter piece inspired by my continued opposition to excessive fee increases, "In Praise of Public Legal Education," *Ultra Vires,* October 21, 2003.

Darlene Johnston

In the fall 2003, Darlene completed her Master of Laws thesis *Litigating Identity: The Challenge of Aboriginality* (supervised by Prof. Patrick Macklem). Her research into the relationship between totemic identity, territoriality, and authority combines oral tradition, historical linguistics, and colonial records. In November, she presented a paper on her interdisciplinary methodology to the Annual Meeting of American Society for Legal History in Washington D.C. Darlene teaches first-year *Property Law* and an upper-year course on *Aboriginal Peoples and Canadian Law.* In May 2003, she presented a retrospective on the Supreme Court's s.35 jurisprudence entitled "Lo, How Sparrow Has Fallen" to the *Access to Justice* Conference sponsored by the Law Society of Upper Canada (forthcoming). In addition to her teaching and research, Darlene serves as Aboriginal Student Advisor and Faculty Advisor to the *Indigenous Law Journal.* The community advocacy skills that she acquired while working on land claims for her First Nation, the Chippewas of Nawash, are being put to good use by the Faculty's International Human Rights Clinic Program. Since September she has made three field trips to Belize to meet with Maya Leaders seeking legal assistance in their struggle for recognition of their land rights. In April, she was awarded a $10,000 Borden Ladner Gervais Summer Student Fellowship to assist with this international indigenous advocacy.

Ian Lee

Professor Lee joined the Faculty in 2003 after practicing with Sullivan & Cromwell in Paris and New York. This year, he developed and taught an upper-year course on the "Law of the European Union," and taught "Business Organizations." He is also in the process of developing a course on "Corporate Social Responsibility," which will be offered in 2005. Prof. Lee's research is focused on ethical aspects of corporate governance, and he is currently working on a paper, "Ethical Investing: Implications for Corporate Governance and Corporate Social Responsibility." His research on this topic will be presented at the 2004 World Congress of the International Society for Business, Economics and Ethics, at the University of Melbourne. With grant funding from the Foundation for Legal Research, Prof. Lee also worked with Professors Doug Harris, Ed Iacobucci, Jeff Macintosh, Poonam Puri and Jacob Ziegel on a new edition of *Cases and Materials on Partnerships and Canadian Business Corporations* (Carswell, forthcoming 2004). Prof. Lee served on the admissions, diversity and short-term curriculum committees at the Faculty of Law, and as faculty advisor to the Laskin Moot team.

Trudo Lemmens

With other interdisciplinary scholars whose work focuses on ethics in medicine, I spent the academic year at the School of Social Science of the Institute for Advanced Studies in Princeton. I am researching how regulatory standards can safeguard the integrity of medical research and improve ethical conduct of researchers. Publications include a paper on research regulation co-authored with Duff Waring *(U of T Law Journal);* and a chapter on conflicts of interest in research, Y. Gendreau, ed., *Mapping Society Through Law* (Montréal: Thémis, 2004). Other articles appeared or are forthcoming in the *Journal of Law, Medicine & Ethics;* the *Canadian Bar Review;* the *Health Law Journal;* the *European Journal of Health Law;* and the *CMAJ.* The article in the CMAJ was prepared by the Task Force on Life Insurance and Genetics, which I co-chaired. For the National Judicial Institute, Justice Stephen Goudge and I organized "A Working Conversation on Scientific Research in the Courtroom." Obtained funding from Genome Canada for a project on DNA and Privacy, as co-applicant on a grant related to genetic research on cancer. The funding will support student summer internships and promote research in the area of privacy and health care. I also organized the Legal Ethics and Professionalism Bridge week for the first year students.

Jeff MacIntosh

In the previous academic year, I published the following articles and book chapters: *"The Extent of Venture Capital Exits: Evidence from Canada and the United States"* in Joe McCahery and Luc Renneboog, eds., *Venture Capital Contracting and the Valuation of High-Tech Firms* (Oxford: Oxford University Press, 2003) with Douglas Cumming, pp. 339-370; *"Canadian Labour Sponsored Venture Capital Corporations: Bane or Boon?",* in A. Ginsberg and I. Hasan, eds., *New Venture Creation* (Amsterdam: Elsevier Science Academic Press, 2003) with Douglas Cumming, pp. 169-200; *"Economic and Institutional Determinants of Venture Capital Investment Duration",* in Gary D. Libecap, ed., *Issues in Entrepreneurship: Contracts, Corporate Characteristics and Country Differences* (Amsterdam: JAI Press, 2003), pp. 205-250; and *"The End of Corporate Existence: Should Boards Act as Mediating Hierarchs?"* A. Anand and W. Flanagan, eds., *The Corporation in the 21st Century: Proceedings of the 9th Annual Queen's Annual Business Law Symposium* (Kingston: Queen's Printer, 2002), pp. 37-75. I also prepared the following invited papers that will also be published: *"The Venture Capital Cycle: Canadian Evidence",* Schulich School of Business, York University, Financial Services and Public Policy Conference, April 22-24, 2004 (with Douglas Cumming); and *"Boom and Bust in Venture Capital Investing"* (one of four invited papers), Willamette School of Law, Portland, Oregon (with Douglas Cumming).


Morgan


Phillips


Putnam


Réaume


Ripstein


Roach


Rogerson


Schneiderman

Ed Morgan

During the past year I have been writing in the op-ed pages and lecturing primarily on the International Law of War and the various conflicts in the Middle East. I gave a series of lectures on the topic last spring at the University of Dar Es Salaam, Tanzania and have just completed teaching an intensive two-week course at Haifa University in Israel. These lectures have culminated in an article published in the German Law Journal, entitled "Slaughterhouse-Six: Updating the Laws of War". In addition, my article "The Mild, Mild West: Living by a Code in Canadian Law and Film" will be published in the inaugural volume of the *Journal of Law, Culture & Humanities*. I have also continued my involvement with Canadian Jewish Congress. My term as Ontario Chair of CJC ends this June, and I have just been acclaimed as the next national president of the organization.

Jim Phillips

I'm now Director of the Centre of Criminology, a three-year appointment. It means less time at the law school, a good thing in some respects and not so good in others – I'm still enjoying teaching first year property. *Murdering Holiness: The Trials of Franz Creffield and George Mitchell* (with Rosemary Gartner) was published in September, and I've just submitted the manuscript for *The Supreme Court of Nova Scotia, 1754-2004* (with Philip Girard) which will come out in September 2004. My principal achievement of the year, though, was singing a few lines at the follies.

Jonathan Putnam

As the ORDCF Chair, Law and Economics of Intellectual Property, Centre for Innovation Law and Policy, I offered a new seminar, The Regulation of High Technology Industries, which examined legal and economic rationales for intervening in high-technology markets. I continued my research on measuring the value of the world's patent rights, and my paper, "International Patent Microdata: A First Look," developed a new method of analyzing publicly available data on international trade in patent rights. I also published papers on the costs and benefits of genomics patents and the economic analysis of bargaining in licensing negotiations. The Centre's new magazine, INNOVATE, contained a profile on me and I contributed an article on the "high" cost of patented pharmaceuticals. I participated in a roundtable at the International Intellectual Property Institute in Washington on the reform of tax laws governing the donation of patent rights. The resulting paper has been submitted for presentation at the meetings of the National Tax Association. Lastly, I testified in Federal bankruptcy court on a claim by the estate of Paragon Trade Brands, which was bankrupted by the 4th largest patent damages award in U.S. history.

Denise Réaume

Recent publications include "Discrimination and Dignity" (2003) 63 La. L. Rev. 643; "Insurance and Intentional Torts: The Case of Sexual Battery", (2004) 12 *Torts Law Journal* 76; and "Beyond *Person*ality: The Territorial and Personal Principles of Language Policy Reconsidered", in Will Kymlicka and Alan Patten, eds., *Language Rights and Political Theory,* (Oxford: Oxford University Press, 2003). Prof. Réaume's work on equality rights theory led to an opportunity to participate in a two-part LEAF sponsored colloquium entitled "In Pursuit of Substantive Equality" bringing together academics and lawyers to examine recent trends in equality rights jurisprudence. Prof. Réaume was delighted to be asked to participate in drafting the LEAF factum for its intervention in the *Auton* case. She has also joined a national team of scholars working on a new set of constitutional law materials under the managing editorship of Professor Len Rotman. Her contribution will be the chapter on Language Rights.

Arthur Ripstein

I was elected a Member, Governing Council, University of Toronto. My publications include: "Authority and Coercion," *Philosophy and Public Affairs,* 32:1 2-35 (2004); and "Too Much Invested to Quit", *Economics and Philosophy,* 20 (2004) 1-24. I also presented papers at several conferences: "The Division of Responsibility and the Law of Tort" conference on Rawls and the Law, Fordham University School of Law, November 2003; "In Extremis," IVR World Congress, Lund Sweden, August 2003; and "Natural Law and Social Contract: Variations on Kantian Themes", conference on Contractarian Legal and Political Philosophy, University of Pennsylvania School of Law, May 2003. I also appeared in two radio specials on CBC Radio 1's show *"IDEAS"* in May 2004. In the first show, "Authority", I appeared with Seana Shiffrin and Gopal Sreenivasan, and in the second show, "Coercion", I appeared with Michael Blake and Gopal Sreenivasan.

Kent Roach

Awarded (with Robert J. Sharpe) the 2003 Dafoe Prize for *Brian Dickson: A Judge's Journey.* Appointed to Advisory Panel for Maher Arar Royal Commission. Pro bono representation of the Canadian Civil Liberties Association and Aboriginal Legal Services of Toronto. Published (with Robert J. Sharpe) *Brian Dickson: A Judges Journey* (Toronto: University of Toronto Press and Osgoode Society, 2003); (with Patrick Healy and Gary Trotter) *Cases and Materials on Criminal Law and Procedure* 9th ed (Toronto: Emond Montgomery, forthcoming); "Wrongful Convictions and Criminal Procedure" (2003) 42 Brandeis Law Review; (with Todd Archibald and Ken Jull) "The Changed Face of Corporate Criminal Liability" (2004) 48 C.L.Q. 367-396; (with Prof. Sujit Choudhry) "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003) 21 S.C.L.R.(2d) 205; "Remedies in Aboriginal Litigation" in Joe Magnet and Dwight Dorey eds. *Aboriginal Rights Litigation* (Markham: Butterworths, 2003); "The Role of Crime Victims under the *Youth Criminal Justice Act"* (2003) 40 Alberta L. Rev. 965; "Twenty Years of the Charter and Criminal Justice"(2003) 19 S.C.L.R.(2d) 39. Frequent judicial and academic lectures across Canada and lectures in Sienna, New York City, Geneva, Belfast, and Budapest. Articles on anti-terrorism law being translated for publication in Russian and Chinese.

Carol Rogerson

I spent the year on sabbatical working, together with Professor Rollie Thompson of Dalhousie Law School, on a large, multi-year project on spousal support guidelines sponsored by Justice Canada. The project, a consultative process with a 12-person advisory group set up by Justice, seeks to develop informal guidelines reflecting local practice. The past year involved organizing three meetings of the advisory group to explore the feasibility of guidelines and the form they should take. We are currently preparing a discussion paper proposing a tentative scheme of guidelines that will provide the basis for broader consultation with the judiciary and bar. My publications this year include: "The Canadian Law of Spousal Support" (forthcoming), spring 2004 edition of (American) *Family Law Quarterly,* special alimony issue; "Developments in Family Law: The 2002-2003 Term" (2003), 22 S.C.L.R. (2d) 273; "They are Agreements Nonetheless," case comment on *Miglin v. Miglin,* (2003), 20 *Canadian Journal of Family Law* 197; and "Contracting Spousal Support: Thinking Through *Miglin"* (2003), 21 *Canadian Family Law Quarterly* 49, with Prof. Martha Shaffer. At the Ontario Bar Association, Institute 2004, "Family Law Reloaded: What's New with Spousal and Child Support and the Reverberations of Recent Case Law", I was part of a panel presentation on "The Implications of *Miglin v. Miglin"*. On December 1, 2003, at the Law Society of Upper Canada "Six Minute Family Lawyer 2003" in Toronto, I gave a presentation on "Spousal Support Guidelines Revisited".

David Schneiderman

Among the papers authored this year and currently in press are: "Canadian Constitutional Culture Post 9-11"; "Canadian Constitutionalism, the Rule of Law and Economic Globalization"; "Revisability, Investor Rights and Discourse Theory: Rolling Back Economic Globalization?"; and "Common Sense: *Gosselin* Through a Media Lens." Two book manuscripts were completed, one entitled *Investing Authority: An Inquiry into the Constitutional Order of Economic Globalization* (under contract with University of Chicago Press) and the other entitled *Laying Down the Law: The Media and the Supreme Court of Canada,* co-authored with Florian Sauvageau, David Taras, and Pierre Trudel (under contract with University of British Columbia Press). Paper presentations were made to the Property Section, 2004 American Association of Law Schools Annual Meeting; the conference "Participatory Justice in a Global Economy: The New Rule of Law?" Canadian Institute for the Administration of Justice; the "Justice Culture and Terror" Conference, University of Saskatchewan; the 2003 American Political Science Association Annual Meeting; the symposium "Social Responsibility of the Legal Profession in the Age of Globalization," Faculty of Law, Osaka City University; and the Poverty and Human Rights Project Colloquium, Institute for Feminist Legal Studies UBC.

Ayelet Shachar

Drawing on her award-winning book, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (2001), Professor Shachar delivered public lectures and keynote addresses on multiculturalism and gender equality in international conferences and symposia at the following institutions: Yale University; Brandeis University; Princeton University; Rutgers University; New York University; Einstein Forum, Potsdam, Germany; Abo Akademi University, Turku, Finland; and the American Political Science Association Annual Meeting. She also delivered the inaugural lecture of the Shared Citizenship – Theory and Practice in Canada Lecture Series, under the Honorary Patronage of the Lieutenant Governor of Ontario, Munk Centre for International Studies, U of T. Prof. Shachar continued to work on her new book, *Citizenship as Property: The New World of Bounded Communities.* Several articles from the book have already been published as free standing pieces, including: "Children of a Lesser State: Sustaining Global Inequality through Citizenship Laws," in *NOMOS: Child, Family, and the State,* Stephen Macedo and Iris Marion Young eds. (2003); and "Birthright Citizenship as Inherited Property: A Critical Inquiry," in *Identities, Affiliations, and Allegiances,* Ian Shapiro and Seyla Benhabib eds. (forthcoming 2004). In spring 2003, Prof. Shachar was appointed Distinguished Visiting Scholar at Princeton University's Program in Law and Public Affairs, and Emile Noel Senior Fellow at NYU School of Law.


Shachar


Sossin


Trebilcock


Valcke


Waddams


E.Weinrib


L.Weinrib

Lorne Sossin

Professor Sossin spent the fall semester in 2003 on sabbatical, undertaking a SSHRC funded research project on the relationship between law and public administration. A portion of this research, "Discretion Unbound: Reconciling the *Charter* and Soft Law" (2003) 45 Canadian Public Administration 465-89, was awarded the 2003 J.E. Hodgetts Award, by the Institute of Public Administration in Canada. The most recent fruits of this project, "Speaking Truth to Power? The Search for Bureaucratic Independence," will be published by the *University of Toronto Law Journal* in 2004. Other publication highlights this year include: "Developments in Administrative Law: the 2002-2003 Term" (2003) 22 *Supreme Court Law Review* (2nd) 21-82; "Empty Ritual, Mechanical Exercise or the Discipline of Deference?: Revisiting the Standard of Review in Administrative Law" (2003) 27 *The Advocate's Q.* 478-508; "The Rule of Policy: *Baker* and the Impact of Judicial Review on Administrative Discretion" in D. Dyzenhaus et al (eds.), *The Unity of Public Law* (London: Hart, 2004) 87-112; and "The 'Supremacy of God', Human Dignity and the Charter of Rights and Freedoms" (2003) 52 *University of New Brunswick Law Journal* 227-41. Finally, Sossin was the recipient of the 2003 Alan Mewett Teaching Award, as voted by the graduating class.

Michael Trebilcock

During the past year, Michael Trebilcock, in his capacity as President of the American Law and Economics Association, organized the Association's annual academic meetings at the University of Toronto in September 2003. He also acted as Research Director for the Panel on the Future Role of Government in Ontario, which reported in February 2004, and co-authored a Staff Report for the Panel. He presented a paper (with Prof. Edward Iacobucci) on International Antitrust to an American Enterprise Institute Conference in Washington in June 2003, and presented papers at three separate colloquia at Berkeley Law School on International Antitrust, International Trade, and NAFTA. He also presented a paper on the choice of governing instrument at a conference at McGill Law School, presented a paper (with Prof. Kevin Davis) on the economics of bijuralism at a conference at the University of Toronto, and presented a paper (with Dean Ron Daniels) at the University of Michigan Law School on Law and Development. Prof. Trebilcock also published a paper in the American Law and Economics Review on the Law and Economics of Immigration Policy, and published a paper (with Roy Hrab) in a C.D. Howe Commentary on Electricity Restructuring in Ontario.

Catherine Valcke

Professor Valcke was on sabbatical at the University of Montreal in 2003-2004. During this time, she wrote for several publications including the article "L'enseignement du droit comparé à l'ère de la mondialisation – les yeux plus grands que la panse?" in Y. Gendreau, ed., *Droit et societé* (Thémis, 2004); "Global Law Teaching," *Journal of Legal Education* (forthcoming 2004); and "Comparative Law as Comparative Jurisprudence: The Comparability of Legal Systems," *American Journal of Comparative Law* (forthcoming 2004). Catherine is currently working on a research project funded through SSHRC, entitled "Towards a Theory of Comparative Law Conferences". The first project focuses on "Comparative Law Methodology" and the second project is on the "Objective/Subjective Theory of Contracts in French Law".

Stephen Waddams

Publications: *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning,* (Cambridge University Press, 2003); *The Law of Damages,* fourth edition, (Canada Law Book, 2003); "Complexities of Private Law: A Historical Perspective", in *Classification of Private Law: Bases of Liabilities and Remedies,* ed. C. Wasserstein Fassberg, and I. Gilead, (Sacher Institute, Jerusalem, 2003); "Classification of Private Law in Relation to Historical Evidence: Description, Prescription, and Conceptual Analysis", in *Law and History, Current Legal Issues 2003, vol 6,* ed. Andrew Lewis and Michael Lobban, (Oxford University Press 2003); "The Relation of Unjust Enrichment to Other Legal Concepts" in *Understanding Unjust Enrichment,* ed. J Neyers, M. McInnes and S. Pitel, (Hart Publications, Oxford, 2003); and "Judicial Discretion" in *Discretionary Power of the Judge: Limits and Control,* ed. M. Storme, B. Hess, and C.H. van Rhee, (Kluwer, Mechelen, 2003). **Lectures and presentations:** Maastricht University, The Netherlands. Paper on "Evidence of Witnesses in the English Ecclesiastical and Admiralty Courts, 1830-1857", Auckland University, New Zealand. Seminar on "Dimensions of Private Law". Intensive LL.M. course on Remedies; and London School of Economics lecture on "Dimensions of Private Law".

Ernest Weinrib

Professor Ernest Weinrib published the second edition of his casebook *Tort Law: Cases and Materials.* His article "Punishment and Disgorgement as Contract Remedies," was published in 78 *Chicago-Kent Law Review* 55-103 (2003), as part of a symposium on punishment and disgorgement in private law. Another article, "Poverty and Property in Kant's System of Rights", appeared in 78 *Notre Dame Law Review* 795-828 (2003). Prof. Weinrib again spent part of the spring 2003 as Visiting Professor at Tel Aviv University, where he taught an intensive course on "The Theory of Private Law." In November 2003, he participated in a conference of leading tort scholars at Pace University on "The Future of Tort Law." His paper set out a corrective justice approach to the duty of care in negligence. He visited the Cardozo Law School in March 2004, where he gave a faculty workshop on tort theory, made a presentation to the New York Tort Theory Group, and gave a lecture on "Formalism, Comparative Law and the Jewish Law of Unjust Enrichment." In April this year, Prof. Weinrib presented a paper entitled "Why do law professors care?" at a conference at the University of Toronto commemorating the bicentennial of the death of Immanuel Kant.

Lorraine Weinrib

Professor Lorraine Weinrib spent a week in South Africa in the fall of 2003, where she delivered the 10th Oliver Schreiner Lecture, "Constitutionalism in the Age of Rights". The lecture opened a two-day conference sponsored by the *South African Law Journal* marking the 10th anniversary of the new Constitution and the Constitutional Court. The lecture is to be published in the journal's Jubilee issue. Prof. Weinrib interviewed members of the Court, academics and practicing lawyers in preparation for an article on the Constitutional Court. She also presented submissions on two occasions before the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, first on the constitutional issues presented by gay marriage and the second on the proposal to formalize the appointing procedure to the Supreme Court of Canada. In May 2003, Prof. Weinrib presented a paper at a comparative conference sponsored by the European Commission for Democracy through Law in Germany. In March 2004, Prof. Weinrib presented a paper, "U.S. Exceptionality and the New Constitutional Paradigm" at the Legal Theory Workshop at the Columbia Law School. In May-June of 2003, Prof. Weinrib was a visiting professor at the Tel Aviv Faculty of Law, where she taught an intensive course entitled "The Postwar Constitutional State".

IS CANADA SENDING MIXED SIGNALS TO FOREIGN-TRAINED IMMIGRANTS?

New immigrants are getting mixed signals about job prospects in Canada. This was one of the key messages that resonated at the Faculty's second annual Law and Diversity Conference: *Making the Mosaic Work,* organized by Prof. Sujit Choudhry and students Graham Mayeda and Soma Choudhury. When applying to enter the country, foreign-trained professionals are often given preference, leading them to believe that there will be jobs for them in Canada. Once they get here, the reality is often very different. For example, foreign-trained doctors are often required to complete additional training before they can practice in Canada and must compete for a limited number of spots to do so. And the problem is often worse for those in unregulated fields who face unwritten standards and employers who have little time or motivation to inform themselves about how to assess foreign credentials. Some say this is costing employers, and our country. In its 2001 report, *"Brain Gain: The Economic Benefits of Recognizing Learning and Learning Credentials in Canada,"* the Conference Board of Canada estimated that Canadian employers forfeit potential gains of between $4 to $6 billion a year by undervaluing Canadian immigrants in the workplace. Naomi Alboim, a fellow and adjunct professor at the School of Policy Studies at Queen's University, says Canadian employers must shift their focus from assessing credentials to recognizing competencies. The Conference proved to be a sounding-board for new ideas and a call to action.

Question period during the "Making the Mosaic Work" conference

(L–R): Rino Stradiotto, Borden Ladner Gervais, and Professors Lawrence Gostin, Georgetown University, Bernard Dickens and Colleen Flood (U of T)

Conference Attracts International Health Law Experts

Access to emergency contraception and abortion services, *Charter* challenges to government decision making, and conflicts of interest in medical research were just a few of the important and often controversial issues discussed at a national health law conference hosted by the Faculty on January 23rd and 24th. *"Who Gets It? Who Decides? Issues of Access and Allocation in Health Care"* attracted more than 200 leading academics, lawyers, health care professionals and policy-makers to the Queen Victoria Ballroom of the Sutton Place Hotel in Toronto. Co-organized by Professor Colleen Flood and Research Manager Greig Hinds, the two-day conference included eight panels featuring health law scholars Professors Trudo Lemmens, Rebecca Cook, and Sujit Choudhry, as well as Professor Michael Decter, Chair of the newly formed Health Council of Canada. The first day ended with presentations by winners of the Weir Foulds LLP Student Paper Competition, including U of T student Janesca Kydd ('03). The conference also celebrated the career of Professor Bernard Dickens through a public lecture by Georgetown University's Professor Lawrence Gostin (supported by Borden Ladner Gervais LLP) and a banquet dinner (co-hosted by the Faculty and Gowlings LLP). The conference was held under the auspices of the CHSRF-funded project "Defining the Medicare Basket" – details about the project can be found on its website: www.law.utoronto.ca/healthlaw/basket/index.html. A book, based on the conference and titled *The Frontiers of Fairness,* will be published in mid-2005 thanks to the assistance of the Ontario Ministry of Health and Long Term Care.

LAW FACULTY WEIGH IN ON SUPREME COURT APPOINTMENT PROCESS

"Canada needs a more open, transparent, and formal framework for appointing Supreme Court judges," says constitutional law expert Professor Sujit Choudhry. "But many of us disagree on the exact form that new process should take." Such was the premise for a day-long conference at the law school on April 19: *Judicial Appointment in a Free and Democratic Society: The Supreme Court of Canada.* Faculty members, justices, politicians and members of the bar gathered to discuss and debate the current situation and how a new appointment system might appropriately reflect the stature and role of the Supreme Court, as well as Canada's distinctive legal and political context. Former Supreme Court Justice, the Hon. Peter Cory moderated an engaging panel discussion that included Kate Malleson (London School of Economics); Judith Resnik (Yale); and George Thomson (National Judicial Institute). Other panel sessions included viewpoints from Professors Lorne Sossin, Sujit Choudhry, Martin Friedland, Kent Roach, Peter Russell, Brian Langille and Mark Freiman (U of T Visiting Law Professor). Earlier this year, U of T Professors Lorraine Weinrib and Jacob Ziegel appeared before the Parliament's Standing Committee on Justice and Human Rights to make recommendations on a new judicial appointments process.

Annual Grafstein Lecturer Encourages Local Cultural Expression

A "cultural tool kit" is one of the measures that a government can develop to encourage a range of local cultural products without undermining freedom of expression. Such was the theme of Peter Grant's lecture delivered on the occasion of the Annual Grafstein Lecture in Communications on March 30, 2004: *Popular Culture in a Globalized World.* The world of cultural economics, says Grant, works quite differently than the marketplace for ordinary commodities. Subjecting cultures to trade agreements "precludes countries from maintaining space and choice for local cultural expression." Grant proposes the establishment of a cultural tool kit – a series of measures that he believes governments should adopt to encourage local popular cultural products. Among the policy measures that he suggests include the "support of public broadcasting" and the "imposition of reasonable scheduling or expenditure requirements on private broadcasters." Many countries are now pitted against the huge US entertainment industry in order to preserve their cultural identity. According to Grant, if countries around the world are unable to tell their cultural stories and are instead overwhelmed with foreign cultural material, resentment will result. Instead, if local culture is fostered and nourished by well-designed cultural tool kits, a nation confident in the future of its own culture will also be "capable of accepting other views without fear." Grant has also written a recent book on this topic, *Blockbusters and Trade Wars.*

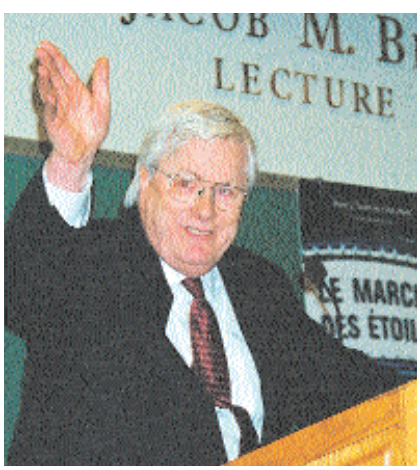
NEWEST MEMBER OF THE SUPREME COURT ON THE RIGHT TO COUNSEL

IN JANUARY 2004, the Faculty welcomed the Hon. Justice Morris Fish as this year's *David B. Goodman Lecturer.* The former justice of the Quebec Court of Appeal, and newest member of the Supreme Court of Canada, discussed *"The Right to Counsel over the Arc of Time,"* and included remarks about his personal experiences as a criminal lawyer, journalist, professor, and judge. Justice Fish reminded his audience that although the right to counsel has been recognized in theory for years, it was almost entirely ignored throughout the 20th century. Only recently did it become common practice with the advent of the Charter of Rights and Freedoms. Fish argued that the right to counsel following arrest is the linchpin of the criminal justice system – and the ultimate determinate of whether the criminal law process is fair to the accused.

ANNUAL LECTURE DRAWS WORLD RENOWNED ISLAMIC LAW SCHOLAR

One of the world's most prominent scholars of Islamic law, Khaled Abou El Fadl, spoke to a packed Bennett Lecture Hall this March 18 on the controversial topic of *"Tolerating Differences in Islamic Law."* A professor of law at UCLA and Visiting Professor at Yale law school, El Fadl addressed modernist interpretations of the Koran and how these views impact current political agendas of various governments throughout the world. El Fadl's many books include *Democracy and Islam in the New Constitution of Afghanistan* (2003) and *Speaking in God's Name* (2001), and are considered some of the most thought-provoking understandings about how Islamic traditions and inter-faith relationships work. During his often poignant talk, El Fadl warned against "clinging" to one specific part of any religion, culture or legal system, arguing that such orthodoxy does not permit us to see flaws in systems or open our minds to different perspectives. His comments on fundamentalism spurred great discussion during the question and answer session that followed.

Mr. Justice Morris Fish, Supreme Court of Canada



Peter Grant, McCarthy Tétrault LLP

(L–R): Prof. Brian Langille, UCLA Prof. Khaled Abou El Fadl and his wife, Grace

Prof. Robert Scott, University of Virginia

CONTRACT THEORY: PROFESSOR ROBERT SCOTT DELIVERS CECIL WRIGHT LECTURE

As an area of research, contract theory has claimed three Nobel prizes in economics and attracted countless studies across a range of disciplines. This year's Cecil Wright Lecturer, Professor Robert Scott of the University of Virginia, Faculty of Law, dedicated his talk to an exposition of the advances made in this area. Scott advocated a return to the classical common law approach to contract law, preferring a strict interpretation of the written contract to the contextual, reliance-based enquiry of modern times. Using examples from the United States, he cautioned against interference by courts in situations that are ill-suited to judicial intervention. The enforcement of some promises may appeal to our sense of justice and fairness but too much intervention by the courts comes at a cost, said Scott. He went on to point out that psychological experiments reveal that parties are less likely to deal fairly if there is the threat of legal enforcement; that is, fairness cannot be imposed from above. Scott concludes from this that contract law should interpret only the plain meaning of the written text and cautioned that efforts to judicialize standards of fair-dealing may be subversive. It would dampen the natural social forces which impel us towards cooperative reciprocity and it would destabilize existing transactions by attracting judicial intervention in cases where parties are better capable of self-enforcement. Scott concluded that whatever use they may have had to the Chancery, the doctrines of good faith or the standards of commercial reasonableness may have no place in a modern courtroom.

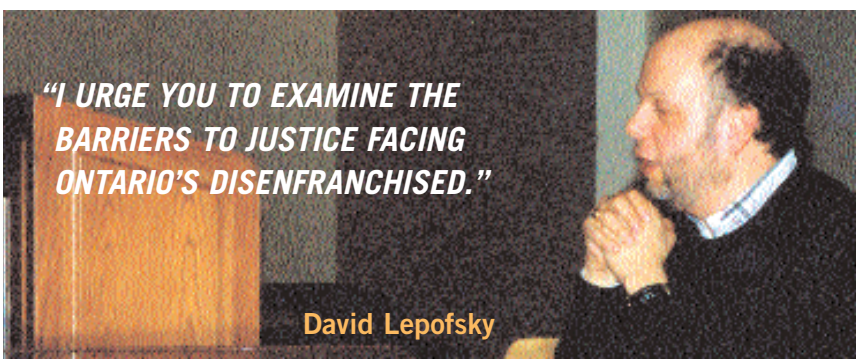
FORMER U.N. AMBASSADOR DELIVERS STUDENT-RUN "PORT TALK"

One of the country's most distinguished diplomats, and the Director of the Centre for Global Relations, Governance and Policy (Wilfrid Laurier University) gave the second "Port Talk" at the Faculty on March 22nd. Paul Heinbecker, former Canadian Ambassador to the United Nations, talked to students, faculty and alumni about the International Criminal Court, the United Nations, and the position of the United States on the Iraq conflict. Ruminating on how decisions are reached at the UN, Heinbecker expounded the need for an internationalist approach respectful of international legal precedents. The talk was followed by questions from the audience, and a reception held in the Faculty Lounge. The first Port Talk, held in the fall 2003, featured President Ehud Barak of the Israeli Supreme Court, and former Justice Dieter Grimm of the German Constitutional Court. The talks are organized and co-chaired by students Usman Sheikh and Nicole Skuggedal.

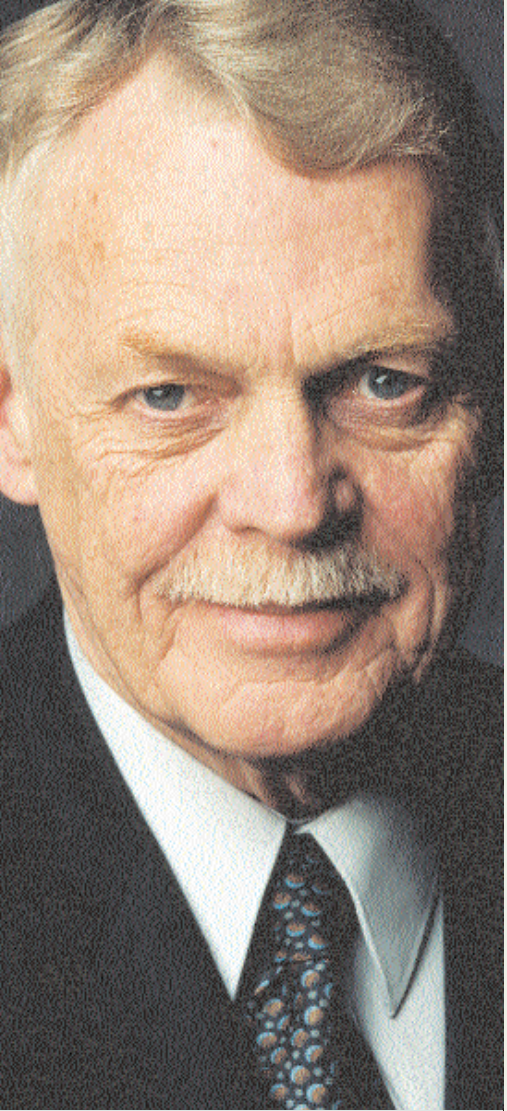
REDISTRIBUTION IN THE CANADIAN FEDERATION

Rising costs for health care and education are prompting provincial governments to question what they are calling the growing fiscal imbalance between provinces and the federal government. Professors Sujit Choudhry, Jean-François Gaudreault-Desbiens and Lorne Sossin joined on February 6th with more than 40 scholars, politicians, and senior civil servants at the Faculty of Law's *Redistribution in the Canadian Federation* conference to examine the options for redesigning redistribution in Canada. The Hon. Benoît Pelletier, Minister of Intergovernmental Affairs for the Province of Quebec opened the conference which also included speakers Richard Simeon (Law and Political Science, University of Toronto), Paul Boothe (Economics, University of Alberta), and Andree Lajoie (Law, Université de Montréal).

U OF T AND OSGOODE STUDENTS JOIN FORCES



ON MARCH 12-13, 2004, the fourth annual SPINLAW conference – jointly organized by students from U of T and Osgoode Law schools –- celebrated the practice of public interest law in Ontario with: *All You Need is Law? The Relationship Between Legal Rights and Human Needs.* The Saturday conference partners with the annual Public Interest Law Career Fair on the Friday, where more than 300 students and over 50 employers come together to learn about opportunities for law careers in the public interest. At the SPINLAW event, lawyer and disability rights activist, David Lepofsky, entertained his audience with a keynote speech *"Imagine: Using Law to Make Actual Social Change."* The conference included a diverse set of panel discussions each examining the legal regulation of various essential human needs, including: accommodation of trans-gendered persons in the homeless shelter system; barriers to claiming refugee status; enforcement of environmental protection laws ensuring our access to healthy air and water; and maintaining healthcare and water supply in an age of global trade and privatization. Speakers included Kathy Laird (Director of Legal Services, Advocacy Centre for Tenants Ontario) and Cynthia Wilkey (Staff Lawyer, Income Security Advocacy Centre).



alumni PROFILE

Clare Lewis '63

"It's not my instinct to go out and pick a fight," says Clare Lewis '63. "But I guess I am suited to taking one on if I'm required to."

For the past five years as Ontario's Ombudsman, this self-described "counter-puncher" has helped thousands of people each year to resolve their complaints with provincial government services – everything from workplace safety issues to problems with disability benefits. For most it is a place of last resort. "There is nothing worse than a citizenry that is increasingly frustrated because it cannot get through to the government," says Lewis. "It can be a very unfriendly and bureaucratic system."

Most of Lewis' career has been marked by a passion for transparency and fairness – and a willingness to take risks in his career to achieve those ideals. "I have lived since 1985 on term appointments for four different governments," says Lewis. "Now that's a high wire act."

Lewis spent the first ten years following his call to the Bar as a criminal lawyer, representing clients in several high profile cases, including Toronto's last capital murder trial in 1973. He went on to become a prosecutor for four years before being appointed to the Provincial Criminal Court bench at age 42. "I thought that was where my future lay," says Lewis. "And if I had any aspirations beyond that court, it was still within the judiciary."

But six years later he was asked by then Ontario Premier David Peterson and Attorney General Ian Scott to become the next Police Complaints Commissioner for the province. It was a risky leap and one that meant Lewis would ultimately decide to resign from the bench to demonstrate his impartiality. "It was my view that no matter how impartially the Commissioner operated, he or she would be seen as an advocate," he says. Lewis spent the next eight years dealing with police and race issues in Ontario, including several months as Chair of Ontario's Task Force on Race Relations and Policing. "It was a very fragile time in the city of Toronto in particular, with the police under considerable attack," says Lewis. "It was undoubtedly the greatest challenge of my career."

Lewis intended to return to the bench one day, but instead "got captured by the job and never looked back." In 2000, he was appointed by the Ontario Legislature as Ontario's fifth Ombudsman, after serving for six years as Chair of the Ontario Alcohol and Gaming Commission. "I always had an interest in the Ombudsman's Office," says Lewis. "But I don't think I ever saw it as a career move."

During his tenure, Lewis has helped to resolve a remarkable variety – and volume – of citizens' complaints – more than 21,000 last year alone. And as a testament to Lewis' fighting nature, for the past five years he has ensured that nearly 75% of the complaints that his office receives each year are resolved within thirty days, and almost all within the year.

Nearly a third – or 8,000 – of those come from the province's most marginalized citizens – the incarcerated. "A good many of your readers will say 'who cares'," says Lewis. "But we should care. No matter what you think about the people who are in prisons and what they did to get there, once incarcerated they're vulnerable and I'm mandated and prepared to spend the time and the effort on them." With over 40 jails in the province, almost a fifth of the Ombudsman's staff of 90 are devoted entirely to corrections, and are on the phone and in prisons every day dealing with issues like overcrowding, fair treatment, yard time, clean clothing, and medical and health issues.

And Lewis is very much the involved leader, personally visiting at least one of the province's jails each month. "We get a lot of resolution. Often it only takes speaking to a senior official at the correctional institution and problems are solved."

Other common complaints received by the Ombudsman's office include family support issues – approximately 1,400 a year from the Family Responsibility Office, which is mandated to oversee every court-ordered spousal or child support payment in the province.

Lewis' commitment to the underdog has taken him along an unconventional career path, and one that was not always secure or easy. But it has been rewarding – and Lewis would have it no other way. "My advice to students today is don't limit yourself. Recognize that a good legal education is a wonderful base for tremendously varied career paths. There is really no limit."

BY JANE KIDNER

"It's not my instinct to go out and pick a fight, but I guess I am suited to taking one on if I'm required to."

The Honourable Mr. Justice Frank Iacobucci

When I agreed to offer some comments as the Last Word for this issue of Nexus, I did so with some discomfort. After all, it has been close to twenty years since I left the law school and constant involvement with corporate and securities law issues. Of course, my daily job does provide me with some experience on rendering the last word in the judicial process, but my discomfort remains, especially after reading the lucid commentaries of Professors Ziegel, Harris, Iacobucci, Lee and MacIntosh. In my remarks, I wish to deal briefly with the topics these scholars have discussed, then turn to related issues that come to my mind, and conclude with some thoughts on the challenge of judging in the corporate and securities areas.

The commentaries of the law school's scholars deal with several important issues: whether directors owe a duty to creditors at or near insolvency; whether Canada should have a national securities regulator and if so how should it be structured; the theoretical justification for insider trading regulation; and equal treatment in sales of corporate control. It is interesting to note that twenty years ago scholars and practitioners were actively discussing and debating virtually all of these issues. Granted the discussion may not have been as sophisticated then as now in terms of theoretical arguments or empirical analysis, since the intervening two decades have witnessed the development of a richer literature reflecting more theoretical and empirical approaches. Although what I am saying *is plus ça change, plus c'est la même chose,* one cannot help being impressed by the greater knowledge and understanding today of the issues involved.

In this connection, the role of Canadian academics in the development of corporate and securities law (or commercial law generally) has been impressive. Without descending into a Monty Python sketch, in my time, legal academics from many of the country's law schools were actively involved in the proposals for legislative reform and revision of the corporations statutes and the securities lists of the provinces. As shown by the sampling of commentaries on current issues, I am delighted to see that this role has become of even greater significance.

To my mind, the collection of scholarly papers raises two fundamentally important issues. The first issue is in two parts: what is the relationship or boundary between corporate law and securities law generally; and how does this relationship, for example, factor into the debates on a national regulator or insider trading regulation for the country and variant models on that theme. It may well be that a decision on a traditional corporate law question may have considerable impact on the securities law regime and arguably vice versa. Again, to take an example, the matter of equal treatment in the sale of corporate control emanated from corporate law in the United States (particularly *Perlman v. Feldmann* and its progeny) but was adopted into the securities law regime in Canada. Interestingly, I understand that U.S. securities law has not made a similar adoption of the doctrine. Other examples abound on the interaction between corporate and securities laws. All this is to say that I am not sure we can easily differentiate corporate from securities law issues, particularly from a practical point of view.

With the decreasing importance of borders, both national and provincial, in markets generally, the second issue is the determination of how decisions and choices on substantive rules and regulatory approaches should be effected. The challenges of national and international collaboration and coordination in these areas are formidable when one considers the underlying interests of efficiency and appropriately protective measures. We can think of many examples where the choice of a substantive rule or mandatory obligation can turn business promoters, through their advisers, to another more favourable or friendly jurisdiction for incorporation or economic activity. In short, more than ever before, on the formulation of a rule or regulatory system, the domestic, inter-provincial, and international perspectives must be considered.

Finally, a few words on judging in corporate and securities law matters. As an oversimplification, these areas are ones that meld private ordering and public interest components. As such, when disputes arise before the courts on these issues, judges must be sensitive to both components. Quite often the focus will be on the choice of substantive rule without enough elaboration of the systemic regulatory features that should be considered or on the impact on other substantive rules. Courts under our adversarial system rely on counsel to bring these considerations to the court's attention. But sometimes lawyers may not be sufficiently sensitive to this dimension in their arguments. Therefore, the choice of the rule may be made on the basis of an incomplete picture, and with the consequence of some resulting impairment of an effective regulatory or private ordering system. This is not the peculiarity of only corporate and securities law disputes, as the same holds for other areas of the law and remains an important challenge on judging generally, viz.: how does the decision on one question impact or relate to other rules in the area in question.

Here is where I return to the contributions of the scholars in this issue of Nexus. Their work affects not only the students they teach, in terms of increased understanding of issues, but also influences regulatory decision makers and legislators on the choice of a regulatory or legislative approach. Their work also affects advocates in the courts and ultimately the judiciary, in the resolution of the conflicts that come before judges. In that respect, I the work of scholars and commentators has become of greater importance in the last twenty years. And that really is the last word.

GAME SHOW PITS STUDENTS AGAINST PROFESSORS

A spirited student brought a "Jeopardy-style" trivia game to the law school this year, in what she hopes will become a yearly event. On February 4, Emily Mak ('04) hosted *"Challenge the Bench"*, an interactive question-and-answer game for students and faculty. Michael Kilby ('05), Chris Essert ('05), Robin Rix ('04) and Oren Bick ('05) were chosen as the student competitors. Professors Abraham Drassinower, Kent Roach, Arnold Weinrib and Lorne Sossin also participated. A series of legal and general knowledge questions were organized into seven categories. Real working buzzers were added to give the competition an authentic feel. Contestants faced off in the Moot Court Room under the watchful eye of judges Ted Tjaden, of the Bora Laskin Law Library, and students Mike Dunn ('04) and Sana Halwani ('04). Despite the professors winning a double-or-nothing lightning round, the students managed to hang on to victory by ten points. "It is my dream to have others students carry on the tradition," says Mak. "I would love to read about it as an alumnus down the road and know it was something I helped create."

(L – R): Students Oren Bick ('05), Chris Essert ('05), Michael Kilby ('05), and Robin Rix ('04)

TAKE THE TRIVIA CHALLENGE

Curious to see how well **YOU** would fare at *Challenge the Bench?* Answer the following six questions that were presented at the trivia game and win a law sweatshirt worth $65 in either blue or red. Please send answers to Kathleen O'Brien at kathleen.obrien@utoronto.ca by August 26, 2004, and the winner will be chosen from a random draw of correct responses.

1. Law & Order
What is the name of the Canadian actress who played an Assistant District Attorney on Law & Order?

2. Everything you ever needed to know you learned in kindergarten
What university did Bill Gates drop out of in 1973 in order to focus on running his new company, Microsoft?

3. F-words
In Fahrenheit, at what temperature does water boil?

4. Sports
Who does the Guinness Book of World Records credit with performing the first "quadruple toe loop" in a figure skating competition?

A. Brian Langille
B. Arnold Weinrib
C. Michael Trebilcock
D. Jacob Ziegel

5. LSAT
What rule of evidence renders an out of court statement inadmissible if offered for the truth of its contents?

6. Geography
Name the city and state where Yale Law School is located.

Bonus Question
What faculty member is pictured in this photo at age 8?

Send your answers to Kathleen O'Brien at kathleen.obrien@utoronto.ca

FACULTY OF LAW ALUMNI WEEKEND 2004

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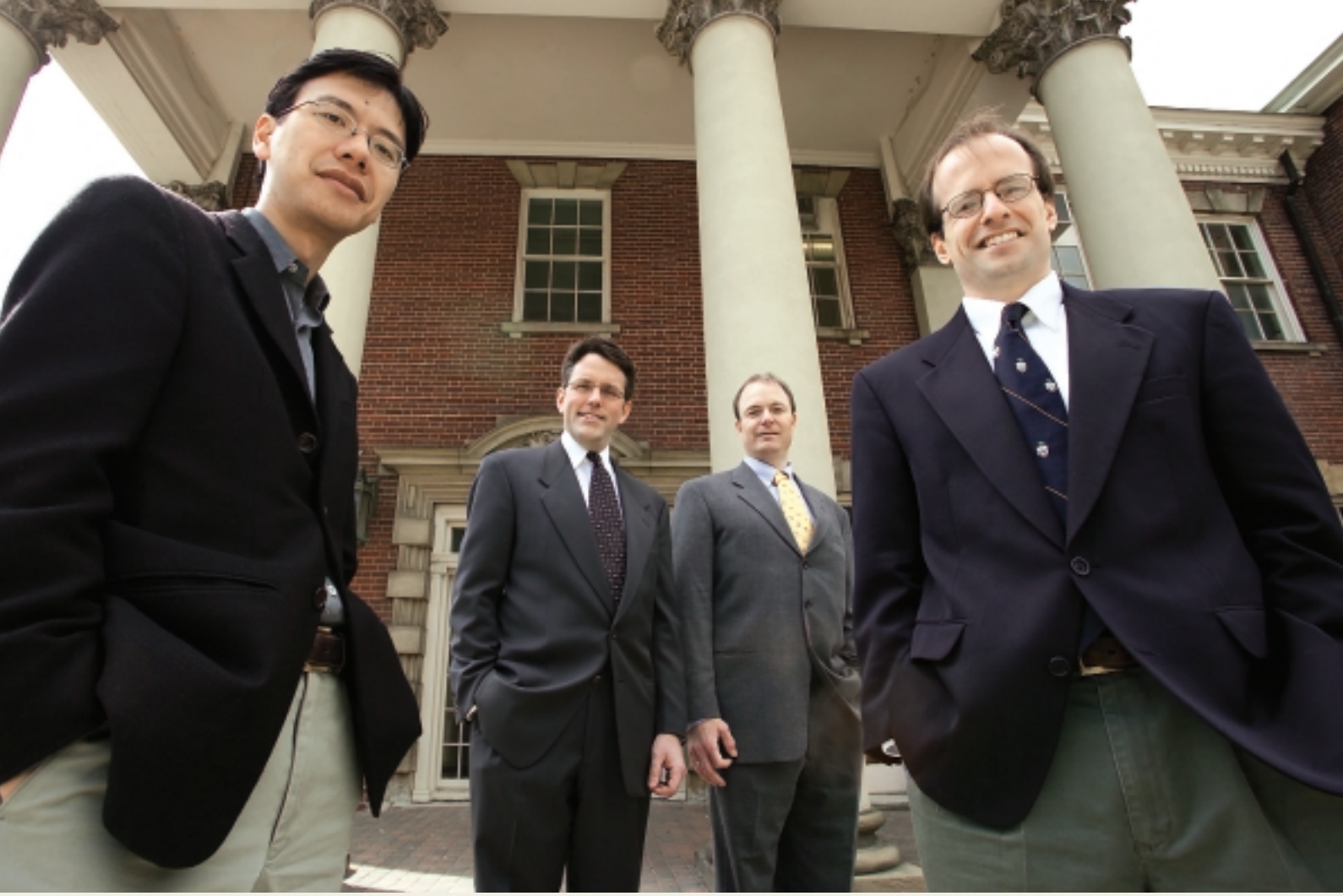

Faculty Members (L-R): Ian Lee, Doug Harris, Jeff MacIntosh and Ed Iacobucci

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