UNIVERSITY OF TORONTO FACULTY OF LAW

nexus

FALL/WINTER 2004

JUDICIAL BIAS?
THE FICTIONAL REASONABLE PERSON

Media Influence and the Supreme Court of Canada

INTERVIEW
Justices Bob Armstrong & Stephen Goudge

LAST WORD
PROF. MARTIN L. FRIEDLAND

PLUS
SPOTLIGHT ON HOLLYWOOD:
ALUMNI LIVING AND WORKING IN LOS ANGELES

UNIVERSITY OF TORONTO FACULTY OF LAW

Upcoming faculty books

WATCH FOR THESE FACULTY BOOKS IN 2005.

Professor Colleen Flood

Frontiers of Fairness

Professor David Schneiderman

Laying Down the Law: The Media and the Supreme Court of Canada

Investing Authority: An Inquiry into the Constitutional Order of Economic Globalization

Professor Ayelet Shachar

Citizenship as Property: The New World of Bounded Communities

Professor Lorraine Weinrib

The Supreme Court of Canada in the Age of Rights

STAY IN TOUCH

It's that time again...

Please submit your "class notes" for the upcoming issue of *Nexus*. Send us 200 words or less about what you are doing in your personal and professional life.

Submissions may be sent by e-mail to j.kidner@utoronto.ca

or by mail to:
University of Toronto, Faculty of Law
78 Queen's Park
Toronto, ON
M5S 2C5

CLASS NOTES




CHALLENGE THE BENCH TRIVIA ANSWERS

Listed below are the answers to our "Jeopardy-style" trivia game featured in the Spring/Summer 2004 issue of Nexus. Justice Todd Ducharme ('86) won the U of T Faculty of Law sweatshirt in a draw of alumni who successfully answered all six questions. Karl J. Pires ('98) won a travel mug for correctly answering the bonus question.

1. What is the name of the Canadian actress who played an Assistant District Attorney on Law & Order? ANSWER: Jill Hennessy
2. What university did Bill Gates drop out of in 1973 in order to focus on running his new company, Microsoft? ANSWER: Harvard University
3. In Fahrenheit, at what temperature does water boil? ANSWER: 212
4. Who does the Guinness Book of World Records credit with performing the first "quadruple toe loop" in a figure skating competition? ANSWER: Kurt Browning
5. What rule of evidence renders an out of court statement inadmissible if offered for the truth of its contents? ANSWER: Rule against hearsay
6. Name the city and state where Yale Law School is located. ANSWER: New Haven, Connecticut

BONUS QUESTION

What faculty member is pictured in this photo at age 8? ANSWER: Arnold Weinrib

nexus FALL/WINTER 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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We invite your letters, submissions, news, comments and address changes. Please e-mail j.kidner@utoronto.ca. Visit the Faculty of Law web site at www.law.utoronto.ca

MESSAGE FROM THE DEAN

Over the last decade, there has been growing interest in the role that strong rule of law institutions play in promoting economic development. Few principles are more important to the rule of law than judicial independence. Although good rule of law institutions are an essential prerequisite for the realization of economic, social and political freedom, the adoption of just laws and legal institutions faces stiff resistance in many developing countries.

Given my own work in this area, I know how fortunate we are in Canada to have a judiciary that is expert, independent and publicly accountable. Our court system is one of the most independent in the world, a fundamental pillar of our constitutional democracy.

Recently, Canada has experienced profound social, demographic and juridical changes that have posed significant challenges to the institutional strength of our judiciary. The justice system is under increasing pressure to adapt to a population that shares different value systems and civic goals.

In this issue, we explore some of these challenges to the judicial process. Mayo Moran proposes that at least one traditional legal concept may no longer accommodate Canadian pluralism and social values. She invites us to dispense with the fiction of the "reasonable person" in favour of a more nuanced and inclusive approach to assessing reasonable behaviour at common law.

Ontarians have been grappling for many months with amendments to the *Arbitration Act* that would expand faith-based resolutions of family law and other personal disputes. Jean-François Gaudreault-Desbiens confronts the seemingly intractable problem of how to reconcile competing values – freedom of religion versus gender equality, private justice versus public policy, *Charter* values versus religious norms – in the context of the judicial process.

The judiciary is also experiencing challenges in its relationship with the media and the public, both of which have become less deferential to government and judicial authority. David Schneiderman unpacks the role of the media in framing constitutional debates. In their reliance on a high level of generality and maximum drama, media reports sometimes miss the actual, often complex and multi-dimensional, legal problem at stake.

By the time you read this, the Supreme Court will have likely opined on the government's proposed legislation that would legalize same-sex marriage. Brenda Cossman exposes the idea of "judicial activism" when it comes to this government-sponsored legislation, observing that opposition to the bill is less about judicial activism (how could it be, given that the government, not the courts, wrote the legislation), than it is about opposition to gay and lesbian marriage.

Canada is also experiencing conflict over the very method by which judges are appointed. Sujit Choudhry interviews Justices Stephen Goudge and Robert Armstrong of the Ontario Court of Appeal, who demystify the appointments process and offer insights into its reform. They conclude that the current system, although imperfect, works well.

Of course, openness and transparency are important rule of law goals. Yet despite pressure by politicians and some citizens to "reform" the nomination process, we must reject reforms that would screen potential judges for ideology. Such a system would fly in the face of our values of democracy, impartial judgment and due process.

Justices Goudge and Armstrong are just two of our alumni at the fore of our judicial system. Over 100 of our alumni sit on ten of our nation's courts, including four of the nine justices of the Supreme Court and over half the judges of the Ontario Court of Appeal. From the Supreme Court of Yukon to the Supreme Court of Canada, our alumni are among Canada's leading jurists.

Another pressing challenge facing our judiciary is composition. Slowly, our judiciary is evolving to reflect the changing character of Canada. Indeed, in this issue we celebrate two recent appointments, each of which represents a moment of profound historical significance for Canada.

In 1976, Justice Rosalie Silberman Abella (or "Rosie" as she is affectionately known), made history as the first pregnant woman appointed to the Bench. Rosie has made history again, not only as the Faculty's first female graduate to be appointed to the Supreme Court, but as the first Jewish woman to sit on the Court. Justice Todd Ducharme also makes history with his appointment to the Ontario Superior Court of Justice, as Canada's first Métis judge.

By appointing judges who reflect the nation's diversity, governments vindicate our cherished value of equality. Yet of the 100 or so judges who are graduates of this Faculty, only about 15% are women, and even fewer are members of a visible minority or another equality-seeking group.

We are working to do our part to ensure that the profession is relevant to all Canadians. Each year, we graduate approximately ten Aboriginal students. This year, women make up over half of our entering class, and almost one-third of the class are people of colour. We are committed to building a program accessible to the very best students, regardless of race, gender or socio-economic status.

I look forward to the day when the composition of our judiciary reflects the composition of our society, even as I remain enormously proud to be part of a legal community that boasts of so many graduates making such profound and enduring contributions to the rule of law.

Ronald J. Daniels '86
Dean

nexus
FALL/WINTER 2004

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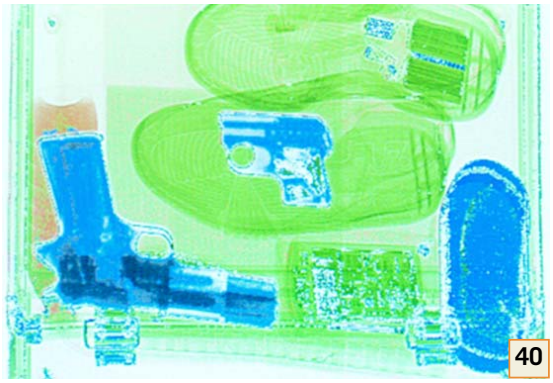
ON THE COVER

The "Figure of Justice" is a central symbol of Western civilization, representing an ideal that goes back thousands of years. The cover photo, taken by photographer Julia McArthur, is of the sculpture of *Themis* by Jack Harman located at the Vancouver Law Courts. In her cross-Canada *Figures of Justice* series, Julia McArthur examines symbolism in the portrayal of justice in Western societies. For more information go to www.julia.mcarthur.name



COLUMNS

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FROM THE editor

JANE KIDNER, ASSISTANT DEAN, EXTERNAL RELATIONS

Over the past six months, we have seen Canadians questioning our judicial system in ways they never have before. This public vetting has been brought to the fore by one of the biggest shake-ups our highest court has ever seen – with two members of the S.C.C. stepping down, making room for a landmark four women bench. Happily, that process resulted in the appointment of one of our very own – Rosalie Abella '70, and the homecoming of another – former dean, the Hon. Frank Iacobucci.

In this issue of Nexus we examine the changing world of judicial decision-making. From the judicial appointments process, and the sometimes hidden influences on judges and tribunal bodies, to the renewed interest in the judicial activism debate, faculty members continue to tackle some of the most controversial and timely topics making headline news.

We also celebrate six alumni who have found career success in the most unorthodox way – writing hit televisions shows, managing superstar actors, and producing award-winning movies. In a stratosphere apart – one that most of us only experience from the outside in – these alums have turned their law degrees into calling cards for a first-class ticket to Hollywood and *"Hollywood North."* In some cases, they gave up everything, including lucrative and stable law jobs, to follow their dream of financing, producing and writing in the entertainment world.

Before interviewing these show biz movers and shakers, I wondered, was there a shared characteristic that set them apart? What strange coincidence had first brought each to attend the U of T Faculty of Law, only to leave it all behind? I soon discovered that it was no coincidence. In one way or another, all six alumni credit their U of T law degree with a foundational part of their success. As David Hoselton '82 put it, "just to get through law school teaches you that you can pretty much take on anything."

With that – take your U of T law degree and let your imagination do the rest. Happy holidays, and happy reading.

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

contributors

DAVID SCHNEIDERMAN, *B.A (McGill), LL.B. (Windsor), LL.M. (Queen's)* is an Associate Professor of Law at the Faculty. He was called to the Bar of British Columbia in 1984 where he practised law. He then served as Research Director of the Canadian Civil Liberties Association in Toronto from 1986-89, and was Executive Director of the Centre for Constitutional Studies at the University of Alberta from 1989-99. Prof. Schneiderman has authored numerous articles on Canadian federalism, the Charter of Rights, Canadian constitutional history, and constitutionalism and globalization. He is founding editor of the quarterly *Constitutional Forum Constitutionnel* and founding editor-in-chief of the journal *Review of Constitutional Studies.*

MAYO MORAN, *LL.B. (McGill), LL.M. (Michigan), S.J.D. (Toronto)* is an Associate Professor who served as the Faculty's Associate Dean from January 2000 to June 2002. She has published in comparative constitutional law, private law, and legal and feminist theory. Professor Moran's work focuses on how our practices and theories of responsibility come to terms with discrimination. Her book, *Rethinking the Reasonable Person* (Oxford University Press) was published in 2003. She is currently engaged in a project on reparations theory and transitional justice that examines the limits and possibilities of law, particularly private law, in redressing widespread historic wrongdoing. Prof. Moran has worked on litigation involving the equality guarantee under the Charter and most recently, the Chinese Canadian Head Tax claim.

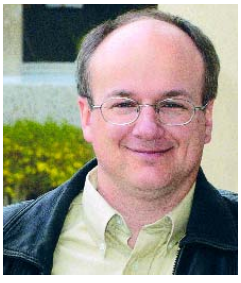
JEAN-FRANÇOIS GAUDREAULT-DESBIENS, *LL.B. (Laval), LL.M. (Laval), LL.D. (Ottawa)* was admitted to the Québec Bar in 1988, and practiced commercial law in Québec before joining McGill University Faculty of Law. In 2002, he became an Associate Law Professor at U of T. Prof. Gaudreault-DesBiens specializes in constitutional law (domestic and comparative), legal theory, corporate law, and law and culture. His most recent work has focused on the law's apprehension of identity-related phenomena. He has published two books, *Le sexe et le droit : Sur le féminisme juridique de Catharine MacKinnon* and *La liberté d'expression entre l'art et le droit,* as well as numerous articles in both French and English.

LORNE SOSSIN, *B.A. (McGill), M.A. (Exeter), LL.B. (Osgoode), Ph.D. (Political Science) (Toronto), LL.M. (Columbia), S.J.D. (Columbia)* is an Associate Professor at the Faculty of Law and the Associate Dean for 2004-2005. Prior to joining the Faculty, he was an Assistant Professor at Osgoode Hall Law School and at York University and U of T's Departments of Political Science. He is a former law clerk to Chief Justice Antonio Lamer of the Supreme Court of Canada, a former Associate in Law at Columbia Law School and a former litigation lawyer with the firm of Borden & Elliot (now Borden Ladner Gervais). His teaching interests span administrative law, constitutional law, legal process/civil procedure, judicial process, social policy, democratic administration, and Jewish law. Prof. Sossin was one of the founders of the Discretionary Justice and Social Welfare (DJSW) Working Group at the Faculty of Law.

ANGELA FERNANDEZ is an Assistant Professor who is teaching contracts and legal history at the Faculty. Most recently, she was at Yale Law School working on her J.S.D. dissertation on the history of the case method and rival forms of legal education in the late 18th and 19th centuries. She is interested in the ways in which legal culture is reproduced.

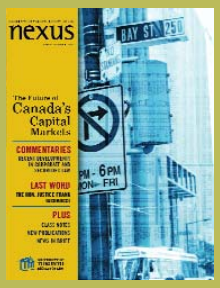
SUJIT CHOUDHRY, *'96* is an Assistant Professor at the Faculty of Law, a Senior Fellow of Massey College, and a Member of the University of Toronto Joint Centre for Bioethics. Prof. Choudhry's principal research and teaching interests are Constitutional Law and Theory, and Health Law and Policy. He currently serves as Chair of the Advisory Board of the South Asian Legal Clinic of Ontario.

BRENDA COSSMAN, *'86* joined the U of T, Faculty of Law in 1999 as Associate Professor, and was promoted to Professor of Law in 2000. Her interests span family law, freedom of expression, feminist legal theory, law and sexuality, and law and development. Prof. Cossman is currently on leave at Harvard University teaching Gender, Law and Public Policy, and Feminist Theory.



KENT ROACH, *'87* joined the University of Toronto in 1989 as a Professor of Law and Criminology. His teaching and research interests include the criminal process, the Charter, aboriginal rights, the role of courts, anti-terrorism and the legal profession. Prof. Roach has written or co-authored nine books. Since 1998, he has also served as editor-in-chief of the *Criminal Law Quarterly.*

to the editor



We want to hear from you. Please send your comments to j.kidner@utoronto.ca.

I thought the securities issue of Nexus was fabulous. There were interesting articles, interesting tidbits about what people were doing, faculty news and you had it all in balance. It's not an area I practice in, but the articles were of general interest and I found them great.

Chuck Schwartz '67 *(Partner, Goodmans LLP)*

NEXUS CORRECTIONS

In the Class Notes section of our Spring 2004 issue we incorrectly attributed the photo of "Zeroman" (the caricature of Leslie Nelson) with alumnus Sheldon Greenberg '63.The Zeroman cartoon character should have been featured alongside Sheldon Wiseman '66 who is President and CEO of Amberwood Entertainment based in Ottawa, and who has for a number of years been producing television shows and feature films. We apologize for our error.

FROM OUR ARCHIVES

75 YEARS AGO

The Howdy Corporation introduces a new soft drink named "Bib-Label Lithiated Lemon-Lime Soda" two weeks before the Wall Street stock market crash of 1929. Shortly afterwards, they change the brand name to 7 Up. Back at U of T, Dean William P.M. Kennedy, Frederick C. Auld and Norman Mackenzie teach a wide selection of courses in the four-year law program, which is considered to be a sub-department of the Political Economy Department.

50 YEARS AGO

In 1954, racial segregation in schools is ruled unconstitutional by the United States Supreme Court in the landmark *Brown v. Board of Education.* The first commercial color television is introduced by RCA, the "CT-100", which retails for $1,000. A number of shows debut that go on to become classics including *The Tonight Show; The Ed Sullivan Show; The Jack Benny Show; Father Knows Best; The Adventures of Ozzie and Harriet; and I Love Lucy.* The law school officially becomes a full-fledged faculty. That year, there were nine professors and 13 graduates, including one woman, Elaine Knight.

25 YEARS AGO

The 1979 movie *Kramer vs. Kramer* comes out and changes how people view divorce. At the law school, Frank Iacobucci takes over as dean from Martin Friedland. Two professors on staff at the Faculty in 1979 would later become dean: Robert Prichard took over from Iacobucci in 1984, and Robert Sharpe assumed the role from 1990 to 1995. Feminism was being introduced into the culture of the law school according to several alumni who were there at the time.

DID YOU KNOW?

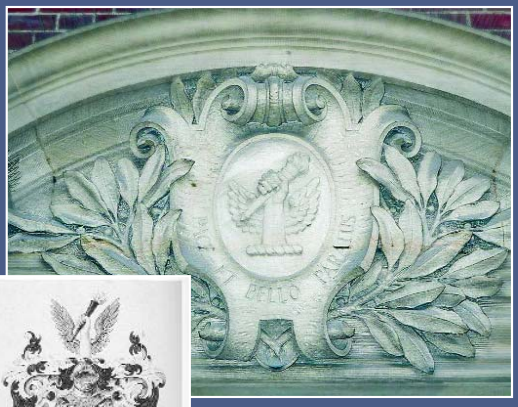


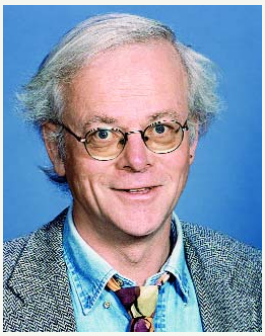
Photo Credit: "A Canadian Millionaire: The Life and Times of Sir Joseph Flavelle, Bart., 1859-1939," by U of T History Professor Michael Bliss; "Holwood and Wymilwood," by Angus Gunn and Ira Nishisato (class of 1993).

Students and faculty entering Flavelle House pass under an armorial carving depicting an ancient family coat of arms featuring a winged arm holding a torch. Engraved are the Latin words "pace-et bello paratus," which mean, "in peace and war prepared." The former owner of the house, Sir Joseph Wesley Flavelle, who was Governor of the University of Toronto from 1906 to 1939, designed his official "Armorial Bearings" after being awarded a baronetcy for his wartime service in 1917. It incorporates his maternal grandmother's coat of arms, featuring a hand reaching for a star, flanked by two 18-pound shells. Because of the intricate design, only the upper portion appears above the door.

End of an Era:

Professor David Beatty Leaves Law School After 33 Years

BY KATHLEEN O'BRIEN



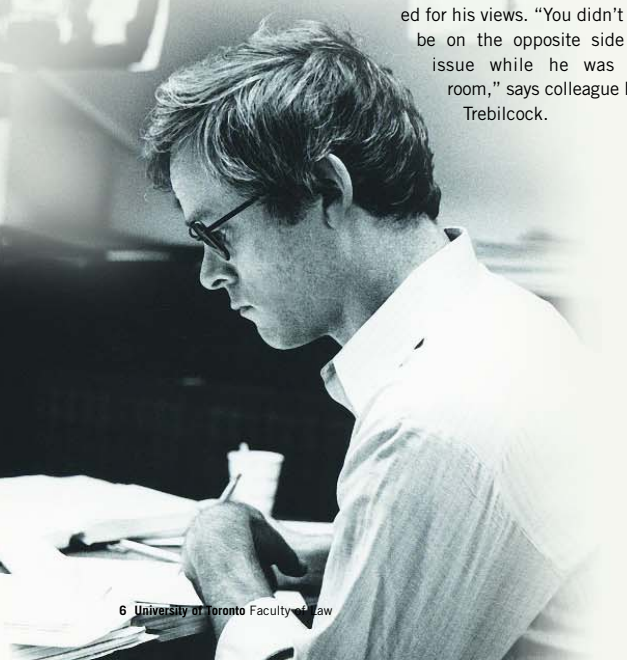
IN SEPTEMBER 1971, students in David Beatty's course were greeted by a professor sporting faded torn jeans and Kodiak work boots with flapping laces.

A popular teacher from the start, "David", as the students called him, was a modern "buckskin-draped maverick of sorts", says former student Stephen Grant ('73), now a lawyer at McCarthy Tétrault LLP in Toronto. "There was no mistaking where he stood on an issue. He instilled principled thinking in his students."

But one of Canada's most influential labour and constitutional law scholars didn't start out as an unconventional academic. Born in Halifax and raised as a Scottish Presbyterian in Ottawa, David studied law at Osgoode Hall. While there, Professor Harry Arthurs reveals that he was a straight-laced student who always wore a suit and tie. All that changed in 1969 when David was studying his Masters at the University of California, Berkeley. He was heavily influenced by the counter-culture movement of the sixties and his casually-dressed thesis supervisor, Professor David Feller.

After that experience, David was a changed man. He came back with a beard, long hair, and a new preference for jeans. It was 1971, and he had just been hired to teach at U of T's Faculty of Law. "David morphed into an inspiration and occasional irritation, but is a true believer in law's power to achieve social justice," Prof. Arthurs says. "He is *sui generis:* committed, passionate, articulate, and as intellectually tough-minded as he is personally soft-hearted."

As a teacher, students found David to be something of an icon. Faculty, however, found themselves engaged with him in major debates and came to know him as eccentric, spirited and somewhat of an academic outsider. But David was always highly respected for his views. "You didn't want to be on the opposite side of the issue while he was in the room," says colleague Michael Trebilcock.



Prof. Trebilcock joined the law school a year after David, in 1972. In somewhat of an inauspicious start, David quickly decided his new colleague was a "capitalist thug" for his right-wing views. But they managed to forge a deep and enduring friendship over the next 30 years and sat in offices next to each other in Falconer Hall.

Back in the 70s, while articling with lawyer Don Brown at Blake, Cassels & Graydon, David and his new friend decided the legal world needed a labour arbitration book. The firm supported the idea and in 1977, *Canadian Labour Arbitration* was published. The book helped establish David's reputation as an expert in labour law. Since its publication 27 years ago, the book has been updated annually and David has written or edited five more books.

The advent of the *Charter of Rights and Freedoms* in 1982 stirred up David's intellect. He decided to make the switch to constitutional law and radically reinvented his work – and it paid off. His theories became well known throughout the world. *The Ultimate Rule of Law* (Oxford University Press) is what Brown calls David's "superb and extraordinary contribution to Charter jurisprudence."

It is difficult to fully capture David's enduring contributions to the law school and the University. He made a tremendous impact and was a guiding force in, for example, creating and then leading the Centre for Industrial Relations.

His decision to take early retirement is a personal and professional loss for the law school. "It's the end of an era," says Prof. Trebilcock. Former student, colleague and very good friend, Robert Prichard ('75), agrees wholeheartedly. "David has been a constant force leading the law school to ever higher levels of aspiration and achievement, always guided by principled arguments and reason. He has stayed the course and emerged as one of the central figures in the creation of the modern law school."

Dean Ron Daniels ('86) says David embodies the very best of the law school: "His magnificent corpus of scholarship in labour law, constitutional law, and comparative law, his fiery and unrelenting optimism, and his passion for liberal ideals and principles, have contributed mightily to the quality of collegial life in our community."

David's strong moral center and intellectual openness has kept the law school focused on its core values, says friend and colleague Brian Langille. "He is morally and intellectually demanding of himself and he expects that of others."

In retirement, David, his wife Ninette, and teenagers Erin and Sam have settled in a French village close to Geneva, Switzerland. Ninette has a senior policy position with the UN High Commission for Refugees and David is working on a new edition of *Canadian Labour Arbitration.*

But David will visit the law school frequently and make a cameo appearance from time to time in the classroom. Just don't expect him to wear a suit. ■

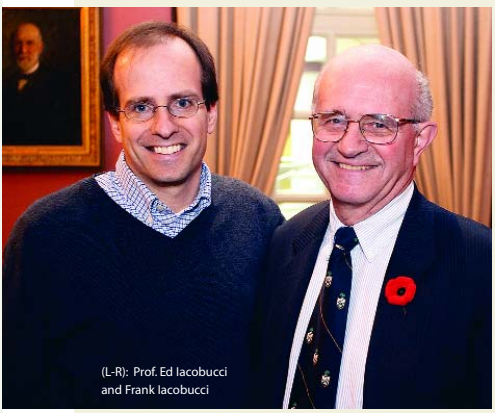
news in brief

THE HON. ROSALIE ABELLA MAKES SUPREME COURT HISTORY

IN A FIRST FOR THE FACULTY OF LAW, A SPECIAL "HIGH TEA" was held for students, staff and faculty on October 18, 2004 to honour and welcome back one of its most beloved graduates, the Hon. Madam Justice Rosalie Silberman Abella (class of 1970). Close to one hundred students packed the Rowell Room to sip tea, sample crumpets and meet the Hon. Justice Abella. Earlier in the month, she was sworn in to fill one of two vacancies in the Supreme Court of Canada along with the Hon. Madam Justice Louise Charron of the Court of Appeal for Ontario. The historic ceremony brought to four the number of women on the nine-member bench, the highest in the court's history. Justice Abella is the first female graduate of the Faculty of Law to receive this highest of honours. Over the last several years, Justice Abella has taught several intensive courses at the Faculty, participated in various symposia and panels on a wide range of different legal topics, and addressed the first year class as a distinguished alumnus. "On every one of these occasions, she has imparted meaning and inspiration to our community, and has fueled our belief in the capacity of law to do good. We couldn't be prouder of Rosie," says Dean Daniels. Justice Abella paid tribute to the Dean, whom she called "a visionary leader for North America" and her predecessor, the Hon. Frank Iacobucci, who was her first-year law professor at U of T.

(TOP): The Hon. Rosie Abella and Dean Ron Daniels.
(BOTTOM): The Hon. Rosie Abella chats with students at a special "High Tea" in her honour.

FRANK IACOBUCCI REJOINS LAW SCHOOL AFTER 19 YEARS



(L-R): Prof. Ed Iacobucci and Frank Iacobucci

In a wonderful example of how life comes full circle, Frank Iacobucci was re-appointed to the U of T Faculty of Law as a Professor in October 2004. Faculty, staff and students celebrated his return a few weeks later at a special luncheon in the Rowell Room. "Joining the law school was a turning point in my professional life. No one could get better friends than the ones I've made here," Prof. Iacobucci told guests. Colleague Martin Friedland recounted how Frank's good humour surrounds him wherever he goes. "What I remember the most was how his laughter and cheer pervaded the hall." Professor Michael Trebilcock added that Frank taught him many things, including the art of self-depreciation. In particular, he recalled Frank's 1982 Law Follies appearance in a large Sombrero with Prof. Bruce Dunlop playing a ukulele. "It wasn't pretty, but a lot of fun." Professor Iacobucci has had an exceptional relationship and long standing affiliation with the University. Over his 18-year career at U of T, he has served as a Law Professor (1967-1985), Law Dean (1979-83), Provost, and VP, Internal Affairs. In 1989, he was given an honorary Doctor of Laws degree by U of T. This past September, Prof. Iacobucci was also welcomed back to the law school where one of his sons, Ed, teaches, to speak at the Orientation luncheon for incoming students. In September, he stepped in as Interim President of the University of Toronto, replacing outgoing president Robert Birgeneau. In "Reflections On My Return," Prof. Iacobucci focused on the challenges and opportunities in the coming year. He said his 20-year absence has allowed him to view the institution with renewed objectivity: "If anyone could have an institution as a mentor, it would be the University of Toronto," he said. "I am amazed at the path of excellence this University has taken. I have returned to such a strengthened institution." Prof. Iacobucci retired from the Supreme Court of Canada in June 2004 following 13 years on the bench.

Law Professors Contribute Expertise to Ipperwash Inquiry

U OF T LAW PROFESSORS DARLENE JOHNSTON AND KENT ROACH were consulted for their expertise as part of a Research Advisory Committee for the highly anticipated Ipperwash Inquiry this summer. Prof. Johnston was one of two experts to testify at the evidentiary hearings into the slaying of native protester Dudley George, who was shot dead nine years ago by an Ontario Provincial Police Officer. Mr. George and others were occupying Ipperwash Provincial Park to protest against the expropriation of their land, which they said contained a burial ground. The aim of the inquest is to discover how the OPP came to use deadly force and how to prevent such violence in the future. The professors helped develop and manage a research/policy agenda and provide expert, ongoing advice to the Commissioner and Inquiry staff. During three days of hearings in July, the inquiry heard testimony from Prof. Johnston who is a specialist in Great Lakes Aboriginal history and a descendant of the Great Lakes Aboriginal ancestors. She relied on accounts of European missionaries and settlers for her research because the aboriginals of the day had no written record. Prof. Roach gave a paper, "Four Models of Police-Government Relations," at a conference on the topic held in June as part of the research program of the inquiry. Both Prof. Johnston's presentation and Prof. Roach's paper are available on the inquiry's website at www.ipperwashinquiry.ca.

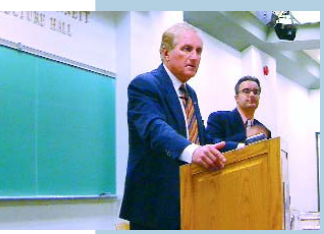
(T-B): Professors Darlene Johnston and Kent Roach

PROFESSOR JOHN HAGAN RETIRES

U of T law professor John Hagan has retired after 30 years teaching law and sociology, 22 years of that time at the Faculty of Law. Known for his collegial warmth and scholarly achievements, Prof. Hagan was cross-appointed to the Law Faculty and the Department of Sociology. "We will miss John's scholarly leadership, creativity, collegiality, decency and warmth greatly, but want to wish John and his family all the best," says Dean Ron Daniels. Over the course of his career, Prof. Hagan had visiting appointments at Indiana University, the University of Wisconsin at Madison, and at the University of North Carolina at Chapel Hill. His pioneering work explored the interstices of law and the social sciences in a number of different contexts and earned him accolades from a variety of different scholarly communities, both nationally and internationally. He has made enormous contributions to the study and teaching of law, in particular to the fields of criminology and socio-legal studies. He is a past president of the American Society of Criminology, and in 1995, published the well-received *Crime and Inequality* (Stanford University Press) and *Gender in Practice: Lawyers' Lives in Transition* (with Fiona Kay, Oxford University Press). Three years later, his book *Mean Streets: Youth Crime and Homelessness* (Cambridge University Press, 1997) received the C. Wright Mills Award from the Society for the Study of Social Problems and the Michael J. Hindelang Award from the American Society of Criminology. In 1997, Prof. Hagan was also awarded the American Society of Criminology Edwin H. Sutherland Award for distinguished contributions to North American criminology. But for of all his accolades, Prof. Hagan says the most meaningful award he has ever received was the designation of University Professor, U of T's highest honour. In all, Prof. Hagan is the author or co-author of over 15 books, including *Northern Passage: American Vietnam War Resisters in Canada* (Harvard University Press, 2001), which received the Albert J. Reiss Distinguished Scholar Award from the American Sociological Association. His latest book, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (University of Chicago Press, 2003) brilliantly shows how an international social movement for human rights in the Balkans was transformed into a path-breaking legal institution and a new transnational legal field. Not one to slow down the pace, Prof. Hagan will keep busy as the inaugural Editor of the *Annual Review of Law & Social Science,* as Co-editor of the *Annual Review of Sociology and Law & Social Inquiry* and as the Criminology Editor of the *Journal of Criminal Law and Criminology.* Prof. Hagan will continue residing in Chicago where he has been appointed the John D. MacArthur Professor of Sociology and Law at Northwestern University and Senior Research Fellow at the American Bar Foundation. Retiring as University Professor Emeritus, Prof. Hagan intends to continue his ongoing research at U of T on Toronto lawyers, youth and global citizenship.

The Hon. Roy Romanow Discusses Future of Medicare

Medicare reform should focus on how to improve the health of all Canadians, not just on waiting times. This was one of the key points the Honourable Roy Romanow made to a standing-room only crowd at the Faculty of Law's Health Law and Policy Seminar Series lecture on September 30, 2004. In his talk, "The Past, Present and Future of Medicare", the Hon. Romanow touched on the First Minister's Meeting on health care in mid-September, levels of health care spending, and aboriginal health issues. As the former chair of the 2001 Commission on the Future of Health Care in Canada, the Hon. Romanow said he was relieved that health care is the single most important issue to Canadians. "What made the Commission a particularly meaningful experience for me was the affirmation of my deep personal belief that Medicare is the single greatest symbol of our uniqueness as Canadians." The Hon. Romanow spent the latter half of the session taking questions from the audience on a number of issues including wait times, whether the Canada Health Act would still apply in Quebec, and what the government response to his report has been. The lecture was organized by the Health Law Group of the Faculty of Law and the Department of Health Policy Management and Evaluation.



(LEFT): The Hon. Roy Romanow

LAW PROFESSOR DRAFTING "GROUNDBREAKING" GUIDELINES

Prof. Carol Rogerson

U of T Law Professor Carol Rogerson and Rollie Thompson of Dalhousie University are drafting new guidelines for spousal support that are being called "groundbreaking". The federal Department of Justice recruited the two distinguished family law scholars in 2001 to come up with a calculus lawyers can use to settle cases before they come to court. The professors have been busy conducting research and consulting various judges and lawyers. "The guidelines are a response to overwhelming concerns voiced by judges and lawyers about the uncertainty and unpredictability in this area of the law. It's very much a response to a practical set of problems," Prof. Rogerson says. Lawyers across the country are saying that the new guidelines could revolutionize family law practice if they are embraced as formulas across Canada. The common law of spousal support in Canada has been in a state of flux for more than a decade, and until now, practitioners have not had uniform national guidelines to follow. Family law lawyers got a sneak preview of the advisory spousal support guidelines at the Canadian Bar Association's annual family law conference earlier this year. Although the guidelines are meant to act as a starting point in negotiations and in devising awards, lawyers are already using them. A working group of 12 lawyers, judges and mediators are offering input on the spousal support guidelines, and a final report is expected to be released by the Justice Department in December or early January.

Participants at the John Willis Conference

CONFERENCE HONOURS CANADA'S FOREMOST PUBLIC LAW SCHOLAR

ON SEPTEMBER 16 AND 17, the Faculty hosted a conference to commemorate the life and scholarship of Professor John Willis (1907-1997), Canada's foremost scholar of public law. Prof. Willis taught at U of T's Faculty of Law for nearly 20 years. The conference brought together scholars from New Zealand, England, the United States of America as well as Canada, and was organized by Professors Harry Arthurs (Osgoode), David Dyzenhaus (Toronto), Martin Loughlin (LSE), and Mike Taggart (Auckland). In a departure, authors did not present their own papers but rather at each of the four panels, a graduate student presented a total of four to five papers and provided comments. This allowed considerable time for discussion on issues ranging from the rule of law to globalization. Prof. Willis was an important part of the Faculty's history. In 1949, he and colleagues 'Caesar' Wright and Bora Laskin resigned from Osgoode Hall law school and joined the University of Toronto. Together, they helped persuade the Law Society of Upper Canada to recognize the LL.B. degree that had been newly established at U of T's Faculty of Law. Prof. Willis went on to teach law at U of T from 1949-1952 and again from 1959 to 1972. He was considered by his students to be among the best teachers they encountered. His first book, *The Parliamentary Powers of English Government Departments,* published in 1933, is still regarded as a classic. Many of his most influential articles were published in the *University of Toronto Law Journal,* which is planning to gather the papers from the conference into a special issue for publication in 2005.

FACULTY AWARDS AND HONOURS

SINCE THE SPRING 2004, **Professors Lorne Sossin, David Schneiderman, John Hagan,** and **Catherine Valcke** won Social Sciences and Humanities Research Council (SSHRC) Standard Research Grants.... Professors **Ayelet Shachar** and **Lorraine Weinrib** were awarded Connaught Fellowships. Prof. Shachar will complete her book, *Citizenship as Property: The New World of Bounded Communities* (Harvard University Press), and Prof. Weinrib will complete her book, *The Supreme Court of Canada in the Age of Rights....* Professor **Jeff MacIntosh** (and co-author Doug Cumming) won the 2004 Iddo Sarnat Award for the best paper, "A Cross Country Comparison of Full and Partial Capital Exits," in the *Journal of Banking and Finance....* Professor **Kerry Rittich** became the William Lyon Mackenzie King Visiting Professor with the Weatherhead Center for International Affairs at Harvard University. In spring 2005, she will conduct research on a Jean Monnet Fellowship at the European University Institute in Florence, Italy.

Special Journal Edition Will Pay Tribute to Professor Bernard Dickens

A special edition of the *Journal of Law, Medicine and Ethics* is being produced in honour of U of T Professor Emeritus Bernard Dickens, who formally retired from the University of Toronto, Faculty of Law in 2003. The journal is being co-edited by Health Law Professor Colleen Flood and one of Dickens' oldest friends, Professor Lawrence Gostin of Georgetown University and the Johns Hopkins University. This volume of essays has been written as a tribute to Dickens' career by leading scholars from around the world on topics ranging from abortion to research regulation. Prof. Flood says the planning of the volume is a testament to Bernard's intellectual legacy. "The diversity of topics and of authors and their wholehearted enthusiastic writing for Bernard underscore his global influence and the high regard in which he is held," she says. The journal will include articles written by nearly 30 international health care experts and scholars including Sev Fluss (Council for International Organisations of Medical Sciences, WHO), who is writing on the evolution of research ethics; Roger Magnusson (Faculty of Law, The University of Sydney), who is writing on the changing legal and conceptual shape of health care privacy; and Charles Ngwena (Department of Constitutional Law & Centre for Health Systems Research, University of the Free State), who is appraising abortion laws in Southern Africa from a reproductive health rights perspective. The volume will be published at year's end.

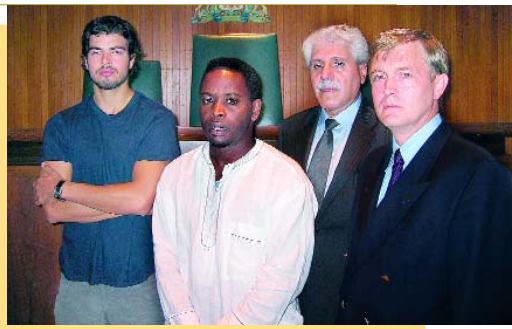
OSLER HOSKIN & HARCOURT LECTURE SPOTLIGHTS PRIVACY AND SECURITY

Prof. Jeffrey Rosen, George Washington University

Top U.S. magazine journalist and renowned legal scholar, Jeffrey Rosen, delivered the 4th Annual Osler Hoskin & Harcourt Lecture, "The Naked Crowd: Balancing Privacy and Security through Law and Technology." On September 29, 2004, Professor Rosen of the George Washington University Law School described how US authorities are collecting massive amounts of personal data and discussed the impact this is having on privacy. He argued that some of the techniques used are far too invasive, and should only be used for the most serious of offences. As an example, Prof. Rosen pointed to an airport surveillance monitor in the US called the 'Naked Machine' that helps airport screeners check for concealed firearms. The machine projects a naked image of airline passengers onto a screen, a clear invasion to passengers' privacy. After a public outcry, this machine was re-designed into what Prof. Rosen called a 'blob machine.' Images of the naked individual are scrambled and then projected onto a computer-generated mannequin. This way, passengers' privacy is protected but airport screeners can check for concealed firearms. The themes of technology and privacy are further explored in his latest book, *The Naked Crowd: Reclaiming Security and Freedom in an Anxious Age.* The lecture was sponsored by the Centre for Innovation Law and Policy.

Helping Canadian Torture Victims Sue

For the first time, Bill Sampson, Houshang Bouzari, Ken Wiwa, and Stephan Hachemi gathered together to discuss the need for legal sanctions against the countries that imprisoned and tortured them. On October 1, 2004, the International Human Rights Program (IHRP) at the U of T Faculty of Law sponsored a public panel entitled *Torture, Human Rights, and the Responsibilities of the Canadian Legal System*. The four guest speakers shared their personal sagas of courage and survival. Mr. Sampson and Mr. Bouzari were victims of torture at the hands of foreign states. Mr. Wiwa and Mr. Hachemi each had a parent who was murdered abroad. The session, moderated by Noah Novogrodsky, Director of the International Human Rights Program, offered panelists an opportunity to tell their story in the first person and explain how torture does not end upon release from prison. In often passionate stories, they described their ongoing psychological trauma, physical injury, chronic unemployment, disconnection from society, alienation from family and friends, and pervasive suspicions of guilt. The panelists argued that victims of torture ought to be able to sue their abusers in Canada's courts. Mr. Bouzari is now dedicating his life to pursuing his assailants through Canada's legal system. "By raising torture's price, we can transform our suffering into something positive. We can make States think twice about harming somebody else." In his case this past summer, *Bouzari vs. Islamic Republic of Iran,* the Ontario Court of Appeal found that Canada's *State Immunity Act* shields foreign countries from Canadian civil suits for torture. Panelists agree that if torture is made an exception to the Act, foreign states would have to account for their abuses of Canadian citizens. "In the last few years, Saudi Arabia, Syria and Iran have totured or killed Canadian nationals with absolute impunity," Novogrodsky says. "Today, there is no obvious way to hold those who torture Canadians abroad accountable for their actions. This outdated practice has to stop." But the Canadian government says the removal of the state immunity shielding foreign torturers will "open the floodgates" to victims claiming compensation. As Mr. Sampson exclaimed before a packed lecture hall, "it is high time we get those floodgates open."



(L-R): Stephan Hachemi, Ken Wiwa, Houshang Bouzari and Bill Sampson

Immediately following the public session, the International Human Rights Clinic (IHRC) sponsored a private meeting with members of the government, Canadian victims of torture, human rights advocates, and legal experts from Britain, the U.S. and Canada. Here, the students involved in the IHRP solicited ideas on how to encourage the Canadian Government to make torture an exception to the State Immunity Act. Leading the charge are students Caroline Wawzonek (2005), Saba Zarghami (2006) and Geoff Blackie (2005), who are working on drafting proposed amendments. "We want to bring about viable exceptions to the Act so Canadian victims of torture can bring suit against their foreign torturers," says Ms Wawzonek. The IHRC's report and draft amendments were circulated in late October.

INTERNATIONAL EXPERTS DISCUSS CONSTITUTIONAL IDEAS ACROSS JURISDICTIONS

Comparative constitutional law is rapidly emerging as a major field within legal scholarship. On October 15-16, 2004, Professor Sujit Choudhry hosted a panel of international experts to discuss how the movement or migration of constitutional ideas is occurring across jurisdictions. Participants discussed why this migration is occurring and whether it should be happening at all. Professor Kent Roach, a guest speaker at the conference, says the comparative study of anti-terrorism law is an important part of the larger field of comparative constitutional law. "The global nature of terrorism, as well as the role of international law and institutions, has resulted in much borrowing and migration of ideas in this field." Moreover, he says broad definitions of terrorism mean that anti-terrorism laws have themselves emerged as "super laws" taking on a special constitution-like status with respect to other laws and on relations between the individual, the state and the courts. The conference also featured a number of constitutional experts from around the world, including guest speakers Andras Sajo, Central European University (Budapest), Jeff Goldsworthy, Monash University (Australia), and Neil Walker, European University Institute (Italy), as well as U of T law professors Jean-François Gaudreault-Desbiens, Ran Hirschl, Karen Knop, Mayo Moran, Ed Morgan, David Schneiderman, and Lorraine Weinrib.

Dean's Leadership Lunch Features Alumnus Cathy Spoel '81

Each year, the Dean's Leadership Luncheon Series gives students an opportunity to meet with some of the faculty's most distinguished graduates. On October 28, the law school was pleased to welcome Cathy Spoel (class of 1981) of the Ontario Energy Board (OEB) as a luncheon guest speaker. Ms. Spoel has built an accomplished career as an administrative lawyer, specializing in environmental and energy law. Her extensive experience in practice, at both large and small firms, led to her 1999 appointment to the OEB where she adjudicates disputes relating to oil, gas, and electricity. Ms. Spoel has been extremely successful in balancing a challenging public interest career with family and community commitments. She has served as president of the Canadian Environmental Law Association, chair of the Brown School Council, and president of the Toronto Synchronized Swimming Club. At the luncheon, she spoke about her law school experiences and career choices. Ms. Spoel stressed that it is never too late in one's professional or personal life to venture onto a new path or learn something new. In particular, she urged students to avoid the trap of letting financial pressure keep them in a job that isn't stimulating anymore. "Life moves in phases. A big part of professional life is taking advantage of opportunities along the way," she advises. Ms. Spoel ended the session by paying tribute to the U of T law professors who inspired her to think broadly about legal issues.

DLS Students Help Unrepresented in Family Court

In January 2005, Downtown Legal Services (DLS) students will begin assisting unrepresented parties at the family court of the Ontario Court of Justice in North York. The newly-created "Family Advocacy Program" will help clients with a range of family law matters, including support, access and custody. DLS is the first student legal clinic in Ontario to offer services in family law. "The need for our services is immense," says Mary Misener, Acting Executive Director of Downtown Legal Services. "The Child and Family Advocacy Division at DLS created this program for people who cannot afford legal representation." The Honourable Mr. Justice Harvey Brownstone, who has been an enthusiastic supporter of the program proposal, says that 89 per cent of the parties who appear before him in the court are unrepresented. A Family Law Advisory Committee, which includes members of the Faculty, senior family law practitioners and representatives from Legal Aid Ontario, will provide guidance to students in this new endeavour.

Earlier this year, a delegation from Bangladesh visited DLS on a tour of legal aid service providers in Ontario. DLS welcomed to the clinic Mr. Moudud Ahmed, Honourable Minister for Law, Justice and Parliamentary Affairs, and members of the National Legal Aid Organization of Bangladesh on October 26. Misener was joined by Glenn Stuart from Osgoode Law School's legal clinic to explain how clinical legal education can foster a commitment to social justice in future lawyers. They also detailed how clinical programs in law schools can build a bar committed to the provision of legal aid. The delegates also learned more about the education and supervision of students, and how the clinic operates on a daily basis. The tour was hosted by the Canadian Bar Association and Legal Aid Ontario.

REUNION 2004

October 2004 marked a special time for those who graduated in a year that ended in "4" or "9". The festivities for all reunion years began with a cocktail reception in Flavelle House. Graduates from 1954 to 1999 reminisced with classmates over drinks before heading off to individual class events at local restaurants.

The class of 1964 decided to do something especially memorable to celebrate their 40th reunion, and accepted the invitation of their classmate, Ed Roberts (now the Lieutenant Governor of Newfoundland and Labrador) to travel to St. John's for the weekend. Despite the inclement weather, the 1964 grads had a wonderful weekend of sightseeing and nostalgia, which ended with a spectacular dinner at Government House. Many shared their memories of Caesar Wright, Bora Laskin, John Willis and the other remarkable teachers who gave so much to their students. It was clear to all that their experience at the law school had created deep bonds of friendship that remain strong forty years later.

The Faculty of Law would like to extend its enormous thanks to all Reunion Committee members for their hard work in making this year's reunion such a resounding success.

DEAN'S RECOMMENDATIONS RESULT IN NEW PUBLIC ACCOUNTING ACT

This past summer, Dean Ron Daniels played a major role in helping the province to ratify new accounting rules – one of the most significant changes for the profession in 40 years. In June 2004, Dean Daniels' recommendations for accounting reform were enacted in the Ontario legislature as Bill 94, the Public Accounting Act, 2004. These recommendations were the result of an extensive consultative process that he conducted on behalf of the Attorney General of Ontario that culminated in the submission of two major reports. The new legislation will build on current internationally recognized regulatory standards in Ontario and strengthen regulatory transparency, independence and accountability in the field. Contained in the bill, for example, is a new requirement that principal accounting organizations overseeing CAs, CGAs and CMAs must demonstrate their ability to meet the standards set by the reconstituted Public Accountants Council. They will also become responsible for the direct licensing and governance of accountants.

LAA Series Delves into International Law and the Developing World

The second year of the Law Alumni Association (LAA) Breakfast Speakers' Series Lectures continued on October 29 with guest speakers, Dean Ron Daniels and Professor Michael Trebilcock, who examined the question: "Can the rule of law really contribute to the developing world?" The lecture was hosted by Osler, Hoskin & Harcourt LLP in Toronto and chaired by Clay Horner ('83), the incoming LAA President. The guest speakers discussed the critical role of law in the promotion of development, but described a general failure in strategies designed to strengthen the rule of law in developing countries. Such strategies are undermined, say Dean Daniels and Prof. Trebilcock, by serious corruption and vested interests in the police force, judiciary and other public institutions. These small elite groups strenuously resist the imposition of rule of law reforms, and meaningful change is thereby thwarted. The fall series began on September 24 (hosted by Torys LLP) with Professor Mayo Moran, who discussed her book *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard.* Earlier this summer, interested alumni gathered at Torys LLP in Toronto to hear Professor Kent Roach and the Honourable Robert Sharpe (Ontario Court of Appeal) discuss their acclaimed book, *Brian Dickson: A Judge's Journey.* The series was designed to highlight cutting-edge legal research at the Faculty. If you have a topic idea or would like to see a specific professor featured, please email Kate Hilton at k.hilton@utoronto.ca.

Grand Moot: An Annual Tradition

Student mooter Nadine Harris addresses the Bench

PERSUASIVE, ARTICULATE, AND A SENSE OF HUMOUR – these qualities characterize the participants in this year's annual tradition, the Grand Moot. On September 28, the Supreme Court of Flavelle convened at the Faculty of Law. Presiding were the Hon. Mr. Justice Stephen Goudge of the Ontario Court of Appeal, the Hon. Mr. Justice Michel Proulx, recently retired from the Quebec Court of Appeal, and the Hon. Mr. Justice James M. Spence of the Ontario Superior Court of Justice. The Justices engaged the law school's top mooters in a lively dialogue. Third-year law students Hilary Book, Nadine Harris, Sidney McLean, and Jeff Shafer showed that they were equal to the task. This year's moot problem raised administrative law and Charter issues, particularly with respect to the boundary between the powers of the judiciary and those of the executive. Hilary Book and Nadine Harris represented the appellants, a fictional Flavellian citizen who had been extradited to the United States and subsequently transferred to Guantanamo Bay, Cuba suspected of being involved with terrorist activity. Sidney McLean and Jeff Shafer, on behalf of the Minister of Justice and the Minister of Foreign Affairs, defended the government's decision not to intervene following the extradition. Following the submissions, Justice Spence said that the Grand Moot was "very much like the real thing" and praised the mooters for their sharpness and thoroughness.

(L-R): Student mooters Jeff Shafer, Sidney McLean, Nadine Harris and Hilary Book.

Student Research Crucial to Online Women's Rights Information Centre

Women's Human Rights Resources
Bora Laskin Law Library
University of Toronto

Eager to line up their extracurricular activities as the school year began, more than 20 first year JD students signed up in September to participate in the Women's Human Rights Resources (WHRR) working group. The WHRR Working Group is one of several student working groups supported by the Faculty's International Human Rights Program. WHRR seeks to make international women's human rights law available and accessible to women's rights advocates, researchers, decision-makers and scholars around the world. Working group members – students from first year to graduate level – contribute to WHRR's online information centre for women's rights law. Organized into 26 women's rights topic areas, the WHRR database provides annotated references to scholarly publications, essential documents, and useful websites. The site averages 44,000 hits per month, with increasingly diverse and international users from more than 90 countries represented on a list of return users. As working group members, students locate new resources for particular topic areas and write the annotations. While helping to ensure the WHRR database is up-to-date, the students hone their international legal research skills and expand their knowledge about women's rights. Students are currently focusing on updating resources on the female child, feminist theory, health and well-being, indigenous women's rights, nationality and citizenship, race and gender issues, and slavery and trafficking. WHRR plans to mark next year's 25th anniversary of the Convention on the Elimination of All Forms of Discrimination Against Women and 10th anniversary of the WHRR website by launching new projects. Fundraising is now underway for support to develop online teaching resources for women's rights law; create an Internet publication for women's rights research by new scholars and scholars from developing countries; establish partnerships to host an online case law database; and support women's rights information centres and law libraries in developing countries. For more information about the WHRR program, visit the website at www.law-lib.utoronto.ca/diana/. To inquire about supporting WHRR's fundraising efforts, please contact Anne Carbert at whrr.admin@utoronto.ca.

Alumni Achievements

IN MAY... Todd Ducharme ('86) and John C. Murray ('69) were appointed justices of the Superior Court of Justice in Ontario. Mr. Justice Ducharme is Canada's First Métis Judge. **IN JUNE...** Distinguished alumnus Wolfe D. Goodman, Q.C. ('76 SJD) was presented with The Law Society of Upper Canada's highest honour, the Law Society Medal, for his invaluable work in tax and estate law, and legal education. **IN JULY...** The Honorable Julius Alexander Isaac (class of 1958), who was the first black chief justice of any court in Canada, had a scholarship established in his name. **IN AUGUST...** Alumnus Robert Hage (class of 1971) was selected for a diplomatic appointment in Hungary as "Ambassador Extraordinary and Plenipotentiary of Canada to the Republic of Hungary," with concurrent accreditation to the Republic of Slovenia. Alumnus Monica Kowal (class of 1987) obtained the top spot at the Ontario Securities Commission (OSC) General Counsel's Office, an in-house legal and policy resource. **IN SEPTEMBER...** Jonathan H. Anschell, a 1992 U of T law grad, was named Executive Vice-President and General Counsel of CBS Television, and is involved in all facets of broadcasting, network and syndication activities. Brian R. Carr (class of 1973), a partner with the law firm Fraser Milner Casgrain LLP in Toronto, was elected chair of the Canadian Tax Foundation. Mr. Carr is a senior member of the FMC National Tax Practice Group, and has practiced in the field of income tax law since 1973 with emphasis on corporate reorganizations and resource taxation. He is also chair of the National Taxation Law Section of the Canadian Bar Association and co-chair of the CBA/CICA Joint Committee on Taxation. Mr. Carr is on the editorial board of the *Canadian Tax Journal* and for many years served as assistant editor of the *Canadian Petroleum Tax Journal*.

ALUMNI VOLUNTEERS HONOURED FOR DEDICATION TO UNIVERSITY

Many programs and services at the law school would not exist without the loyalty and generosity of alumni and friends. The Faculty of Law is grateful to those who volunteer their time to better our community. To formally recognize their dedication, the Arbor Awards were established by U of T in 1989 to honour its volunteers. For 2004, recipients of the Arbor Awards in Law are Peter Brauti '96, Sally Bryant '94 and John B. Laskin '76. For the past seven years, Mr. Brauti has been an instructor in the Trial Advocacy course where students learn the art of witness examination and cross-examination, and has served as a member of the Law Alumni Association Council since 2001. Ms. Bryant, who enrolled in law school after a successful career in education and real estate, provides extraordinary mentorship and counseling to mature students. She sits on the "Second-Career Lawyers" panel hosted annually by the Career Development Office. Mr. Laskin has provided significant support and advice to the law school administration on a range of issues, and is a member of the Law Alumni Association Council. He also helped the law school establish a Breakfast Speakers' Lecture Series. Graduates of the law school who were also awarded a 2004 Arbor Award by another division or faculty of U of T include Rodica David '68, Bernard Fishbein '75, Michael Hines '81, John Keefe '74, Sherry Liang '85, Poonam Puri '95, and Ronald Slaght '70.

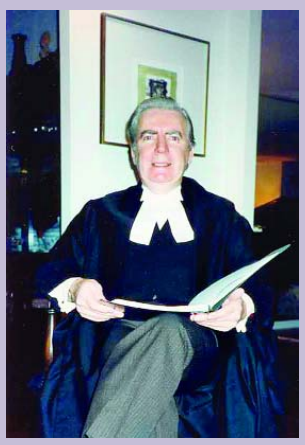
JOINT JD/LLM SEMINAR INITIATIVE A SUCCESS

Graduate and JD students will again be participating in a 12-week joint JD/LLM seminar series first launched last January by Dean Ron Daniels and Associate Dean of the Graduate Program, David Dyzenhaus. The program was created as an opportunity for graduate students to meet and engage in meaningful intellectual debate with the Faculty's JD students. In addition, graduate students can spend their short time at the Faculty learning from each other, students in the JD program and the instructor. Conversely, both the instructor and the JD students get the opportunity to learn from graduate students, many of whom come from other countries and who are doing quite specialized work. As a result, Associate Dean Dyzenhaus says, the class as a whole receives the benefit of specialized and comparative perspectives. This fall and spring, students will participate in three seminars: "Powers of the Intangible: Intellectual Property in a Globalized Community," taught by Professor Abraham Drassinower; "Governing Governance: Legal Institutions and Corporate Performance in Comparative Perspective," taught by Professor Ed Iacobucci; and "Can There Be Universal Human Rights (and other rights debates)?" taught by Professor Jennifer Nedelsky. 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.

CAREER DEVELOPMENT PLACES EMPHASIS ON JOB SEARCH SKILLS

This fall, the Career Development Office hosted a number of new and familiar programs as part of its career development curriculum, placing an emphasis on building job search skills for students participating in the summer recruitment process. Its most popular programs, such as the *Mock Interview* program and *The Minority Experience on Bay Street* panel, relied heavily on the participation of our alumni, upper year students, and the generosity of many of Canada's law firms. With the assistance of our alumni participants, well over half of the second year class received invaluable hands-on and individualized interview coaching. The 2004 CDO curriculum programs include *The 20 Minute Miracle: Preparing for On-Campus Interviews and Mock Interview Programs; Advanced Business Etiquette: Surviving the Business Meal & Cocktail Party;* and *Decoding Law Firms: Interviewing and Firm Culture,* with consultant Tim Leishman ('86). Alumni are always welcome to participate in our programs. For more information, please contact CDO Recruitment Coordinator, Suzanne Bambrick, at suzanne.bambrick@utoronto.ca or 416.978.2756.

IN MEMORIAM



The Faculty of Law is saddened by the passing of several alumni this year, including Michael Temple, Q.C., '58, whose family has provided the following:

W. Michael Temple, Q.C., passed away on February 21st, 2004. Mike was evacuated from London, England in 1940 and was relocated to St. Catharines, Ontario. He received his law degree from the University of Toronto, Faculty of Law in 1958, and was called to the Bar in 1960. His main legal interests were in the areas of civil litigation and administrative law. In recent years, he was proud to represent many police officers as Chief Legal Counsel for the Ontario Provincial Police Association. Of his frequent travels, Mike particularly enjoyed returning to Bermuda and Italy. He loved good food, good wines, the Maple Leafs, golfing, gardening and most of all, his family. He leaves behind his wife, Shirley, his three sons, his daughter and four wonderful grandchildren.

The Early Days of LEGAL EDUCATION

BY PROFESSOR ANGELA FERNANDEZ

Today's law students have it easy. At least, in comparison to the 1800's. Unlike students 200 years ago, law students can now access legal information quickly and easily on the Internet or in computerized databases. But many practices of today's students (both in and out of class) have been around for centuries. Professor Angela Fernandez takes a look at the early days of legal education and its relationship to teaching and learning in the 21st century.

LEARNING WHAT the law is by reading cases is something we don't usually think much about – it's just what we do. However, battles raged over "the Case Method" when it was first introduced as such at the Harvard Law School in the 1870's.

Another form of early legal education, the most common across North America, was and continued for a long time to be apprenticeship in a lawyer's office. If this was combined with formal schooling at all, it was likely to have taken the form of a set of lectures based on available treatises. In many schools, students were also given daily oral quizzes known as "recitations." This was known as "the Yale Method," given its long use at the Yale Law School from the 1820's to the end of the Century. An earlier and less well-known form of formal American legal education – "the Notebook Method" – consisted of a system in which students took notes at lectures and recopied these into bound books, which they used as a portable law library at a time when law books were not readily available. This system was used at the first American law school of national repute, the Litchfield Law School, located in Connecticut, which trained over a thousand law students from the 1780's to 1833, many of whom went on to be eminent lawyer-leaders.

One of the most striking features in the history of these various methods of legal education is the way in which a rhetoric based on the metaphor of independence was regularly used to promote a particular method, and how categories of dependence – primarily associated with women, children, and slaves – were used to disparage rival methods. So, for instance, apprenticeship was routinely called "slavish," given the office chores it often involved, by those promoting more formal methods of legal education. Or the case method might be touted as "virile" when compared against a system of recitations, which treated the law student as a mere "schoolboy." Arguments structured around independence and categories of dependence in this way were recycled over the entire period, including the early and middle Twentieth Century when the case method was spreading across the United States and migrating to other places, including Canada. This was despite the fact that those categories were getting increasingly outdated, as well as the fact that the methods of legal education that were getting left behind in the process had their own perfectly plausible claims to independence-inculcation.

The Litchfield Notebook Method might seem to be the least innovative and most robotic form of legal education. It is the most remote in time and in technique, a hand copying that at times amounted to little more than dictation, created for a time in which there was a scarcity rather than a plethora of legal resources. However, by making literal the replication and imitation essential to the transmission of cultural knowledge in all forms of legal education, a focus on it brings the operation of

"the Notebook Method" – consisted of a system in which students took notes at lectures and recopied these into bound books, which they used as a portable law library at a time when law books were not readily available.

the reproduction of legal culture itself into sharp relief. Copying is key – whether that means learning in a law office by imitating the more senior lawyer, making a set of notes that are orienting if not authoritative, or performing in the imitative style of an oral form of learning like a moot court. Indeed, "scribal practices" like these early law students' notebooks are part of a commonplace book tradition that continues to exist today in the practice of student outlines and summaries. Casebook compilers and law teachers in the Twentieth Century began to advocate this practice as a way of making the case method come alive and work as a more satisfying form of self-study. The idea that there was an intrinsic value to engaging in such a practice, that it was part of the process of learning how to be a lawyer, is an old idea, older than 1780's New England, and the aim, to personally process the knowledge, take it into oneself and "make it one's own" in some way is one that remains with us today. ■

(For more information on the Litchfield Law School and its museum, including the reconstructed schoolroom, see www.litchfieldhistoricalsociety.org/lawschool.html.)

interview

Justices Speak Out on Judicial Appointments Process

BY PROFESSOR SUJIT CHOUDHRY '96

JUSTICE MINISTER IRWIN COTLER RECENTLY ANNOUNCED HIS INTENTION TO REVAMP THE PROCESS OF FEDERAL JUDICIAL APPOINTMENTS. THIS PAST NOVEMBER, PROFESSOR SUJIT CHOUDHRY (CLASS OF 1996) SAT DOWN WITH TWO ALUMNI WHO SIT ON THE ONTARIO COURT OF APPEAL TO GET THEIR INSIGHTS ON THE ISSUE. JUSTICE ROBERT ARMSTRONG (CLASS OF 1965) EXPLAINED HOW THE CURRENT PROCESS WORKS, AND JUSTICE STEPHEN GOUDGE (CLASS OF 1968) OFFERED HIS THOUGHTS ON WHAT SHAPE A REFORMED APPOINTMENTS PROCESS COULD TAKE. IN THE FOLLOWING PAGES ARE CHOUDHRY'S INTERVIEWS WITH JUSTICES ARMSTRONG AND GOUDGE.

CHOUDHRY: There's not a lot of awareness about the federal judicial appointments process that you've been a part of. Could you explain what the process used to be like, what it involves now and what your role has been in it?

ARMSTRONG: For many years, the judicial appointments process was entirely ad hoc. It was mostly a political process, with the Minister of Justice responsible for nominations. There was no formalized process of consultation with the Bar or with other judges. In the late 1980's, there was a push for reform, with the ultimate result being the current system of Judicial Advisory Committees.

CHOUDHRY: How many Judicial Advisory Committees are there?

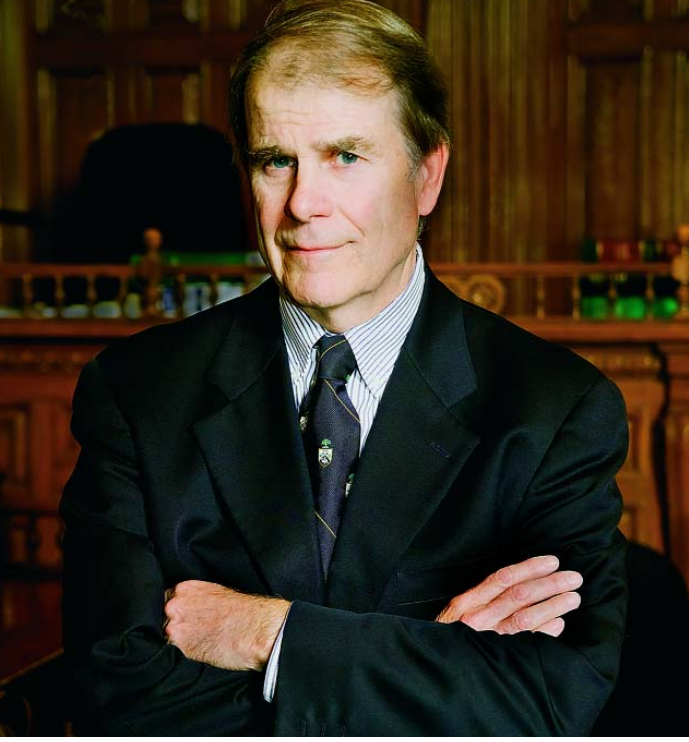
ARMSTRONG: There are a total of sixteen – three in Ontario and two in Quebec, and one in every other province and territory.

CHOUDHRY: What is a "federal" judicial appointment?

ARMSTRONG: The federal government appoints judges to provincial superior courts and courts of appeal, the Federal Court, the Federal Court of Appeal and the Tax Court of Canada.

CHOUDHRY: Who sits on Judicial Advisory Committees?

ARMSTRONG: Committee members are all appointed by the Minister of Justice, and are from the Bar, the public, and the bench. For example, the Committee I served on – the GTA Committee for Ontario – consisted of a judge nominated by Chief Justice McMurtry (myself), a layperson nominated by the Attorney General of Ontario (Harry Fine), a nominee of the Law Society of Upper Canada (Julian Porter), and a nominee of the Ontario Bar Association (Tony Keith). The remaining three people on my committee were appointees of the Minister of



Justice Robert Armstrong ('65)

Justice – Paul Monahan, Elizabeth Wilson, and Lee-Anne Mercury. The make-up was three lawyers, three laypeople and a judge. It's almost by tradition that the committee elects the judge as its chair. Our committee was by far the busiest committee in the country, because almost a quarter of Canada's lawyers live in the GTA.

CHOUDHRY: How long did you serve on the GTA Judicial Advisory Committee?

ARMSTRONG: My appointment ran from August 2, 2002 to June 30, 2004, when the mandate of all the committees expired. As a consequence, no applications have been processed in the last five months. New committees were appointed recently. At our last meeting, we considered applications that had been received in February 2004. I have been reappointed to serve on the committee.

CHOUDHRY: How often did you meet as a committee?

ARMSTRONG: Every month.

CHOUDHRY: How many applications would you review at every meeting?

ARMSTRONG: On average, we did eight to ten in a three hour meeting.

CHOUDHRY: Can you explain how you reviewed the applications?

ARMSTRONG: Under the old system, there was no formal application to become a judge. Today there is a very detailed application. Applicants must provide both personal and professional information – information about what they've done in practice and what they've done in their lives. Applicants also write a statement about why they want to be a judge, and why they think they would be a good judge. I remember when I applied for appointment to the Ontario Court of Appeal. It took a long time to prepare my application.

On the application form, applicants list at least four references of people who are prepared to speak for them. Some people list as many as fifteen references, but that's rare. Most people have five or six references. Applicants must also list the names of persons who are aware of their work as a lawyer whom the committee could consult, such as judges before whom they have appeared, and lawyers against whom they have argued cases.

On our committee, the three lay members divided up the references and did telephone interviews with them. The three lawyers on the committee went beyond the references, and either worked off the subsidiary list provided by the applicant, or made inquiries from other members of the Bar in the applicant's practice area. Almost half of the time, the lawyers we consulted would not be on the subsidiary list. We did our own due diligence.

CHOUDHRY: Do you think going beyond the list of names provided by the applicant was a good thing?

ARMSTRONG: Absolutely. Ninety percent of the time, the people who are referees are the applicant's close friends or close professional associates. You're not going to get anything from those people other than unbridled praise, in most instances. We wanted a certain level of confidence, so we looked beyond that particular group. That's a very time consuming process, and our committee was diligent in performing that task. Because I've been around a long time, and because I was Treasurer of the Law Society of Upper Canada, I know a lot of people in the profession. So I also phoned a lot of other lawyers. I think that was probably the most important work we did.

CHOUDHRY: How did your meetings proceed?

ARMSTRONG: We considered the applications in the order in which they were received in Ottawa. We started with the laypeople, who reported on what they were told by the references. We did not consider anyone unless we had spoken to at

Choudhry: What did your committee look for in an application?

Armstrong: First, personal and professional integrity. Second, legal competence. Third, judgment and common sense.

Professor Sujit Choudhry

least four references. We then canvassed the rest of the committee to report back on what information they had received. Along the way, we would have in-depth discussions with a lot of back and forth.

When all the information was on the table, we would make one of three possible recommendations: "highly recommend," "recommend" or "unable to recommend." Those recommendations went to the federal Minister of Justice, along with a paragraph of supporting reasons. My understanding is that since the advisory committee system was initiated, there have been no appointments to any of the section 96 courts of candidates who had not been recommended or highly recommended.

CHOUDHRY: What did your committee look for in an application?

ARMSTRONG: First, personal and professional integrity. Second, legal competence. Third, judgment and common sense. There are many people with great integrity, and who have a lot of brain power and know a lot about the law, but who have no common sense and no judgment. Fourth, we looked for people skills. Trial judges in particular are the face of the judicial system. So we were always interested to know whether a person was a potential candidate for *"judgitis."*

CHOUDHRY: Did politics play a role in your committee's deliberations?

ARMSTRONG: Absolutely not. When we were considering applicants, their politics never surfaced. Partisan party politics just never entered the discussion in the room, which I think was a real tribute to what our committee did.

CHOUDHRY: What was the impact of having a mix of lawyers and non-lawyers on your committee?

ARMSTRONG: The laypeople usually didn't know any of the candidates. So they came at it *tabula rasa,* which I think is very helpful. Since we're all human, if somebody I knew applied and I thought they'd be a superb judge, I would say in the committee "I've know this person for 30 years, I've seen her practice, I've seen her sit as a bencher, and I think she'd be fabulous," but I may have had a kind of built-in bias. The laypeople served as a useful check.

It was also interesting that sometimes, the laypeople saw issues differently than we, as lawyers, saw them. For example, where the committee was troubled or deadlocked, the layperson would often say, "I don't know why you're taking so much time over this person. If you're agonizing so much, this person isn't suitable to be a judge." They brought a reality check to the proceedings.

Laypeople also played an important role when we considered applicants who were academics or public servants, and who had not been engaged in practice before the courts. The lawyers on the committee may have known the applicant, and we may have had a gut instinct that he or she was intelligent and street smart, had good common sense, and should be recommended. The laypeople provided a check. They would ask us to explain how somebody who had never been in a courtroom could be appointed next week, and end up in a courtroom presiding over that courtroom. We really had to convince them.

CHOUDHRY: Any concluding thoughts?

ARMSTRONG: In terms of making appropriate recommendations regarding applicants, the system does work very well. The people who were on my committee took the job very seriously. It was deadly serious. There was a sense, on the part of everyone who served on our committee, that they were doing something that was extremely important, and that it was important to come to the right conclusion. It's almost as if we were making the appointment ourselves. And so it was important that we got the right person. It was also important, I think, that everybody got a thorough airing and a thorough review.

A few days later, Professor Choudhry sat down with Justice Goudge to explore his thoughts on the reform of the federal judicial appointments process, and possible selection criteria for provincial court of appeal and Supreme Court of Canada judges. Here is their interview.

CHOUDHRY: What do you think is at stake in the potential reform of the federal judicial appointments process?

GOUDGE: One of the challenges for me is the constant political refrain that the federal judicial appointments process needs to

Justice Stephen Goudge ('68)

I THINK WE HAVE A RELATIVELY GOOD JUDICIARY THAT IS NOT AFFLICTED WITH A SERIES OF APPOINTMENTS WHERE POLITICS TRUMPED ABILITY. THIS IS ABOUT IMPROVING A VERY GOOD SYSTEM, NOT CURING A SICK SYSTEM.

be changed to provide for more "accountability," without any unpacking of what accountability means in that context. At its most extreme, it would be politicians seeking to ensure that potential nominees will decide politicians' cases their way. For me, to combine that goal with the public questioning of nominees is the doomsday scenario. So that's the wrong meaning of accountability, and is the antithesis of what we want to try to achieve.

CHOUDHRY: Justice Minister Irwin Cotler suggests that he wants to promote accountability – not of the judiciary for its decisions, but of the executive for judicial appointments.

GOUDGE: If that's what it means, it as an entirely laudable objective to make the executive clearer and more transparent. But I'm not sure that's what's meant when other politicians use it.

CHOUDHRY: What could a reformed judicial appointments process look like?

GOUDGE: The goal would be to try to remove politics as much as possible from the federal judicial appointments process. At present, applicants do not apply for a specific vacancy on a court. So those who are recommended or highly recommended by judicial advisory committees go into a large pool. Members of the pool develop political support as best they can, and keep the political pressure as high as they can over an indeterminate time frame, as vacancies continue to open up. If some members of the pool are politically connected, the process may take on a political character.

By contrast, the paradigm of a successful model is Ontario's process for provincial court appointments, which Ian Scott designed when he was the Attorney-General. On that model, applicants apply for advertised vacancies. An apolitical committee generates a short list, and the Attorney-General must choose the nominee from that short list in a determinate time-frame. This system reduces the role of politics, because there is no residual pool of candidates engaged in political lobbying over an indeterminate time-frame.

CHOUDHRY: Is politics a problem under the current system?

GOUDGE: No. I think we have a relatively good judiciary that is not afflicted with a series of appointments where politics trumped ability. This is about improving a very good system, not curing a sick system.

CHOUDHRY: Should applicants be interviewed?

GOUDGE: My concern is that interviews remain both superficial and potentially misleading. Individuals who are glib may seem eloquent, and individuals who are halting may seem less able than they are.

CHOUDHRY: Should a reformed appointments process apply to elevations, for example, from a trial court to an appellate court? If we want to keep open the possibility of direct appointments from the bar to courts of appeal, should sitting judges who wish to be elevated be considered by the same or a parallel nominating committee?

GOUDGE: The mechanics of the process are ultimately resolvable. A more difficult question is figuring out what criteria should apply to appellate appointments. Being an appeal court judge is a little different from being a trial judge. First, a very important role for trial judges is to be the front-line face of justice for the public. At the Ontario Court of Appeal, by contrast, we interface with lawyers more than with the public. Second, on an appeal court, there is perhaps an elevated premium on the willingness and ability to write clear judgments. Third, on a court like ours that is busy, judges must be able to assimilate a large number of cases on a rapid-fire basis.

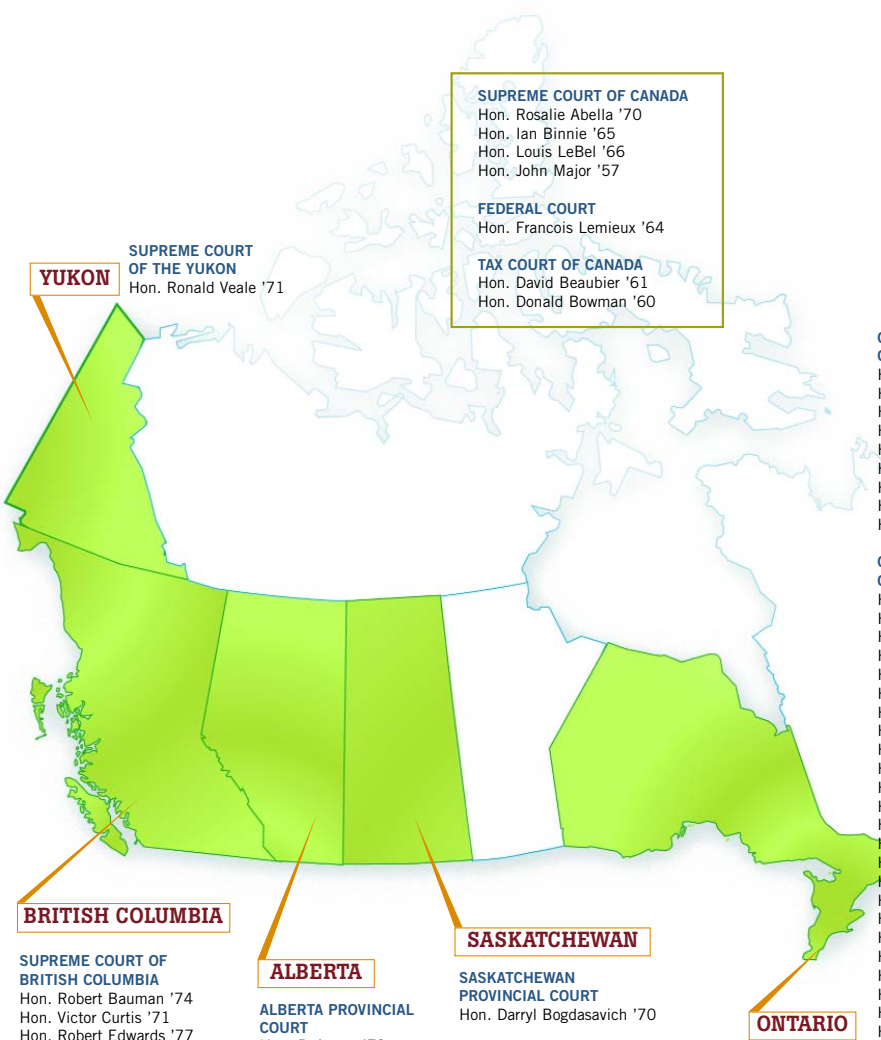
CHOUDHRY: Should the selection criteria for Supreme Court of Canada judges be different as well?

GOUDGE: Potential judges must be willing to grapple in every case with fairly profound legal problems. By contrast, on our court, we do a significant amount of "error correction" in cases that do not always raise profound legal issues. There's also even more of a premium on good writing, because judges are writing for a much wider audience. ■

POTENTIAL JUDGES MUST BE WILLING TO GRAPPLE IN EVERY CASE WITH FAIRLY PROFOUND LEGAL PROBLEMS. BY CONTRAST, ON OUR COURT, WE DO A SIGNIFICANT AMOUNT OF "ERROR CORRECTION" IN CASES THAT DO NOT ALWAYS RAISE PROFOUND LEGAL ISSUES.

ALUMNI HOLD JUDICIAL APPOINTMENTS ACROSS CANADA

More than 100 alumni from the U of T Faculty of Law are serving on our country's courts – including four of the nine judges on the Supreme Court of Canada, and more than half of the Court of Appeal for Ontario. The law school is proud of the contribution our alumni are making to the judicial process.



SUPREME COURT OF CANADA
Hon. Rosalie Abella '70
Hon. Ian Binnie '65
Hon. Louis LeBel '66
Hon. John Major '57

FEDERAL COURT
Hon. Francois Lemieux '64

TAX COURT OF CANADA
Hon. David Beaubier '61
Hon. Donald Bowman '60

YUKON

SUPREME COURT OF THE YUKON
Hon. Ronald Veale '71

BRITISH COLUMBIA

SUPREME COURT OF BRITISH COLUMBIA
Hon. Robert Bauman '74
Hon. Victor Curtis '71
Hon. Robert Edwards '77
Hon. Peter Fraser '71
Hon. Harvey Groberman '82
Hon. Heather Holmes '79
Hon. Ian Pitfield '67

ALBERTA

ALBERTA PROVINCIAL COURT
Hon. P. Ayotte '73
Hon. I.F. Kirkpatrick '73
Hon. J.D.B. McDonald '72
Hon. D.G. Rae '71
Hon. J.C.M. Spence '65

SASKATCHEWAN

SASKATCHEWAN PROVINCIAL COURT
Hon. Darryl Bogdasavich '70

ONTARIO

ONTARIO COURT OF APPEAL
Hon. Robert Armstrong '65
Hon. Robert Blair '68
Hon. Stephen Borins '59
Hon. Marvin Catzman '62
Hon. Kathryn Feldman '73
Hon. Stephen Goudge '68
Hon. John Laskin '69
Hon. Michael Moldaver '71
Hon. Robert Sharpe '70

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Hon. John Belleghem '65
Hon. Alan Bryant '68
Hon. Donald Cameron '61
Hon. James Carnwath '60
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Hon. Edward Then '70
Hon. Roger Timms '70
Hon. Brian Trafford '70
Hon. George Valin '68
Hon. Henry Vogelsang '68
Hon. Lawrence Whalen '73

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Hon. James Blacklock '75
Hon. Kathleen Caldwell '86
Hon. Ian Cowan '69
Hon. Norman Edmondson '59
Hon. Donald Halikowski '74
Hon. Peter Hryn '74
Hon. Lynn King '71
Hon. Brent Knazan '75
Hon. Gerald Lapkin '68
Hon. Brian Lennox '72
Hon. Sidney Linden '64
Hon. Eric Lindsay '63
Hon. James Nevins '66
Hon. Russell Otter '70
Hon. John Ritchie '68
Hon. Paul Robertson '88
Hon. Robert Spence '77
Hon. John Takach '67
Hon. Colin Westman '73
Hon. Bruce Young '69

THE MEDIA, THE SUPREME COURT, AND CANADA'S CONSTITUTIONAL CULTURE

BY PROFESSOR DAVID SCHNEIDERMAN

Many Canadians learn about the constitution and fundamental legal norms through the popular media, contributing to what Professor David Schneiderman calls Canada's "constitutional culture." This form of cultural leadership, he says, represents the "dominant social consensus" around certain constitutional values, like those of equality and security of the person.

In a provocative look at the courts and the media, Schneiderman concludes that, on occasion, the Supreme Court of Canada will articulate values that correspond with those portrayed in media reports. Together, judicial opinions and media reports create an environment hostile to certain types of claims that are deemed as not fitting well with our constitutional culture.

The constitution is a lived thing. It cannot be confined to constitutional text or to the pronouncements of the Supreme Court of Canada. We should find articulations of constitutional values also in legislative enactments, royal commission reports, non-governmental organizations, and media pronouncements. Canadians too will have their own understandings of constitutional values. These understandings will be augmented, even challenged, when they watch the evening television news or read the morning newspapers. It is via the popular media, then, that Canadians will learn much about the constitution and the fundamental norms that guide constitutional practice in Canada. It is these basic and foundational norms and values, articulated in various locales, which I associate with the idea of "constitutional culture." These values, admittedly, may not be shared equally amongst all Canadians. In fact, there likely is deep disagreement about many of them. There will be some values, however, which are portrayed as representative of a dominant social consensus. Both the courts and the media can be relied upon to articulate those values.

Work that I have undertaken with colleagues in media studies suggests that, on occasion, media reports will conflict with the message of Supreme Court of Canada constitutional opinions. This often is a consequence of the media's use of "frames": frames arrange stories in ways that focus attention on certain salient features at the expense of other important features. Our work reveals that reporting of Court rulings often rely on intense conflict, high drama, and personality-driven reporting. Journalists, to be sure, attempt to report on constitutional events in seemingly objective ways, but in their framing exercises place stories on familiar axes that will often give expression to dominant shared understandings, with the media acting in the role of moral entrepreneur.

There also are occasions when media reports affirm, even complement, Supreme Court of Canada decision making. On such occasions, the media help to fill out the contours of the dominant social consensus that makes up our constitutional culture. This describes well the role the media played in reporting on *Gosselin v. Quebec (Attorney General)*. This was a controversial Charter case concerning amounts of welfare paid to those under the age of thirty. In this essay, I summarize findings that will appear in a forthcoming collection of essays entitled *Social and Economic Insecurity: Rights, Social Citizenship and Governance,* edited by Gwen Brodsky, Shelagh Day, and Margot Young (UBC Press). In order to assess media reporting of the *Gosselin* case, I undertook a qualitative analysis of national and regional print and television media reports of the Supreme Court hearing and decision. Though many of the reports I examined were neutral in tone and accurate in content, others were disparaging and incomplete. Overall, I found an interesting correspondence between media representations and the Court's ruling in this case. The media reports, I conclude, helped contribute to an environment hostile to the constitutional argument made in *Gosselin.* Let me turn briefly to a review of the Supreme Court decision before describing these findings in more detail.

THE GOSSELIN CASE

In *Gosselin,* a divided Supreme Court ruled that there was no denial of Charter equality rights when welfare amounts in Quebec paid to those under thirty years of age were significantly below the amount paid to those over thirty. Quebec's work- and education-for-welfare program required those under the age of thirty to participate in one of several re-training programs in order to have their regular benefits topped up so that they roughly approximated benefits ordinarily available to those over thirty. This caused severe economic hardship for those, like Ms. Gosselin, who were waiting to join programs or were between programs and had nowhere else to turn. As the dissenting justices noted, the program was structurally deficient, with restrictive eligibility criteria, and could not even accommodate most of those who were entitled to benefit from it. The Government of Quebec, indeed, abandoned the harsh discriminatory practice some time ago.

Though there was a distinction based on age – a prohibited ground of discrimination expressly enumerated in the Charter – the Court ruled that there was no denial of "human dignity" that amounted to discrimination under the Charter. A denial of human dignity, according to the Court's decision in *Law v. Canada (Minister of Employment and Immigration),* requires a finding by the Court that a claimant has been denied concern, respect, and equal consideration from a distinctive "subjective-objective" perspective. Discrimination directed at those who are younger and receiving income assistance at lower levels, according to the *Gosselin* majority, did not give rise to the sort of stereotyping and prejudice – an assault on human dignity – that the Court now requires in equality rights cases. Rather, the Court's majority judgment (5:4), penned by Chief Justice McLachlin, held that the policy reflected an estimation of ability that was grounded in the likelihood that younger workers would successfully re-train and re-enter the work force. Significantly, the four dissenting justices on this point held that the government operated on false assumptions about the situation of young people and failed to take into account their already vulnerable situation. The minority justices could not even find that this discriminatory practice was justifiable under section 1. Plunging those under thirty into severe poverty appeared disproportionate to the stated aim of both discouraging reliance on social assistance and integrating young people into the work force.

The majority of the Court was not interested at all in Ms. Gosselin's section 7 argument. This was a controversial claim that welfare payments well below the minimum required to satisfy basic needs amounted to a denial of security of the person that was not in accord

with the principles of fundamental justice. Chief Justice McLachlin for the majority (7:2) refused to rule on this aspect of the case. She did write, however, that nothing in section 7 "places a positive obligation on the state to ensure that each person enjoys life, liberty, or security of the person." Lastly, Ms. Gosselin's argument that section 45 of the *Quebec Charter of Human Rights and Freedoms* entitled her to "an acceptable standard of living" also was dismissed. The majority held that this provision did not entitle courts to review the adequacy of social assistance programs.

My interest in the case does not rise from these jurisprudential moves (though they are of some significance). Rather, my interest is in the reasoning of the majority where it departs from legal principle and moves to the identification of dominant values – what might be referred to as the "social consensus" – in Canadian society on the question at hand. These values appear to enter the majority's reasons most expressly in the application of the second of the *Law* criteria which assists in the determination of whether there has been a denial of human dignity amounting to discrimination. This requires an assessment of the "relationship between grounds and the claimant group's characteristics or circumstances." At this stage of the analysis, a Court is to determine the extent to which an impugned scheme takes into account the circumstances of a person such as the claimant. In *Gosselin,* the majority were of the view that the scheme appropriately accounted for these circumstances and so benefited persons in the claimant's group rather than denied their dignity.

It is via the popular media, then, that Canadians will learn much about the constitution and the fundamental norms that guide constitutional practice in Canada.

"Logic and common sense support the legislature's decision to structure its social assistance program in the way that it did," wrote Chief Justice McLachlin. To support her opinion, the Chief Justice traced labour market conditions in the 1980s though she referred to no sources or authority in support. Hit by a "deep recession in the 1980s," North American economies saw unemployment levels rise to a high of 14.4 per cent for the general population and 23 per cent for young people, and so entry of young people into the employment market surged. Many of these young people were high school dropouts, "significantly less educated than the general population." Quebec's welfare scheme, then, was aimed at educating youth while at the same time relieving their dependence on welfare. Constructing this simple incentive system and financially penalizing those who were in non-compliance made sense to the majority. "Simply handing over a bigger welfare cheque would have done nothing to help welfare recipients under 30 escape from unemployment and its potentially devastating social and psychological consequences above and beyond the short-term loss of income," wrote McLachlin, C.J. The mandatory scheme, then, was good medicine for those under thirty. The four dissenting justices came to the opposite conclusion on this question. For these justices, there were too many restrictions and impediments built into the program to ensure that everyone could benefit from it. This suspicion was made manifest by the fact that only 11.2 per cent of young adults under thirty received full benefits.

It could not be argued, the majority wrote, "based on this record that the legislature's purpose lacked sufficient foundation in reality and common sense to fall within the bounds of permissible discretion." Logic, reality, and common sense, then, supported the government's scheme. It was "reasonably grounded in everyday experience and common sense." It should now be apparent that the decision in *Gosselin* hinges, in an important sense, on judicial invocations of common sense. This raises an interesting research question: by what sources do we measure "everyday experience and common sense"? This is not to deny that judges have access to something we might call common sense, but by what means, other than reliance upon judicial aptitudes, do we determine what qualifies as common sense? An inquiry into this question might begin with the reporting and commenting of dominant media institutions.

THE MEDIA REPORTS

For this study, I examined media reports by national print media *(The Globe and Mail* and *National Post),* regional print media *(The [Montreal] Gazette, Le Journal de Montreal,* and *Le Devoir),* electronic national media (print versions of CBC and CTV television news), and a handful of other local Southam newspapers *([Victoria] Times Colonist, The [Vancouver] Province,* and *Ottawa Citizen).* I reviewed news reports together with opinion pieces and editorials during the Supreme Court hearing in October 2001, and in the days around the release of the decision in December 2002. No quantitative analysis was undertaken; instead, this discussion concerns qualitative evaluations of these reports using discourse analysis. I considered the reporting along two related criteria: first, how accurately did media convey the argument being made by Gosselin's counsel and the anti-poverty movement and, second, how was this argument portrayed? In the short space provided here, I provide only a brief representative sampling of the data.

On the first axis, of particular initial interest is whether a media account explains the nature of the Charter claim. In *Gosselin,* there is a claim of discrimination under section 15 in addition to a "security of the person" claim under section 7. This information seems important because, to the extent that this is explained accurately, it conveys the impression that Ms. Gosselin's claim is grounded in the text and structure of argument under the Charter. It also is significant that "age" – the ground of discrimination invoked here – is enumerated expressly in section 15. This lends force to the argument that Gosselin's claim has some real merit. To the extent that the argument is not reasonably derived from the Charter, it could lead to confusion in readers' minds or the impression that the claim is purely fanciful.

The news reports, op-eds and editorials collected are mixed on this front. When a report explains quite well the nature and complexity of the claim being made by Ms. Gosselin, editorial staff at the *National Post* would disparage the claim with the headline: "Court to rule on right to cheque." Reports in the Southam news chain emphasize "the question of

discrimination," rather than the security of the person claim, yet the case is described at too high a level of generality: as being one about a "constitutional obligation to protect the poor." In other instances, the security of the person argument is prominently noted with only passing reference, if any, to the discrimination claim. An *Ottawa Citizen* editorial is noteworthy in this context. The editorial mentions only the section 7 claim, and concludes that Courts institutionally are incapable of judging social policy. Without any assessment of the more meritorious section 15 claim, it looks like Gosselin's claim, indeed, is mostly made up.

There is, not surprisingly, even less information provided in the television newscasts. At the time of the hearing, a CBC reporter, for instance, talks vaguely about a "fundamental right to a decent standard of living." Upon release of the decision, confusion persists over the grounds on which Ms. Gosselin lost. The *National Post* reports that the Court, by a 5:4 decision, rejected the security of the person argument and so confuses the split over section 15 with the section 7 claim. By mentioning only the much more contentious s. 7 claim, readers and viewers are left overall with the impression that Ms. Gosselin's case is not reasonably well grounded in the Charter.

The second axis examined concerns how the *Gosselin* case is portrayed in media reports. By portrayal, I refer to the manner in which the overall claim is drawn for public consumption. The references here move beyond the specifics of the claim to the constitutional rights of the poor more generally. From this angle, opinion pieces and editorials play a more prominent, though not exclusive, role. Columnists in *The [Montreal] Gazette* and *The [Vancouver] Province* disparaged the claim, as well as the poor generally, in their pieces published at the time of the hearing. The least sympathetic piece of journalism, entitled "In the real world, it's called freeloading," authored by Southam columnist Don Martin, describes a "legal industry" campaigning to rid Canada of conditional assistance, with its "premise rooted in laziness." "[H]undreds of thousands of chronically unemployed Canadians lying on their couches, waiting for their cheque to arrive," Martin writes, "could one day raise a beer to her name if she claims supreme victory." Martin, it should be noted, makes no mention of the section 15 claim – this only is a case about security of the person. The nastiness continued in the op-ed pages of *The Globe and Mail* where Neil Seeman of the National Citizens Coalition complains that if Gosselin were to succeed under section 7, "it may well require an act of Parliament to mend the problem" though "Canadians may recoil at the prospect of amending the Constitution." Not only is there confusion over the federal government's role (the case concerns provincial policy) and the manner in which Supreme Court of Canada rulings may be reversed (there is no mention of the notwithstanding clause), the claim also is inaccurately drawn.

Following release of the Supreme Court decision, journalists, commentators, and columnists appear to heave a collective sigh of relief. "Canadians should be grateful that sanity was in the ascendant," opines the *Calgary Herald.* Chief Justice McLachlin's decision is approvingly oft-quoted. The *National Post* reports that, according to Chief Justice McLachlin, "[w]ork-for-welfare programs are a 'common sense' initiative to break the welfare cycle of dependency." In *Le Devoir,* Jean-Robert Sansfaçon's editorial describes the decision as "prenait appui sur la logique et le sense commun." *The Globe and Mail* opines that section 7 cannot impose a "positive obligation on the state to feed and clothe the poor." Yet there is no mention in the editorial that Gosselin's claim under section 15 imposed no such obligation. Rather, the argument only is that, when the government acts in the provision of basic income assistance, it should not be allowed unfairly to discriminate without compelling justification.

Taken together, readers would have been under the impression that Gosselin's claim was appropriately dismissed. It was not discriminatory to have required persons under thirty to participate in inadequate workfare programs or halve their welfare as punishment. It was entirely appropriate not to include a guaranteed annual income within the scope of s. 7. Moreover, this was a social policy matter that belonged more appropriately to elected politicians rather than to courts. This simply was not a legal question cognizable under the Charter. To have decided otherwise would have made a mockery of common sense. It would have been incongruent, it might be said, with our constitutional culture. ■

RETHINKING THE REASONABLE PERSON

BY PROFESSOR MAYO MORAN

THE "REASONABLE PERSON" HAS BEEN USED BY JUDGES FOR MORE THAN 160 YEARS TO ASSESS THE ACTIONS OF INDIVIDUALS. BUT ACCORDING TO A RECENT STUDY AT U OF T, THIS FICTIONAL TEST OFTEN BUILDS GENDER AND OTHER STEREOTYPES INTO JUDICIAL DECISIONS. WITH A RECENT BOOK PUBLISHED ON THE ISSUE, PROFESSOR MAYO MORAN ARGUES THAT IT IS TIME TO ABOLISH THE TEST IN FAVOR OF MORE NUANCED WAYS OF MEASURING REASONABLENESS.

Judges, scholars and generations of law students have puzzled over the reasonable person. This hasn't prevented the reasonable person, or more aptly the reasonable man, from becoming a prominent figure in areas as diverse as private, criminal and administrative law.

He forms the centerpiece of the standard of care in negligence and is at the heart of criminal law defences such as provocation and self-defence. And recently the reasonable person has played a prominent and controversial role in the American law of sexual harassment. The very frequency of his appearances however, suggests that it may be difficult to determine the 'true nature' of the reasonable person.

And indeed, in part for this reason, the reasonable person has become the object of suspicion. Decades ago A.P. Herbert's fictional judge in *Fardell v. Potts* puzzled over gender – in all of the law, he pointed out, there was "no reasonable woman," only "woman as such." Later the reasonable man became one of the first targets of feminist legal critics. More recently, critical race theorists, queer theorists and others have also directed their attention to the reasonable person. And though the criticisms are many, they are united by concern about just who the reasonable person actually is.

"THE CLEARER THE OBJECTIVE CONTENT OF THE REASONABLE PERSON, THE LESS RELEVANT HE SEEMS TO BE."

Courts so seem to reach for the reasonable person when a situation demands both sensitivity to individual attributes and a more objective component. But which qualities of the reasonable person are fixed or objective and which are subjective and vary with the individual? While the reasonable person's frequent appearances suggest that he possesses a certain 'common sense' appeal, this question has proven extremely difficult to answer. Most often however the reasonable person seems to be the common man. The famous 'man on the Clapham omnibus' is but one illustration of a far more persistent association. Thus, in the law of negligence and in the criminal context, the reasonable person is often understood as a standard of ordinariness. This is quite explicit in private law where the reasonable person is insistently described in terms of ordinariness, not moral fault. Similar patterns also characterize criminal law. But if the reasonable person holds common beliefs and attitudes, it seems very likely these will include common biases and stereotypes. And to the extent that this occurs, the reasonable person will build discrimination into the legal standard itself.

In fact, looking at the reasonable person in practice reveals how its reliance on 'ordinariness' does infuse the standard of care with stereotypes about gender. So when assessing the negligence of the playing child, the test is far more forgiving of reckless boys than of reckless girls. Courts commonly exonerate even the boy who was warned about danger or who is unable to restrain himself in the face of temptation, noting that "boys must be boys." And even though boys often injure others while most careless girls only injure themselves, courts are much more likely to find girls responsible for the results of their reckless play. Unlike with dangerous boys, courts lecture injured girls and tend to hold them responsible for failing to avoid even relatively subtle dangers. So even though boys are involved in many more injuries, girls are more likely to be found liable. Thus the reasonable child test here works to reinforce stereotypes about how boys and girls should behave.

The troubling equality effects of the reasonable person are also apparent elsewhere. In the law of self-defence, for example, the reasonable person has long been the standard for assessing the reasonableness of the use of deadly force. But courts tended to imagine the 'barroom brawl' scenario as the paradigm self-defence case. Because of physical differences, however, women rarely killed abusive partners in the face of the kind of imminent threat that characterized male-on-male claims. And it was not until feminist advocates began to challenge the male bias inherent in this approach that the defence became less gendered. But to some critics, the difficulties apparent in self-defence suggested that the reasonable person, and with him the *objective* content of the standard, should be entirely abolished. It was simply impossible, they believed, to fashion a non-discriminatory reasonableness standard. However, developments in other areas of criminal law raised questions about whether abolishing the reasonable person and subjectivizing the standard would really make criminal law more egalitarian.

The law of provocation is a particularly dramatic example. Provocation is a partial excuse that diminishes a conviction from murder to manslaughter. The reasonable (or ordinary) person is used to judge the reasonableness of the reaction to provocation and hence the availability of the defence. Early feminist and critical theorists, concerned that the reasonable person benefited the privileged, had suggested that it be subjectivized to be responsive to the social reality of the accused. However, feminists were given pause when studies began to reveal that the defence primarily benefits men who use violence to punish female infidelity. To many critics this suggested a profound gender bias in the law of provocation, a bias embodied by the reasonable person. This seemed borne out by the fact that women who killed their male partners in response to long term physical abuse rarely experienced the success under the defence that jealous husbands did. Critics also noted with concern the willingness of courts to excuse lethal violence in situations where one man initiated a sexual advance towards

"...ALTHOUGH THE REASONABLE PERSON MAY BE THE COMMON LAW'S MOST ENDURING FICTION, IT SEEMS TIME TO DISPENSE WITH HIM."

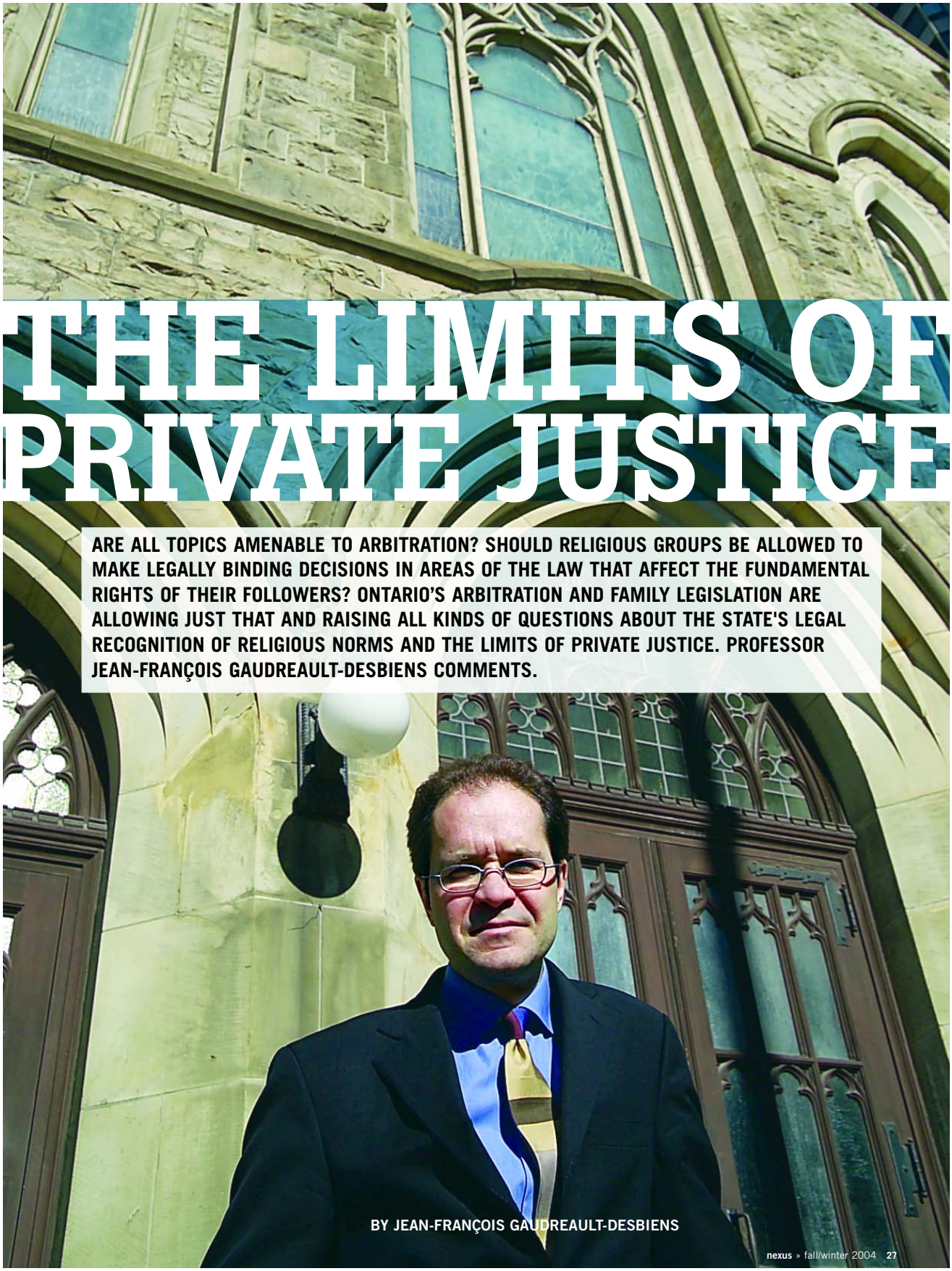
another. The last thing equality-seekers wanted here was to make the standard more *subjective*. Indeed, most argued that the defence should be entirely abolished because it was unclear that the reasonable person here could ever be used in an egalitarian way.

In sexual assault too, equality seekers began to question whether subjectivizing the reasonable person standard was the correct response to its undoubted bias. Here also it seemed that the reasonable person standard could only be made more egalitarian by increasing its objectivity. Opening up the standard by subjectivizing it, by contrast, only gave more play for biases and stereotypes. So critics turned their efforts to figuring out how biases and stereotypes threaten the objective content of the standard by undermining the ordinary meaning of consent in the sexual assault context. This in turn made it possible to begin to structure the discretion inherent in reasonableness tests to ensure that they were consistent with equality. In fact, recent amendments to the sexual assault provisions of the Criminal Code can be seen as just such an effort to structure the discretion inherent in the reasonable person's objective content. The aim is to shape an objective standard that is not satisfied by ordinary behaviour but demand instead behaviour consistent with equal respect. Thus, despite all of the ambivalence about objective standards and the reasonable person in the feminist debates, it is possible to see much of feminist law reform in criminal law as an illustration of how the reasonable person might be reformed so that the objective content is consistent with the law's basic commitment to equal worth.

But this also presents a bit of a puzzle. The clearer the objective content of the reasonable person, the less relevant he seems to be. Once we understand his objective core in any given context, the actual construct of the reasonable person seems quite marginal. The problems are deeper than this however because using a fictionalized person to represent a normative ideal also creates severe equality problems. The American law of sexual harassment makes this clear. Courts there struggle with which characteristics of the individual ought to be incorporated into the standard and litigators end up insisting that everything from sex to age to language to education and occupation must be included to make the standard function properly. The resulting litany of characteristics can seem ridiculous but it reflects a deeper problem. Because 'unmodified', the reasonable person has the characteristics of the privileged, those who do not share those characteristics have the burden of identifying and displacing them. And to the extent that they fail to do so, the standard ends up enshrining privilege as part of its 'objective' content. So while the reasonable person may simply seem unhelpful in that it has little clear normative content, it is important to note how the construct itself poses serious equality worries.

Thus, although the reasonable person may be the common law's most enduring fiction, it seems time to dispense with him. This does of course entail figuring out just what he is meant to accomplish across his widely different applications. But while this may be arduous and will undoubtedly render the common law less picturesque, the difficulties that lurk behind the reasonable person's common sense appeal have simply become too pressing to ignore. ■

For more on Professor Mayo Moran's theories about the "reasonable person" test, please see her book on the subject, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard,* published by Oxford University Press in 2003.



THE LIMITS OF PRIVATE JUSTICE

ARE ALL TOPICS AMENABLE TO ARBITRATION? SHOULD RELIGIOUS GROUPS BE ALLOWED TO MAKE LEGALLY BINDING DECISIONS IN AREAS OF THE LAW THAT AFFECT THE FUNDAMENTAL RIGHTS OF THEIR FOLLOWERS? ONTARIO'S ARBITRATION AND FAMILY LEGISLATION ARE ALLOWING JUST THAT AND RAISING ALL KINDS OF QUESTIONS ABOUT THE STATE'S LEGAL RECOGNITION OF RELIGIOUS NORMS AND THE LIMITS OF PRIVATE JUSTICE. PROFESSOR JEAN-FRANÇOIS GAUDREAULT-DESBIENS COMMENTS.

BY JEAN-FRANÇOIS GAUDREAULT-DESBIENS

What are the limits of private justice? Are all topics amenable to arbitration?

In Ontario, the *Arbitration Act 1991* does not exclude family-related or personal status-related disputes from arbitration, nor does family law legislation, subject to the respect of some formal conditions or to a few substantive exceptions dealing with custody and access to children and with the protection of these children's best interests. This allows faith-based tribunals set up as arbitration boards to render legally binding awards in such disputes. However, the Arbitration Act not only makes such awards legally binding and enforceable, but restricts to a bare minimum the possibilities of judicial review, first, of the way in which the arbitral process was conducted and, second, of the substance of the award. One of the grounds allowing for judicial review is evidence that the applicant was not treated equally and fairly, a ground which essentially refers to equality before the law and administrative fairness. In no way can the notion of the equality be construed as referring to *substantive* equality, which would allow the applicant to challenge the intrinsic quality of the norm applied to him or her. It is no surprise, then, that the possibility of faith-based arbitrations of family-related or personal status-related disputes has raised concerns, especially within women's groups.

Arbitration, which is a form of private justice, is an effective means of rendering justice, particularly in commercial law contexts. The situation may be different, though, with disputes potentially affecting the status of the person, both as an individual and as someone embedded in a network of social relations. Such issues raise the potential application of constitutional values such as dignity and equality and over which the state may still legitimately insist on retaining some form of normative monopoly. This is not to say that the application of religious norms in the context of an arbitration procedure will always lead to outcomes that undermine the dignity or the equality of the individuals involved. Actually, such an outcome may very well be the exception rather than the rule. Moreover, there is a plurality of possible interpretations of religious norms. For instance, scholars are extremely divided about the interpretation to be given to Islamic law (Sharia), a question that has recently generated a lot of interest in Ontario. The same thing could be said of Jewish law, Canon law, or Aboriginal spirituality.

IN SPITE OF THE NOBLE IDEALS THEY PROFESS, SEVERAL RELIGIONS HAVE USED, AND STILL USE, PHYSICAL OR PSYCHOSOCIAL COERCION TO FORCE INDIVIDUALS TO COMPLY WITH THEIR DICTATES.

But while it is probably fair to surmise that only some, marginal, interpretations of religious norms are likely to offend the fundamental human rights recognized in both Canadian and international law, this particular risk must be borne in mind when trying to determine how the Ontario government should approach the recognition of arbitral awards rendered on the basis of religious norms in family law contexts or in disputes touching on the personal status of the litigants.

The first element of the puzzle is that of consent. Although it is possible that most parties to a faith-based arbitration freely and willfully give their assent to that type of procedure, we cannot exclude outright that some do not. And if their assent is given in a context of coercion, then it is vitiated. Friedrich Hayek defines this concept as follows: "By coercion we mean such control of the environment or circumstances of a person by another that, in order to avoid greater evil, he is forced to act not according to a coherent plan of his own but to serve the ends of another. Except in the sense of choosing the lesser evil in a situation forced on him by another, he is unable either to use his own intelligence or knowledge or to follow his own aims and beliefs."[1] But isn't it arguable that some level of coercion is always discernable in any form of human interaction? It may be so, but this finding should not prevent us from recognizing that some contexts may be more susceptible than others to facilitate the operation of coercion mechanisms to such an extent that the consent of the person so coerced can actually be characterized as vitiated.

From that angle, it is hard to deny that in spite of the noble ideals they profess, several religions have used, and still use, physical or psychosocial coercion to force individuals to comply with their dictates, with or without the complicity of the state. And if these individuals were historically of both genders, it is even harder to deny that a disproportionate number of them were, and still are, women. Thus, there is a risk that some, but not necessarily all, faith-based arbitral awards reflect or perpetuate circumstances of oppression and discrimination that a free and democratic society cannot condone. That risk is heightened when these norms affect groups that are especially vulnerable, such as immigrant women. That being said, there are different ways not to condone such circumstances and the processes which facilitate them.

One is to rehabilitate toleration as opposed to full-fledged recognition. Indeed, state recognition of the binding effect of faith-based arbitral awards, and this, with no appeal possible, is a way to condone the commission or the perpetuation of potential discriminations. But there is more. Arbitration is a form of private justice and the vocation of private justice is, well, to remain as private as possible. This means that potentially unjust awards not only are not appealable but are never submitted to the broader, quasi democratic, scrutiny of the general public. In that, arbitral awards stand in stark contrast with public judgments issued by state courts. While private arbitrators seek to legitimize their awards only before the parties who appear before them, state judges, on the contrary, must not only ground their reasoning on publicly debated norms, they must also appeal to a form of public reason. Indeed, the legitimacy of a judgment rendered by a state judge is in large part related to its ability to persuade, firstly, the universal audience formed by the parties to the dispute, their lawyers, the general public and the media, whose expectations turn around the fairness of the process, and, secondly, to the particular audience formed by other members of the legal community (other judges, lawyers, Bar officials, legislators, law professors), who tend to be concerned by the coherence of the

[1] F.A. Hayek, *The Constitution of Liberty,* (Chicago: University of Chicago Press, 1960, at 20-21.)

legal system and by the insertion of the judgment in that supposedly coherent framework[2]. In such a legitimization process, constitutional values are at least likely to be taken into consideration, while the risk that such values not be taken into account is much higher in private justice contexts. For that reason, it is of the utmost importance to look critically at situations where the state, either by positive action or by omission, does not seek to decrease that risk. In this respect, the state's recognition of the legality and legitimacy of a system of parallel justice – the word system is critical here – allowing for the use of non-state norms for the settlement of disputes simply cannot be assimilated to its validation, operated elsewhere, of particular, individualized settlements arrived at by the parties to such disputes, and this, even though the arbitration agreement permitting access to this system of parallel justice is itself a contractual device. Indeed, the stakes involved in family law-related or personal status-related disputes as well as the breadth of potential derogations to the state's most basic norms and values allowed by the existing private arbitration framework raise questions of a much more significant magnitude. So, in order to better grasp the problems posed by an uncritical use of arbitration in these fields, some basic parameters must be identified. These parameters stem from the text of the Canadian Constitution itself, as well as from the philosophical underpinnings of a society which perceives itself as a free and democratic one.

"POTENTIALLY UNJUST AWARDS NOT ONLY ARE NOT APPEALABLE BUT ARE NEVER SUBMITTED TO THE BROADER, QUASI-DEMOCRATIC, SCRUTINY OF THE GENERAL PUBLIC."

The first principle is derived from two of the core values informing the modern concept of democracy, i.e. liberty and equality. Individuals are, or should be, free and equal, and a democratic polity has the responsibility to provide them with an environment where they can achieve that objective. Although they are conceived of in a primarily individualistic way, liberty and equality may also carry a communal dimension. From their interplay, I will suggest that we can draw an overarching principle that I will call the principle of "freedom of identity." Any person should, to the extent possible, always be able to willfully and freely choose his or her destiny, which includes the freedom to belong to a group but also the freedom to exit from that group. It is indeed arguable that exit from a given group as a result of a change in one's patterns of belonging, whether this belonging is inherited or acquired, must *always* be possible in a free and democratic society. This view somehow echoes Sartre's definition of liberty as one's capacity to tear oneself away from "givens." It follows from this that the state assumes the duty not to erect obstacles in the path of an individual who may actually be tempted to consider exercising that right of exit. Viewed under this lens, the optimal decision, to the extent that such a thing exists, would be one that seeks to maximize the freedom of identity of both individuals and communities, or, put negatively, that is the least likely to allow infringements of that freedom.

The second principle that must be taken into consideration when reflecting on the interaction between religious norms and their potential recognition by the state through statutes such as the *Arbitration Act of 1991* is, unsurprisingly, the principle of freedom of religion. On one hand, that freedom should be infringed as little as possible by governmental actions. On the other hand, it must be borne in mind that, absent specific guarantees to the contrary, freedom of religion is conceptualized as a negative liberty. As such, it does not impose any positive obligation upon the state, such as the obligation to recognize positive legal effects to religious norms.

A third principle is highly relevant to debates about the state's direct or indirect recognition of positive legal effects to religious norms. It is especially relevant in the context of the present debate about Sharia courts in Ontario. This principle is that of non-discrimination. It follows that any new governmental policy regarding the formal legal recognition, through the Arbitration Act of 1991, of arbitral awards rendered by religious tribunals in family-related or personal status-related disputes should stay clear of singling out *Islamic* tribunals because *Islamist* fundamentalist ideologies are gaining ground worldwide. The only solution acceptable is therefore one that would

[2] See, *inter alia,* C. Perelman, *Logique juridique, nouvelle rhétorique,* (Paris: Dalloz, 1970); C. Perelman, *Traité de l'argumentation,* 5th ed., (Bruxelles : Éditions de l'Université de Bruxelles, 1988)

be applicable to all religious tribunals, whatever their creed.

A fourth principle, which arises out of the *Canadian Charter of Rights and Freedoms,* can be found in s. 28 of that Charter. It provides that "notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." So, not only is sex a prohibited ground of discrimination under s. 15 of the Charter, but gender equality itself is expressly elevated to the status of an overarching principle. Subsection 2a's freedom of religion and section 27's multiculturalism clause being encompassed in this "notwithstanding," it means that religion-based or multiculturalism-based arguments invoked so as to protect, shield, or hide, under the guise of a right, practices that potentially discriminate against women, will be viewed with suspicion. A prudential principle can be drawn from this: to the extent that religious norms may serve as justifications for discriminatory practices against women, section 28 makes the risk associated to the positive recognition of the legally binding nature of these norms an even less acceptable one. This principle implies adopting risk-minimizing strategies in tackling difficult situations where fundamental constitutional values are susceptible of being undermined.

The combination of these principles leads me to the following conclusion: whenever there is a risk that the situation of a vulnerable party could be worsened as a result of the application (or misapplication) of religious norms, the state should at the very minimum ensure that it does not facilitate the application of such norms or that it potentially reinforces their power over such a vulnerable party. Thus, in case of doubt, the state should elaborate its policies so as to favour the protection of individuals rather than the cohesion of groups, religious or otherwise. As well, it should always ensure that its policies seek to protect one's right to exit from such groups, which implies a refusal to recognize the positive legal enforceability of these groups' norms or dogmas.

In light of these principles, what is the least problematic solution to be given to the problems presently posed by the *Arbitration Act of 1991* as it relates to religious courts? Three options can reasonably be considered.

The first option is to amend the Act so as to fill its gaps. For instance, one could imagine providing for a specific judicial review process that would reduce the risk of unfairness in faith-based arbitrations conducted in family-related or personal status-related disputes. This specific judicial review process could allow for the verification of the authenticity of the consent of the parties involved. It could as well comprise a *particularized* scrutiny of the fairness of the arbitral procedure. Questions such as "Were testimonies provided by women given the same weight as those given by men?" could therefore be examined. While superficially alluring, this idea of filling legislative gaps would likely create more problems than it would solve. Indeed, since "preliminary" questions, such as that of the consent of the parties, and "procedural" ones, such as that of the fairness of the procedure, inevitably raise substantive issues, we could end up in a situation where ill-equipped secular judges would decide what is "true" Islam, "true" Judaism, "genuine" aboriginal spirituality, etc[3]. Let us take the example of consent. To ensure that the basic values of the Canadian constitutional order have not been ignored in the arbitration, a judicial tribunal would have to go beyond a mere formalistic assessment of the presence or not of a genuine and free consent. It would have to examine the whole context in which that consent was given, which would induce it to look for potential sources of coercion. This, in turn, could lead that court to try to ascertain whether or not the interplay of religious norms and of social pressures created an environment where the complainant was coerced. The very identification of the relevant religious norms would itself be difficult, given the possible plurality of sources in each case. This acuteness of the problem would moreover be heightened by the existence of several competing interpretations of the same sacred texts. Very likely, this identification task would require the secular court to rely on credible experts, who may themselves be difficult to identify. Ultimately, conflicts internal to religious groups themselves could be brought to bear in a public setting and judgments made about the coercive "nature" of a given community, this, at the risk of perpetuating or reinforcing negative stereotypes. The end result of amending the Act so as to fill its gaps could therefore be to allow for extremely intrusive secular inquiries into a given religion's normative corpus, an outcome that might not be ideal from the perspective of the affected religious group. The potential – and virtual – benefit of adapting religious norms to fundamental constitutional values through the positive legal recognition of faith-based

[3] This would be highly problematic from a positive legal standpoint, as the Supreme Court of Canada's interpretation of freedom of religion clearly emphasizes that judges must refrain from examining or second-guessing the subjective beliefs of rights claimants for the purpose of identifying an objective "core" of principles for each religion. See: Syndicat Northcrest v. Amselem, 2004 SCC 47.

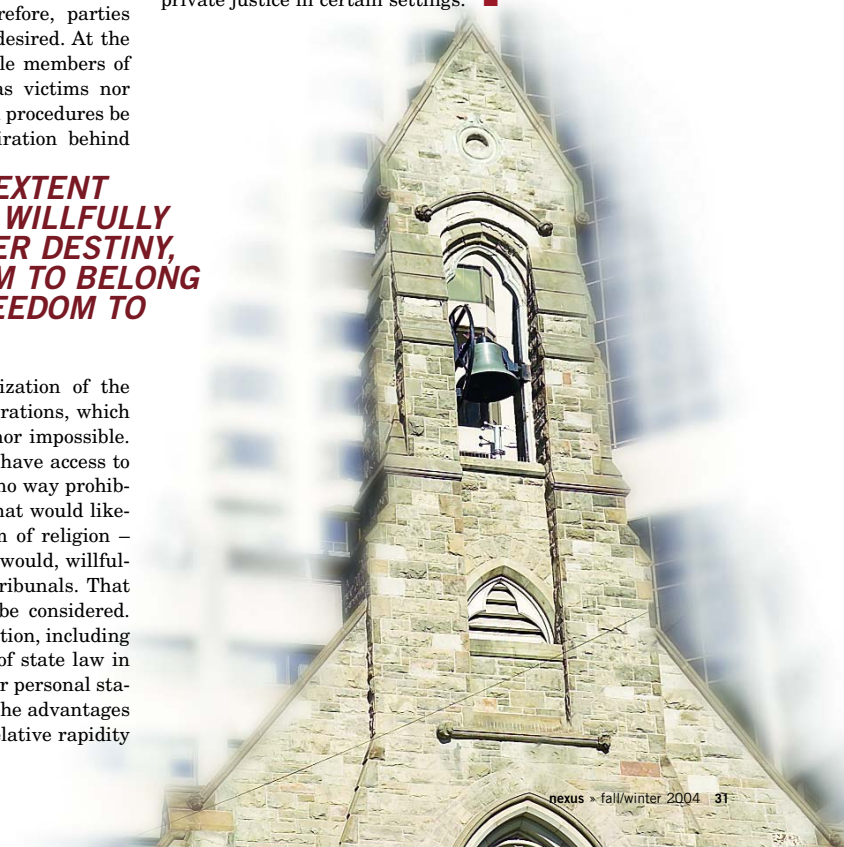
awards would be lost accordingly. Last, in addition to being problematic from a faith-based perspective, such an amendment would legitimize a level of judicial interventionism that is antithetical to the very idea of private arbitration.

Another option is to wait for a section 15 challenge of the *Arbitration Act 1991* on the basis that it indirectly condones discriminatory practices against some vulnerable groups such as women by recognizing full legal effect to faith-based arbitral awards without substantially ensuring that basic rights and freedoms are respected in the arbitration process. Should the factual background of such a case support that thesis – which would presuppose gathering evidence of systemic discrimination that would actually be difficult to obtain given the relative secrecy of arbitration procedures – chances of success could be relatively good. However, such a "wait and see" attitude would transfer the financial, psychological and social costs of law reform to some individual citizens, potentially vulnerable ones, which is hardly an acceptable outcome in my view.

Thus, the solution lies elsewhere. First, it may lie in the amendment of the *Arbitration Act 1991* so as to exclude its application to faith-based arbitrations in disputes raising family law or personal status issues. This is more or less the policy adopted in the *Civil Code of Québec,* which provides, at article 2639, that "disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration." What would be the effects of such an amendment on parties to a faith-based arbitration conducted in the context of such disputes, as well as on the religious groups who desire faith-based settlements of these disputes? On one hand, believers could still submit their disputes to a faith-based arbitration, but the award rendered would not be legally binding from a positive law standpoint. Therefore, parties would retain their right to exit, if needed and desired. At the same time, religious women (or other vulnerable members of religious groups) would not be essentialized as victims nor would religious clerics presiding over arbitration procedures be essentialized as victimizers. In fact, the inspiration behind the type of amendment proposed is the realization of the *contingency* of victimization in faith-based arbitrations, which means that victimization is neither necessary nor impossible. On the other hand, religious groups would still have access to religious tribunals as the amendment would in no way prohibit the existence of such tribunals – something that would likely be an unconstitutional restriction of freedom of religion – and believers could, and most of them probably would, willfully comply with the awards rendered by these tribunals. That being said, a second, "softer" option can also be considered. That option would be to amend provincial legislation, including family law legislation, so as to impose the use of state law in state-sanctioned arbitrations where family law or personal status-related questions arise. This would present the advantages of retaining the benefits of arbitration, i.e. its relative rapidity and cheapness, and of ensuring that, to a large extent, the norms relied upon are aligned with our society's constitutional norms and values. While the "exit" problem would still be posed in this modified arbitration framework, the mandatory reliance on state norms would possibly alleviate its impact. However, the fate of faith-based arbitrations would be the same either under this "softer" option or under the "stronger" one.

The "stronger" amendment proposal would maximize the freedom of identity of all the actors interested in faith-based arbitrations. While the "exit" option would now be available to individual parties, they could also decide to voluntarily comply with the religious tribunal's award. They would thus be free to privilege their identity as individual, right-bearing citizens, or, alternatively, their identity as believers and members of a particular religious community. Such a choice may be as excruciating as it is inevitable, but what matters is that the capacity to choose never be impeded by state policies. The amendment envisioned would also respect the freedom of identity of the religious group involved as the provision of religious justice would still be accessible to its adherents. It would also remove the specter of intrusive state interventions in these now self-enforcing faith-based arbitrations, essentially confining such interventions to exceptional situations where a party decides not to comply and is coerced into complying by any type of behaviour that ordinarily constitutes a cause of civil or criminal action. Thus, it would recognize state norms and religious norms as forming co-existing and sometimes conflicting legal orders, which points to the hypothesis of legal pluralism. Subject to the "exit" caveat, the "softer" amendment proposal would essentially achieve the same benefits. But, most importantly, both of these options would take stock of the limits of private justice in certain settings. ■

ANY PERSON SHOULD, TO THE EXTENT POSSIBLE, ALWAYS BE ABLE TO WILLFULLY AND FREELY CHOOSE HIS OR HER DESTINY, WHICH INCLUDES THE FREEDOM TO BELONG TO A GROUP BUT ALSO THE FREEDOM TO EXIT FROM THAT GROUP.



IN THE PAST YEAR, ALLEGATIONS OF POLITICAL INTERFERENCE WITH CIVIL SERVANTS HAVE RESULTED IN NO LESS THAN THREE MAJOR INQUIRIES: THE FEDERAL SPONSORSHIP AD PROGRAM, ARAR AND IPPERWASH. IN THE FOLLOWING ARTICLE, PROFESSOR LORNE SOSSIN TAKES A LOOK AT THE SO-CALLED *INDEPENDENCE* OF THE CIVIL SERVICE, AND HOW TO GUARD AGAINST CIVIL SERVANTS SERVING PARTISAN RATHER THAN PUBLIC INTEREST.

One of the many arresting revelations of the Inquiry into the Sponsorship Affair headed by Mr. Justice John Gomery was a confidential memo from Jocelyne Bourgon, then Clerk of the Privy Council (the head of the federal civil service) to then Prime Minister Jean Chrétien, in which she stated to the PM that "accountability rests with you." In other words, she accepted that Mr. Chrétien would run the sponsorship program out of the "national unity reserve" and acknowledged extraordinary political supervision over the disbursement of these funds.

While both bureaucratic and political heads may roll as a result of the sponsorship affair, what the Inquiry likely will not ask is whether the head of the public service should have allowed the sponsorship program to be run this way. Did Ms. Bourgon have an obligation to do more than simply wash her hands of the sponsorship program? Did the Liberal government's manipulation of the civil service to serve partisan ends violate the neutrality of the public service? If so, does this amount to a political foul or does it constitute an infringement of a constitutional guarantee? These are some of the questions my research on the concept of bureaucratic independence in Canada seeks to address.

For government to be effective and to serve the public interest, politicians and bureaucrats often must work in tandem, hand in glove, especially in the development and implementation of public policy. At such times, the separation between the political and the bureaucrat-

SPEAKING TRUTH TO POWER

THE SEARCH FOR BUREAUCRATIC INDEPENDENCE IN CANADA

BY PROFESSOR LORNE SOSSIN

ic functions is fluid and porous and the executive branch of government is characterized by the interdependence of these political and bureaucratic spheres. At other times, a virtually impenetrable wall insulates the bureaucratic from the political sphere, as in the context of prosecutorial discretion in the criminal justice context. What unites virtually all governmental settings is that some boundary distinguishes the bureaucratic from the political role. The questions across these various governmental settings are: how independent should the civil service be from the government of the day and how can this independence be assured? My research, to be published in a forthcoming issue of the *University of Toronto Law Journal,* which I hope will lay the foundation for a book-length study, seeks to explore the nature and scope of bureaucratic independence, examine its sources in Canada's constitutional order and explore its implications for public law, public administration and political practice.

The boundary between the partisan interests of ministers and the impartial duties of civil servants represents the defining, internal dynamic within the executive branch of government. When one speaks of the separation of powers in Canada, one tends to consider the relationship between the executive, legislative and judicial branches of government. From this vantage, the relationship between ministers and bureaucrats appears straightforward. The executive branch is headed by the Premier or Prime Minister and the Cabinet composed of the ministers, who in turn are in charge of the bureaucracy. Bureaucrats are accountable directly to ministers and ministers are accountable directly to the legislative branch, which in turn is accountable to the people. The concept of bureaucratic independence as a constitutional norm challenges this traditional, one-dimensional view of the executive branch of government. It implies that the executive branch of government must be seen in pluralistic terms, as a complex web of political arrangements, institutional relationships, constitutional obligations and legal duties. For the purposes of this analysis, the key dynamics include the roles of the "political executive" (Premier/PM and Cabinet, drawn from the political party which controls the legislature), and the roles of the "civil service." The political executive directs the "government of the day"

"The boundary between the partisan interests of ministers and the impartial duties of civil servants represents the defining, internal dynamic within the executive branch of government."

"Bureaucratic independence remains a constitutional enigma. Civil servants are the guardians of a public trust underlying the exercise of all public authority. Their ability to maintain the integrity of that trust and, when called upon, to "speak truth to power," depends on a measure of independence from undue political influence."

while the civil service, like the Crown itself, enjoys continuity through transitions of government. Under this approach, the political executive and civil service may be seen at once as interdependent and independent entities within government.

In his recent, thought-provoking study of Canadian bureaucracy, *Breaking the Bargain: Public Servants, Ministers and Parliament,* Donald Savoie takes as his point of departure that the relationship between bureaucrats and politicians is not subject to constitutional rules and therefore has developed around mutually acceptable practices, or in his words, a "bargain." While it is true, as Savoie observes, that the Canadian Constitution Acts of 1867 and 1982 contain virtually no references to the civil service, this overlooks a rich constitutional tradition in Canada in locating many of our most important constitutional principles (judicial independence, the primacy of the rule of law, and so forth) largely outside the formal text of the Acts. I argue that the civil service is subject to a dense network of constitutional provisions, conventions and principles, and that our democratic institutions and practices would be meaningfully enhanced if these rules, principles and conventions were more fully elaborated.

The Supreme Court addressed the issue of bureaucratic independence most fully in the 1985 case, *Fraser v. Public Service Staff Relations Board.* This case involved a gadfly who worked at Revenue Canada, and whose hobby was publicly criticizing the government's policies, especially on metrification (he was photographed in the *Kingston Whig-Standard* with a placard that read "your freedom to measure is a measure of your freedom"). Mr. Fraser was sanctioned for his conduct and challenged this sanction on the grounds that civil servants should be free to criticize the government of the day if they disagree with their policies or practices. In the course of finding that Mr. Fraser enjoyed no legal protection against the sanction, Chief Justice Dickson set out the circumstances which would justify civil servants becoming whistle-blowers. He concluded that it would be inappropriate to penalize a civil servant for opposing government policy in public where the government was involved in illegal acts; or where the government's policies jeopardized the life, health or safety of public servants or others. In other words, all civil servants enjoy a measure of legal protection should they decide to become whistle-blowers whether or not specific whistle-blower legislation exists to protect them (controversial whistle-blower legislation from the federal government was introduced before the last election and roundly criticized; a revamped version of the Bill has been reintroduced by the Liberal Minority government). The Supreme Court, in separate decisions, confirmed that civil servants enjoy significant Charter protection for their freedom of expression (though this is not without its limits, especially for more senior government administrators) and characterized the neutrality of the civil service as a "constitutional convention," "a right of the public" and as "an essential principle of responsible government." The Court characterized the civil service as an "organ of government."

Bureaucratic independence remains a constitutional enigma. Civil servants are the guardians of a public trust underlying the exercise of all public authority. Their ability to maintain the integrity of that trust and, when called upon, to "speak truth to power," depends on a measure of independence from undue political influence. This raises obvious and troubling questions in a system such as Canada's where the top civil servants (Clerk of the Privy Council, provincial secretaries of cabinet, etc.) remain political appointees. In this vein, the activities of Chuck Guité in the sponsorship affair, who is alleged to have facilitated the disbursement of sponsorship program funds to liberal friendly advertising firms for little or no work in exchange, serves as a cautionary tale of what may transpire

when a senior civil servant is too closely aligned with his political masters.

Unlike judicial independence which is built on a series of uniform and objective requirements (i.e. security of tenure, financial independence, administrative independence), bureaucratic independence must be a sufficiently elastic concept to encompass highly adjudicative administrative tribunals and highly independent officials such as Crown prosecutors on the one hand, and a range of policy analysts, line departmental staff members and bureaucrats on the other hand. It must be capable of adapting to what is sometimes referred to as the "post-bureaucratic era" of change-oriented, citizen-centred forms of public service-delivery and restructuring within the public service which may include public-private partnerships, outsourcing tasks and a variety of "new public management" initiatives. These new pressures create confusion and dislocation in terms of the roles and responsibilities of the bureaucratic and political spheres of executive government. What does bureaucratic independence mean in the context of a privately managed prison? Or where large management consultants are retained to redesign welfare service delivery? Bureaucratic independence, if it is to remain coherent, must operate on the basis of a spectrum of duties and obligations applicable across often disparate governmental settings.

Bureaucratic independence represents a crucial check on the legitimate powers of the government of the day to pursue its policy preferences. Given that the executive branch of Canadian governments are the repository of immense power, sporadic supervision and relatively scant public scrutiny, the internal dynamics by which this power may be constrained become crucial to the integrity of responsible government and the rule of law. And yet, the relationship between the political executive and the civil service is a poorly understood area of law. Civil servants are defined in differing ways across the country; they are subject to varying legislative schemes; and issues of bureaucratic independence too often arise in labour relations settings, where a civil servant claims that a sanction or dismissal was politically motivated. The Sponsorship Inquiry, the Ipperwash Inquiry and the Arar Inquiry all, to varying degrees, are probing the nature and dynamics of this relationship in a new light, and the resulting illumination on the accountability of civil servants, political staff, cabinet ministers and Prime Ministers will be a welcome tonic.

I have titled my study "the search for bureaucratic independence" both because the scope and implications of this concept have yet to be settled and because political and bureaucratic leaders seem to lose sight of it in a crisis when it matters most. If bureaucratic independence does emerge as a defining norm of Canada's constitutional and democratic systems, as I believe it should, its architecture will not be designed in courts, as has been the case with so many other constitutional doctrines. Rather, it will take its form and its strength from the day-to-day collaboration between civil servants and political executive, from the mutual respect each organ of government must show to the distinctive role of the other, and from their shared commitment of both pillars of the executive branch of government to protecting the rule of law and advancing the public interest. Of course, the civil service cannot be accountable to itself. New mechanisms of oversight and dispute avoidance/resolution may also be needed. The public inquiries dotting the Canadian landscape promise to provide new momentum and political will to strengthen the foundation of bureaucratic independence. And the stronger the infrastructure of bureaucratic independence becomes, the rarer public inquiries into political corruption and public maladministration will be. ■

faculty publications

CONSTITUTIONAL GOODS

Professor Alan Brudner

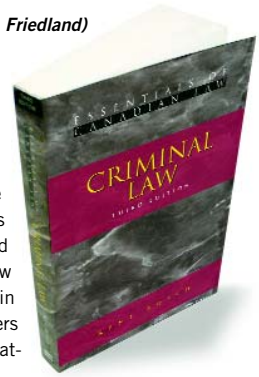
ISBN: 0-19-927466-5
Publisher: Oxford University Press
Suggested retail price: $158 (HC)

From the publisher: This book aims to distil the essentials of liberal constitutionalism from the jurisprudence and practice of contemporary liberal-democratic states. It argues that the model liberal-democratic constitution is best understood as a unity of three constitutional frameworks: libertarian, egalitarian, and communitarian. When viewed in this light, the liberal constitution embodies a surprising synthesis. It reconciles a commitment to individual liberty and freedom of conscience with the perfectionist idea that the state ought to cultivate a type of personality whose fundamental ends are the goods essential to dignity.

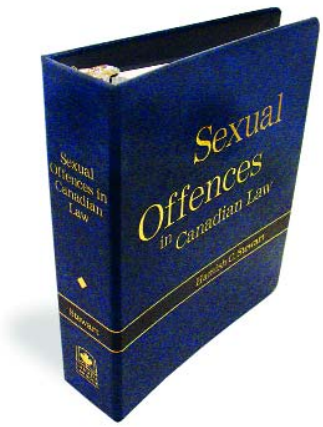
CRIMINAL LAW (3RD EDITION)

Professor Kent Roach (Foreword by Professor Emeritus Martin L. Friedland)

ISBN: 1-55221-091-X
Publisher: Irwin Law Inc.
Suggested retail price: $44.95 (SC)



From the publisher: Since publication of the first edition in 1996, *Criminal Law,* by Kent Roach, has become one of the best-selling and most highly-regarded titles in Irwin Law's Essentials of Canadian Law series. Professor Roach's clear and concise account of the current state of substantive criminal law and theory in Canada has become essential reading, not only in law schools, but also among judges, practitioners, and others involved in the criminal justice system. This is a thoroughly updated and expanded third edition.

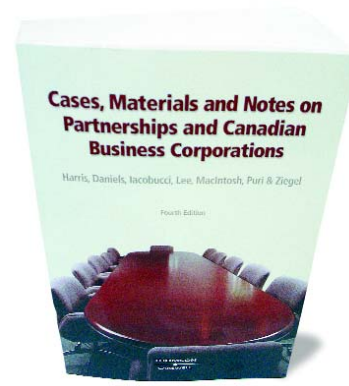


SEXUAL OFFENCES IN CANADIAN LAW

Professor Hamish Stewart with contributing author John Norris (class of 1991)

ISBN: 0-88804-407-0
Publisher: Canada Law Book
Suggested retail price: $165 (looseleaf)

From the publisher: The laws that govern the prosecution of sexual offences, and the procedural and evidentiary framework in which these offences are tried, have changed dramatically over the past 25 years. *Sexual Offences in Canadian Law* provides comprehensive, critical coverage of the substantive, evidentiary, and procedural law governing the prosecution and defence of sexual offences in Canada. Readers will find useful information on the prosecution and defence of historic offences, sexual assault, and offences against children, as well as general rules of evidence that often arise in sexual cases, rules of evidence that are specifically applicable to sexual offences, and sentencing.



CASES, MATERIALS AND NOTES ON PARTNERSHIPS AND CANADIAN BUSINESS CORPORATIONS (4TH EDITION)

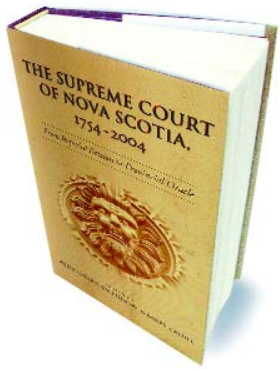
Professor Douglas Harris (Contributing Editor), Dean Ron Daniels, Professors Ed Iacobucci, Ian Lee, Jeff MacIntosh and Jacob Ziegel, and Poonam Puri, a 1995 graduate of the Faculty.

ISBN: 0-459-24147-8
Publisher: Thomson Carswell
Suggested retail price: $90 (SC)

Many recent graduates of the Faculty will, no doubt, have fond memories of the 3rd edition of this standard casebook on Canadian partnerships and corporate law. Several members of the Faculty have collaborated on an updated edition that takes into account the many developments in this fast-changing area since the 3rd edition was published in 1994. The 4th edition continues to provide a comprehensive examination of the principles of corporate law and the law of partnerships, but also includes an expanded note assessing the application of the Charter of Rights and Freedoms to corporations, a comprehensive analysis of the normative debate over insider trading regulation, and a new focus on Canadian cases regarding duties of controlling shareholders.

THE SUPREME COURT OF NOVA SCOTIA, 1754-2004: FROM IMPERIAL BASTION TO PROVINCIAL ORACLE

Professor Jim Phillips (Co-editor with Philip Girard, Dalhousie University, and Barry Cahill, Nova Scotia Archives)



ISBN: 0802080219
Publisher: University of Toronto Press
Suggested retail price: $93 (HC)

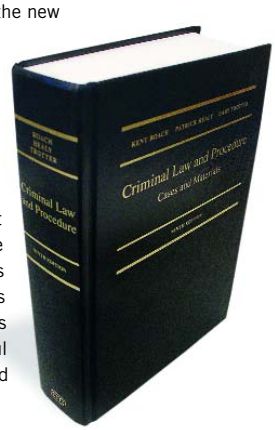
From the publisher: This volume has been prepared to coincide with the 250th anniversary of the Supreme Court of Nova Scotia, Canada's oldest surviving common law court. The thirteen essays include an account of the first meeting of the court in Michaelmas Term (October) 1754 and surveys of jurisprudence (the court's early federalism cases, its use of American law, and attitudes to the administrative state). There are also chapters on the courts of Westminster Hall, on which the Supreme Court was modelled, in the eighteenth century, and on the various courthouses occupied over the two and a half centuries of the court's existence. Anchoring the volume are two longer chapters, one on the pre-confederation period and one on the modern period, which together provide a complete narrative history of the court – a unique contribution to our knowledge of the history of Canadian provincial courts. They take the reader through the establishment of the one-judge court to the present day. Along the way they examine dramatic incidents in the court's history, such as the crises of the near-impeachment of two judges in the 1790s and the Marshall Inquiry of the 1980s. They also deal with the establishment and operation of the circuit system, the removal of judges from overt political roles, the struggle for full judicial independence, the origins of law reporting, the fusion of law and equity, patterns of civil and criminal litigation, and the court's relationship to the bar.

CRIMINAL LAW AND PROCEDURE CASES AND MATERIALS (9TH EDITION)

Professor Kent Roach (Co-editor with Gary Trotter, Queen's University, and Patrick Healy, McGill University)

ISBN: 1-55239-118-3
Publisher: Emond Montgomery Publications
Suggested retail price: Student $92 / Practitioner $125 (HC)

From the publisher: Building on Professor Martin Friedland's acclaimed and innovative course materials, this new edition provides a valuable teaching tool for introductory courses on criminal law and criminal justice. Students are provided with an overview of the entire criminal process, from police investigation to sentencing. The completely revised and reorganized ninth edition has expanded coverage of topics such as the new Criminal Code provisions on corporate criminal liability; analysis of new cases, including the recent Supreme Court of Canada cases on spanking and the constitutionality of marijuana offences; and comprehensive coverage on the basic principles of criminal liability, including absolute and strict responsibility and ignorance of the law. Detailed analysis of the various defences is included, as are chapters on police powers, the trial process (based on a case study of the wrongful conviction of Donald Marshall Jr.), and sentencing.



SAÚDE REPRODUTIVA ET DIREITOS HUMANOS: INTEGRANDO MEDICINA, ÉTICA E DIREITO (revised Portuguese edition of Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law, Oxford University Press)

Professors Rebecca J. Cook and Bernard M. Dickens, and Mahmoud F. Fathalla (Professor of Obstetrics and Gynecology, Assiut University, Egypt)

Publisher: Cepia in Rio de Janeiro, Brazil

As a testament to the success and international relevancy of *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law,* the book has been translated and revised in two more languages, Spanish and Portuguese. It is currently being translated into French. Plans are underway for the translation of Part II, containing 15 case studies, into Arabic with commentary from Islamic scholars. First published in April 2003 by Oxford University Press, the Spanish version, "Salud Reproductiva y Derechos Humanos: Integración de la medicina, la ética y el derecho", was published in December 2003 by Profamilia Colombia in Bogota. Both the Spanish and Portuguese editions include two additional case studies, one on cervical cancer, and the other on miscarriage. The books are being used for teaching in medical and law schools and for training in health professional organizations involved in reproductive and sexual health. Plans are underway to post the detailed table of contents of the book, its introductory chapter and one of its case studies, with an updated section for the book on the Faculty of Law's Women's Human Rights Resources (WHRR) website: www.law-lib.utoronto.ca/diana. WHRR, an online education tool and database of legal documents on international women's human rights, will link to the partner organizations responsible for the language editions of the book.

From fishing rights for First Nations, to sign language translators for hearing-impaired patients, judicial activism is running amuck – or so its critics would have us believe. Courts, it is said, are usurping the role of Parliament. Instead of simply interpreting the law, they are now in the business of making the law, stepping well beyond their appropriate institutional role.

No issue is more of a flashpoint for this critique than that of gay and lesbian rights and same sex marriage. Since its inception, the critics of judicial activism have directed their ire at the judicial decisions – particularly those of the Supreme Court – that have extended rights protection to gay men and lesbians. Beginning with *Vriend,* in which the Court held that Alberta's Individual Rights Protection Act violated the Charter because it failed to prohibit discrimination on the basis of sexual orientation, and then read sexual orientation into the Act, the critics of judicial activism have been enraged about Court-made law. First, they say, the Charter simply doesn't mention sexual orientation. Second, they say, the Alberta legislature should be perfectly free to decide who to protect in its human rights code. Third, they say, no Court should be rewriting legislation.

The critique has gained momentum and volume as the Court continued to extend Charter protection to gay men and lesbians, particularly in extending this protection to same sex relationship in M. v. H. in 1999. It reached a crescendo with the Ontario Court of Appeal decision in Halpern in June 2003, where the Court held that the opposite sex definition of marriage violated the Charter, and revised the common law definition of marriage to include same sex marriage, making its remedy effective immediately.

Now, the critics argued, the Courts had simply gone too far. They were messing with the most sacred of institutions – marriage. They had to be stopped.

But the federal government didn't stop them.

The federal government decided to accept the ruling. It drafted a new law redefining marriage as a union between two persons. The draft law also provided that no religious official should be required to perform a same sex marriage against his or her religious beliefs. The federal government then sent the draft law by way of a reference to the Supreme Court, initially with three questions: (1) does the federal government have exclusive jurisdiction over the definition of marriage? (2) is the draft law consistent with section 15 equality guarantees and (3) is the draft law consistent with section 2 freedom of religion guarantees? Before the reference could be heard, the Government changed, and the new Martin government added a fourth question (4) is the opposite sex definition of marriage unconstitutional?

Assuming that the Court approved the draft bill, the plan is to send the bill back to Parliament where it will be subject to an open vote.

Enter now the judicial activism critique. They are opposed to the Supreme Court reference, because it gives too much power to the Courts. But, they are also just plain old opposed to same sex marriage. And many groups and individuals associated with the critique of judicial activism lined up to intervene in the reference, arguing that the Court should say that the opposite sex definition of

THE MARRIAGE REFERENCE AND THE CRITIQUE OF JUDICIAL ACTIVISM

BY PROFESSOR BRENDA COSSMAN

The judicial activism debate continues to simmer in the news, with critics alleging that courts are interfering into issues that ought to be decided by publicly elected representatives. Are courts intervening too far in the political realm? In her article, Professor Brenda Cossman takes another look at this controversial issue through the lens of the same-sex marriage debate.

marriage is constitutional, and that the new bill is not consistent with either equality or freedom of religion rights.

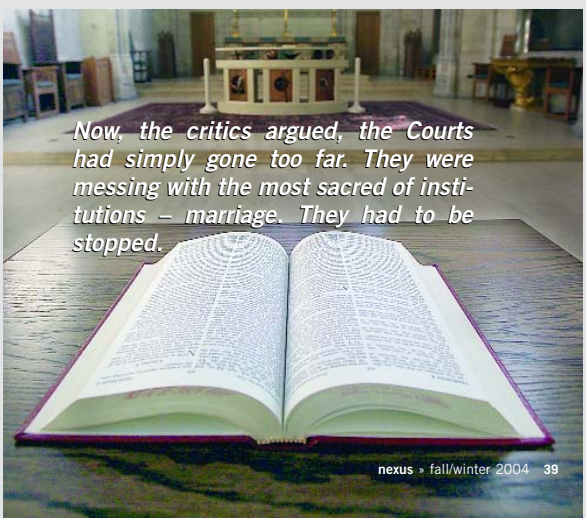
Interesting that folks opposed to judicial activism are asking the Court to reject a proposed piece of government legislation. Wouldn't a non-activist court be one that deferred to government, one that said, 'yes, your piece of legislation looks fine?' Apparently, not in this case – since to do so would be to endorse same sex marriage.

The marriage reference reveals that underlying many of the critics of judicial activism lays a very particular policy agenda, which includes opposition to equality rights. This isn't just about judicial deference to Parliament. It is about using every possible vehicle to oppose gay rights and same sex marriage.

This hypocrisy was seen last year, when the Supreme Court rejected a challenge by the National Citizens Coalition to Canada's election financing laws; a challenge that was initiated when Stephen Harper – a champion of judicial restraint – was running the coalition. The Coalition had asked the Court to strike down a law passed by Parliament. And when the Court refused, Harper condemned the decision. Judicial activism, it seems, is okay, as long as it is consistent with their underlying policy agenda.

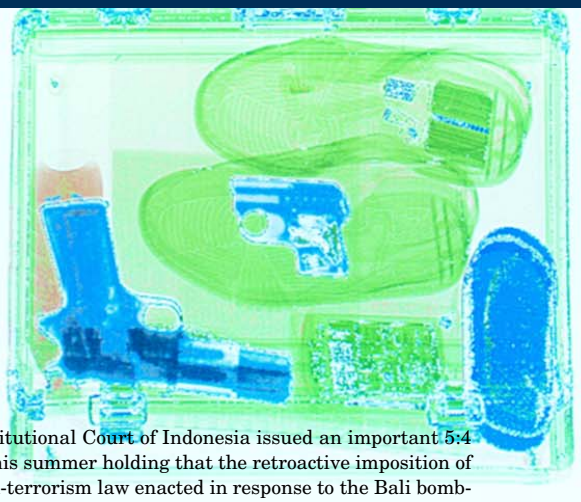
The marriage reference was an interesting intervention in the debates about the appropriate roles of courts and governments, attempting to forward a dialogue between the two institutions. The Government changed its mind – deciding that same sex marriage was the right thing to do, admittedly with more than a little persuasive assistance from the Court. It then sought – proactively and preemptively – the opinion of the Court on its new legislation, knowing full well that the legislation would otherwise be challenged, and hoping that a Supreme Court good housekeeping seal of approval might be of persuasive assistance when the bill went to a free vote in Parliament. The back and forth between the institutions is no longer captured by simplistic labels like judicial activism or judicial restraint.

Liberal democracies protect minority rights – even when they are unpopular. It would be great if legislatures always rose to the occasion, but when they don't, that's what the courts are for. And of course, the result is going to be unpopular – because that's why the legislature didn't touch the issue in the first place. The Courts are just doing their job – a tough one yes, often even a controversial one, but one that simply must be done. ■



THE COURTS AND TERRORISM

BY PROFESSOR KENT ROACH



Post-September 11, how will courts stand up to governments' tough new anti-terrorism laws and policies? Using examples of the recent terrorism cases such as the bombing of Air India and detainees rights at Guantanamo Bay, Professor Kent Roach discusses whether the courts, and independent judiciaries, have been improperly influenced by government policies.

IN LATE 2001 AND 2002, the legislative and executive branches of governments throughout the world responded to the terrorist attacks of September 11, 2001 with tough new anti-terrorism laws and policies. Now, three years after that terrible day, we are starting to see whether independent judiciaries will moderate these anti-terrorism laws and policies.

This summer, the United States Supreme Court delivered three landmark decisions on the role of legality in the war against terror. The good news for legality is that significant majorities of the Court rejected the Bush Administration's claims that the war could be conducted in an essentially lawless fashion. The bad news is that the Court may have legitimated a significant dilution of due process.

In one of the three cases, *Rasul,* the Court decided 6:3 that the 600 detainees at Guantanamo Bay could challenge the legality of their detentions by way of *habeas corpus.* The majority held that as long ago as 1759, Lord Mansfield had confirmed that the great writ extended to territory "under the subjection of the Crown." Justice Scalia in his dissent raised the spectre of the Court extending the writ to the four corners of the earth, something that indeed may be necessary given American detention practices including the atrocious behaviour revealed in Iraq prisons. (A U of T footnote is that both the majority and minority relied on former Dean Robert Sharpe's leading treatise, *The Law of Habeas Corpus).*

The Court's decision in another of the three cases – the *Yaser Hamdi* case – provides some clues about what sort of due process may be required. Justice O'Connor suggested a sliding scale approach that will tolerate a reverse burden on the detainee, hearsay evidence, and military commissions. The Bush Administration quickly jumped on this idea and created combatant status review tribunals at Guantanamo composed of three military officers, with no right to counsel and a reverse burden on the detainee to dispel a presumption in favour of the government's evidence. This is a mockery of independent courts and the adversary system. As for Hamdi himself, he has been sent back to Saudi Arabia.

A more attractive prospect was revealed in a surprising alliance of Justice Scalia and Justice Stevens. They argued that the government either had to suspend *habeas corpus* or lay criminal charges against citizens alleged to be enemy combatants. In Canadian terms, this could be translated as respect for the principles of fundamental justice or a temporary override of basic rights. These are stark alternatives but they may be preferable to the middle way of diluted due process. The House of Lords will soon decide whether Britain's decision to derogate from fair trial rights to allow certain non citizens to be indefinitely detained is justified.

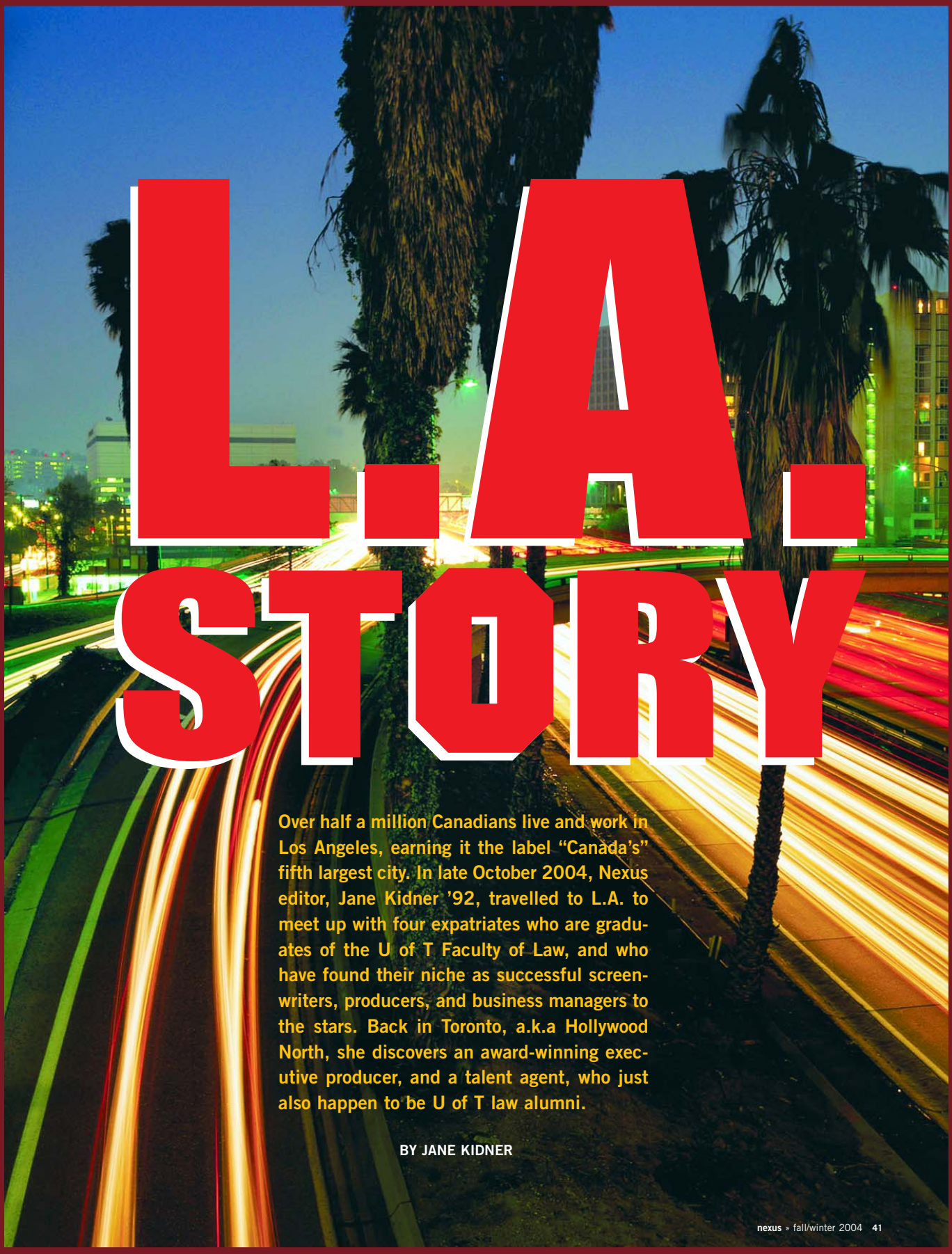
The Constitutional Court of Indonesia issued an important 5:4 decision this summer holding that the retroactive imposition of a new anti-terrorism law enacted in response to the Bali bombings violated a constitutional guarantee against retroactive punishments. It is not clear yet whether this decision will benefit those already convicted under the retroactive law including three persons sentenced to death. New anti-terrorism laws can invite successful due process challenges and ignore the strength of the regular criminal law in punishing murder as murder.

The Supreme Court of Canada also delivered two important judgments this summer. The Court indicated in *Application re Section 83.28* that the investigative hearings provisions included in the 2001 Anti-terrorism Act could be used with respect to the ongoing Air India investigation and trial. The law requires a person to testify at an investigative hearing in violation of the right against self-incrimination. Three judges in dissent, however, held that the use of the novel procedure in the middle of the trial was an abuse of process with two judges concluding that judges should not preside over police investigations. The majority relied on the Act's provision of use and derivative use immunity for the compelled testimony and extended the immunity to deportation and extradition hearings. Given the nature of international terrorism, these additions constitute important safeguards that Parliament did not contemplate.

THE LEGAL COMMUNITY MUST ENCOURAGE JUDGES TO FULFILL THEIR ANTI-MAJORITARIAN AND PRINCIPLE-PRESERVING ROLE AT A TIME OF PERCEIVED CRISIS.

The majority also stressed that both the judge and counsel for the subject should play an important role in ensuring the fairness of the hearing. This can be contrasted favourably with the sliding scale approach taken by the plurality in the *Hamdi* case. A majority of the court also insisted on a rebuttable presumption that investigative hearings be open and concluded that the sweeping publication bans imposed in the case were overly broad. At the same time, the door was left open for publication bans that could cover the very existence of the investigative hearing if necessary to protect ongoing investigations and confidential security intelligence.

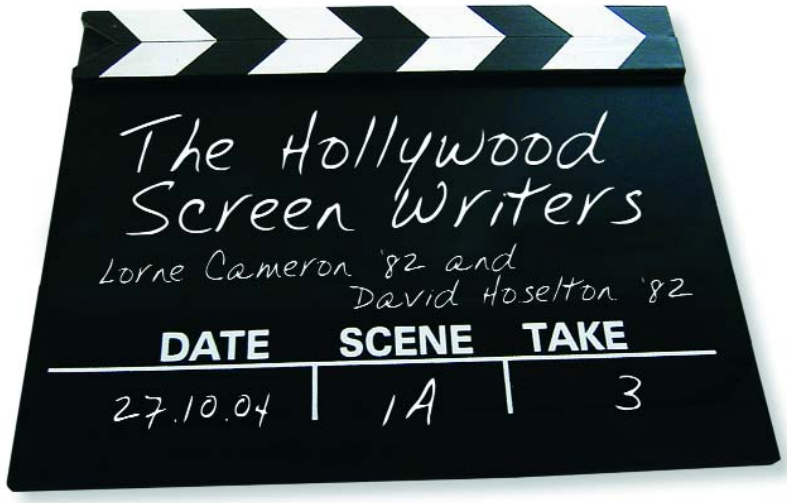
All in all, the courts are moderating the war against terror in the interests of legality, but the decisions this summer leave no room for complacency. The courts are fairly evenly divided on many of these issues and the legal community must encourage judges to fulfill their anti-majoritarian and principle-preserving role at a time of perceived crisis. ■



L.A. STORY

Over half a million Canadians live and work in Los Angeles, earning it the label "Canada's" fifth largest city. In late October 2004, Nexus editor, Jane Kidner '92, travelled to L.A. to meet up with four expatriates who are graduates of the U of T Faculty of Law, and who have found their niche as successful screenwriters, producers, and business managers to the stars. Back in Toronto, a.k.a Hollywood North, she discovers an award-winning executive producer, and a talent agent, who just also happen to be U of T law alumni.

BY JANE KIDNER



Lorne Cameron '82 sprawls casually across the living-room couch of his stylish Santa Monica home. The place is comfy rather than ostentatious, and so is Lorne. He wears the L.A. screenwriter look – jeans and a button down shirt, slightly rumpled. Across the room, sitting in an upright chair, is his friend and co-writer David Hoselton '82 – similar look, if a bit more pressed. They're both 45, though they look, and arguably behave much younger. On this typical L.A. day – the sun pours through the window – the two are enjoying *their typical day,* trading jokes, witty banter and plenty of laugher.

And they have the nerve to call this work.

Lorne and David have been successful Hollywood screenwriters for more than 15 years. Their credits include TV movies *Catch Me If You Can* (1998) and *Justice League of America* (1997) as well as big-screen hits *First Knight* (1995), *Like Father Like Son* (1987) and, most recently, *Brother Bear* (2003), which earned an Academy Award nomination for best animated feature film.

Their creative start came at an unlikely time and place. *Law Follies,* now running for nearly a quarter century, was little more than an idea in 1979 when Lorne and David met while attending U of T's Faculty of Law. "It had been talked about for years, but no one could get it off the ground," says Lorne. He and David convinced fellow classmates to walk the talk – on stage – and put together the law school's first-ever talent show. It was a fairly "slap dash" event, recalls Lorne, but classmates' impersonations of professors Jacob Ziegel and Dick Risk became classic skits. The would-be impresarios even convinced then Dean Frank Iacobucci to don a large sombrero and sing a duet with professor Bruce Dunlop – on the ukulele no less. *Law Follies* quickly became a popular annual revue, which still fills the theatre with alumni and students.

After realizing how well they worked together, the two began collaborating on a screenplay – a romantic comedy called *Courting.* What they didn't know at the time, is that it would later become their calling card to success in L.A. While most students were busy writing course summaries, Lorne was practicing for a career as a screenwriter by writing "spec" television scripts. A video project for high-school in Scarborough, Ontario had already earned him high praise from his teacher, who compared him to a 'waspish Woody Allen.' Says Lorne: "At that moment, I realized I wanted to be a screenwriter." While at law school, he also wrote a TV script about a guy who robs a bank with a "how to" book. He submitted it to *The Red Green Show,* then called *Smith and Smith.* To his surprise, they not only wanted it, but offered him work on future episodes. "That sort of validated the fact that I might have some talent."

After an articling year at McMillan Binch, Lorne moved to L.A. He gave himself two years to make a mark – if he didn't succeed, he could always return to Toronto and practice law. "It was the right period of my life to give it a shot," he says. With an armful of spec scripts, he took along *Courting* as a calling card to agents.

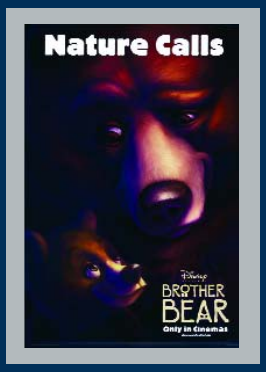
David took a slightly more circuitous route to Hollywood. A self-described "TV nerd" as a kid growing up in Sault St. Marie and then Guelph, Ontario, he toyed with the idea of practicing entertainment law. Following an articling year at the Ombudsman's Office, he landed a writing job for *Program Guide.* Each week David took home a stack of videos and wrote movie reviews. "I thought, this isn't work." A year later, he started his own movie review magazine for First Choice Pay TV. A merger with Super Channel that left him out of a job helped him hone his focus: "After that I knew I wanted to write in the entertainment world."

The would-be impresarios even convinced then Dean Frank Iacobucci to don a large sombrero and sing a duet with professor Bruce Dunlop – on the ukelele no less.

(L-R): Former Dean Frank Iacobucci and Professor Bruce Dunlop

Meanwhile, Lorne had landed an L.A. agent on the strength of *Courting.* Bracing himself for a long wait to get paid for his writing, he returned to Canada to work as a tour guide in

(L-R): Lorne Cameron '82 and David Hoselton '82



the Rocky Mountains. He had hardly arrived in Banff when a frantic call came from his agent. The president of TriStar, one of the largest production houses in Hollywood, had read the script and wanted to meet with Lorne immediately. He sheepishly broke the news to a busload of elderly tourists about to embark on a three-day tour: His dream job, the chance of a lifetime, was calling him. To his relief, they cheered him on. Lorne gave instructions to the driver, hopped off the bus, and boarded a plane bound for L.A.

Lorne landed the TriStar writing job, and it would not be long after before he earned a studio writing credit, for his first produced feature, *Like Father Like Son* (1987). It caught the attention of Hollywood executives and launched his career. But it was bittersweet. "I wanted Nick Nolte for the lead," recalls Lorne "a big, tough, strong man." But studio executives signed 5'2" Dudley Moore instead. Even worse, the studio subjected Lorne's script to standard Hollywood treatment: they hired a number of screenwriters to rework it, watering it down so much that Lorne barely recognized his own story. To top off his frustration, he took a critical hit in *USA Today.* The review said, "Lorne Cameron must have switched brains with Igor to have come up with this drivel." Today he *can* laugh at the anecdote. "I was a 26-year-old kid. That's a tough way to start."

Two years later, in 1989, Lorne finally convinced David to join him in L.A. The two – who had kept in contact during the writing of *Like Father Like Son* – immediately began working together. Their first paid writing gig was for a "cheesy horror film" *Frankenstein High,* says David. But he figured he had finally arrived: he was barely out of his twenties, and working at the kitchen table with his friend, while enjoying a beer in the middle of the afternoon. David remembers thinking, "this is one of the coolest things in the world." But when one beer led to three, and then four, and a hangover the next day – with little work accomplished – he learned a crucial element of screenwriting: discipline. "But for that one day, I thought I can do whatever I want," recalls David. "So it lasted a day."

Working together, Lorne and David soon made a name for themselves as a collaborative writing team, specializing in family comedies. They agree their best collaboration to date is Walt Disney's *Brother Bear,* a humourous animated tale about family values. As a testament to the star power of the movie, they landed Phil Collins for the soundtrack, and appropriately, two of the voiceovers are by Canadian actors Rick Moranis and Dave Thomas.

But not all the films they've penned have made it to the silver screen, let alone to Oscar night. Says David, "We wrote a movie called *'My Junior Partner'* but we weren't able to sell it. It sat on a shelf. Finally somebody read it and liked it, but didn't want it as a feature. It was made into a television movie instead – they called it *Catch Me if You Can."* He quickly clarifies that it is not *the* Hanks/ DiCaprio caper. "Spielberg stole the title," he jokes.

What does come easily, however, is working together. Sometimes they labour over the same scene separately to see if they can come up with different points of view. Sometimes they write together, standing over each others' shoulders. Other days find them at a studio office collaborating with others. They hash out ideas over the phone and at the kitchen table. David, more the dialogue guy, often works a nine-to-five day, pounding out ideas that come from "anywhere and everywhere." Lorne, better at the "big picture" confesses that he can't sit in a chair for more than five minutes. "I would rather dust," he says. And his ideas come slowly, sometimes after hours of nothing. But their differences – and a mutual admiration for each other – have kept them a team. Collaborating means not only sharing the writing credit, but also the pay cheque. But both say having someone on their side makes the work more rewarding. "It's been sanity saving," says David.

And it shows. In the sometimes harsh world of Hollywood, they remain grounded – grateful for their success but taking nothing for granted. "You could be making a million dollars next year, but you could also be making zero," says David. "It's tough to plan a life around that." And there are other rewards to consider. Lorne recalls traveling in Spain and seeing his name on a large billboard poster advertising their movie. "It was like I had touched the world," he says. "Good or bad, you get a chance to have some sort of impact."

That's the sweet reward after persevering through years of developing an idea, selling it, seeing it sit on the shelf, then (hopefully) having it made. Says Lorne: "It's like a big jumbo jet that goes along a runway and you think it is never going to take off. And then suddenly and inexplicably it does. Those are magic moments." ■

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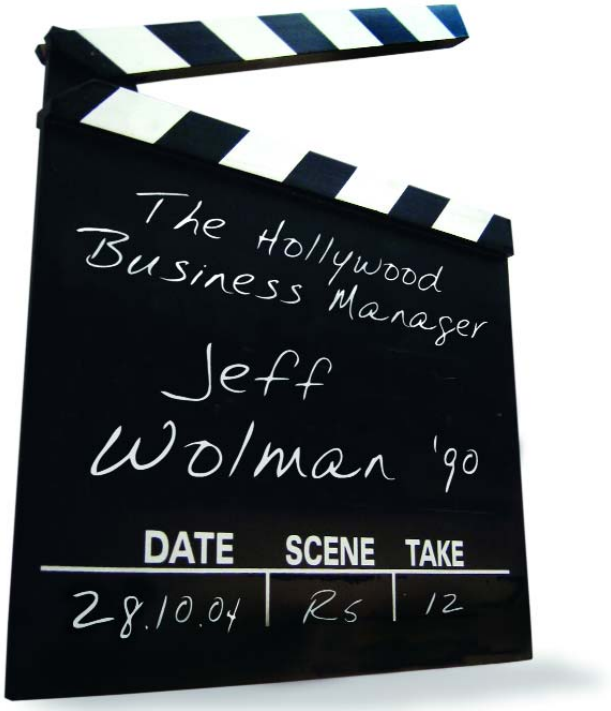
Brother Bear courtesy of Walt Disney and *First Knight* courtesy of Columbia/Tristar Motion Picture Group.



ON A QUIET PALM-LINED STREET in Westwood, a well-heeled enclave of Los Angeles, Jeff Wolman '90 is working at home. Well, it *was* his home before he turned the entire bungalow into his office eight months ago. He and his wife, Leslie Corne, and their two children, moved their home just five minutes away into a larger place, making room for Jeff's expanding Hollywood clientele.

Yet the office of *Wolman Wealth Management* retains its homey air, right down to the employee nursery/daycare he established in the converted garage, his original office location when he first moved to L.A. Indeed, home is an apt metaphor for the service that the 43-year-old provides as a business manager to the stars.

His clients entrust him to handle some of the most important and private details of their lives. He advises on all matters financial, from large investments and home purchases to insurance and divorces. He's the first person they call should they have a run-in with the law. And, for more than half of his clients, Jeff has cheque-signing authority and pays all their bills. In those cases, he's more apt to place the phone call to clients – to put the brakes on spending.

A big part of his job, he says, involves saying *no* to people who are used to hearing *yes.* "It's a daily struggle when I look at their credit card bills. But I tell them, they're paying me to say no."

They're also paying him for discretion and honesty. A tall, lanky, but athletic build, Jeff is calm, articulate and thoughtful. He chooses his words precisely, and tactfully dodges any questions that venture too far into the personal. He clearly cares a great deal about his clients. Initially, he won't even reveal who's on his roster. Then, after placing calls for permission, he offers a few names. They include a who's who of Hollywood talent: Oscar winner Halle Berry; Frankie Muniz – *Malcolm in the Middle;* and fast-rising star Bradley Cooper (of Alias and the soon-to-be-released *The Wedding Crasher).* He also recalls the day he signed on a young Will Arnett (of *Arrested Development)* and Amy Poehler (of *Saturday Night Live, Weekend Update* fame). Some have even become close family friends, like Columbia TriStar President Mark Platt, who produced *Legally Blonde.*

Which begs *our* prying question, how did the youngest of four children from a middle-class family in Halifax, Nova Scotia, find himself doing business in this galaxy? Even while growing up, Jeff admits that he was less interested in the lives of movie stars than he was in their finances. "As a kid I used to wonder how they paid for their clothes," laughs Jeff recalling.

Jeff Wolman with his wife, Leslie Corne, and their two children

He can blame his success on his wife. And his two degrees. After graduating from the Ontario School of Accountancy in 1984, Jeff worked for several large firms then, in 1987, decided to add a U of T law degree to his CV, for "added credibility." The *Über* student juggled contracts and torts while maintaining 150 accounting clients.

His career took an entertaining twist when theatre actress Leslie Corne entered his life. Jeff's rolodex of tax clients soon filled up with Toronto actors and entertainers. Then Leslie moved to New York to pursue a Broadway career, and star in her own cabaret act, which she had written and produced. But it wasn't until Jeff learned of a high-profile actor of a popular 1970's television sit-com who had lost a third of his fortune, thanks to his agent's mismanagement, that Jeff realized exactly what he wanted to do with his twin degrees. "I thought, there's got to be room for a business manager with honesty."

Seven hours after his call to the Bar, Jeff boarded a plane for the Big Apple to join his new wife, Leslie. The first few years were tough. Working from a cramped NY apartment, Jeff did tax returns for actors in an office that doubled as his son's nursery. One of his clients was an up-and-comer he had a hunch would become a huge star – Halle Berry.

For the next year and a half, Jeff pursued Berry though her talent agent, Vincent Cirrincione, "calling him every day" for an opportunity to meet her and discuss becoming her business manager. His persistence paid off. Landing Berry was the beginning of Jeff's upward trajectory.

Wolman's roster includes a who's who of Hollywood talent: Oscar winner Halle Berry; Frankie Muniz– *Malcolm in the Middle;* and fast-rising star Bradley Cooper (of *Alias* and the soon-to-be-released *The Wedding Crasher).*

> ***A big part of his job, he says, involves saying no to people who are used to hearing yes. "It's a daily struggle when I look at their credit card bills. But I tell them, they're paying me to say no."***

In 1996, he and Leslie made the move to L.A. Today, he has 22 clients and a business that nets him five percent of his clients' earnings. And he just marked his 10th anniversary with Berry, whom Jeff affectionately describes as a "down-to-earth homebody who doesn't take her celebrity status too seriously."

Ever down-to-earth himself, Jeff says the real value he adds is helping clients make the right lifestyle choices – to get them on sound financial footing – so they don't have to compromise on creative decisions. A great actor starring in a bad movie, Jeff suggests, is a sign the actor just needed the pay cheque, and better financial management. "Celebrity aside, my clients are artists first. They need someone who's going to help them navigate [the financial] waters."

Jeff explains that his job leads him to do "anything with a dollar sign in front of it." But there's one thing he refuses to do. "When they ask me to read a script, I won't go near it." He describes himself as a man with "absolutely no talent." Creative talent, that is. "I'm a left brain kind of guy, an accountant-lawyer. How much more left brain can I be?"

He credits his U of T law training with giving him a great liberal arts education but says his business requires a certain temperament you can't learn in school. "I have an accountant's soul," he says. "If it weren't for my wife, I'd be wearing brown shoes, brown pants, a brown toupée, and living in Thornhill." ■

Each morning on his way to work, David Shore '82 walks by a dirty *New York* police precinct. Not unusual perhaps – except that David lives in Los Angeles. His office at Fox Studio, is just steps away from the set of the hit TV series NYPD Blue. And now the studio is also home to David's very own brainchild, the new TV series *House,* which the Washington Post hailed as "the best new medical drama since the debut of E.R."

On this day, however, the 45-year old executive producer and head writer for the show is not feeling the glamour. He's recovering from a nasty cold. His wavy brown hair and stripped pull-over make him look more like a university student than a Hollywood success story. He jokes that he has not had time to get a haircut. His schedule is *impossible.*

On a typical day, he may be juggling an entire series: shooting episode nine while editing eight, doing pre-production on 10, rewriting four. Often daily shooting goes past midnight, making for 16-hour days. The greatest stress, he says, is having to be "on" each day. There's no time for writer's block. And his scripts are constantly being critiqued by studio executives, producers and actors. "When you're working on a show you have to write a new script every day. And it's got to be good."

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FOX STUDIOS IS ALSO HOME TO DAVID'S VERY OWN BRAIN-CHILD, THE NEW TV SERIES *HOUSE*.

"IT WAS ONE OF THE GREAT INSANE DECISIONS OF ALL TIME," LAUGHS DAVID. "NOT ONLY DID I NOT HAVE A JOB, BUT I HAD NO REASON TO THINK I'D EVER GET A JOB."

HOUSE

LAW & ORDER

L.A. LAW

Then there's always this hanging over his head: a show that premiers one day could be cancelled the next. "Lawyers usually have a pretty good idea what they'll be doing in five years," says David. "Here you never know from one week to the next."

But David, married with three children, is used to working hard, if at his dream job. Law school was another matter. Growing up in London, Ontario, he recalls watching a lot of TV – "I was preparing for my career," he jokes. He was also dreaming of being a lawyer, as far back as age 12, a dream that lasted until his second week of law school. "Frank Iacabucci, who was Dean at the time, said to my parents at graduation, that if I had applied myself I might have done okay. My mother took that as a compliment. She really did."

But law proved to be the springboard for his TV career. After securing a position with Lerner and Associates, a mid-sized law firm, he stayed in contact with law-school friend Lorne Cameron '82, who had moved to L.A. to become a screenwriter. "Lorne was the first to come down here and be successful," says David. "I guess that was part of the inspiration."

In 1991, at the age of 31, and with no TV-writing experience, David took a two-year leave of absence, moved to a tiny *"Melrose Place"* apartment in L.A. and gave himself two years to turn his dream into reality. "It was one of the great insane decisions of all time," laughs David. "Not only did I not have a job, but I had no reason to think I'd ever get a job."

He started writing comedy sitcom scripts, hoping to be noticed by an agent. "It's a Catch-22. Agents won't consider you if you haven't sold anything. And you can't sell anything unless you have an agent." After a year and a half and nothing to show for his efforts, David reached back to his legal roots and tried writing an episode of *L.A. Law.* It attracted an agent. But his safety net – the law job that was being held for him back in Toronto – was running out.

Two years and two weeks to the day from his move to L.A., the producer of the *Untouchables* called. It took a few minutes for the news to sink in. David recalls jumping up and down when they offered him a writing job. "In that moment, I changed from one of the thousands trying to write scripts into an actual professional writer."

David's gutsy move soon started to pay off big. In 1994, he was asked to write for the brand new popular Canadian series *Due South,* which David describes as his "golden calling card." That entailed a move back to Toronto, but not for long. In 1996, he received a Gemini award for his work on *Due South.* He went on to become head writer on the Canadian drama *Traders* then returned to L.A. to write for David Kelly's *The Practice.* Dozens of hit television shows followed, including *Law and Order, Family Law* and *NYPD Blue.*

Now at the helm of his own TV series, he's moved into yet another stratosphere. *House* features actor Hugh Laurie playing an acerbic doctor who diagnoses unsolvable illnesses. Says David of the lead character: "He likes the puzzles, but doesn't like patients. He's a real curmudgeon."

Though the show is a medical drama, David still finds himself reaching back to his law training as a story teller. "There is something about putting together a logical coherent argument that you do as a lawyer that lends itself to creating a logical coherent fictional story," he says. "It's not enough to have clever dialogue. You have to have a cohesive story first."

These days, David likes to tell this one – proof that for all his success, he doesn't take himself too seriously. The day after he won his Gemini for his work on *Due South,* he recalls running into Mary Walsh, then star of *This Hour Has 22 Minutes.* "She said to me 'you're now on *Traders* right?' And I thought to myself, oh my god she must be following my career." After they parted, David realized he was wearing a *Traders* T-Shirt. "I had thought we were two writers connecting, and she was just talking to some schmuck in a T-shirt." ■

IN HIS FUNKY BLACK-RIMMED GLASSES, stylish jeans and *Hugo Boss* blazer, Toronto-based Marty Katz looks every ounce the part of a successful Executive Producer. The Winnipeg-born alumnus and one time avid actor, stands casually, his hands stuffed in his pockets, as he addresses nearly 500 students and alumni packed into the *Bader Theatre.* They have braved the icy November rain for an exclusive screening of Marty's latest film, *Hotel Rwanda.* He smiles easily and often. And why wouldn't he. At age 42 (two kids and married to alumnus, Laura Trachuk '86), he's at the top of his career having just produced two independent feature films opening in theatres across North America.

In July 2004, *Hotel Rwanda,* a story based on the atrocities committed during the 1994 Rwandan genocide, won the coveted *People's Choice Award* at the *Toronto International Film Festival.* A few months later it took *Best Feature Film* at the *Los Angeles International Film Festival.* It will open in theatres across North America on December 22nd. Marty is modest about the enormity of his success. "I didn't write the movie, and I didn't direct it or star in it, – but I played a central role in getting it made, so I am proud of that." It's unusual to have two feature films out at the same time, but that's just what Marty has done. *Stander,* based on the political turmoil of the 1970's South African apartheid regime, opened December 3rd, and like *Hotel Rwanda,* is also a strong contender for academy award nominations in the New Year.

In an interview with ***Nexus*** just days before going to press, Marty spoke openly and passionately about what it means for him to bring true stories of important international human rights issues to the big screen, and to the attention of broader, mainstream audiences. He also shared his thoughts on how he got to where he is today, and the value of his U of T law degree. What follows are some of his insights and perspectives on being an Executive Producer of independent feature films.

Can you give us a general sense of what you do as an executive producer of "independent films"?

MARTY: "I like to say that an executive producer raises the money and the producer spends the money. In the case of studio pictures, the financing comes from the Hollywood studio. By contrast, in the case of *independent films,* it is the executive producer who raises the money. The source of the financing tends to be global in scope and tends to come from pre-sales (the process of pre-selling the film to a distributor) in other countries. It can also come from government sources like tax credits in Canada and Australia; from structured financing such as exists in Luxemburg, Ireland and England, and formerly existed in Canada; and from equity investments from individuals or equity funds. It often comes from a combination of all of those things. In the case of *Hotel Rwanda,* it was pre-sold to MGM United Artists for the North American release. The rest of the financing was composed of equity investment, structured financing, and pre-sales in a couple of other territories.

Do you offer a particular niche or expertise in feature film financing?

MARTY: "My particular expertise, which has a unique quality in the world of feature film financing, is *international co-production financing.* That is a new field for feature films with budgets of $15 – 25 million dollars, which in the past would have been made by studios or large distributors. Today, studios are concentrating on making the very large budget films – the $170 million *Polar Express,* and the $200 million *Harry Potter* sequel. But, there is still a market for more artful, aggressive, independently-minded films that can't sustain those budgets. That's where my expertise comes in. And it's safe to say there aren't that many people in the world that do that on the scale that I work on."

"We met at a Starbucks in Beverly Hills, and I sketched out on a napkin how I thought the structuring of the financing could come together. The rest is history."

When you first left law school in the early 80's you started your career in publishing, and then in television as the head of business affairs at CBC. How did that ultimately lead you into feature film financing?

MARTY: "After the CBC I went to work at Atlantis films, which was then a company of about 20 people. The model upon which we financed television was based on international co-production financing, and Canada was at the forefront of that kind of financing. Now, 20 years later, that television financing model has become applicable for the first time to feature films. I've brought that history and my expertise to the feature film business, before many in the rest of the world have caught on."

You have had great success with the business and financial side of film making. Do you also have to be creative to do your job well?

MARTY: "I think you do. At the end of the day we are building and selling a creative product. In order to raise financing for a particular project, I have to be able

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> there was only one way to resolve the situation – reviewing each and every clause, of each and every contract, in a 2,000 page closing book, that had already been negotiated for months. This seemed to our British lawyers to be hopeless, and a completely inappropriate waste of time. *I did it anyway.*

to pitch the story to people who might want to buy the exploitation rights for their territories. And for that, I have to be able to sell it in a creative and compelling way. So when I read the scripts, I read them with a view to determining whether I can see myself selling them."

What attracted you to go to law school?
MARTY: "I really felt that a legal education would be valuable whether I was going to be a lawyer or not. I never went to law school thinking I *wouldn't* be a lawyer, but I was very young when I went to law school, and I felt that being a lawyer would be a good thing to do when I was older. So at the beginning of my career, I tried to avoid ways of getting myself caught up in the practice of law – and that led me onto this career in the media."

Has your legal education played a direct role in your success?
MARTY: "It would be very hard to imagine most of the things I have done without the formation I got in law – and in particular the formation I got at U of T Law. It was quite a revelation to come to the University of Toronto and encounter students who were interested in learning for its own sake. That was a moment of profound discovery. U of T stands out from other law schools in providing a more liberal legal education than I would have had in a black letter law school, and in the last 20 years has gone significantly beyond that level of course offering even from those days. I think that is an enormously valuable thing about U of T as a place of learning as distinct from other laws schools in Canada."

***Hotel Rwanda* won People's Choice at the Toronto International Film Festival. Do you have any indication yet how it will do with more mainstream audiences?**
MARTY: "Studios market test the films before they decide how much to spend on marketing them. *Hotel Rwanda* is testing better than any film anyone ever remembers testing. We have been doing sneak screenings in Los Angeles, Washington, New York, and it had its world premier here in Toronto. At every screening, audiences have been on their feet clapping and crying. It is clearly a film that is touching a nerve among the people who see it."

What do you think is the societal importance of *Hotel Rwanda* and *Stander?*
MARTY: "*Hotel Rwanda* is a film about an event that occurred ten years ago about which most people thought very little at the time. In the context of the military injustices of today's world, people are now remembering how little attention they paid. And it's bringing them around, in a very human way, to wanting to be involved politically. With my other film, *Stander,* what's remarkable is that many of the 18-24 year old kids who go to the movies today weren't alive when the Soweto riots were happening. And so for a large part of the film-going audience in North America, *Stander* is a revelation about the truth of what happened when Apartheid started to crumble in the 70's. It's incredibly rewarding to be part of a cultural product that delivers that kind of history, and that can affect the way people see the world."

Do you feel you have an obligation as an executive producer to select movies that have that kind of political and social importance?
MARTY: "That's a tough question. It's not that often that a movie comes along that threatens to change the world. To the extent that I can, I like to apply what I do to films that I think are important. And I have been able to do that, and that's been terrifically rewarding. And I hope to be able to continue to do that. But it's kind of like asking a lawyer if he or she has an obligation to choose clients whose businesses they believe in. I think the answer has to be it's a great bonus."

How did the *Hotel Rwanda* story come to your attention?
MARTY: "*Hotel Rwanda* was written by Terry George, who also wrote the great Irish films, *The Boxer* and *In The Name of the Father.* He was trying to get the film made at a studio in Los Angeles and was having no luck because its subject matter is not very mainstream. Also, because of the nature of the film, it was going to require a budget relatively out of scope with the size of its star. In desperation he showed the screenplay to a colleague of mine in Los Angeles who said there's this guy in Toronto who knows how to do this. He e-mailed me the script and I read it that day. It was one of those memorable literary moments. I went to Los Angeles the next week and we met at a Starbucks in Beverly Hills. I sketched out on a napkin how I thought the structuring of the financing could come together. The rest is history."

> ***"It would be very hard to imagine most of the things I have done without the formation I got in law – and in particular the formation I got at U of T Law."***

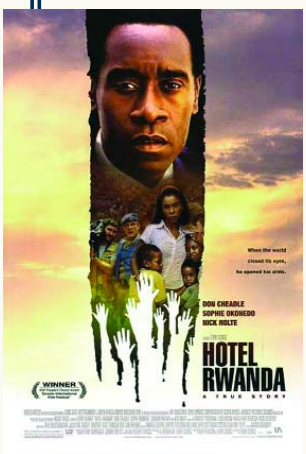
Did you face any problems or unique challenges in securing financing for these two international movies?
MARTY: "Putting the financing together for an international co-production unavoidably means you are working with people in other countries. And almost always means you are working with people from other cultures and other languages. Hotel Rwanda was a British-Italian-South African co-production with pre-sales in the United States. Every phone call was an example of a profound culture war, not to mention the fact that it was midnight for someone on the phone every time we had a meeting."

Can you offer an example of the types of cultural difficulties you are talking about?
MARTY: "There were so many. At one point, the negotiations with our Italian partner broke down completely over a contractual point which led them to be suddenly suspicious of the underlying structure of the deal. It appeared that the deal was hopelessly endangered. I got on the phone with the Italian lawyers and quickly determined that there was only one way to resolve the situation – reviewing with them each and every clause, of each and every contract, in a 2,000 page closing book that had already been negotiated for months. This seemed to our British lawyers to be a lost cause, and a completely inappropriate waste of time. *I did it anyway.* It involved a 26 hour conference call – we started at 11:00 am on Monday, and at 1:15 pm on Tuesday everything was signed. We had only a half a dozen breaks, none longer than 20 minutes. It saved the deal."

Do you think being Canadian has helped you to be successful in this field?

MARTY: "Canada is a leader in this kind of financing. And being Canadian is clearly relevant to the way I put film financing together. Canadians are particularly pre-disposed to being open to culturally diverse approaches to problem-solving and working together cooperatively. Most of the people I work with around the world are from countries that are, or have been, imperial powers. I think it's less easy for them to deal with people who have a different work ethic or different legal systems."

What do you hope Hotel Rwanda will achieve?



MARTY: "I hope that its message will get out – its message of political activism and responsibility for the whole world. Rwanda ten years ago was a kind of flash point that marked a turning away from decades of *Reagan/Thatcherite* abandonment of the developing world to the forces of free market economics, to a realization that was a flawed perspective. There are people who believe that as citizens of the earth we all share responsibility which we cannot simply abandon to free market economics, and that our governments must play a role in the successful development of the economies of all of the countries in the world."

Have you made a deliberate decision to stay in Canada or will you move to Los Angeles?

MARTY: "I have made a conscious decision to live in Toronto. And the good news is that because what I do now depends less on the vicissitudes of the Canadian film industry and more on bridging the gap between European and other foreign financing with Hollywood, the exoticism of being in Toronto has actually been helpful rather than being detrimental."

What is next for you? Are there other feature films that you are looking forward to making?

MARTY: "I actually think that South Africa is on the ascendancy. I am currently working on the adaptation of General Roméo Dallaires's autobiography in Rwanda which is a different perspective on the Rwandan genocide than *Hotel Rwanda.* It is the perspective of the envoy from the West that came to report what was going on and that tried desperately and in vain to attract the world's attention. That is a very important story for me and a film that I think we will get a chance to make in the new year. So that's what I am looking forward to."

What advice would you give today's students or young graduates if they were interested in a career such as yours?

MARTY: "When people ask me today how to get into the film business I find myself giving the advice which I followed, which is, *go to law school.* Unless you are going to write screenplays, or unless you need the basics and fundamentals of film making techniques because you want to be a director, so much of what we do in the film business is the big business of film financing. And I could not have done that without going to law school. It's hard for me to imagine getting into the film business more effectively in a different way." ■

Hotel Rwanda courtesy of United Artists Films Inc.

Paul Hemrend '92 pulls up on his 450-pound, rugged *Enduro* motorcycle – his preferred mode of transportation since a cross-continent trip a few years back. He's dressed in his signature black leather jacket, which appears as well-traveled as he is. With an infectious laugh and a bent for witty repartee, he's clearly relishing his role as the easy-riding talent agent to Canadian television and movie stars.

Spinning in his rolodex are the names of some of Canada's top actors – Sonja Smits, Don McKellar and Eugene Levy. His office at *Edna Talent Management* is on the second floor of a renovated Victorian home at Toronto's McCaul and Dundas streets, which he shares with five other agents and as many support staff. The pace, he says, is "furious." He estimates that he churns out some 300 calls a day. "If I'm on the line for more than 45 seconds, something's wrong."

Paul spends most mornings trouble-shooting – someone hasn't shown up for an interview, there's a problem on the set, a star is unhappy with the size of his dressing room. He spends the rest of the day securing auditions for clients and reviewing and negotiating contracts. "It's a high intensity job," he says. "You're performing at peak levels all day, without any breaks."

But, clearly, Paul likes things to move *fast.* After a year articling at criminal law firm *Manning and Simone,* Paul settled into practicing law – he says for what seemed like *"an eternity"* before deciding it wasn't for him. His legal career lasted three weeks and two days.

"ESSENTIALLY YOU MAKE OR BREAK YOUR CAREER AS AN AGENT BY THE TALENT YOU REPRESENT"

Paul test drove a number of jobs – including working at an auction house, creative writing and teaching tennis. He even toyed with the idea of becoming a psychotherapist – before serendipity practically knocked him over. While walking along Bloor Street, he bumped into an old friend who was the head of casting at Alliance, now Alliance Atlantis. He suggested that Paul consider becoming a talent agent. "I didn't even know what a talent agent did," laughs Paul. But he went for an interview that Friday, and started his new career on Monday.

With zero experience to bring to the table, he jokes that he had a leg up on others. "I had watched so much *Gilligan's Island* over the years, I just knew what good acting was." But Paul admits that he had a lot to learn in the early days, recalling that he used to look for only the "most talented actors." Today, he knows that good acting alone won't guarantee success. "I can instantly sense who's going to work and who isn't, because I've seen it a million times." That intuition has earned him the respect of casting directors and producers across Canada.

On the constant lookout for new Canadian talent, he sees an average of 50 plays and some 100 movies a year, which helps him build his roster of clients. He carefully selects actors whom he feels "passionate about," tactfully declining those who don't have the right stuff. "Essentially you make or break your career as an agent by the talent you represent."

Ironically, Paul credits his legal degree with giving him a creative edge in the field of agenting. "The creation of new arguments, of trying to change society through the law, and coming up with an interesting intellectual case, that's a very creative act." Perhaps that's why he believes lawyers make some of the best talent agents. ■

Philanthropy has always been at the core of what makes U of T Law School great. In the current climate of reduced government spending on higher education, more than ever the law school needs the continued support of its graduates. In this issue of Nexus, we celebrate and thank the following philanthropic alumni and friends of the law school who have given so generously to help us achieve our shared vision of excellence, relevance, and societal leadership.

BY RANDI CHAPNIK MYERS

IVY MAYNIER BURSARY

(TOP): Ivy Maynier

Back in the 1940's, long before it was common for members of minority groups to attend law school, Peter Fuld ('46), a German "half-Jew", and Ivy Maynier ('45), a woman of colour, met at the University of Toronto. It was there that their mutual passion for law and education defied the barriers of discrimination.

Recently, the Faculty of Law has become the grateful beneficiary of Fuld and Maynier's remarkable lifelong friendship. After Fuld's untimely death, he willed part of his fortune to Maynier, who, upon her death, passed on a bequest of $600,000 to their alma mater. Matched by the University to create a $1.2 million dollar endowment, the gift will fund the Ivy Maynier Bursary which will be awarded to students from underrepresented minority groups who demonstrate financial need.

Ivy (Lawrence) Maynier was born in Montreal, Canada, of Trinidadian parents. Despite growing up a black woman in a climate of racial and sexual discrimination, Maynier placed the highest premium on education. According to her younger cousin, Dorothy Hamilton, Maynier was determined, against all odds, to forge a successful career. From an early age, she wanted to make a difference in the world. In fact, Maynier's intelligence and determination led her to become a pioneer in many academic areas. At McGill University, she was named President of the Women's Debating Union and the first woman student to be awarded the McGill Debating Key. After obtaining her B.A., she was awarded a scholarship to U of T law school where she was the first to graduate with honours in International Law. It was there that she befriended Peter Fuld.

Peter Harry Fuld, son of a Jewish father and a Christian mother, was born in Frankfurt in 1921. As a "half-Jew," Fuld was forced to leave Germany in 1939. With the beginning of the war, he was interned as a German in England and in Canada until his 1941 release. At that time, he applied for Canadian citizenship and enrolled at U of T law.

Throughout law school, Maynier and Fuld were close friends. As they acquired a top notch legal education, both were grateful to the University of Toronto for accepting them into the program. They were always aware that as members of minority groups from outside Ontario, they might have been turned away.

Despite his friendship with Maynier, Fuld's law school years were shadowed by his experience of discrimination. As a "half-Jew," he was shunned by both Jewish and German communities and, as a German, he was shunned by his Canadian colleagues. It was these very experiences, coupled with his observation of similar race discrimination directed at his fellow students of colour, that moved Fuld to help others in need. Throughout his life, he provided assistance to many visible minority refugees in postwar England.

Photos courtesy of McGill University Archives

Despite growing up a black woman in a climate of racial and sexual discrimination, Maynier placed the highest premium on education.

After Fuld met his untimely death in 1962, his will bequeathed part of his fortune to establish the Peter Fuld Foundation in Germany. Today, this non-profit organization provides education and training for talented young people who have suffered discrimination because of their origins. In addition, Fuld left a large bequest to Ivy Maynier, his old law school friend with the understanding that she would use part of her inheritance to benefit the law school. Although in later years, they had drifted apart, Fuld and Maynier still kept in touch and always recalled each other and their shared experiences with fondness.

By this time, Maynier had long left Canada and was still adding to her impressive list of achievements. After law school, she was called to the Bar in England in 1947. By 1948, she had completed a comparative survey of labour legislation in the British West Indies before moving to Trinidad to practice law, then to Paris to work for the United States Information Service. Thereafter, Maynier found her niche in adult education.

Like Fuld, Maynier was moved to help others. She undertook community and welfare work, and expended extraordinary effort developing courses, programs and lectures in all disciplinary fields to make University more accessible to students in Trinidad and Tobago. In 1961, she married a career diplomat with the Federal Government and continued her career at the University of West Indies in Jamaica. According to Lennox Bernard, Resident Tutor School of Continuing Studies, Maynier "moved with ease and panache among the upper class and the intellectual elite, but she also related directly to the various dispossessed groups and communities. She exemplified all that was good and important in an adult educator. She was pragmatic, innovative, people-oriented, radical at times, strong-willed and an agent of social change." Adds Margaret Streadwick, who reported to Maynier at the University of West Indies in 1968, "Ivy had a reputation for having the interests of her students at heart."

Dorothy Hamilton remembers her cousin as a leader who instilled in others the courage to pursue their dreams. Because Maynier went to school on scholarships, she recognized the financial obstacles that so many students faced. So just as U of T did for her so many years ago, she wanted to provide academic opportunities to those who were starting their education at a disadvantage. Maynier's extraordinary bequest to the Faculty of Law carries on her tradition of helping others and making higher learning accessible to all. Says Arnold Weinrib, Admissions Committee Chair, "Roughly 30 per cent of our law school class are visible minority students. This wonderful gift will help many more afford a legal education."

(TOP): Peter Fuld

(LEFT): Ivy Maynier with her brother Bert Lawrence

CLASS OF 2000 GRAD, JEREMY MILLARD GIVES BACK

As a new associate just starting his career at Goodwin Procter LLP in Boston, alumnus Jeremy Millard recalls the rewarding summer he spent working at the Faculty's Downtown Legal Services Clinic (DLS). So Millard decided to give back to the clinic. With his generous donation of $10,000, next summer, one extra student will be able to experience the same sense of satisfaction while making a difference in the lives of those less fortunate.

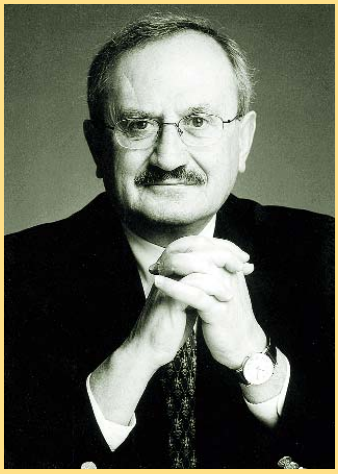
Jeremy Millard '00

After graduating in 2000, Millard knocked on the door of DLS Acting Director, Mary Misener. "He told me that he wanted to donate part of his salary to help clients whose cases don't qualify for Legal Aid." He also wanted to share with a current law student the professional and personal growth he acquired while working at DLS. Through his donation, that student will gain invaluable exposure to the realities of legal practice and social policy issues. "It is an amazing gesture of goodwill," says Misener. "I just wanted to hug him."

Each year, DLS is swamped with applications for summer jobs. But there's always a glut of qualified applicants who must be turned away. "It becomes a question of which talented candidates we have to let go," Misener explains. "Jeremy's gift means that this year, one more student will be told yes."

It's Millard's hope that his gift will inspire other alumni to follow suit. "Poverty clinics are vitally important in our society but they are few and far between. Hopefully, through lawyers' generosity, their availability will be increased."

ALBERT GNAT MEMORIAL SCHOLARSHIP



Albert Gnat, Q.C.

A much appreciated gift of $25,000 from Lang Michener, Barristers and Solicitors has been matched by the University to create the Albert Gnat Memorial Scholarship. This annual award will be open to a student who demonstrates financial need in any year of study at the Faculty of Law.

Albert Gnat Q.C. graduated from U of T law school in 1965 and trained with the legendary Bud Estey before becoming a partner at Lang Michener in 1974. For 30 years, he specialized in corporate/commercial law, finance, and mergers and acquisitions. Serving as legal advisor to major corporations, Albert developed senior level contacts with government, financial institutions, business executives and professional firms throughout North America, Europe and the Far and Middle East.

Albert was known for tackling cases with limitless energy. He is remembered not only for his dedication to the practice of law, but for his integrity and loyalty to his family, friends and clients alike. After his passing, the firm wanted to create a lasting tribute to a long-time partner and friend.

Managing Partner, Howard M. Drabinsky, also recalls that Albert felt very strongly about the value of education. He took great pride in the legal training he received at the University of Toronto's Faculty of Law, which helped him become a leader in his field. "Although he came from very humble origins, Albert was able to reach the pinnacle of success in Canadian business and the legal profession. Through our gift, we hope to help create an opportunity for others to follow in his footsteps."

DIANE HARRIS MEMORIAL BURSARY

Diane Harris '75

A generous gift from Goodman & Carr LLP has been matched by the University to create a $50,000 endowment in memory of Diane Harris, a leading real estate lawyer who passed away on March 7, 2004.

A graduate of the University of Toronto's Faculty of Law, Diane was called to the Bar in 1977 and went on to carve out a rich career as one of the top real estate lawyers in the country. Gary Luftspring, Managing Partner of Goodman & Carr's Litigation team, and a long-time personal friend, recruited her to join the firm. "Diane was an incredibly hardworking lawyer with tremendous leadership skills. And she loved to teach. She referred to all of the younger associates as her 'kids.'" But only a few months after she began working at the firm, tragedy struck. "She left a huge gap," says Luftspring. "Not just as a lawyer, but as a wife, a mother, and an exceptional leader in the community."

The annual Diane Harris Memorial Bursary will first be awarded in 2006 and is open to any student in any year in the University's J.D. program who demonstrates financial need and an interest in real property and/or business transactions. The Faculty of Law is enormously grateful to Goodman & Carr for choosing to recognize Diane's legacy of leadership through a gift that will benefit future law graduates.

Gallant Ho Prize

The Faculty of Law gratefully acknowledges the gift of $100,000 from Mr. Gallant Ho, which was endowed in September to create the annual Gallant Ho Prize. The Prize will be awarded for the first time at the 2005 Convocation to the graduating student who obtains the highest cumulative average over three years at the law school.

"Such awards not only provide an extra incentive to excel but create an atmosphere of added excitement in the law school learning environment."

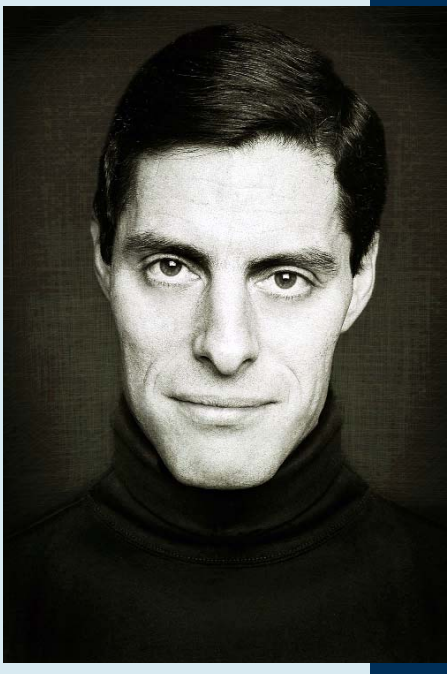
Gallant Ho is the founder of Gallant Y.T. Ho & Co., one of the leading law firms in Hong Kong. Mr. Ho, who retired from the practice of law to focus on property development in Canada and abroad, is a strong proponent of scholarly excellence. Although not himself an alumnus, Mr. Ho has a number of connections to the Faculty of Law: his sister, Betty Ho, who teaches Business and Securities Law at the Tsinghua University Law School in Beijing, China, is a graduate of the Class of 1977, and his friend and lawyer, Walter R. Stevenson, for whom Mr. Ho endowed an earlier bursary, is a graduate of the Class of 1968.

"The Faculty of Law is honoured that Mr. Gallant Ho has chosen to recognize and reward the extraordinary achievement of the Gold Medalist in each year," says Dean Ron Daniels. "Such awards not only provide an extra incentive to excel but create an atmosphere of added excitement in the law school learning environment."

JOHN STRANSMAN MEMORIAL LECTURE

In memory of John Stransman, one of the law school's most talented graduates and a doting husband and father, 219 individual donors pledged a total of over $200,000 to fund a new annual lecture series at the Faculty of Law. Many of these donors were John's colleagues from Stikeman Elliott. The John Stransman Memorial Lecture, established after John's untimely death in 2002, invites a leading non-lawyer to speak on a subject of interest to the law school community. This generous gift is a fitting tribute to John, whose love of education was infectious.

After graduating in 1977, John went on to pursue an LL.M. in Securities Law from Harvard University. He was also called to the New York Bar. "John was always interested in other perspectives, especially American," recalls his wife Anne Rogers, another U of T law alumnus. "He was a true lateral thinker with a flair for shining a light on an issue from many different angles."



John Stransman '77

"He was a true lateral thinker with a flair for shining a light on an issue from many different angles."

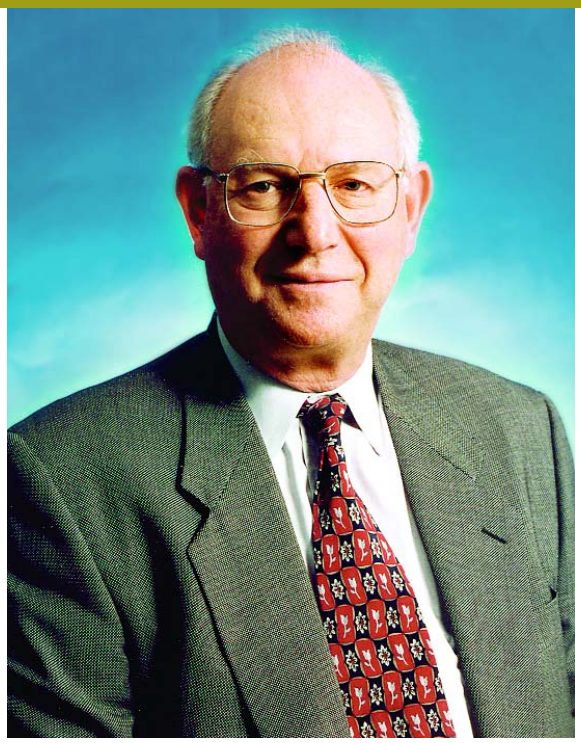
Known as a soft-spoken negotiator who excelled at bringing opponents together to resolve complex issues, John guided many of the country's largest companies through high profile takeover and securities cases. He was particularly noted for his creative corporate transactions, the redesign of market structure in the securities industry and energy sector and the recent landmark YBM settlement. But he was famous for leading a life that was rich in ideas.

John's partner, Ed Waitzer, remembers meeting him in law school almost thirty years ago. Even back then, he recognized John's extraordinary desire to challenge and be challenged. "John was full of curiosity, thoughtfulness and intellect," he recalls, noting that his friend became more than a consummate professional. He was interested in public policy and tackled problems with the confidence that he would always solve them. "John was the master of the elegant solution."

His passion for learning in all areas made it seem effortless. "John would tell you he knew nothing about litigation," says Waitzer. "But after listening to the specialists, he would instinctively figure out the right strategy. Our tax lawyers loved working with John even though he 'knew nothing about tax.' So, too, with coaching his boys' sports teams or winning dance contests at firm functions."

The inaugural John Stransman Memorial Lecture will be delivered by an extraordinary Canadian, Professor Michael Ignatieff on March 4, 2005 at 4:30 p.m. in the Bennett Lecture Hall, Flavelle House. Professor Ignatieff is the Professor of the Practice of Human Rights and the Director of the Carr Center for Human Rights Policy at the John F. Kennedy School of Government, Harvard University. "John loved a stimulating academic dialogue," remembers his wife Anne. "He would have enjoyed this series."

James Hausman Tax Law and Policy Workshop Series



James Hausman '61

In memory of James (Jim) Hausman, a 1961 law graduate and a specialist in international tax, the Faculty of Law is proud to offer an exciting new Tax Law and Policy Workshop Series. The series, which invites foreign tax experts to address international topics, kicked off this fall with a lecture delivered by Dan Shaviro of the New York University Law School.

Before his death in 2002, Jim was keenly aware of the importance of international tax policy in an increasingly global world. Notably, he championed the idea for a workshop series at the Faculty of Law, where he had taught International Tax for a number of years. Though renowned for his superb legal skills, Jim was also dedicated to mentorship. "Jim was a gifted teacher who championed people. No matter how difficult a problem, he cheered you through," remembers Virginia Davies, a personal and professional friend.

Davies, also a tax lawyer and a U of T alumnus (Class of 1979), and her husband, Willard Taylor, a tax specialist with Sullivan & Cromwell in New York, donated the amount of $30,000 to fund the series. "We wanted to make Jim's dream come true," said Davies. Their generous donation was swiftly matched by Blake Cassels, the firm at which Jim practiced. At Blake's, Jim was involved in major international deals, most notably the Interbrew purchase of Labatt's and the Seagram transaction. He was also famous for leaving the office to make it home in time for dinner, having struck that rare balance between career success and family.

On November 3, 2004, a commemorative dinner was held to celebrate the inaugural workshop and its donors. During the evening, David Hausman, Class of 1989, recalled how his father was so impressed with the U of T law school that he discouraged him from applying anywhere else.

"The workshop is like a window that allows us to see the rest of the world while the rest of the world sees us. That way, we all learn from each other."

- Professor David Duff

The new series is boosting the Faculty's worldwide reputation as a leader in international tax policy. And the turnout has been overwhelming. "We're attracting not only law students, but people from all departments and faculties and even business and legal practitioners," says Associate Professor David Duff, who runs the program along with new faculty member Benjamin Alarie. In setting the agenda, they seek speakers who bring an international flavour to tax. This year, guests include Jack Mintz from the C.D. Howe Institute, Eduardo Baistrocchi of Universidad Torcuato Di Tella in Buenos Aires and Marjorie Kornhauser of Tulane Law School. Explains Duff, "The workshop is like a window that allows us to see the rest of the world while the rest of the world sees us. That way, we all learn from each other."

MICHAEL TREBILCOCK CHAIR IN LAW AND ECONOMICS

SEVERAL YEARS AGO, a $1 million dollar endowment created the Chair in Law and Economics, honouring one the founders of law and economics study, Professor Michael Trebilcock. Three law graduates – David Macdonald, James Hinds, and Murray Edwards – who were inspired by Michael and motivated by the economics courses taught at law school, were among the donors to this important gift.

After graduation in 1981, David Macdonald went on to establish a notable business career. He vividly remembers being a student in Professor Trebilcock's Law and Economics course. The class was small, composed of only a dozen students. "It was there that I learned the principles for deriving a sense of underlying order in legal discipline," Macdonald recalls. "Michael was exceptionally gifted in presenting the [interdisciplinary] linkages in a way that resonated and was easy to understand and absorb. I found him very intelligent, committed and engaging."

Under Professor Trebilcock's direction, the Law and Economics Program, the only of its kind in the country, allows for critical analysis not only in traditional economics-oriented fields such as antitrust and corporate law but also areas at the very heart of our legal system: torts, property, contracts, domestic relations, procedure and constitutional law.

James D. Hinds (J.D., 1983) left law school and headed straight into business. He is grateful for the knowledge of economics that he acquired during his years at U of T. "Law gives you an organizational matrix to understand the economy. I learned to see how institutions relate to one another. The bottom line is that in the corporate world, you must understand how economics underlies business in order to succeed."

Another philanthropic alumnus, N. Murray Edwards '83, has gone on to become one of Canada's leading business figures. After graduating with honours, Edwards began his career as a partner at Duckworth & Palmer in Calgary before launching into business full-time. As founder and President of Edco Financial Holdings Ltd, he developed a reputation as a guru in the oil and gas business. An unpretentious supporter of Calgary business and charitable initiatives, Edwards is currently Co-Owner of the Calgary Flames Hockey Club and Director of the Business Development Bank of Canada. In 2003, he established the N. Murray Edwards Market Information Centre in the Haskayne School of Business, which provides realtime financial information for business students and faculty. He was recently named one of "50 Canadians to Watch" by Maclean's Magazine.


Professor Michael Trebilcock

Under Professor Trebilcock's direction, the Law and Economics Program, the only of its kind in the country, allows for critical analysis not only in traditional economics-oriented fields such as antitrust and corporate law but also areas at the very heart of our legal system: torts, property, contracts, domestic relations, procedure and constitutional law. The endowed Chair ensures that the Program continues to shape the development of public policy and legal education in this important area of study and to inspire students to think broadly about their career aspirations. "I'm a real believer in supporting world class excellence," says Macdonald. "The University of Toronto is an institution that is committed to excellence and Michael is not just committed to it, he is it." ■

last word

PROFESSOR MARTIN L. FRIEDLAND '58 COMMENTS ON THE CANADIAN JUDICIAL PROCESS

Professor Martin L. Friedland, C.C., Q.C., Ph.D., LL.D., F.R.S.C. receiving the Order of Canada, presented by the Governor General, Adrienne Clarkson

On October 30th, 2004, Professor Martin Friedland '58, former Dean of the Faculty and University Professor, was inducted as a Companion of the Order of Canada. He was previously made an Officer of the Order of Canada in 1990. The Governor General's citation said the following of Professor Friedland:

Martin Friedland has made outstanding contributions to the Canadian legal system and to the administration of justice. University professor and professor of law emeritus at the University of Toronto, he has authored one of the most definitive studies of the role of the judiciary in our country. His legal writings have been wide ranging and have been cited by the highest courts in Canada and abroad. In addition, he has played significant roles in a number of government commissions and committees. As a legal scholar and teacher, he has inspired a great many young lawyers and students. This is a promotion within the Order.

The articles in this issue of NEXUS show the continuing importance of adjudication in Canadian society. The role of courts and other adjudicative bodies in resolving disputes and developing public policy continues to grow. As a result, the public has become increasingly concerned about many aspects of the legal process that were formerly the exclusive province of lawyers. The judiciary itself continues to come under public scrutiny, with intensifying debates over many of the subjects I dealt with in my 1995 report to the Canadian Judicial Council, *A Place Apart: Judicial Independence and Accountability in Canada.* In this brief "Last Word", I will comment on some of these issues. Clearly, it will not be the last word on these topics.

The recent appointment of two new members of the Supreme Court of Canada was the occasion for rethinking the appointment process. The government's solution for those appointments – having the minister of justice meet with a parliamentary committee to explain its choices – was viewed by many, including me, as inadequate. What should be done? My own solution – put forward in *A Place Apart* – is to have the vetting, consultation, and interviewing of potential candidates done by a representative committee of persons drawn from the bar, the judiciary, the academic community, the relevant province, the federal government, and the public. The committee would put forward a short list of names to the government, which would select a nominee from that list. If the government wanted to go outside the list, it would have to subject its choice to review by a parliamentary committee.

Another contentious issue is whether the courts should have 'the last word' on judicial compensation. In the Provincial Judges Compensation Case of 1997, the Supreme Court of Canada mandated independent committees to advise on matters of compensation, and held that a government that did not accept the committee's recommendation had the burden of justifying its decision before a court. It seems to many observers that this places the courts in a conflict of interest, something they are careful to prevent when it involves others. If there is to be judicial scrutiny of this issue, the onus should be on the judges to persuade the courts that the government's decision is unreasonable. Better yet, the courts should leave the matter to public opinion.

Clearly, the administration of the courts throughout Canada needs further study. A number of obvious changes are required. There needs to be a separation between the judiciary and the attorney general for each province, and members of the judiciary should be given greater control over their working conditions. Further, it makes sense to have the three levels of courts working together. There are ways of sharing resources and streamlining court procedures, if there is a cooperative effort among the courts. A provincial Court Services Agency would make the case for budget support, decide how the money is allocated, and look for ways of making the court system more efficient. The agency could consist of representatives of the three levels of courts, government officials, representatives of legal groups, and members of the public. Those who would directly benefit from the decisions of such an agency – namely, the judges – should not constitute a majority of the agency.

There are many other issues that require greater thought. Should the legal aid budgets in the provinces be as low as they are? In the field of criminal law, for example, which accounts for about half of all legal aid spending, should we deprive those indigent persons who are unlikely to go to jail of the right to be legally represented by legal aid, as is now the practice in Ontario? Protecting innocent persons from their first conviction may be equally important – if not more important – than other more high profile use of legal aid funds.

Finally, there have been a number of studies of the health care system in Canada, the Romanow and Kirby reports being the most recent ones. The last comprehensive study of the criminal justice system in Canada was the Ouimet Committee report in 1969. Surely it is time for a comprehensive federal review of the administration of the entire criminal justice system. ■

Calendar of Upcoming Events 2005

Jan 11, 2005
7:00 – 9:00 PM
Professor David Dyzenhaus, Faculty of Law, University of Toronto
Law and Literature Series: Literature Through the Lens of Law

Jan 12, 2005
12:10 – 2:00 PM
Mr. Jack M. Mintz, President and Chief Executive Officer, C.D. Howe Institute, The James Hausman Tax Law & Policy Workshop Series
Topic: ***Conduit Entities: Implications for Investment and Tax Policy***

Jan 14, 2005
12:10 – 1:45 PM
Professor Richard Moon, Faculty of Law, University of Windsor
Constitutional Roundtable

Jan 20, 2005
4:30 – 6:30 PM
Professor Martha L. Minow, William Henry Bloomberg Professor of Law, Harvard Law School, Cecil A. Wright Memorial Lecture

Jan 28, 2005
12:10 – 1:45 PM
Professor Michelle Williams, Assistant Professor and Director, Law Programme for Indigenous Blacks & Mi'kmaq, Dalhousie University, Diversity Workshop
Topic: ***From Affirmative Action to Transformative Outcome: Equality Jurisprudence and the 'Little Program that Could'***

Feb 2, 2005
12:10 -2:00 PM
Professor Lior Strahilevitz, Assistant Professor of Law, University of Chicago Law School, Law and Economics Workshop
Topic: ***A Network Theory of Privacy***

Feb 3, 2005
4:30 – 6:30 PM
Mr. Daniel Kaufman, World Bank Institute Director, Global Governance, Annual David B. Goodman Lecture

Feb 4, 2005
12:10 – 1:45 PM
Professor Frank I. Michelman, Robert Walmsley University Professor, Harvard Law School, Legal Theory Workshop

Feb 9, 2005
12:10 – 1:45 PM
Professor Eduardo Baistrocchi, Professor of Law, Universidad Torcuato Di Tella, The James Hausman Tax Law & Policy Workshop Series
Topic: ***The Arm's Length Standard in the Twentieth Century: A Proposal for Both Developed and Developing Countries***

Feb 11, 2005
12:10 - 1:45 PM
Professors Judith Resnick, Arthur Liman Professor of Law, Yale Law School and Vicki C. Jackson, Professor of Law; Associate Dean (Research & Academic Programs) Georgetown University Law Center, Constitutional Roundtable
Topic: ***Federalisms and Feminisms: The Jurisdiction of Equality***

Feb 23, 2005
12:10 – 2:00 PM
Professor Albert Yoon, Assistant Professor of Law and Assistant Professor of Political Science (by courtesy), Northwestern University School of Law and Visiting Professor, Woodrow Wilson School of Public and International Affairs Princeton University, Law and Economics Workshop

Feb 23, 2005
7:00 – 9:00 PM
Professor Ernest Weinrib, Cecil A. Wright Chair, Faculty of Law, University of Toronto, Law and Literature Series: Literature Through the Lens of Law
Topic: ***The Talmud (selected passages)***

Feb 25, 2005
12:10 – 1:45 PM
Professor Maneesha Deckha, Faculty of Law, University of Victoria, Diversity Workshop

Mar 1, 2005
4:30 – 6:30 PM
The Hon. **Michael J. Bryant,** Ontario Attorney General
Morris A. Gross Memorial Lecture

Mar 3, 2005
4:30 – 6:30 PM
Professor **Richard Ericson,** Professor of Criminology, Director of the Centre for Criminology and Fellow of All Souls College, University of Oxford, John Ll. J. Edwards Memorial Lecture
Topic: ***Criminalization and the Politics of Uncertainty***

Mar 4, 2005
12:10 – 1:45 PM
Professor Benedict Kingsbury, Institute for International Law and Justice, New York, University School of Law, JD/MAIR Speaker Series
Topic: ***Should Indigenous Peoples Have Special Legal Rights?***

Mar 8, 2005
4:30 – 6:30 PM
Professor Michael Ignatieff, Professor of the Practice of Human Rights and Director, Carr Center for Human Rights Policy, John F. Kennedy School of Government, Harvard University
John Stransman Memorial Lecture

Mar 9, 2005
7:00 – 9:00 PM
Professor Lorraine Weinrib, Faculty of Law, University of Toronto
Law and Literature Series: Literature Through the Lens of Law

Mar 11, 2005
12:10 – 1:45 PM
Professor Carl F. Stychin, Chair, Dean, Faculty of Economic & Social Sciences, School of Law, University of Reading, Diversity Workshop
Topic: ***Family Friendly? Rights, Responsibilities, and Relationship Recognition***

Mar 16, 2005
12:10 – 2:00 PM
Professor Laura N. Beny, Assistant Professor of Law, The University of Michigan Law School, Law and Economics Workshop
Topic: ***Does Diversity Pay: Theoretical and Empirical Reflections on the Returns to Diversity at Elite U.S. Corporate Law Firms***

Mar 18, 2005
12:10 – 1:45 PM
Professor Elizabeth Kiss, Associate Professor of the Practice of Political Science, Duke University, Legal Theory Workshop

Mar 21, 2005
12:10 – 2:00 PM
Professor Marjorie E. Kornhauser, W. R. Irby Professor of Law, Tulane Law School, The James Hausman Tax Law & Policy Workshop Series
Topic: ***Choosing a Rate Structure in the Face of Disagreement***

Mar 22, 2005
12:10 – 1:45 PM
Professor Lucie Lamarche, Professor and Researcher, Faculty of Political Science and Law, Université du Québec à Montréal
JD/MAIR Speaker Series
Topic: ***Women' Equality at Work and Trade Agreements: Beyond the numbers...the new paradigm for public regulations. A case study: The Employment Equity Model in Canada***

Mar 29, 2005
12:10 – 2:00 PM
Mr. Robert Carney, Ministry of the Attorney General, Ontario and Ms. Mary Eberts, Eberts Symes Street Pinto & Jull Barristers and Solicitors, Constitutional Roundtable
Topic: ***The Autism Wars: Autism Treatment and the Charter of Rights in Canadian Courts***

Mar 30, 2005
12:10 – 2:00 PM
Professor Richard Brooks, Associate Professor of Law, Yale Law School, Law and Economics Workshop
Topic: ***Incorporating Race***

Apr 1, 2005
12:10 – 1:45 PM
Professor Nicola Lacey, Professor of Criminal Law, Mannheim Centre for the Study of Criminology and Criminal Justice, London School of Economics and Political Science
Feminism and Law Workshop

Apr 5, 2005
7:00 – 9:00 PM
Professor Ed Morgan, Faculty of Law, University of Toronto
Law and Literature Series: Literature Through the Lens of Law

Apr 6, 2005
12:10 – 2:00 PM
Professor Michael Lang, Department of Austrian and International Tax Law, Vienna University of Economics and Business Administration, The James Hausman Tax Law & Policy Workshop Series

May 10, 2005
7:00 – 9:00 PM
Professors Carol Rogerson and **Brenda Cossman,** Faculty of Law, University of Toronto, Law and Literature Series: Literature Through the Lens of Law

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