UNIVERSITY OF TORONTO FACULTY OF LAW

nexus

FALL/WINTER 2003

The Evolution of the Family

ALUMNI SHAPE THE DEBATE ON SAME-SEX MARRIAGE

THE GAY MARRIAGE DIALOGUE BETWEEN COURTS AND LEGISLATURES

MARTIN AND MILLER TAKE CENTRE STAGE

EXCLUSIVE INTERVIEW

MADAM JUSTICE ROSALIE SILBERMAN ABELLA

UNIVERSITY OF TORONTO FACULTY OF LAW

nexus

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

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MESSAGE FROM THE DEAN

Over the last several months that I have been visiting at Yale Law School, I have been reminded again and again of the dramatically different choices our two countries have made in a range of diverse policy contexts, from health care to criminal law to foreign policy. I have also become increasingly aware of the great admiration many American progressives have for the choices we have made in Canada.

From the time of my arrival here in September, the most lively and spirited conversations respecting the differences between our two countries have focused on Canada's rapidly evolving jurisprudence respecting the recognition, rights and obligations of lesbians and gay men. In case after case, Canadian courts and human rights tribunals have addressed and remedied the various forms of discrimination borne by the lesbian and gay community. The pinnacle of this rights revolution was, of course, the Ontario Court of Appeal's recent decision in *Halpern* regarding restrictions on same-sex marriage.

The law has not stood still in America, either. Last spring, in the celebrated case of *Lawrence*, the American Supreme Court reversed its earlier precedent and declared that the state was precluded from penalizing two men for engaging in consensual sexual relations. As I write this letter, the highest court in Massachusetts has followed the lead of the Canadian courts and ruled that the restrictions on same-sex marriage are unconstitutional.

The story is yet to be fully told as to how and why Canadian society has advanced more rapidly than many other countries in addressing the equality claims of lesbians and gays. However, as this issue of *Nexus* demonstrates, at least part of the responsibility for this social and legal transformation can be traced to the work of several faculty members, students and graduates of the Faculty of Law.

For many years, Professors Carol Rogerson, Brenda Cossman and Martha Shaffer have been instrumental in questioning and redefining the legitimate legal contours of the concept of family and in exposing both the blunt and subtle layers of discrimination. The work of these scholars has also been fuelled and fortified by a generation of our law students who have been insistent that the Faculty train its intellectual resources on the discrimination sustained by gays and lesbians. Perhaps the most important organization in this enterprise has been UTOIL ("U of T, Out in Law") which has sponsored a series of conferences, seminars and other events designed to bring this agenda to the fore.

Although the conversation that has taken place in our intellectual community over the years respecting discrimination against gays and lesbians has, at times, been passionate and unsettling, it has nevertheless forced a fundamental re-thinking of received wisdom in this area. The result has been that members of our law school — both past and present — have, through policy analysis, through advocacy, through judicial decision-making and through legislation, contributed to fundamental and just societal transformation.

In this respect, the Faculty is fulfilling the mission and responsibility of all great academic institutions: to create an environment conducive to truth seeking, to robust debate and analysis, and to scrutiny of received wisdom that benefits broader society. ■

Ronald J. Daniels '86

From the Editor

JANE KIDNER,
ASSISTANT DEAN,
EXTERNAL RELATIONS

Family law is experiencing a period of dramatic transition in Canada. The changes are happening swiftly (although some argue not swiftly enough) and in many cases are challenging traditional values, core institutions, and deeply held personal beliefs. The result has been inevitable controversy and debate in the public realm and around dinner tables.

The most striking of these changes happened in June of this year with the Ontario Court of Appeal's landmark ruling in *Halpern v. Canada*. As a result, Canada is now one of only three countries in the world to allow same-sex marriage, along with the Netherlands and Belgium. At a more fundamental level, the Halpern decision has forced Canadians to re-examine the very notion of what it means to be a family in the 21st century.

This issue of Nexus is dedicated to exploring the important role that our faculty and alumni are playing as scholars, advocates, public servants and members of the judiciary, pushing the boundaries of the law and rethinking what we as a society believe a family can and should be.

Three main feature articles by professors Carol Rogerson, Brenda Cossman, and Martha Shaffer explore the evolution, change, and future of family law. A commentary by professor Kent Roach (page 32) probes the role of courts and legislatures in the gay marriage dialogue, and on page 34 professor Bernard Dickens examines the impact of modern medicine and reproductive technologies on notions of the traditional family. Alumni help to shape the debate with commentaries on page 40-42, and a special report on the *Halpern* case on page 27.

Finally, on another note, we met with some of our readers in the summer and received valuable feedback. You told us what you liked – and more importantly you told us how we could improve. In response, we have added two new departments, *Behind the Scenes* (page 5), and *From our Archives* (page 4) as well as more profiles of alumni, commentaries, and a shorter news section, now called *In Brief*. Please continue to write with your comments, feedback and suggestions for improvement. Happy reading – and happy holidays! ■

Jane Kidner '92
j.kidner@utoronto.ca
Editor

ON THE COVER

Historically, a "family" has been perceived as a married heterosexual couple with the children naturally conceived, or adopted, within the marriage. Evolving laws and new reproductive technologies may be changing all of that.

DEPARTMENTS

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FALL/WINTER 2003

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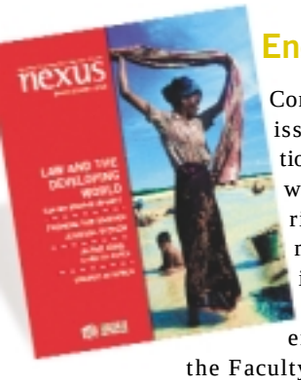

Encouraging Words

Congratulations on the recent issue of Nexus. As an international development practitioner working in the field of human rights/democratic development/peacebuilding it was interesting to read about research and practical endeavours undertaken by the Faculty. Some of the articles offered me ideas for integrating recent research of some professors into some of my monitoring assignments.

Kim Inksater, Class of 1993
Kimberly Inksater LL.B. Consulting Services, Ottawa

... It would be great to see environmental law highlighted in a future edition of Nexus, particularly now that the law school is building its strength in this area with the addition of Professors Green and Brunnee.

David R. Boyd, Class of 1989
Senior Associate, POLIS Project on Ecological Governance, Faculty of Law, University of Victoria

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Nexus...reflects the excellence of the faculty and trumpets their achievements with the appropriate balance of pride and good taste, so that I find myself reading about scholarly endeavours which leave my mind reeling over the intellectual challenges, which I, fortunately never had to contend with. I congratulate you for the success of this great publication.

Clifford Lax, Class of 1968
Partner, Lax O'Sullivan Scott LLP

Omission in Article: "Redressing Human Rights Violations in Sierra Leone"

(Nexus, Spring 2003, page 26)

I read with interest an otherwise informative article on Sierra Leone published in your Spring/Summer 2003 edition of "Nexus", but was most disappointed by a rather serious omission contained therein. The article claims that British and UN troops intervened to stop human rights abuses there, but says absolutely nothing about the fact that for years (while the British, Canada and the rest of the World stood by and watched) hundreds, nay thousands, of Nigerian troops were killed and maimed fighting to restore peace and human rights to that country. It was Nigerian troops that risked and lost their lives taking back most of the country from the rebels. It was Nigerian troops that virtually ended the horrific human rights atrocities committed by the rebels. While their contribution is important, the British and the UN came in at the tail end of this effort. As a scholar, a professor of international human rights law at Osgoode Hall Law School and a Nigerian, I found this omission to be most disturbing given its significance.

Dr. Obiora C. Okafor
Associate Professor,
Osgoode Hall Law School

In Response to Dr. Okafor's Letter

The point made by Professor Okafor about Nigerian peacekeepers fighting and dying in SL is wholly legitimate. There is, of course, much to be said about the Nigerian peacekeepers in SL, about their central role in stopping the Jan. 6, 1999 offensive on Freetown, about their role in ECOWAS and current UN peacekeeping forces, about the human rights abuses committed by some members of the peacekeeping forces from Nigeria and Guinea and their immunity from prosecution before the Special Court. I'd be pleased for your point about the Nigerian contribution to be raised in some forum. More generally, I am trying to bring a greater focus to African human rights issues here at the Faculty and I'd welcome the opportunity to discuss some of our initiatives if you are interested.

Noah Novogrodsky
Director, International Human Rights Program and Adjunct Professor, University of Toronto, Faculty of Law

FROM OUR ARCHIVES

first "test-tube" baby, was born

25 YEARS AGO: On July 25, 1978, Louise Joy Brown, the world's first successful "test-tube" baby, was born in Great Britain. The medical technology was heralded as a triumph of modern science, but it also caused many to consider the possibilities of future ill-use. Closer to home, the Faculty of Law had three female professors: Hilda McKinley, Marie Huxter, and Mary Eberts. The "small group" program had just been established by Dean Martin Friedland and Associate Dean Ralph Scane.

50 YEARS AGO: On June 2, 1953, Queen Elizabeth II was crowned at her Coronation ceremony in Westminster Abbey in London. Canada was led by Lois St. Laurent. At the law school, Caesar Wright reigned as dean, and students took part in the now famous march on Osgoode Hall to protest the Law Society's refusal to recognize the law program at U of T. The Class of 1953 had 15 graduates – all of them male. The law school was situated in Baldwin House on 33 St. George Street, where it had just moved from 45 St. George Street one year earlier.

U of T students march on Osgoode Hall

100 YEARS AGO: On December 17, 1903, the Wright Brothers made aviation history with their first flight at Kitty Hawk, North Carolina. The divorce rate was less than eight per cent. That year U of T introduced the LL.M. degree. Students who came to U of T for an LL.B. still had to spend three years at Osgoode before they could practice. The University law course attracted students including Mackenzie King (who would later become Canada's Prime Minister) and Clara Brett Martin, the first woman barrister in the British Empire.

Divorce rate was less than 8 %

BEHIND THE SCENES

"YOU NEVER REALLY KNOW A SUBJECT UNTIL YOU TEACH IT." SO SAYS CAROL ROGERSON, WHO HAS BEEN TEACHING WITH GREAT SUCCESS AT U OF T'S FACULTY OF LAW SINCE 1983.

One of the first handful of female faculty members at the law school, Rogerson has BA and MA degrees in English and almost pursued her interest in the poetry and prose of the nineteenth century as a career. Instead, she decided to go into law – and some 25 years later she is one of Canada's leading scholars in family law and a popular and well-respected professor at the law school.

A first year law student in 1979, Rogerson recalls professors such as Stephen Waddams, Michael Trebilcock, Dick Risk, and Katherine Swinton, as central to shaping her views on the law. Waddams, she recalls, "was my small group professor in first year and was simply outstanding. Then later, during the summer after my second year, I worked for Michael Trebilcock, which was a great experience." The feeling was mutual, according to Trebilcock: "I was astounded by her ingenuity, persistence and attention to detail, and struck by her intellectual openness and acuity – qualities that have subsequently made her one of the most respected members of this Faculty."

Like almost all academics, Rogerson found the first year of teaching to be the hardest, but, she adds, "the most rewarding too. You never relax in the classroom; there's always a bit of constructive tension." Also occasionally difficult, she says, was being a female in what traditionally had been a male domain. "My colleagues were extremely supportive, but the classroom dynamic was sometimes challenging in ways that are hard to quantify but easy to feel." She's quick to point out, however, that happily the gender balance on faculty and among students has pretty much become a non-issue at the law school.

Over the past 20 years, Rogerson has taught hundreds of students the content and form of family and constitutional law. Her métier, is the large lecture – "that's where I honed by teaching style" – but she enjoys all aspects of teaching, something that comes across clearly to her students. Sarah Kraicer, for example, who graduated with the Class of '86 and now works in the Constitutional Law Branch of the Ontario Ministry of the Attorney General, is full of praise about Rogerson's teaching and mentoring: "She was a thoughtful and inspirational teacher and today I continue to turn to her to talk about legal issues and to seek her wisdom."

For Rogerson, the passing years have also made her aware of the widening gap in age between those she teaches and herself. "When I began teaching," she laughs, "the students were pretty much my peers, but not anymore." Constantly changing too, says Rogerson, is the law itself. She's amazed, for example, at the ways in which family law has been remade in recent years. "Totally different," is how she describes both family and constitutional law between 1983, when she started teaching, and today. Over that span of time "all the statutory law that I reference has been reformed once, in some cases twice."

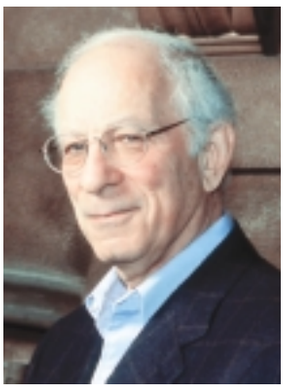
At the moment Rogerson's scholarship finds her immersed in what she predicts will be a five year project on the constantly changing issue of spousal support. Sponsored by the federal Department of Justice, Rogerson is working on the project with a colleague from Dalhousie University Law School, Rollie Thompson. Spousal support is both a highly contentious and a highly discretionary area of the law and, she stresses, what they are trying to do is engender "informal law reform" by "coming up with guidelines for judges and mediators based on capturing the trends in their current decisions." The net effect, she hopes, will be one of "speeding up the common law process by bringing into being standards and articulating principles for judgments about spousal support." Family law, says Rogerson, is an area where discretion on the part of judges and mediators is an intrinsic part of decision-making. Her research is meant to make that process easier, better, and more predictable. And that, says Rogerson, means that she can have an influence on the course the law takes. For legal scholars, there can be no higher aspiration. ■

BRAD FAUGHT

Brad Faught is a Toronto historian and writer. He is assistant professor of history at Tyndale University College and the author of *The Oxford Movement: A Thematic History of Tractarians and Their Times*.

PROF. CAROL ROGERSON

IN BRIEF


(L-R): Prof. Patrick Macklem, Prof. Emeritus Martin Friedland and Prof. Colleen Flood

FACULTY AWARDS & ACCOLADES

Since our last issue of Nexus *(Law and the Developing World, Spring 2003)*, a number of our faculty have received awards and recognition for publications, research, and distinguished careers.

MACKLEM AND FRIEDLAND HONOURED BY THE ROYAL SOCIETY OF CANADA

The Faculty of Law added its 10th Royal Society Fellow this past spring with the appointment of **Professor Patrick Macklem** to The Royal Society of Canada. In recognition of his career, the Society praised Professor Macklem for his "exceptional contributions to Canadian constitutional law as it relates to Aboriginal peoples" and for his "deep commitment to interdisciplinary and theoretical rigour". During his 15-year academic career at U of T, Professor Macklem has written and taught on various areas of law including indigenous peoples, constitutional law, and labour law and policy. He served on a Royal Commission on Aboriginal Peoples from 1993 to 1995, and wrote an award-winning book, *Indigenous Difference and the Constitution of Canada.*

A second recipient of the Royal Society of Canada's attention this year was **Professor Emeritus Martin Friedland,** who received the *2003 John William Dawson Medal.* The Dawson Medal is one of 12 prizes that the Society offers each year to Canadians for extraordinary achievement in the social sciences, humanities, and pure and applied sciences. Commending Friedland's "important and sustained contributions in a wide range of disciplines," the Society made special note of the fact that Friedland's legal work had been cited with approval by the highest courts in Canada, England, and the United States. Friedland has also recently received the *Chalmers Award* for the best book published on Ontario History in 2002. The award recognizes Friedland's sweeping account of the university's history in *The University of Toronto: A History* (2002). In June of this year Friedland also received an honourary degree from Osgoode Hall Law School to recognize his many contributions to the legal academy.

COLLEEN FLOOD AWARDED PRESTIGIOUS RESEARCH CHAIR

This past fall, **Professor Colleen Flood** was awarded a *Canada Research Chair in Comparative Health Policy* by the Government of Canada Research Chairs Program. Established in 2000, the Canada Research Chairs Program allows Canadian universities to attract and retain outstanding researchers who have shown promise or well-established success in their careers. To date, 926 Chairs have been awarded to researchers from across Canada and around the world. Colleen's work will analyze and assess the legal, political and economic processes chosen by countries around the world for determining which types of health care should be publicly funded. She hopes her comparative study will help health care policy decision makers both in Canada and around the world.

MICHAEL TREBILCOCK ACKNOWLEDGED FOR HIS SERVICE TO THE PROFESSION

This past July, **Professor Michael Trebilcock** was awarded an honorary degree by the Law Society of Upper Canada in recognition of his many contributions to the Canadian legal profession. At the ceremonies on July 10th, the Law Society acknowledged Prof. Trebilcock as a distinguished professor and legal author "who has provided unparalleled service to his students and the greater public [and who] personifies the character and integrity to which the legal profession aspires."

FACULTY MEMBERS PRAISED FOR THEIR BOOKS AND ARTICLES

The ranks of award-winning faculty expanded this past spring with **Professor Karen Knop** winning the *American Society of International Law Certificate of Merit 2003* for her book *Diversity and Self Determination in International Law.* Professor Knop's book was deemed by the Society to be a "preeminent contribution to creative scholarship". In her book, Knop discusses the emergence of new states and independence movements after the Cold War intensified the long-standing disagreement among international lawyers over the right of self-determination. For more information on the book, please visit the publications section of the Faculty's web site at www.law.utoronto.ca.

Also recognized in the book category were **Professors Michael Trebilcock, Ed Iacobucci** and **Ralph Winter,** along with '92 alumnus **Paul Collins,** who received the *2002 Purvis Prize* for a "work of excellence relating to Canadian economic policy" for their book *The Law and Economics of Canadian Competition Policy.* The book offers

a unique cross-disciplinary approach to scholarship in law and economics, while critically evaluating all of the major doctrines of Canadian competition policy. For more information, please visit the publications section of the Faculty's web site at www.law.utoronto.ca or visit www.utppublishing.com.

Praised for his article *"Discretion Unbound: Reconciling the Charter and Soft Law,"* **Professor Lorne Sossin** was bestowed the *J.E. Hodgetts Award* by the Institute of Public Administration in Canada (IPAC). The award, given for the best English language article of 2002, recognized Sossin's outstanding scholarly contribution to the field of Canadian public administration. The Canadian Public Administration journal examines the structures, processes, outputs and outcomes of public policy and public management related to executive, legislative, judicial and quasi-judicial functions at all three levels of Canadian government.

PHILLIPS APPOINTED DIRECTOR OF THE CENTRE OF CRIMINOLOGY

In Faculty news, **Professor Jim Phillips** has been appointed Director of the University's Centre of Criminology. Professor Phillips is cross-appointed to the Faculty of Law and the Department of History, and has extensive expertise in property law and legal history. In 2001, he was the winner of the *Mewett Teaching Award* at the law school for teaching excellence, and recently co-wrote *Murdering Holiness: The Trials of Franz Creffield and George Mitchell.* Professor Phillips will be on a half leave from the Faculty over the next three years to support this appointment.

LECTURES & CONFERENCES

Faculty and distinguished scholars from around the world offered a number of thought-provoking lectures and conferences at the law school this past fall.

DISTINGUISHED INTERNATIONAL JUSTICES TEACH COURSE AT THE FACULTY

Particularly noteworthy was an extraordinary visit by three very special guests, **President Aharon Barak** of the Supreme Court of Israel, **former Mr. Justice Dieter Grimm** of the Federal Constitutional Court of Germany, and the **Hon. Mr. Justice Frank Iacobucci** of the Supreme Court of Canada. The three eminent justices took part in a one-week intensive course in early September that introduced students to the role of Courts in reviewing the actions and laws of elected branches of government under the Constitution. The eminent justices discussed comparative legal aspects of constitutionalism from the Canadian, German and Israeli experience, and touched upon a number of Charter issues including same-sex marriage, abortion, and human rights in times of terror. The justices explained the role of judges in such complicated issues, and the need to balance the role of the legislatures with the role of the judiciary.

At a separate event held on September 10th, Justices Barak and Grimm also spoke about the growing importance of international law in shaping their countries' constitutions. The inaugural *International Law Society "Port Talk"* sponsored by the International Law Society and McCarthy Tétrault LLP, gave students an opportunity to hear Justice Grimm speak about the impact of the judicial decisions of the World Trade Organization, the World Bank/IMF, and the European Union. While he remains optimistic and supportive of European integration and the conventions, treaties, and legal decisions that it produces, he cautioned the audience to consider the counter-majoritarian effects and the issue of legitimacy on Germany's constitutional reform. From an Israeli perspective, President Barak spoke about the military constitution, settlements, the occupied territories and other aspects of Israeli life as well as the role of international law on shaping Israeli responses to these and other security dilemmas the nation faces.

FACULTY IN THE INTERNATIONAL ARENA

A day-long workshop on September 12, *Canada and the Use of Force: Caught Between Multilateralism and Unilateralism,* explored how Canada can most effectively influence the contemporary legal and political frameworks on the use of force in international relations. Organized by professors **Jutta Brunnée** of U of T Faculty of Law and Stephen Toope of McGill University, and sponsored by the Canadian Centre for Foreign Policy Development of the Department of Foreign Affairs and Faculty of Law, the workshop included discussions ▶

Prof. Michael Trebilcock

(L-R): The Hon. Mr. Justice Frank Iacobucci, former Mr. Justice Dieter Grimm, and President Aharon Barak

Prof. Doug Harris, Director, Capital Markets Institute

Prof. John McCamus, Osgoode Hall Law School

about the implications for Canada of possible tensions between its traditional commitment to multilateralism and its *de facto* dependence upon an increasingly dominant USA that shows strong tendencies towards unilateralism. Panelists included H.E. Paul Heinbecker, Canada's Permanent Representative at the UN in New York, Colleen Swords, Legal Adviser to the Department of Foreign Affairs and International Trade, as well as professors Margaret MacMillan, Provost and Vice-Chancellor of Trinity College, U of T, Emanuel Adler, Department of International Relations, Hebrew University of Jerusalem, and Janice Stein, Munk Centre for International Studies, University of Toronto.

A panel discussion *Exporting Generic AIDS Medicine to Africa* on October 17th explored ways Canada can amend its patent laws, manufacture, and export cheaper, generic versions of AIDS drugs to Africa, where it is estimated that nearly 29.4 million people have the disease. Chaired by Richard Owens, Executive Director, Centre for Innovation Law and Policy, panelists discussed how intellectual property law must bear some blame for the spread of AIDS, and that without barriers such as monopoly pricing of patented AIDS drugs, fewer lives might be lost. Panel members included Professor & Political Scientist Jillian Cohen, Faculty of Pharmacy, U of T; Patrick Kierans, Ogilvy Renault; Tim Gilbert, Gilbert's LLP; Professor Jonathan Putnam, U of T Faculty of Law; and Richard Elliot, Canadian HIV/AIDS Legal Network.

International Lawyers and Economists Against Poverty (ILEAP) gathered together international trade experts at the University of Toronto, Faculty of Law on October 24 to discuss trade and export implications of September's WTO Ministerial Conference on African and Caribbean Countries. In the months leading up to the WTO Conference, ILEAP advisors and trade experts provided advice and recommendations to assist negotiating teams in African countries. However, WTO members failed to reach a consensus. The panel discussion, moderated by Professor Michael Trebilcock, included ILEAP Executive Director Dominique Njinkeu, as well as David Chatterson, Department of Foreign Affairs and International Trade; Blanka Pelz, Canadian International Development Agency; and Susan Joekes, International Development Research Centre.

CAPITAL MARKETS, ECONOMICS AND COMMERCIAL LAW

The conference season continued with a half day Capital Markets Institute (CMI) conference dedicated to "*Income Trusts: A Made-In-Canada Market?*" on September 24th. The CMI was pleased to have finance and tax experts Paul Halpern, Oyvind Norli, and Jack Mintz, all faculty at U of T's Rotman School of Management, as well as Professor Mark Gillen from the University of Victoria Faculty of Law. Discussions included whether Canada's income trust market can provide useful lessons to capital markets policymakers. "This was the first time that Canadian academics have examined the current trust market in detail, providing analysis and policy recommendations at a stage when there are significant developments underway," said Professor Doug Harris, Director of the Capital Markets Institute. Copies of the papers and presentations are available on the CMI website at www.utcmi.ca.

One of the Faculty's most acclaimed conferences each year, the Annual Workshop on Commercial and Consumer Law, took place on October 17 and 18. Organized by U of T Professor of Law Emeritus Jacob Ziegel, and now in its 33rd year, the conference featured prominent lawyers, distinguished professors and scholars from across North America, Australia and the UK, including the Hon. Mr. Justice Maurice Cullity, Superior Court of Ontario, and the Hon. Mr. Justice Michel Bastarache, Supreme Court of Canada. Participants and panelists took part in discussions on contemporary issues ranging from developments in contract law, to consumer bankruptcies and enforceability of foreign judgments. Former English Law Commissioner, Andrew Burrows, Norton Rose Professor of Commercial Law, Oxford University, gave a keynote address on "Law Reform and the Work of the English Law Commission." Many of the papers and commentaries are expected to be published in the *Canadian Business Law Journal*. For more information, please visit the conference web site at www.law.utoronto.ca/cclworkshop/33index.html.

The American Law and Economics Association held its 13th annual meeting in mid-September at the Faculty of Law. Professors Jeff MacIntosh, Edward Iacobucci, and Kevin Davis, along with other speakers presented papers on topics including antitrust and regulated industries, and social welfare policy. "We were fortunate to have attracted top scholars from across North America to discuss how law and economics are impacting and influencing each other," said organizer and President of ALEA, Professor Michael Trebilcock. A dinner was held on September 20th at the Sutton Place Hotel, where incoming president Judge Frank Easterbrook, United States Court of Appeals (Seventh Circuit), spoke about the enforcement of US antitrust laws.

A number of guest speakers participated in the 12th Annual CACR Information Security Workshop &

4th Annual Privacy and Security Workshop on November 6 and 7. *Privacy and Security: The Next Wave* explored privacy issues and new technologies, and investigated whether security features are compliant with federal privacy legislation. This year's workshop showcased both private and public sector leaders in an interactive case-study approach. For more information, please visit the Centre for Innovation Law and Policy web site under "Centre News and Events" at www.innovationlaw.org.

PROF. FRIEDLAND LECTURE CELEBRATES 40TH ANNIVERSARY OF THE CENTRE OF CRIMINOLOGY

In celebration of the Centre of Criminology's 40th anniversary at the University of Toronto, the Eighth Annual John Ll. J. Edwards Memorial Lecture, *Criminal Justice in Canada Revisited*, was held on October 22. Named in honour of the Centre of Criminology's founder and our late colleague at the Faculty, Prof. John Ll. J. Edwards, Professor Emeritus Martin Friedland discussed some of the significant developments in the area of criminal justice in Canada over the past 40 years.

SARS - PUBLIC HEALTH AND HUMAN RIGHTS

Following the outbreak of Severe Acute Respiratory Syndrome (SARS) that led to the deaths of 44 Canadians and more than 800 citizens of China and Asia this year, experts from across Canada gathered at the Faculty of Law to consider what the epidemic has meant for international human rights. On October 31, the hard-hitting conference, *Human Rights in China, Globalization and the Spread of SARS*, examined China's response and the lessons to be learned from the outbreak. Panelists addressed topics such as public health and human rights, freedom of information, transparency and open government response, as well as the role of international law and institutions. A few weeks earlier, at a conference entitled *Anticipating the Next Pandemic Influenza Virus: Lessons from SARS*, Professor Bernard Dickens also discussed ways in which society and officials can deal with the potential future health epidemic. For more information, please visit the Faculty's web site under "Lectures, Workshops and Seminars" at www.law.utoronto.ca.

Class Valedictorian Noah Klar addresses his fellow graduates at Convocation 2003

The Hon. Madam Justice Maryka Omatsu

(L-R): President Elect of ALEA, Judge Frank Easterbrook, U.S. Court of Appeals for the Seventh Circuit, University of Chicago, and President of ALEA, Prof. Michael Trebilcock, University of Toronto Faculty of Law

AROUND THE LAW SCHOOL

READY FOR THE FUTURE: CONVOCATION 2003

With high spirits and great excitement, 160 students gathered at Convocation Hall on June 9 to celebrate the culmination of their years studying law at U of T. After a warm welcome by Dean Ronald Daniels, the Mewett Teaching Award for teaching excellence was given to Professor Lorne Sossin, who joined the Faculty in 2002. With words of inspiration about the future, Class Valedictorian Noah Klar urged fellow classmates to "remember the lessons we learned as a class, and to never to take justice for granted." Klar later collected the Gordon Cressy Student Leadership Award. Ending the ceremonies with a Hail & Farewell address, Professor Jim Phillips thanked students for their many contributions to the law school and reminded them of "the importance of community and service."

For a complete list of student awards given out at Convocation ceremonies, please visit the Student section of the Faculty's website at www.law.utoronto.ca.

A NEW BEGINNING: ORIENTATION 2003-2004

Just over three months later in early September, the 2003 Orientation Committee put together a special program for incoming law students. Highlights of Orientation week included a special event to meet faculty members, and a guest lecture given by the Hon. Madam Justice Maryka Omatsu (Ontario Court of Justice). In 1993, Justice Omatsu became Canada's first Asian woman judge when she was appointed to the Ontario Court of Justice. During the 1980s, Justice Omatsu distinguished herself as counsel and a negotiator for the National Association of Japanese Canadians in their successful claim for compensation from the Canadian government. Justice Omatsu urged students as junior lawyers to give back to the community. "Through *pro bono* work, you can make a difference and it will help you sustain the ideals that you brought with you into law school," said Justice Omatsu. The week also included a welcoming speech by Acting Dean Brian Langille who encouraged students to be fearless and honest in their thinking. "We do not ask that ▶

you either subvert or sustain any particular status quo. Rather, we ask you to pursue the truth as honestly as you can – and see where that takes you," said Langille. "Be open to arguments and positions with which you are unfamiliar or which you think you can ignore. Be civil with your comrades in intellectual arms."

STANDING OVATION FOR JUSTICE IACOBUCCI

Rounding out the Orientation festivities, the Hon. Mr. Justice Frank Iacobucci, Supreme Court of Canada, received a standing ovation from the first year class for his inspirational speech at the Distinguished Speaker Luncheon. Justice Iacobucci said his 18 years at U of T as both a faculty member and later as Dean from 1979 to 1983 were "stimulating, rewarding, and fulfilling in so many ways." Justice Iacobucci inspired students to make the best of their time at law school. "This is a place where I made among my most formative friendships which are still ongoing. I wish the same for all of you," he said.

GRAND MOOT IMPRESSES THE BENCH

Continuing the U of T tradition, three distinguished justices participated in this year's annual Grand Moot event on September 23. The Hon. Madam Justice Louise Arbour of the Supreme Court of Canada, the Hon. Mr. Justice Robert Sharpe of the Court of Appeal for Ontario, and the Hon. Madam Justice Joan Lax of the Superior Court of Justice Toronto listened attentively as four of the school's top law students presented their legal arguments. A showcase of a classic legal art, students Brock Jones, Keith Burkhardt, Sarah Perkins, and Ryan Morris put on a spectacular display to a standing-room only audience.

THE FACULTY THANKS CASSELS BROCK & BLACKWELL LLP

Students, faculty, and lawyers at Cassels Brock & Blackwell LLP gathered on September 29th at a special ceremony to thank the law firm and officially open and dedicate the Casssels Brock & Blackwell Classroom at the Faculty of Law. The modern, state-of-the-art classroom in Flavelle House was renovated to provide a high tech setting for up to 80 students, including those with disabilities. "We believe it is important for law students to have a top quality learning environment and I'm pleased to return to the law school to commemorate this classroom for students," said the Hon. David Peterson ('67) Chairman of Cassels Brock & Blackwell LLP.

The classroom dedication event also marked the launch of the "Pay-it-Forward" program, the brainchild of third year student David Wei, and supported by the Faculty and Cassels Brock. Second year students working at firms donate one day of their summer salary to a fund that supports additional student internships for public interest and international human rights. Noah Novogrodsky, Director of the International Human Rights Program (IHRP), said the Pay-it-Forward program piloted this summer funded three additional internships this year: Street Kids International in Peru; Project Ploughshares in Waterloo, Ontario; and the Canadian Great Ape Alliance in Cameroon.

A DISTINGUISHED CAREER HONOURED

Internationally renowned health law expert, Professor Bernard Dickens, retired earlier this summer. With 357 publications to his name, presentation papers in the thousands, and having served on a multitude of panels, advisory boards and committees, Professor Dickens has made an indelible mark on the law school, the University and Canada. To toast his career and pay tribute to his many achievements, a special dinner was held in his honour. Faculty and friends, including former Dean and University President Rob Prichard, honoured Professor Dickens' career by sharing anecdotes during the Vaughn Estate Retirement Dinner on September 25th. "Bernard Dickens was an exemplary citizen of both the law school and the University as a whole. As a scholar and teacher, he was enormously productive and recognized around the world for his leadership in his field. To the University and our teaching hospitals, Bernard gave selfless service for a quarter century in ensuring our ethical standards for research were consistent with the finest international norms. This wonderful but modest colleague lived his career to the highest standards we know at the Faculty of Law," said Prichard. To show the Faculty's appreciation for his many achievements, the University

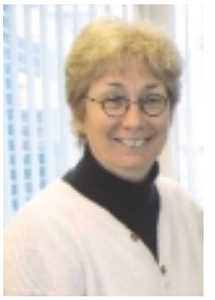
(L-R): Justice Robert Sharpe, Justice Joan Lax, Prof. Brian Langille, and Justice Louise Arbour (sitting)

Noah Novogrodsky, Director, International Human Rights Program

The Hon. Mr. Justice Frank Iacobucci

Prof. Bernard Dickens thanks guests at his retirement party

Jean Teillet ('94)



Ann Nunez ('93)

presented Professor Dickens with a teak bench as a retirement gift. "Bernard Dickens' retirement marks a significant moment in the life of this great faculty – a chance both to celebrate a colleague whose career exemplifies our highest ideals of scholarship and personal integrity and also to reflect upon and rededicate ourselves to those values which Bernard has advanced so admirably," said Brian Langille, Acting Dean.

ALUMNI NEWS

ALUMNI PUBLICLY RECOGNIZED, AWARDED

The Faculty is proud to report that the **Hon. Madam Justice Rosalie Silberman Abella** (Class of 1970) has won the *2003 Justice Prize of the Peter Gruber Foundation* for her international influence in the areas of equality, human rights and fundamental rights. The Justice Prize is awarded to individuals or organizations that have made significant contributions in the area of justice and whose efforts and accomplishments have furthered the cause of justice through the legal system. Justice Abella shares the honour with the Honorable Bertha Wilson, former justice of the Supreme Court of Canada. The justices were chosen by a panel of judges and lawyers for their work in breaking barriers limiting the participation of women in the legal system. The award and gold medals were bestowed to the justices in a formal ceremony in Marrakech, Morocco on October 8, 2003.

A number of our female alumni were recognized in a special Financial Post section of the National Post on September 10th dedicated to the legal profession. The top-ranked female general counsels in Canada included five U of T law alumni: **Linda Bertoldi** ('74), **Jean Fraser** ('75), **Susan Grundy** ('78), **Juli Morrow** ('79), and **Linda Robinson** ('77). The article also chose the top 15 up-and-coming lawyers to watch for, which included four U of T law alumni, **Diana Cafazzo** ('86), **Pamela Huff** ('85), **Susan Hutton** ('91), and **Karrin Powys-Lybbe** ('94).

Another U of T law school graduate made headline news when she won a decade-long legal battle to assert the Constitutional rights of Canada's Métis. The great-grandniece of Louis Riel, lawyer **Jean Teillet** (Class of 1994), helped win a landmark Supreme Court of Canada ruling recognizing that the Métis people are a distinct aboriginal group with a Constitutional right to hunt for food.

On December 4th, alumnus **Janet Minor** '73 received the Women's Law Association of Ontario 2003 Presidents' Award in recognition of her unstinting support of the WLAO, her dedication to public service, her contribution to the development of public law and her consummate professionalism. The Award was bestowed at a special dinner and ceremony at the King Edward Hotel.

ALUMNI HONOURED FOR THEIR VOLUNTEERISM

Five alumni were honoured this past summer with U of T's highest award for volunteer service to the University. **John Yaremko,** who along with his wife Mary, established the John and Mary A. Yaremko Program in Multiculturalism and Human Rights at the Faculty of Law in 2002, attended the Honours Law Program at University College in the late 1930s and has been an unwavering advocate for the importance of education ever since. **Frank Marrocco,** a 1970 graduate of the Faculty of Law, has been a member of the University of Toronto Tribunal since 1982 and serves as a Presiding Chair in trial level cases. A member of the class of 1980, **Scott Wilkie** has been an adjunct faculty member since 1999 and has been an invaluable addition to the academic program at the law school. Also serving as an adjunct faculty member since 1998, **Melissa Kennedy** (class of 1987) has been a member of her Class Reunion Committee and served as co-chair in 1992. **Laleh Moshiri,** a graduate of the class of 1992, has been instrumental in the success of various events held at the Faculty focusing on women in the profession and has demonstrated a strong commitment to students.

MILLER AND MARTIN: OUR NEW LEADERS OF TORONTO AND CANADA

The most exciting new development to report in this issue of Nexus is undoubtedly the election of David Miller '84 as Toronto's new Mayor, and Paul Martin '64 as the country's next Prime Minister. Both have had long and distinguished careers in politics, and both credit their desire to contribute to public life, in part, to their law school experience. Read more about these distinguished alumni on page 41 of Nexus.

IN MEMORIAM

The Faculty was saddened by the loss of alumnus **Ann Nunez** (Class of 1993) who died unexpectedly on October 2, 2003. Ann was born in Torrance, California, and eventually settled in Toronto. She graduated from the University of Toronto law school in 1993, was called to the Bar in 1995, and practiced law for four years before she was appointed to Ontario's Health Professions Appeal and Review Board. There she served as Vice Chair until her untimely death. Besides caring for her five children, who have all graduated or are attending Canadian universities, Ann found time to acquire her LLM at York University where she also recently taught mediation. Ann was a wonderful mother and a great friend to many. She enriched the lives of everyone she knew through her bright and sensitive mind, her sense of humour, her unique ability to get along with everyone, and her generosity of spirit. ■

Definitions of *Controversy, Contestation, and Change…*

PROFESSOR BRENDA COSSMAN

FAMILY

Family law regulates the family – which presupposes that we know what a family is. Yet, in Canadian law, the question of the definition of family has been the subject of controversy, contestation and change for many years now. At one time, the legal and social definition of the family was a much more straightforward affair. For example, a widely-used one defined the family as "a social group characterized by common residence, economic cooperation, and reproduction. It includes adults of both sexes, at least two of whom maintain a socially-approved sexual relationship, and one or more children, own or adopted, of the sexually-cohabiting adults." [1]

But demographic changes in the composition of the family since the 1960s have rendered such definitions all but obsolete. With the increase in divorce, single parenting, remarriage, and non-marital cohabitation, it is no longer so easy to define the family. Families may include one parent or three (bio mom, bio dad and step mom). Families may, or may not, live together. Divorce and remarriage means that children may live with one parent, and visit the other. Or it may mean that they spend equal amounts of time living with each parent and their new spouse. With the increase in rates of childlessness, families may have no children. Or they may have children through the use of reproductive technologies. Many Canadians now live together outside of marriage (so-called 'common law' relationships – although, strictly speaking, it is not a legal concept). For many, it is a temporary arrangement, a test on the road to marriage. For others, it is just how they live. And increasingly, these cohabiting Canadians are having children.

Canadian law has changed with the times. Definitions of family, of spouse, and of parent have expanded to embrace a broader range of familial relationships. In the 1970s, the law began to recognize cohabiting relationships for some limited purposes. In family law, spousal support obligations began to be imposed on these couples. In Ontario, for example, a man and a woman who had lived together in a conjugal relationship for a period of not less than 5 years would be considered to fall within the extended definition of spouse for the purposes of spousal support (in 1986, this was reduced to 3 years).

Definitions of parent were similarly extended to include not only individuals who were related to children by blood or adoption, but also to individuals who stood in the place of a parent. Step-parents, for example, could be treated as parents for the purposes of custody, access and child support, if they had shown a settled intention to the treat the child as a member of his or her own family. Parenting then had moved from a focus on biology and adoption to include a broader social relationship.

Beginning in the 1980s, same-sex couples began to challenge their exclusion of these extended definitions of spouse and parent as violations of their rights to equality under the Canadian Charter of Rights and Freedoms. While unsuccessful at first, throughout the 1990s gay men and lesbians were increasingly victorious in their efforts to have their parenting and spousal relationships recognized. In cases like *Re K.*[2], where an Ontario court allowed a step-parent adoption for a lesbian couple, the parenting relationships of same-sex couples began to be recognized. And in the groundbreaking case of *M. v. H.*[3], the Supreme Court of ▶

1 Murdoch, as cited in Margaret Eichler, Families in Canada Today 1983) at 3.
2 Re K. 23 O.R. (3d) 679
3 M. v. H. [1999] 2 S.C.R. 3

Prof. Brenda Cossman

Canada recognized that the exclusion of same-sex couples from a definition of spouse included in the Ontario Family Law Act for the purposes of spousal support was unconstitutional.

Following on the heels of *M. v. H.*, both federal and provincial governments moved to amend their legislation to extend rights and responsibilities to same-sex couples. In some provinces like New Brunswick and Newfoundland, the laws were amended more narrowly to only include same-sex couples for the purposes of spousal support. In other provinces like Ontario and Saskatchewan, the laws were amended to treat same-sex couples like unmarried cohabiting couples, extending the same rights and responsibilities.

Alberta, which was somewhat resistant to the recognition of same-sex couples, pursued a different approach. Instead of specifically extending the definition of spouse or partner to include same-sex couples, it introduced a law recognizing adult interdependent relationships. Any couple who met the definition of an adult interdependent relationship were granted a limited range of rights and responsibilities. In this way, Alberta was able to broaden the law to include same-sex couples, without having to recognize them as equivalent to opposite-sex couples.

Quebec and the federal government went the furthest, although they each pursued very different approaches.

Quebec, which had been ahead of the curve in recognizing and extending rights to same-sex couples, introduced a civil union regime, which allowed same-sex couples to register their relationships as civil unions, and thereby be entitled to all the rights and responsibilities of marriage. Although it wasn't called marriage (and its not clear that a province has the jurisdiction to change the definition of marriage in any case), the law introduced a parallel status that was equivalent to marriage.

The federal government amended its laws to treat all unmarried couples (same- and opposite-sex couples) the same as married couples. (At the provincial level, there are still significant differences. For example, no province yet recognizes unmarried couples as spouses for the purposes of the division of property on the breakdown of the relationship.)

For same-sex couples – particularly those in Ontario, British Columbia and Quebec where they are treated virtually the same as unmarried opposite-sex couples – marriage remained the final frontier. In the aftermath of their victory in M. v. H., gay and lesbian couples set their sights on the prohibition of same-sex marriage. Constitutional challenges were brought in those three provinces: Quebec, Ontario and British Columbia. And with one exception, the courts have unanimously agreed that the opposite-sex definition of marriage violates the equality rights of gays and lesbians, and is not a reasonable limit within the meaning of section 1 of the Charter.

Only the British Columbia trial court upheld the law, on what were increasingly questionable grounds. The court held that marriage was all about reproduction and that since only heterosexuals could reproduce, it was justifiable to limit marriage to opposite sexes. The court also suggested that neither the federal nor provincial governments actually had the jurisdiction to amend the definition of marriage. In this strange, and subsequently overruled, reasoning, since marriage is a head of power under the Constitution, and marriage in 1867 meant opposite-sex marriage, the federal government did not have the authority to change the definition: it could only be done by constitutional amendment.

Both the Ontario and British Columbia Courts of Appeal have subsequently weighed in on the side of same-sex marriage.[4]

In their view, there are simply no reasonable justifications for the violation of equality rights. The reproduction argument doesn't work. Plenty of heterosexual married folks choose not to have children, and plenty of gay and lesbian folks choose to have them, making the reproduction requirement both over- and under-inclusive. The tradition and morality argument doesn't work, because it is predicated on a history of discrimination against same-sex couples, and discrimination simply can't constitute a valid government objective. And the idea that the federal government does not have jurisdiction to amend the definition of marriage because it is a head of power under the constitution has been rejected as, at best unpersuasive, at worst absurd.

There is an increasing inevitability to same-sex marriage. In legal terms, many have seen it as "a no-brainer" – it involves the denial of formal equality rights to an important, publicly-sanctioned institution. And there is no longer any viable justification for the exclusion. Arguments that once carried a kind of common sense weight just don't hold up under close examination.

Following the British Columbia and Ontario Court of Appeal decisions, the federal government changed its course. It decided not to appeal the decisions to the Supreme Court, and instead, to introduce legislation allowing same-sex marriages. In an effort to defuse the opposition and protect freedom of religion, the proposed law would make clear that no religious organization would be forced to accept same-sex marriages. The bill has been referred to the Supreme Court, with three specific questions. Is the definition of marriage constitutional? Does the law protect freedom of religion? And what is the federal/provincial jurisdiction in relation to marriage? Assuming the bill passes constitutional muster, the

4 Egale v. Canada [2003] B.C.J. No. 994 (B.C.C.A.); Halpern v. Canada [2003] 225 D.L.R. (4th) 529 (O.C.A.) 3. At the time of the writing, the Quebec Court of Appeal has not yet delivered its decision.

Government intends to introduce the bill in Parliament, where it will be subject to a free vote.

While the federal government has joined the same-sex marriage bandwagon, the controversy has moved in the legislative forum, where same-sex marriage is anything but a "no-brainer". Politicians of various stripes are still trotting out arguments about marriage as religious, marriage as all about reproduction, marriage as a traditional and sacred institution that must be protected. Arguments that no longer hold any water in a judicial forum apparently still have considerable political clout.

And while the public opinion in the country remains divided on same-sex marriage, beneath the aggregate numbers lies a story of the inevitability of same-sex marriage. Poll after poll demonstrates that younger Canadians (defined as folks under the age of 37, or 35 or 32, depending on the poll) are overwhelmingly in favour of same-sex marriage. Older Canadians, on the other hand, are opposed. The conflict over same-sex marriage reflects a generation gap – a conflict over norms and values between different generations. And this generation gap only adds to the certainty that same-sex marriage is part of our future, as Canadians under the age of 35 will, in the not-so-distant future, become the Canadians under the age of 45. Subsequent generations will wonder what all the fuss was about, not unlike the way many of us look back at the civil rights struggles of the 1950's and 1960's and wonder how anyone could have been opposed.

Same-sex marriage will remain on the front pages of our newspapers for a while to come. The government bill may, or may not, pass on a free Parliamentary vote. It will be shameful if it doesn't. But, even if it doesn't pass, same-sex marriage will not go away. The fact that the federal government did not appeal the decisions in Ontario, British Columbia, and the anticipated decision in Quebec, means that same-sex couples will continue to be able to get married in these provinces.

The more interesting legal and public policy questions have already shifted beyond same-sex marriage. The Law Commission of Canada, for example, has recommended that governments fundamentally rethink the ways that they regulate adult personal relationships.[5] Instead of simply assuming that marriage and marriage-like relationships are always an appropriate proxy for allocating rights and responsibilities, the Law Commission recommended that all laws that take relationship into account be reexamined with the following four questions:

1. Does the law serve a legitimate policy objective? (if not, it should be repealed)
2. If the law does serve legitimate policy objectives, do relationships matter? Are the relationships that are included important or relevant to the law's objectives?
3. If relationships do matter, could the law allow individuals to choose which of their own close personal relationships they want to be subject to the law? (if so, revise the law to permit self-definition)
4. If relationships do matter, and public policy requires that the law delineate the relevant relationships to which it applies, can the law be revised to more accurately capture the relevant relationships? (if so, revise the law to include a more appropriate functional definition).

According to the Law Commissions, relationships often do matter. For example, there are important relational interests in laws that allow individuals to sponsor family members for immigration to Canada, or laws that are designed to prevent conflict of interests. But, the current law does not necessarily capture the right relationships, focused as it is on relationships of marriage, cohabitation, and sometimes, blood. Why, for example, would we not extend to two adult sisters who lived together for 30 years many of the same rights and responsibilities of marital and marital-like relationships? If they are emotional and economically interdependent, it might make sense to do so. But, few laws would include this relationship.

These broader questions regarding the relevance of adult personal relationships to law are the next frontier of the law and policy of familial definition. It requires that we think hard about why relationships are important in our lives, and how the law should take these relationships into account. It requires that we once again broaden our notion of who a family is – not only beyond marriage but also beyond relationships of blood and conjugality. If the reason that we think it is important to recognize and protect familial relationships is because of the unique nature of the economic and emotional interdependencies that characterize these relationships, then we might want to expand our concept of family to include these relationships.

Equality norms have played an important role in expanding definitions of spouse, parent and family in Canadian law to include unmarried opposite-sex couples and same-sex couples. But, the questions now on the table require that we think beyond the comparative dimension of equality – who should be treated the same as whom – to more fundamentally rethink the ways in which we regulate familial relationships. And these questions only further highlight the extent to which definitions of family must remain fluid and change alongside the ways that Canadians live and families change. ■

5 Law Commission of Canada, Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships (2001).

Brenda Cossman, B.A., LL.B., LL.M.

Prof. Cossman joined the U of T, Faculty of Law in 1999 as Associate Professor, and was promoted to Professor of Law in 2000. She teaches and researches in the area of family law, freedom of expression, feminist legal theory, law and sexuality, and law and development, and is an author or co-author of five books. She most recently co-edited *Privatization, Law and the Challenge to Feminism.* Prof. Cossman has prepared a number of research reports on the legal regulation and definition of the family for both the federal and provincial governments. Most recently, she was a research consultant to the Law Commission of Canada in relation to their work on the legal regulation of adult personal relationships. Prof. Cossman is currently on leave at Harvard University teaching Gender, Law and Public Policy, and Feminist Theory.

FAMILY LAW: DIF

PROFESSOR CAROL ROGERSON

FAMILY LAW IS AN AREA OF LAW IN CONSTANT FLUX. This is no surprise. The past couple of decades have witnessed significant changes in the family–increasing rates of divorce, shifting gender roles, and increasing rates of unmarried cohabitation, to name just a few—and family law has been struggling with how to respond. The shifting norms of family life are highly controversial, resulting in an unstable area of law characterized by constant shifts in policy as the appropriate balance between competing values is sought.

Two recent Supreme Court of Canada decisions, *Nova Scotia (Attorney General) v. Walsh*,[1] which dealt with the property rights of unmarried couples, and *Miglin v. Miglin*,[2] which dealt with the effect of separation agreements on rights to spousal support under the *Divorce Act*, graphically illustrate the contested terrain of modern family law.[3] Both cases, in their different contexts, raised important questions about the nature of family relationships and the obligations they generate upon breakdown.

In both *Walsh* and *Miglin* the Supreme Court of Canada's decisions were a surprise. Emerging patterns in family law, and indeed recent decisions of the Court itself, had emphasized the importance of state regulation to ensure fair treatment of vulnerable family members when complex relationships of interdependency break down. *Walsh* and *Miglin* reversed these trends, signaling that family law needs to give more weight to values of individual autonomy and choice, and their corollary, individual responsibility, in the structuring of family relationships.

1 2002 SCC 83, 221 D.L.R. (4th) 1.

2 2003 SCC 24, 224 D.L.R. (4th) 193.

3 For a much more detailed discussion of these cases see Rogerson, "Case Comment: *Miglin v. Miglin*" (2003), 20 Can.J.Fam.Law [forthcoming] and Rogerson, "Developments in Family Law: The 2002-2003 Term" (2003) 22 S.C.L.R. (2d) [forthcoming].

NOVA SCOTIA (ATTORNEY GENERAL) V. WALSH: THE PROPERTY RIGHTS OF UNMARRIED COUPLES

Walsh raised the issue of how the law should deal with unmarried couples—what are sometimes referred to as "common law" relationships. For most purposes, Canadian law now treats unmarried couples, whether opposite-sex or same-sex, like married couples, operating on the assumption that they function as family units and so should be treated as such.[4] The one striking exception is matrimonial property laws. Despite what many unmarried couples believe, they do not have an automatic right to claim equal division of property when their relationship terminates.[5] The issue of the justifiability of this continued exclusion finally reached the Supreme Court of Canada in the *Walsh* case.

FICULT CHOICES

Susan Walsh and Wayne Bona seemed like a typical married couple, except for the fact that they were not actually married. They had lived together for approximately 10 years (the median duration of marriage in Canada) and had two children. Walsh had given up her job to follow Bona when he was transferred and had not worked since the birth of their first child. When they split up, they had relatively modest assets, many of which were in Bona's name. As a common law partner, Walsh was allowed, under provincial law, to claim spousal support and child support, but was excluded from claiming property division under Nova Scotia's *Matrimonial Property Act*.

Walsh brought a constitutional challenge to the legislation, claiming that the exclusion of unmarried couples constituted discrimination on the basis of marital status under s. 15 of the Charter. The Nova Scotia Court of Appeal accepted Walsh's argument. However, in a move that surprised many legal commentators, the Supreme Court of Canada reversed, finding no violation of equality rights. The key argument at the Supreme Court of Canada was "choice." In choosing not to marry, reasoned the Court, unmarried couples (or at least *some* of them) have chosen to avoid the legal obligations of marriage, including that of property sharing. To impose such obligations would be an intrusion on their rights of liberty and autonomy–their rights to choose alternative family forms and have those choices respected by the state.

The Court's acceptance of the choice argument was surprising in light of its 1995 decision in *Miron v. Trudel* where it had ruled that s. 15 of the Charter protected against discrimination based on marital status and required that spousal benefits be extended to unmarried couples.[6] In that case a majority of the Court firmly rejected the choice argument and emphasized the similar ways in which married and unmarried couples function as family units.[7]

Justice L'Heureux-Dubé, as the lone dissenter in *Walsh*, continued to support the functional approach to the family. In her view Walsh and Bona's relationship was the same as a marriage—a long-term relationship of intimacy and mutual economic dependence—and to exclude relationships like theirs from the presumptive right to equal sharing of matrimonial property was unjustifiable. She offered a much more complicated understanding of the "choices" people make in intimate relationships and highlighted the limitations of the majority's reliance on choice arguments. Given that most people are not lawyers, she questioned whether they even took legal considerations into account when making the ▶

4 For more on this issue see Brenda Cossman, *"Definitions of Family"* on page 12

5 Unmarried cohabitants may rely upon the equitable doctrines of unjust enrichment and constructive trust to seek compensation for benefits they have conferred on the other partner during the course of the relationship, but these remedies are costly to pursue and the outcome is often very uncertain. Unmarried cohabitants do not have the benefit of the presumption of equal division of property granted to married couples.

6 [1995] 2 S.C.R. 418. *Miron* involved automobile insurance benefits that one spouse could claim when the other spouse had been injured in an accident. The majority in *Walsh* tried to distinguish *Miron* on the basis that *Miron* involved benefits conferred by a third party, whereas *Walsh* involved the obligations of the parties between themselves. This ignores, however, that rights of spousal support have been extended to unmarried couples.

7 The choice argument was accepted only by the dissenters, in an opinion authored by Gonthier J.

choice of whether or not to marry. She asked whose choice the law should respect if, for example, Walsh had wanted to marry but Bona had not. And most importantly, she argued that both marriage and cohabitation are *relationships* that develop and change over time in ways that the parties cannot predict at the beginning. A single moment of choice at the beginning of the relationship could not determine the obligations that partners owe to each other at the end. Walsh and Bona chose not to marry, but they also made many more important choices along the way, including the choice to have children.

Walsh has left family lawyers and policy-makers scrambling to understand its significance. Is it to be read only as a ruling on the rights of unmarried couples to sharing of property? Or does it signal a significant shift in thinking about how our legal system should, in general, deal with unmarried couples? Is the idea of choice an appropriate way of thinking about the legal consequences of relationships?

This new emphasis on choice bodes well for the interests of same-sex couples who are demanding that the legal system allow them the "choice" to marry. However, at least on the majority's version of the choice argument, it does little to protect the interests of women like Susan Walsh who did not marry and have been economically disadvantaged by years of caring for children. Unmarried couples are a diverse group. There are undoubtedly some who make a conscious mutual choice to be free of the legal obligations of marriage and who manage to retain their economic independence during the course of the relationship. Should family law's default rules, for those couples who have not entered into their own cohabitation agreement, be drafted for them, as the majority ruled, or as L'Heureux-Dubé J. argued, for Susan Walsh and Wayne Bona?

Walsh has left family lawyers and policy-makers scrambling to understand its significance.

MIGLIN V. MIGLIN: THE EFFECT OF SEPARATION AGREEMENTS ON RIGHTS TO SPOUSAL SUPPORT

A few months after *Walsh*, the Supreme Court of Canada decided *Miglin*, another important family law case that raised similar themes of choice and autonomy in family relationships. The issue in *Miglin* was the weight to be given to separation agreements releasing or limiting post-divorce obligations of spousal support. Should such agreements have binding effect, or should courts be able to over-ride them if they consider the outcome unfair?

In 1987, in a case called Pelech,[8] the Supreme Court of Canada staked out a strong policy choice of upholding spousal agreements and limiting courts' ability to relieve spouses of bad bargains. In the interests of facilitating a clean break between divorcing parties, they endorsed a very stringent test for over-riding final spousal support agreements—that of a radical change in circumstances causally connected to the marriage—that meant most agreements would be upheld, however unfair. Over the years the *Pelech* test has been the subject of much criticism because of its harsh results. Since *Pelech*, the Supreme Court of Canada has also significantly expanded the scope of the spousal support obligation, recognizing its important role in compensating spouses for the economic consequences of the marriage and its breakdown and in meeting post-divorce needs.[9] In *Miglin* the Supreme Court of Canada had to decide whether, in light of these developments, *Pelech* was still good law.

Eric and Linda Miglin separated in 1993 after a 14 year marriage during which they had 4 children and worked together in a family-owned resort business. After protracted negotiations conducted by their lawyers, the couple signed a separation agreement in which they divided their property equally, (Mrs. Miglin received the matrimonial home and Mr. Miglin retained the resort business). Mr. Miglin agreed to pay child support, and Mrs. Miglin, like many women, waived all rights to spousal support,[10] despite the fact that if she had gone to court she might have received a fairly generous support award. Five years later, Mrs. Miglin did go to court. She had not been employed since the separation, while Mr. Miglin continued to draw a salary of approximately $200,000 per year from the resort. She applied for spousal support under the *Divorce Act*, asking the court to over-rule *Pelech* and ignore the waiver of support in the separation agreement.

The Supreme Court of Canada's response was complicated and somewhat surprising. In a decision jointly authored by Bastarache and Arbour JJ., the Court did, as many predicted it

8 Pelech v. Pelech, [1987] 1 S.C.R. 801.

9 Those decisions were Moge v. Moge, [1992] 3 S.C.R. 813 and Bracklow v. Bracklow, [1999] 1 S.C.R. 420.

10 However, under the terms of a separate "consulting agreement," Mrs. Miglin was to receive annual consulting fees of $15,000 from the resort for five years. This could be viewed as modest form of time-limited spousal support.

While the new Miglin test allows some scope for judicial intervention in egregiously unfair agreements, the dominant message sent by the decision is that support agreements should be upheld, that a contract is a contract.

would, over-rule *Pelech*, finding its privileging of values of clean break inconsistent with the current law of spousal support. However, the new test crafted by the Court provided no relief to Mrs. Miglin. In the Court's view, there was no significant unfairness in requiring her to live with the terms of the agreement she had signed. She had had professional advice before she signed, the agreement had left her with significant assets, and there had been no unexpected changes since the agreement was signed. Most surprising of all, in terms of the Court's retreat from its prior decisions on spousal support, Mrs. Miglin was told by the majority that she had not been significantly disadvantaged by the marriage and could make the "choice" to work if she wished to improve her economic circumstances.

How did the Court reach this result? While the actual Pelech test was found to no longer be good law, the majority emphasized that the policy concerns that informed that decision–certainty, finality and autonomy–continued to have relevance. Respect for contracts remained an important value, in their view, to encourage settlement and discourage litigation. But an even stronger theme in the majority reasons, reminiscent of its earlier ruling in Walsh, is the need to allow couples the freedom to shape the support obligation to meet their own expectations and understandings of their relationship. The majority saw the spousal support obligation as uncertain and controversial. Couples should be allowed to make their own determinations of fair support obligations, rather than having them arbitrarily imposed by a court.

While the new Miglin test allows some scope for judicial intervention in egregiously unfair agreements, the dominant message sent by the decision is that support agreements should be upheld, that a contract is a contract. In language reminiscent of Pelech, the Court told Mrs. Miglin:

> Although we recognize the unique nature of separation agreements and their differences from commercial contracts, they are contracts nonetheless. Parties must take responsibility for the contract they execute as well as for their own lives.

Justice LeBel, with Deschamps J. concurring, wrote a strong dissent that criticized the majority for tipping the balance too far in favour of finality over fairness. Echoing the concerns voiced by L'Heureux-Dubé J in her dissent in Walsh, Lebel J. was strongly critical of the private contract model as the basis for regulation of the family. In his view, the context in which spousal support agreements are negotiated—one involving the disentangling of complexly interwoven lives, intense emotions, unequal bargaining power and flawed assumptions about the future—creates a high risk of unfair agreements that requires the redress of the courts.

Once again, as in Walsh, the dissent posed questions that challenged the majority's conceptions of choice and autonomy. Could it really be said that the separation agreement Mrs. Miglin signed reflected her true expectations and understandings of her marriage and the obligations it generated? Did it protect her autonomy? In Lebel J.'s view, the answers to these questions was no. Reading the facts of the Miglin's marriage in a very different way from the majority, and one more in keeping with the Court's previous support decisions, he saw Mrs. Miglin as suffering significant disadvantage from the marriage and its breakdown and as having a strong claim to spousal support that the separation agreement did not recognize.

CONCLUSION–THE CONTRACTUAL MODEL OF THE FAMILY

Taken together, Walsh and Miglin signal an increasing emphasis on individual choice and autonomy in the structuring of family relationships—and moreover on formal moments of choice such as the signing of a separation agreement or the decision to marry. Is this new shift in favour of individual choice and responsibility a much-needed readjustment of the balance? Will it temper an excessive paternalism that had crept into family law and allow greater scope for diverse family arrangements? Or, as L'Heureux-Dubé and LeBel JJ. argued in their dissenting judgments, is this contractual model of family relationships a move in the wrong direction? Does it ignore much of the lived reality of family relationships and offer inadequate protection of the interests of women and children?

At the very least, these decisions raise challenging questions about which choices and whose autonomy the law is protecting and how one determines the meaning of the "contractual" terms, whether implied or express, that structure family relationships. ■

Carol Rogerson, B.A., M.A., LL.B., LL.M.

Prof. Rogerson has been a professor at the Faculty of Law since 1983, and served as Associate Dean from 1991 to 1993. Her teaching and research interests include constitutional law, family law, children and the law, family theory and public policy. She is editor of *Competing Visions of Constitutionalism: The Meech Lake Accord* (with Justice Kathryn Swinton) and one of the co-authors of *Canadian Constitutional Law.* Prof. Rogerson is also the author of numerous law review articles in both the constitutional and family law areas and has frequently worked with governments on issues of family law reform.

REFORMING CHILD CUSTODY LAW: IMPROVED FRAMEWORK OR POLITICALLY DRIVEN WINDOW DRESSING?

PROFESSOR MARTHA SHAFFER

GENDER POLITICS are seldom far from the surface in family law. The law respecting child custody and access is no exception. Over the last two decades, custody law has become something of a gender battleground in which fathers' rights groups and feminists engage in heated and bitter debates. Fathers' rights advocates argue that custody law is biased in favour of women and thus discriminates against men. Feminists contend that this claim is inaccurate and that if anything, the law fails to place sufficient emphasis on the fact that women tend to be children's primary caregivers during marriage. They also argue that the law does not adequately address the relevance of wife abuse to custody and access determinations, with the result that courts sometimes make orders that place women and children at risk.

Under the current law, parental roles after marriage breakdown are described in terms of "custody" and "access." Custody has been understood to mean the legal right to make decisions regarding the child's upbringing, such as decisions about where the child will live and about the child's education, religious instruction and health care. Access provides the parent the right to visit with the child and to receive information about the child's welfare. A common arrangement within this framework is for the child to reside with the custodial parent and to spend alternate weekends and one evening a week (as well as additional holiday time) with the access parent. Other child-rearing arrangements are possible within the custody/access framework and are, in fact, becoming increasingly frequent. Joint legal custody arrangements in which both parents share responsibility for child-rearing decisions are increasingly common. So too are joint physical custody arrangements where children spend roughly equal amounts of time with each parent. The concepts of custody and access themselves have changed over time, such that there has been a gradual expansion of the rights of the access parent and a corresponding erosion of those of the custodial parent.

Despite the flexibility to fashion childcare arrangements within the current legal framework, the custody and access approach has been the subject of longstanding criticism. The most vociferous criticism has come from fathers' rights groups, but criticism has also arisen from other quarters, including divorce mediators and children's mental health professionals. Critics argue that the concepts of custody and access create a "winner takes all" mentality which increases conflict between the parents and diminishes their ability to focus on their children's best interests. The custody/access framework has also been blamed for the failure of some access fathers to remain involved with their children post-divorce on the theory that some parents become demoralized by being relegated to the status of "access" parent.

As a result of vigorous lobbying by fathers' rights organizations, custody law reform has been on the federal government's agenda periodically since the early 1990s. Most notably, fathers' rights groups were instrumental in pressuring the government to establish the Special Joint Committee on Custody and Access in 1997. The Committee's

public hearings received widespread publicity as a result of their often fierce gender politics. The Committee's report, *For the Sake of the Children*, and the government's response form the basis of the current reform initiative.

In December, 2002, the government introduced *Bill C-22*, which, if enacted, will dramatically alter the framework for structuring post-divorce parenting within the *Divorce Act*. The most fundamental change is that the Bill eliminates the terms "custody" and "access" and replaces them with the concept of a "parenting order," a change that is clearly aligned with the fathers' rights agenda. Parenting orders would deal with the amount of time each parent will have with the children ("parenting time"), as well as the allocation between the parents of decision making responsibility for the children ("parental responsibilities"). Under the proposed framework, both parents would receive the same type of order – a "parenting order"- rather than one parent receiving custody and the other receiving access. Like the current *Divorce Act*, the *Bill* specifies that parenting arrangements are to be made on the basis of the "best interests of the child." Unlike the current *Act*, which is generally silent as to the factors that courts should consider in ascertaining the child's best interests, *Bill C-22* contains a list of factors that courts must consider. These include "the benefit to the child of developing and maintaining meaningful relationships with both spouses and each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse", "the history of care for the child", and "any family violence." These latter two factors respond to feminist concerns.

According to the government's background paper, eliminating the terms custody and access serves several purposes. By removing the "win/lose" connotations associated with those terms, the new legislation will reduce parental conflict and stress. This will assist parents to focus on creating arrangements that meet their children's parenting needs rather than on battling each other and make it easier for parents to agree on parenting arrangements without going to court. Eliminating custody and access also allows for the creation of a new model of post-divorce parenting based on the idea that both parents are responsible for their children's well-being following marriage breakdown.

Bill C-22 is part of a law reform trend that is occurring across several western jurisdictions. England, Australia, and several U.S. states have already amended their legislation to eliminate the terms custody and access for reasons similar to those currently being advanced here.

It remains to be seen whether *Bill C-22* becomes law and if so, whether it will have any impact on post-divorce parenting, either in terms of reducing the adversarial nature of custody disputes or in terms of creating better post-divorce parenting arrangements. Based on studies recently conducted in the United States, England and Australia, the prospects do not appear to be promising. A Washington State study conducted in 1999 showed that despite the fact that custody and access had been replaced in 1988, the most common post-divorce child rearing arrangement remained one in which the children resided with one parent and spent every other weekend plus one evening per week with the other. While most parents agreed to joint decision making, this turned out to be unworkable for many, and particularly problematic for women who had been subject to domestic violence. Similarly, studies in Australia and England revealed that women who had been abused during their marriage often were pressured into parenting arrangements they believed were unsafe for them or for their children. The Australian study demonstrated that rather than decreasing use of the courts, its parental responsibility legislation was having the opposite effect.

Bill C-22 represents a political compromise between the fathers' rights agenda and feminist concerns. Whether it serves the best interests of children remains to be seen. ■

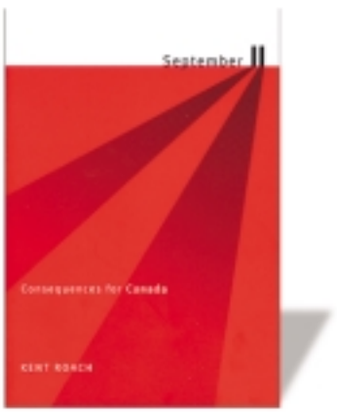
Eliminating custody and access also allows for the creation of a new model of post-divorce parenting based on the idea that both parents are responsible for their children's well-being following marriage breakdown.

Martha Shaffer, A.B., LL.B., LL.M.

Prof. Shaffer joined the Faculty of Law in 1990 and is now Associate Professor. She teaches and writes in the areas of criminal law and family law.

FACULTY PUBLICATIONS

Faculty members maintained their publishing momentum this year with professors publishing a number of books on topics ranging from reproductive health and human rights to the consequences of September 11 for Canada.



SEPTEMBER 11: CONSEQUENCES FOR CANADA

Professor Kent Roach

ISBN: 077352584X (HC); 0773525858 (PB)
Suggested retail price: $65 (HC); $22.95 (PB)

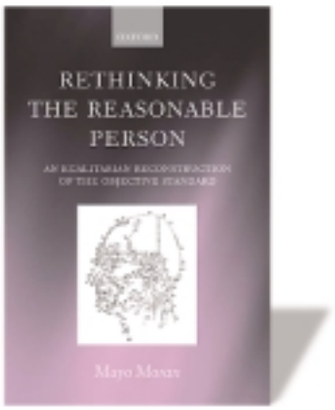
From the publisher: The September 11 terrorist attacks on the World Trade Center and the Pentagon have forced countries around the world to reevaluate their defence policies. In *September 11* Kent Roach provides a critical examination of the consequences of September 11 for Canada, showing how our laws, democracy, sovereignty, and security have been affected. A broad range of anti-terrorism measures are assessed, including the Anti-terrorism Act, the smart border agreement, Canadian participation in the war in Afghanistan, changes to refugee policy, the 2001 Security Budget, and the proposed Public Safety Act. Referring specifically to the threat of nuclear and biological terrorism and aviation safety, Roach argues that more emphasis on administrative and technological measures and less emphasis on criminal sanctions and military force may better protect Canadians from both terrorism and other threats to their security.

REPRODUCTIVE HEALTH AND HUMAN RIGHTS: INTEGRATING MEDICINE, ETHICS AND LAW

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

ISBN: 0-19-924132-5 (HC); 0-19-924133-3 (PB)
Suggested retail price: $65 (HC); $29.95 (PB)

From the publisher: The book is designed to equip health care providers and administrators to integrate ethical, legal, and human rights principles in protection and promotion of reproductive health, and to inform lawyers and women's health advocates about aspects of medicine and health care systems that affect reproduction. The authors integrate their disciplines in reproductive medicine, women's health, human rights, medical law and bioethics, to provide an accessible but comprehensive introduction to reproductive and sexual health. They analyze fifteen case studies of recurrent problems, focusing particularly on resource-poor settings. Approaches to resolution are considered at clinical and health system levels. They also consider kinds of social change that would relieve the underlying conditions of reproductive health dilemmas. The aim is to equip readers to fashion solutions in their own health care circumstances, compatibly with ethical, legal and human rights principles.

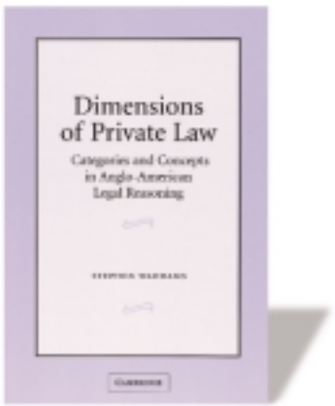


RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD

Professor Mayo Moran

ISBN: 0-19-924782-X
Suggested retail price: $110

From the publisher: The reasonable person standard plays a central role in the law, figuring prominently in tort law, criminal law, and administrative law. However, the reasonable person has also attracted substantial criticism from egalitarian critics and feminists insofar as it presupposes contested notions of 'normal' behaviour and may discriminate against certain classes of defendant. Judges and mainstream theorists also increasingly puzzle over what the standard amounts to and how to apply it. Using these controversies as a point of departure, *Rethinking the Reasonable Person* examines the promise and the perils of the reasonable person standard. Ultimately, it argues that an objective standard is not only defensible but essential. Yet only with a radical reconstruction will it be possible to realize the promise of the standard and to ensure a truly egalitarian conception of responsibility.

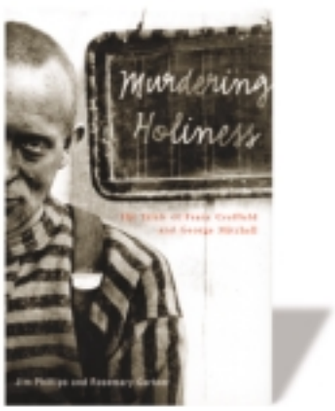


DIMENSIONS OF PRIVATE LAW: CATEGORIES AND CONCEPTS IN ANGLO-AMERICAN LEGAL REASONING

Professor Stephen Waddams

ISBN: 0521816432 (HC);
052101669X (PB)
Suggested retail price: $105 (HC);
$38 (PB)

From the publisher: Anglo-American private law (the law governing mutual rights and obligations of individuals) has been a far more complex phenomenon than is usually recognized. Attempts to reduce it to a single explanatory principle, or to a precisely classified or categorized map, scheme, or diagram, are likely to distort the past by omitting or marginalizing material inconsistent with proposed principles or schemes. Many legal issues cannot be allocated exclusively to one category. Often several concepts have worked concurrently and cumulatively, so that competing explanations and categories are not so much alternatives, of which only one can be correct, as different dimensions of a complex phenomenon, of which several may be simultaneously valid and necessary. This study will be of importance to those interested in property, tort, contract, unjust enrichment, legal reasoning, legal method, the history of the common law, and the relation between legal theory and legal history.

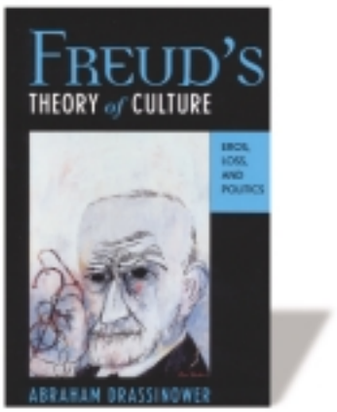


MURDERING HOLINESS: THE TRIALS OF FRANZ CREFFIELD AND GEORGE MITCHELL

Professors Jim Phillips *and* ***Rosemary Gartner***

ISBN: 0-7748-0906-X
Suggested retail price: $45

From the publisher: *Murdering Holiness* explores the story of the "Holy Roller" sect led by Franz Creffield in the early years of the twentieth century. In the opening chapters, the authors introduce us to the community of Corvallis, Oregon, where Creffield, a charismatic, self-styled messiah, taught his followers to forsake their families and worldly possessions and to seek salvation through him. As his teachings became more extreme, the local community reacted: Creffield was tarred and feathered and his followers were incarcerated in the state asylum. Creffield himself was later imprisoned for adultery, but shortly after his release he revived the sect. This proved too much for some of the adherents' families, and in May 1906 George Mitchell, the brother of two women in the sect, pursued Creffield to Seattle and shot him dead. The authors take us into the courtroom for the trial that made headlines across North America. Based on court records and archival sources, this case study includes a detailed examination of the trial, the media's response to it, and the dramatic aftermath.



FREUD'S THEORY OF CULTURE: EROS, LOSS, AND POLITICS

Professor Abraham Drassinower

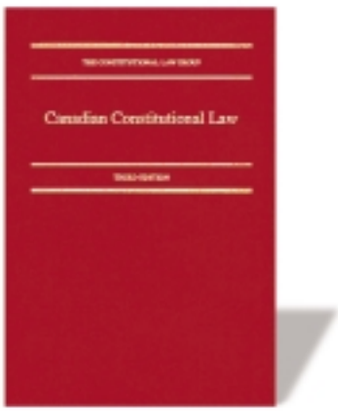
ISBN: 0-7425-2261-X (HC); 0-7425-2262-8 (PB)
Suggested retail price: $65 (HC); $29.95 (PB)

From the Back Cover: "Correcting the popular image of Freud as a morose pessimist, Drassinower presents him as a sober theorist of culture–where 'culture' means a pedagogy of 'mourning' which relentlessly pursues traces of Eros in the midst of our entanglement with death. Viewed in this way, Freud also emerges as a significant political thinker, steering a course between Hobbesian fear of death and Hegelian reconciliation, in the direction of an endeavor to lengthen creatively our 'circuitous paths to death.' A remarkably thoughtful, lucidly written work."

Fred Dallmayr, University of Notre Dame

"Freud's Theory of Culture is a pleasure to read. The work reveals a high degree of intelligence and learning. It has something to say and it says it clearly, elegantly, often poignantly. It is worthy of being read by anyone who works on Freud or his relationship to culture and politics."

Melissa Orlie, University of Illinois at Urbana-Champaign

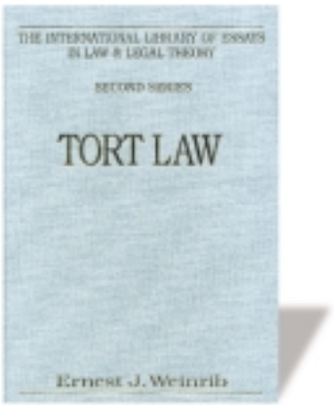


CANADIAN CONSTITUTIONAL LAW, THIRD EDITION

Professors Sujit Choudhry, Jean-Francois Gaudreault-Desbiens, Patrick Macklem, R.C.B. Risk, Kent Roach, Carol Rogerson, David Schneiderman and Lorraine Weinrib, along with Joel Bakan, John Borrows, Robin Elliot, Donna Greschner, Patricia Hughes, Jean Leclair, Richard Moon, and Bruce Ryder

ISBN: 1-55239-85-3
Suggested retail price: $94 (students); $125 (practitioners)

From the publisher: Sixteen academics from all parts of the country, known as the "Constitutional Law Group", joined forces to make this new edition a truly national project — one that benefits from geographical, regional, linguistic, and scholarly diversity. *Canadian Constitutional Law* provides up-to-date coverage and analysis of Charter jurisprudence, including recent developments in equality rights, freedom of expression, religion, and association, rights to life, liberty, and security of the person. With expanded analysis of contemporary constitutional issues relating to the Canadian federation, including secession, the spending power, the amending formulas, the criminal law, and the impact of international trade agreements on the constitutional order, the authors have provided the foundation for understanding constitutional decisions. The third edition remains true to the structure and purposes of previous editions, and especially to the idea that understanding constitutional history is critical to comprehending the present and future of Canadian constitutional law. This edition's historical reach has been extended back in time to the earliest colonial encounters between Aboriginal peoples and European colonies, and to the conflict between European empires over territorial and sovereign control of the continent.



TORT LAW, THE INTERNATIONAL LIBRARY OF ESSAYS IN LAW & LEGAL THEORY, SECOND SERIES

Edited by Professor Ernest Weinrib

ISBN: 0-7546-2142-1
Suggested retail price: $205

From the publisher: The first series of The International Library of Essays in Law and Legal Theory has established itself as a major research resource. The rapid growth of theoretically interesting scholarly work in law has increased a demand for a Second Series which includes significant recent work and also gives an opportunity to include additional areas of law. Volume editors have selected not only the most influential essays but those which they consider will be of greatest continuing importance. Each volume has an introduction which explains the context and the significance of the essays chosen. This volume contains essays on tort theory published in law journals over the last decade. All the essays explore the notions of justice that inform the doctrines and institutions of tort law. Many of them explicitly invoke the idea of corrective justice; others explore ideas of responsibility and fairness. Although the authors of these essays are frequently in disagreement with one another, they share a common interest in treating law as a normative phenomenon that is to be understood in moral terms.

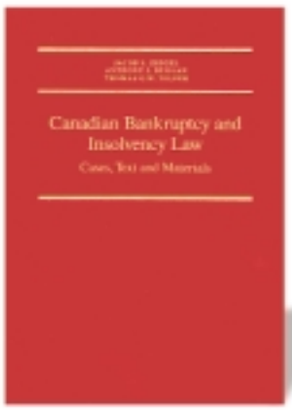
THE RULE OF LAST CLEAR CHANCE

Judith McCormack, *Executive Director, Downtown Legal Services*

ISBN: 0-88984-264-7
Suggested retail price: $18.95

From the publisher: "Fresh, imaginative, witty" these words have all been used to describe Judith McCormack's stories, gathered in a powerful debut collection. McCormack's offbeat characters, many of them lawyers, provide a lively look at the absurdities that lie beneath the skin of everyday life. A grocer who sells lobsters, a Cuban apothecary, a hapless thief, and a dreamy lawyer who navigates by smell are some of the people who fall in and out of trouble in these stories. The collection follows their restless attempts to find footing in a colourful but tricky landscape. All of this is detailed in language with a remarkable sense of cadence, punctuated with tart insights.

Her book has been called "devastatingly good" (John Metcalf); "an extraordinary new collection" (the Ottawa Citizen); and "a joy to read" (Nino Ricci). "The stories are rich with bang-on physical description, unforced natural dialogue and the telling particulars of daily life…*The Rule of Last Clear Chance* is a collection of substance…a debut to be savoured." (Quill and Quire).



CANADIAN BANKRUPTCY AND INSOLVENCY LAW

Professor Jacob Ziegel, Professor Tony Duggan, and Thomas Telfer *(Associate Professor, Faculty of Law, University of Western Ontario)*

ISBN: 1-55239-132-9
Suggested retail price: $84

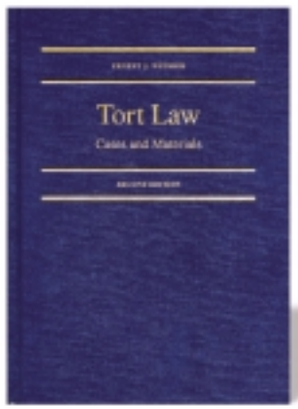
From the publisher: Bankruptcy law is no longer, if it ever was, the preoccupation of a few specialists. It permeates many branches of modern corporate, commercial, and consumer law and provides a rich intellectual fare, even for students not contemplating practicing in this field. This casebook is designed to give students an overview of the key issues in contemporary Canadian bankruptcy law and some appreciation of the actual operation of the Canadian bankruptcy system. It is a substantially expanded and revised version of part II of *Secured Transactions in Personal Property, Suretyships and Insolvency,* 3rd edition, by Jacob Ziegel and R.C.C. Cuming. The new edition includes updated and revised material in every chapter, as well as a new section on international insolvency. Introductory notes to many of the chapters and the notes preceding or following the source materials are intended to assist the student in putting topics and controversies in their proper context.

COMPARATIVE CONSUMER INSOLVENCY REGIMES

Professor Jacob Ziegel

ISBN: 1-84113-272-1
Suggested retail price: $78

From the publisher: All modern legal systems with advanced economies must address the question of how to respond to the needs of insolvent consumers whose burden of debt greatly exceeds their capacity to repay within a reasonable time frame. This study surveys comparatively the insolvency regimes currently in place or likely to be adopted in the foreseeable future in Canada, the United States, Australia, England and Wales, Scotland, Scandinavia and a representative group of Western countries on the continent of Europe. Modern legal systems have two basic alternatives in providing relief for over-committed consumers. The first, which involves restricting the enforcement of individual creditor remedies is a method with which this study is not concerned. Where the consumer is seriously insolvent and owes money to many creditors, a different approach is required — a collective solution to debtor's problems — and this, the solution provided by modern insolvency systems, is the focus of this study.



TORT LAW: CASES AND MATERIALS, SECOND EDITION

Professor Ernest Weinrib

ISBN: 1-55239-114-0
Suggested retail price: $92 (students); $125 (practitioners)

From the publisher: Professor Weinrib's casebook aims to illuminate tort law by including the most interesting judgments from the common law world, and to foster classroom debate by constantly juxtaposing judicial and academic material that gives conflicting views on the issues at hand. This new edition substantially revises and updates the previous edition with six years of case law, with major revisions to chapters dealing with duty of care, factual causation, wrongful life, vicarious liability, and psychiatric harm. The book's logical, natural progression through the basic building blocks of tort law encourages students to come to grips with judicial reasoning, not merely with the rules. The book combines comprehensive coverage with clarity and organization, making it perfectly suited for first-year students.

Photo courtesy of The Toronto Star © 2003

(L-R): Michael Leshner '73 and Michael Stark

U OF T LAW ALUMNI SHAPE THE DEBATE ON SAME-SEX MARRIAGE

This past June, seven same-sex couples made Canadian legal history when they won their three year court battle for the legal right to marry. On the morning of June 10, 2003, the Court of Appeal for Ontario released its landmark ruling in Halpern v. Canada, making Ontario the first jurisdiction in North America to legalize same-sex marriages. In that case, (now known as "Halpern" for the first named litigant, Hedy Halpern), the Court found that the definition of marriage as a lawful union between one man and one woman discriminated on the basis of sexual orientation, violating the couples' equality rights under s. 15 of the Charter.

One of those couples was alumnus Michael Leshner (class of 1973) and his partner of 22 years, Michael Stark. Although Leshner is perhaps the best known alumnus in the case, he is by no means the only one to have played a pivotal role. Indeed, representing nearly every side of this controversial issue, were a number of U of T law alumni. And while each is quick to point out they were just part of their respective legal teams in this complex case, we have every reason to be proud of the professional role that each played in helping to shape the future of family law.

THE BACKGROUND

The legal recognition of gay and lesbian couples began changing in 1999 following the Supreme Court of Canada's decision in *M. v H.* which extended spousal support to same-sex couples. Almost immediately, legislatures across the country responded by extending a vast array of spousal rights and obligations to same-sex couples. However, at least one very important legal right was still not available – the right to marry.

A year later, Leshner and Stark decided to test the issue, and applied for a City of Toronto marriage licence. "*The fact that we were not allowed to marry was always a human rights issue for us,*" said Leshner in an interview with Nexus.

THE CITY OF TORONTO TAKES A NEUTRAL POSITION

As counsel for the Clerk of the City of Toronto when Leshner and Stark filed their application in May 2000, class of 1979 alumnus **Leslie Mendelson** was involved from the very beginning. She explains that questions arose from the outset as to how to proceed, including whether the Clerk had the authority to issue a marriage licence to a same-sex couple under the provincial Marriage Act and its regulations.[1]

"*The most important question we had to deal with was whether a refusal to grant the licence would constitute a breach of the couple's rights under the Canadian Charter of Rights and Freedoms,*" says Mendelson. Although sexual orientation is not a listed ground of discrimination, the Supreme Court of Canada confirmed in 1995 in *Egan v. Canada* that Section 15(1) prohibits discrimination on the basis of sexual orientation.

Deciding to take a neutral position, the City of Toronto filed an application on behalf of the Clerk asking for the Court's guidance on the Charter issue. In the meantime, while the City waited for its answer, a number of same-sex couples issued a separate application asking the Court, among other things, for an order directing the Clerk to issue them marriage licences. A motion was heard to determine which court application ought to go forward, and Case Management Judge, Justice Lang, allowed the couples' application to proceed to Divisional Court while staying the Clerk's application.

"The most important question we had constitute a breach of the couple's

In April 2002 the Divisional Court released its decision in what would be the first in a series of victories for same-sex couples. All three judges of that court determined that the common law definition of marriage as "a union between one man and one woman to the exclusion of all others" was contrary to the Charter right to equality. The declaration was suspended for two years to allow Parliament to deal with the issue.[2]

Not about to wait for two years, just a few weeks later the couples appealed to the Court of Appeal for Ontario, represented by Martha McCarthy, a senior partner at Epstein Cole. A number of new litigants joined the case.

MAKING THE CASE FOR "SAME-SEX MARRIAGE"

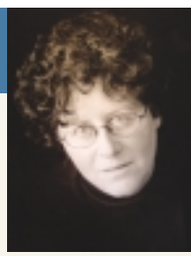
Supporting the position advanced by the couples at the Ontario Court of Appeal (which included Leshner and Stark) were several organizations, one of which was Egale Canada Inc., Canada's only national equality rights organization advocating for lesbians, gays, bisexuals and transgendered people.

1 Section 92(12) of the Constitution Act gives the Provinces power over "Solemnization of Marriage in the Province", which includes licencing. The word "marriage" is an undefined term in the Marriage Act, and the City's marriage licence application, which is a form under a regulation, refers to a "bride" and "bridegroom." Further, under Section 24(3) of the Marriage Act, during the marriage ceremony, the persons are required to be declared "husband and wife."

2 Under section 91(26) of the Constitution Act, Parliament has the power to legislate with respect to "Marriage and Divorce", which includes the rules governing the capacity to marry.

MICHAEL LESHNER '73, ONE OF 7 SAME-SEX COUPLES THAT WERE LITIGANTS IN THE HALPERN CASE

Michael Leshner graduated from the U of T Faculty of Law in 1973 and was called to the Bar in 1975. He clerked at the District Court of Ontario for one year, before settling into the Crown Attorney division at the Ministry of the Attorney General of Canada in 1976. Leshner has been with the AG ever since, where he has spent 13 of his nearly 30 years as Prosecutor in criminal court. Leshner began leaving his mark on Canadian law with his personal involvement in a 1992 Human Rights Tribunal ruling that the civil service must extend survivor pension benefits to same-sex couples. In December, *Out* magazine chose Leshner as one of its Top 100 most influential gay people in North America.



LESLIE MENDELSON '79, COUNSEL TO THE CITY OF TORONTO

Following her graduation from the U of T Faculty of Law in 1979, **Leslie Mendelson** articled as a clerk at the High Court and then began her career in litigation. For the past 14 years Leslie has practiced at the City of Toronto where she is regularly involved in litigation, judicial review and appellate level hearings on election matters, Building Code, zoning, and public health issues, and on Charter challenges involving municipal legislation. As in-house lawyer for the City, Leslie regularly appears in court to defend the City's position. This spring, Leslie was called on to provide advice and prepare for any litigation on behalf of Public Health arising out of the SARS outbreak. As a result of that involvement, she has delivered an in-house seminar, co-written a paper for a legal journal and presented at a Regional Municipal Solicitors meeting.

Class of 1991 alumnus, **Vanessa Payne,** a partner at Sack Goldblatt Mitchell, was counsel to Egale, an intervenor in the Ontario case. A native of Vancouver, Payne has worked on many Charter cases, including several significant lesbian and gay rights cases that have been decided by the Supreme Court of Canada. *"Egale's position was that any restriction on the freedom of same-sex partners to marry was discriminatory,"* says Payne. *"For Egale, the fundamental issue was one of choice. Heterosexuals enjoy the inherent dignity of being free to choose whether or not to marry. We felt that to deny same-sex couples the same freedom was discriminatory, because it denied lesbians and gays the autonomy to make their own choice about a fundamental societal institution."*

to deal with was whether a refusal to grant the licence would rights under the Canadian Charter of Rights and Freedoms"

In its case, Egale disputed the claim that the principal purpose of marriage was the procreation of children. *"The evidence demonstrated that both heterosexual and same-sex couples have and raise children through a variety of reproductive and parenting arrangements,"* says Payne. *"They both foster children, adopt children, conceive children by means of assisted conception and surrogacy, and form blended families with children from previous relationships."*

Egale also contested the assertion that freedom of religion would be jeopardized by equal marriage. *"Religious bodies have never been compelled to solemnize marriages that do not accord with their beliefs; civil recognition of same-sex marriages would not affect this right,"* says Payne. Finally Egale categorically rejected the notion of a "registered domestic partnership" regime for gays and lesbians which they felt would relegate lesbian and gay couples to a second class status.

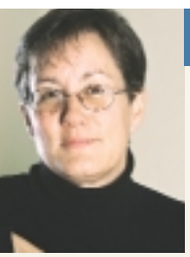
Also supporting the couples' position was the Metropolitan Community Church of Toronto (MCCT), a Christian Church belonging to the Universal Fellowship of Metropolitan Community Churches. Class of 1982 alumnus, **Douglas Elliott,** a partner at McGowan Elliott & Kim LLP, represented the MCCT. Himself a member of the church, Elliott has been involved as counsel in most of the important gay and lesbian equality litigation in Canada, including *M. v H.*, where he represented the Foundation for Equal Families at both the Court of Appeal and the Supreme Court of Canada. So when the MCCT asked Elliott to represent their interests in the case, Elliott enthusiastically agreed. *"I felt that it was important to demonstrate that there were a range of religious views on this subject. This was not about the gays versus God,"* says Elliott.

"The MCCT took the position that the existing definition of marriage was no longer acceptable and that it infringed upon the Church's right to freedom of religion, religious equality, and the rights of gays and lesbians under s. 15 (1) the Charter," says Elliott.

The central teaching of the MCCT, explains Elliott, is that Christianity and homosexuality are compatible, and that the traditional Christian view that homosexual acts are sinful is in error. *"It teaches that this view was based on misinterpretations of Scripture, as well as ancient, unscientific and outdated beliefs about the nature of human sexuality; beliefs that influenced early Christian attitudes toward sexuality in general, and homosexuality in particular,"* says Elliott. Also central to the MCCT's case was the legal validity of two same-sex weddings performed by the church in January 2001 under a religious process known as a "banns".

The position of the MCCT on freedom of religion and religious equality was supported by the Canadian Coalition of Liberal Rabbis for Same-Sex Marriage, a group of 25 liberal rabbis from synagogues across Ontario. The rabbis were represented by 1984 alumnus and professor of law, **Ed Morgan,** whose lengthy legal and academic career has included acting as legal counsel to various Jewish community organizations.

The liberal rabbis were concerned that their legal position be heard, says Morgan, because another group of religious intervenors introduced evidence from an orthodox rabbi that historically Judaism rejected same sex relationships. Morgan explains that the position of the rabbis was about equality rather than religion, and that the inclusion of same-sex partners in the definition of marriage would augment religious freedom in a pluralistic society.



VANESSA PAYNE '91, COUNSEL TO EGALE CANADA INC.

Vanessa Payne is a partner at Sack Goldblatt Mitchell, one of Canada's leading labour and constitutional law firms. A native of Vancouver, Vanessa earned a B.A. at Simon Fraser University in 1985 and then attended graduate school at the University of Toronto's Centre of Criminology. She graduated with Honours from the Faculty of Law in 1991 and was called to the Bar in 1993. A member of the law firm's research group, Vanessa's practice focuses primarily on written advocacy in the areas of labour, administrative and constitutional law. Over the past ten years, Vanessa has worked on numerous Charter cases at all levels of court, including several significant lesbian and gay rights cases that have been decided by the Supreme Court of Canada. She has also appeared as co-counsel before the Supreme Court in a number of constitutional and administrative law cases involving the rights of employees and trade unions.

It had been three years and several court battles since Leshner and Stark and other same-sex couples began their quest for equality. They weren't about to waste any time.

"In our view this case did not present a question of religious law but rather it presented a question of religious diversity and equality," says Morgan.

The liberal rabbis argued that equality rights under the Charter require that the law treat gay members of liberal religious denominations the same as their more conservative counterparts. They further argued that freedom of religion under the Charter protects the rights of liberal rabbis to officiate at same-sex ceremonies and the rights of their gay and lesbian congregants to have the state sanction their union.

MAKING THE CASE FOR THE TRADITIONAL VIEW OF MARRIAGE

In any litigation, there is always more than one argument to be made – and this case was no exception. The Association of Marriage and the Family in Ontario, a public interest group that supports traditional family values, intervened to advance their argument.

"Acting for an intervener in any constitutional law case, necessarily drives one to identify and advance issues that will not be addressed by the main parties in the litigation," says class of 1981 alumnus, **David Brown,** who acted for the Association.

Brown, who is a partner at Stikeman Elliott LLP, has had extensive experience in constitutional cases dealing with religious freedom, freedom of expression, division of powers over taxation, education and same-sex issues.

Much of the Association's intervention consisted of an argument founded on the division of powers between Parliament and provincial legislatures and the interplay between the equality guarantee of s. 15(1) of the Charter and the scope of the heads of legislative powers set out in sections 91 and 92 of the Constitution Act 1867.

The argument crafted by the Association was a simple one according to Brown. *"Since Confederation, the word 'marriage' in the Constitution Act has been understood as meaning only the union of a man and a woman,"* says Brown. *"Part of our argument, therefore, was that the courts could not unilaterally change the meaning of that word, and that any change to the meaning of a constitutional term would require an amendment to the Constitution."*

The Association further argued that the Court could not use a section of the Charter (in this case s. 15(1)) to abrogate or amend a provision in another part of the Constitution.

Also defending the constitutionality of the existing definition of marriage was class of 1982 alumnus **Gail Sinclair,** who along with lead counsel Roslyn Levine, Q.C. of McGill law school and others represented the Attorney General of Canada.

JUNE 10, 2003: THE DECISION IS RELEASED

On the morning of June 10, 2003, the Ontario Court of Appeal released its decision. Upholding the lower court's ruling, the Court of Appeal found that the traditional definition of marriage, as including one man and one woman, violated the Charter's section 15 equality guarantee and was not justifiable under section 1. However, unlike the decision of the British Columbia Court of Appeal, which had released a similar decision just over two months earlier but had suspended its declaration for two years, the Court of Appeal for Ontario made its declaration effective immediately. The declaration included a reformulation of the common law definition of marriage to now read: "the voluntary union for life of two persons to the exclusion of all others."

News of the Court's decision traveled fast. City of Toronto lawyer, Leslie Mendelson recalls that by 9:30 on the morning of June 10, 2003, she and others at the City of Toronto had the decision in their hands. *"A half hour later, we advised the Clerk to start issuing marriage licences to same-sex couples,"* says Mendelson.

It had been three years and several court battles since Leshner and Stark and other same-sex couples began their quest for equality. They weren't about to waste any time.

DOUGLAS ELLIOTT '82, COUNSEL TO THE METROPOLITAN COMMUNITY CHURCH OF TORONTO

Douglas Elliott is a partner with the Toronto firm of McGowan Elliott & Kim LLP. After graduating from the University of Toronto, Faculty of Law he was called to the Bar in 1984. He was certified as a specialist in Civil Litigation earlier this year. Mr. Elliott was the founding co-chair of the Sexual Orientation and Gender Identity Committee of the Canadian Bar Association at the provincial and national levels. Mr. Elliott is the current President of the International Lesbian and Gay Law Association. He has been honoured with the Community Service Award of the Metropolitan Community Church of Toronto and the Canadian AIDS Society's Leadership Award. Mr. Elliott has been before the Supreme Court of Canada on a number of occasions.

ED MORGAN '84, COUNSEL TO THE COALITION OF LIBERAL RABBIS FOR SAME-SEX MARRIAGE

After clerking at the Supreme Court of Canada from 1984-85, Professor Morgan spent four years teaching at the Faculty of Law, University of Toronto before leaving in 1989 to practice civil litigation at Davies, Ward & Beck. In 1998 Ed rejoined the Faculty of Law as a full time professor teaching in the fields of constitutional law and international law. He has published a book, International Law and the Canadian Courts (Carswell, 1990), and numerous law journal articles, case comments and journalism pieces dealing with current legal issues. He was national legal counsel to the Canadian Jewish Congress from 1998 to 2001, and is currently Chair of the Canadian Jewish Congress, Ontario Region. He has represented numerous public interest groups in human rights, constitutional and international law matters, including PEN Canada, the Writers Union of Canada, the Canadian Arab Federation, and the Assembly of First Nations.

The "Michaels", as they have become known, were first in line for a marriage licence that morning, and they were one of several couples to wed later that day in a civil ceremony held at 361 University Avenue. *"It was a tremendous victory,"* says Leshner. *"And while it was a conservative legal revolution, it shows that gay rights are about principled lawyers often doing pro bono work to address discrimination and fundamental human rights issues."*

All alumni who were involved in the case agree that it was an exceptional experience. *"It was a privilege to be involved in such an interesting and historically significant case,"* says Mendelson.

Doug Elliott agrees. *"My involvement in this case is undoubtedly one of the high points of my legal career. It is also a source of great pride for me as a Canadian,"* he says.

Counsel for the Attorney General of Canada, Gail Sinclair, describes more fully the significance of the case. *"The case was an exceptional one to work on from many perspectives. Clearly it will be a case of historical importance nationally and internationally. Nationally, it raised a treasure trove of issues – division of powers, the Charter, comparative constitutional law, international law and the role of the Attorney General of Canada. Internationally, once the proposed federal legislation is passed, Canada will be the third country in the world in which couples of the same sex can marry for civil purposes,"* says Sinclair.

THE EPILOGUE

On June 27th the Attorney General of Canada chose not to seek leave to appeal the judgment of the Court of Appeal for Ontario. On July 29th and August 14th, respectively, two intervenors in support of the traditional definition of marriage – the Association of Marriage and the Family in Ontario and the Interfaith Coalition on Marriage and the Family – sought leave to appeal the Court's judgment to the Supreme Court of Canada in separate applications. They asked the Court to give them party status and re-consider the case. In response, the Attorney General of Canada, along with the same-sex couples and the Metropolitan Community Church of Ontario, moved to quash those proceedings. On October 6, 2003, the Supreme Court of Canada heard oral argument on all three motions, and three days later released its judgment granting the motions to quash and dismissing the intervenors' motions.

In the meantime, on July 17th the Governor in Council referred to the Supreme Court of Canada proposed federal legislation to change the definition of marriage for civil purposes and asked the Court for an opinion on its constitutional validity.

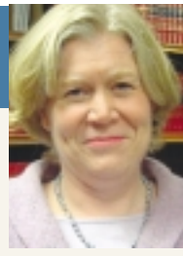
With the draft federal legislation now before the Supreme Court of Canada by way of reference, the country can only wait for the Court's opinion on its constitutionality. ■

JANE KIDNER

DAVID M. BROWN '81, COUNSEL TO THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO

David Brown is a Partner at Stikeman Elliott LLP and currently serves as a Director of the Advocates Society. David's career includes extensive trial, appeal and arbitration experience in complex commercial cases and as well as constitutional cases dealing with religious freedom and same-sex issues. He was recently listed as an expert in Electrical Energy in the 2003 LEXPERT/ALM Leading 500 Lawyers in Canada, and cited as a leading practitioner in the energy/natural resources field by the 2003 Guide to the World's Leading Energy & Natural Resources Lawyers. David's publications include: Energy Regulation in Ontario (Canada Law Book); "Sauvé and Prisoners' Voting Rights: The Death of the Good Citizen?" (forthcoming, Supreme Court Law Review, 2003); "Freedom From or Freedom For? Defining the Content of Charter Rights: Religion as a Case Study" (2000), 33 U.B.C. Law Review 551; and "What Can Lawyers Say in Public?" (1999), 78 Canadian Bar Review 283.

GAIL SINCLAIR '82, COUNSEL TO THE ATTORNEY GENERAL OF CANADA



Gail Sinclair is a Senior Counsel in the Public Law Section of the Department of Justice's Ontario Regional Office (Toronto). She graduated from the University of Toronto with a common law degree in 1982, and from the University of Montreal with a civil law degree in 1985. The Public Law Section is a group of a dozen lawyers responding to Charter challenges on the civil side, challenges that often have the Attorney General of Canada or the Privy Council Office as instructing counsel, or that have the potential of having an impact on more than one government department. In this role, she has been encouraging her colleagues for years to bring to bear an international comparative constitutional perspective - looking at what Germany, Israel, New Zealand and the UK have done on the same issue, both in legislation and in litigation.

The Gay Marriage Dialogue Between Courts and Legislatures

PROFESSOR KENT ROACH

The idea that the Charter promotes a dialogue between courts and legislatures over rights and freedoms has been winning support from courts and commentators. But some argue that the recent gay marriage cases demonstrate that the dialogue is more of a monologue with the courts calling the shots.

Prof. Kent Roach

The judges carefully examined the objectives behind the traditional definition of marriage and found that they could not justify the exclusion of same-sex couples.

Parliament affirmed its commitment to restricting marriage to opposite-sex couples in 1999 and again in 2000. What is striking about these debates in Parliament is how they were driven by perceptions of what the majority wanted. The debate was also very undisciplined. Side issues about whether the government was "anti-family" on matters such as young offenders and pornography were frequently explored. There was name calling on both sides of the issue.

Charter litigation provided a structure that was not present in the Parliamentary debates. The judges were not deluged with phone calls and faxes from their constituents and they did not have to worry about opinion polls and re-election. They did, however, have to worry about fairly listening to the parties and responding to their arguments. The adjudicative process can itself be seen as a structured dialogue in which the judges are obliged to respond to the parties' arguments and give reasons for accepting or rejecting the arguments.

The judges carefully examined the objectives behind the traditional definition of marriage and found that they could not justify the exclusion of same-sex couples. At first, they were careful to preserve some space for legislatures to respond to their decisions and delayed judicial recognition of same-sex marriages for a two year period. Suspended constitutional remedies are an important instrument of dialogue because they give the legislature a finite period of time to select among constitutional options while articulating what the court's remedy will be should the legislature not intervene. They have become quite routine in Canada and are now specifically contemplated under the South African constitution.

The Ontario Court of Appeal's decision in Halpern v. Canada altered this dialogic balance with an immediate and mandatory remedy recognizing gay marriages.

The Ontario Court of Appeal's strong actions, however, have not precluded the federal government from playing an important role. A decision was made by the Cabinet not to appeal the ruling but to draft legislation recognizing gay marriages but exempting religions from recognizing them. The Cabinet made a conscious decision to balance state recognition of same-sex marriages with state recognition of religious freedom not to recognize them. Although this policy has not satisfied some opponents of gay marriage, it was a significant act of accommodation and statecraft. It broadened the debate beyond the issue being litigated and is an example of dialogue between courts and legislatures in which the two institutions play distinct and complementary roles.

The definition of marriage remains very much a matter of continued political controversy and debate. There has been more interest about how Members of Parliament will vote than how the Supreme Court will decide the reference on whether the draft bill is consistent with the Charter. A motion re-affirming Parliament's 1999 resolution was defeated by a narrow 137-132 vote, even though it could be read as authorizing Parliament to use the notwithstanding clause to preserve the traditional definition of marriage. It remains unclear whether and when the draft legislation will be introduced into Parliament or whether it will be introduced in its current form. The government has committed itself to a free vote on the issue and the bill could possibly be defeated if the controversial override issue is taken off the table.

The defeat of the bill would, however, not alter the new status quo in Ontario and British Columbia where courts have now recognized gay marriages with immediate effect. A new legislative majority (probably in both Parliament and the provincial legislatures) would have to be formed for a civil union or registered partnership alternative and those options would be tested under the Charter. The sleeper in the reference may be the question which asks the Court to affirm exclusive federal jurisdiction over the definition of marriage. This may preclude dialogue at the provincial level. The division of powers, unlike the dialogic Charter, is not subject to reasonable limits or overrides.

My point is not to attempt to read the political tea leaves, but only to show that even on an issue where the courts have been quite bold, elected governments and legislatures still play an important role. It is possible that the federal government will be unable to enact its draft legislation. Whether the draft law is enacted or not, gay marriage might become a significant issue in the next federal election. These various scenarios all belie arguments that it no longer matters how legislators and the people vote. To be sure, the legislative agenda on gay marriage has largely been set by Charter litigation and the courts, but its outcome remains in the hands of our elected governments. ■

Professor Roach's books include Constitutional Remedies in Canada and *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue.*

REPRODUCTIVE TECHNOLOGY AND THE "NEW" FAMILY

PROFESSOR BERNARD M. DICKENS

THE RELATIVE SUCCESS WITH WHICH FAMILY LAW HAS ACCOMMODATED SOCIAL UNITS CREATED BY REPRODUCTIVE TECHNOLOGIES SUGGESTS THAT IT CAN SIMILARLY COPE WITH INCORPORATION OF SAME-SEX MARRIAGES. Legal recognition of the right of single people and same-sex couples to adopt children into their families shows how far this development has already progressed. This gives effect to the International Covenant on Civil and Political Rights, afforded general force in Canada by the Charter of Rights and Freedoms, which provides in Article 23(1) that:

> The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

This raises doubts whether society and the state could condemn *de facto* group units in society as unnatural because they involved new means of human reproduction, and deny them legal recognition as families.

THE HISTORICAL PERCEPTION OF A FAMILY

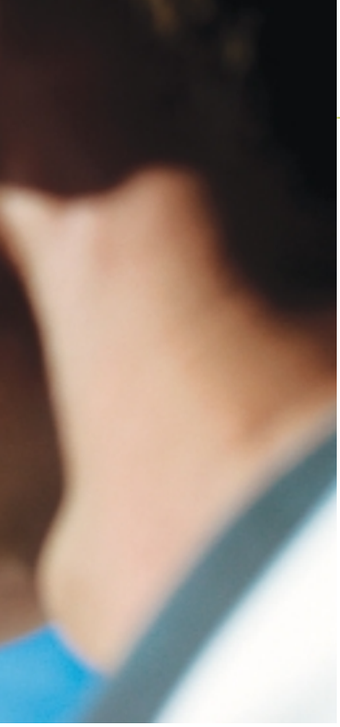
The historical perception of a family was modeled on a married heterosexual couple and the children naturally conceived or born within the marriage. The family history or tree was a coherent genetic and marital line traceable back through earlier generations. Family members were linked not just by genetics and affinity, but also by lawful succession to land, wealth and other inheritance. In law, children conceived and born outside marriage were denied rights of succession, since they were illegitimate or "bastard" children, a word that remains a degrading epithet. The description "illegitimate children" was unjust in stigmatizing children of illegitimate parents, meaning people who, by law, should not have conceived children together because they were legally unmarried or married to others. Modern abandonment of this characterization of children marked a salutary move towards justice.

THE SHIFT FROM BIOLOGICAL TO SOCIAL CRITERIA

With improving health care in the last half-century or so, divorce has largely replaced early death as the event that ends marriage, and remarriage is common. This has produced genetically compound families of "her children, his children and their children." Genetic complexity was no barrier to legal recognition of such families, which were understood to be "natural." The same applies to children born when medical means assisted a married couple to conceive a child of them both by artificial insemination.

The first legal contest to recognition of families created by medical assistance concerned whether a child conceived by artificial insemination through use of donated sperm was "legitimate" or whether the procedure constituted medically mediated adultery. Asexual reproduction by artificial insemination obviates sexual intimacy between partners, so no sexual infidelity is involved, but genetic infidelity may be involved. Even when a husband consents to sperm donation, his genetic lineage may be misrepresented to his family and society, and at his death family property may pass outside the family's genetic lineage. This is especially so in legal systems that maintain tenacious presumptions that children women bear in marriage are their husbands'. This benign presumption, which spares children the stigma of bastardy and protects their interests in paternal support and inheritance, shows historical authority for treating children conceived outside genetic lineage of a marriage *de facto* to be *de jure* members of the marital family. Legislation designed to accommodate artificial insemination by donor with a husband's consent incorporated legal paternity of the husband, and excused the donor of child support responsibility.

Identification of families by social rather than biological or genetic criteria was recognized when Ontario's Family Law Reform Act provided that the term "parent" includes "a person who has demonstrated a settled intention to treat a child as a child of his … family." The movement towards social criteria of family membership has recently gathered momentum, but has a long ancestry. Birth registration had identified children's mothers accurately by the coincidence of genetic and gestational criteria, up until the advent of ovum and embryo donation and surrogate motherhood. However, the legal presumption of legitimacy had, since earliest times, resulted in registration as children's fathers of their mothers' husbands, not only in cases of deception and doubt as to children's genetic paternity, but also in cases of husbands' known



and approved non-paternity. Men might deny fatherhood of children their wives conceived outside marriage, but those who knowingly or unknowingly did not were regarded in law as fathers, and the children were considered family members. Birth registration has long been a matter of social appearance and convenience, rather than authentic proof of genetic lineage.

FROM SURROGATE MOTHERHOOD TO EMBRYO TRANSPLANTATION

The unexceptional nature of the recognition as families of social units in which children are genetically unrelated to their adult guardians is shown in adoption. When a child is legally adopted into a family, its original birth registration is sealed and a new birth certificate is issued to show its name within its new family. In the early accommodation of surrogate motherhood, when the gestating mother was also the biological mother, the child was registered at birth in her name. On evidence of the father's biological paternity, when any husband of a surrogate mother denied his own paternity, the biological father would be entitled to custody of the child. However, he would usually also adopt the child, in order for a new birth certificate to be issued with the child registered in his name. His wife would undertake step-parent adoption in order to regularize her legal relationship with the child, and create consistent documentation.

The same practice was followed when the early form of so-called "partial" surrogacy developed, by *in vitro* fertilization (IVF) and embryo transplantation, into "full" surrogacy. In this, the gestational mother had no genetic bond to the child, but the legal presumption remained that the woman who gestated and delivered the child was its mother. The biological father's adoption and his wife's step-parent adoption would regularize the legal status of the family. Where a couple's husband provided the sperm for IVF, and his wife the ova, the resulting legal record would then coincide with the genetic record.

Some birth registrars who would accept evidence of the husband's biological paternity to acknowledge him as the child's father have been willing to accept evidence of his wife's provision of ova for IVF to record her as mother of a child gestated by a surrogate. This practice replaces the presumption of gestation and delivery of the child as constituting motherhood by recognition instead of ovum provision. The effect is to update legal recognition of motherhood, which was genetic, gestational and social, by accepting a form that is genetic and social, but not gestational.

POST-RELATIONAL PARENTHOOD

The modern willingness to see families as social rather than genetic units is seen outside as well as within Canada. United States jurisdictions operate much as Canadian, and the United Kingdom has gone further, by judicial and legislative means, to recognize posthumous parenthood. Deceased husbands' fatherhood is widely recognized of children born within 300 days of their deaths. The law in the U.K. now recognizes paternity of children conceived after death, by sperm recovery or donation prior to death and artificial insemination after death. In September 2003, Royal Assent was given to the U.K. Human Fertilisation and Embrylogy (Deceased Fathers) Act, which confirmed judicial rulings allowing registration of a man's fatherhood of his widow's child conceived after his death. This recognizes the social fact of his paternity in law, and also recognizes his child's genetic, though not necessarily legal inheritance.

The first legal contest to recognition of families created by medical assistance concerned whether a child conceived by artificial insemination through use of donated sperm was "legitimate" or whether the procedure constituted medically mediated adultery.

It is not clear that, unless amended by new legislation or a Charter judgment, Ontario law would allow this result, and further challenges remain. In September 2003, for instance, the English High Court refused to permit women to receive implantation of embryos, preserved by freezing, created with male partners from whom they had subsequently separated. The men no longer consented to father children with their ex-partners and, under the Human Fertilisation and Embryology Act 1990, implantation cannot be undertaken without their consent. United States courts have similarly favoured men's rights not to father children with women from whom they have separated over the women's claims to embryo implantation and gestation.

In February 2003, the English Court of Appeal, reversing the lower court, held a man not to be legal father of a child born by IVF to his ex-partner. The couple began IVF together but separated before embryo implantation. The woman requested implantation of the frozen embryos without disclosing the couple's separation. The man was not the biological father, because donated sperm were used for IVF. One may speculate whether the law, in England or Ontario, would apply differently had he been the biological father.

Accordingly, the law has scope for evolution on rights to found, and not to found, families. Many who find this area of the law at the fringe of their own immediate interests may find the approach it takes to be near the centre of values they hold important. ■

HUMAN RIGHTS PROGRAM WEA LITIGATION HAT

PROFESSOR ED MORGAN

The combined efforts of the Test Case Program for constitutional litigation and the International Human Rights Clinic have produced a series of cases over the past several years in which faculty and students have had the opportunity to remove their strictly academic thinking caps and put on their litigation hats. It has been, one might say, a nearly religious experience – or, at least, a highly educational one.

One recent initiative has the Faculty of Law forming part of a legal team advocating the right of Muslim schoolgirls in Singapore to wear religiously mandated headscarves in public schools. The controversy over wearing the *tudung*, as it is called in the Malay language spoken by most Singapore Muslims, or the *hejab*, as it is referred to in the Arabic language and in much of the Islamic world, has surfaced in numerous jurisdictions around the globe. The Quebec Human Rights Commission has confronted the issue, as have the constitutional courts of France, Germany, and Turkey, not to mention the European Court of Human Rights. For its part, the Supreme Court of Canada has dealt with the related issue of Sikh turbans in the R.C.M.P., and the U.S. Supreme Court has addressed the issue in terms of an Orthodox Jewish soldier wearing a *kippah* in the armed forces. Following the assortment of results is enough to make an international lawyer's hair stand on end.

In Singapore, the *tudung* question is closely related to the status and rights of the Malay minority in that country. While the Malays, as an indigenous people now numbering roughly 15% of the population, enjoy constitutionally entrenched protection for their mostly Islamic cultural and religious practices, these measures have not been applied in the context of Singapore's national schools. Rather, the schools operate on a strictly integrationist policy, requiring school uniforms from which no deviation is tolerated. The central government itself has weighed into the fray, declaring that education is crucial not only to national unity but to economic survival. The government's view is that the

Singapore national school system is at the vanguard of the country's continued success as one of Asia's economic 'tigers' and, indeed, its survival as a multi-ethnic polity. All of which has left Malay schoolgirls with bare heads and out in the normative cold.

Around the world, it is fair to say that the religious headgear issue has been addressed in much the same way as the Singapore debate has been framed: the societal or contextual need for uniformity versus the individual or community need for tolerance and diversity. It is a socio-religious version of an issue with which all law students are familiar. Do we force aggrieved minority groups and individuals to tough it out with their heads uncovered like the majority population, or do we allow for religious differences and require society to take its people as it finds them – a society-wide thin skullcap rule?

If one surveys the terrain one finds that Quebec has been more tolerant than France, and that Germany's constitutional court has sided in a definitive way with a Muslim schoolteacher who had been told to remove her *hejab* while at work. Meanwhile, the European Court of Human Rights refused to take the Turkish government to task for compelling students and even female members of Parliament to remove their headgear. Perhaps the most interesting pair of cases has been the U.S. and Canadian rulings over the issue of non-regulation headwear in uniformed police and armed services. The court in the United States has said that the military prizes discipline, and with it uniformity, above all other values, and is therefore justified in removing religious headcoverings from under the helmets of any of its Orthodox soldiers. The Supreme Court of Canada, on the other hand, has said that the Mounties must always get their man no matter what ethnicity or religion he may be, and has ruled that the turban may be worn in conjunction with the red tunic.

The entrance of the International Human Rights Clinic into the fray in Singapore harks back to one of the first cases engaged in by the Faculty of Law's Test Case Litigation program several years ago. In *Taylor v. Canadian Human Rights Commission*, the Federal Court addressed the question of whether a judge presiding over a trial can insist that audience members remove their hats as a sign of decorum and respect. Michael Taylor, an Imam by training, had refused to remove his *kufi*, a headcovering commonly worn by devout Muslim men, and filed a human rights complaint upon being ordered to leave the courtroom. The Commission dismissed his complaint on the grounds of judicial immunity, and Taylor sought review in the Federal Court of Canada. The Test Case Litigation program intervened as counsel to Canadian Jewish Congress in support of Taylor's claim, allowing Muslims and Jews – two peoples of the hat – to come together in a show of legal solidarity.

As it turned out, the Court was less generous with religious rights in the courtroom than has been the case with the classroom. The U.S. courts, in remarkably similar litigation by a Muslim challenger supported by the American Jewish Congress, have ruled that a person has a First Amendment defense to a charge of contempt of court where he or she is charged upon refusal to remove religious headwear in court. In Canada, however, the Federal Court of Appeal opined that just as a sitting judge is immune from the threat of civil action, he or she must also be free from a human rights commission's investigation of judicial conduct. Needless to say, one takes one's hat off to those U.S. appellate judges who have seen past their protective instincts toward fellow judges.

Having learned that the judicial process is often an unpredictable one, the International Human Rights Clinic has nevertheless gone into its recent project with a full head of steam. According to local counsel with whom the University of Toronto program is working, Singaporeans are scratching their heads wondering how their government will react to what is for that country an unusually activist use of the courts; however, the Canadian faculty and students working on the case have taken their heads out of the academic clouds and are optimistic about an ultimately successful result. Having done the comparative law research necessary for the case, it has become evident to us that in many jurisdictions the headscarf question is a thinly veiled excuse for government sanctioned prejudice.

Headcoverings, of course, are not the end of the road for religious rights, but rather are just the beginning. Indeed, the next possibility for an interfaith coalition spearheaded by the U of T Faculty of Law human rights advocacy programs may lie just ahead. In recent months we have received a heads-up that a group of concerned doctors has applied for Charter challenges funding seeking the abolition of all non-medically indicated male circumcision, which may include ritual circumcision as practiced by Muslims and Jews. Once again, a coalition may be forming along a familiar, if inverse theme. But perhaps, before making any further headway, I should stop there. ■

Ed Morgan teaches constitutional law and international law. He is the Director of the Test Case Litigation program and is the Faculty's Chair of the International Human Rights Clinic.

FOUR U OF T ALUMNI COMMENT ON THE CHALLENGES OF FAMILY LAW

We asked four prominent alumni to comment on the challenges of working in this highly controversial area of the law. Below, they provide four unique perspectives – from the bench, private practice, government, and a public interest organization.

STEPHEN GRANT '73

Stephen is a Counsel in the Litigation Section of McCarthy Tétrault LLP (Toronto), where his practice focuses specifically on family law and professional liability. He has worked on many high-profile family law cases, including Francis v. Baker and Black v. Black, and has been certified by the Law Society of Upper Canada as a Specialist in Family Law.

Practicing family law over the last 30 or so years has been like riding a roller-coaster. Whether the law anticipated changes in social norms, particularly the advent of feminism after the turbulent '60's, or responded to these changes is difficult to say. It was probably a combination of both.

The tumult has yet to subside. As fewer people marry but more choose to live in common law or same-sex relationships, the courts and legislatures will have to grapple with the property rights and obligations on these couples upon relationship breakdown to provide an even-handedness that is currently lacking. If a recent Sunday New York Times article has it right—namely, that women, having reached the promised land of equal opportunity, have chosen to eschew its supposed fulfillment as being ultimately vacuous—we are left with the perpetuation of the traditional roles in the male/female relationships, breadwinner or home manager/child-rearer, with economic disadvantage as the consequence of performing these functions.

When placed in the context of a constantly shifting legal landscape, the ability to advise is fraught with an overlay of uncertainty.

There can be no doubt, however, that family law has had a significant impact on societal norms. While the law, both statutory and common, has redressed decades of inequality, there is currently an imbalance: the pendulum is off centre. As I write this note, there are three distinct strains of family law in Canada: a law for women, a law for men and a law for rich men. Regrettably, they are all quite different.

This differentiation can be seen most clearly in the context of domestic agreements, such as separation agreements and marriage contracts. This is particularly applicable for those agreements that were negotiated in the 70's and 80's, when the emphasis was on economic rehabilitation and self-sufficiency (the "clean break" theory of separation).

Recent jurisprudence would have us compare the terms of an agreement with statutory objectives that attempt to balance competing spousal interests but ultimately, and rightly, the agreement is to be tested against a statutory backdrop of compensation for economic disadvantage arising from the marriage and its breakdown. This is clearly a more realistic approach and permits greater reliability on the legal efficacy of properly-negotiated domestic contracts. I was able to observe this phenomenon first hand as counsel in *Bailey v. Plaxton*, later overtaken by *Miglin v. Miglin*.

Still, as in other areas of law, family law is about managing clients' expectations. The main difference between other areas of law and family law is that the consequences to the family law client are intensely personal. When placed in the context of a constantly shifting legal landscape, the ability to advise is fraught with an overlay of uncertainty. While the law has become more formulaic, especially in the areas of property and child support, to the extent that there is judicial discretion (and there is still plenty), there will always be scope for disagreement about the likelihood of a particular outcome.

One thing is certain, though: the sociological perspective that this constant tension between social norms and legal rights and remedies is truly fascinating for the onlooker, especially for those of us privileged enough to have a minor role in the shifting of the tectonic legal plates.

What can possibly be next, you ask me? Wait until the Alpha Females dominate the Beta Males. Then we will see the pendulum start making full circles around its axis. ■

THE HON. MADAM JUSTICE LYNN KING '71

Recently, in the business section of *The Globe and Mail* of all places, I read an article about the Dalai Lama. It was on the "Art of Happiness at Work", which, given the context, made seeing his name among the financial columns make sense. Happiness at work, according to the Dalai Lama, comes from "benefiting other human beings." When it comes to my own work, as a youth and family court judge, that sentiment, from a good man, from another culture, couldn't be more true. For almost 19 years I have been a family court judge, and can sincerely say I have been "happy" every day of work. Family court, which at our court includes child welfare and youth court, provides all one could ask for in work, according to the Dalai Lama's definition. A key to this happiness is the presumption that one is consistently curious, and I am.

One of the biggest questions facing a family court judge, on a "macro" level as the business journalist who interviewed the Dalai Lama might say, is the role of the state in people's lives. This is acutely so in child welfare matters. In the most serious cases a child's life could be at stake. At the same time one must question the effectiveness of the state in its chosen role, namely, the protection of children. In private disputes,

…one must question the effectiveness of the state in its chosen role, namely, the protection of children.

about custody and access for instance, we must tread carefully when it comes to social engineering. The belief that with the right tinkering the best interest of the child will prevail should be approached warily.

Justice King practiced law for 13 years before her 1986 appointment to the Ontario Court of Justice. Since that time she has adjudicated primarily family law and youth cases in the family court at 311 Jarvis Street. She has written two books: What Every Woman Should Know About Marriage, Separation and Divorce; and Women Against Censorship

On the "micro" level, being a family court judge means learning something every day. The variety of family structures and behaviour seems limitless. As Tolstoy said "each unhappy family is unhappy in its own way." The great novelist was telling the truth.

I am constantly amazed at the inventive and heartbreaking ways, some of them nearly unimaginable, that family members make themselves and each other miserable. At the same time I am so often heartened by the kernels of strength, goodness and courage that show through in so many unhappy situations. There is resilience and goodness in the human heart. I get to see that, along with the difficulties and sadness. To quote Tolstoy again "Only those who are able to feel deeply can experience great suffering, but this very ability to feel deeply also allows them to love, and that is what heals them."

Finally, being a family court judge must be the best job in the world for a person like me who never, ever tires of other people's stories. ■

MARTHA MACKINNON '84

One of the unique challenges that Justice for Children and Youth has consistently taken on is that of asserting a role for children as individuals in the family. We represent children, take their instructions, and allow them, if they are competent, to give instructions even if it may not be in their best interests. It is for courts and tribunals to determine best interests, and for lawyers to represent clients, including young clients, even when such representation is used to oppose parents. Given that Canada was not just a signatory, but a proponent to the United Nations Convention on the Rights of the Child, children should be involved in legal processes that affect them. In fact, the *Convention* requires that the decisions made are in the best interests of the affected child.

Martha served as Counsel to the York Region Board of Education for eight years, and currently is Executive Director at Justice for Children and Youth, a legal clinic for low-income youth that advocates for a child-centred perspective in family law and child protection cases. Martha has argued cases on issues including sibling access, deportation and power of decision-making.

Justice for Children and Youth has worked on many issues representing the interests of children, one example being the right to sibling access in child welfare and in family law generally. When a child is made a Crown ward available for adoption, existing parental and family access is terminated. This may be fair to the biological parents who lost the right to parent through a court process or consent, but it does not reflect the interests of a sibling who was not responsible for the adoption process. We represented a boy whose access to his sister was terminated when her private adoption succeeded, while his adoption placement broke down. Eventually after jurisdictional and substantive issues were argued up to the Supreme Court of Canada, the boy won the right to have post-adoption access to his sister.

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MARTHA MACKINNON '84

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We have also represented young people who sought to know the identities of their fathers where the mother wanted to keep paternity a secret in order to protect an existing or subsequent family. We intervened in the *Louie v. Lastman* case at the Court of Appeal in order to argue that children are entitled to know the identity of their biological parents and that parents have a legal obligation to disclose their identities to their children. Unfortunately, the Louies were unwilling to put any responsibility on their mother to disclose the identity of their father in a timely way, so the court did not rule on our submissions. It will be a continuing issue for children who cannot assert their rights against their parents if they do not know who their parents are. We received many telephone calls from "children" as old as 78, who cannot rest until they know the identity of their fathers. No doubt at the time the decision was made to keep parental identity a secret, it was considered wise from the parental point of view, but I am proud of the unique role that Justice for Children and Youth plays in looking at legal issues in the family, in restructured families and in external institutions where parents exercise decision-making power over the child's life.

If we accept that children are human beings and individual rights-holders, then our notion of family must adjust to include respect for all its members.

I am certainly not suggesting that children should be able to "rule" the family, but I am saying that our concept of family will be stronger and will better prepare our children to live in a civil society if we pay genuine respect to the perspectives of all of its members. ■

SARAH KRAICER '86

After four years at McCarthy Tétrault LLP, in 1991 Sarah joined the Ministry of the Attorney General (Ontario) and is currently counsel in the constitutional law branch. Sarah has recently been counsel in a number of high–profile cases involving constitutional issues in the family law context, including Walsh v. Attorney General of Nova Scotia and Falkiner v. Ontario.

As a constitutional lawyer, your question sets me thinking about the difficult issue of how the state defines, and then uses the concept of family to recognize rights and responsibilities and to distribute benefits in society. In fact, this issue has been at the heart of a significant number of recent cases that have challenged definitions of family in a variety of contexts, including private property division *(Walsh)*, social assistance eligibility *(Falkiner)*, and private support *(M. v. H.)* which my colleagues at the Constitutional Law Branch and I have had the opportunity to be involved in.

Underlying these cases is the fundamental question of whether, and how, the state can take into account existing social definitions of family relationships and family structures in fashioning social policy. For example, when entitlement to support, or property, or social assistance depends on whether or not you are a "spouse", the definition of who is a spouse is of critical importance. The first challenge for the state is to determine when social policy should take into account family relationships, rather than simply being based on the individual. In some contexts the answer to this may be obvious; for example, family law legislation must deal with family relationships. However, it is a question that must be addressed in other contexts, such as conflict of interest, or benefit entitlement.

If family relationships are to be taken into account, the second challenge is how to define the family relationship to meet the particular social policy objectives at issue, given the changing forms, structures and roles of families in Canada today.

These questions are legal questions as well as social policy questions, because of the constitutional guarantee of equality in the Charter. Our courts continue to grapple with these fundamental issues about the family and the state. And since these issues do not have easy answers, and because the family is constantly evolving, it is an area that has given rise to some really fascinating work for constitutional and family lawyers.

In my own experience, I recently acted as counsel for the intervenor the Attorney General of Ontario in the case of Attorney General of Nova Scotia v. Walsh, which challenged the exclusion of common law spouses from the statutory scheme for property division in family law legislation. The challenge for counsel supporting the existing law in that case was to convince the Supreme Court of the good reasons why only married relationships should be subject to a family law property division regime, while both common law and married relationships are subject to family law support obligations. The arguments in the case required an examination of the sociology of common law and married couples, the origins of property division and support laws, and the underlying values of autonomy and choice involved in marriage, and in common law relationships. Despite a series of lower court decisions striking down similar laws, generally negative academic commentary, and skepticism from most of the family law practitioners I know, the arguments of Nova Scotia and the intervening provinces were accepted by the Supreme Court, and the constitutional validity of the law was upheld. The practical result in Ontario was that dozens of challenges to similar Ontario legislation were quickly settled, and the question of the validity of this particular definition of family, in this particular context, has been answered. ■

ALUMNI REPORT

Canada's Liberals Choose Paul Martin ('64) As Their New Leader

AFTER 15 YEARS IN ELECTED POLITICS, THE HON. PAUL MARTIN WILL STEP INTO THE COUNTRY'S TOP POLITICAL SPOT IN DECEMBER, THE FIRST ALUMNUS OF THE MODERN FACULTY OF LAW TO LEAD THE COUNTRY.

"Paul Martin's vision for Canada will no doubt have far reaching global significance as he steers Canada through an important time of change for the nation..."

At the November 14th Liberal leadership convention, an overwhelming 93 per cent of delegates elected Paul Martin as the leader of the Liberal Party of Canada. On December 12th, he will be sworn in as Canada's 21st Prime Minister.

Before entering politics, Martin had a distinguished career in the private sector as a business executive of Power Corporation of Canada in Montreal, and as Chairman and Chief Executive Officer of Canada Steamship Lines. But the call to public service was strong. In 1988, Martin left the corporate world to take a seat in Parliament as a back-bencher for the opposition after he was elected as Member of Parliament for LaSalle-Émard, in Montreal, Quebec.

Born in Windsor, Ontario, Martin was not the first family member to enter and succeed in politics. His father, the Hon. Paul Martin Sr., was a distinguished Parliamentarian, an influential cabinet minister and an important influence on his son. Paul Martin's university education began at St. Michael's College at the University of Toronto where he studied philosophy and history. He went on to attend the Faculty of Law and graduated in 1964. One year later, he married Sheila, and together they have had three sons, Paul, Jamie and David. He was called to the Bar of Ontario in 1966.

In 1990, Martin assumed the roles of Associate Finance Critic and Critic for the Environment for the Liberal opposition in the House of Commons. He played a key role in developing the Liberal platform for the 1993 federal election. That same year, the Liberals returned to power and Martin became the Minister of Finance, a position he held for nine years until 2002.

During his time in the finance chair, Martin led the country to five consecutive budget surpluses, wiped out a $42 billion deficit, and instituted the largest tax cuts in Canadian history. Martin was highly regarded within the Cabinet, was seen publicly as one of the most successful Finance Ministers, and represented Canada well at a series of international summits. In 1999, he was appointed inaugural chair of the G-20, an international group composed of G-7 and emerging market nations.

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The Honourable Paul Martin receiving the 2002 Distinguished Alumnus Award, presented by Ms. Kirby Chown ('79)

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Most people who have met Martin know him as being open and accessible, charming and possessing a curious nature that is both refreshing and disarming. To most Canadians, he's the man who eliminated the deficit and is committed to strengthening social programs and foreign aid.

"Paul Martin's vision for Canada will no doubt have far reaching global significance as he steers Canada through an important time of change for the nation. We are all enormously proud that he is an alumnus of the Faculty," says Dean Ronald Daniels.

In 2002, Martin returned to the law school to accept the Distinguished Alumnus Award that recognizes the achievements of the law school's most illustrious graduates and their contributions to society. The Faculty looks forward to witnessing Paul Martin's future accomplishments and his leadership of Canada. ■

KATHLEEN O'BRIEN

New Mayor David Miller ('84) to Revitalize Toronto

The new Mayor of Toronto says his legal education and law career provided him with the skills necessary to become a successful politician. In December, class of 1984 alumnus, David Miller, started his new role as Mayor after receiving 44 per cent of the vote in the municipal election.

Miller entered politics in 1994 after a successful career as a lawyer at Aird & Berlis, where he specialized in employment, immigration and shareholder-rights litigation. During his ten years at the firm, Miller rose to partner, but says his desire to contribute to public life, which began at law school, led him toward an unplanned career in politics. In 1994, he won a seat on the now-defunct Metro Council, where he served for three years, and was Councillor for Parkdale-High Park for six years.

Miller was born in San Francisco and was just 18 months old when he lost his father to cancer. Shortly after, he and his mother returned to her native Britain, and later emigrated to Canada when Miller was 8 years old. After settling in Ottawa, Miller attended high school on a scholarship at Lakefield College School near Peterborough, Ontario, where he excelled at sports such as soccer and rugby. His natural abilities for math and top marks won him another scholarship to Harvard University, where he studied economics and became captain of the university's rugby team, even competing in the US national championships. Miller then attended the U of T Faculty of Law, continued to play rugby, and graduated in 1984.

Faculty members and classmates such as professors Ed Morgan and Kent Roach recall him as a quiet, but eminently likeable student who got along well with his peers. "He has a lot of wonderful qualities which will make him a great Mayor for Toronto," says Morgan. Those who know Miller agree that he is a down-to-earth man who loves taking his two kids to soccer practice, and listening to the concerns of Torontonians. The Faculty is enormously proud of his achievement and looks forward to supporting his leadership of Toronto. ■

KATHLEEN O'BRIEN

ALUMNI PROFILE: VIRGINIA **DAVIES** ('79)

"Coming back to the law school has been extraordinary. Intellectually, it's wonderful to be here." So says Virginia Davies, Class of '79, with great animation as we sip a cup of breakfast tea in her sunny mid-town Toronto home. Indeed, after chatting amiably for over an hour, it's hard to imagine Davies as less than animated about anything, a trait that has taken her in various directions professionally since she graduated 24 years ago. But in the fall of 2001 – and in conventional terms, in mid-career – she returned to Flavelle House, first to complete an LLM, and then recently to begin work on an SJD. Anyone who has ever embarked upon a graduate degree of any sort will tell you that such decisions are not taken lightly. So the obvious question is why, or at least why now?

For Davies, the most exciting thing about coming back to U of T is that it presented her with "a terrific white piece of paper opportunity," she says. The old idea of tabula rasa, is, of course, highly appealing to most people. The thought of starting something new and fresh has an enduring appeal and Davies is the first to admit that she's always found such opportunities irresistible. The first of them came in 1976. Just two years into her undergraduate arts program at Trinity College she was admitted to law school. Though barely 20 years old, she happily crossed Philosopher's Walk and began three years at the Faculty, a time that she loved. "My law school years were both intellectually stimulating and emotionally nurturing," remarks Davies. Many professors from those days stand out in her mind, although most vivid is that of the late, inimitable, Alan Mewitt, "who was both challenging and vastly entertaining, the most entertaining prof I've ever had," she says with a laugh.

For Davies, her original law school years impressed upon her the conviction that a legal education could be used in a variety of ways. Upon graduation, that meant first going to the federal Justice Department. She remained there until 1988, a period of time that included living in Edmonton and working on the landmark case that resulted in the Supreme Court's striking down of the Lord's Day Act in 1985. Then it was back to Toronto and, after a short hiatus, plunging into the world of tax law and banking at a time when the field was expanding rapidly. She went to the TD Bank, and among other things took computer training – computer training in the summer of 1988! – and then the next year went over to the Bank of Montreal to become its senior tax lawyer, which came with an executive appointment. Seven years at BMO were followed by a couple of years at Goldman Sachs in New York and then, from 1999 until 2001, a move to the United Nations Foundation as Vice President, Development and Capital Partners.

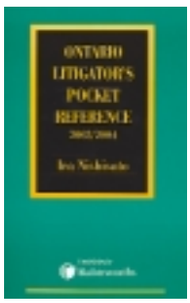
For Davies, these various career shifts have allowed her to pursue clear avenues of interest, and, she says humbly but with conviction, to try and be "an agent of change." At the UN, for example, one of the main projects on which she worked was polio eradication. She has since undertaken a number of other projects including overseeing the financing of small business enterprises for women in South America. Impressed by these and other achievements, *Chatelaine* magazine named Davies Woman of the Year in 2000. For the law school, she has hosted a number of New York-based alumni events and serves on the Strategic Development Board. Intellectually, Davies' years in banking and finance and at the UN demonstrated to her the prominence and importance of non-profit organizations in society. And so at U of T her ongoing graduate work consists of a comparative study of the tax law of the non-profit area in Canada, the US and the UK.

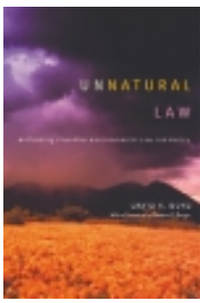
Virginia Davies' wide experience and various interests mean that while she's not sure what might come next in her professional life, "I'm sure there will be something." Her LLM will be conferred in November and she has completed the course work for the SJD. "We live in a great country," she says as our conversation comes to an end too soon, along with the tea. "I've received a great deal from my community, which includes the law school, and I want to give something back." ■

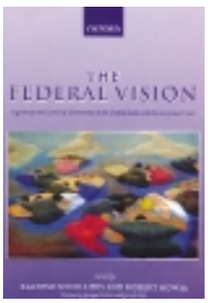
BRAD FAUGHT

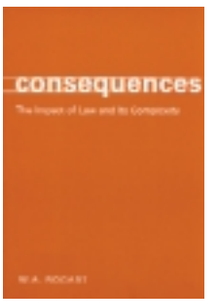
ALUMNI PUBLICATIONS

From Canadian environmental law and policy, to the changing relationship between levels of governance within the US and European Union, alumni from U of T's Faculty of Law continue to demonstrate their expertise in a broad range of legal and social issues.









ONTARIO LITIGATOR'S POCKET REFERENCE 2003-2004

Ira Nishisato *(Class of 1993)*

ISBN: 0-433-44305-7
Suggested retail price: $50

From the publisher: The first of its kind in Canada, this user-friendly guide to the litigation process offers an invaluable tool to all litigators, from neophyte to seasoned veteran, as well as to law clerks, articling students and legal assistants. The text directs the reader to important legal and tactical considerations encountered on a regular basis by litigators and provides ready access to practical information, that has never before been available in a single volume. The format consists of eleven chapters which guide the reader, point by point, through the entire litigation process, from the initial client interview to the commencement of an action, to preparation for trial, conduct of the trial and appeals, and 24 appendices that contain information required on a daily basis by litigators such as motion scheduling arrangements, court forms, limitation periods, and current practice directions and notices to the profession issued by the courts.

CONSEQUENCES: THE IMPACT OF LAW AND ITS COMPLEXITY

W.A. Bogart *(Class of 1974)*

ISBN: 0-8020-3599-X (HC);
0-8020-8456-7 (PB)
Suggested retail price: $95 (HC);
$29.95 (PB)

From the publisher: In North American society, there is increasing reliance on law in the attempt to grapple with complex political and social issues. What is the effect of this growing dependence on law and legal systems? In *Consequences* W.A. Bogart explores the impact of law on societies, and demonstrates how excessive reliance on law, particularly litigation, has generated difficulties regarding issues of social consensus and domestic policy. Focusing mainly on the United States as the centre for post-Second World War legal culture, the book also takes into consideration other Western countries and their respective legal systems.

UNNATURAL LAW: RETHINKING CANADIAN ENVIRONMENTAL LAW AND POLICY

David R. Boyd *(Class of 1989)*

ISBN: 0-7748-1048-3 (HC);
0-7748-1049-1 (PB)
Suggested retail price: $85 (HC);
$29.95 (PB)

From the publisher: While governments assert that Canada is a world leader in sustainability, *Unnatural Law* provides extensive evidence to refute this claim. A comprehensive assessment of the strengths and weaknesses of Canadian environmental law, the book provides a balanced, critical examination of Canada's record, focusing on laws and policies intended to protect water, air, land, and biodiversity. The struggle for a sustainable future is one of the most daunting challenges facing humanity in the twenty-first century. *Unnatural Law* prescribes the changes Canada must make in order to respond to the ecological imperative of living within the Earth's limits. Academics, lawyers, students, policymakers, and concerned citizens interested in the health of the Canadian and global environments will find this book an invaluable source of information and insight.

THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION

Edited by Robert Howse *(Class of 1989)*
and ***Kalypso Nicolaidis***

ISBN: 0-19-924132-5 (HC);
0-19-924133-3 (PB)
Suggested retail price: $65 (HC);
$22.95 (PB)

From the publisher: *The Federal Vision* is about the complex and changing relationship between levels of governance within the United States and the European Union. Based on a transatlantic dialogue between scholars concerned about the modes of governance on both sides, it is a collective attempt at analyzing the ramifications of the legitimacy crisis in our multi-layered democracies, and possible remedies. Starting from a focus on the current policy debates over 'devolution' and 'subsidiarity', the book engages the reader into the broader tension of comparative federalism. Its authors believe that in spite of the fundamental differences between them, both the EU and the US are in the process of re-defining a federal vision for the 21st century. (This book includes chapter 14 written by Professor Sujit Choudhry of the U of T Faculty of Law, "Citizenship and Federations: Some preliminary reflections".)

TITLE SEARCHING & CONVEYANCING IN ONTARIO, 5TH EDITION (STUDENT EDITION)

Marguerite Moore *(Class of 1975)*

ISBN: 0-433-44349-9 (HC); 0-433-43942-4 (PB)
Suggested retail price: $75 (HC); $55 (PB)

From the publisher: The new 5th edition of this widely-popular manual addresses the combined law, practice, and latest technology for title searching, land registration and title conveyancing in Ontario. It contains both significantly expanded chapters on the land titles system, condominiums, title insurance and POLARIS and completely revised chapters on Electronic Land Registration and Closing the Transaction. In addition, it thoroughly updates changes in law such as the re-definition of spouse under Ontario's *Family Law Act.* Sixteen chapters answer the key legal, procedural and technical questions for every stage in the process, from identifying the appropriate registry office to closing the deal. The procedures to be followed for the conventional paper-based and the automated system including registry, land titles and condominiums are all covered. Readers will also find the numerous checklists, precedents, charts, sample POLARIS searches and electronic documents, Teraview screen illustrations, maps and printouts quite useful and practical.

STUDENT REPORT

POST-MORTEM CHILDBIRTH

Until recently, when a pregnant woman was struck by brain-death, doctors were faced with just two options – allowing the mother (and fetus) to die naturally without intervention, or performing a cesarean section which inevitably led to the death of the child. In both cases, the unborn child had little or no chances for survival. Recent advances in medical technology, however, now mean that doctors have the ability to keep the mother alive on life support – in some reported cases for 107 days – long enough to allow for the successful delivery of the fetus.

How should physicians react in these situations? Whom should they consult with? Are pregnant women prepared to leave directions in case of a tragic death during pregnancy, and do these directives have any force in Canada? What are the legal tools that future pregnant women, their partners, family members and health-care providers have under these special circumstances?

These and other questions are at the centre of legal research conducted by Daniel Sperling, whose LLM thesis explores the management of post-mortem pregnancy. "I examine the moral and legal issues of keeping a brain-dead pregnant woman 'alive' long enough to deliver the child," says Sperling. "I also examine the legal requirement for consent, rights of next-of-kin and friends of the deceased, and the physician-patient relationship." Sperling's thesis includes recommendations for better training of medical professionals about advance directives and pregnancy provisions, and how to facilitate the special grieving process that is needed. "A brain-dead body needs to be respected in a humane way. A woman's right to make decisions about her own body and reproductive choices should be substantially protected, and life-sustaining treatment threatens these elementary concepts," says Sperling.

Daniel Sperling is currently in the SJD program at the Faculty of Law, where he continues to explore the legal and philosophical aspects of treatments that are performed on "newly-dead" persons such as practicing resuscitation procedures, extracting organs and other tissues from the dead for therapeutic purposes, and using the dead for future reproduction. "While analyzing these issues, I hope to focus not only on the family members of the brain-dead patient and their "interests" in the first, but on the legal and moral status of the brain-dead person herself," says Sperling. Earlier this year, Daniel won the Canadian Bioethics Society Award for his work in this area.

Daniel Sperling, SJD Candidate

Pam Shime '95, National Director, Pro Bono Students Canada

STUDENTS HELP IN TORONTO'S FAMILY COURTS

For many Canadians their first introduction to our legal system is at a family court – and for a staggering 70% it is without the assistance of a lawyer.

Until just five years ago, most people were on their own to make sense of complicated family law forms, and an even more complicated system. In 1998, however, the **Family Law Project** was founded as part of the *Pro Bono Students Canada Program* at the U of T Faculty of Law. Motivated by an inspirational speech given by Justice Harvey Brownstone in 1997, students at U of T Law School learned about the increasing

continues ▶

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number of unrepresented litigants in the Ontario Provincial Court Family Law system, and one year later started the Family Law Program (FLP).

Funded in Ontario by the *Law Foundation of Ontario*, the FLP program has also received financial assistance from *Legal Aid Ontario*, which for the past three summers has paid for three full time students at family court. Today, the FLP is jointly run by U of T and Osgoode Hall law schools, under the leadership of Pam Shime. Since its inception, the program has helped an estimated 4,000 litigants in the Toronto area, and has had more than 25 students volunteering each year.

Much of the students' work takes place at 311 Jarvis Street, Toronto's main family law courthouse. More recently the program has expanded its services to the Eglinton Courthouse in Scarborough. "Students provide an indispensable service to members of the Toronto community," says Jay Waterman, head Duty Counsel at the Jarvis Courthouse. Waterman, a lawyer with Legal Aid Ontario, is one of several counsel who supervise students working with litigants in the family court system. "Without students' help, many people in Toronto would be unable to have their cases presented effectively."

The students are quick to point out, however, that they get as much out of the program as they put into it. "As future lawyers, our success will be defined by how we help others," says Brandon Parlette, co-coordinator of the program and a recent Osgoode grad. Third year U of T student and co-coordinator, Daliah Szechtman, agrees. "There is no better time to start contributing to the community than in law school."

SOCIAL MOVEMENTS AND THE GAY MARRIAGE DIALOGUE

Jo-Anne Pickel, SJD Candidate

Courts and legislatures are having a dramatic impact on notions of family and marriage in Canada today. What may be less clear is to what extent ordinary members of society are influencing judicial and legislative policy in this area.

U of T law doctoral candidate **Jo-Anne Pickel** has devoted her SJD thesis to exploring the interaction between state institutions and members of the lesbian, gay, bisexual and transgendered community in the evolution of the notions of family and marriage in Canada. "Traditional legal analyses based on state institutions and legal forums only capture part of the Charter picture," says Pickel. "A broader analysis is required to gain a more complete and nuanced understanding of same-sex relationship recognition."

Pickel argues that too narrow a focus on the actions of courts and legislatures may lead us to neglect the important role played by members of the lesbian and gay community in establishing and propelling judicial and legislative processes forward. However, Pickel points out that members of the gay and lesbian community must be careful not to limit their interventions to the courtroom. "A wide range of interventions in a variety of spheres will be necessary in order to achieve lasting change on the issue of same-sex relationship recognition," she says.

Jo-Anne Pickel, a candidate in the S.J.D. programme at the University of Toronto, is completing her doctoral thesis "*Toward a Broader Approach to Charter Dialogue: Lessons to be Learned From Developments on the Issue of Same-Sex Relationship Recognition.*" ■

INTERVIEW with

MADAM JUSTICE ROSALIE SILBERMAN *ABELLA*

Her infectious smile, warmth, and exuberance could well have made her everyone's favorite teacher. Instead, these same qualities, and many more, have made Justice Rosalie Abella one of the best, and most beloved judges in Canada.

One of only a handful of women on the Court of Appeal for Ontario, "Rosie" as she is known by almost everyone, has spent the past almost 30 years on the Bench, the first seven of those adjudicating family law cases. Appointed to the Ontario Court of Justice, Family Division in 1976, Rosie was just 29 years old when she began her judicial career. A rare combination of modesty, compassion, and keen intellect have helped her over the years to decide difficult cases, many of which she describes as "legally soluble but often emotionally and psychologically insoluble."

In a recent interview for *Nexus,* Justice Abella candidly discussed her experiences as a judge in the family court in a time of changing laws, societal transition and an expanding definition of the family.

"There isn't any question in my mind that family law, because of the intersection of law with raw human experience, is one of the hardest areas of the law. Courts don't see happy families. They see only families that are no longer able to continue as families. They are all in pain. The kids are in pain. The parents are in pain. Those tensions play out in family law with a unique intensity. The best judges are those who are intellectually empathetic, who use their intelligence not only in a principled way, but in an empathetic way."

Family Court is where ordinary people, often of limited means, come into contact with the judicial system for the first, and sometimes the only time in their life. Justice Abella sees her role as both a great responsibility and a great honour.

"I always felt very proud to be a family court judge – it was for me as real as it gets. For each one of the families that appeared before me, I was their justice system at that moment in time. So it was very important to get it right. In family law I learned to be less judgmental. My own life was so fortuitously privileged – I had children who were healthy. I had a husband who was extraordinarily engaged in raising the children. And yet I was in a position where I had to make judgments about people whose lives were totally different from mine and not nearly as fortunate. So I learned to take a step back and look at those circumstances from their point of view rather than looking down on the situation from a very privileged perch."

It is this kind of empathy that helped Justice Abella to make difficult decisions involving young children, at a time when she herself was a new mother.

"Being a family court judge in those days was a very strange experience because I was making decisions about whether people could keep their children, as the mother of a very young child and of a baby. It was probably the most difficult set of decisions that I ever had to make as a judge – deciding whether a child should be removed from the family home – because I knew what it felt like to be a parent of young children and I also knew how vulnerable the children were. So it was almost as if I was a spectator and a participant in my own movie."

Justice Abella started her career on the bench during a period of transition in both society and in the family law arena. Changes included the introduction of the Divorce Act in 1968, the recognition of common law relationships, the increased focus on the best interests of the child, and the gradual recognition of the value of women's work in the home. All of these created a unique and interesting environment for family law judges, says Abella.

"The whole approach to families has been revolutionized since the 1970's. It just isn't the same concept that we had when I graduated from law school. Until 1968, with the exception of a few changes to custody laws, the law of the family had remained untouched for nearly a hundred years. Families were seen to involve a morality which was considered timeless and immune to shifting social norms, ▶

We went from mythologizing the family to parsing out the relationships within the family, and redefining what family means to include respect for each individual member, not just the unit.

(L-R): The Hon. Rosalie Abella, Hon. Bill Graham and Hon. Dieter Grimm

and legal approaches were designed to solidify the image of the perfect family - mother, father and a couple of kids. That all started to change in the early 1970's."

One of those changes, says Abella, that marked a turning point in family law was the gradual acknowledgment that the "family" was not always the safe haven and ideal unit that it was previously publicly touted as being.

"Historically, family law was intended as a means of maintaining the family and protecting the family unit at all costs. Slowly we started to recognize the complex nature of family relationships and to realize that the traditional family was not necessarily or always conducive to the emotional well-being of its members This was most notable in the legal treatment of sexual assault cases involving young children, which used to be dealt with in the family court, rather than the criminal courts, and were very much focused on reconciliation of the family unit. The consequences were that the child used to be removed from the home in order to protect the sanctity of the family. So you had a victim of sexual assault victimized twice, once by the abusing parent and a second time because she was removed from the only environment that she had ever known. Eventually I decided that a solution needed to be found that did not involve disrupting the child any further. At the time, that was considered dramatic, but to me it just flowed from a different sense of family. We went from mythologizing the family to parsing out the relationships within the family, and redefining what family means to include respect for each individual member, not just the unit."

And along with those changes, has come the recent inclusion of same-sex couples in the broader definition of the family. According to Justice Abella, this development is part of the ongoing continuum of the courts' role in interpreting and re-interpreting the notion of the family.

"The same-sex judgment of this court is a reflection of an evolutionary recognition that the family is capable of so many more textures than the way it has been traditionally defined. To me the case crystallizes the role of the court in a democracy. Unlike governments who get elected every four or five years, and who are directly accountable to the public for their decisions, courts and judges, through their independence, are accountable to the public interest, as opposed to public opinion. And so where governments may not have felt prepared to include sexual orientation as a right, the courts, and particularly this court, interpreted the Charter in a way that acknowledged that this is a form of discrimination that is not acceptable."

The dramatic transformation over the past 35 years in how courts think about the family unit has been a direct response to shifting social realities. And this, says Abella, has ultimately strengthened our notion of the family.

"Court decisions can set new thresholds and create new status quos. And if you see law and justice as an ongoing process that flows from increased awarenesses, then judges and legislatures and the general public all participate in a public conversation about what kind of society we want. This generation, that conversation about the family started with the Murdoch decision and ended with gay marriage. As far as our understanding of what the family is, and what the family can and should be, I think we have closed a circle, a circle of understanding that is far more compassionate than it used to be and more understanding of the complexities and challenges of maintaining a good family." ■

JANE KIDNER

Justice Abella has been a judge on the Court of Appeal for Ontario since 1992. Along with her four books, seventy articles, eighteen honorary degrees and a host of other accomplishments, she was recently awarded the *2003 Justice Prize of the Peter Gruber Foundation* for her international influence in the areas of equality, justice, and human rights. Her greatest sources of pride, however, are her two sons Jacob and Zachary, both of whom are lawyers.

Upcoming Events at the Faculty of Law

WINTER 2004

Thursday, January 8, 2004
12:10 - 2:00 p.m.
Professor Tom Archibald, Faculty of Law, University of Alberta and SJD Candidate, Faculty of Law, University of Toronto
Health Law & Policy Seminar Series
Topic: ***Emerging Tensions Between Labour Law and Health Policy***

Wednesday, January 21, 2004
12:10 - 1:45 p.m.
Professor Obiora Okafor, Osgoode Hall Law School
Diversity Workshop Series and JD/MAIR Speaker Series
Topic: ***International Law and Global (In)Justice in Our Time: A TWAIL Analysis***

Thursday, January 22, 2004
4:30 - 6:00 p.m.
Professor Lawrence O. Gostin, Faculty of Law, Georgetown University
Health Law & Policy Seminar Series
Topic: ***The Legal and Ethical Aspects of SARS***

January 23-24, 2004
Professors Sujit Choudhry, Rebecca Cook, Bernard Dickens, Colleen Flood and **Trudo Lemmens** and Canada Research Chairs **Jocelyn Downie** and **Tim Caulfield**
National Health Law Conference
Topic: ***Issues of Access and Allocation in Health Care***

Thursday, January 29, 2004
12:10 - 2:00 p.m.
Professor Colleen Flood, Faculty of Law, University of Toronto
Health Law & Policy Seminar Series
Topic: ***Fair and Just? The Role of Evidence and Values in Defining Publicly Funded Health Care***

Thursday, January 29, 2004
5:00 p.m.
Mr. Justice Morris Fish, Supreme Court of Canada
Goodman Lecture and Dinner

Friday, January 30, 2004
1:00 - 5:00 p.m.
Co-chair Sujit Choudhry, with third-year students Graham Mayeda and Soma Choudhury
Second Annual Lecture on Law and Diversity
Topic: ***Making the Mosaic Work: Accrediting Foreign-Trained Professionals and Labour Market Integration***

Wednesday, February 4, 2004
12:10 - 1:45 p.m.
Professor Chi Carmody, Faculty of Law, University of Western Ontario
JD/MAIR Speaker Series
Topic: ***Remedies and the WTO Agreement***

Thursday, February 12, 2004
12:10 - 2:00 p.m.
Professor Terence Sullivan, Vice President, Research & Prevention, Cancer Care Ontario; Department of Health Policy, Management & Evaluation, University of Toronto
Health Law & Policy Seminar Series
Topic: ***Reconstructing Cancer Services in Ontario***

Thursday, February 26, 2004
12:10 - 2:00 p.m.
Professors Stanley Hart and **Patrick Monahan,** Osgoode Hall Law School, York University
Health Law & Policy Seminar Series
Topic: ***Section 7 Challenges to Restrictions on Private Health Care in Canada***

Thursday, March 4, 2004
12:10 - 2:00 p.m.
Professor Chris Manfredi, Department of Political Science, McGill University
Health Law & Policy Seminar Series
Topic: ***Rights Litigation and Health Care Reform: Opportunities and Constraints***

Thursday, March 4, 2004
Professor Robert Scott, University of Virginia
The Cecil A. Wright Memorial Lecture
Topic: ***Taking Fairness Seriously: Contract Law in a World of Self-Interest and Reciprocity***

Thursday, March 18, 2004
12:10 - 2:00 p.m.
Professors Peter Coyte and **Eric Nauenberg,** Department of Health Policy, Management & Evaluation, University of Toronto
Health Law & Policy Seminar Series
Topic: ***Decision-Making Regarding New Technologies: Who Pays? Who Decides?***

Thursday, April 1, 2004
12:10 - 2:00 p.m.
Professor Jerry Hurley, Department of Economics and CHEPA, McMaster University
Health Law & Policy Seminar Series
Topic: ***The Murky Relationship Between Public and Private Financing in Health Care***

Thursday, April 15, 2004
12:10 - 2:00 p.m.
Kate Dewhirst, Wier Foulds, LLP
Health Law & Policy Seminar Series
Topic: ***Accountability in the Attendant Care Sector***

For complete details of these and other Faculty of Law events, please visit the Faculty's web site at www.law.utoronto.ca.

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