

What Is Access to Justice?

CONSTANCE BACKHOUSE

INTRODUCTION

In his paper 'Access to Justice in Canada Today – Scope Scale and Ambitions' (see note 1), Professor Roderick A. Macdonald describes an empirical study of 9,000 files from the Montreal Small Claims Court examined in the late 1990s. This was a court that was premised upon expanding accessibility, that excluded lawyers, that enhanced the clerk's and judge's role to assist lay litigants, that made geographic and temporal arrangements to enhance accessibility. The study pulled together a statistical profile of the plaintiffs to determine whether the Small Claims Court had actually accomplished its objective.

Professor Macdonald reported that the plaintiff base was anything but reflective of the population. As he noted, "the paradigmatic plaintiff turned out to be much like me – white, male, non-immigrant, English or French speaking, professional, well-educated, falling within the 40-80 percentile of wage earners and aged between 35 and 60".¹ Now this is surely cause for some concerned reflection. If a court explicitly designed to enhance accessibility comes up with a client base that looks just like Professor Macdonald, what does that indicate about our prospects for enhancing access elsewhere?

My paper will focus on the people who, with the greatest of

respect, look somewhat different from Professor Macdonald. I would like to try to explore how variables such as Aboriginality, racialization, gender, disability, class, and sexual identity may impact upon one's ability to obtain justice.

Historical Foundations

Our historical roots profoundly shape present-day realities and perspectives. It is no accident that twenty-first century Canada has become a society in which white, non-immigrant, able-bodied, affluent men dominate our justice system. The inequalities that lace our society are not random. Nor are they "merited" in any recognizable sense of that much-vaunted concept. White, Canadian-born, able-bodied, affluent men didn't just percolate up to the top of the heap by dint of superior talent and hard work. The hierarchies within our present society were erected upon discriminatory laws and practices that prevailed for centuries.

First, let us look at how our current population came to be. Apart from Aboriginal communities, the people who populate Canada have all been immigrants at some stage. If we had allowed immigration to take its natural course, admitting any who wished to select Canada as their home, it would not have taken until the late twentieth century for racial diversity to begin to make significant inroads.

Some of our sister colonies blatantly proclaimed their immigration goals up front. For instance, "The White Australia Policy" was explicitly promoted to foster white supremacy through restricted immigration.² Canada has always been less forthcoming about its racism, but our immigration policy has been equally restrictive. For centuries, Canadian immigration law has privileged white, able-bodied male immigrants. Prime Minister Sir John A. Macdonald gave Canadian racism a truly official face when he objected to the Chinese as a "semi-barbari[c]" "inferior race" in a speech in the House of Commons.³ Between 1885 and 1923, the federal government collected over \$23 million from Chinese immigrants pursuant to a racially-based head tax.⁴ A federal order in council passed in

1908 also singled out "Asiatic immigrants," requiring them to be in possession of \$200 spending money upon entry.⁵ The *Chinese Exclusion Act*, in force between 1923 and 1947, virtually eliminated all further entry.⁶

Prime Minister Macdonald was equally vitriolic about the prospect of African-Canadian immigration. Without benefit of any identifiable data, Macdonald lamented the "frequency of rape committed by negroes, of whom we have too many in Upper Canada" and who were "very prone to felonious assaults on white women."⁷ Canadian physicians and senior governmental officials speculated that the harsh Canadian winter would "efface" the Black population, and the federal government responded in 1910 with an *Immigration Act* that empowered the cabinet to prohibit the admission of immigrants "belonging to any race deemed unsuited to the climate or requirements of Canada." An order in council was drafted in 1911 to prohibit the landing in Canada of "any immigrant belonging to the Negro race," but it was never declared in force. Opting to use less overt mechanisms of racist practice, the authorities adopted unwritten, informal rules to accomplish the same end.⁸

Diplomatic treaties were signed to reduce the number of Japanese immigrants, and "continuous voyage" regulations were enacted to restrict the immigration of South Asians, whose travel options did not permit them to immigrate "directly from their country of origin."⁹

Immigration law also discriminated against individuals with disabilities,¹⁰ and those whose same-sex sexual identity may have resulted in criminal records from their countries of origin.¹¹

Legal authorities next erected a host of discriminatory provisions to ensure that inequities continued to be visited on the minorities that remained or emerged despite all efforts to overrun them through selective immigration. Aboriginal peoples found their land and resources appropriated by white settlers, and their First Nations' identities restrictively defined

in the *Indian Act* by federal legislators, who also claimed that "Indians" were not entitled to be identified as "persons."¹² They were denied the franchise, and their traditional governance structures were supplanted by band elections controlled by federal officials under the *Indian Act*.¹³ Aboriginal people found their languages and cultures undermined by government and church-run schools that were forced upon their children.¹⁴ Their spirituality was attacked when criminal authorities jailed Aboriginal individuals for performing traditional dances.¹⁵ Indian agents appointed by the federal government restricted the rights of Aboriginal individuals to come and go from reserves.¹⁶

For centuries, the right to vote was restricted not only with respect to Aboriginality, but also by race.¹⁷ Access to education, employment, residence, and business opportunities varied dramatically by race.¹⁸ At times the right to attend certain schools, to hold specific jobs, to live in particular neighbourhoods, and to enter into entrepreneurial competition was denied certain races by legislation. At other times, racist teachers, employers, landholders, and customers accomplished the identical ends without such statutory backing, and the legal authorities stood by and refused to intervene.¹⁹

The right to have one's choice of marriage partner respected by the larger society hinged on questions of race.²⁰ Thousands of Canadians joined the Ku Klux Klan in the 1920s, and actively participated in its cross-burning and other intimidatory tactics.²¹ Race was often pivotal to access to public services such as theatres, restaurants, pubs, hotels, and recreational facilities.²²

For centuries, women were barred from all direct control over the legal system – as voters, legislators, coroners, magistrates, judges and jurors.²³ The legislatures and the courts constructed Canadian families as patriarchal structures. Married women were divested of their property, stripped of the right to contract and carry on business in their own names, and prohibited from bringing tort actions against violent husbands.

Wives found their husbands explicitly exempted from prosecution for spousal rape.²⁴ Judges historically proclaimed that a "man had the right to chastise his wife moderately."²⁵ Access to divorce enshrined a double standard regarding male and female adultery.²⁶

Until well into the twentieth century, fathers took virtually complete precedence over mothers in child custody decisions.²⁷ Prohibitions on abortion and the dissemination of birth control stopped women from regulating their own fertility.²⁸ Although the law prohibited sexual assault on women, those who charged that they had been raped found themselves held up to extraordinary public inquiry, and generally disbelieved unless they could point to irreproachable sexual reputations and tenacious physical resistance.²⁹ Women found their access to paid work restricted by gender-specific regulations and occasionally barred entirely by law.³⁰

The right to vote has also been prohibited to those defined to be suffering under mental disability.³¹ The right to sit on juries was also barred to those with mental and physical disabilities.³² The history of disability in Canada has yet to be fully uncovered, but early studies suggest that inequitable legal treatment was rife. Access to education, employment, public services, and housing was often blocked for people with disabilities, and authorities confined many such individuals to jails, hospitals, asylums and other institutional settings against their will.³³

Preliminary research on the history of gays, lesbians and transgendered people indicates that they were denied access to employment, housing, and public services. They were denied the right to marry, to form families with children, and barred from access to other benefits ordinarily associated with marriage. They were persecuted by criminal justice authorities, under force of criminal law that defined their sexual behaviour to be criminal.³⁴

Class was another variable that provoked differential treatment, with the poorer classes subjected to unwarranted

discriminatory sanctions. For much of Canadian history, property requirements barred the poor from exercising the right to vote.³⁵ Similar restrictions prevented them from serving on juries.³⁶ The criminal law penalized poverty with vagrancy statutes that confined those without occupations or resources to penal institutions.³⁷ Obtaining access to good education and jobs, housing, and public services was a perennial struggle, one that ended mostly in abject failure.³⁸

Canadian judges have also expressed overt prejudice against identifiable groups. To offer but a few historical examples, George T. Denison, a white police magistrate in Toronto in the late nineteenth-century, openly referred to Jews as "neurotic," southern Europeans as "hot-blooded," the Chinese as "degenerate," Aboriginal peoples as "primitive," and Blacks as "child-like savages."³⁹ Another white, early 20th-century Ontario Court of Appeal Judge, William Renwick Riddell described the Inuit and First Nations of western and northern Canada as people with "savage appetites," who "seldom considered themselves to be bound by anything but their own desires," in contrast to whites, whom he designated a "higher race." Riddell publicly portrayed Blacks as incompetent and uncivilized.⁴⁰ Male judges adjudicating cases involving sexual aggression frequently described women on the whole as prone to lie, scheme and extort, even as "corrupt" and "designing."⁴¹

Historical Amnesia and Contemporary Debates

The historical record is replete with evidence of discriminatory practices and laws that operated to create privileges for white, able-bodied, heterosexual males. This is a history that Canadians would prefer to forget. We pride ourselves instead on being a nation that prizes egalitarianism and fair play. We like to rank ourselves much higher than our U.S. neighbour to the south, with its problems of racism and wealth disparities. We feel a sense of patriotic pride when documentary directors like Michael Moore depict us in films such as "Bowling for Columbine" as historically less violent than, and culturally

morally superior to, the United States.⁴² We lay claim to nurturing multiculturalism in Canada. We aspire to play the role of the honest power-broker and peacekeeper through international diplomacy. And so it becomes easier to forget that the foundations of our nation were forged upon layers and layers of deeply rooted discrimination.

Instead, we look around us and assume that the hierarchies that now exist in terms of educational attainment, occupation, and economic status must reflect merit, or else some quirky combination of randomness and differential fortune. When individuals and groups who critique these hierarchies allege that they are based upon racism, sexism, or other bias, a nasty streak of defensiveness emerges. The first refuge is typically outraged denial. It is as if historical amnesia sets in. Those of us who have amassed and inherited privilege through the discriminatory practices of the past generally insist that we are completely innocent. The apoplectic reactions of university administrators and faculty to the most restrained "chilly climate" reports about sexism and racism in Canadian universities during the 1980s and 90s provide interesting case studies.⁴³

The response of the white Crown prosecutors and police officers in 1994 to the comments of Canada's first African-Canadian woman judge, Madam Justice Corinne Sparks, about the widely-acknowledged tendency of our police to overreact when dealing with adolescent male African-Canadians, provides yet another fascinating illustration. The efforts to appeal her decision as "biased" were supported by a surprising number of white judges. While the bias application was ultimately rejected at the Supreme Court of Canada, the divided court showed only minimal recognition of the racism inherent in the arguments.⁴⁴

Allegations that Toronto police officers make widespread use of "racial profiling" sparked outraged denials in 2002.⁴⁵ When the Ontario Human Rights Commission attempted to follow up with further research, the Ontario Association of Chiefs of Police threatened "to hold accountable, and take to task, those people who seek to destroy the credibility of our

officers."⁴⁶ And damages of \$240,000 were imposed at trial upon two criminal defence lawyers – one African-Canadian and one white – when they expressed concerns that their African-Canadian adolescent female clients had been strip searched by white police in circumstances when young white women would not have been.⁴⁷

The historical amnesia also infects the response to demands for change. When subordinated groups suggest that compensatory measures are necessary to make reparations or affirmative action programs needed to create conditions for equity, we frequently label such claims as reverse discrimination, and reject them with arguments couched in egalitarian language. We forget that such responses come both much too late and much too early. The class action on behalf of Chinese head-tax payers, claiming repayment for the racially-biased immigration toll, went down to defeat in *Mack et al. v. Canada (Attorney General)* in 2002, before an all-white set of judges who seemed astonished that the legal system might be asked to atone with reparations.⁴⁸ Ontario Premier Mike Harris's "common sense revolution" made short shrift of the former NDP government's very preliminary efforts to commence an employment equity program, obliterating the *Employment Equity Act* in 1995 with the *Job Quotas Repeal Act*, the full title of which was "An Act to repeal job quotas and to restore merit-based employment practices in Ontario."⁴⁹ The breathtaking assumption that our employment practices have ever been truly merit-based appears to have gone largely unchallenged in public discourse.

Implications for Access to Justice

How does this landscape affect issues of access to justice? Numbers are one of the most obvious features. Groups that were barred historically from participating in the legal system as voters and legislators continue to be statistically under-represented in the political realm. Women hold 32% of the appointed seats in the Canadian Senate, 21% of the elected seats in the House of Commons, and 13% of the positions in the Ontario

Legislature.⁵⁰ Racially subordinated groups are also under-represented, but it is difficult to access numbers, because full racial statistics are neither publicly collected nor disseminated.⁵¹ One academic study estimated that visible minorities constituted only 5.6% of the Canadian M.P.s elected in 2000, compared to a population base of approximately 14%.⁵²

Groups that have experienced historical discrimination in law are also under-represented in the legal profession. The Law Society of Upper Canada has reported that 7.3% of lawyers in Ontario are non-white, compared to 17.5% of the Ontario population base. Only 0.6% of lawyers are Aboriginal, compared to 1.4% of the population. More than four-fifths of Ontario lawyers were born in Canada.⁵³ Gender breakdowns show 30.1% of all lawyers in Ontario are female.⁵⁴ Lawyers' incomes reflect white male dominance as well, with the average income of white lawyers at peak ages between fifty and fifty-four running at more than double that of non-whites. Within the same age cohort, male lawyers earned 94% more than female lawyers.⁵⁵

The judiciary also presents an over-representation of white males. As of 1999, 80% of federally appointed and provincially appointed judges were male. Racialized judges represent only 3.13% of provincially appointed judges.⁵⁶ Further statistics regarding disability, class of origin, and sexual identity are not apparently collected.

The overwhelming political and legal dominance of white, able-bodied, economically privileged, apparently heterosexual men – historically and continuing today – has grave implications for access to justice. Politicians, lawyers and judges whose lives contain little personal experience of racism, sexism, disability, poverty or homophobia are at risk of failing to understand the realities of those who face such problems day in and day out. I do not mean to suggest that privileged individuals are incapable of learning about those whose lives differ from theirs. However, I do think that this is a complex and difficult task that requires commitment, time, resources and constant attention. In fact, many do not succeed. Those who fail shape our laws,

our legal arguments, our law practices, and the **decisions** of our tribunals and courts in ways that maintain and **bolster** the historical inequities.

The under-representation of subordinated **communities** also substantially affects who decides to engage the legal system. Groups that are disproportionately absent from our legislatures, legal profession and courts have less access to knowledge about their legal rights, and reduced **capacity** to redress complaints. The situation is complicated **still** further because of the historical amnesia and cultural **defensiveness** that greet efforts to articulate problems like racism, **sexism**, and so forth. Gwen Brodsky and Shelagh Day have **demonstrated** that males have been the group most likely to **bring** Charter challenges alleging discriminatory treatment under **the** equality provision in section 15.⁵⁷ After white men, white **women** have probably made the most inroads upon the legal system.⁵⁸ Yet Mary Eberts has written extensively about the **difficulties** faced by feminist litigators who have to prepare an evidentiary record that tries to bridge the chasms of gender experience between female clients and male judges.⁵⁹ Predominantly female victims of spousal violence and sexual assault are terrified to bring complaints about their abuse to the attention of the criminal justice system. Statistics Canada estimates that 78% of sexual assaults and 63% of spousal assaults on female victims are not reported.⁶⁰ Jane Doe, who sued the Toronto Police Force for failing to warn women that a serial rapist was at large in her neighbourhood in 1986, has cited "police and legal behaviour" as the "largest factor in the decision not to report."⁶¹ In my work on sex discrimination within Canadian university faculties, I met many female professors who had persuasive documentation regarding their discriminatory treatment. With few exceptions, they refused to bring human rights complaints or employment law actions because they did not feel that this would improve their situation.

Racialized communities have watched with growing cynicism as their complaints of race discrimination have been dis-

missed by human rights commissions with astonishing regularity.⁶² I have spoken to community leaders within the African-Canadian and South Asian communities who have advised that they routinely counsel their colleagues not to bring race complaints into the legal realm, despite what appear to be water-tight cases of discriminatory evidence. They distrust the capacity of our adjudicatory tribunals and courts to recognize racist practices, and to implement remedies that would begin to rectify the situation. As Professor Macdonald speculated they might in his Foundation Paper, these citizens "have no confidence in the system, or in lawyers and judges," and they "simply won't use it."⁶³

Some Strategies for Redressing These Problems

Canadian society is currently very imbalanced. Aboriginal and other racialized communities, women, persons with disabilities, poor people, and non-closeted gays, lesbians and transgendered people are disproportionately absent from positions of political, economic, social and legal power. These imbalances are premised on egregious instances of historical discrimination that have never been properly compensated and that leave continuing legacies. The imbalances must be changed.

Some will argue that the temper of the times makes such transformation highly unlikely. Canada appears to be in the grip of an internationally irresistible drift to the right, in which socially progressive ideas and programs are disparaged, dismissed and dismantled. The very partial and preliminary affirmative action programs that have been set up in some governmental, private sector, and academic circles are under erosion and attack. The U.S. Supreme Court has just finished hearing an action designed to enjoin the affirmative admissions policy in place at the University of Michigan. During the widespread media focus on the case, the language used to denounce all forms of affirmative action was uncompromisingly harsh.⁶⁴

Yet the fact that prestigious universities have, for many decades, utilized blatant affirmative admissions standards for

the sons and daughters of alumni and donors has gone unchallenged. The *Wall Street Journal* reported in February 2003 that "most universities acknowledge favoring children of alumni who support their alma mater," and that colleges had increasingly begun to "bend admissions standards to make space for children from rich or influential families." The latter practice of giving formal preference to students whose parents would make large donations to the institution has even apparently been dubbed "development" admissions.⁶⁵

Many Canadians believe that sexual inequality has already been eradicated, and that feminists seek to obtain unfair privileges for women. Many Canadians believe that the polite way to respond to racial diversity is to pretend we live in a "raceless" society, and that it is worse to be called a racist than to be one. Many Canadians believe that persons with disabilities are unfit for schooling and gainful employment, that the poor deserve what they get, and that gays and lesbians should hide their sexual lives from the rest of us.

There are days when the prospect of overcoming such regressive ideology seems overwhelming. Yet I continue to be surprised, and deeply reassured, by how many dissenting ripples there are within this sea of conservatism. Those who seek change are greater in number than one might think, given the prevailing ethos. We need to reorganize. We need to rethink how we engage with the media. We need to utilize our ideas and resources more effectively than we have in the past. We need to create functioning coalitions of individuals and groups who can work together to demand progressive reform.

Within the political system, programs must be initiated to improve the proportion of historically disadvantaged groups sitting in elected and appointed positions. Professor Macdonald has offered the suggestion in his paper that the number of electoral constituencies in Canada be cut in half, and that voters be asked to cast two ballots to elect one woman and one man from every remaining constituency.⁶⁶ This interesting proposal was debated during the establishment of the Nunavut electoral

regime, although ultimately defeated in a close referendum.⁶⁷ Macdonald has also suggested that the Senate be reformed to reflect diversity on grounds other than geography.⁶⁸

Other measures might include: 1) training and incentive programs, along with funding, to recruit more diverse political candidates, 2) affirmative action programs within political parties, 3) reform of campaign financing regulation, and 4) programs that encourage and facilitate ballot casting by all qualified voters.

With respect to the legal system, the obvious entry point is the law schools. While most law schools have made substantial progress on gender equalization, and some progress on racial diversification within their faculties and student bodies, much more needs to be done with respect to Aboriginality, disability, class, and sexual identity. Law schools need to reconsider their 1) admissions policies, 2) tuition increases, 3) faculty hiring, 4) curriculum selections, 5) pedagogies, 6) methods of evaluation, and 7) career counselling services. Canadian law schools, which are still primarily publicly funded, should be obliged to maximize social justice perspectives. Law schools are the gatekeepers to the profession, and from there to the judiciary. They have a special obligation not simply to extend the status quo, but to redress the historical and continuing inequities within our society.

One of the most promising examples of a forward-thinking approach is the Program in Public Interest Law and Policy at the University of California Los Angeles School of Law, which has been operational since 1997. Students are recruited and admitted on a separate track, based on criteria that balance their likelihood of "academic success" with a demonstrated commitment to public interest, special abilities enabling them to serve or represent groups or interests lacking adequate access to law and lawyers, and intellectual strengths and acquired expertise relevant to problem solving and policy analysis. Once admitted to the Program, students are required to satisfy the usual law school requirements for a J.D. degree, but also receive a special curriculum tailored to the public interest orientation. The

Program incorporates special courses and extracurricular opportunities, organized by a core group of faculty committed to the public interest field, with the assistance of staff whose time is dedicated to the Program. When funding permits, students are provided with stipends that allow them to work for public interest organizations in the summers during their legal education. (In recent years, all students were offered such opportunities.) All students are given extensive career counselling and support to aid them to find permanent, full-time jobs in the public interest sector. Over the past five years, the program has graduated approximately twenty-five students a year, the majority of whom have gone on to public interest careers.⁶⁹

Some of our provincial law societies have begun ambitious equity programs that seek to mentor law students and lawyers from historically subordinated groups, and to provide the profession with guidelines and continuing education instruction relating to the incorporation of diversity. These programs need expansion. Adjudicators at all levels – from regulatory and quasi-judicial tribunals to the courts – must be provided with extensive, on-going education about racism, sexism, able-ism, class bias and homophobia. Complaints that adjudicators and judges are insufficiently cognizant of discriminatory stereotypes and perspectives must be treated far more seriously than they have been to date. The Canadian Judicial Council complaint process has proven highly unsatisfactory, and needs wholesale overhaul. The very composition of tribunals and the courts must change dramatically.

Access to justice has been contingent historically upon gender, race, dis/ability, class and sexual identity. The past inequities have left enduring legacies. Our current justice system continues to reflect the same patterns of inequity. Canadians must confront these manifestations of ongoing discrimination with a stronger commitment to change than our ancestors demonstrated. Failure to achieve a substantially more balanced legal system and society will only cement into place

further layers of injustice for the next generations to have to dismantle.

Endnotes

- 1 Roderick A. Macdonald, "Access to Justice in Canada Today -- Scope, Scale, Ambitions", this collection [Macdonald].
- 2 Geoffrey Blainey, *A Shorter History of Australia* (Milsons Point, NSW: Random House, 1997) at 135-7.
- 3 House of Commons Debates, *Hansard*, 12 May 1882 at 1471, 30 April 1883 at 905. In 1922, Prime Minister William Lyon Mackenzie King, stated that it was "impossible ever to hope to assimilate a white population with the races of the Orient." Phrasing it as a matter of national interest, King proclaimed: "If I am correct...and I believe I am...in the assertion that it is a great economic law that the lower civilization will, if permitted to compete with the higher, tend to drive the higher out of existence, or drag it down to the lower level, then we see the magnitude of the question viewed as a great national problem." See House of Commons Debates, 8 May 1922 at 1555-6.
- 4 *Chinese Immigration Act*, S.C. 1885, c.71, s.4; *An Act respecting and restricting Chinese Immigration*, S.C. 1900, c.32; *An Act respecting and restricting Chinese immigration*, S.C. 1903, v.I, c.8. Similar legislation applied in Newfoundland, which was at this time a separate and independent colony: *An Act respecting the Immigration of Chinese Persons*, S.Nfld. 1906, c.2; *An Act to amend 6 Edward VII, Cap. 2, entitled 'An Act respecting the Immigration of Chinese Persons'*, S.Nfld. 1907, c.14; *Of the Immigration of Chinese Persons*, C.S.Nfld. 1916, c.79; *An Act Respecting Immigration*, S.Nfld. 1926, c.29. The British Columbia legislature enacted eight additional statutes between 1900 and 1908, all designed to eliminate Asian immigration by barring entry for immigrants who could not complete a "European language test."
- 5 O.I.C., C. Gaz. 1908.vol. xii.3276. *An Act respecting Immigration and Immigrants*, S.C. 1906, c.19, s.20 explained the motivation: "And whereas Canada is looking primarily for immigrants of an agricultural class to occupy vacant lands, and as immigrants from Asia belong as a rule to laboring classes, and their language and mode of life render them unsuited for settlement in Canada where there are no colonies of their own people to insure their maintenance in case of their inability to secure employment, it is necessary that provision be made so that such immigrants may be possessed of sufficient money to make them temporarily independent of unfavourable industrial

conditions when coming into Canada." Section 30 of the 1906 statute also authorized the Governor in Council, by order or proclamation, to prohibit the landing in Canada "of any specified class of immigrants" whenever it was considered "necessary or expedient."

- 6 *An Act Respecting Chinese Immigration*, S.C. 1923, c.38. The Act was so effective an exclusionary device that only forty-four Chinese individuals entered Canada over the next two dozen years, causing Chinese populations to age, and Chinatowns across the country to wither and decline. See Jean Barman, *The West Beyond the West: A History of British Columbia* (Toronto: University of Toronto Press, 1991) at 233.
- 7 John A. Macdonald (8 June 1868), Ottawa, National Archives of Canada, (MG 26A, Letterbook 11, no. 184), letter from John A. Macdonald to William Johnston Ritchie, Chief Justice Nova Scotia. On the speciousness of such comments, see Angela Y. Davis, *Women, Race and Class* (New York: Random House, 1981).
- 8 *An Act respecting Immigration*, S.C. 1910, c.27, s.38(c). On the speculations of mid-nineteenth-century physicians and turn-of-the-century bureaucrats from the department of the interior, see Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999) at 176 [Backhouse, "Colour Coded"]. See also *An Act to amend The Immigration Act*, S.C. 1919, c.25, s.13, which expanded upon the rationale. Now the cabinet was empowered to prohibit the landing "of immigrants belonging to any nationality or race or of immigrants of any specified class or occupation, by reason of any economic, industrial or other condition temporarily existing in Canada or because such immigrants are deemed unsuitable owing to their peculiar customs, habits, modes of life and methods of holding property, and because of their probable inability to become readily assimilated or to assume the duties and responsibilities of Canadian citizenship within a reasonable time after their entry." Under the informal exclusionary program, the Department of the Interior made it very clear, both to immigration agents and to prospective Black settlers, that the standard medical and character examinations made at the border would result in the rejection of Black immigrants: Harold Troper, *Only Farmers Need Apply* (Griffen House: Toronto, 1972) at 140-1; R. Bruce Shepard, *Deemed Unsuitable: Blacks from Oklahoma Move to the Canadian Prairies in Search of Equality in the Early 20th Century Only to Find Racism in their New Home* (Toronto: Umbrella Press, 1997). Similar legislation was enacted in Newfoundland. *An Act Respecting Immigration*, S.Nfld. 1926, c.29, s.11 provided: "Regulations made by the Governor-in-Council

under this Act may provide as a condition to permission to land in this Colony that Immigrants shall possess in their own right money to a prescribed minimum amount which amount may vary according to the race, occupation or destination of such immigrant...." Section 12 provided: "The Governor-in-Council may, by Proclamation or order whenever he deems it necessary, or expedient, [...] (b) prohibit for a stated period, or permanently the landing in this Colony, or the landing at any specified port of entry in this Colony, of immigrants belonging to any race deemed unsuited to the climate or requirements of this Colony, or of immigrants of any specified class, occupation or character."

- 9 For details of the Lemieux Agreement or "Gentlemen's Agreement" signed with Japan at the turn of the twentieth century, and the continuous voyage regulation passed in an order in council on 8 January 1908, see Patricia A. Roy, *White Man's Province* (Vancouver: University of British Columbia Press, 1989) at 207-12, 237.
- 10 *The Immigration Act*, R.S.C. 1886, c.65, s.17-22 imposed special requirements upon immigrants who were "lunatic, idiotic, deaf and dumb, blind or infirm persons." Medical superintendents examining immigrants were charged with identifying any such persons "not belonging to any immigrant family" who were "likely to become permanently a public charge." The masters of vessels transporting these individuals were required to post sureties for the purpose of maintaining them, or to reconvey such persons to the ports from which they came. *The Immigration Act*, R.S.C. 1906, c.93, s.26 provided that "no immigrant shall be permitted to land in Canada who is feeble-minded, an idiot, or an epileptic, or who is insane, or who had had an attack of insanity within five years; nor shall any immigrant be so landed who is deaf and dumb, or dumb, blind or infirm, unless he belongs to a family accompanying him or already in Canada, and which gives security, satisfactory to the Minister, and in conformity with the regulations in that behalf, if any, for his permanent support." *The Immigration Act*, R.S.C. 1927, c.93, s.3 added the following groups to the prohibited classes: "immigrants who are dumb, blind, or otherwise physically defective, unless in the opinion of a Board of Inquiry or officer acting as such they have sufficient money, or such profession, occupation, trade, employment or other legitimate mode of earning a living that they are not liable to become a public charge, or unless they belong to a family accompanying them or already in Canada and which gives security satisfactory to the Minister against such immigrants becoming a public charge," "persons of constitu-

tional psychopathic inferiority," "persons with chronic alcoholism," and "persons not included within any of the foregoing prohibited classes, who upon examination by a medical officer are certified as being mentally or physically defective to such a degree as to affect their ability to earn a living." See also *The Immigration Act*, R.S.C. 1952, c.145, s.4. *The Immigration Act*, R.S.C. 1970, c.I-2, s.5 altered the language somewhat, but continued to prohibit persons who were "idiots, imbeciles or morons," "insane," with "constitutional psychopathic personalities," "afflicted with epilepsy," "deaf, blind or otherwise physically defective," "chronic alcoholics," and "persons addicted to the use of any substance that is a narcotic." *The Immigration Act*, R.S.C. 1985, c.I-2, s.19 modernized the language still further, to prohibit the admission of any "persons who are suffering from any disease, disorder or other health impairment as a result of which... (i) they are likely to be a danger to the public health or to public safety, or (ii) their admission would cause or might reasonably be expected to cause excessive demands on health or social services."

- 11 *The Immigration Act*, R.S.C. 1886, c.65, s.24 provided that the Governor General might, by proclamation, whenever he deemed necessary "prohibit the landing in Canada of any criminal, or other vicious class of immigrants designated in such proclamation." *The Immigration Act*, R.S.C. 1906, c.93, s.29 provided that "no immigrant shall be permitted to land in Canada who has been convicted of a crime involving moral turpitude." Section 33 provided that an immigrant who had, within two years of landing in Canada, committed a crime involving moral turpitude, could be ordered deported. *The Immigration Act*, R.S.C. 1927, c.93, s.3 added the following group to the prohibited classes: "persons who have been convicted of, or admit having committed, any crime involving moral turpitude." See also *Immigration Act*, R.S.C. 1952, c.145, s.4. *The Immigration Act*, R.S.C. 1970, c.I-2, s.5 continued the prohibition on those convicted of, or having admitted crimes involving moral turpitude, and added for the first time "homosexuals, or persons living on the avails of...homosexuality" as well as persons who attempted to bring into Canada other persons "for the purpose of homosexuality." *The Immigration Act*, R.S.C. 1985, c.I-2, s.19 prohibited admission of "persons who have been convicted of an offence that, if committed in Canada, constitutes or, if committed outside Canada, would constitute an offence that may be punishable under any Act of Parliament and for which a maximum term of imprisonment of ten years or more may be imposed, except persons who have satisfied the Governor in Council that they

- have rehabilitated themselves and that at least five years have elapsed since the termination of the sentence imposed for the offence," and "persons who there are reasonable grounds to believe will commit one or more offences punishable by way of indictment under any Act of Parliament."
- 12 *The Indian Act*, 1876 S.C. 1876, c.18, s.3 defined "Indian" as "any male person of Indian blood reputed to belong to a particular band, any child of such person, and any woman who is or was lawfully married to such person." On the racialized definitions imposed at law upon "Indians" and "Eskimos," see Backhouse, "Colour Coded", *supra* note 8 at 18-55. Section 3(12) provided that the term "person" means an individual other than an Indian, unless the context clearly requires another construction." *The Indian Act*, R.S.C. 1886, c.43, s.2(c) stated: "The expression 'person' means any individual other than an Indian." See also *Indian Act* R.S.C. 1906, c.81, s.2(c); *An Act respecting Indians*, R.S.C. 1927, c.98, s.2(i). This offensive provision was not removed until 1951: see *An Act respecting Indians*, S.C. 1951, c.29. In *The Queen v. Murdock* (1900), 4 C.C.C. 82, at 86 the Ontario Court of Appeal indicated that "person" must encompass "a white man, woman, or child, a non-treaty Indian, and perhaps an enfranchised Indian."
- 13 Indians were denied the suffrage federally until 1960, with the exception of a brief interlude between 1885 and 1898. The province of Ontario barred Indians from voting until 1954. British Columbia barred them until 1949, Manitoba until 1952, Saskatchewan until 1960, Prince Edward Island and New Brunswick until 1963, Alberta until 1965, and Quebec until 1969. See Backhouse, "Colour Coded", *supra* note 8 at 129. *The Indian Act*, S.C. 1869, c.6 authorized the government to pre-empt traditional forms of selecting leaders by ordering triennial elections at which only Aboriginal males over the age of twenty-one could vote. The government was also empowered to depose elected chiefs on the grounds of "dishonesty," "intemperance" or "immorality." "Incompetency" was added to the list by the *Indian Act*, S.C. 1876, c.18, s.61-2. *The Indian Act*, S.C. 1895, c.35, s.3 specified that, however selected, whether through election or "according to the custom of the band," chiefs could be deposed by the governor-in-council. The Department of Indian Affairs actively intervened in the election processes, nominating individuals known to be supportive of departmental policies, attempting to coopt traditional chiefs, and removing from office certain leaders who displeased government officials. In Western Canada, the government simply abandoned the electoral system and began to appoint chiefs who would toe the

departmental line. See Backhouse, "Colour Coded", *supra* note 8 at 74-5.

- 14 After 1879, the federal government began to develop a policy of assimilation favouring separate Aboriginal schools, including large industrial, residential schools located away from Aboriginal territories, boarding schools nearer Aboriginal communities for younger students, and day schools in long-settled areas. Schools were to be operated wherever possible by missionaries, a cost-saving measure that attempted to utilize Christian zeal and denominational rivalry to offset public expenditure. By 1884, the bulk of the statutory enactments became coercive in nature, forcing schooling on reluctant Aboriginal peoples: see *An Act further to amend 'The Indian Act, 1880'*, S.C. 1884, c.27. For more details on this, and other statutes, see Backhouse, "Colour Coded", *supra* note 8 at 75. See also Canada, Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*, v.1 (Ottawa: Minister of Supply and Services Canada, 1996) at 333-409; Celia Haig-Brown, *Resistance and Renewal: Surviving the Indian Residential School* (Vancouver: Tillacum, 1988); Isabelle Knockwood & Gillian Thomas, *Out of the Depths, The Experience of Mi'kmaq Children at the Indian Residential School at Shubenacadie, Nova Scotia* (Lockeport, N.S.: Roseway, 1992); Basil H. Johnston, *Indian School Days* (Toronto: Key Porter, 1988); Linda Jaine, ed., *Residential Schools: The Stolen Years* (Saskatoon: University of Saskatchewan, 1993); Geoffrey York, *The Dispossessed: Life and Death in Native Canada* (Toronto: Lester & Open Dennys, 1989); Canada, Assembly of First Nations, *Breaking the Silence, An Interpretive Study of Residential School Impact and Healing as Illustrated by the Stories of First Nations Individuals* (Ottawa: First Nations Health Commission, 1994).
- 15 Aboriginal individuals spent months in jail for doing potlatch, giveaway, grass dances and other traditional forms of dancing. The Canadian government first began to pass criminal laws prohibiting ceremonial dancing among the First Nations in the *Indian Act*, S.C. 1884, c.27, s.3, when it banned the Potlatch and Tamanawas dances native to the west coast. The prohibition was extended in the *Indian Act*, S.C. 1895, c.35, s.6, 114, to encompass all festivals, dances, and ceremonies that involved the giving away of money or goods, or the wounding of humans or animals. Such legislation remained substantially intact until 1951; see Backhouse, "Colour Coded", *supra* note 8 at 56-102; Katherine Pettipas, *Severing the Ties That Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (Winnipeg:

- University of Manitoba Press, 1994).
- 16 For some discussion of the restrictiveness with which Indian agents controlled the behaviour and movements of Aboriginal peoples, see Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal: McGill-Queen's University Press, 1990) [Carter]. On the pass system, which was first implemented after the 1885 Rebellion, see Laurie Barron, "The Indian Pass System in the Canadian West, 1882-1935" (1988) 13:1 *Prairie Forum* 13:1 (1988) 25-42; John Jennings, "The Northwest Mounted Police and Canadian Indian Policy, 1873-1896" (Ph.D. Thesis, (University of Toronto, 1979) at 289; John Jennings, "The North West Mounted Police and Indian Policy After the 1885 Rebellion" in F. Laurie Barron and James B. Waldram, *1885 and After: Native Society in Transition* (Regina: Canadian Plains Research Center, 1986) 225 at 227; Sarah Carter, "Controlling Indian Movement: The Pass System", (1985) *NeWest Review* (May 1985) at 8-9; Carter, *infra* *Lost Harvests* at 150-6. Although there were efforts to pass legislation which would authorize the enforcement of the pass system, none was ever enacted and its genesis is traced to administrative rules developed unilaterally by the Department of Indian Affairs. Lacking force of law, Indian agents attempted to enforce the pass system by withholding rations from those who violated it. The police occasionally assisted in enforcement by arresting those found off the reserve without passes and prosecuting them for trespass under the *Indian Act* or vagrancy under the *Criminal Code*. The pass system violated treaty rights, since Indians were not compelled to live on reserves nor deprived of freedom to travel under the terms of the treaties. On the permit system, see Carter, *infra* at 156-8.
- 17 British Columbia restricted the Chinese, Japanese, "Hindu," and "other Asiatics," along with Aboriginal peoples, from exercising the vote for decades: see *Qualification and Registration of Voters Act*, S.B.C. 1872, c.39, s.13; *An Act relating to an Act to make better provision for the Qualification and Registration of Voters*, S.B.C. 1875, c.2, s.1 and 2; *An Act to Regulate Immigration into British Columbia*, S.B.C. 1900, c.11, s.5; S.B.C. 1902, c.34, s.6; S.B.C. 1903, c.12, s.6; S.B.C. 1907, c.21A, s.6; S.B.C. 1908, c.23, s.6; *Provincial Voters' Act Amendment Act*, S.B.C. 1895, c.20, s.2; *Provincial Elections Act* S.B.C. 1903-4, c.17, s.6; *Provincial Elections Act Amendment Act*, S.B.C. 1907, c.16, s.3; *Provincial Elections Act*, S.B.C. 1920, c.27, s.5(1)(a); R.S.B.C. 1924, c.76; S.B.C. 1931, c.20; R.S.B.C. 1936, c.84; *Provincial Elections Act*, S.B.C. 1939, c.16, s.5. *The Provincial Elections Act Amendment Act*,

S.B.C. 1947, c.28 gave the franchise to all except the Japanese and "Indians," but took it from the Doukhobors, the Hutterites and the Mennonites, unless they had been in the Armed Forces. The same statute also barred from suffrage every person who did not have "an adequate knowledge of either the English or French language." See also R.S.B.C. 1948, c.106. Since the right to hold public or professional office was limited to those on the provincial voting list, these groups were consequently barred from jury service: *Jurors' Act*, S.B.C. 1883, c.15, s.5. They were also denied the right to run for election to the provincial legislature: *Qualification and Registration of Voters Act*, S.B.C. 1876, c.5, s.3; *Constitution Act*, C.S.B.C. 1888, c.22, s.30; or for municipal government: *Municipal Clauses Act*, S.B.C. 1896, c.37, s.14-18; *Municipal Clauses Act*, S.B.C. 1906, c.32, s.14-18; *Municipal Act*, S.B.C. 1914, c.52, s.16-19; *Municipal Election Act*, S.B.C. 1896, c.38, s.36; or for school trustee: *Public Schools Act*, S.B.C. 1885, c.25, s.19 and 30; *Public Schools Act*, S.B.C. 1891, c.40, s.19 and 40; *Public Schools Act*, R.S.B.C. 1897, c.170, s.19, 24 and 28; *Public Schools Act*, S.B.C. 1905, c.44, s.25 and 32; *Public Schools Act*, R.S.B.C. 1911, c.206, s.31 and 38; *Public Schools Act*, S.B.C. 1922, c.64, s.37. Chinese and South Asian men and women received the right to vote in 1947: *Provincial Elections Act Amendment Act*, S.B.C. 1947, c.28, s.14. Japanese and First Nations' men and women did so in 1949: *Provincial Elections Act Amendment Act*, S.B.C. 1949, c.19, s.3.

In Saskatchewan, *An Act respecting Elections of Members of the Legislative Assembly*, S.S. 1908, c.2, s.11 excluded "persons of the Chinese race." See also R.S.S. 1909, c.3, s.11; R.S.S. 1920, c.3, s.12; R.S.S. 1930, c.4, s.12; R.S.S. 1940, c.4, s.12. The electoral disqualification of the Chinese was removed by S.S. 1944, c.2, s.2. See also *An Act to amend the Saskatchewan Election Act*, S.S. 1946, c.3, s.1; *An Act to protect Certain Civil Rights*, S.S. 1947, c.35, s.7 and *An Act to amend the Saskatchewan Election Act*, S.S. 1948, c.4, s.13. Manitoba resorted to a language test to retard access to the franchise. *An Act respecting Elections of Members of the Legislative Assembly*, S.M. 1901, c.11, s.17(e) disqualified "any person not a British subject by birth who has not resided in some portion of the Dominion of Canada for at least seven years...unless such person is able to read any selected portion or portions of 'The Manitoba Act' in one of the following languages, that is to say, English, French, German, Icelandic or any Scandinavian language...." Since those who could meet the language test could vote after one year of residence (s.16), this meant a potential delay of six years. See also R.S.M. 1902, c.52, s.19(e). This test was deleted by *An*

Act to amend 'The Manitoba Election Act', S.M. 1904, c.13, s.2.

- Between 1885 and 1898, the federal government explicitly denied the right to vote to anyone of "Mongolian or Chinese race." See *An Act respecting the Electoral Franchise*, S.C. 1885, c.40, s.2; *Franchise Act*, 1898 S.C. 1898, c.14, s.5(a). Subsequently the federal government piggy-backed on racist provincial statutes through the adoption of provincial voters' lists for federal elections: *Dominion Elections Act*, S.C. 1900, c.12; *Dominion Elections Act*, R.S.C. 1906, c.6, s.6 and 10; *Dominion Elections Act*, S.C. 1920, c.46, s.30(g); *Dominion Elections Act*, R.S.C. 1927, c.53, s.30(g); *Dominion Elections Act*, S.C. 1938, c.46, s.14(2)(i). The federal government removed its provincial piggy-backing race provisions in 1948, providing that provincial disqualification would no longer constitute a reason for disqualification from the federal franchise: *Dominion Election Act*, S.C. 1948, c.46, s.6.
- 18 For details, see Backhouse, "Colour Coded", *supra* note 8; Clayton James Mosher, *Discrimination and Denial: Systemic Racism in Ontario's Legal and Criminal Justice Systems, 1892-1961* (Toronto: University of Toronto Press, 1998).
- 19 Backhouse, "Colour Coded", *supra* note 8.
- 20 *Ibid.*
- 21 *Ibid.* at 173-225.
- 22 *Ibid.*
- 23 Specific legislative exclusions were enacted against female voting in New Brunswick in 1791, Prince Edward Island in 1836, the United Province of Canada in 1849, and Nova Scotia in 1851. The last exclusion based on gender alone was removed in Quebec in 1940. See Catherine L. Cleverdon, *The Woman Suffrage Movement in Canada* (Toronto: University of Toronto Press, 1974); Carol Lee Bacchi, *Liberation Deferred? The Ideas of the English-Canadian Suffragists, 1877-1918* (Toronto: University of Toronto Press, 1983). For further details regarding the barring of women from other positions in the nineteenth century, see Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Women's Press, 1991) [Backhouse, "Petticoats and Prejudice"].
- 24 Backhouse, "Petticoats and Prejudice", *supra* note 23..
- 25 *Ibid.* at 167-81; Annalee E. Golz (Lepp), "If a Man's Wife Does Not Obey Him What Can He Do? Marital Breakdown and Wife Abuse in Late Nineteenth-Century and Early Twentieth-Century Ontario" in Louis A. Knafla and Susan W.S. Binnie, eds., *Law, Society and the State: Essays in Modern Legal History* (Toronto: University of Toronto Press, 1995) at 323; Annalee Golz, "Uncovering and Reconstructing

Family Violence: Ontario Criminal Case Files" in Franca Iacovetta and Wendy Mitchinson, eds., *On the Case: Explorations in Social History* (Toronto: University of Toronto Press, 1998) at 289.

²⁶ Backhouse, "Petticoats and Prejudice", *supra* note 23 at 181-99.

²⁷ *Ibid.* at 200-27.

²⁸ *Ibid.* at 140-66; Constance Backhouse, "Prosecutions of Abortions under Canadian Law 1900-1950" in Jim Phillips, Tina Loo and Susan Lewthwaite, eds., *Crime and Criminal Justice: Essays in the History of Canadian Law*, vol. 5 *Volume V* (Toronto: The Osgoode Society, 1994) at 252-92; Constance Backhouse, "Physicians, Abortions, and the Law in Early Twentieth-Century Ontario" (1993) *Canadian Bulletin of Medical History* 10 (1993) at 229-49.

²⁹ Backhouse, "Petticoats and Prejudice", *supra* note 23 at 81-111.

³⁰ *Ibid.* at 260-92.

³¹ See, for example, e.g. *The Dominion Elections Act*, R.S.C. 1906, c.6, s.67 which provided that persons disqualified from voting included "a patient in a lunatic asylum." See also *The Dominion Elections Act*, S.C. 1920, c.46, s.30; R.S.C. 1927, c.53, s.30. *The Dominion Elections Act*, S.C. 1929, c.40, s.13 provided that persons prohibited from voting included those who were "restrained of...liberty of movement or deprived of management of...property by reason of mental disease." See also *The Elections Canada Act*, R.S.C. 1970, c.14, s.14; R.S.C. 1985, c.E-2, s.51.

³² See for example *The Jurors and Juries Act*, C.S.U.C. 1859, c.31, s.3, which qualified only a person "in the possession of his natural faculties and not infirm or decrepit." See also *The Jurors' Act*, R.S.O. 1877, c.48, s.3; *The Consolidated Jurors' Act*, of 1883 S.O. 1883, c.7, s.3; *The Jurors' Act*, R.S.O. 1887, c.52, s.3; *The Jurors' Act*, R.S.O. 1897, c.61, s.3; *The Jurors' Act*, S.O. 1909, c.34, s.3; *The Jurors' Act*, R.S.O. 1914, c.64, s.3; *Jurors and Juries Act*, R.S.O. 1927, c.96, s.2; *Jurors and Juries Act*, R.S.O. 1937, c.108, s.2; *The Jurors' Act*, R.S.O. 1950, c.191, s.2; *The Jurors' Act*, R.S.O. 1960, c.199, s.2. The provisions were broadened in *The Juries Act*, S.O. 1974, c.63, s.4, to disqualify a person who was "infirm, decrepit, or afflicted with blindness, deafness or other physical infirmity incompatible with the discharge of the duties of a juror" as well as a person who was "not in the possession of his natural faculties." *The Juries Act*, S.O. 1980, c.64, s.3 revised this to disqualify anyone who "has a physical or mental disability that would seriously impair his ability to discharge the duties of a juror," or "is blind." See also *The Juries Act*, R.S.O. 1980, c.226, s.4. The specific reference to blindness was removed in *The Juries Act*, R.S.O. 1990, c.J-3, s.4.

- ³³ Ontario also disqualified anyone who was "a patient in a hospital for the insane" from voting; see *The Ontario Election Act*, R.S.O. 1914, c.8, s.15. See also *The Voters' List Act*, S.O. 1926, c.4, s.18; *The Election Act*, R.S.O. 1927, c.8, s.17; *The Election Act*, R.S.O. 1937, c.8, s.17; *The Election Act*, 1950 R.S.O. 1950, c.112, s.17; *The Election Act*, S.O. 1954, c.25, s.3; *The Election Act*, R.S.O. 1960, c.118, s.16. *The Election Act*, 1968-69 S.O. 1968-69, c.33, s.11 disqualified from voting "persons who are patients in mental hospitals, or who have been transferred from mental hospitals to homes for special care as mentally incompetent." See also *The Election Act*, R.S.O. 1970, c.142, s.11; R.S.O. 1980, c.133, s.13. For some discussion of the discriminatory diagnosis and treatment of those labelled "feeble-minded," see Jennifer Stephen, "The Incurable, the Bad and the Immoral: Toronto's Factory Girls and the Work of the Toronto Psychiatric Clinic" in Louis Knafla and Susan Binnie, eds., *Law, Society and the State* (Toronto: University of Toronto Press, 1995) at 405. For details regarding the institutionalization of those deemed mentally disabled, see James E. Moran, *Committed to the State Asylum: Insanity and Society in Nineteenth-Century Quebec and Ontario* (Montreal: McGill-Queen's University Press, 2000); Harvey G. Simmons, *Unbalanced: Mental Health Policy in Ontario, 1930-1989* (Toronto: Wall & Thompson, 1990). *Re Bowyer* (1930), 66 O.L.R. 378 (Ontario High Court), provides an example of a case in which the courts enforced the commitment of a woman to an insane asylum based on extra-marital sexual activity, in what appears to be class-based and gender-based discriminatory analysis. See also Clifton F. Carbin, *Deaf Heritage in Canada* (Toronto: McGraw-Hill Ryerson, 1996).
- ³⁴ For some preliminary research on historical discrimination against gays and lesbians, see Steven Maynard, "Horrible temptations: sex, men, and working-class male youth in urban Ontario, 1890-1935" (1997) 78 *Canadian Historical Review* v.78 (1997) 99; Steven Maynard, "On the Case of the Case: The Emergence of the Homosexual as a Case History in Early-Twentieth-Century Ontario" in Franca Iacovetta and Wendy Mitchinson, eds., *On the Case: Explorations in Social History* (Toronto: University of Toronto Press, 1998) at 65; Steven Maynard, "Through a Hole in the Lavatory Wall: Homosexual Subcultures, Police Surveillance and the Dialectics of Discovery, Toronto, 1890-1930" in Joy Parr and Mark Rosenfeld, eds., *Gender and History* (Toronto: Copp Clark, 1996) at 165; David Kimmel and Daniel J. Robinson "Sex, Crime, Pathology: Homosexuality and Criminal Code Reform in Canada, 1949-1969"

- (2001) 16:1 *Canadian Journal of Law and Society* 16:1 (2001) 147; Terry L. Chapman, "An Oscar Wilde Type: The Abominable Crime of Buggery in Western Canada, 1890-1920" (1983) 4 *Criminal Justice History* v.4 (1983) 100; Becki Ross, *The House that Jill Built: A Lesbian Nation in Formation* (Toronto: University of Toronto Press, 1995); Jeffrey Weeks, *Sex, Politics and Society: The Regulation of Sexuality Since 1800* (London: Longman, 1981); Angus McLaren, *Sexual Blackmail: A Modern History* (Cambridge: Harvard University Press, 2000); Elizabeth Lapovsky Kennedy and Madeline D. Davis, *Boots of Leather, Slippers of Gold: The History of a Lesbian Community* (New York: Penguin, 1993); Mary Louise Adams, *The Trouble With Normal: Postwar Youth and the Making of Heterosexuality* (Toronto: University of Toronto Press, 1997). Ontario legislation prohibited any man convicted "of any crime that is infamous" unless he had obtained a pardon from serving as a juror; see *The Jurors and Juries Act*, C.S.U.C. 1859, c.31, s.13; *The Jurors' Act*, R.S.O. 1887, c.52, s.10. The provisions were broadened in *The Juries Act*, S.O. 1974, c.63, s.4, to disqualify anyone who had been convicted of an indictable offence, unless subsequently granted a pardon. See also *The Juries Act*, R.S.O. 1980, c.226, s.4; *The Juries Act*, R.S.O. 1990, c.1-3, s.4.
- 35 See, for example, *The Election of Members of the House of Commons Act*, S.C. 1873, c.27, s.6 which provided that persons entitled to vote were male persons, of the full age of twenty-one years, subjects of Her Majesty by birth or naturalization...being at the time of the election "owners of real estate in the Electoral District for which they claim to vote, of the value of two hundred dollars or upwards, or householders in the same, and having been such owners or householders, during the six months next preceding the election." *The Dominion Elections Act*, R.S.C. 1906, c.6, s.67 provided that persons disqualified from voting included any person who was "maintained in whole or in part as an inmate receiving charitable support or care in a municipal poor house or house of industry" or any "inmate receiving charitable support in any institution receiving aid from the government of the province." See also *The Dominion Elections Act*, S.C. 1920, c.46, s.30; R.S.C. 1927, c.53, s.30. Ontario provisions were equally prohibitive. *The Election Law of 1868*, S.O. 1868-69, c.21, s.5 provided that electors must be males who were the owners, tenants or occupants of real property of a value of \$400 in cities, \$300 in towns, and \$200 in incorporated villages and townships. This was continued in *The Election Act*, R.S.O. 1977, c.10, s.7, along with a provision qualifying voters who derived an income from "some trade, calling, office or

- profession of not less than four hundred dollars annually." See also *The Voters' Lists Act*, R.S.O. 1877, c.9. *The Ontario Election Act*, R.S.O. 1914, c.8, s.15 disqualified any person who was "maintained in whole or in part as an inmate receiving charitable support or care in a municipal house of refuge or house of industry." See also *The Voters' List Act*, S.O. 1926, c.4, s.18; *The Election Act*, R.S.O. 1927, c.8, s.17; *The Election Act*, R.S.O. 1937, c.8, s.17; *The Election Act*, 1950, R.S.O. 1950, c.112, s.17. The provision was not eliminated until *The Election Act*, S.O. 1954, c.25, s.3. Municipal election statutes were equally restrictive. *The Consolidated Municipal Act*, 1892, S.O. 1892, c.42, s.73 provided that one did not qualify to be elected as a mayor, alderman, reeve, deputy-reeve, or councillor of any municipality unless he had, or his wife had, "as proprietor or tenant, a legal or equitable freehold or leasehold" to the value of \$200 freehold or \$400 leasehold in incorporated villages, \$600 freehold or \$1200 leasehold in towns, \$1000 freehold or \$2000 leasehold in cities, and \$400 freehold or \$800 leasehold in townships. For property restrictions on municipal voting, see also s.79.
- 36 Property qualifications were required for prospective jurors in Ontario as early as 1859. *The Jurors and Juries Act*, C.S.U.C. 1859, c.31, s.3 set forth that those who qualified as jurors had to be "assessed for local purposes upon property, real or personal, belonging to him in his own right or in that of his wife, to the amount hereinafter mentioned." Section 6 provided that the Selectors for each Township, Village or Urban Ward should determine the "relative amount of property for which a person is assessed" at the time of the annual selection of jurors. The mode for ascertaining this was to put "the names of one half of the assessed resident inhabitants" upon a list, "commencing with the name of the person rated at the highest amount of such roll and proceeding successively towards the name of the person rated at the lowest amount." Presumably this meant that one had to be in the top half of the wealthiest residents in order to qualify. See also *The Jurors' Act*, R.S.O. 1877, c.48, s.3, 6. The amounts were spelled out in *An Act, to Amend the Jurors' Act*, S.O. 1879, c.14, s.1 to be property, real or personal, of a value of not less than \$600 in cities and \$400 in towns, incorporated villages and townships. See also *The Consolidated Jurors' Act*, of 1883, S.O. 1883, c.7, s.3; *The Jurors' Act*, R.S.O. 1887, c.52, s.3; *The Jurors' Act*, R.S.O. 1897, c.61, s.3; *The Jurors' Act*, S.O. 1909, c.34, s.3; *The Jurors' Act*, R.S.O. 1914, c.64, s.3; *Jurors and Juries Act*, R.S.O. 1927, c.96, s.2; *Jurors and Juries Act*, R.S.O. 1937, c.108, s.2; *The Jurors' Act*, R.S.O. 1950, c.191, s.2; *The*

- Jurors' Act*, R.S.O. 1960, c.199, s.2; *The Jurors' Act*, R.S.O. 1970, c.230, s.2; *The Jurors' Act*, R.S.O. 1960, c.199, s.2.
- 37 See, for example, Lorna McLean, "Common Criminals, Simple Justice: The Social Construction of Crime in Nineteenth-Century Ontario, 1840-81" (Ph.D. Dissertation, University of Ottawa, 1997) [unpublished]; Jim Phillips, "Poverty, Unemployment, and the Administration of the Criminal Law: Vagrancy Laws in Halifax, 1864-1890" in *Essays in the History of Canadian Law*, vol. 3 (Toronto: Osgoode Society, 1990) at 128; B. Jane Price, "Raised in Rockhead, Died in the Poor House: Female Petty Criminals in Nova Scotia, 1864-1890" in *Essays in the History of Canadian Law*, vol. 3 (Toronto: Osgoode Society, 1990) at 200.
- 38 For some research on the legal regulations affecting poor people in Canada historically, see Judy Fudge and Eric Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948* (Don Mills: Oxford University Press, 2001); W.J.C. Cherwinski and Gregory S. Kealey, eds., *Lectures in Canadian Labour and Working-Class History* (St. John's, Nfld.: Committee on Canadian Labour History, 1985); Gregory S. Kealey, ed., *Class, Gender, and Region: Essays in Canadian Historical Sociology* (St. John's, Nfld.: Committee on Canadian Labour History, 1988); Dorothy E. Chunn, *From Punishment to Doing Good: Family Courts and Socialized Justice in Ontario, 1880-1940* (Toronto: University of Toronto Press, 1992); Jane Ursel, *Private Lives, Public Policy: One Hundred Years of State Intervention in the Family* (Toronto: Women's Press, 1992); Suzanne Morton, *Ideal Surroundings: Domestic Life in a Working-Class Suburb in the 1920s* (Toronto: University of Toronto Press, 1995); Linda Kealey, *Enlisting Women for the Cause: Women, Labour and the Left in Canada, 1890-1920* (Toronto: University of Toronto Press, 1998).
- 39 George T. Denison, *Recollections of a Magistrate* (Toronto: Musson Book Co., 1920), as cited in Carolyn Strange, *Toronto's Girl Problems: The Perils and Pleasures of the City, 1880-1930* (Toronto: University of Toronto Press, 1995) at 16, 153, 250 [Strange]; Robin W. Winks, *The Blacks in Canada: A History*, 2nd ed. (Montreal: McGill-Queen's University Press, 1997) 2nd ed. at 298 [Winks]; Backhouse, "Petticoats and Prejudice", *supra* note 23 at 404.
- 40 Strange, *supra* note 39 at 250; Winks, *supra* note 39 at 298; William Renwick Riddell, "Administration of Criminal Law in the Far North of Canada" (1929) 20:2 *Journal of Criminal Law, Criminology and Police Science* 294.
- 41 See some of the judicial comments in seduction trials, in Backhouse, "Petticoats and Prejudice", *supra* note 23 at 40-80.
- 42 "Bowling for Columbine," a 2003 documentary written, directed, and produced by Michael Moore. Michael Moore, and others interviewed, acclaimed Canada for its substantially lower rate of firearm deaths. Charlton Heston of the National Rifle Association attributed the higher American rates to a history of violence and a multi-ethnic population. The film made a point of noting that Canada also had a racially diverse population, but said nothing about our historical record of racism and other forms of discrimination. My sense was that Canadian audiences came away from this film with a strong sense of national pride that our history and culture promoted racial tolerance and other forms of diversity.
- 43 See, e.g. The Chilly Collective, eds., *Breaking Anonymity: The Chilly Climate for Women Faculty* (Waterloo: Wilfrid Laurier Press, 1995); The York Stories Collective, eds., *York Stories: Women in Higher Education* (Toronto: TSAR, 2000).
- 44 See *R. v. S. (R.D.)* (1997), 10 C.R. (5th) 1 (S.C.C.) and commentary by Christine Boyle *et al.*, "Case Comments: R. v. R.D.S.: An Editor's Forum" (1998) 10:1 *Canadian Journal of Women and the Law* 159-212; Richard Devlin, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in *R. v. R.D.S.*" (1995) 18 *Dalhousie Law Journal* 408.
- 45 The allegations were raised in a study of data from the Criminal Information Processing System, obtained under a freedom of information application by the *Toronto Star*, and reported on 19 October 2002 and 20 October 2002, in articles titled "Treatment differs by division," "Race and police records," "Toronto black community has been worried for years," "Police and Race," "Police target black drivers." Strenuous denials came from Toronto Police Chief Julian Fantino: see "There is no racism, we do not do racial profiling" 19 October 2002.
- 46 Ontario Association of Chief of Police, Press Release, copy on file with the author, "Ontario Police Chiefs Take Firm Stand on Accusations of Racial Profiling" (25 February 2003). The release added: "The OACP has grave concerns with the Ontario Human Rights Commission's recent call for submissions on issues of racial profiling...the absence of stakeholder consultation into the mandate, terms of reference and process of this initiative is irresponsible and may be interpreted as a declaration of 'open season' on police officers across this province. As such, we will not be participating in any further summit meetings."
- 47 *Campbell v. Jones* (2001), 197 N.S.R. (2d) 212 (N.S.S.C.); (1998), 168

- ...R. (2d) 1 (N.S.S.C.). The decision was overturned, and the defamation action dismissed, by a divided Nova Scotia Court of Appeal: *Campbell v. Jones* (2002), 220 D.L.R. (4th) 201 (N.S.C.A.); (2002), 209 N.S.R. (2d) 81 (N.S.C.A.). An appeal to the Supreme Court of Canada may follow.
- 48 *Mack et al. v. Attorney General of Canada* (2001), 55 O.R. (3d) 113 (Ont. Sup. Ct.); upheld as *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (C.A.). Leave to appeal was denied by the Supreme Court of Canada in April 2003. A complaint regarding the comments of the Honourable Justice James MacPherson lodged with the Canadian Judicial Council by the Chinese Canadian National Council was dismissed in 2003; copy of complaint document on file with the author.
- 49 The *Employment Equity Act*, S.O. 1993, c.35 set no mandatory quotas, but merely required employers to devise individual employment equity plans. For the repealing statute, see S.O. 1995, c.4.
- 50 As of 11 February 2003, women held 63 of the 298 occupied seats in the House of Commons, or 21.14%. They held 34 of the 105 seats in the Senate or 32.38%. See "Women – Party Standings in the House of Commons" and "Women – Federal Political Representation, Current List" Library of Parliament, Information and Documentation Branch <<http://www.parl.gc.ca>>. Staff at the Ontario Parliament, Interparliamentary Public Relations Branch advised on 8 May 2003 that there were 113 men and 17 women elected to the 130 seats in the Ontario Legislature, making it 13.07% female.
- 51 The Library of Parliament, Information and Documentation Branch, released data on the number of Inuit, North American Indian or Metis members of the House of Commons, who held 4 of the 298 seats, or 1.3% in 1999. See "Members of the House of Commons – Current List – Inuit, North American Indian or Metis Origin" Library of Parliament <<http://www.parl.gc.ca>>. The only other data collected is the "country of origin." The staff at the Library of Parliament confirmed that they do not collect data on the ethnic or racial designation of the members. According to the Ontario Parliament, Interparliamentary Public Relations Branch, 8 May 2003, no information is collected or available on the racial composition of the Ontario Legislature.
- 52 Jerome H. Black, "Ethnoracial Minorities in the House of Commons" (2000) 24 *Canadian Parliamentary Review* 24, noted at 25 that 17 visible minority members were elected to the 37th Parliament in 2000, resulting in a proportion of 5.6% of the House of Commons. Black noted at 24-5 that the 1996 census population estimated 11.2% visible minorities in the population at large, and that a 1995 projection-oriented study produced for Statistics Canada estimated that racial minorities would comprise between 14.0% and 14.2% of the population by 2001.
- 53 Michael Ornstein, "Lawyers in Ontario: Evidence from the 1996 Census" (Toronto: Law Society of Upper Canada, 2001) at i [Ornstein]. More recent statistics indicate that visible minority students made up 17% of the bar admission course in 2002, a major increase in numbers, although it takes many years of bar admission classes to make an impact on the larger numbers in the profession. See Vern Krishna, "Promoting Greater Diversity Within the Legal Profession" *Law Society of Upper Canada Gazette* (3 May 2003) [Krishna].
- 54 Ornstein, *supra* note 53 at i. More recent data show that 53% of the bar admission students were female in 2002, although again it takes time to alter the numbers in the profession as a whole. See Krishna, *supra* note 53.
- 55 Ornstein, *supra* note 53 at i-ii.
- 56 I have calculated the racialized percentage from the table provided on "Provincially Appointed Courts and Representation Based on Characteristics Other Than Gender" in Richard Devlin, *et al.*, "Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a 'Triple P' Judiciary" (2000) 38:3 *Alberta Law Review* 734 at 762. The same table indicates that Aboriginal judges represented 2.24% of provincially appointed judges. No Aboriginal or racialized data are kept on federally appointed judges.
- 57 Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989). The study analyzed all reported and unreported court decisions under s.15 for the first three years, and found that men had initiated more than three times as many sex equality challenges as women had (at 66).
- 58 Sherene Razack, *Canadian Feminism & the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991) outlined some of the effort and organization that resulted in the gendered litigation strategies, and speculated upon why gender was the category that dominated over race and other characteristics of disadvantage.
- 59 Mary Eberts, "New Facts for Old: Observations on the Judicial Process" in Richard F. Devlin, ed., *Feminist Legal Theory* (Toronto:

Emond Montgomery Publications, 1991) 110, noted at 110-12: "Women lawyers and litigants doing cases about women's lives have a special interest in the discovery, proffering, and reception in court of facts about women's lives. This is because of the particular nature of the reality described and embedded in the law (and in other social institutions): though it passes for a general description, it is actually a description of male reality. Cases involving women are, more often than not, decided in the light of an ostensibly 'gender-neutral,' but actually male-centred, view of the world... [t]he work of feminists is essential to a rewriting of the male vision of our social and intellectual life. What feminists do, in the legal system, is to expose its previously unseen maleness, and attempt to deconstruct it, in order to make room for the viewpoints, the concerns, and the experience of women."

- 60 Sexual assault is overwhelming a crime committed against adult women by men. Canadian data show that in 1998, 85% of victims in reported cases of sexual assault were women; 98% of the accused were men. See Canada, *Juristat: Crime Statistics in Canada, 1998*, v.19, no.9 (Ottawa: Ministry of Industry, 1999) at 6, 21. Canada, Statistics Canada, *Canadian Crime Statistics 1999* (Ottawa: Minister of Industry, 2000) estimated that 78% of sexual assaults were not reported to the police. Women accounted for 85% of all reported spousal violence victims in 2000. Based on 1999 data, it is estimated that only 37% of spousal assault cases involving female victims were reported to the police. See Canada, Statistics Canada, *Family Violence in Canada: A Statistical Profile 2002* (Ottawa: Ministry of Industry, 2002) at 6-7.
- 61 Sarah Redekopp, "The message of one Jane Doe" *Interpares*, University of Ottawa Faculty of Law, (April 2003) at 2.
- 62 Susan Steffen, "Human Rights Commissions and Race Discrimination" in Errol Mendes, ed., *Racial Discrimination Law and Practice, Looseleaf* (Toronto: Carswell, 1995) 2-1 at 2-5, 2-9, and 2-13, noted that there were "wide gaps in the treatment of discrimination on different grounds" and documented an "unsettling trend" that "cases involving complaints of racial discrimination tend to be dismissed more often than complaints based on other grounds."
- 63 Macdonald, *supra* note 1.
- 64 Barbara Grutter, a white woman, brought an action against the University of Michigan on behalf of herself and all others similarly situated, alleging that the university's admissions policy violated the Equal Protection Clause of the Fourteenth Amendment when it utilized race as a factor in determining admissions to the law school.

The University's admissions policy evaluated a series of factors: LSAT scores, undergraduate grade-point average, the enthusiasm of the recommenders, quality of undergraduate institution, quality of applicant's essay, residency, leadership, work experience, unique talents or interests, and areas and difficulty of undergraduate course selection. Students with low index scores were potentially admissible where (a) there was good reason to be skeptical of an index score based prediction, and (b) admission of such students might help achieve the diversity that had the potential to enrich everyone's education. The United States District Court for the Eastern District of Michigan at Detroit held that the law school's consideration of race and ethnicity violated the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. The United States Court of Appeals for the Sixth Circuit reversed that decision on 14 May 2002. See *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999) allowing motions to intervene filed by prospective minority applicants for admission to university, and non-profit organizations dedicated to preserving higher educational opportunities for minority students. For the 6th Circuit decision, see *Grutter v. Bollinger*, [2002] CA6-QL 162 (No. 01-1447, 6th Cir., 05/14/2002). The dissenting judgments in that case offer some glimpse of the hostility directed towards affirmative action; see, for example, the comments of Boggs J.: "The fact that some might think this society would be a better one if more governmental benefits were allocated, because of their racial or ethnic status, to blacks, Hispanics, or Native Americans, and less to whites, Asians, or Jews, or vice-versa, does not make those policies permissible under our Constitution. ...Even a cursory glance at the Law School's admissions scheme reveals the staggering magnitude of the Law School's racial preference. Its admissions officers have swapped tailor's shears for a chainsaw. ...Michigan's plan does not seek diversity for education's sake. It seeks racial numbers for the sake of the comfort that those abstract numbers may bring. It does so at the expense of the real rights of real people to fair consideration." (at 186, 190, 339.) The appeal to the United States Supreme Court was argued in the spring of 2003; [Editors' note: see now *Grutter v. Bollinger* 539 U.S. 306 (2003) and *Gratz v. Bollinger* 539 U.S. 244 (2003)].

- 65 Daniel Golden, "Extra Credit: At Many Colleges, the Rich Kids Get Affirmative Action" *Wall Street Journal* (20 February 2003), at A1. The article noted that "top schools ranging from Stanford University to Emory University say they occasionally consider parental wealth in admissions decisions." Duke University admitted utilizing a formal

preferential admissions program, in which 500 likely applicants with rich or powerful non-alumni parents were identified through its own network and names supplied by trustees, alumni, donors and others. Children of major alumni donors were given similar preference in a separate process. These potential students were cultivated with campus tours and admissions advice. The pool was winnowed by the development office, and then candidates were admitted based upon their family's likely contribution evaluated against their academic shortcomings. The aggressive new policy to recruit students with family wealth or connections has apparently paid off, with Duke "leading all universities nationwide in unrestricted gifts to its annual fund from non-alumni parents."

⁶⁶ Macdonald, *supra* note 1.

⁶⁷ On 26 May 1997, the newly created territory of Nunavut held a public vote on the following question: "Should the first Nunavut Legislative Assembly have equal numbers of men and women MLA's, with one man and one woman elected to represent each electoral district?" The results showed 57% voting no, and 43% voting yes, with a voter turnout of 39%. See Legislative Assembly of the Northwest Territories, Press Release, "Official Count shows little change in public vote results" 12 June 1997, copy on file with the author.

⁶⁸ Macdonald, *supra* note 1.

⁶⁹ Subcommittee to Review the Program in Public Interest Law and Policy, "Five Year Review of Program in Public Interest Law" UCLA Faculty of Law Report, (2 September 2002). For the years for which full data are available, approximately 50% of the students took public interest positions after graduation.