Personal Relationships of Dependence and Interdependence in Law

Legal Dimensions Series

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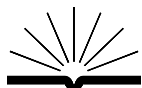

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Introduction

Nathalie Des Rosiers

How should the law reflect the phenomenon of interdependence in human relationships? This is the question raised in this book. Intuitively, we recognize that ours is a world of interdependence: ecological equilibrium rests upon an understanding of interdependence among species, international peace is built upon the concept of the interdependence of nations, and economic prosperity relies upon shared commercial arrangements and mutually accessible markets. Nevertheless, it often seems that, when it comes to analyzing relationships among people, law has not reflected the centrality of the concept of interdependence. Our traditional legal instruments seem to relegate interdependence to a question of individual choice (through the law of contract, whereby, for example, X agrees to sell to Y a certain number of widgets, provided that Y agrees to buy more in the future) or to the realm of family law. Current legal thinking has not fully explored the concept of interdependence in nonintimate relationships, nor has it studied the structural aspects of interdependence. This is what this book sets out to discover. It questions the way that law has conceptualized relationships outside of the usual context of family and intimate relationships. Each chapter approaches a type of relationship, whether between therapists and patients, different people in a business context, lawyers and clients, computer users and Internet service providers, or bureaucrats and citizens, in order to explore their "interdependent" aspects. Then there is an examination of how the law currently reflects, undermines, encourages, supports, or ignores this interdependence.

It is interesting to reflect upon the common themes raised by each of the five authors. First, they develop some central components of interdependence: trust, the fear of exploitation, and the lack of choice to abandon the relationship. Second, they explore the way in which law structures, often ineptly, the features of interdependence. And, finally,

they prompt us to think about how to improve our legal models so that they better reflect the complex and dynamic nature of interdependent relationships; that is, they prompt us to consider paths for law reform in this area.

Features of Interdependence

The interpersonal relationships explored here, even those that are virtual, are rooted in *trust,* or at least have as an important factor the absence of an expectation of trust, as argued by **William Flanagan** in "Fiduciary Duties in Commercial Relationships: When Does the 'Commercial' Become the 'Personal'?" Furthermore, all the interpersonal relationships examined here involve the risk of the exploitation of one party by the other, and the *fear of exploitation* explains, in part, the legal structures that have been adopted to regulate them. Finally, because of trust and because of the unequal aspects of these relationships, merely severing them is not always realistic: *termination is not always an option.*

Interdependence and Trust

Why people trust their lawyers, their therapists, the people they do business with, their Internet service providers (ISPs), and the bureaucrats with whom they deal remains a bit of a mystery. It is clear, however, that such human relationships are rooted in trust. In fact, developing trust is often the goal of the relationship. As **Sue Campbell** point outs in Chapter 1, "Dependence in Client-Therapist Relationships: A Relational Reading o*f O'Connor* and *Mills,"* it would be impossible for a therapist to do her work if her client did not trust her. The client cannot open herself up and confide in the therapist without having this sense of security. Similarly, lawyer-client relationships, as described by **Lucie Lauzière** in "Dependence and Interdependence in the Lawyer-Client Relationship," have often been viewed in the same way; the client must absolutely trust the confidential nature of the lawyer-client relationship if she is to confide in the lawyer and to obtain the appropriate legal advice.

Within a business context, Flanagan argues that expectations of trust must be balanced against the realities of a market-driven economy, where it is assumed that businesspeople act according to their own self-interests. Only maximizing such self-interest can ensure the efficiency of the marketplace. Nevertheless, trust is also key to business transactions: trust or confidence in the economy; confidence in market potential; and trust in one's employees, suppliers, and buyers. Indeed, the four scenarios reviewed in Chapter 3 reveal that businesspeople often trust,

to their detriment, people with whom they do business. When that trust is broken, they sue, expecting the legal system to punish the trust breaker or to repair the broken trust. The issue explored by Flanagan's chapter involves the extent to which law, and, in particular, the concept of fiduciary duty, should be used to respond to this demand that misplaced trust be honoured. He reviews, in particular, (1) the conflict between Justice LaForest's views that fiduciary obligations should be imposed when "reasonable expectations" about trust have been raised and (2) the narrower view held by the late Justice Sopinka that fiduciary obligations should arise only when one party is vulnerable to the other.

Trust is also essential to the development of the Internet. Indeed, people will not use the Internet if they fear that their messages will be intercepted or their credit cards misused. As described by **Ian Kerr** in Chapter 4, "Personal Relationships in the Year 2000: Me and My ISP," Internet users are becoming increasingly dependent upon their access to the Internet and are willing to enter into a wide range of contractual arrangements to secure such access.

Finally, our democratic and bureaucratic structures could not exist if citizens did not trust them. It is when citizens lose their trust in a political regime that arbitrary rule tends to appear. Trust is not always a choice: when people are not necessarily trusting – when they may have some doubts about the competence, integrity, or helpfulness of the other party – they often do not have much choice but to presume the other party's good faith and rely upon them. Confronted with an unequal power situation, whether it be intellectual, social, or financial, citizens often have no choice but to trust the other party and hope for the best. This is particularly true with regard to bureaucrat-citizen relationships, which are explored by **Lorne Sossin** in Chapter 5, "Law and Intimacy in the Bureaucrat-Citizen Relationship." Here, for example, one can only hope that the civil servant in charge of one's application for refugee status is a trustworthy individual.

With her lawyer, therapist, Internet service provider, or, worse still, the bureaucrat in charge of her visitor's permit application, a person can only hope that it is not unreasonable to trust the other party. People are often unable to choose the person with whom they must enter into a relationship, and because of the imbalance that may exist between them, she cannot really allow herself to criticize, question, or even abandon that relationship.

Indeed, in Chapter 2, Lauzière reviews the societal aspects of the trust bestowed upon lawyers. She argues that the organization of the Bar, the monopoly it has over the delivery of legal services, and the discipline it

exercises over its members lead clients to believe that lawyers, as a class, are worthy of trust. This point must not be forgotten: the relationship between lawyers and clients, and, indeed, between therapists and clients, exists within a social context that structures the relationship. The relationship is not just between individuals; it is also between a privileged class of people and a less privileged class of people. It could be that the privileges granted the former, such as the monopoly over the delivery of services, must be reexamined if the risk of exploitation is to be significantly curbed. This brings us to the other point made by all five authors: it is the risk of exploitation within relationships of dependence and interdependence that society must deal with and manage.

Interdependence and the Fear of Exploitation

The five chapters in this book identify a number of risks:

- the risk of incompetence (lawyer, therapist, bureaucrat)
- the risk of bad incentives (an ISP that is more responsive to lucrative publicity ads than to the interests of users or that responds to the pressure of justice officials and discloses the names of its users; a bureaucrat who is more responsive to institutional constraints than she is to the application before her; a business associate who pursues her own interests instead of those of the ongoing relationship)
- the risk of dishonesty (a lawyer who takes money from her trust account to pay off gambling debts; a racist bureaucrat who knowingly misleads an immigrant; a business partner who flees with all the money in the company's bank accounts).

These risks might be better managed if their nature were better understood. The risks of incompetence may be minimized by accreditation procedures, but these would not suffice to help manage the risks of bad incentives or dishonesty. There may be very competent lawyers or therapists, for example, who have passed all the requisite exams but who may not resist wanting to unduly increase their profits or satisfy their personal interests at their clients' expense.

It must also be noted that the reduction of such risks calls for a global approach. Flanagan argues, appropriately, that legal intervention occurs after the fact, when the damage has already been done. The inconsistencies in the courts' responses may stem from a desire to respond to apparent unfairness without looking at the range of options available outside the court system.

It is not sufficient to simply clarify provisions relating to fraud in the *Criminal Code,* to establish an accreditation system for all therapists, or to better regulate contracts entered into on the Internet in order to deal with the range of risks identified. A more sophisticated approach is required. The responses to risks of bad incentives, of incompetence, or of dishonesty need to be addressed through a global examination of social and legal frameworks. It may well be that law reform efforts should be concentrated on this type of review.

Interdependence Means That Termination Is Not Always an Option

One possible response to problems in a relationship is to terminate that relationship and look elsewhere to satisfy one's needs. In *Éloge de la fuite,* French philosopher Henri Laborit suggests that flight, as a solution to problems in human relationships, is natural and often beneficial.[1] Often, parties to interpersonal relationships cannot resolve some of the problems that arise within them: it may be better to get out before it is too late.

In fact, the idea of "choice" as a regulating tool in human relationships is at the forefront of democratic principles: the ability to choose one's government is the basic principle underlying our political organization. In addition, the nature of our market economy is based upon the choices offered to consumers. Consumers have power because they can decide to buy elsewhere and to choose another product, another store, or another supplier. The possibility of terminating an unsatisfactory human relationship involving governance or consumerism cannot be disregarded as an appropriate solution to solving problems involving relationships of dependence and interdependence. Indeed, the possibility of terminating the relationship is often a very useful tool. If a client can find better service by going to another lawyer or another therapist, then, in the event of any disagreement, she can, as suggested by Lauzière, assert this option and, thereby, influence the power imbalance. Maximizing available choices is often an excellent option.

However, when one looks at the essence of particular relationships of dependence and interdependence, one sees that the availability of choices diminishes as the relationship develops. When one is well acquainted with a lawyer or a therapist, for example, one may hesitate before going elsewhere, where one would have to re-explain all the issues pertaining to one's situation. There are also inherent costs to such changes; the new lawyer or therapist will need time to become familiar with the issues. This can be even more difficult when purchasing Internet

services is involved; if we have to change our email address in the process, then we must redefine an important part of our identity. We have to notify all our email correspondents, lose certain contacts, reset our software, and so on. To change business associates or commercial connections can also be trying: links that have been developed are at stake. Interpersonal relationships of dependence and interdependence cannot always be analyzed through the application of the theory of maximizing choices, the typical solution of a market-based society.

Inadequacies of the Legal Models

The different relationships of dependence and interdependence presented in this book invite us to reflect upon specific weaknesses within our current legal framework. Also, by trying to manage the risks of exploitation in more creative ways, they compel us to conceive of dynamic models that involve more than simply characterizing the nature of these relationships.

The five examples discuss three basic legal frameworks for regulating relationships: (1) the contract model (Kerr, Flanagan), (2) the fiduciary obligation model (Lauzière, Campbell, Kerr, Flanagan), and (3) the administrative law model (Sossin). These three models raise interesting questions concerning the efficient management of the fear of exploitation and the protection of the citizen's trust.

Contract Model

The contract model has many advantages: it offers flexibility; it values individual autonomy; and it respects people's abilities to organize their lives and relationships. It allows citizens to interact with one another and to express their common hopes and possible achievements.

Flanagan argues that the contract model is the ideal model to allow sophisticated businesspeople to manage the risks of incompetence or dishonesty and to create the right incentives for the other party. In his view, contract law continues to be the vehicle of choice for commercial law actors. Indeed, the contract model works best when both parties are equal and can truly express their needs and negotiate the performance of their expectations.

In civil law, the contract is the dominant tool for analyzing the relationship between a professional and her client. Lauzière reviews how the features of a fiduciary relationship were added to the contract model through the influence of common law thinking.

However, the reality of contracts is that they have often been used to protect the interests of those who are better off. Kerr's survey of ISP-user

contracts demonstrates the extreme flexibility of the model; it is unclear whether users know about the variety of contractual arrangements that are offered to them or whether they even compare Internet service providers on that basis.

Powerful actors are often the ones who determine the terms of the contract and who have the power to make it a "take-it-or-leave-it" proposition. We know that complex, fine-printed, incomprehensibly written contracts are commonplace in our society and that they often intimidate consumers.

How to balance the power of each party in a relationship is the subject of the second part of our analysis. Before tackling this issue, however, we will first look at another current legal model: the fiduciary obligation model.

Fiduciary Obligation Model

In common law courses, the preferred example of the concept of fiduciary obligations involves an executor of an estate appointed to manage property "for the good of" heirs who are too young to manage the assets themselves. Of course, the fiduciary (i.e., the executor) is not allowed to take the property for her personal use. The fiduciary – and this is the essence of a fiduciary obligation – must act "in the interests of" the person for whom she holds the assets (i.e., in this case, the underaged legal heirs).

Over the years, this obligation has been extended to a number of human relationships in order to counterbalance the powers of individuals who have taken advantage of the weak. The following are some of the relationships considered by our authors: child-parent, lawyer-client, corporate director-shareholder, Internet service provider-Internet user, and the Crown-First Nations.

Although not always built upon vulnerability (as Flanagan rightly points out), the fiduciary concept has been useful in remedying the power imbalance that may exist in some relationships. However, the concept of fiduciary duty is based upon the problematic assumption that the fiduciary is capable of determining what is in the best interests of the beneficiary of the trust. The idea that one person can fully understand another's needs and determine how to fulfil them is not a notion that belongs in this day and age. Nowadays, we no longer speak for others; we realize that doing so either silences them or creates misunderstandings. Therefore, the idea that a fiduciary may speak on behalf of a beneficiary, and may know what is in her best interests and act accordingly, appears somewhat outdated. It seems even more dangerous

when one considers that the fiduciary has no concomitant obligation either to inquire about the beneficiary's needs or to inform the beneficiary of available alternatives.

The fiduciary model was developed to ensure the adequate representation of the interests of children inheriting huge fortunes, and it does provide the clients of lawyers and therapists with the requisite dignity and respect. Clients want to have a better understanding of their options; they want to have someone (e.g., a lawyer or therapist) to explain their options to them, and they do not want to leave their decision-making capabilities at that person's doorstep.

Indeed, the entire notion of professionalism appears to be designed to enhance the sense of power of the fiduciary rather than to encourage her to share her knowledge, experience, and expertise with the beneficiary. Lauzière's analysis is particularly telling within this context.

Some thought must be given to the limits of the concept of fiduciary obligations as a viable solution to countering the risks of exploitation in relationships of dependence and interdependence. As currently understood, imposing fiduciary obligations can certainly be seen as a way of correcting a situation a posteriori. However, in the course of the fiduciary relationship, it may be wise to impose an obligation to consult with and inform the beneficiary or even a proactive obligation to encourage the beneficiary's independence. This innovative dynamic notion would seek to minimize a beneficiary's dependence and to promote her independence, and it is not far from the approach that some "fiduciaries" take towards their fiduciary obligations. For example, many therapists seek to affirm the reality of their clients' experiences so as to enable their clients to no longer have to rely upon their services. In some areas, lawyers' duties are being described as an obligation to promote and to affirm their clients and to provide them with the means to defend themselves on their own. Stephen Wexler has notably advocated this in a famous paper entitled "Practicing Law for Poor People,"[2] in which he proposes a model for professionals who wish to empower their clients by sharing their knowledge and expertise.

We also see a willingness to empower consumers and citizens in other areas. Service providers are increasingly interested in developing interactive tools to communicate with their clients, to consult them, and to get them to participate in product and service development. This is particularly the case with Internet-based companies that build on their users' sense of autonomy and independence. Similarly, governments are moving towards "citizen engagement" models that would enhance

the capacity of citizens to participate in decision-making processes. But this transformation of the structures of administrative decision making is not without its difficulty.

Administrative Law Model

The obligation of public authorities and government officials to act fairly and with impartiality speaks to their duty to respect the rule of law. As Sossin explains, these rules often prevent bureaucrats from obtaining adequate information from citizens and, more important, from sharing information. In his view, such a legal culture creates detachment and abstraction in the delivery of public policy. In a way, we have created a system that values the decision-making power of the "stranger" – the bureaucrat who does not know very much about the individual circumstances of the citizen affected – in order to rule with "objectivity." Sossin argues for the adoption of a more "intimate" relationship between citizens and bureaucrats, one that would still reflect concern about nepotism, partiality, and bias but that would also support the display of empathy on the part of civil servants.

The inadequacies of the legal structures that support relationships of dependence and interdependence invite us to consider whether it is possible to do better and thus to reform our legal understanding.

Paths for Law Reform

Our examination of relationships of dependence and interdependence suggests that, ideally, in order to correct the power imbalances inherent within them, we should transform them from relationships of dependence into relationships of interdependence. Working on both fronts would probably be the best option: limit the powers of one party, while increasing the powers of the other.

Specific improvements to our legal mechanisms are in order. Some of these could be focused upon setting certain limits to some contractual obligations: rendering certain abusive clauses illegal; making disclosure of certain information compulsory; and allowing consumers to change their minds. Law can be used to limit the powers of a person, a lawyer, a therapist, an Internet service provider, or even business partners, either by imposing some type of fiduciary obligations or by determining certain contractual terms and conditions.

Although these reforms could prove very useful, they presuppose access to the courts. However, indebted and over-burdened consumers, betrayed and possibly ruined business associates, lawyers' clients disillusioned

with the system, or therapists' patients already struggling with deeply rooted psychological issues of identity and self-worth are unlikely to have, or be able to take advantage of, such access. Even if a new culture of fiduciary obligations – one with a view to enhancing the autonomy of beneficiaries – were introduced, this still might not be enough. Action will have to be taken at other levels as well – for example, with regard to the development of a culture of ethics.

Development of a Culture of Ethics

The development of an ethical community of professionals, of commercial actors, or of bureaucrats does not involve a novel approach to diminishing risk; professionals have adopted codes of ethical conduct by which they recognize their powers and the potential for exploitation that they hold. Such individual ethical commitments are often supported by a collective self-management culture that serves to reinforce its ethical values. Professional groups of various callings have followed suit. Similar self-regulating systems have started to develop in the areas of trade and commerce (e.g., ISO registration, organizations such as the Better Business Bureau, and a number of other professional organizations).

All these systems must be considered within the context of law reform, of seeking to provide a better framework for addressing personal relationships of dependence and interdependence. A better understanding of how these systems work will help us to know how they can best complement formal legal intervention. As Lauzière's chapter points out, a culture of ethical commitments that is rooted in the justification for a monopoly over the delivery of legal services may not support the transformation of a relationship of dependence into one of independence. Nevertheless, a culture of ethics can be a powerful counterbalancing factor in the dynamics between relationships of dependence and relationships of interdependence. As can the intervention of powerful third parties.

Third-Party Involvement

In managing the risk of exploitation, it is often helpful to enlarge the context of the relationship. A code of ethics, for example, brings new considerations into a relationship. Thus, although within what appears to be a harmless context a therapist may be tempted to relate the story of a patient, consideration of her code of ethics may stop her from doing so. Third-party intervention, like a code of ethics, also enlarges the context of a relationship: it is no longer sufficient to satisfy the client;

one must also satisfy the union representative, the ombudsperson, or the patient's advocate.

The mere presence of a third party often changes the dynamic of a relationship by increasing the power of the dependent party. For example, a third party acting in support of the dependent person could intervene and so prevent exploitation. Such third parties could include consumer advocacy organizations, victim support groups, unions, privacy commissioners, and so on.

What third-party intervention offers is not so much the establishment of restrictions on the power of one person in the relationship as a subtle change in the dynamics of the relationship itself. Formal intervention by the third party may never be necessary; it is sufficient that such intervention is possible for the risk of exploitation to be further reduced.

Conclusion

The essays in this book look critically at the legal concepts that have framed the different relationships of dependence and interdependence: the law of contract, the concept of fiduciary duty, the "duty to act fairly," and the concept of the impartiality of decision makers. Many of these concepts obscure the element of interdependence in human relationships. These essays demonstrate that the lens of interdependence is a fruitful framework through which to reevaluate some of our traditional legal concepts.

Upon examining these different relationships within a broad context, the following points have emerged: the necessity for trust, the difficulties of adopting only market-based solutions regarding enhancing choice, and the challenges of finding solutions that will minimize the risks of exploitation. Certainly, further research will be needed to advance the different solutions that are advocated (e.g., reassessing the concept of fiduciary duty, developing a culture of ethics, and allowing for adequate third-party intervention).

As always, law reform does not offer magical solutions. To be truly effective, action must be taken at many levels – at the level of formal legal change as well as at the more subtle level of creating adequate pressures within different relationships. Only an approach to risk reduction that looks carefully at the issues of dependence and interdependence, and at the subtle ways in which they manifest themselves, can lead to the development of mechanisms to support relationships that can be healthy, beneficial, and exempt from all forms of exploitation.

Notes

1 Laborit, H., *Éloge de la fuite* (Paris: Gallimard, 1985).
2 Wexler, S., "Practicing Law for Poor People" (1972) 79 Yale L.J. 1049.

Personal Relationships of Dependence and Interdependence in Law

1
Dependence in Client-Therapist Relationships: A Relational Reading of *O'Connor* and *Mills*

Sue Campbell

In this chapter, in light of recent legal contests, decisions, and acts of legislative reform concerning the confidentiality of complainant records in sexual assault cases, I use a feminist perspective to explore social and legal representations of women's relationships with their therapists. In Canada, as elsewhere, relationships between women and therapists have become the site of increased public and judicial wariness as relationships of potentially alarming dependence. Throughout the last decade of sexual assault litigation, this wariness has been reflected in the frequent defence demand to have access to women's confidential records in order to scrutinize their interactions with their therapists. The work of the False Memory Syndrome Foundation (hereinafter the FMS Foundation) has encouraged distrust of therapeutic relationships and has functioned to facilitate records production.[1] The FMS Foundation contends that, during the 1980s and 1990s, a certain gendered phenomenon reached epidemic proportions: the practice among therapists of inappropriately suggesting to distressed and easily influenced female clients that they might have been sexually abused as children and yet might fail to consciously remember that abuse. Though few of the Canadian cases in which a complainant's personal records have been sought by the defence have involved women who recovered memory in the context of therapy, what I shall call "false memory discourse" has activated potent stereotypes of women as emotionally unstable and easily manipulated. These gendered stereotypes have combined with growing public uncertainty about the reliability of autobiographical memory to allow for an extraordinarily fluid use of false memory discourse, enabling defence lawyers to call into question the credibility of women who bring complaints of sexual harm before the courts.

In *R.* v. *O'Connor* (hereinafter *O'Connor*),[2] the Supreme Court formulated procedures for records production, and, in its remarks on relevance,

the majority expressed concern about therapeutic relationships. In the later *R.* v. *Mills* (hereinafter *Mills*),[3] the court upheld the constitutionality of Bill C-46, which replaced the *O'Connor* regime with a more restrictive approach to records access. The majority recognized the importance of therapeutic relationships to women's recovery from sexual harm and did not express any general suspicion of these relationships. The obvious difference between the decisions is that the majority in *Mills* attended to equality rights while the majority in *O'Connor* did not. I shall argue that this difference required a second difference and, indeed, led naturally to it. *Mills* used a relational representation of persons while *O'Connor* ignored the relational context of women's lives. In this chapter, I analyze the disturbing representation of women in *O'Connor* and argue that, if we wish to promote equality, then we need to adopt a relational account of persons.

I begin by defending the theoretical framework I use to assess *O'Connor* and *Mills*. Drawing on the work of a number of feminist theorists, particularly on Christine Koggel's *Perspectives on Equality: Constructing a Relational Theory*,[4] I argue that promoting equality requires a relational understanding of people's lives. Feminists have contended that relational approaches to persons, which focus "on the dynamics of human interaction in the context of concrete social practices and political contexts,"[5] allow us to see the ways in which people's self-concepts, abilities, and life opportunities are shaped by their positions in complex networks of personal and institutional relationships. Because we are differently situated, relational theories emphasize the importance of attending to a diversity of perspectives when evaluating and rectifying inequalities, and they allow us a better understanding of the effects of social inequalities than do more generalized representations of persons, which focus on what we all have in common. Drawing attention to the importance of others' perspectives also allows me to raise issues concerning how people's self-understanding can be exploited in unequal relationships. I shall argue that this exploitation is a central harm of records disclosure and that it is masked when our analysis ignores relationships.

I then go on to outline the judicial and legislative events that constitute the Canadian response to records disclosure. Finally, in the major critical section of this chapter, I use a relational framework to analyze the transition from *O'Connor* to *Mills*. I do this by undertaking two tasks. First, I discuss the disturbing representation of women in *O'Connor.* I contend that a lack of realistic attention to relationships in *O'Connor* led the court to ignore how women's self-concepts and perspectives can

be exploited in ways that contribute to their inequality. Moreover, I explore how false memory stereotypes of women, which posit that they are easy to manipulate because they lack psychological boundaries, encourage and facilitate this exploitation. Second, I argue that *Mills* can and should be read as endorsing a more relational view of the self, not only in the court's contextual approach to values, but also in its specific attention to networks of relationships as the context within which values that support equality are given meaning. Of particular interest, given frequent feminist scepticism about the value of privacy, is the court's transformed relational understanding of the value of privacy to women's equality. In *Mills* we see greater awareness, at least on the part of the Supreme Court, that respect for equality requires attention to relational selves.

Relational Selves and Equality

In Western pluralistic democracies, a positive concern for equality has often been expressed as the commitment to treat all persons with equal concern and respect.[6] Moreover, this commitment has been made within the general acknowledgment that substantive inequalities continue to affect the lives of many. Equality theorists have disagreed, however, on how best to approach an exploration and defence of the practices of equality as well as on how to represent persons within their discussion of these practices. My interest concerns how those who favour broadly substantive approaches to equality can best understand and represent persons.[7]

A strategy of analysis often associated with liberal theorists has involved offering a description of persons that focuses on what we have in common, on the basis of which we should all be equally accorded concern and respect.[8] Because, for example, we are all rational choosers, each with our own sense of what constitutes the good life, each of us should have an equal chance to pursue our own good. Although liberal substantive theorists recognize that individuals in different situations may require differential treatment in order to secure equality, we deserve equality because we are fundamentally the same, whatever our situation; and, once we recognize this, we are each rationally compelled to support equality for all others. The power of a liberal approach lies in its insistence that certain basic similarities amongst persons constitute sufficient grounds for demanding their equal treatment, while its persuasiveness often depends upon persons recognizing each other as what Seyla Benhabib refers to as generalized others: "The standpoint of the generalized other requires us to view each and every individual as a

rational human being entitled to the same rights and duties we would want ascribed to ourselves. In assuming this standpoint, we abstract from the individuality and concrete identity of the other."[9]

Despite the attractiveness of a view of equality supported by a reasonable appreciation of what we all share, feminist theorists have argued that we make a mistake in our approach to equality when we represent persons as generalized others and when we found discussions of substantive equality on the ability to identify with others as like ourselves. First, such discussions often fail to provide a detailed understanding of circumstances of inequality (this is not their focus), and this affects their ability to ground appropriately contextual specifications of the values at issue. In a political context characterized by substantive inequalities, we cannot say what it is to treat persons with concern and respect without knowing quite a lot about the circumstances of their lives, including the specific ways they have been disadvantaged. We may have a general idea of autonomy as the ability to direct one's life, or of privacy as limited accessibility, but we need to understand how to give content and support to these ideals in the specific contexts within which they may be applicable. For this, we require information about people's identities, self-concepts, and circumstances. Second, representations of these values will, in fact, necessarily be developed around assumptions about people's lives that move away from what we have in common and may leave some people outside the range of these values. As described, a value may even harm them. In this sense, a focus on specific values may actually harm these people. Finally, such approaches to equality require that we be able to imagine ourselves into very different lives, making judgments about what others do and should value and about what should count as valid reasons for so doing. We have little assurance that we can do this with any degree of fullness or accuracy.[10]

The question for theorists who argue that positive formulations of equality require a comprehensive understanding of inequalities is: How do we achieve this understanding? How do we come to understand the mechanisms by which values are shaped and the real effects of how values are institutionally embodied on the lives of those with whom we stand in moral community? Feminists such as Christine Koggel, Susan Sherwin, and others have argued that we must attempt to think of persons distinctively and concretely rather than generically and that doing so requires paying attention to the variety of relationships within which people's lives, self-concepts, capacities, and values are actually formed.[11] We develop and live our lives as persons within complex networks of institutional, personal, professional, interpersonal, and political

relationships, both chosen and unchosen. We are shaped in and through our interactions with others in ways that are ongoing, and we develop intellectual and moral capacities and skills, including skills of moral reflection, in relational contexts that give these capacities and skills specific content and offer us methods of evaluation and self-evaluation. We come to understand our lives through how others respond to us, and our relational histories are significant determiners of the tenor of our responses to others. Moreover, feminist theorists have argued that, within the context of substantive inequalities, we must pay particular attention to relationships that undermine persons, their self-concepts, abilities, and opportunities; that shape values and structure interactions in ways that entrench rather than ameliorate inequalities. A commitment to equal concern and respect for persons gives us little practical guidance with regard to the specific practices required for equality. Relational theorists contend that a practical understanding of what is necessary for equality requires paying attention to the details of people's real lives.[12]

To illustrate the difference between an equality analysis that uses a generalized other and one that attends to persons as concrete others with specific relational histories, I will consider two different approaches to privacy – one of the values most seriously at stake in the production of women's personal records. In using privacy as an example, I assume that concern and respect for persons sometimes requires that we value their privacy and thus that privacy is, at least sometimes, necessary to equality. Later on I defend the importance of privacy to women's equality within the context of sexual assault litigation.

In his classic liberal analysis of privacy, "Privacy, Freedom and Respect for Persons," Stanley I. Benn assumes that an exploration and defence of the value of privacy is best conducted from the standpoint of the generalized other. He writes: "A general principle of privacy might be grounded on the more general principle of respect for persons ... To *conceive* someone as a person is to see him as actually or potentially a chooser, as one attempting to steer his own course through the world, adjusting his behavior as his apperception of the world changes, and correcting course as he perceives his errors. It is to understand that his life is for him a kind of enterprise like one's own."[13]

Benn contends that "to *respect* someone as a person is to concede that one ought to take account of the way in which his enterprise might be affected by one's own decision."[14] "As a man's view of what he does might be radically altered by having to see it, as it were, through another's man's eyes,"[15] this respect for persons requires a prima facie

obligation not to alter the interpretive circumstances of their choosing by the intrusion of uninvited or unwanted observation.

As the quoted description indicates, in order to engage with Benn's defence of a prima facie obligation towards privacy, we focus on basic similarities amongst persons, on our status as self-directed choosers who regard our lives as our own. In other words, Benn's chooser is explicitly represented as a generalized other to whom we relate through an attitude of reciprocal respect for one like ourselves. In order not to compromise the generality of the description, the chooser is represented as unembedded within a social context: we know little about his social location or the networks of relationship that structure his life and sense of himself.

The central insight of Benn's account – that one's perspective on one's own life has value and is often worthy of protection – is one that I endorse. However, Benn's strategy for defending this value cannot secure it in the contexts within which we need it, and this is at least partly due to his representation of a generalized other. First, the description of persons as unembedded leads to a distorted idea of what is even possible with regard to our practices of noticing and attending to our environment. Jeffrey Reiman points out that, as Benn is aware, Benn's principle (i.e., no unwanted or uninvited observation of the circumstances of my choosing) is unacceptably wide and would, for the most part, forbid us to pay attention to what is going on in the world. However, as Reiman also argues, Benn's attempt to set limits to this principle, by stipulating that privacy is especially important when the observation is of what I take to be central to my identity, simply begs the question.[16] The strategy of Benn's defence of privacy represents persons in a way that denies the inherent sociability of human life.[17] Even if we agree with his insights, we are left with the issue of defining the kinds of circumstances within which limited accessibility to others is an important value and then with defending why this is so. However, in order to provide this defence, we need a full and realistic understanding of what counts as harmful accessibility to others, and this understanding requires a view of persons as concretely embedded within diverse networks of relationships.

Second, it is impossible to represent a person in a wholly generalized way. Representing a chooser as unembedded in the social world in fact represents him as someone whose enterprise and sense of that enterprise is independent of relations and, thus, highly self-directed. Benn's chooser appears in the text quoted as the captain of his own fate, responsible by himself for perceiving his errors and directing and

redirecting his course.[18] In other words, affirming the importance of privacy involves identifying with Benn's chooser as autonomous in the sense of being independent of others, and this assumption of independence becomes part of Benn's description through the representation of an allegedly generalized other. We do not know how to proceed on Benn's analysis when we are considering the nature and importance of privacy interests for people whose circumstances are such that they cannot conceive of their lives as substantially self-directed or whose values do not condone the degree of independent self-directedness of the chooser in Benn's example.[19] Nor do we know how to proceed if we do not find ourselves in Benn's description. The strategy of Benn's analysis does not encourage us to move outside of thinking about the generalized other in our exploration of privacy, even while the actual details of his analysis do represent a particular kind of person. As records disclosure will show, the effect of privacy invasions can have differential and serious consequences for groups whose members' lives have been subject to previous continuous invasions of privacy in relationships of inequality. And these consequences cannot be understood without paying attention to the histories of these peoples' lives.

In "Women and Their Privacy: What Is at Stake?" Anita Allen offers a contrasting style of analysis of privacy, understood initially as limited accessibility involving dimensions of secrecy or confidentiality, anonymity, and solitude.[20] Allen does not seek to give greater definition to this value through the representation of a generalized other; rather, as her title suggests, she provides a detailed analysis of the interest women have in privacy as mapped through an understanding of how women's relational histories may compromise informational privacy and anonymity, and render solitude impossible. She discusses the ways in which women are subject to systematic unwarranted invasions of informational privacy through inappropriate questioning about their personal lives, martial status, or sexual histories in their relations with the courts, with potential employers, with welfare officials, with banks, and with teachers or professors. She discusses women's distress at such invasions and the injuries to women's careers, financial stability, and self-esteem. She considers the anonymity and informational privacy invasions "commonly experienced by women in public places," where women "come to accept being questioned about personal matters by strangers ... and being singled out by strangers."[21] She discusses women's response to these invasions – how, for example, many "come to believe they are 'fair game' if they venture into public places into which men may go to find repose."[22] She attends to how women lack solitude, especially at

home, where their care-taking function allows them little time for themselves. Moreover, Allen's work is sensitive to how privacy has developed as a politically inflected value that has helped to relate people unequally by, for example, exposing them to harm in designated places of state non-interference (like the home). Allen thus discusses the special interest women have in decisional privacy involving *"limited control by others of matters affecting their sexual and familial life,"*[23] for only through decisional privacy can they hope to obtain lives not constantly subject to a damaging lack of privacy, and not subject to little control over how the privacy interests of others can deprive them of decisional authority and expose them to harm.

Allen directs us to think of how privacy has taken shape as a value in political and relational contexts where women's concrete needs for types of limited accessibility have not been addressed. Later, I apply this type of strategy to the issue of records disclosure. Here I conclude by focusing attention on some of the moral dimensions of relating to others in ways that I have endorsed as a theoretical imperative; that is, relating to persons as concrete others with specific relational histories.

Allen's account attends both to structures of interpersonal and institutional relationships and women's responses to invasions of privacy. Koggel remarks that, "when we focus on the network of relationships, we begin to notice patterns both in the stories told by individuals with concrete histories and identities and in the social and legal structures which make the stories possible, patterns that make us attend to the inequalities experienced by concrete others in specific circumstances."[24]

Precisely because we cannot assume that we are all the same or that we can understand people's lives though conceiving of them as generalized others, a relational analysis directs us to attend to the perspectives of those who are marginalized, those whose equality we are attempting to defend. But attending to others' perspectives within the context of a commitment to equality raises questions about how to do so in ways that support equality.

Laurence Thomas, in "Moral Deference," points out that the different patterns of injustice endured by those in disadvantaged social locations will have a profound effect on their self-concepts, structures of memory, and emotional configurations. He argues that no amount of goodwilled imagination on the part of those whose lives have not been subject to these patterns of injustice will provide access to the perspectives of those who have been systematically disadvantaged.[25] Thus, in order to be morally responsive to groups affected by systemic injustice we must defer to their accounts of their experiences. Thomas is not claiming

that those who are marginalized cannot be wrong about the character of their experiences; rather, he is claiming that there should be a presumption in favour of their accounts – a presumption that is warranted because they are speaking from a vantage point to which the more advantaged do not have access. Thomas's view requires that the socially dominant, if they want to be morally responsive to inequality, must trust the accounts of those treated unequally when they say what it is like to be in their situation. Moreover, the dominant must act in ways that enable those who have been treated unequally to trust the former with their perspectives and to see value in providing them with their accounts.[26]

This last point is particularly important in considering records production. A relational account of persons stresses the importance of gaining access to the perspectives of those treated unequally. However, those concerned about equality must guard against how easily the perspectives of those treated unequally can be exploited in order to do further harm. Elizabeth Spelman, in "Treating Persons as Persons," elaborates this concern by differentiating treating a person as a bearer of rights from treating her as a person in a fuller sense: "treat[ing] [her] as the person she is ... more exactly, the person who someone takes himself or herself to be."[27] To treat people as persons in this latter sense is to attend to their self-concepts, "to attend to the ways which they choose to be seen and not to our favoured ways of perceiving them."[28] Responding to people through attending to their self-concepts does not mean simply accepting their view of themselves. Here Spelman agrees with Thomas. It does, however, involve respecting that they have a perspective on their lives and coming to know what that perspective is. But Spelman points out that our self-concepts also mark points at which we are particularly vulnerable. If you know how I regard myself, what facts about me I take to be the most important to who I am, what kind of affective orientation I have towards the world, what causes me joy and what causes me shame – as well as who I hope to become – then you know a great deal that can harm me. Those concerned with equality must understand the self-concepts, perspectives, and emotional configurations of those disadvantaged by current arrangements while protecting and promoting the circumstances within which people can form self-concepts without being exploited.

To capture the importance of not exploiting others' perspectives on their lives, I shall define as a positive value the ability to develop a self-concept and perspective on one's life and experiences within relational contexts that support rather than undermine this development. How to treat persons respectfully as persons raises issues of what persons should

and should not be obliged to share with others, their ability to set boundaries and to develop a perspective and sense of self in relationships of equality, and the ability to avoid or sever relationships that undermine or exploit them. As we lack an adequate term for the positive value of having one's own perspective on one's life, I shall refer to it as the value of the personal. The personal, as a value, is obviously linked to issues of privacy and confidentiality, but it assumes a relational rather than an unembedded self.

The distance between Thomas's account of deference, with its relationships of reciprocal trust forged across relations of unequal power, and the actual way in which the perspectives of those marginalized are often regarded is so striking as to render obvious the moral and political challenges of attending to the epistemic dimension of inequalities. Margaret Walker writes that any specific discriminatory practice will require an "epistemic firewall" "sealing off recognizable injuries and credible complaints."[29] In order to sustain inequality "it is necessary that some kinds of people are 'known' going in to be liable to irrational discontents, manipulative complaints, incompetent assessments, childish exaggerations, dangerous wilfulness, malicious ingratitude, wily deceit or plain stupidity ... A reduced, circumscribed, or discredited status as knowers and claimers – being epistemically marginalized or unauthorised – is no small working part of the identities of those 'necessarily' subordinate."[30]

Ameliorating the effects of former substantive inequalities will require the dismantling of these epistemic firewalls and the wide range of stereotypes that embody epistemic discrediting. In responding to inequality, it is necessary to arrange relationships so that those who are dominant can understand the perspectives of those who are treated unequally without exploiting them. After reviewing the Canadian response to records production, I will show that the exploitation of others' perspectives in circumstances of inequality is one of the chief harms associated with this practice.

The Canadian Response to Records Production

In the 1990s, a defence strategy for contesting women's credibility in sexual assault trials changed from directly questioning a complainant about her sexual past – an option restricted though not foreclosed by rape-shield legislation – to attempting to gain information about a complainant's personal past through seeking disclosure of a wide range of records about her life, often including notes made within the context of

therapy or counselling. The shift was dramatic in terms of the frequency of requests for records, the undiscriminating volume of material about women's lives that was subpoenaed, and the range of records requested. In its first eighteen years of operation the Ottawa Rape Crisis Centre did not receive a single request, but, in 1994, it received nine.[31] In her study of the use of personal records in sexual assault cases, Karen Busby found forty cases where records were sought by the defence within the eighteen-month period before the Supreme Court dealt directly with issues of records disclosure in *O'Connor*.[32] "In 1995, two hospitals in Toronto, along with two legal assistance organizations and a community agency for women, received pre-trial subpoenas to produce all their records for the last five years. The subpoenas did not even mention the name of the rape complainant."[33] In some cases "the accused sought access to virtually every document ever written on the complainant."[34] Records requested have included not only any sort of therapy or counselling records, but also child welfare records, public and residential school records, personal diaries, records from social service organizations, children's aid societies, prison and detention centres, immigration offices, witness assistance programs, alcohol recovery centres, and so on.[35] Personal records have been of little interest to the defence outside of cases of alleged sexual harm. In other words, records production has been a gendered practice.

Allen's work on privacy presents a picture of women as disturbingly physically, psychologically, and emotionally accessible to others. It is not surprising, given the history of women's accessibility, that a particular sort of violation of informational privacy became a viable defence strategy. *R.* v. *Osolin*, the first records case to come before the Supreme Court, and one that did not result in procedures for records production, makes clear how this informational accessibility supports assumptions of sexual accessibility.[36] In this case the seventeen-year-old complainant met up with two men, one of whom she had dated, and went with them to a third man's trailer. She had consensual sex with the man she had dated (who subsequently left) and had consensual sex later that day with the man's companion, whom she found nice. Two other men, McCallum and Osolin, arrived at the trailer. They went drinking with the owner of the trailer who told them that the complainant was "easy" and that they could all have a turn with her. McCallum and Osolin returned to the trailer and the latter drove the complainant's companion some distance off while the former attempted, unsuccessfully, to have intercourse with her. When Osolin returned, he forcibly

removed the complainant from the trailer. She was wearing only her underwear, which, according to her testimony, was then torn off. On a March night she was driven naked to a cabin forty miles away, where Osolin tied her to a bed, shaved her pubic hair, and had intercourse with her. She was found by the RCMP on the highway at 3:30 AM, crying and hysterical. Much of her testimony was corroborated by other testimony and was supported by physical evidence, including torn underwear recovered outside the trailer and swelling, bruises, and abrasions that were more consistent with sexual assault than with consensual sex. Moreover, Osolin himself testified not only that he overrode her complaints when he removed her from the trailer, but also that she was protesting while he shaved her. Aside from that, he claimed that she had been an eager participant in the incident.

The complainant had had previous psychiatric treatment. Defence counsel requested access to her counselling records, acknowledging that he did not know what he would find in them but thinking that he might find something helpful. Though there was no indication whatsoever that the complainant was incompetent to testify, the defence requested the records on the grounds that they might reveal something about her competence; and, when they did not, he requested permission to use them to cross-examine her on her character. The trial judge did not allow this and, moreover, refused to put the defence of mistaken belief in consent to the jury. The conviction was upheld on appeal, the appeal judge stating that "an argument that a man who, knowingly or recklessly, forcibly confined a woman against her will can have an honest belief that, during her confinement, she was freely consenting to his sexual advances has no air of reality about it at all."[37] On appeal to the Supreme Court, however, a narrow majority judged that, once the records were released to the defence, the lawyer should have been able to cross-examine the complainant, not on her character, but on possible motive for bringing an allegation of assault and on behaviour that might be related to the assailant's belief in her consent. With respect to the latter, months after the incident, and shortly after the complainant had undergone a gruelling cross-examination about her interaction with the men and was facing a further delay in her trial, her therapist noted that "she is concerned that her attitude and behaviour may have influenced the man to some extent and is having second thoughts about the entire case."[38]

In order for the assumption of women's sexual accessibility to be maintained in a social context within which everyone agrees that women

must consent to sex, there must be mechanisms for devaluing their claims that they have not consented. The unique accessibility of records in sexual assault cases provides such a mechanism. If records are commonly held to be far more relevant in these cases than they are in others, then the implication is that exceptional measures must be taken before the court can conclude that a woman has not fabricated charges or has not acted in such a way that her lack of consent is irrelevant to her accessibility. The easy availability of information about her by which to raise doubts concerning motive or concerning behaviour supports the current epistemic firewall that surrounds sexual assault as a practice of inequality.

As *Osolin* exemplifies, requesting records has been used to try to find anything in a woman's past that might scare her off or discredit her testimony. Although records have been sought for many mundane reasons (e.g., to try to find inconsistent statements), in many cases records have been produced when the defence has offered no grounds for saying why the information contained in them would be relevant. Lawyers have certainly been aware of the effect of records production on complainants. In the May 1988 *Lawyer's Weekly*, a defence lawyer who was an early advocate for the strategy was quoted with regard to the advantages of attacking the complainant at the pre-trial stage: "You have to go in there as defence counsel and whack the complainant hard ... get all the medical evidence, get the Children's Aid Society records ... and you've got to attack with all you've got so that he or she will say 'I'm not coming back.'"[39] Katharine Kelly noted that the defence counsel she interviewed said they examined records "for evidence that the primary witness is not credible, or for inconsistencies in her account or for material that embarrasses her or humiliates her enough to convince her not to proceed."[40]

Finally and significantly, although an extensive range of records has been requested for different reasons, the broad justification for the practice to the public, and frequently to the courts and by the courts, has been the threat of therapist influence on women's memories. For example, a prominent defence lawyer's response to the court's decision in *O'Connor,* which involved the demand for a vast array of records[41] and in which there was no suggestion of inappropriate therapy, was as follows: "In cases where a rape complainant has gone to therapy, and the accused's position is 'I'm innocent, she was never raped,' you have to have those records to see whether or not the counsellor was encouraging her false beliefs or solidifying them."[42] It should be noted that this

justification for records production does not involve reference to memories recovered in therapy but simply to any case where a complainant has had therapy and the accused denies the rape.

Subsequent to *Osolin,* in the companion decisions *O'Connor* and *A.*(*L.L.*) v. *B.*(*A.*) (hereinafter *A.*(*L.L.*)), the Supreme Court devised procedures for defence access to third party records in sexual assault cases.[43] In *O'Connor,* Bishop Hubert O'Connor, former principal of a Native residential school, was charged with four sexual offences involving four different women, all of whom were former students at the residential school and had subsequently been employed at the school under O'Connor's supervision. He was also their priest. The women were ordered to authorize release of all residential school records (medical, academic, and employment) and all medical, psychiatric, and counselling records that related to the incidents. In *A.*(*L.L.*), a woman laid a complaint against someone who had been a close family friend for an event alleged to have taken place when she was six. The defence sought access to her counselling records.

In *O'Connor*, the Supreme Court, again by a narrow majority, instituted a two-stage procedure involving a context of disclosure and a context of production. At the first stage, the judge would assess the likely relevance of the records to the defence. If the judge determined that an initial relevance threshold was met, then the records would be ordered disclosed to the court and examined by the judge to see if they contained information "logically probative to an issue at trial or the competence of a witness to testify."[44] The judge would then "examine and weigh the salutary and deleterious effects of a production order and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence."[45] At this second stage, the judge was enjoined to balance the rights of the accused against the privacy interests of those referred to in the records and, particularly, the privacy and dignity of the complainant.

O'Connor was a reaction to the burgeoning demand for women's personal records and an attempt to regulate the practice. But because of the majority's silence on women's equality, and because it offered little guidance on when records might not be relevant to the accused, the decision was widely seen as having opened access to records at the disclosure stage.[46] The court stated explicitly that, at the first stage, the onus on the accused to show relevance "should be a low one."[47] It held that the "sheer number of decisions in which such evidence has been produced supports the potential relevance of therapeutic records."[48] Moreover, it speculated that, "generally speaking, an accused will only become aware

of the existence of records because of something which occurs in the course of a criminal case,"[49] suggesting, in somewhat unclear language, that there would be a presumption of materiality if the accused were aware of the existence of the record. Finally, the majority gave three examples of when the records would be relevant but no indication of when they might not. One of these examples involved the potential influence of therapy on women's memories. In a later decision, Belzil J. summarized his understanding of the discussion of relevance by stating that the decision "must be interpreted as meaning that the majority of the Supreme Court of Canada accepts that therapeutic records will often be relevant (but not always) in cases of this type, or indeed the statement may even be read as meaning that such records will only rarely not be relevant."[50]

Given the strong privacy interest in most of the records subpoenaed, and given that, within this context, the request for records was becoming routine and their production frequent – but only in sexual assault cases – L'Heureux-Dubé J. remarked, in a strongly worded decision for the four-person minority, that "the uninhibited disclosure of complainant's private lives indulges the discriminatory suspicion that women's and children's reports of sexual victimization are uniquely likely to be fabricated."[51] The minority sought to take equality explicitly into account and also cautioned against creating a new class of victims vulnerable to sexual assault – those, like the complainants in *O'Connor*, for example, whose lives had already been the subject of extensive documentation.[52] Moreover, it was concerned that the court not allow discriminatory practices "to reappear under the guise of extensive and unwarranted inquiries into the past histories and private lives of sexual assault complainants,"[53] suggesting that the majority decision would allow a variation on a practice that the courts had already judged to be discriminatory.

In May 1997, Parliament responded to concerns about records by proclaiming into force Bill C-46 (modelled on the minority decision in *O'Connor*) to regulate records production through amending ss. 278.1 to 278.91 of the *Criminal Code*. The legislation was framed through concerns about women's equality, the role of sexual violence in their lives, and the impact of records production on the reporting of sexual offences and on women's recovery from the effects of sexual assault. While keeping a two-stage process, the procedure of C-46 significantly modified the *O'Connor* regime. It applied to both third party records and to those in possession of the Crown, where privacy interests had not been explicitly waived. Showing relevance at the disclosure stage was made

more challenging by elaborating a series of eleven statements, the bare assertion of which would be inadequate to show relevance: for example "that the record may relate to the credibility or the complainant or witness," or "that the record relates to the complainant's sexual reputation," or that "the record may relate to the reliability of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling."[54] Finally, in considering both disclosure to the court and production to the accused, the judge was required to consider both the salutary and deleterious effects of the determination on the accused's right to make full answer and defence, and on the complainant's rights to privacy and equality, taking into account, at each stage, eight factors. These include the extent to which the records are necessary for the accused to make full answer as well as society's interest in encouraging the reporting of sexual offences and in encouraging treatment for victims of sexual assault.[55]

C-46 was immediately challenged on all of the ways in which it differed from the *O'Connor* regime and was judged unconstitutional by Belzil J. of the Alberta Court of Queen's Bench on the grounds that it violated the accused's section 7 right to make full answer.[56] In *Mills,* with McLaughlin and Iacobucci JJ. writing for a seven-person majority, the constitutionality of C-46 was upheld.

Relations in *O'Connor* and *Mills*

My interest in the transition from *O'Connor* to *Mills* concerns the representation of women in these decisions and the extent to which a greater concern for equality involved a shift from a fundamentally non-relational to a relational view of women's lives. I believe that focusing on the representation of women in these decisions will allow us to understand the harm to women's equality in record's disclosure, the important role that false memory discourse has played in facilitating access to records, and why *Mills* was a substantively better decision than was *O'Connor.*

Feminist intervenors to *O'Connor* and *A.(L.L)*, and subsequent critics of *O'Connor,* framed the issue of records production as the court's responsibility and with it the subsequent failure to pay attention to the specific inequalities associated with sexual harm to women. In what follows I draw upon the factums presented in these cases and on the subsequent criticism of *O'Connor* in order to read this concern as the majority's failure (1) to attend to women as concrete others with specific

relational histories and (2) to consider how records production would contribute towards relationships of inequality.

In what Karen Busby has categorized as a series of "stunning oversights,"[57] the majority in *O'Connor* failed to mention any of the history of institutional and interpersonal relationships of inequality that characterized the context of the case. The case involved Aboriginal women who had been put into residential schools and thus had relational histories that had involved enormous previous invasions of personal and informational privacy. The majority did not reflect on these histories to consider how records production would have disproportionately invasive consequences for women who suffer intersectional oppressions. These women are not only more vulnerable than are others to sexual assault in the first place, but they also often live lives that are more vulnerable to scrutiny and recording, thus putting them in the position of being yet more vulnerable to sexual assault due to being yet more vulnerable to invasions of personal and informational privacy. Busby also pointed out that the accused was related to the complainants along multiple axes of social power, including White/Aboriginal, male/female, teacher/student, employer/employee, and priest/parishioner. Someone in the dominant position on all these axes of power who had sexually assaulted women would be in a very strong position to sexually exploit women to compel their silence or, later, to discredit their testimony. In considering *A.(L.L.)*, the court did not take into account how family members, relatives, neighbours, and friends are often able to sexually exploit girls with relative impunity: "As adults they are imbued with power and social status denied children and are regarded as more credible than their young victims, because of the privilege accorded them by their age and gender. These dynamics operate effectively to immunize adult men from prosecution and conviction for sexual offences against children."[58]

That sexual assault might be a sort of violation leading to a heightened privacy interest was considered by the majority in *O'Connor* only in the context of records in possession of the Crown, where it was dismissed by suggesting the complainant had given up her privacy interests in such records.[59] That the accessibility of personal records might reproduce some of the emotional harms that are the effect of sexual violation was not considered at all. The majority gave no reflection to the importance of counselling to assaulted women who might be involved in generally unsupportive relationships, nor did it consider the effects of production on counselling relationships.

Both Benn's and Allen's accounts of privacy make clear that our discussions of values are shaped by assumptions about persons and how they are, or are not, related to each other. The presence of such assumptions needs to be kept in mind when assessing the majority's critical discussion of relevance. The history of sexual assault jurisprudence is one in which access to assumed relevant information about women's lives has been judged by later courts to depend upon and to entrench discriminatory stereotypes and beliefs. As one would thus expect the court to be very careful in its deliberations on relevance, I find the majority's distorted representation of women at this point in the decision – as being without previous specific histories of institutional or interpersonal relationships – particularly disturbing. Although the majority opined that the sheer number of cases in which records are produced supports assumption of relevance, production is, more arguably, a reflection of women's relationships with the legal system in their role as complainants in sexual assault cases – an alternative interpretation that the majority did not even consider. In taking the accused's awareness of a record as a reason to suspect its materiality, the majority evoked the imagery of an accused and complainant who are strangers to each other rather than, as is most often the case, people who have had some relationship to each other prior to the events that brought them before the courts. The courts know full well that most assaults are not committed by strangers. (In only one case of the forty studied by Busby were the accused and complainant unknown to each other.)[60] Given the long-term, complex relationships between the complainants and the accused, and given that the accused may have had a hand in producing the very records he sought, *O'Connor* seemed like a particularly odd context for the imagery of stranger assault.

Moreover, although therapeutic records are among those most frequently requested, the majority offered no thoughtful reflection about the nature of therapeutic relationships and how that might bear on such records. There was no context given for concerns about suggestive therapy, leaving open the reading that it would always be appropriate to suspect contamination. As well, no attention was paid to the exploratory or interpretive dynamics of therapeutic relationships. In her minority remarks in *Osolin*, quoted in full in her minority opinion in *O'Connor*, L'Heureux-Dubé J. offers a cogent description of the difference between the context of trial and the context of therapy – a contrast that, in her view, renders therapeutic records "inherently problematic as regards reliability." In contrast to the testimonial context of a trial: "In therapy an entire spectrum of factors such as personal

history, thoughts, emotions, as well as particular acts may inform the dialogue between therapist and patient. Thus, there is a serious risk that such statements could be taken piecemeal out of the context in which they were made to provide a foundation for entirely unwarranted inferences by the trier of fact."[61]

Although the majority's remarks on relevance were explicitly framed as a response to L'Heureux-Dubé's contention that records would rarely be relevant, it ignored rather than responded to her reasoning. The majority also neglected the interpretative dimensions of note-taking, seeing therapists as authoritative representers of client psychology. The remarks in *Osolin* were used as evident indication of the relevance of therapeutic records, but this is a notation of the therapist, and we have no idea what the client actually said.[62] In summary, neglect of the relational dimensions of women's lives caused the court to be inattentive to a number of potential harms associated with records production, and it also allowed for an unsubstantiated estimation of relevance – something that could only encourage the practice.

I now turn to a specific effect of records production with regard to promoting relationships of inequality. Records production has been described as a compensatory strategy for gaining information about a complainant's past – a strategy that has been lost through rape-shield legislation – and many commentators have pointed out that the idea of false memory syndrome provides a timely replacement for stereotypes of women as outright liars with regard to sexual assault.[63] Earlier, however, I argued that a relational account of persons directs us to attend to the self-concepts and perspectives of those treated unequally, to recognize that these self-concepts are themselves relationally formed and that they can easily be exploited. When we consider the exploitation of women's self-concepts, records production differs in disturbing ways from questioning a complainant about her sexual history; and false memory discourse, in my view, helps activate a representation of women that makes them especially vulnerable to both disrespect and exploitation of the persons they take themselves to be.

In *O'Connor*, the Aboriginal Women's Council et al. wrote that "an equality respecting justice system would treat individual complainants as individuals not as types. It would view such individual's history of mental health treatment or sexual assault not as a justification for extra-invasive disclosure, but as reason for caution, sensitivity, and a heightened vigilance about the purpose and effect of records disclosure."[64]

I read this remark as echoing Spelman's concern about how to treat a person as the person she is rather than as filtered through our favoured

ways of seeing her. It is to treat her as having a self-concept, a perspective on her life, and an emotional affective orientation towards her life. It is to recognize that only she can articulate this perspective, and it is to relate to her through paying attention to it (although this does not mean simply accepting it). It is to take into account the fact that self-concepts are formed in and through relationships with others and to recognize the importance of relational resources that contribute to the possibility of having a self-concept that has not been consistently damaged and undermined by oppression. It is to recognize that who a person takes herself to be can make her particularly vulnerable, and it is to be obliged not to use her own self-concept or emotional-affective configuration against her in ways damaging to her equality. I have described this orientation to the perspective of others as a concern about the personal as a positive value, and this deep dimension of respect for persons reveals some further very disturbing aspects of records disclosure.

First, when records made by others are represented as defining the complainant in court, she has little control over her self-representation in the very context within which her credibility and character are being tested. Her articulation of her perspective is pre-empted as she is represented (1) through the interpretation of whoever made the record and (2) through the interpretation of the defence who seeks to represent her as non-credible. Nevertheless, her records, especially her therapeutic records, may contain considerable information about how she views her life. Thus, second, she is unable to set relational boundaries concerning with whom she will share herself. Moreover, as the records are produced to the accused, their production has the potential to make her life history available to the person who may have assaulted her. Records production has the potential to re-relate her, through a dynamic of shame and humiliation, to her assailant. Relationships with therapists and counsellors are a type of relationship, usually chosen, in which a woman gives others considerable access to who she takes herself to be, and production of such records may involve the betrayal of her trust in this relationship at a time when she is particularly vulnerable, thus causing emotional harm. In addition, it may involve betraying her trust in the very relationship to which she has turned in an attempt to re-establish herself as a person with boundaries – a person who has some control over when and to whom she is accessible. Thus records production may re-relate her in a damaging way to her complainant while, at the same time, destroying the positive context within which she has chosen to try to re-understand her life after the assault. Production may also undermine her by leading her to doubt her judgment in having made herself

vulnerable within the therapeutic situation. It may then undermine self-trust, which is necessary to her sense of herself as autonomous. She is particularly likely to feel she has betrayed herself if she has engaged in self-recrimination about the assault as this will certainly be used to suggest her responsibility. Because, historically, dominant understandings of sexual assault have involved prescriptions that women take particular responsibility for men's sexual interest, regardless of its circumstances, it is not uncommon for a woman to feel some responsibility for her own assault.

Finally, records production involves trying to get as much information as possible about a person's perspective on her life precisely in order to use it against her. In *Osolin*, the complainant had been cross-examined extensively on consent and on a difficult relationship with her parents that the defence presented as a motive to fabricate. The records offered not new information but, rather, indications of self-doubt, confusion, and self-recrimination, all of which could be used to undermine her. As well, information may be sought about who the person is precisely in order to support a stereotypical understanding of her life, and this, too, is true of *Osolin*. One of the most disturbing aspects of *O'Connor* was the majority's failure to recognize the potential of records production to create or shape relationships of exploitation and emotional harm through allowing others to gain access to a complainant's perspective on her life and to use it against her in a situation characterized by substantive inequality.

The issue of records production has been rife with allusion to false memory and suggestive therapy. It is notable that, within a context barren of thoughtful representation of women's relationships, one relationship – that of a women to her therapist – has been repeatedly singled out as a justification for records production. Although there was no suggestion of inappropriate therapy in *O'Connor*, the majority, in offering explicit illustrations of the potential relevance of records, remarked that "they may reveal the use of a therapy which influenced the complainant's memory of the alleged events."[65] The defence attorney previously quoted on the *O'Connor* decision used the language of indoctrination to describe memory influence: "You have to have those records to see whether or not the counsellor was encouraging her false beliefs or solidifying them ... We're talking about a kind of indoctrination here where a therapist encourages a belief in the victim, hardening the memories or filling in the blanks. These people have no concern about the presumption of innocence and the possibility of convicting innocent people."[66]

In *A.(L.L.)*, the defence sought counselling records partly in order to determine "the method of extracting the information from her during the 14 months she underwent sessions before going to see the police,"[67] thus suggesting that the complaint was manufactured during an interrogation. And this despite the fact that the complainant testified that she had never forgotten the incident, described it to friends as early as Grade 3, had raised the incident in therapy herself, and had come forward because she heard that the respondent had assaulted someone else.[68] The case was presented in the press as one in which the defence sought production "on the suggestion that counsellors may have unwittingly coached her into developing false memories of abuse."[69] In a pre-*O'Connor* article in the *Medical Post*, a quote from a defence lawyer (who uses the language of implantation) describes records production wholly in terms of the threat of false memory syndrome: "The false memory syndrome is something that has been noted and accepted by our courts as a potential defence ... It has been legitimately used in cases where it has been suggested that there is a memory implanted by a therapist." The attorney said that, in such a case, "I want to see your records. I want to see exactly what you wrote down during those therapeutic sessions, and whether it could be suggested that you in fact assisted in some way in enhancing or developing this memory."[70] Belzil J., in the second part of his two-part decision declaring C-46 unconstitutional, made repeated reference to "recovered memory syndrome" as a concern that required continued access to records, incidentally completely blurring the distinction between false memory and recovered memory. Busby's study of forty cases revealed seven in which therapist suggestion was offered to the court as a reason for seeking disclosure, although only two cases involved memories that had been recovered, and in neither case were they recovered in therapy.

The purported suggestibility of women and their consequent susceptibility to false memory syndrome has been an important legal justification and, perhaps, the primary public justification for records disclosure. It is thus important to understand its power within this context. False memory syndrome has played the role of a new social harm, one that can override expectations of privacy or force a renegotiation of duties of confidentiality. As the fact about production that catches the attention of the public, false memory syndrome has allowed for an elision of the difference between cases, obscured the amount and array of records ordered and, thus, the ways in which records production particularly targets women whose lives have been heavily documented. It perversely allows for a repetition of the theme that, when complaints of sexual

harm come before the courts, someone has an honest but mistaken belief about what went on. In one case counsel for the defence argued that the complainant's memories of abuse were "either fabricated or honest but mistaken recollections."[71] The use of false memory syndrome allows the defence to raise issues of both competence and credibility: it is presented as a personality disorder that renders memories of sexual harm unreliable or, at least, represents women as too easily influenced to be reliable witnesses.

Most significant to understanding some of the harm associated with records production – the attempt to gain maximal access to a person's self-concept and perspective on her life in order to use this information against her – is that false memory syndrome represents women as no longer having appropriate psychological boundaries that others need to respect. One's personal memories are crucial to who one takes oneself to be. False memory syndrome is presented as a disorder in which the memories most fundamental to one's sense of self are not only false, but they have been implanted by someone else – the therapist. The FMS Foundation has explicitly identified false memory syndrome as analogous to a personality disorder, "as a condition in which a person's identity and interpersonal relationships are centred around a memory ... that is objectively false ... [but] is so deeply ingrained that it orients the individual's entire personality and lifestyle."[72] As the person's identity, personality, interpersonal relationships, and lifestyle allegedly become centred on this memory, she no longer has her own perspective or an autonomous self-definition. She is not just presented as easily influenced or as lacking full psychological integrity, but as having a self-concept that has been constructed by a therapist. FMS Foundation advisory board member Richard Ofshe, in an article whose title, "Making Monsters," is an allusion to Frankenstein's creature, represents women in therapy as clearly being the creations of the therapist. He writes that clients "are blank canvasses on which the therapist paints."[73] "Whatever doubts they have are subordinated to the therapist's judgement, the images they have fantasized, the stories they have confabulated, and the identity they have developed through participation in the course of this process."[74] The FMS Foundation presentation of a woman in therapy opens what she might think of as most personal about her life – her feelings, memories, perspectives, and sense of identity – to scrutiny because it is no longer properly hers. False memory discourse and records disclosure combine to present a potent stereotype of women as being without relational boundaries. And this stereotype is used to justify a practice that, in fact, deprives them of the ability to set such boundaries.

In *Mills*, the majority moved away from the explicit concern about women's relationships with their therapists – a concern that has been a dominant justification for records production. In fact, it presented women's relationships with their therapists as valuable and worthy of protection. I believe that this shift away from the distorted and damaging presentation of therapeutic relationships that has haunted the debate on records production is the consequence of a much broader and more detailed focus on women's lives as relational – a focus that is itself the result of a specific concern with women's equality. According to Koggel, "what we need to do is sketch a conception of the relational self that demonstrates the importance of all kinds of relationships ... to justice and equality."[75] Women appeared as relational selves in *Mills* but not in *O'Connor*, and, generally speaking, the decision in the former is replete with the language of relationality.

The majority in *Mills* positioned itself in an ongoing, lively, and positive dialogue with Parliament. It also recognized that Parliament was attending to relationships of horizontal inequality – equality that results from acts of individuals and groups rather than from the state. In doing so, it immediately expanded the relational considerations at work in its deliberations. This is important, given that concern about equality in criminal cases has been nearly wholly dominated by considerations of "power imbalances as between the state and the accused."[76] *Mills* characterized Parliament as a valuable ally of the vulnerable. It also recognized that horizontal equality concerns would have an impact on women's relationships with the courts.[77] It acknowledged and discussed the fact that women whose lives had been heavily documented in their previous relationships with institutions would have special equality concerns with regard to records production.

One of the most interesting developments in *Mills* was the majority's move to talk about values both contextually and relationally. A relational approach to equality is one in which the values that embody respect for persons must be shaped by paying attention to the details of particular contexts. Koggel writes that such an approach "cannot provide general conditions for satisfying equality in all contexts or for all times. These conditions can only be settled dialogically in concrete contexts by taking account of the perspectives of everyone involved under conditions that promote a presentation of diverse views and that enforce mechanisms for giving and assessing justifications for current and proposed policies."[78]

The court reaffirmed an approach to rights and values that does not see them as competing but, rather, as co-existing in particular contexts,

where the nature of the context will shape the definition and scope of the rights and values. It stated that "rights often inform, and are informed by, other similarly deserving rights and values at play in particular circumstances"[79] and that a contextual analysis of rights requires attention "to the factual content" of particular contexts. A commitment to examining context could not help but move the court towards a more attentive assessment of the relevant institutional and interpersonal relationships vis-à-vis sexual assault litigation. For example, delineating the appropriate contextual understanding of full answer and defence in a context where women's equality rights are at play required the court to attend to how, historically, women have been subject to discriminatory biases and stereotyping in their position as sexual assault complainants. The court concluded that full answer and defence must be understood with careful attention to how myths and stereotypes distort the truth-seeking process. Moreover, the commitment to a realistic understanding of sexual assault compelled the court to reflect upon complainant/therapist relationships. *Mills* included an extensive analysis of the value of such relationships to victims of sexual assault, categorizing "the notion that consultation with a psychiatrist is, by itself, an indication of untrustworthiness" as a recent and "invidious" myth about the unreliability of women's testimony.[80]

The majority pointed out that privacy as well as full answer and defence falls under fundamental justice, and that both sets of rights must be understood as being informed by the equality provisions of the charter. I am particularly interested in the evolution of the court's view of privacy, and I will conclude with a discussion of this view. Feminist intervenors to *A.*(*L.L.*) stated that the issue in records production is not principally one of privacy but, rather, of equality.[81] I believe that this assessment reflects the fact that privacy has traditionally been seen as a value that must often give way to other values.[82] However, what is important in thinking about privacy within this context is how accessibility is related to discriminatory practices. With a contextual approach to values there is no reason to suppose that privacy, as adequately informed by equality, should give way to full answer rather than help to shape it.[83] Although the personal as a positive value is not the same as privacy, a contextual understanding of privacy informed by equality can help to prevent the particular kind of undermining of the personal that is at stake in records production. And I take the court to be moving towards such an understanding of privacy.

In *Mills*, the court noted that it had previously "characterized the values engaged by privacy in terms of liberty, or the right to be left

alone by the state."[84] It also noted that it had understood privacy in terms of the ability to protect a core of information relating to one's "individual identity"[85] – information, for example, about lifestyle, intimate relationships, and religious and political views – locating the idea of the personal primarily in the kind of information any individual might want protected from dissemination to the state. Even the minority decisions in *Osolin* and *O'Connor* rely on these understandings. However, in *Mills*, the court explicitly signalled that it was moving away from what, in the privacy literature, is often characterized as an individualist notion of privacy to an approach that stresses the role of privacy in creating certain relational possibilities. It stated that "privacy is ... necessarily related to many fundamental human relations,"[86] and it moved beyond case law to cite philosophical treatments of privacy by Charles Fried and James Rachels, who argue that privacy, as control over with whom one shares information, is a value that is necessary for the development of certain relationships.

Fried, in "Privacy (A Moral Analysis)," is interested in the conditions necessary for developing relationships of love, friendship, and trust.[87] The development of such relationships, he argues, requires that we be able to withhold certain information from most people in order to share it with particular chosen others, thereby constituting the intimacy of these chosen relationships. Fried claims privacy allows us to accumulate "the moral capital" that we spend in friendship and love. Rachel's version of the view is more generalized. Different patterns of behaviour characterize different relationships. Moreover, "however one conceives one's relations with others, there is, inseparable from that conception, an idea of how it is appropriate to behave with and around them, and what information about oneself it is appropriate for them to have."[88] Rachels concludes that "our ability to control who has access to us, and who knows what about us, allows us to maintain the variety of relationships with other people that we want to have."[89] Although, for Fried, privacy is a functional value, it "is not just a possible social technique for assuring this or that substantive interest,"[90] but, rather, it is conceptually related to the relationships that it serves. Moreover, according to Fried, and quoted in *Mills*, this ability to form intimate relationships "is at the heart of our notion of ourselves as persons among persons."[91] And so privacy gains fundamental importance as a value.

The majority in *Mills* recognized that its previous approach to privacy was inadequate to the task of shaping an understanding of privacy informed by equality within the context of records production, and I see in its use of Fried a struggle to find an account of privacy adequate to

this task. I first want to point out obvious problems with Fried's view and then comment on what I take to be the value of the court's deliberation.

Jeffrey Reiman, in criticizing Fried's account of informational privacy as necessary to intimate relationships, argues that it is not the sharing of information that is important to intimacy but, rather, the context of caring that makes that sharing significant.[92] Moreover, Reiman finds Fried's view of intimate relationship, as symbolized by the expression "moral capital," distastefully economic in spirit. I believe, first, that Reiman is right to say that the nature of a relational context, and of how people do or do not care for us, determines the importance of our ability to share or withhold information from others. This is obvious in the case of records production. Moreover, in categorizing Fried's view as overly economic, Reiman points to a persistent tendency in the privacy literature – a tendency that Fried does not escape – to talk in terms of the secure possession of a self that is shared or not shared. Privacy theorists ignore the continuous development of identities and self-concepts through relationships that form and change us. Finally, neither Fried nor Rachels pays attention to relationships of inequality; and the relationships they discuss (along with Fried's focus on exchange) may reinforce the assumption that privacy as a value is tied to "relationships of voluntary (economic) exchange, of intimacy, and of domesticity" and that these relationships "[are] not about power."[93]

Fried and Rachels do have the important insight, however, that patterns of access configure relational possibilities, and this understanding can be extended to relationships of inequality and equality within the contexts of records production. Marilyn Frye has argued that differences in power are manifested in asymmetrical access. For example, "the president of the United States has access to almost everybody for almost anything he wants of them, and almost nobody has access to him." "The creation and manipulation of power is constituted by the manipulation and control of access."[94] We need to understand and shape the values through which we regulate patterns of access within concrete contexts in order to encourage or discourage certain relational possibilities. And privacy is the primary value through which we regulate access.

I contend that the majority used Fried because, in his account, it saw the potential to link privacy to the creation of positive possibilities for relationships through, in some contexts, allowing people to control access to personal information. There are two sorts of positive possibilities at issue. First, the court was concerned to protect relationships within which women can recover from sexual assault, which the court has characterized as a complete denial of women's equality. As most victims of

sexual assault seek counselling, the court was particularly concerned to protect access to therapy. The court characterized therapeutic relationships as relationships of trust, "an element of which is confidentiality."[95] However, the court moved from Fried's remarks on intimate relationships to its remarks on therapeutic relationships without much indication of what these relationships have in common or of why Fried's account applies to the latter.[96] The connection seems to be this: these are all relationships in which we typically choose to let others treat us as maximal persons in Spelman's sense. We sometimes give others a lot of access to our self-concepts and perspectives, and, in doing so, we give them the power to affect how we view our lives as well as the power to undermine us, should they so choose. We hope that in therapeutic relationships, as well as in relationships of love and friendship, we can explore aspects of our lives that make us vulnerable because we trust that our doing so will not be used to undermine us either by the persons to whom we express our lives or by their revealing, or being forced to reveal, this information to others. We count on our lovers and friends not to make us vulnerable to others by revealing information that they could predict might be used to harm or undermine us. Within the context of sexual assault, women's formal ability to restrict informational access to some opens up possibilities for others to treat them as maximal persons in ways that enhance rather than undermine equality.

I have argued that we have a political responsibility to make sure that people's perspectives on their lives are not easily accessible to those who may use them to entrench, promote, or excuse relationships of inequality. More specifically, I have argued that persons should not be obliged to reveal their perspectives, doubts, hopes, and confusions about their lives to those who will use this information to treat them unequally. Further, when a person's sense of self has been damaged by practices of inequality, she should have access to relational contexts within which she can attempt to repair this damage. The court used Fried to make a connection between these imperatives. Even in *Mills*, I do not think that the court recognized the full degree of exploitation inherent in records production; but it did recognize the importance of allowing women control over access to information in order to protect opportunities for them to deal with the harms associated with inequality.

Second, and finally, I have argued that those concerned with equality must, in fact, have access to the perspectives of those treated unequally; however, this access must not result in these perspectives being exploited and, thus, exacerbating inequality. The court recognized that, if the

defence can easily obtain counselling records, then women who do seek counselling will be less likely to report assaults. As women can only be protected against sexual assault if they are willing to speak about being assaulted, the court recognized that a relationship with women that supports their equality before the law depends upon offering greater protection of their personal records.[97]

O'Connor was recognized as a disaster for women's equality. The announcement that the constitutionality of C-46 had been upheld in *Mills* was thus initially greeted as a "stunning victory."[98] The contrast between these decisions, however, is not that stark. Feminist intervenors sought an absolute prohibition on records production. *Mills*, like *O'Connor*, leaves records decisions to judicial discretion and, thus, did not adequately recognize records production as a practice of gendered inequality. Moreover, like *O'Connor*, *Mills* offers little real guidance about relevance, and this is especially disturbing given that we are in the grip of a renewed cultural scepticism towards women's claims of sexual harm. Finally, I have described the change in the court's reasoning from *O'Connor* to *Mills* as its move towards an understanding of inequality that recognizes the necessity of attending to the diverse networks of relationships that structure people's lives, experiences, and self-concepts. But this understanding is implicit rather than fully articulated in *Mills*. If it is to take hold, then it must be given a more reflective affirmation. I would hope, meanwhile, that the Canadian judiciary would follow the attention *Mills* gives to the relationships of inequality and exploitation that have infected much sexual assault litigation, and, in their practice, condemn the production of women's records as inimical to women's equality before the law.

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Notes

1 The FMS Foundation was founded in Philadelphia as an advocacy group for parents whose adult children had accused them of sexual abuse. It has been enormously successful at promoting the idea of false memory syndrome to the public and to lawyers through legal education initiatives stressing the importance and desirability of raising the possibility of false memory syndrome in court, especially in those cases where a woman who has recovered memories in therapy accuses a parent of abuse. Despite the description of false memory syndrome – and it should be remembered that, for good reason, this description has little legitimacy as a diagnosis of an illness, pathology, or personality disorder – concerns about the syndrome have frequently been raised in contexts where there is no indication whatsoever of memories recovered in therapy. It is an inaccurate reading of the impact of the idea of false memory syndrome to see it as operating within the restricted domain of cases of recovered memory. My interest in this chapter is not in recovered memory but, rather, in a debate that displays the more pervasive influence of false memory discourse. For a discussion of the influence of the FMS Foundation, see M. Stanton, "U-turn on Memory Lane" (July/August 1997) Columbia Journalism Review 44. For a critical discussion of the legitimacy of false memory syndrome as a diagnosis, see K. Pope, "Memory, Abuse and Science: Questioning Claims about the False Memory Syndrome Epidemic" (1996) 51:9 American Psychologist 957.

2 *R.* v. *O'Connor*, [1995] 4 S.C.R. 411, [1995] S.C.J. No. 98, online: QL (SCJ).

3 *R.* v. *Mills*, [1999] S.C.J. No. 68, online: QL (SCJ).

4 C. Koggel, *Perspectives on Equality: Constructing a Relational Theory* (Lantham: Rowman & Littlefield, 1998).

5 *Ibid.* at 59.

6 *Ibid.* at 49.

7 Feminist discussions of equality differ from many liberal discussions in their focus on issues of social rather than individual justice; that is, by their focus on the relationships between groups. Christine Koggel has remarked to me in conversation that she would want to distinguish a relational view of equality from a substantive view of equality as depicted within the liberal tradition, which continues to focus on individuals. For the purposes of this chapter I am treating many liberal and all feminist views as substantive (to distinguish them from views endorsing merely formal equality) and setting aside many differences between liberal and relational approaches in order to focus on issues concerning the ontology and representation of persons.

8 *Supra* note 4. The following discussion is, in general, indebted to Koggel's account. I have simplified many of her insights in order to put her theory to use in this context.

9 S. Benhabib, "The Generalized and Concrete Other," in S. Benhabib and D. Cornell, eds., *Feminism as Critique* (Minneapolis: University of Minnesota Press, 1984) 77 at 87.

10 We have little reason, in particular, to believe that the emotional understandings, values, and expectations that we imagine would be those of the person herself. Further, our epistemic norms may simply reflect our own bias about what counts as a good reason for her choices. We have no way of testing our perspective without engaging with hers. *Infra* note 26.

11 S. Sherwin, "A Relational Approach to Autonomy in Health Care" in The Feminist Health Care Ethics Research Network, *The Politics of Women's Health: Exploring Agency and Autonomy* (Philadelphia: Temple University Press, 1998) 19.
12 Theorists refer to a social, or embedded, self from a variety of different perspectives. While agreeing that the self is social and embedded, feminists have often preferred to speak of relational selves. This terminology is meant to highlight a contrast between feminist theory's concern with relationships and liberal theory's relative inattention to them. At the same time, a focus on the dynamics of relationships distinguishes feminist approaches from communitarian versions of the social self. Communitarians often claim that we form our identities through discovering the communal values that constitute our good. The supposition of the community as a relatively homogeneous source of positive value for all its members strikes most feminists as fatally conservative. For a discussion of this difference between feminist and communitarian views, see L. Barclay, "Autonomy and the Social Self," in C. Mackenzie and N. Stoljar, eds., *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York: Oxford University Press, 2000) 52. Finally, although feminist relational theory has part of its source in object relations theory (especially as adapted by Carol Gilligan), I stress that most feminist relational theorists have an interest in the impact of all kinds of relationships – not just personal ones – and a special interest in those that embody and entrench oppression.
13 S. Benn, "Privacy, Freedom and Respect for Persons," in F. Schoeman, ed., *Philosophical Dimensions of Privacy* (Cambridge: Cambridge University Press, 1984) 223 at 228.
14 *Ibid*. at 229.
15 *Ibid*. at 242.
16 J. Reiman, "Privacy, Intimacy, and Personhood," in F. Schoeman, ed., *Philosophical Dimensions of Privacy* (Cambridge: Cambridge University Press, 1984) 300 at 309.
17 Benn's insight about the change of consciousness in finding oneself the object of another's observation is indebted to Sartre, who regards this interaction as threatening. Benn wonders why Sartre should think of interaction this way rather than as respectful, but he does not consider its necessity. There is no indication that he regards personhood as inherently public or social. Moreover, in reading the text, we are clearly not meant to identify with a concrete socially embedded individual. Benn's chooser is often simply referred to by a letter (A, B, or, C). We imagine a chooser at one point beating a donkey (in the text, a fanciful example not meant to direct our attention towards real lives) and, at another point, having a conversation with another individual (a wholly generic activity we can imagine anyone performing). Nevertheless, although the chooser is meant to be any person, the minimal detail provided in the examples represents a property-owning man going about his own business in an autonomous fashion. *Infra* note 18.
18 In the more concrete examples used by Benn to illustrate the application of the principle he makes mention of President Johnson, candidates to the Supreme Court, and a famous conductor – all examples of people who would seem to others to have lived exceptionally self-directed, autonomous lives, people who symbolize those who direct others rather than those who are directed by others.
19 *Supra* note 11.

20 A. Allen, "Women and Their Privacy: What Is at Stake?" in C. Gould, ed., *Beyond Domination: New Perspectives on Women and Philosophy* (Totowa, NJ: Rowman & Allenheld, 1983) at 233.
21 *Ibid.* at 241.
22 *Ibid.*
23 *Ibid.* at 245.
24 *Supra* note 4 at 107.
25 L. Thomas, "Moral Deference" (1992-93) 24:1-3 Philosophical Forum 233.
26 To stress the importance of others' perspectives when assessing issues of equality is compatible with a range of feminist epistemologies. The view emphatically rejected is that a solitary moral reasoner can imagine others' lives in a way that is sufficient for addressing inequalities. Koggel contends that we need to understand others' perspectives in order to know about the effects of inequalities on their lives; to reduce the potential for biased judgment, given our own positions; and to perform a necessary check on whether the justifications of policies and practices are comprehensive (i.e., acceptable to those affected by them *(supra* note 4, ch. 5). In particular, the importance of others' perspectives need not involve a commitment to standpoint theory, which, in my view, can reify categories and suggest a fixed content to perspectives in ways that are often problematic. I also do not accept that the perspectives of those who are disadvantaged are, on the whole, less partial than are the perspectives of those who are advantaged. Finally, I hold that epistemic norms are infused with power and contestable. For a useful discussion of some of the problems of standpoint theory, see C. Smart, "Proscription, Prescription and the Desire for Certainty?: Feminist Theory in the Field of Law," in C. Smart *Law, Crime and Sexuality: Essays in Feminism* (London: Sage Publications, 1995) 203.
27 E. Spelman, "Treating Persons as Persons" (1977-78) 88 Ethics 150 at 151.
28 *Ibid.*
29 M. Walker, *Moral Understandings: A Feminist Study in Ethics* (New York: Routledge, 1998) at 173.
30 *Ibid.* at 174.
31 M. McPhedran, "The Legal Assault on Physician-Patient Privilege" (1995) 153:10 C.M.A.J 1502 at 1505.
32 K. Busby, "Discriminatory Uses of Personal Records in Sexual Assault Cases" (1997) 9 C.J.W.L. 148 at 149.
33 *Supra* note 31 at 1502.
34 *Supra* note 32 at 162.
35 *Ibid.* at 149.
36 *R.* v. *Osolin*, [1993] 4 S.C.R. 595, [1993] S.C.J. No. 135, online: QL (SCJ).
37 *Ibid.* at para. 121.
38 *Ibid.* at para. 150; *Supra* note 32 at 160.
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40 K. Kelly, "You Must Be Crazy If You Think You Were Raped: Reflections on the Use of Complainants Personal Therapy Records in Sexual Assault Trials" (1997) 9 C.J.W.L. 178 at 187.
41 *Supra* note 32 at 173.
42 "Rock Must Modify Court's Rape Ruling," *Toronto Star* (4 January 1996) A16.
43 *Supra* note 2 and *A.*(*L.L.*) v. *B.*(*A.*), [1995] 4 S.C.R. 536.
44 *Surpa* note 2 at para. 22.

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46 "Court Opens Rape Records to the Accused," *Toronto Star* (15 November 1995) A3.
47 *Supra* note 2 at para. 24.
48 *Ibid.* at para. 27.
49 *Ibid.* at para. 26.
50 *R.* v. *Mills*, [1997] A.J. No.1036 at para. 57(Alta.Q.B.), online: QL (AJ).
51 *Supra* note 2 at para. 123.
52 *Ibid.* at para. 124.
53 *Ibid.* at para. 122.
54 *Criminal Code*, R.S.C. 1985, c. C-46, s. 278.3.
55 *Criminal Code*, R.S.C. 1985, c. C-46, s. 278.5(2).
56 *Supra* note 50.
57 *Supra* note 32 at 174.
58 Aboriginal Women's Council, et al., "Factum for *A.*(*L.L.*) v. *Beharriell,*" in Women's Legal Education and Action Fund, *Equality and The Charter: Ten Years of Feminist Advocacy before the Supreme Court of Canada* (Toronto: Edmond Montgomery, 1996) 451 at 455.
59 *Supra* note 2 at para. 7.
60 *Supra* note 32 at 150.
61 *Supra* note 36 at para. 44 and *supra* note 2 at para. 109.
62 The majority twice cited the *Ross* trials in Nova Scotia (*R.* v. *Ross* (1993), 79 C.C.C. (3d) 253 (N.S.C.A.), *R.* v. *Ross* (1993), 81 C.C.C. (3d) 234 (N.S.C.A.) to support its position on relevance, first, as evidence that the way the accused became aware of records would support a presumption of materiality; second, as an example of how records may be relevant to credibility. The circumstances surrounding the Ross trials, however, ought to act as a cautionary tale about records production. Dr. Eric Hansen approached the Crown after the conviction of Kenneth Ross on sexual assault to say that he had treated the complainant and suspected a miscarriage of justice. However, in subsequent disciplinary proceedings by the College of Physicians and Surgeons of Nova Scotia, Hansen was censored not only for his violation of patient confidentiality, but also for "incompetence amounting to professional misconduct" both in his note-taking practices and in his giving the impression to third parties that there were five different diagnoses that might apply to the complainant (including histrionic personality disorder and factitious personality disorder). There was no indication that he had carried out the comprehensive evaluation necessary to make such diagnoses (Discipline Proceedings of College of Physicians and Surgeons of Nova Scotia 3:2 October 1996).
63 S. Bronitt and B. McSherry. "The Use and Abuse of Counselling Records in Sexual Assault Cases: Reconstructing the 'Rape Shield?'" (1997) 8:2 Crim. L. R. Camden 259.
64 Aboriginal Women's Council et al., "Factum for *O'Connor* v. *The Queen,*" in Women's Legal Education and Action Fund, *Equality and The Charter: Ten Years of Feminist Advocacy before the Supreme Court of Canada* (Toronto: Edmond Montgomery, 1996) 429.
65 *Supra* note 2 at para. 29.
66 *Supra* note 42.
67 *Supra* note 58 at 464.

68 *Ibid*. at 459.
69 *Supra* note 46.
70 M. Fitz-James, "Sexual Abuse Cases Raise Tricky Issues of Records Disclosure," *Medical Post* (12 September 1995) 18.
71 E. Brady, "False Memory Syndrome: 'The Female Malady'" (1996) 5 Dal. J. Leg. Stud. 69 at 82.
72 False Memory Syndrome Foundation, *False Memory Syndrome* (pamphlet) (1994).
73 R. Ofshe and E. Watters, "Making Monsters" (March/April 1993) Society 4 at 9.
74 *Ibid*. at 10.
75 *Supra* note 4 at 142.
76 J. McInnes and C. Boyle, "Judging Sexual Assault Law against a Standard of Equality" (1995) 29:2 U.B.C.L. Rev. 341 at 347.
77 *Supra* note 3 at para. 58.
78 *Supra* note 4 at 244. Koggel also stresses the necessity of offering justifications that can stand as reasonable and fair "to all parties," including "those whose perspective have been absent or ignored." In my view, the court endorsed this approach through expressed concern "that due regard [be] given to the voices of those vulnerable to being overlooked by the majority." Moreover, it reiterated that a range of different perspectives were legitimately involved in determining whether a trial process was fair not only for the accused, but also for the community and the complainants.
79 *Supra* note 3 at para. 61.
80 *Ibid*. at para. 119.
81 *Supra* note 58 at 460.
82 As discussed above, feminists have also been well aware that privacy has evolved to protect spaces within which women are likely to meet harm.
83 It is important to see how full answer is both shaped and protected in *Mills*. It "does not include the right to evidence that would distort the search for truth" (at para. 76). Where information contained in a record "is part of the case to meet or where its potential probative value is high," the right to full answer will be centrally implicated (at para. 94). In borderline cases, where it is not clear whether the information is necessary in order to meet full answer and defence, "the judge should err on the side of production to the court" (at para. 132).
84 *Supra* note 3 para. 79.
85 *Ibid*. at para. 80.
86 *Ibid*. at para. 81.
87 C. Fried, "Privacy [A Moral Analysis]," in F. Schoeman, ed. *Philosophical Dimensions of Privacy* (Cambridge: Cambridge University Press, 1984) 203 at 211.
88 J. Rachels, "Why Privacy Is Important," in F. Schoeman, ed. *Philosophical Dimensions of Privacy* (Cambridge: Cambridge University Press, 1984) 290 at 295.
89 *Ibid*.
90 *Supra* note 87 at 205.
91 *Supra* note 3 at para. 81.
92 *Supra* note 16 at 305.
93 M. Ackelsberg and M. Shanley, "Privacy, Publicity and Power: A Feminist Rethinking of the Public-Private Distinction," in N. Hirschmann and C. Di Stefano eds., *Revisioning the Political: Feminist Reconstructions of Traditional Concepts in Western Political Theory* (Boulder CO: Westview Press, 1996) 213 at 215.

94 M. Frye, "On Separatism and Power," in *The Politics of Reality: Essays in Feminist Theory* (Freedom, CA: The Crossing Press, 1983) at 95 at 103.
95 *Supra* note 3 at para. 82.
96 Fried's own specific remarks on trust are an extension of his views on privacy and involve his belief that our ability to withhold information about ourselves is essential to having others trust us and, thus, to relationships of reciprocal trust. Monitoring prisoners, for example, as an option to incarcerating them, removes the possibility of error and so renders trust inapplicable. "Privacy confers a choice on how to act essential to relationships of trust" (*supra* note 87 at 211). These remarks do not seem to provide any argument for the confidentiality of therapeutic records.
97 The court's remarks on mental integrity also showed awareness of how perspectives on lives are shaped through relational interactions. It recognized that, within the context of sexual assault litigation, relationships with the courts can easily exacerbate the complainant's sense of violation and affect her mental integrity. It recognized that relationships of dependency and trust are often essential to preserving or restoring the mental integrity of individuals violated by assault (*supra* note 3 at para. 85).
98 "Top Court Bows to Will of Parliament," *Globe and Mail* (26 November 1999) A1.

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2
Dependence and Interdependence in the Lawyer-Client Relationship

Lucie Lauzière

There are forty-four officially recognized professions in Quebec, and they have a total of 275,000 members, including about 18,000 lawyers. Some of these professions have an exclusive right to practise, others practise with a reserved title only (e.g., therapists who alone can use the title of psychologist but who are not the only ones providing therapy). These professions are constituted into professional bodies such as the Barreau du Québec and the Collège des médecins.

The traditional image of a professional is that of someone highly regarded by society.[1] Recognized professional status tends to confer respect and admiration as well as numerous privileges. Professionals are also thought to bring a certain degree of objectivity to issues and a certain degree of competence to resolving them. This recognition is not, however, to be dissociated from the notions of "duty" and "dedication," which refer to the sense of devotion and concern for competence that are deemed to guide the worthy and honourable practice of a profession. Sustained by a social elite aware of its privileges and responsibilities, the professional system rested and continues to rest upon institutions that proclaim to be reconciling the interests of the public with those of professionals.

Membership in a professional body ensures the livelihood, indeed the prosperity, of those who practise within it as well as the promotion and development of their knowledge and qualifications. However, professional bodies also play an eminently social role. According to P. Struye, a barrister of the French Cour de Cassation, the social role of the Bar is explained by a "dual historic truth": "Humanity has always, in its profound aspirations to equity, felt the need to resort to a corps of 'advocates,' and any efficient and stable organization of a civilized and constitutional State has required the existence of such a corps."[2] Owing to the complexity of the judicial apparatus, the justiciable person seeks a protector who inspires trust and dedication and is prepared to defend

interests other than her own. Thus, "this need for defence must be addressed, in a well-organized society, by the existence of a corps of advocates that provides those who turn to it sufficient guarantees of science, of character and of impartiality."[3] As well as defending individual interests, the lawyer gives the community the sense of security necessary for social development. This is what forms the basis of the study of dependence and interdependence in the relationship between lawyers and clients as well as the relationship of trust that must be established for the client-lawyer relationship to be productive.

This chapter explores the complex nature of both the individual and the collective aspects of the professional relationship between a lawyer and her client. My hypothesis is that lawyers, as a class, benefit from the trust and confidence of their clients not only because of the qualities that they display, but also because of the "structural," or what I refer to as the "collective," aspects of the relationship.

Personal Aspects of the Interdependent Relationship between Lawyers and Clients

An analysis of professional ties (i.e., the general rules of civil and professional law that frame the client-lawyer relationship) reveals certain elements designed to promote the independence of the parties. These include the existence of a contract between the parties and the institution of mechanisms for monitoring and controlling the work of the professional. However, the professional relationship often creates nonlegal, personal ties that can foster relationships of dependence and/or interdependence. This, in any case, is what emerges from the sociolegal analysis of the roles of the system's various stakeholders: the public, those who practise the profession, and the state.

I now review the current legal thinking that underlies the individual aspects of the lawyer-client relationship and then go on to analyze the current trend towards personalized services.

Regulation of the Lawyer-Client Relationship: The Individual Model

Quebec jurisprudence and doctrine agree in defining the relationship that exists between clients and lawyers as contractual. In this relationship, the very nature of the contract may vary according to the professional services rendered. Whether it is the trial lawyer concerned about the practical conduct of the trial or the legal counsel who practises in nonlitigious areas of law, the professional relationship of the lawyer with her client is described as a contract of agency, a contract for services, or even a hybrid contract containing certain elements of both.

Lawyers are subject to the general provisions governing contractual obligations set out in the *Civil Code*.[4]

The relationship between the lawyer and her client may also be described as a fiduciary relationship similar to the one that exists between parent and child, psychotherapist and patient, physician and patient, teacher and pupil, or employer and employee.[5] Justice Wilson, in *Frame* v. *Smith*, ascribes the following two characteristics to the fiduciary relationship: (1) a *power or discretion* that can be exercised unilaterally by the fiduciary so as to affect the beneficiary's interests, and (2) a certain *vulnerability* on the part of the beneficiary to the fiduciary holding the discretion or power.[6] According to Justice Wilson:

> The foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of contract and tort. Sometimes the doctrines may overlap in their application, but that does not destroy their conceptual and functional uniqueness. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently, the law seeks a balance between enforcing obligations by awarding compensation when those obligations are breached, and preserving optimum freedom for those involved in the relationship in question. The essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other.[7]

Consequently, the law applicable to fiduciary relationships should "ensure that the fiduciary does not coerce the beneficiary."[8] The fiduciary relationship is based on trust, not on self-interest.[9] It is characterized by the dependence of the client, though that dependence may vary according to the beneficiary's vulnerability. It is within this legal context that new pressures to satisfy clients are emerging.

Trend towards Personalized Services

These days, there is little difference between a client and a consumer. Clients have become consumers of professional services, and professionals are aware that they are "in business." Indeed, the distribution of professional services is governed by the general rules of administrative management, marketing, and business.

Along with changes that have affected the practice of professions,[10] a consumer society insists upon the effective distribution of professional services. Clients, who have become consumers of professional services

and are well informed about the duties and obligations of professionals, are more apt than they used to be to take a critical look at professional services generally.

The personal qualities that inspire a client's trust in a professional, notably a lawyer, generally have to do with that person's perceived empathy and concern. The lawyer's reputation, specialization, age, gender, and personality certainly influence the client's choice. Personal qualities looked for in lawyers are those projected by the image of the profession; namely, competence, integrity, and morality. The lawyer must exhibit, both personally and professionally, conduct that respects the code of ethics and the rules of society.

The law firm is now the intermediary between client and lawyer, and it must also display the characteristics outlined above. The advent of large firms of professionals, modelled on corporations, has prompted their executives to develop new ways of dealing with clients. Lawyers, who have become entrepreneurs, have developed numerous marketing and customer service techniques. The challenge for law firms is to attract and establish the loyalty of clients. In this regard, quality of service is the key to success. The concept of quality has economic and strategic importance, and it is by maintaining the standards intimated by *quality of service, customer satisfaction,* and *repeat customers*[11] that client loyalty seems to be effectively established.

The first element in recruiting clients and ensuring their loyalty is the image of the professional. If clients are to place matters in the hands of a lawyer and entrust her with their problems, then she must have the necessary skills to put them at their at ease and to inspire their confidence. But beyond the human relationship, even before meeting the professional, the client enters a physical environment. This physical environment not only projects the firm's image, it is also part of its "personality."[12] There is a reason why management of the physical environment has become a priority for marketing managers.[13] Since their main objective is to establish client loyalty, they must ensure that the physical environment and atmosphere the firm conveys stimulate certain behaviours in the client. In their marketing strategies, firms rely upon quality of service to keep the client, while freely accepting the fact that the client initially judges the quality of service according to the physical environment. Consequently, the importance law firms attach to having an attractive physical environment, which must be wholly consistent with the image they want to project, is understandable.

A second element in developing client loyalty is the firm's desire to create client dependency. Generally speaking, once they have granted

it, members of the public do not easily withdraw their trust from professionals. This is known as the phenomenon of client loyalty. According to a number of authors who describe the legal practice as a business,[14] lawyers have borrowed the vocabulary and the approaches of business to optimize the client relationship and to increase client loyalty. Lawyers have services to offer and sell; therefore, marketing and client services have now been incorporated into their profession. Lawyers have learned to exceed clients' expectations and have adopted a basic mantra for working with clients: attract them, convince them, sign them, serve them, and (doubtless most important) keep them.

Intangibility and degree of client contact are two dominant features of services as opposed to products.[15] In describing their specific nature, a third feature can be added; namely, specialization, which allows lawyers to tailor themselves to the particular needs of particular clients. The client's presence in the professional system creates a dynamic that illustrates the balance of power in the client-lawyer relationship. The client "serves as input, is 'processed,' and then leaves as output with added value."[16]

In the course of lawyer-client interaction, a relationship of domination may arise:

> The most common reasons why a client finds himself dominated are lack of choice, urgency, or a wide gap between the professional's competence and his own. For the sake of efficiency, the client must submit to very strict procedures, provide the information requested, and leave matters in the hands of the expert, who thus has the power to keep him in a state of considerable passiveness and total dependence.[17]

Or, as Albert C. Plant fittingly explained, "nobody *wants* a lawyer – individuals and business *need* lawyers to accomplish certain things that, without their professional help, would not be completed."[18] In other words, lawyers meet a social need.

The client-lawyer relationship is not, except in rare exceptions, an egalitarian one. It is a relationship of helping and of power, in which the role of the professional largely involves making decisions. As an advisor, the professional influences the client's decisions; as legal representatives, lawyers have the power to make decisions for their clients. This situation, moreover, imposes upon lawyers a duty to advise according to the skill or knowledge of the clients.

The duty to advise[19] is inherent to the liberal professions. According to the legal sociologist Jean Savatier:

> His action [that of the professional] must always be inspired by the client's interests, and since the client, as a rule, is not able to judge what his interests are in the technical matters for which he has sought out the professional, the member of a liberal profession has a duty to advise.[20]

The client who has some expertise in the field in which she is seeking advice is supposed to be familiar with the practices followed and so able to assess the risks.[21] The obligation to foresee or disclose everything seems too onerous a burden for lawyers, especially when the client is someone who is well informed.[22]

The extent of the duty to advise restores a certain balance between the parties, as it takes the client's skill into account. In an egalitarian relationship, the duty to advise is less broad when the client is well informed than it is when her legal situation is beyond her skill. The client's vulnerability is, therefore, an important factor in considering the client-lawyer relationship.

One might often define the client-lawyer relationship as a relationship of "intimate reliance":

> The lawyer is doing legally for the client "all that his client might fairly do for himself, if he could." In that reliance the client virtually places his/herself in the hands of the lawyer. Accordingly the phrase "intimate reliance" may be consonant with the concept of a request for and a provision of the legal services required in the circumstances.[23]

The "intimate reliance" of the client on the lawyer stems from the belief in professionalism – a belief rooted in the collective aspects of the relationship.

Collective Aspects of the Interdependent Relationship between Lawyers and Clients

The collective aspects of the lawyer-client relationship present certain features of interdependence. There is an interdependence between, on the one hand, support for the establishment of a professional body and a monopoly in the delivery of services, and, on the other hand, support for monitoring the power dynamic in the lawyer-client relationship through the enactment of a code of ethics and an investment in professional discipline.

Establishment of a Professional Body

Unlike the professions that govern economic life through the production

or exchange of goods, and those that provide health care and services, the legal profession governs individual relationships and social life. Thus, in carrying out the mission of the Bar, lawyers play an important social role in the community. For nearly two centuries the Bar has been a very stable institution. In fact, the rules pertaining to this institution have served as a model for the Quebec professional system.[24]

The recognition of professional status, which is determined by a series of factors set out in section 25 of the *Professional Code,* has as its premise the public's trust in professionals. Among the factors to be taken into account in determining whether a professional body should or should not be constituted are:

- the knowledge required to engage in the activities of the profession
- the degree of independence enjoyed by the professionals in engaging in the activities concerned, and the difficulty that persons without the same training and qualifications would have in assessing these activities
- the personal nature of the relationships between these persons
- the confidential nature of the information that professionals are called upon to have in practising their profession.

Having been granted the exclusive right to practise their profession, lawyers, along with notaries, are the only persons qualified to advise a client about the existence, extent, and exercise of her rights. They also hold the near-exclusive right to represent the interests of a party before the courts.

Monopoly and the Specialization of Services

Perhaps the main element of service delivery is the monopoly that characterizes the practice of certain professions. The *Act Respecting the Barreau du Québec* grants members of the professional body of lawyers the exclusive right to practise the profession. This right may be conferred only by an act "in cases where the acts carried out by these persons are of such a nature and where the freedom to act they have by reason of their ordinary working conditions, such that for the protection of the public they cannot be done by persons not having the training and qualifications required to be members of the order."[25] Thus, no one can claim to be a lawyer, or represent herself as such, or carry out acts reserved for the members of the professional body of lawyers, unless she holds a valid permit and is entered on the roll of the professional order.[26] Sections 128 and 129 of the *Act Respecting the Barreau du Québec* define the

scope of the profession of lawyers, listing the acts that are their exclusive prerogative and that may be performed for others. Lawyers are, pursuant to section 128, the only persons empowered (1) to give legal advice and consultations on legal matters; (2) to prepare and draw up a notice, motion, proceeding, or other similar document intended for use in a case before the courts; and (3) to plead or act before any tribunal, except as stipulated in the act. Consequently, for all these matters, the client has no choice but to put her fate in the hands of a lawyer.

Specialization leads to relationships of economic and social dependence: "The fact of depending on the expertise of others tends to narrow the sphere of experience and knowledge common to the members of a society, while widening the social gap that separates them."[27] Hence, the possibility for a professional group to become autonomous. In addition, the monopoly given a professional group to practise creates, to varying degrees, an imbalance of power in the relationships between clients and professionals:

> The wider the social gap, the more powerless and dependent the consumer; the greater the uncertainty and tension (including the possibility of exploitation), the more the need is felt for effective social control. Medicine, law, dentistry and pharmacy illustrate this perfectly: the ability of the consumer to help himself and to judge the quality of the services he receives is limited; if he wants to receive the services of a professional, the consumer must allow an intrusion into the most intimate and vulnerable areas of his private life: the body, the mind, family relationships, illegal or actionable business activities.[28]

Thus, the professional relationship is transformed, and there is a gradual transition from a professional relationship to a relationship of both personal and social dependence (notwithstanding the fact that professional status gives a person considerable psychological advantages).

> Professionalism is a near-ideal form of organization ... giving [professionals] significant material and psychological advantages. It allows professionals to "call the shots" – the near-genius side of the ideology of professionalism is such that it *forces* them to do so – with a minimum of interference from consumers or the State.[29]

Within a context of complete autonomy, the professional takes charge of the problems that the client entrusts to him, while, in the background, the professional body takes on the responsibility for ensuring the

competence and integrity of its members. One aspect of this interdependence, the creation of an atmosphere of trust, has been described as follows:

> In our civilization, the climate of trust is established, in most cases, by the personal relationships entered into and is based on diffuse emotional bonds, of which kinship is the best example. Professional relationships have, in the past, exhibited some of these characteristics, but not all. Established in a context of personal relationships, they afforded, at least for a certain number of professionals, a high degree of continuity ... Trust relies, then, on professional relationships, on personal factors, but also on other factors. The client trusts the professional with whom he deals, but also the professional association. It is on the latter that he relies to ensure that his interests are served by the professional, through two distinct mechanisms. He entrusts his interests to professionals to the extent that they are instilled, during their years of training, then in contact with implicit or explicit professional standards, with an ideology that prompts them to assume their responsibilities as agents. The client trusts professionals because professional privilege is governed by specific rules that the association undertakes to establish and enforce.[30]

There is then both an individual and a collective aspect to the trust that a client bestows upon a lawyer. As a class, clients trust their lawyers because of the professional and social organizations that support such a trust.

The professional system established by the *Professional Code* is protectionist and is designed to reassure the public. It is socially recognized that "the public as a whole trusts all professionals in general; [that] it doubts neither their competence nor their integrity nor the quality of the services they provide."[31] The personal nature of professional services, the frequency with which they are used, and the high stakes of the problems that are taken on are all factors that foster and maintain the public's trust in the professional relationship. But what equally inspires this trust in professionals is their membership in a professional body charged by law with monitoring their adherence to a code of ethics and having the power to discipline them. It is within the context of maintaining the public trust that the development of professional ethics must be understood.

Ethics

From the standpoint of professional and disciplinary law, lawyers are

subject to a set of rules governing the practice of their profession. The 1973 *Professional Code* set up a supervisory and regulatory body whose function was to oversee the protection of those members of the public who make use of professional organizations. Notably, the *Office des professions* oversees an organization's obligation to draft a code of ethics for its members. Thus, the Bar continually reminds lawyers of their social responsibility and the code of ethics to which they must adhere. Most of the provisions of this code concern client-lawyer relationships. Specifically, the lawyer has the obligation:

- to bear in mind, before accepting a mandate, the extent of her proficiency and knowledge, and the means at her disposal
- to acknowledge at all times the client's right to consult a colleague, a member of another professional body, or any other person
- to seek to establish a relationship of mutual trust between herself and her client
- to carry out her professional duties with integrity
- to safeguard her professional independence and to avoid any situation from which she would derive a direct or indirect, real or possible, personal benefit
- to avoid any situation in which she would be in conflict of interest.

Clients make judgments about the services they receive and even about those who provide them. However, while there may well be reasons serious enough for the client to break the professional bond, she will generally hesitate to resort to the disciplinary procedure stipulated in the *Professional Code*. This attitude is borne out by the general conviction that professionals are at a distinct advantage in the professional-client relationship.[32] And the client's reliance upon the professional for help no doubt deters her "from disputing the competence and ethics of those on whom [she must] depend."[33] It should also be pointed out that the "mistakes" of professionals have long been hidden by the near-total absence of lawsuits against them, not to mention the lack of publicity given the trials of those who do face suits. In other words, the public does not have much to go by. This is partly owing to the fact that, until 1986, disciplinary boards met behind closed doors.

Furthermore, as I mentioned earlier, certain elements create an imbalance of power in the client-lawyer relationship in favour of the latter. These elements fall into two groups: (1) those directly related to the delivery of services (the collective aspects) and (2) those directly related to the skill of the individual providing those services (the individual aspects).

It is difficult for the client to resort to a lawyer's services even if, as a consumer, she is accustomed to using various types of public services (e.g., transportation, hotel, repair, etc.). Because professional services provided by lawyers have to do with the most intimate and vulnerable areas of private life (i.e., one's family life, estate, financial situation, health, and/or freedom),[34] relying upon them presents a higher degree of risk than does relying upon public services generally.[35] In order to understand the legal problems that affect and, in most cases, overwhelm them, clients turn them over to a lawyer, who advises them and acts on their behalf. Unless they consult another professional, it is difficult for them to judge the quality of the services received.

Nevertheless, there are some safeguards that seek to reduce the client's vulnerability to the legal profession. These include the guaranteed ability to choose one's own lawyer, the establishment of a body overseeing professional competence and discipline, and, lately, an attempt to apply "zero tolerance" towards sexual relationships between lawyers and clients.

Choice of Lawyer

Although, in certain circumstances, clients simply must turn to a lawyer to resolve their problems, they are nevertheless entirely free to consult the professional of their choice. In this regard, Quebec's *Code of Ethics of Advocates* obliges the lawyer to respect this freedom and to acknowledge the client's right to consult another professional if she wishes to do so.[36] The lawyer is not obliged to accept a mandate but cannot refuse to provide services to a person because of her race, colour, sex, age, religion, national extraction, or social origin.[37] Before accepting a mandate, lawyers must bear in mind the extent of their proficiency and knowledge as well as the means at their disposal.[38] A lawyer may, however, delegate or refer her duties to a colleague.

The *Code of Ethics of Advocates* stipulates, under the duties and obligations towards the client, that when their mandate has terminated, lawyers must reimburse any portion of advance fees for work not carried out.[39] As the first approach to a lawyer has already resulted in expenses, even if she recovers a portion of the advance, the client will probably be reluctant to consult another lawyer, who will ask for a further advance. In other words, as terminating a first mandate to entrust it to another lawyer can prove costly for the client, requiring her to pay an advance serves to ensure her loyalty.

Similarly, the current practice of referring a case to a colleague in the same firm is also a way of ensuring the client's loyalty. Notably, the

specialization of lawyers in any given area of practice (e.g., tax law, intellectual property law, environmental law, etc.) produces a captive clientele.

Good lawyers are always on the lookout for opportunities to delegate a client's work to the best practitioner. They recognize that happy clients stay with the firm that produces excellent work, the one that builds client relationships.[40] These practices, which are generally in keeping with a process favoured by firms and known as "relationships marketing,"[41] consolidate the relationship between lawyers and their clientele.

It appears to be easier for a client to terminate the lawyer-client relationship than it is for a lawyer to do so. The client can, without reason or notice, unilaterally terminate the professional relationship; a lawyer may not cease to act for her client unless she has sound and reasonable grounds for so doing.[42] What constitutes sound and reasonable grounds is determined by the *Code of Ethics of Advocates,* which includes:[43] loss of the client's confidence; deception on the part of the client; failure of the client to cooperate; inducement by the client to perform illegal, unfair, immoral, or fraudulent acts; persistence of the client in continuing a futile or vexatious proceeding; circumstances within which the lawyer finds herself in a conflict of interest or whereby her professional independence could be called into question; and refusal by the client to acknowledge an obligation respecting costs, disbursements, and fees or, after reasonable notice, to make provision for these.

The purpose of seeking a balance in the client-lawyer relationship is twofold: (1) to inspire the public's respect for the practice of law and (2) to ensure that matters turned over to the members of the profession are settled competently and with integrity.

Discipline

The *Professional Code* contains provisions concerning the competence and integrity of the members of a professional body. The *Code* obliges each professional body to form a professional inspection committee to monitor the practice of the profession and to inspect the records, books, and registers of its members. The committee may also inquire into the professional competence of members.[44] It may make a recommendation to oblige a member to serve a period of refresher training and to limit or suspend the right of that member to engage in professional activities during such a period.[45]

Each professional body must also form a disciplinary committee. The committee is apprised of every complaint made against a professional for an offence against the *Code*, against the act constituting the professional body of which she is a member, or against the regulations made

under the *Code* and/or act.[46] The disciplinary committee may impose penalties ranging from a reprimand, to a fine of $600 to $6,000, to a temporary or permanent striking off the roll of the professional body, to revocation of a permit, to limitation or suspension of the right to practise professional activities.[47] This monitoring of professional practice is in keeping with the social mission of the *Office des professions* (and of all professional bodies) to ensure the protection of the public.

Sexual Relationships with Clients

In 1994, during the reform of the *Professional Code,*[48] a section dealing with a disciplinary infraction of a sexual nature was inserted into it. This section sets out the limits of the conduct of professionals who become involved in intimate relationships with their clients.[49] It applies to all professional bodies:

> 59.1 The fact of a professional taking advantage of his professional relationship with a person to whom he is providing services, during that relationship, to have sexual relations with that person or to make improper gestures or remarks of a sexual nature, constitutes an act derogatory to the dignity of his profession.

Section 59.1 of the *Professional Code* provides a good frame of reference for the study of dependence and interdependence within the professional relationship. It can be seen to illustrate the clash between the professional's authoritative power and the client's state of dependence and vulnerability. This section tempers the policy of zero tolerance that applies in matters of health care and that seemed, until 1994, to be boldly asserting itself into other professional bodies as well.

Can a lawyer, despite the existence of a professional relationship, become involved in a consensual intimate relationship with a client without consequences? The policy of zero tolerance, which prohibits any sexual relationship between a professional and her client, is based upon the presumption that the professional relationship is one of power and authority and that to become involved in a sexual relationship with a client violates the professional code of ethics. This may not always be the case. A professional relationship combined with an intimate relationship raises many questions relating to professional ethics, some of which have been tackled by jurisprudence in proceedings involving the professional ethics of lawyers.[50]

The limitation set by section 59.1 of the *Professional Code* depends upon the client's degree of dependence. This section does not prohibit

all sexual relations between a lawyer and a client. These relations cannot, however, be based upon the professional's exploitation of the client's vulnerability or upon an imbalance of power between client and lawyer. It was considered inappropriate to draft section 59.1 of the *Professional Code* with explicit reference to these elements in its wording, as this would have established too vague a prohibition and too onerous a burden of proof. It was deemed preferable to entrust the disciplinary committees of professional bodies with responsibility for evaluating the circumstances of each case and determining the culpability of the professionals, taking into account the reasons for consultation, the nature and duration of the relationship, the status of the clients, and the harmful consequences they may have suffered.[51] The success of that strategy will need to be evaluated.

Conclusion

Referred to as one of the liberal professions (the others being medicine, theology, and engineering), the legal profession oversees relationships within society. Other than social status, the liberal professions have in common the ability to offer personal and direct services that affect essential domains in life. Even if the legal profession seems to be characterized by a staunch individualism, it has an eminently social role.

Recognized professional status confers numerous privileges upon those working within a profession. To a varying extent, the monopoly given a professional group creates a dominant relationship in professional-client relations. Specialization on the part of professionals leads to dependent relationships on the part of the public. This is how, within a context of complete autonomy, professionals take charge of the problems that clients entrust to them.

Overseeing this activity, the professional body takes on responsibility for ensuring the competence and integrity of its members. This administrative monitoring is aimed at reinforcing the public's confidence in the professional system. The lawyer, as a professional, is placed within family and societal relationships. The client-lawyer relationship creates a certain number of ties that are often personal and that intensify the client's vulnerability when confronted with the lawyer's authority and decision-making power. In addition, professional specialization and the monopoly given to professionals are among those elements that reinforce the power of the lawyer, thus increasing the client's vulnerability. There have been attempts to modify the unequal power relationship between client and lawyer; institutional control over professional competence and conduct, for example, aims at introducing an equalizing factor into

this relationship. Nevertheless, such relationships often operate in a way that reinforces the power of the professional.

The collective aspects of the lawyer-client relationship (i.e., the monopoly over provision of services and the Bar's institutional control over practice) must be considered in any attempt to understand the interdependent aspects of this relationship. Looking only at the individual aspects of the relationship would not take into the account the powerful reasons why clients trust lawyers. Clients trust lawyers not only because of the individual display of competence or empathy, but also because they are collectively led to believe that they *ought* to trust lawyers. The collective aspects of the lawyer-client relationship must be taken into account in any attempt to reform and influence the unequal balance of power between lawyers and clients.

Notes

1 This view may be changing: in surveys, the level of esteem in which lawyers as a class are held tends to be low. However, individual lawyers tend to be treated with respect, and their opinions are often cited as worthy of consideration.
2 P. Struye, "L'avocat," in *Les professions dirigeantes et leur rôle social,* Collection "Bâtir," 2d ed. (Tournai: Casterman, 1943) at 135, 136 [translated by author].
3 *Ibid.* at 138 [translated by author].
4 *Civil Code of Québec,* S.Q. 1991, c. 64.
5 P. Coleman, "Sex in Power Dependency Relationships: Taking Unfair Advantage of the 'Fair' Sex" (1988) 53 Alta. L. Rev. 95.
6 *Frame* v. *Smith,* [1987] 2 S.C.R. 99 at 136, Wilson J.
7 *Norberg* v. *Wynrib,* [1992] 2 S.C.R. 226 at 272, McLachlin J.
8 T. Frankel, "Fiduciary Law" (1983) 71 Cal. L. Rev. 795 at 801 [translated by author].
9 "Thus, a fiduciary may enter into a fiduciary relationship without regard to his own needs. Moreover, an entrustor does not owe the fiduciary anything by virtue of the relation except in accordance with the agreed-upon terms or legally fixed status duties"; *Ibid.* In the decision *Norberg* v. *Wynrib,* [1992] 2 S.C.R. 226 at 273.
10 The practice of law has changed greatly in recent years. After seeing, in the early sixties, the explosion of the traditional concept of "profession" and a significant increase in the number of professions, every professional organization was thrown into question. The liberal professions underwent profound changes. Large professional firms appeared and were run like businesses, while a majority of the members of the liberal professions found themselves, in connection with employment, in an employer-employee relationship.
11 B. Paquin and N. Turgeon, *Les entreprises de services: Une approche client gagnante* (Montréal: Éditions Transcontinental, 1998) at note 28 at 118-25.
12 "Moreover, this 'personality' can be the key point of differentiation between competitors, especially in a very competitive market." Paquin and Turgeon, *supra* note 11 at note 28 at 317 [translated by author]; D.W. Cowell, *The Marketing of Services* (Oxford: Heinemann Professional Publishing, 1990) at 236-7.

13 L.G. Shostack, "Breaking Free From Product Marketing" (1977) 41:2 Journal of Marketing 73-80.

14 There are a good many documents about the management of law firms, including several periodicals with excellent articles on this subject. Experts are available to act as management consultants to firms. A number of conferences and symposiums are held regularly on various administrative aspects of managing firms.

15 "Four main factors distinguish services from products: they are *intangible,* they are produced and consumed *simultaneously,* they are *heterogeneous* and, finally, they are *perishable."* See Paquin and Turgeon, *supra* note 11 at 39 [translated by author].

16 *Supra* note 11 at 43 [translated by author].

17 *Supra* note 11 at 53 [translated by author].

18 A.C. Plant, *Making Money: The Business of Law* (Aurora: Canada Law Book, 1993) at 10.

19 The duty to advise is defined as "both the moral and the legal obligation ... to inform the parties, according to their respective needs and the particular circumstances of each case, about the nature and the legal, sometimes economic, consequences of their actions and their agreements." P.-Y. Marquis, *La responsabilité civile du notaire* (Cowansville: Éditions Yvon Blais, 1999) at 122 [translated by author]. The definition of the duty to advise, given here for the notary, has been adapted to apply also to advocates.

20 Jean Savatier, *La profession libérale* (Legal and practical study) (Paris: Librairie générale de Droit et de Jurisprudence, 1947) at 278 [translated by author].

21 See, for example, the decision *Smith* v. *McInnis*, [1978] 2 S.C.R. 1357, in which, based on the facts, a law firm considers it necessary to retain the services of another law firm that specializes in the field of insurance to be advised on how to prepare proofs of loss suffered by their client.

22 *St-Germain* v. *Hamel,* [1979] C.S. 658; See also André Poupart, "En matière de responsabilité professionnelle, les tribunaux ont-ils été trop sévères à l'égard des avocats?" in *La responsabilité civile des professionnels au Canada* (Cowansville: Éditions Yvon Blais, 1988) 163. The author suggests that jurisprudence does not very easily release the client from her obligation to become informed about the effects and consequences of the services she asks the lawyer to perform, particularly in the case of administrative or business practices with which the client is familiar.

23 B.G. Smith, *Professional Conduct for Lawyers and Judges* (Fredericton: Maritime Law Book Ltd., 1998) c. 2 at 2, citing J. Boswell, *Life of Samuel Johnson,* vol. 5, (New York: E.P. Sutton, 1925) 28.

24 Some "rules of the profession of advocate" adopted in 1868 by the Conseil général du Barreau are at the very source of the first regulation made pursuant to the *Act Respecting the Barreau du Québec,* R.S.Q. c. B-1, which became in 1973 the *Code of ethics of advocates,* R.R.Q. 1981, c. B-1, r. 1. These regulations were subsequently taken up again in the *Professional Code,* R.S.Q. c. C-26.

25 *Professional Code,* R.S.Q. c. C-26, s. 26.

26 *Ibid.,* s. 32.

27 L.S. Bohnen, "Sociologie des professions au Canada," in *Les professions autonomes* (Ottawa: Conseil de recherche en consommation Canada, 1975) 20 [hereinafter

Bohnen]. The author explains the theory of the sociologist Terence Johnson, as set out in *Professions and Powers,* 1972 [translated by author].

28 Bohnen, *ibid.* at 20-1 [translated by author].

29 *Ibid.* at 23 [translated by author].

30 C.J. Tuohy and A.D. Wolfson, "Les professions dans le contexte politico-économique," in *Les professions autonomes* (Ottawa: Conseil de recherche en consommation Canada, 1975) 69 [translated by author].

31 Such are the findings of a study by the Office des professions, whose purpose was to poll public sentiment towards professionals after implementing the reform of the professional system. Office des professions du Québec, *Le public québécois et les services professionnels* (Study, Survey Report) Research Department (Quebec: Office des professions du Québec, 1980) at VIII [translated by author].

32 Office des professions, *Attitudes des consommateurs aux prises avec des problèmes relatifs aux services professionnels* (Quebec: Office des professions, January 1980) at 4, taken from a study of consumer problems in Quebec done in July 1978 by the Office de la protection du consommateur. It is critical of the public's overall attitude of defeatism, rather than of their insufficient knowledge of the law, in explaining the lack of remedies.

33 Bohnen, *supra* note 27 at note 11 at 22 [translated by author].

34 Bohnen, s*upra* note 27 at note 12 [translated by author].

35 C.J. Hill and S.E. Neely, "Difference in the Consumer Decision Process for Professional vs. Generic Services" (1988) 2 Journal of Services Marketing 17-23.

36 *Code of Ethics of Advocates,* R.R.Q. 1981, c. B-1, r.1, ss. 3.01.02 and 3.05.02.

37 *Professional Code,* R.S.Q. c. C-26, s. 57.

38 *Code of Ethics of Advocates,* R.R.Q. 1981, c. B-1, r. 1, s. 3.01.01.

39 *Code of Ethics of Advocates,* R.R.Q. 1981, c. B-1, r. 1, s. 3.02.01 (1).

40 Plant, *supra* note 18 at note 32 at 143.

41 Plant*, supra* note 18 at 11.

42 *Code of Ethics of Advocates,* R.R.Q. 1981, c. B-1, r. 1, s. 3.03.04.

43 *Ibid.*

44 *Professional Code,* R.S.Q. c. C-26, s. 112.

45 *Ibid.* s. 113.

46 *Ibid.* s. 116.

47 *Ibid.* s. 156.

48 *An Act to Amend the Professional Code and Other Acts Respecting the Professions,* S.Q. 1994, c. 40.

49 *Professional Code,* R.S.Q. c. C-26, s. 59.1.

50 *Audet* v. *Mastriaco* (26 January 1993), (C.S.) Montreal, 500-05-015402-900 J.E. 93-599, Hurtubise J.

51 S. Richer, "Une dialectique de mise en œuvre de la politique de tolérance zéro en matière d'inconduite sexuelle professionnelle" (1994) 2 R.E.J. 117 at 136-7. Here, the author discusses the issue of sexual relations between a professional and a former client. One can infer from the same reasoning the elements that apply to sexual relations between a professional and a client during the professional relationship.

3
Fiduciary Duties in Commercial Relationships: When Does the "Commercial" Become the "Personal"?

William Flanagan

Personal relationships of dependence and interdependence arise in many different contexts, frequently giving rise to fiduciary obligations in law. Within these relationships, equity has long enforced duties of loyalty and propriety that go far beyond common law requirements. Fiduciary obligations are imposed upon those who are placed in positions of trust and confidence to ensure that the fiduciary's position of trust is not abused for personal gain. A number of well-identified relationships have long involved fiduciary obligations, such as the relationship between principal and agent, solicitor and client, trustee and beneficiary, and director and corporation. Other relationships are more ambiguous, such as relationships between employers and employees, co-owners of property, and those involved in a joint venture. Some may give rise to fiduciary duties; others will not.

Historically, commercial relationships, outside those long recognized as fiduciary, such as principal-agent, have not given rise to fiduciary obligations. It was long thought that commercial transactions at arm's length generally lacked the degree of trust and confidence necessary to find fiduciary obligations.[1] Individual autonomy and the pursuit of self-interest typically characterize commercial relationships. Profiting from superior information or taking advantage of the commercial weakness or vulnerability of a rival does not, per se, raise any particular legal objection. Indeed, the rationale for the market economy, and its presumption of efficiency, rests on these assumptions. Arguably, the market could not function efficiently in the absence of the vigorous pursuit of self-interest.

However, recent jurisprudence has increasingly raised the question of the broader application of fiduciary duties in commercial relationships.[2] The essence of a fiduciary relationship is that one party is required to

avoid any pursuit of self-interest and instead act in the best interests of the other party. In short, fiduciary obligations are arguably fundamentally inconsistent with most commercial relationships. However, the increasing application of fiduciary obligations in this context raises the intriguing question of the extent to which individual autonomy, and the pursuit of self-interest, remain the founding assumptions of commercial relationships.

The Question

A number of examples can help demonstrate the difficult question of when fiduciary obligations should apply in commercial relations.

- A company was the distributor of certain products on behalf of an overseas supplier. The distributor was required by contract with the supplier to act in the supplier's best interests and develop its market. Contrary to this obligation, the distributor established its own company with a view to pirating the supplier's market position. The supplier sought to take advantage of the equitable remedies of equitable lien and constructive trust, and thereby cast a wider net over the property that could be seized to satisfy a judgment. As a result, the supplier argued that the distributor not only breached its contractual obligations, but was also in breach of a fiduciary duty to the supplier.[3]
- A junior mining company provided confidential geological findings regarding a certain property to a senior mining company, and the senior company advised the junior to aggressively pursue the purchase of the property. Although they entered into these discussions, the parties did not conclude any binding contract between them. The senior company then acquired the property but never informed the junior of its intention to do so. Because there was no contract, the junior had no remedy in contract law but instead sought to characterize the senior as in breach of its fiduciary duty and on this ground sought the return of the disputed property. Although a case could be made for breach of confidence, this cause of action might lead to a remedy in damages only. Preferring a remedy in constructive trust over the property in question, the junior sought to establish a breach by the senior of a fiduciary obligation.[4]
- A stockbroker who was inexperienced in tax planning engaged an independent professional to provide tax planning advice. Relying on this advice, the stockbroker made certain investments in various real estate projects that later proved to be disastrous. Unknown to the

> stockbroker, the advisor was in fact acting as a paid promoter for these real estate investments at the time the advice was provided. The stockbroker sought the return of all of the money that he had invested on the grounds of breach of fiduciary duty. In reply, the advisor argued that there was no fiduciary relationship, and the stockbroker was limited only to recovery for breach of contract relating to the advisor's failure to disclose the conflict of interest. Under this head of damages, the advisor argued that the stockbroker was, at most, entitled to recover the fee paid to the advisor by the real estate project. Any other loss sustained by the stockbroker was due to the market decline in the value of the investment, not the advisor's breach of contract. In short, if there were a fiduciary relationship, the stockbroker could recover a much higher amount: the return of all money invested in the real estate project.[5]

These cases share a number of characteristics. First, they all involve common commercial transactions between business parties operating at arm's length. Second, these cases all involve fairly sophisticated business parties who could be reasonably expected to pursue and protect their best interests. None of these cases involves a serious inequality of bargaining power between the parties. Third, in all cases the plaintiffs were dissatisfied with either the lack or the limited nature of the contract law remedy in question. It is for this reason that the plaintiffs alleged fiduciary obligations.[6]

Given that these cases involved common commercial transactions between sophisticated business parties, it may not be immediately apparent why any of these parties should be entitled to remedies beyond those available in contract law. In particular, it is not clear that any of these cases involved such a degree of trust and confidence that fiduciary obligations and the exceptional equitable remedies that accompany such obligations should be applied. However, the courts reached arguably inconsistent decisions in these cases, finding a fiduciary relationship in the last case, but not in the first two.

The cases demonstrate that it is difficult to determine whether fiduciary obligations might arise in a given commercial relationship. At some point, it appears that a commercial relationship might evolve into a more complex relationship that may no longer be dominated by an assumption of mutual autonomy and self-interest. It might even be described as a more "personal" relationship because it involves a significant level of trust and confidence between the parties, leaving one party particularly vulnerable to the other. This raises the question of how and

under what circumstances does the relationship between commercial parties evolve into a relationship of trust, confidence, and vulnerability? What does "vulnerability" even mean in a commercial relationship? Such relationships are by their nature fraught with risk. Should the law undertake to shift this risk of loss between commercial parties, who are otherwise usually well placed, and indeed expected, to defend and promote their own self-interest? What is left of the pursuit of self-interest, once the law imposes fiduciary obligations in a commercial context? Does market efficiency suffer? Is there a risk that this judicial trend will lead to greater uncertainty in commercial law, as courts increasingly apply "equity's blunt tool"[7] in commercial transactions? Is this an unwelcome intrusion of "morality" into commercial law?

Development of Canadian Law

The development of modern Canadian law dealing with fiduciary duties can be traced to the Supreme Court of Canada's decision in *Guerin* v. *R.* in 1984.[8] This is one of the first decisions where the court found a fiduciary obligation between parties that did not fall within one of the traditional categories of fiduciary relationships. The case raised a novel situation. Although there was no traditional fiduciary relationship, the facts nonetheless suggested a relationship that was similar in various key aspects. There was a significant degree of trust and confidence between the parties. One party had authority over the proprietary interests of the other and relied upon that party's exercise of discretion, although in a situation that did not raise an express or constructive trust. The court considered the question of whether fiduciary obligations should be found even in the absence of a traditionally recognized fiduciary relationship.

In *Guerin,* a Native band had surrendered valuable lands to the federal Crown for lease as a golf course. Although the surrender document was silent as to the terms of the lease, the government arranged a lease on terms less favourable than the oral terms that had been approved by the band when the land was surrendered. Because the surrender document was silent as to terms of the lease, there was no obvious remedy available in contract law. However, the Native band sought a remedy on the grounds that the federal government had breached its fiduciary duty to the band. The court found that the Crown did not hold the Native land, either before or after surrender, as trustee on behalf of the Natives. Whatever the limited nature of the Native interest in Native land, it did not amount to an equitable estate. However, the court found that the Crown nonetheless owed a fiduciary duty to the Native band. Dickson

J. for the majority wrote that the class of fiduciary relationships was not exhausted by the "standard categories of agent, trustee, partner, director and the like."[9] He added that it is the "nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty."[10] Noting the Crown's historic responsibility to protect Native interests in transactions with third parties, the Crown's discretionary power over Native lands, and the Crown's promise that the land would be leased on specific favourable terms, the court found that the Crown's failure to comply with its promise was an unconscionable breach of its fiduciary obligations. The court outlined the key features of a fiduciary relationship: "where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary."[11]

The court's characterization of a fiduciary relationship is remarkable for a number of reasons. First, there is no requirement that there always be an undertaking by one party to act as fiduciary, as this obligation can also be imposed simply by statute and in the absence of any undertaking. Second, the key feature is that the obligation carries discretionary power. This definition is extraordinarily broad. Holders of public office, including judges, exercise such discretionary power, yet is that alone sufficient to make them fiduciaries?[12]

At about the same time that *Guerin* was decided, the High Court of Australia released a decision that examined the question of when fiduciary relationships might arise in a commercial context: *Hospital Products Ltd.* v. *US Surgical Corp.*[13] The facts of the first case scenario set out earlier in this chapter are drawn from this decision. The court considered the question of whether the distributor, in addition to its contractual obligations, also owed a fiduciary obligation to the supplier not to pirate the supplier's market position. The majority noted that the categories of fiduciary are not closed but were unwilling to find that this particular commercial relationship gave rise to fiduciary obligations. Gibb C.J. wrote that there were two features of the case that constituted an "insuperable obstacle"[14] to finding a fiduciary relationship. First, the arrangement was "a commercial one entered into by parties at arm's length and on an equal footing."[15] It was open to the parties to include in their contract whatever terms might be necessary to protect their positions. Gibb C.J. added that the "fact that the arrangement was of a purely commercial kind and that they had dealt at arm's length and on an equal footing has consistently been regarded by this Court as important, if not decisive, in indicating that no fiduciary duty arose."[16]

Second, in the performance of the contract, a conflict of interest was likely to arise between the parties. The manufacturer's interest is in maximizing the number of units sold. The distributor, however, might decide that its interests are best served by selling a smaller number of units at a higher price. In such circumstances, the majority found that it was not possible to conclude that the distributor was under an obligation not to profit from its position and not to place itself in any conflict of interest. Accordingly, the majority concluded that the distributor was not a fiduciary and the manufacturer was thus limited to a remedy for breach of contract only.

Hospital Products v. *US Surgical Corp.* was considered in the now famous dissenting judgment of Wilson J. in *Frame* v. *Smith.*[17] This decision again raised the question of the application of fiduciary duties in a relationship that fell outside the traditional categories, in this case the relationship between a custodial and noncustodial parent. The majority of the court held that there was no fiduciary relationship largely for reasons of public policy, that it would be inappropriate to imply a fiduciary obligation in a relationship that was now governed by comprehensive family law legislation. Taking a different approach, Wilson J. held that there were sufficient grounds to find a fiduciary obligation. She noted the majority discussion in *Hospital Products* v. *US Surgical Corp.,* where Gibb C.J. wrote that fiduciary duties might arise where one person is obligated, or undertakes, to act in the interests of another in circumstances where the other party is uniquely vulnerable to a potential abuse of this power. She also noted the dissenting judgment of Mason J. in that same case, where he outlines the critical features of a fiduciary relationship: the fiduciary "undertakes to act for or on behalf of or in the interests of another person in the exercise of power or discretion which will affect the interests of that other person in a legal or practical sense."[18] She noted a general reluctance of common law courts to give content to the general fiduciary principle, making it difficult to determine whether fiduciary obligations arise in any given relationship, outside of those long recognized as fiduciary. She proposed the following criteria, qualified as a "rough and ready guide":

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> 1 The fiduciary has scope for the exercise of some discretion or power.
> 2 The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

3 The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[19]

The test proposed by Wilson J. is remarkable in a number of ways. First, as is the case in *Guerin,* there is no requirement for an undertaking in order to find fiduciary obligations. It might be difficult to imply any such undertaking between a custodial and noncustodial parent, thus Wilson J. seems to overlook the fact that both the majority and dissenting judgments in *Hospital Products* v. *US Surgical Corp.* wrote that an undertaking was an essential feature of a fiduciary relationship. Second, unlike *Guerin* where the majority did not discuss any requirement of vulnerability, Wilson J. suggests that vulnerability is a crucial feature of any fiduciary relationship. She also adds that because of this requirement of vulnerability, fiduciary obligations "are seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arm's length ... such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, i.e., any 'vulnerability' could have been prevented through the more prudent exercise of their bargaining power."[20]

Wilson J.'s dissenting reasons regarding the nature of fiduciary relationships have proven influential as they have been adopted in part by the majority and minority Supreme Court decisions in *Lac Minerals* v. *International Corona Resources Ltd.*[21] in 1989 and *Hodgkinson* v. *Simms*[22] in 1994. The facts of the second case scenario set out earlier in this chapter are drawn from *Lac Minerals,* where the court had to determine whether the senior mining company owed a fiduciary duty to the junior company not to take advantage of confidential information regarding the property in question. The majority of the court found that there was no fiduciary relationship but instead that the senior company had only breached a duty of confidence owned to the junior. LaForest J., in the minority on this point, found that there was a fiduciary relationship, and Wilson J., also in the minority, found that although there was no fiduciary relationship, there was nonetheless a fiduciary duty that had been breached. Noting that there are "few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship,"[23] LaForest J. relied on both *Guerin* and *Frame* as providing some direction. He noted that the relationship in question did not fall within the traditional class of relationships recognized as fiduciary; however, he added that fiduciary obligations might still arise in relationships not normally regarded as fiduciary, arising "as a matter of fact

out of specific circumstances of a relationship."[24] LaForest J. found that three facts suggested a fiduciary relationship in this case:

1 A relationship of trust and confidence had developed between the parties, giving rise to a reasonable expectation that one party would refrain from acting against the interests of the other.[25]
2 There was an industry practice whereby such data was generally regarded as confidential, giving rise to a reasonable expectation on behalf of the junior company that the senior company would not misuse this information.[26]
3 The junior was vulnerable to the possible misuse of this information by the senior.[27]

Contrary to Wilson J.'s finding in *Frame,* LaForest J. concluded that vulnerability, although present in this case, was not a necessary ingredient in every fiduciary relationship.[28] Rather, the "issue should be whether, having regard to all the facts and circumstances, one party stands in relation to another such that it could reasonably be expected that that other would act or refrain from acting in a way contrary to the interests of that other."[29] In short, LaForest J. focused primarily on reasonable expectations as being the key factor in determining whether fiduciary obligations arise. Neither an undertaking nor a degree of vulnerability appeared to be necessary to find fiduciary obligations.

Sopinka J., writing for the majority on this point, found that there was no fiduciary relationship. He noted that such a relationship will rarely be found in a commercial relationship and suggested that the overuse of this "blunt tool of equity" might lead to great uncertainty in commercial relationships.[30] He adopted the three features of a fiduciary relationship as outlined by Wilson J. in *Frame:* discretion, an ability to unilaterally exercise this discretion, and vulnerability. However, he added a crucial qualification: "It is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship."[31] One feature, however, is "considered to be indispensable to the existence of the relationship, and which is most relevant in this case, is that of dependency or vulnerability."[32] Citing with approval various academic comments, he suggests that there must be an "implicit dependency" where one party is "at the mercy" of the other's discretion.[33] On the facts, he did not find that "industry practice" established any kind of fiduciary obligation. He also rejected any suggestion that there was any kind of "physical or psychological dependency"[34]

where the junior company was somehow particularly vulnerable in its negotiations with the senior company. They were "experienced mining promoters," and the mere fact that the junior was anxious to make a deal with the senior company "cannot attract the special protection of equity."[35] If there were any dependency, it was "gratuitously incurred," and the junior was always free to exact an undertaking that the senior would not acquire the property in question.[36] Concluding that vulnerability was "virtually lacking"[37] in this case, Sopinka J. found that there was no fiduciary obligation.

The Supreme Court had the opportunity to revisit the issue in *Hodgkinson* v. *Simms,* the decision from which the third case scenario set out earlier in this chapter is drawn. Were the stockbroker and his tax advisor in a fiduciary relationship? Writing for the majority this time, LaForest J. found that there was a fiduciary relationship. Sopinka J., now in dissent, wrote the minority reasons. LaForest J. adhered to his view that vulnerability was not a requisite part of every fiduciary relationship, whereas Sopinka and MacLachlin JJ. vigorously maintained the position that vulnerability was an essential requirement and one that was lacking on the facts of this particular case. LaForest J. wrote "the concept of vulnerability is not the hallmark of fiduciary relationship though it is an important indicium of its existence."[38] He added that an inequality of bargaining power is not a necessary element of a fiduciary relationship,[39] nor does the presence of a contract preclude the existence of fiduciary obligations.[40] In short, although the stockbroker was a sophisticated party fully capable of protecting his own interest and had entered into a contractual relationship with the tax advisor, none of these factors precluded the finding of a fiduciary relationship. For the minority, relying on the majority reasons in *Lac Minerals,* the fact that the stockbroker was not a particularly "vulnerable" person who retained "the power and ability"[41] to make his own investment decisions precluded finding a fiduciary relationship. For the minority, there was neither a "total assumption of power by the fiduciary" nor a "total reliance by the beneficiary."[42] In the absence of these factors, there could be no fiduciary relationship.

Rather than require a certain degree of vulnerability, LaForest J. further elaborated on what might be called his reasonable expectations test for fiduciary relationships. He wrote: "the question to ask is whether, given all the circumstances, one party could reasonably have expected that the other party would act in the former's best interest with respect to the subject matter at issue."[43] He added: "what is required is evidence of a mutual understanding that one party has relinquished its own

self-interest and agreed to act solely on behalf of the other party."[44] He noted that merely because a party might retain the capacity to protect one's self from harm, so that there was an absence of an extreme and unilateral "power-dependency" relationship,[45] this party might still have a reasonable expectation that the other party would act in the former's best interest. He noted that the majority in *Lac Minerals* concluded that the requisite degree of vulnerability was lacking because the complaining party retained its capacity to protect itself from harm, had it chosen to do so. He distinguished *Lac Minerals* as a case dealing with arm's length commercial relationships, unlike the professional advisory relationship in *Hodgkinson*.[46] In this context, the stockbroker had the "right to expect" that his professional advisor would act in his best interest.[47] The minority reasons stressed the need to read fiduciary relationships narrowly so that the "draconian consequences" of finding a fiduciary obligation would not be imposed in inappropriate circumstances where there was an absence of "total reliance."[48] Where parties retain the capacity to protect themselves through contract negotiation, the market should rule. In stark contrast, LaForest J. for the majority wrote that "not all relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the rules."[49]

The views of the majority and minority decisions in *Hodgkinson* cannot be easily reconciled. They take conflicting approaches to the question of the degree to which the complaining party must be vulnerable to the other party in order to give rise to fiduciary obligations.[50] Curiously, the issue was not clearly resolved in *Hodgkinson*. Only three of seven judges agreed with what is essentially LaForest J.'s rejection of *Lac Minerals* and its absolute requirement of vulnerability. Iacobucci J., despite agreeing with LaForest J.'s disposition of the case and giving him his narrow majority, stated without further reasons that he would prefer simply to distinguish *Lac Minerals*.[51] As a result, it is not strictly accurate to state that *Hodgkinson* reversed *Lac Minerals* insistence that vulnerability is an essential feature of a fiduciary relationship, as there was no clear majority on this point. In short, the debate at the Supreme Court on this point will likely continue in future cases.

Analysis

The cases reveal a large degree of confusion about the scope of fiduciary law in Canada, particularly as it applies to commercial relationships. On the one hand, there is a judicial stream of thought that favours a narrow reading of fiduciary obligations in commercial relations. This arises largely out of a concern that a broad reading would create uncertainty,

impair freedom of contract, unduly interfere with market forces, and impose the "draconian" consequences of fiduciary obligations and remedies in inappropriate circumstances. On the other hand, there is a judicial stream that takes a more generous reading of fiduciary obligations, one arising out of a concern to protect the reasonable expectations of commercial actors. Much turns on the degree to which vulnerability is regarded as an essential feature of a fiduciary relationship. If essential, to the point where there needs to be a "total assumption of power by the fiduciary" and a "total reliance" by the beneficiary,[52] this would have the effect of excluding many commercial relationships from fiduciary obligations. In most cases, commercial parties retain at least the "power and ability" to protect their own interests, even if they have failed to do so in the specific circumstances of a given case. According to this judicial stream, the alleged fiduciary is under no obligation to further the interests that the other party, although fully capable of doing so, has failed to protect. In short, such a reading suggests that only in rare circumstances does a commercial relationship evolve into a "personal" relationship of trust and confidence giving rise to fiduciary obligations.

On the other hand, if vulnerability is not an essential feature of fiduciary relationships, then the net is cast more broadly over the class of commercial relationships that may give rise to fiduciary obligations. Instead, a much broader range of factors might be considered when assessing the reasonable expectations of commercial actors, including "trust, confidence, complexity of subject matter, and community or industry standards."[53] Such a reading gives a broader scope for the evolution of commercial relationships into "personal" relationships of trust. Matters as broad and possibly ill defined as community or industry standards may give rise to reasonable expectations that will be enforced with equitable obligations.

One consequence of this confusion is that it is increasingly common to allege fiduciary obligations in commercial disputes, particularly if other claims based in tort or contract are weak or give rise to less desirable remedies.[54] In an attempt to bring some certainty and predictability to this area of law, numerous commentators have tried to articulate the rationale behind fiduciary obligations with the goal of identifying with greater precision those relationships that can be characterized as fiduciary.[55] This issue is perhaps most acute in commercial relationships, where the courts have had the greatest difficulty in articulating the essential requirements of fiduciary relationships and drawing the line between the "personal" and the "commercial."

Although the contrary is sometimes suggested, there is nothing inherent about commercial relationships that precludes the application of fiduciary duties.[56] Many commercial relations have long been recognized as giving rise to fiduciary obligations: partners in a partnership are a most obvious example. Directors of a corporation are another. There is also nothing about the existence of a contract that precludes the application of fiduciary duties.[57] An agency agreement is a contract that also includes fiduciary obligations. However, the broad extension of fiduciary obligations into commercial relationships could involve troubling consequences. Parties otherwise relying on the binding nature of their negotiated contractual obligations might find that they have incurred additional and unanticipated liability because their commercial relationship has for some reason evolved into a fiduciary one. For example, the parties may have negotiated and relied upon a clause limiting liability. However, such a clause might not limit liability for breach of a fiduciary duty.[58] The result may be that it is difficult for parties to determine the scope of their obligations and liability, even in the presence of a clause limiting liability, because of the uncertain state of the law regarding the application of fiduciary duties.

The imposition of fiduciary obligations in commercial relationships also means recourse to the much more substantial remedies available for equitable breach. In some cases, this may impose an onerous and unfair burden on the party in breach. For example, in *Hodgkinson* there was no doubt that the tax advisor had breached his contract with the stockbroker in failing to disclose his conflict of interest. However, the more difficult question was the remedy for this wrongdoing. If confined to breach of contract, the stockbroker would be entitled to be placed in the same position that he would have been in had the advisor performed as promised. According to Sopinka J., the concept of foreseeability of damages in contract would limit the stockbroker's recovery to only the damages that were in the reasonable contemplation of the parties at the time of contracting.[59] This would exclude losses caused by a general downturn in the economy. On the facts, Sopinka J. found that the stockbroker was not entitled to any damages because, notwithstanding the failure to disclose, the stockbroker had still not paid any more than market value for the investments in question at the time they were purchased. Any losses suffered, including the general market downturn, were unrelated to the particular breach of contract; that is, the failure to disclose.

Having found a fiduciary relationship, the majority was not limited to contract law remedies. LaForest J. held that the proper remedy for

breach of fiduciary duty is restitutionary. He found that the stockbroker was entitled to be put in the position that he would have been in had the breach not occurred; that is, the return of all the capital invested.[60] Recognizing the importance of strictly supervising fiduciary obligations, LaForest J. concluded that the risks of marketplace fluctuations should be placed on the fiduciary.[61] This finding reflects both the compensatory and deterrent elements in equitable remedies. Even in situations where the beneficiary has not suffered any loss, equity may nonetheless impose the remedy of disgorgement or restitution in order to deter fiduciaries from even being tempted to breach their obligations.[62] In *Hodgkinson,* although there is no doubt that the tax advisor had behaved badly in failing to disclose his conflict of interest, is it fair that he should have been held liable for such a high level of damages? The point is even stronger when the tenuous connection between the stockbroker's loss and the tax advisor's failure to disclose is taken into account. Is this equitable level of recovery in reasonable proportion to the nature of the wrong?

Competing Theories of Fiduciary Obligations

Several theories have been advanced that try to address the difficult question of when fiduciary obligations arise in commercial relationships that do not fall within the traditional classes of fiduciaries.[63] Tracing fiduciary obligations back to trust law, some have suggested that the essential feature of a fiduciary relationship is that one has control over property belonging to another. However, fiduciary obligations have long been extended to relationships that do not necessarily involve property interests, including doctor and patient[64] and religious leader and congregation member.[65] Others have suggested that the essential ingredient of a fiduciary relationship is an inequality between the parties. This theory assumes that beneficiaries are generally inferior in power with regard to their fiduciary, such as is the case between parents and their young children, and guardians and their wards, in what might be described as a "power-dependency" relationship. However, there are many fiduciary relationships that do not necessarily arise between dominant and subservient parties, such as partners in a partnership and directors of corporations. Although a beneficiary may transfer power to a fiduciary, and thereby create a relationship where there is an inequality of power, this is the *result* of the fiduciary relationship, not the cause. The parties may begin from a point of complete equality of bargaining power. Sopinka J.'s description of fiduciary relationships, with its strong emphasis on the need for vulnerability, is closely related to this inequality

theory of fiduciary obligations. But his analysis overlooks the fact that parties do not need to be unequal for a fiduciary relationship to occur.[66]

Some argue that the key feature of a fiduciary relationship is that one party has undertaken to act in the best interests of the other.[67] However, as noted above, no undertaking was required in *Guerin* to find a fiduciary obligation on the Crown to protect Native interests in transactions with third parties.[68] Likewise, Wilson J. in her dissenting reasons in *Frame* did not include an undertaking as an essential feature of a fiduciary relationship.[69] Others suggest that a key feature of fiduciary relationships is that these relationships are deemed to be of particular social value, that fiduciary obligations help to strengthen key "social institutions and enterprises."[70] However, it could be said that all contractual obligations, and the institution of contract itself, is a key social institution of particular social value, but that does not mean that all contracts give rise to fiduciary obligations. There is no natural limit to the types of relationships that might be regarded as of unique social value. How does one distinguish between commercial relations of unique value and those that are not?

Given the difficulties in articulating the elements essential to fiduciary relationships, L.I. Rotman has suggested that a "situation-specific" theory ought to be adopted, one that considers the question on a case-by-case basis with a particular focus on the context within which a fiduciary obligation is being proposed.[71] He suggests that any attempt to "create a taxonomic definition of fiduciary relations in the absence of context is impossible or, at the very least, unwise."[72] He argues that a "simplified theory capable of precise and identical application to all relationships" would eliminate the "flexibility that is one of the fiduciary theory's most valuable attributes."[73] He suggests that a situation-specific theory can be a "blueprint for the protection and continued efficacy of interdependent societal relations."[74] A flexible theory of fiduciary obligations that does not attempt to identify its key or essential features may seem an attractive solution to a knotty problem. However, it is not of particular assistance to commercial actors and courts faced with the difficult question of assessing if and under what circumstances a given commercial relationship has evolved into a fiduciary relationship. Rotman's proposed test fails to resolve the pervasive uncertainty in this area of law.

Conclusion

The question thus remains: Under what circumstances does a commercial relationship evolve into a fiduciary one? When does this relationship

cease to be dominated by an assumption of the pursuit of self-interest? When does it become a relationship of dependence and interdependence such that it attracts equitable obligations? Returning to the examples provided at the start of this chapter, what are the key features that suggest that the first two are not fiduciary, yet the third one is?

The Supreme Court, particularly the majority reasons of Sopinka J. in *Lac Minerals* and his minority reasons in *Hodgkinson,* suggest that a narrow interpretation of a requirement of vulnerability is sufficient to exclude all three examples from fiduciary law. If so, this could resolve some of the confusion that has arisen in these cases and limit the application of fiduciary obligations to commercial relations. It was evidently Sopinka J.'s desire to do so. However, the vulnerability theory as a broad theory to explain a key feature of all fiduciary relationships is seriously incomplete. It effectively excludes a wide range of commercial relationships that have long been regarded as fiduciary, most obviously that between partners in a partnership and directors of a corporation. Like the stockbroker in *Hodgkinson,* many partners in sophisticated professional partnerships retain the *capacity* to negotiate a partnership agreement that will protect their interests. In the narrow sense of vulnerability advanced by Sopinka J., such partners are not "vulnerable" to one other in the sense that there is a "total assumption of power" by the fiduciary and "total reliance"[75] by the beneficiary. Because the stockbroker in *Hodgkinson* retained the *capacity* to protect his interests, Sopinka J. found there could be no fiduciary relationship. However, even though a partner might retain the *capacity* to protect his interests, that does not mean that there is no fiduciary relationship between them. The obligation, for example, to refrain from diverting partnership opportunities to their own personal gain applies, notwithstanding the relative bargaining power, sophistication, or capacity of the partners in question.

It would appear that, having opened the door to a broader definition of fiduciary relationships in *Guerin,* further expanded by Wilson J. in her dissenting reasons in *Frame,* the Supreme Court has yet to offer a satisfactory and consistent limit to the extension of fiduciary obligations in commercial relationships. The extent to which the court has attempted to impose limits with the vulnerability theory is not only an incomplete theory of fiduciary obligations, but also one that has most recently been effectively rejected by LaForest J.'s majority reasons in *Hodgkinson.*

Returning to the examples provided at the outset of this chapter, there is no doubt that the complaining party has been badly treated in all three cases. In the first case, the distributor attempted to pirate the

supplier's goods. In the second, the senior mining company used confidential information given to it by the junior company to purchase valuable property and rob the junior of a valuable commercial opportunity. In the third, the tax advisor failed to disclose his own conflict of interest when offering financial advice to a client. When other remedies seem inadequate to correct the wrong, there is a strong temptation to find fiduciary obligations. Although the courts are adamant that their analysis is not remedy-driven,[76] it appears that at least one factor that might lead to confusion in this area is a desire for the courts to find a just outcome in a given case, and from this conclude that a fiduciary relationship can be found. For example, in *Hodgkinson,* in the absence of a fiduciary relationship, according to Sopinka J., the stockbroker would have been without any remedy at all. Given this hard choice, when faced with obvious bad behaviour on the part of the advisor, it may seem difficult to conclude that there was nothing "personal" about the relationship between the stockbroker and his advisor. On the other hand, in the first two examples, there were remedies available in contract law (breach of the distribution agreement in the first and breach of confidence by the senior mining company in the second example). These remedies were less extensive than those available in equity, as neither gave rise to a claim in constructive trust. Nonetheless, at least some remedy was available to address the obvious bad conduct by the defendant, perhaps making it less likely that a court would feel pressured to find alternative remedies in equity.

However, to suggest that the judicial approach to fiduciary obligations in commercial relationships is primarily result-driven is an even less satisfactory conclusion than to suggest the adoption of the "situation-specific" theory considered above.[77] It cannot be the case that the courts will simply impose fiduciary obligations largely at random so that equitable remedies will be made available wherever a court finds it necessary. This would suggest that there is no meaningful content to fiduciary relationships, other than a judicial desire to have unlimited access to equitable remedies to correct the wrong in question. There must remain something unique about fiduciary relationships that distinguishes them from ordinary commercial relationships. However, it is fair to conclude that the Supreme Court has not yet been able to articulate the unique features of fiduciary relationships so that the law can be applied in a predictable manner to commercial relationships. According to LaForest J.'s majority reasons in *Hodgkinson,* matters as ill-defined as "trust, confidence, complexity of subject matter, and community or industry standards"[78] may be sufficient to find fiduciary obligations in

commercial relations. If these matters give rise to a "reasonable expectation" that one party will act in the best interests of the other, fiduciary obligations may apply.

It is not difficult to imagine the endless circumstances where commercial parties might reasonably disagree about the "community or industry standards" that generally apply to their commercial relations. Interpreted broadly, this could impose an entirely new layer of obligations that would overlap and perhaps even supersede the contractual terms negotiated between commercial parties. Moreover, these obligations would be enforced with the exceptionally broad and even punitive scope of equitable remedies. It is now clear that fiduciary obligations can arise in a broad range of commercial relationships. There is no doubt that some of these relationships do cross the boundary between the commercial, where self-interest is expected and rewarded, and the personal, where self-interest must yield to the interests of others. What remains unclear is the nature of the boundary, leaving it a particularly risky territory for commercial actors.

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Notes

1 See *e.g. Keith Henry & Co. Pty. Ltd.* v. *Stuart Walker & Co. Pty. Ltd.* (1958), 100 C.L.R. 342, where the court found that parties engaged in "ordinary commercial transactions" at arm's length do not stand in any fiduciary relationship.

2 Starting most recently with *International Corona Resources Ltd.* v. *Lac Minerals Ltd.,* [1989] 2 S.C.R. 574 [hereinafter *Lac Minerals*], further considered in *Hodgkinson* v. *Simms,* [1994] 3 S.C.R. 377 [hereinafter *Hodgkinson*], the court has wrestled with the question of the extent to which fiduciary relationships might arise in the commercial context.

3 *Hospital Products Ltd.* v. *United States Surgical Corp.* (1984), 55 A.L.R., 417 [hereinafter *US Surgical Corp.*].

4 *Lac Minerals, supra* note 2.

5 *Hodgkinson, supra* note 2.

6 For a critical discussion of the broader scope of equitable compensation for breach of fiduciary duty, see J. Berryman, "Equitable Compensation for Breach by Fact-Based Fiduciaries: Tentative Thoughts on Clarifying Remedial Goals" (1999) 37 Alta. L. Rev. (No. 1) 95-113.

7 A term employed by Sopinka J. in *Lac Minerals, supra* note 2 at para. 29.

8 *Guerin* v. *R.,* [1984] 2 S.C.R. 335.

9 *Ibid.* at 384.

10 *Ibid.*

11 *Ibid.*
12 P. Parkinson, ed., *The Principles of Equity* (Sydney: Law Book Co., 1996) at 366-7.
13 *US Surgical Corp., supra* note 3 at 417.
14 *Ibid.* at para. 38.
15 *Ibid.*
16 *Ibid.* at para. 33.
17 *Frame* v. *Smith,* [1987] 2 S.C.R. 99.
18 *US Surgical Corp., supra* note 3 at 454, para. 68.
19 *Frame* v. *Smith, supra* note 17 at 135, para. 61.
20 *Ibid.* at 137-38.
21 *Lac Minerals, supra* note 2.
22 *Hodgkinson, supra* note 2.
23 *Lac Minerals, supra* note 2 at 643, para. 145.
24 *Ibid.* at 648, para. 150.
25 *Ibid.* at para. 162-5.
26 *Ibid.* at para. 166-70.
27 *Ibid.* at para. 171-8.
28 *Ibid.* at 662, para. 171. He noted some fiduciary relationships where the beneficiary of the duty is not vulnerable to all the actions of the fiduciary, such as that between the director and his corporation (at para. 172). Moreover, he noted that vulnerability suggests a susceptibility to harm, and in a trust, fiduciary obligations can be breached without harm being inflicted on the beneficiary; *Keech* v. *Sandford* (1726), 25 E.R. 223.
29 *Lac Minerals, ibid.* at 663, para. 173.
30 *Ibid.* at 595, para. 27.
31 *Ibid.* at 599, para. 33.
32 *Ibid.* at 599, para. 34. On this point, Sopinka J. adopts the reasoning of Dawson J. in *US Surgical Corporation, supra* note 3.
33 *Ibid.* at 599, para. 35.
34 *Ibid.* at 606, para. 51.
35 *Ibid.* at 606-7, para. 51.
36 *Ibid.* at 607, para. 52.
37 *Ibid.* at 606, para. 50.
38 *Hodgkinson, supra* note 2 at para. 25.
39 *Ibid.* at para. 27.
40 *Ibid.* at para. 28.
41 *Ibid.* at para. 136.
42 *Ibid.* at para. 142.
43 *Ibid.* at para. 32.
44 *Ibid.* at para. 33.
45 The term "power-dependency" was used by LaForest J. in *Norberg* v. *Wynrib,* [1992] 2 S.C.R. 226, to describe the relationship between a physician and patient, where the physician was using his patient's addiction to painkillers to extract sexual favours from her. In such a relationship, where there is a marked inequality of power, the court concluded that there was no genuine consent to the sexual contact. McLachlin and L'Heureux-Dubé JJ., writing for the minority on this point, found that there was also a breach of the physician's fiduciary duty to his patient. The majority, however, did not resolve the case on the basis of a fiduciary relationship, but rather on the basis of tort of battery.

46 *Hodgkinson, supra* note 2 at para. 38.
47 *Ibid.* at para. 42.
48 *Ibid.* at para. 132.
49 *Ibid.* at para. 48.
50 See L.I. Rotman, "The Vulnerable Position of Fiduciary Doctrine in the Supreme Court of Canada" (1996) 24 Man. L.J. 60 at para. 85-86 [hereinafter "Vulnerable Position"].
51 *Hodgkinson, supra* note 2 at para. 160.
52 As per Sopinka J., *ibid.* at para. 142.
53 As per LaForest J., *ibid.* at para. 35.
54 See M.V. Ellis, *Fiduciary Duties in Canada* (Toronto: De Boo, 1988) at 1-8: "It is somewhat ironic that this area – one of the most rapidly expanding and powerful areas of law – is probably one of the least understood."
55 See L.I. Rotman, "Fiduciary Doctrine: A Concept in Need of Understanding" (1996) 34 Alta. L. Rev. 821 [hereinafter "Fiduciary Doctrine"]; R. Flannigan, "Commercial Fiduciary Obligation" (1998) 36 Alta. L. Rev. (No. 4) 905; J. Grover, *Commercial Equity: Fiduciary Relationships* (Sydney: Butterworths, 1995); P. Parkinson, "Fiduciary Obligations," in P. Parkinson, ed., *The Principles of Equity* (Sydney: Law Book Co., 1996); and E.J. Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1.
56 Flannigan, *supra* note 55.
57 *Hodgkinson, supra* note 2 at para. 28.
58 *Penner* v. *Yorkton Securities Inc.* (1996), 183 A.R. 5 at 22, para. 93 (Q.B.): "Where there is a breach of fiduciary duty, exclusion clauses and verification clauses in the contract have no application. The fiduciary duty transcends these terms and it is abhorrent for contractual terms to abrogate that duty." See also C. Feasby, "Fiduciary Obligations and Exculpatory Clauses" (1998) Alta. L. Rev. (No. 4) 923, who argues that the "expansive fiduciary principles" (para. 66) adopted by the Supreme Court make it more likely that fiduciary obligations may arise in unforeseen circumstances in commercial relations. To remedy this confusion, the author argues that exculpatory clauses excluding liability for equitable breach should be enforced.
59 *Hodgkinson, supra* note 2 at para. 155.
60 *Ibid.* at para. 73.
61 *Ibid.* at para. 93.
62 *Boardman* v. *Phipps,* [1967] 2 A.C. 932.
63 For a useful summary, see "Fiduciary Doctrine," *supra* note 55.
64 *McInerney* v. *MacDonald,* [1992] 2 S.C.R. 138.
65 See Ellis, *supra* note 54 at 11A-4.
66 See Rotman, "Vulnerable Position," *supra* note 50 at para. 92, where he advances the argument that vulnerability is simply a by-product of a fiduciary relationship "rather than a primary ingredient in their creation." He suggests that Sopinka J. has incorrectly identified vulnerability as an essential feature of a fiduciary relationship. LaForest J. also makes this point in his dissenting reasons in *Lac Minerals, supra* note 2 at para. 172.
67 Parkinson, *supra* note 55 at 363-4. See also *US Surgical Corporation, supra* note 3 at 454, para. 68.
68 See discussion, *supra* note 8.
69 See discussion, *supra* note 17.

70 *Hodgkinson, supra* note 2 at para. 48.
71 "Fiduciary Doctrine," *supra* note 55.
72 *Ibid.* at note 40.
73 *Ibid.* at note 41.
74 *Ibid.* at note 135.
75 *Hodgkinson, supra* note 2 at para. 142.
76 LaForest J. makes this point at length in *Lac Minerals, supra* note 2 at para. 151.
77 One of the most notorious examples of this result-oriented approach is *Chase Manhattan Bank* v. *Israel-British Bank,* [1981] Ch. 105. The plaintiff paid two million dollars to the defendant bank. Due to a clerical error, a second payment in the same amount was made the same day. The plaintiff later attempted to stop the second payment, but the defendant bank had gone bankrupt. To permit an equitable tracing of the funds, the court found a fiduciary relationship between the plaintiff and defendant banks, even though there was nothing about this relationship that suggested any degree of trust or confidence between the parties. Unjust enrichment was not an available remedy because it was not recognized as an independent head of action in England. "Fiduciary Doctrine," *supra* note 55 at note 59.
78 As per LaForest J., *Hodgkinson, supra* note 2 at para. 35.

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4
Personal Relationships in the Year 2000: Me and My ISP

Ian Kerr

The Gatekeepers

Aquacool_2000 loves to talk business. Unfortunately, not everything that he *says* is golden. For example, in reference to three members of the management team of a publicly traded corporation known as AnswerThink Consulting Group Inc., Aquacool_2000 stated the following: “One of them is an arrested adolescent whose favourite word is ‘turd.’ One is so dull that a 5-watt bulb gives him a run for his money. And the third believes that the faster you go in your car, the smarter you get.” These remarks were never spoken. But they were posted to an online message board available to all 125 million subscribers of Yahoo!, perhaps the largest portal on the World Wide Web.[1] Recognizing that its advertising revenue and stock valuations rest mainly in the invisible hand of corporate America, Yahoo! had invited its subscribers to “discuss the future prospects of the company and share information about it with others.”[2] In fact, Yahoo! had set up similar message boards for every publicly traded corporation listed on the New York exchange.

Clearly, Yahoo! had envisioned a frank exchange of information on its message boards. One might even say that Yahoo! had abetted such exchanges. By constructing an architecture that encouraged message board participants to select a nom de plume and thereby communicate pseudonymously, Yahoo! ensured an online discussion that has been described as “colloquial in tone, opinionated, speculative, and frequently caustic and derogatory.”[3]

As the story goes – and as one might imagine – AnswerThink did not think too highly of Aquacool_2000’s remarks and answered with a threat of legal action. Capitulating to the pressure exerted by AnswerThink, Yahoo! decided to disclose personal information about Aquacool_2000[4] without even telling him that it had done so. Had Yahoo! notified Aquacool_2000 of its decision to disclose the requested information to

AnswerThink, he would have had the opportunity to seek a protective order to enforce his constitutionally protected right to speak anonymously.[5] His inability to do so resulted not only in a (potentially frivolous) defamation suit against him, it also resulted in the immediate termination of his employment. As it turns out, Aquacool_2000 was an AnswerThink employee.

Before proceeding further, it is important to have a sense of the means by which Internet service providers collect personal information about people like you, me, and Aquacool_2000. There are a number of ways for a service provider to collect such information. First, it can ask users to fill out an information form. Often, this information is the *quid pro quo* given in exchange for the service. The level of invasiveness in the questionnaire usually correlates with the perceived importance of the services rendered. For example, if a user wishes to do something simple such as view certain content on a Web page designed by Macromedia, it will need to use a special plug-in.[6] In order to obtain the plug-in, the user will be asked to fill out an information form. Given the relative insignificance of the plug-in, the Macromedia form makes it optional for a user to include his first or last name. But every user is required to supply his email address. If the user is willing to provide this basic information, he will then be able to download the plug-in and view the desired content in an optimal manner. Other online services demand more extensive information in return for their more extensive products. For example, to avail themselves of Yahoo! email and Web page services, Yahoo! users must fill out a form that not only requires disclosure of their names and email addresses, but also their street addresses, interests, and hobbies, etc. Information collected from forms such as these are combined into massive databases owned by the respective service providers.

A somewhat more subtle method by which service providers are able to gather information is through the use of cookies, also known as "persistent client-side hypertext transfer protocol files."[7] These are small files that are downloaded from the service provider's host computer to an individual user's computer and stored there. When the user returns to the service provider's site, the cookie is retrieved from the user's computer, allowing the service provider to maintain details on the movements of the user within its site. Some Internet service providers have set up wide-ranging networks of cookie senders and collectors, in the form of banners that appear on Web sites of all types and descriptions. The program associated with those banners pumps the cookie information into a single depot. Online advertising giant Doubleclick is one such company.[8] It develops and maintains individual user profiles that can

then be sold to direct advertisers to better target their advertising audiences. The method by which cookies are stored and maintained may also be employed in a corrupt manner, allowing a service provider's computer to mine and manipulate all of the cookies gathered by a user and thus develop a very highly detailed profile of where the user has been and when they were there.[9]

Internet public discussion groups such as Usenet and Listserv can also operate as a source of information about Internet users. When a user posts opinions on one of these forums, that information is often archived in a permanent database. If a user's email address or user name remains constant over the years, it becomes a simple matter to write an automated software routine that will scan those archives, and collate and analyze the opinions of that user.

As a final example, service providers supplying access to the Internet are in a unique position to gather and store information pertaining to individual users. The Internet is a global network of large servers (nodes) sharing information in a way that allows data to be efficiently routed to particular host computers. Internet access providers are the gatekeepers, standing between individual users and the World Wide Web. Access providers send and receive information to and from users and route it through to larger Internet nodes. Billing and other information needed to carry on the service provider-user relationship is stored by the access provider. In addition, the access provider can obtain and record accurate information detailing the exact location of particular users at a particular time and compile lists of all of their points of destination while online. In some cases, this allows access providers to learn the habits and preferences of their users. By linking the real-life identity of the user to his online activities, the access provider can build a highly personal profile of the user.

Returning to our narrative, Yahoo! collects personal information. In order to subscribe to any of Yahoo!'s services, a user must provide, inter alia, his zip or postal code, gender, occupation, industry, and interests. In addition to this information, which is "voluntarily"[10] disclosed by those who wish to be subscribers, Yahoo! also collects other kinds of information about its subscribers without their knowledge. For example, Yahoo! gathers information that would allow an interested party to trace the source of each and every comment posted on each and every one of its message boards. Yahoo! does this by saving a log of Internet Protocol (IP) addresses[11] for every person that posts a message to one of its message boards. These IP logs are kept by Yahoo! for years and could potentially be cross-referenced to private emails sent or received by its

subscribers, which are also stored on Yahoo! servers. The only way for users to ensure that Yahoo! does not have access to private communications is to encrypt their messages:[12]

> Encryption may be divided into two types: symmetrical encryption and asymmetric encryption. The former works by creating a single key that is used in the calculations to convert the file into the ciphertext. That same key must then be used to decrypt that same file. The latter involves two related keys, one of which only the owner knows (the "private key") and the other which anyone can know (the "public key"). The message is encrypted using the private key and may then be decrypted by using the public key. In doing so, the decrypting party may satisfy himself that the message received is accurate in content and that the party sending the message is, in fact, who he purports to be.[13]

Given its incredible technical means to gather, copy, store, and manipulate personal information, it is no surprise that Yahoo! had exactly the information that AnswerThink was looking for. And this was likely not the first time that a high-powered corporation like AnswerThink had instituted legal proceedings merely to intimidate and silence its online critics.[14] Is it any less surprising that Yahoo! decided to disclose to AnswerThink personal information about Aquacool_2000?

Don't decide yet – there are additional facts. The relationship between Yahoo! and its users is said to be governed by the "Terms of Service" promulgated on the Yahoo! Web site. The "Terms of Service" incorporate by reference Yahoo!'s "Privacy Policy."[15] The first sentence of its "Privacy Policy" proclaims that "Yahoo! is committed to safeguarding your privacy online." It further states that:

> This Privacy Policy will let you know: what personally identifiable information is being collected about you; how your information is used; who is collecting your information; with whom your information may be shared; what choices are available to you regarding collection, use, and distribution of your information.[16]

The policy also provides that subscribers will be notified "at the time of data collection or transfer if your data will be shared with a third party and you will have the option of not permitting the transfer."[17] However, according to the policy, Yahoo! will only disclose a member's personal information when it believes in good faith that such disclosure is required by law.[18]

At the bottom of its "Privacy Policy" and throughout its Web site, Yahoo! displays the TRUSTe certificate,[19] a logo that is familiar to many Internet users. By featuring the TRUSTe seal throughout its Web site, Yahoo! represents to its users that it complies with strict privacy policies and procedures and that it will not disclose personal information to third parties without prior permission or some other legal justification.

Notwithstanding its explicit "Terms of Service" and detailed "Privacy Policy," Yahoo! handed over to AnswerThink all of the information that it had requested. Apparently, Yahoo! receives hundreds of similar requests for personal information every year and has granted several such requests without ever notifying the subscriber that his personal information and private communications were about to be disclosed.[20] By failing to notify its subscribers, Yahoo! precludes people like Aquacool_2000 from mounting any sort of defence until it is too late. Once Aquacool_2000's personal information became known to AnswerThink, there was no turning back.

Aquacool_2000 is not alone in his plight. In fact, the US Federal Trade Commission has been investigating the actions of Yahoo!'s GeoCities[21] since the fall of 1998. The FTC has charged GeoCities with misleading subscribers by advertising that its policy was to not release personal information while, in fact, GeoCities was selling that information to direct marketers. The information was then used to contact subscribers with unsolicited, unwanted advertisements.[22] More disturbingly, Geocities has also been accused of using a children's version of its Web site to collect personal information from unwitting minors. Information-gathering techniques have included requesting information about parents' mutual funds and their income-earning capacities in exchange for various prizes or rewards. The FTC has taken a special interest in discovering the extent of such activity, its ramifications, and possible solutions to this unacceptable practice.[23]

Of course, Yahoo! is not the only Internet service provider known to have disclosed personal information to a third party upon request. Consider the case of Timothy McVeigh, a retired officer of the US Navy, who faced discharge from his position on a US submarine after a member of the Navy's judge advocate general, acting on an anonymous tip, asked a paralegal to contact America Online (AOL) to find out personal information about him. Without a warrant or court order, AOL released personal information to the paralegal about McVeigh's sexual orientation. On this basis, McVeigh was dismissed from the Navy – his conduct ruled as being against its policies on homosexuality. This decision was ultimately overturned and the conduct of the naval investigation was found

to be questionable. Initially, AOL denied that it had released the information at all but eventually issued a full apology for contravening its own standards of privacy and confidentiality.[24]

American service providers are not the only ones to disclose personal user information to third parties without their knowledge or consent. Canadian providers have done the same. Imagine the following. Someone sends you an email with the subject header, "TRY THIS!" You aren't even aware that this particular email has been sent to you. Because your inbox is overloaded with messages, the "TRY THIS!' message causes you to exceed your available disk quota. Consequently, access to your email is disabled. So you phone your Internet service provider, Supernet, to complain that you are unable to access your email. You are told that a technician will look into the matter. In an attempt to free up some memory and thereby enable your email account, the technician searches for files with large attachments that can be deleted. After opening the message with the subject header, "TRY THIS!," the technician notices attachments with suspicious filenames. Suspecting that the large attachments are child pornography, the technician opens a file. Sure enough, the message that has been sent to you without your knowledge or consent contains images depicting young children engaged in sexual activity. The technician informs her supervisor, who in turn contacts the police. The police request an electronic copy of the file. Supernet decides to cooperate. Consequently, Supernet forwards several of your messages to the police without telling you.

It is worth pausing to underscore the fact that, because your account has been disabled, the illicit "TRY THIS!" file (the existence of which remains unknown to you) has not yet been delivered to you. Knowing this, the police instruct your Internet service provider to resend the pornographic email to you so that it will be in your possession. On this basis, the police will then be able to obtain a search warrant, seize your computer, and arrest you.

Believe it or not, this actually happened in Alberta.[25] Perhaps even more surprising was the decision that was rendered by the Alberta Court of Queen's Bench. Smith J. held that Supernet's search of the user's inbox, its decision to open the user's email without his consent, the police's instruction to copy and then forward them his mail without telling him, and the police's instruction to resend the illicit file to the user did not unjustly interfere with the user's reasonable expectation of privacy.[26]

After pausing for dramatic effect, I must now confess that, in my previous narrative, I sugarcoated the facts. In the actual Alberta case, Dale Weir, the recipient of the "TRY THIS!" email, was not an innocent

person who was framed by the sender of the email. On the facts set out in *R.* v. *Weir*, the addressee of the message was a consumer of child pornography. Though this revelation certainly makes it more difficult to sympathize with Weir about the fact that his personal information was ultimately disclosed, the manner in which Weir's private communications were discovered and disclosed should be troubling to everyone. There was no subpoena, no search warrant – no prior judicial authorization of any sort. Supernet simply made a unilateral decision to sift through Weir's private account and then disclose its finding without notice or any other form of due process.

The narratives considered above illustrate the incredible power that Internet service providers (ISPs) hold over their users. ISPs are by default the gatekeepers of informational privacy on the Internet. By providing online services such as email, Web site space, or portals to various online consortiums, an ISP gains access to and control over a plethora of personal information and private communications belonging to each of its many users. Each user is therefore dependent on those who provide them with Internet services, not only for the proper storage, maintenance, and management of their personal information and private communications, but also for determining whether and when their personal information may be disclosed to third parties. In other words, the safeguarding of user information is largely dependent on the benevolence and good judgment of ISPs. As illustrated by the above narratives, this is sometimes cause for concern.

In Canada, the newly enacted *Personal Information Protection and Electronic Documents Act*[27] prescribes a number of rules that are sure to have an impact on many of the informational transactions between ISPs and third parties. But as Canada's federal privacy commissioner has recently stated, "Bill C-6 is far from the end of the process of protecting privacy in this country. There remain enormous gaps in the protection of individuals from inappropriate intrusions, be they brought about by dealings with personal information or by other forms of surveillance."[28] The aim of this chapter is to fill in one of those gaps. Despite the growing body of literature on privacy in the information age, there is a paucity of research focusing squarely on the nature of the legal relationship between Internet user and service provider.

The object of this study is to examine that relationship as a special instance of a relationship of dependence. There are several valuable reasons for doing so. First, a clearer understanding of this relationship might assist law reformers in determining whether special obligations ought to flow from it. Given the future importance of access to

information and informational privacy, it is essential to know whether the relationship between Internet user and service provider is or ought to be governed by anything other than the contractual arrangements between the parties or the minimal requirements of recently enacted privacy legislation. Second, an examination of ISP-user relationships in this context will have the reciprocal effect of deepening our understanding of the notion of a "relationship of dependence." By casting its focus on the *informational imbalance* between the parties rather than the more familiar types of power imbalances (e.g., inequalities based on economics, social status, physical strength, and expertise), this study seeks to provide a more robust understanding of what it is that makes a relationship one of dependence. As such, this chapter will ultimately contribute to a broader understanding of the law of obligations.

The Contractual Underpinnings of ISP-User Relationships

The logarithmic proliferation of available Internet services defies comprehensive quantification or classification. However, it is useful to categorize Internet services according to the nature of the exchange between ISP and user. For present purposes, it is sufficient to consider three kinds of basic exchanges: (1) services in exchange for cash, (2) services in exchange for personal information, and (3) services in exchange for tolerated advertising.[29]

Internet access is almost always exchanged for cash. Service providers of this sort act as the direct intermediary between the user's individual computer and the Internet. Usually, access is gained through local land phone lines that connect the user to the access provider's host computer. Access providers often provide a range of services on a cash-for-service basis. Among these are: email accounts (with arrangements made to download the email to the user's computer), multiple email addresses, access to various databases, access to mailing lists of users with similar interests, and hosting for user Web pages. Other services offered in exchange for cash include the use of remailers and other technologies that allow users to gain anonymous access to databases in libraries, government departments, and other data collection services, as well as anonymous access to certain entertainment sites.

The second category provides various services in exchange for a user's personal information rather than money. These often include portal services, i.e., personalized launch pads to various zones of the Internet tailored to each user's specific interests. Yahoo! is an example. In exchange for the user's name, address, and other personal information about his habits and preferences, the user can get stock quotes,

subscribe to a personalized news compilation service, be apprised of the local weather conditions, etc. Web site hosting (e.g., GeoCities) is also available in exchange for personal information.

In the third category, personal information is not required. Services are "free" to users (except for the annoyance costs generated by distracting advertisements). Services in this category range from the strange and whimsical to the obvious gateway to paid services. An example near the former end of the spectrum is an online purity test that allows users to rate their purity against the scores collected about others.[30] Apparently, the information collected for the purity test is not logged. At another point on the spectrum, users encounter a slew of cartoons generally dealing with the death and dismemberment of small fuzzy creatures.[31] The other end of the spectrum is exemplified by a site that offers a free mortgage calculator in the hopes that the user will then be tempted to make use of the paid services of that same Web site.[32]

There is a common thread stitching together this motley collection of service providers. Whether in exchange for remuneration, information, graft, or graffiti, the vast majority of online service providers do not merely create a public thoroughfare for virtual voyeurs. Rather, they attempt to establish some sort of relationship with those who show interest in their services. Stripped down to their most basic form, almost all of these relationships can be understood as contractual in nature. Something of value is offered by one person to another in exchange for an online service.

Much has been written on the subject of contract formation online.[33] Recently, various jurisdictions have begun to propose and enact electronic commerce legislation, one of the aims of which is to ensure that traditional doctrinal defects associated with the formation of online contracts are cured through the use of functional equivalents.[34] For example, contracts that traditionally required a signature can now be achieved through a series of mouse clicks on a computer. In this instance, the functional equivalent of a signature is simply the manifestation of assent through some identifiable means.[35] So long as the online transaction demonstrates the communication of an offer, its acceptance, and the exchange of valuable consideration, a contract will be created.[36] The medium of communication is relevant only insofar as it might affect the place where the contract was purportedly made, or the time at which the contract was said to have come into existence, should such determinations be in dispute.

For the purposes of this study, the analysis of ISP-user agreements will be limited to situations in which service providers clearly intend to enter into contractual relationships and therefore require users to

manifest their assent to a prominently displayed "Terms of Service" document via some functional equivalent of a signed document. For the sake of simplicity, it will be assumed that the typical problems associated with contracts of adhesion (viz. reasonable notice as to onerous or unusual terms) have been adequately dealt with through the careful design and delivery of the particular Web-wrap agreement in question.[37]

Limiting the investigation of ISP-user relationships to situations where the ISP provides explicit "Terms of Service" that are manifestly assented to by the user, a relatively extensive survey of more than forty such agreements[38] governing a variety of services in various jurisdictions[39] ultimately revealed a range of different obligations undertaken by ISPs with respect to the disclosure of personal user information. The results of the survey indicate that ISP-user relationships can be understood as falling into one or more of five categories:[40] (1) Confidential; (2) Confidential within the Limits of the Law; (3) Disclosure when Illegality Is Suspected; (4) Disclosure to Protect ISP or in Extraordinary Circumstances; and (5) Voluntary Disclosure and Active Monitoring.

Confidential

Though this form of contractual undertaking is indeed quite rare, some ISPs have actually promised to keep their users' personal information confidential in spite of any and all requests for disclosure. A relatively well-known example of this was an anonymous remailer service known as anon.penet.fi. By stripping email messages of the identities and digital addresses of the original sender and then remailing them to the locations specified, the anon.penet.fi. remailer service allowed individuals who might not otherwise have participated in certain socially beneficial discussions to have a voice, without fear of reprisal.[41] Given his allegiance to the cause of anonymous speech, this particular service provider, Johan Helsingius, had evinced a "strong commitment to preserving anonymity in all cases," indicating that he would not waiver even in the face of a court order.[42] However, when push came to shove, after a Finnish court required him to divulge the email address belonging to one of his users who was suspected of distributing child pornography, Helsingius caved. Shortly thereafter, he decided to shut down his remailer.[43]

ISPs are generally unwilling to promise absolute confidentiality to their users because of recently proposed and enacted legislation in various jurisdictions that require ISPs to comply with law enforcement, failing which the ISP will be strictly liable, either criminally or civilly, for the conduct of its users. For example, the recently proposed Bill

C-231, the *Internet Child Pornography Prevention Act,*[44] requires ISPs to "advise the Minister of the identity of [the user], the nature of the material and the means whereby it may be accessed by others."[45] According to this bill, an ISP that fails to do so will itself be guilty of an offence and could lose its licence or be subject to more serious criminal sanctions.[46]

Provisions such as this have become known as *safe harbours*.[47] In the present context, a safe harbour aims to encourage responsible online behaviour by providing a statutory limitation on the liability of service providers. As one American author put it:

> Legal accountability in cyberspace hinges critically on establishing, and fairly defining, the liability of [service providers]. Such liability is appropriate when the [ISP] provides the tools for the underlying offenses, and further aids the responsible party by concealing the user's identity. However, an opportunity should also be provided for [ISPs] to avoid liability when they are willing to cooperate with authorities. Such an incentive can be provided through a safe harbor provision guaranteeing the [ISP] protection from civil and criminal liability when the administrator (1) has acted in good faith, and (2) voluntarily discloses to the authorities the identity of a user engaging in illegal activities.[48]

Notice the strategy here. Rather than involving government directly in the policing of online conduct, regulation is left in the hands of ISPs and users. A safe harbour allows an ISP to avoid liability for illegal conduct that takes place on their sites or as a result of their services. ISPs can protect themselves by taking affirmative action (e.g., removing the offending materials) and in some instances by disclosing information about their users.[49]

While this strategy circumvents problems typically associated with a top-down governmental approach to regulation, it has its own drawbacks. As Sopinka J. astutely pointed out a few years ago:

> A determination of the scope of liability of network operators will surely have ramifications on freedom of speech. If computer operators are held liable for the expression of their subscribers it would place a duty on them ... The result would likely lead to an increase in screening of private messages. It would potentially result in censorship, as companies would wish to protect themselves from possible civil or criminal liability. *This would put network administrators in the unenviable position of deciding what is acceptable speech and what is not.*[50]

Though it does not, strictly speaking, contain a safe harbour provision, section 7 of the recently enacted *Personal Information Protection and Electronic Documents Act* [51] has a similar effect.[52] Assuming that ISPs are governed by the *Act*,[53] it will encourage ISPs to disclose personal information to third parties without the users' knowledge or consent whenever an ISP "has reasonable grounds to believe [that the users' personal information] could be useful in the investigation of a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed, and the information is used for the purpose of investigating that contravention."[54] To restate the point made by Sopinka J. in a slightly different way, legislative initiatives such as these put an ISP in an unenviable relationship with its users. While ISPs clearly owe certain duties to protect the confidentiality of their users, keeping quiet will sometimes conflict with their own interests. As a result of the safe harbour approach, it will sometimes be in an ISP's interest to disclose personal information in a manner that undermines the interests of its users.

Given that most ISPs recognize this cruel fact of online life, the "Terms of Service" agreements almost never promise confidentiality in regard to any and all requests for disclosure.

Confidential within the Limits of the Law

Many "Terms of Service" agreements promise that the ISP will take steps to ensure the confidentiality of a user's communications and will only release personal information in circumstances where the ISP is legally compelled to disclose. For example, the University of Calgary's "Computing and Networks Policy" promises that, "if a user is suspected of using university computers for illegal purposes, access to files, directories or other user information may be granted to persons outside the university only by appropriate order of a competent court."[55] ISPs who adopt this approach will generally request that the user remove the illicit material, failing which it will take matters into its own hands. A sample from Demon Internet's "Acceptable Use Policy" illustrates this approach:

> Demon Internet's relationship with other networks, and ultimately its connectivity to the rest of the Internet depends largely upon proper behaviour by its customers. Demon Internet cannot tolerate any behaviour by customers which negatively impacts upon its own equipment or network, or upon the use by other customers of the Internet, or which damages Demon Internet's standing in the wider community.

> Demon Internet will therefore enforce appropriate sanctions against any of its customers who are responsible for serious abuse of the Internet. Such sanctions include, but are not limited to, a formal warning, suspension of one or more of the customer's services, suspension of all Internet access through Demon Internet or termination of the customer's account(s).[56]

ISPs who have opted for internal sanctioning of their users do not generally disclose information to law enforcement authorities unless they are explicitly directed to do so. Nor do they monitor online conduct or communications unless they have been notified of a user's illicit activity. An example of this approach can be found in America Online's "Rules of User Conduct":

> America Online generally does not pre-screen, monitor, or edit the content posted by users of communications services, chat rooms, message boards, newsgroups, software libraries, or other interactive services that may be available on or through this site. However, America Online and its agents have the right at their sole discretion to remove any content that, in America Online's judgment, does not comply with Rules of User Conduct or is otherwise harmful, objectionable, or inaccurate. America Online is not responsible for any failure or delay in removing such content.[57]

Disclosure When Illegality Is Suspected

A good number of ISPs are disinclined to treat their users' personal information as confidential. They are therefore willing to disclose information whenever suspicion arises or a legally motivated request has been made. As we have seen, this is the practice adopted by Yahoo!.[58] ISPs who fall into this category tend to view cooperation with investigations as a more important goal than safeguarding their users' personal information. Recall that this latter approach was adopted by Supernet in its decision to forward Dale Weir's emails to the police merely on the basis of a request to do so. Unlike Yahoo!, the actions of Supernet comport with its current "Acceptable Use Policy and Liability Disclaimer," which provides that Supernet "will report to law enforcement authorities *any actions which may be considered illegal,* as well as any reports it receives of such conduct. When requested, [Supernet] will fully cooperate with law enforcement agencies in any investigation of alleged illegal activity on the Internet."[59] Presumably, notices such as these will make

it difficult for users to argue that they reasonably held a high expectation of privacy.

Disclosure to Protect ISP or in Extraordinary Circumstances

Some ISPs leave open the possibility that they might disclose personal user information for reasons other than law enforcement. Typically, these include the release of information where it is used for the purposes of acting in respect of an emergency that might threaten the life, health, or security of an individual.[60] Many commercial ISPs draft the exclusions to their privacy policies even more broadly. An example of one such provision is found in Microsoft's Hotmail "Terms of Service":

> Microsoft will not monitor, edit, or disclose any personal information about you or your use of the Service, including its contents, without your prior permission unless Microsoft has a good faith belief that such action is necessary to: (1) conform to legal requirements or comply with legal process; (2) protect and defend the rights or property of Microsoft; (3) enforce the TOS; or (4) act to protect the interests of its members or others.[61]

By including the right to disclose personal information in order to protect and defend its rights or property as well as to protect the interests of others, Microsoft makes it quite clear that it has less interest in safeguarding its users' personal information than ISPs falling into the other categories enumerated above. Still, ISPs in this category do promise that their default position is to not disclose personal information unless there is at least some reason for doing so. This can be contrasted with ISPs in the final category who make no such promises.

Voluntary Disclosure and Active Monitoring

The final category consists of ISPs who are unwilling to make any assurances as to the confidentiality of their users' personal information. Often, these ISPs make it clear to their users that they should have a low expectation of privacy. For example, Verio's "Acceptable Use Policy" spells out to its users that:

> In general, the Internet is neither more nor less secure than other means of communication, including mail, facsimile, and voice telephone service, all of which can be intercepted and otherwise compromised. As a matter of prudence, however, Verio urges its subscribers to assume that

> all of their on-line communications are insecure. Verio cannot take any responsibility for the security of information transmitted over Verio's facilities.[61]

Similarly, Muskoka.com informs users that it "does not guarantee privacy of your files and email. If you want complete privacy, encryption software is freely available."[62]

Some ISPs go so far as to provide notice that they are actively monitoring user accounts and that they will voluntarily disclose user information and communications in a variety of circumstances. This is often the case with employers who provide Internet services to their employees, since employers generally have a greater duty to control the conduct of their employees. Consider the following typical employer policy:

> The company's telephone, voice mail, computer storage and e-mail systems are the property of the company and are to be used for company authorized purposes only.
>
> All information transmitted or stored using the company telephone, voice mail, computer system and e-mail system is the confidential and proprietary information of the company, except for publicly available information.
>
> All messages recorded or saved on voice mail or e-mail and all files stored on company computers are considered to be company records and may have to be delivered by the company in connection with litigation or to comply with a requirement.
>
> Employees should not expect that any matter created, received, stored or sent on the telephone, voice mail, computer or e-mail systems will be confidential or private from company management, except for attorney client privileges benefiting the company. The company reserves and employees must protect and not waive rights of attorney client privilege as the right of the company. In addition, the company reserves all trade secret protection and all rights to prohibit other parties from accessing such matters.
>
> Except as provided in this Policy, company management reserves the right to access any voice mail, e-mail message, or any computer file created, sent, stored or received by any employee at any time and without notice.[63]

Similar policies have been adopted by a number of service providers who offer online forums for real time chat. For example, ICQ indicates in its "Terms of Service" that it may:

> (c) nominate any person who may not be an ICQ employee to monitor, using his own discretion, any channel or chatroom and to allow him to deny or terminate access granted to you or any other user, without notice, at anytime, including while you are chatting or delivering or sending information. ICQ may cancel such nomination, at any time for any reason or no reason.[64]

To summarize the contractual underpinnings of ISP-user relationships – and this should come as no great empirical surprise – it appears that Internet service providers have adopted quite a broad range of relationships with their users viz. the treatment of their personal information. At one end of the spectrum, some ISPs hold themselves out as the guardians of informational privacy. At the other end of the spectrum are ISPs who do not view it as part of their role to safeguard the privacy interests or, for that matter, *any* interests of their users.

So far, we have only considered contractual approaches to various ISP-user relationships. Underlying the contractual understanding of the relationship is the idea that the parties to the agreement are otherwise unrelated and each of them is acting in a self-interested manner. Although the law of contract governs relationships voluntarily entered into by parties at arm's length, not all contractual relationships are considered to be relationships at arm's length.[65] The question that must ultimately be addressed is whether the relationship between ISP and user – though it is at its core contractual in nature – is *always* to be understood as a relationship at arm's length.

Relationships of Dependence and Interdependence

Social Exchange Theory

Contract lawyers are not the only ones to conceive of relationships as founded on the idea of an exchange. Social psychologists have, for many years, used the exchange model as a means of understanding human interaction. According to social exchange theory, participants in a social interaction jointly determine the rewards and costs that they achieve from it.[66] By understanding social interaction in this way, those who form relationships with each other may come to depend on one another. According to social exchange theory, the notion of *dependence*

describes the degree to which one of the two interacting parties needs their relationship.[67] One can gauge the level of a person's needs by determining the extent to which that person's well-being rests on involvement in the relationship. Dependence is thought to be greater to the degree that a relationship provides good outcomes and to the degree that the outcomes available in alternative relationships are poor.[68]

Some social exchange theorists have recognized that dependence in a relationship affects the power held by each of the parties. This is so because one individual's power over another derives from the other party's being dependent on him.[69] Not straying too far from Weber's classic definition of power, social exchange theorists define power as the potential for one actor to obtain favourable outcomes in an exchange episode at another's expense.[70] Accordingly, power is fundamentally rooted in the dependence actors have on one another.[71]

Thus in order to determine whether a particular relationship is a relationship of dependence, one must determine whether one party holds power over the other. Social psychologists who subscribe to *interdependence theory* have for some time held that the measure of one person's power in a relationship is the extent to which, by varying his behaviour, he can affect the quality of another's outcomes. According to Thibaut and Kelly, power can manifest itself in two forms: *fate control* and *behaviour control*.[72] When X has fate control over Y, he can affect Y's outcomes regardless of what Y does. It is therefore possible for X to employ his fate control over Y as a means of controlling Y's behaviour. However, when X merely has behaviour control over Y, it remains possible for Y to reduce the variations to his outcomes by adjusting his behaviour in response to X. In the context of behaviour control, the effect of X changing his behaviour will sometimes make it desirable for Y to change his own behaviour accordingly.

Since the nature of a social exchange is dyadic, it is usually the case that *both* parties involved in a personal relationship are to some extent dependent on their relationship. The notion of *interdependence* in a relationship describes the extent to which the well-being of both parties is dependent upon the existence of the relationship.[73] Usually, this means that each party has some power over the other. Thus, as the level of interdependence increases in a relationship, each party becomes restricted in terms of the power that can be exerted upon the other with impunity. Increasing interdependence ultimately results in an equilibrium in terms of the power structure underlying the relationship.

So far, the notion of dependence has been characterized as a function of the extent to which a relationship can satisfy the needs of the party

and the extent to which the quality of alternative relationships is poor. Other interdependence theorists have extended these basic ideas. One recent extension known as the *investment model*[74] adds two further dimensions. First, it suggests that dependence increases to the degree that the dependent party makes an *investment* into the relationship. Here, investment refers to the resources that a person has devoted to the relationship, either directly or indirectly.[75] Understood quite broadly in this context, resources include anything that can be transmitted from one person to another. Thus one invests in a relationship by devoting such things as goods, services, love, status, or information to the relationship.[76] The more that one invests into the relationship, the more he becomes dependent on it.

Those who subscribe to the investment model suggest that dependence in a relationship also produces the psychological experience of *commitment*.

> Commitment includes conative, cognitive, and affective components. The conative component of commitment is *intent to persist* – John feels intrinsically motivated to continue his relationship with Mary. The cognitive component is *long term orientation* – John envisions himself in the relationship for the foreseeable future and considers the implications of current action for future outcomes. The affective component is *psychological attachment* – John experiences life in dyadic terms, such that his emotional well-being is influenced by Mary and their relationship.[77]

It is important to differentiate between dependence and commitment. Dependence describes the structural aspect of the relationship between two parties, whereas commitment characterizes one party's subjective experiences concerning the relationship. Dependence is a structural state describing the degree to which an individual needs a relationship to increase the quality of his outcomes. Individuals may or may not be aware of their dependence:

> At critical moments, John may actively contemplate his dependence on Mary, consciously reviewing the extent of his satisfaction, alternatives and investment. At other times, however, John's dependence may remain largely implicit – he may not consciously consider the extent of his need. In contrast commitment is the *subjective state* that dependent individuals experience on a daily basis. In this sense, commitment can usefully be construed as the subjective sense of allegiance that is established with regard to the source of one's structural dependence.

> Because John is dependent on his relationship, he develops intentions to persist with Mary, he foresees long term involvement with Mary, and he feels affectively linked to Mary and their relationship. It is the psychological experience of commitment, rather than the structural state of dependence, that is argued to influence everyday behavior in relationships.[78]

Though commitment is what influences a party's behaviour in a relationship, it is the level of that person's dependence that affects the actual power held by each of the parties in the relationship. This is an important distinction to keep in mind when applying social exchange theory to an examination of ISP-user relationships.

Dependence and Interdependence in ISP-User Relationships

Social exchange theory provides a deeper understanding of the relationship between Internet service provider and user than the more straightforward contractual approach contemplated earlier in this chapter ("The Contractual Underpinnings of ISP-User Relationships"). This theory can be utilized to explicate the degree to which users come to depend on Internet service providers.

Internet User Dependence

Internet users are dependent on service providers in a number of different ways. Given the vast range of services available, it is neither possible nor desirable to compile a comprehensive list. A few examples will suffice. Perhaps the most basic need of Internet users that requires the establishment of a relationship with an ISP is the need to gain access to the Internet.[79] An inability to obtain the services of an access provider will decrease the quality of a person's outcomes. In a networked world, it will leave individuals completely disconnected from the many new forms of social interaction that take place online. That is, a relationship with an ISP is necessary for the development of other personal relationships. While the question of universal access to online services may seem unimportant to some,[80] the issues surrounding access will become more pressing as government and private sector organizations begin to disseminate information and do business exclusively in the online setting. This possibility is not farfetched. For example, the Ministry of the Attorney General of Ontario is about to launch its Integrated Justice Project.[81] The project aims to integrate information flowing from a number of its justice partners, including: law enforcement agencies, the Crown Attorney's office, court services, the judiciary, and correctional

services. The integration process and the delivery of vital information will gradually move away from the paper-based world to the online setting and aims eventually to disseminate all court-related documents and to discharge all Crown disclosure obligations by exclusively electronic means. Without establishing a relationship with an ISP, individuals will be unable to obtain information necessary to the administration of justice. The same will soon be true for many other kinds of government and private sector information and informational services.

As an American author recently put it, "in an age where the key wealth-creating activity ... concerns the production, distribution and manipulation of information, the Internet is destined for a prominent role."[82] With a continued social migration into digital environments, the well-being of individuals will come to depend on their relationships with ISPs. Some services, such as access, are widely available. For now, this means that people are not necessarily dependent on the relationships they have with particular access providers since they could achieve virtually identical outcomes through an alternative service provider. This is generally true for those users who have the necessary resources (i.e., cash or credit). Others, who rely on a local FreeNet and other no-charge service providers, are more dependent on the relationship they have with their access providers.[83]

In addition to a user's dependence on an ISP to gain access to important information services and to establish and continue online relationships with others, we have seen that ISPs are by default the guardians of informational privacy on the Internet. By providing online services such as email, Web site space, or portals to various online consortiums, an ISP gains access to personal and private information belonging to each of its many users. Each user is therefore dependent on those who provide him with Internet services, not only for the proper storage, maintenance, and management of his personal information, but also for ensuring that his private communications are secure from intrusion and kept confidential. Once user information is in the care and control of a service provider, the ISP is usually in a position to assert power over its users.

Applying interdependence theory to this scenario, an ISP has fate control over its users. That is, by being in a position to employ a user's private information to various ends,[84] an ISP can affect the user's outcomes, regardless of what the user does. To continue with an earlier example, Yahoo!'s decision to disclose the identity of Aquacool_2000 to AnswerThink (in order to avoid its own legal battle with the powerful corporate entity) resulted in the dismissal of Aquacool_2000 from his

place of employment. Because of Yahoo!'s practice – which was to disclose personal information without notice whenever such information was being sought for the purposes of litigation – the quality of Aquacool_2000's outcomes was diminished. As soon as his personal information was disclosed, there was nothing that Aquacool_2000 could have done to alter his fate. Recall from above that fate control can be used by the power-holder in a relationship as a means of controlling the dependent party's behaviour. Thus an ISP's ability to disclose a user's personal information or private communications *with impunity* can be used as a means of regulating the user's conduct online. In fact, this is precisely the strategy that underlies the legal use of safe harbour provisions discussed earlier (in "The Contractual Underpinnings of ISP-User Relationships").

One might argue that, given the availability of alternative service providers, the power that can be asserted by any given ISP is in fact limited to behaviour control. Those who espouse this position would say that an ISP does not have the power to control its users' fate, since users are not in fact bound to remain in that relationship.[85] If a user does not like the privacy policy of a particular ISP, he can simply change his behaviour; i.e., surf the Net and sign on with a different provider whose privacy policy would result in more favourable outcomes. If nothing else, the Internet has created a multiplicity of alternatives.

While it is true that, for many Internet services, a user might easily establish an alternative relationship that would result in better outcomes, it is crucial to recognize that, if the user has previously entered into a relationship with a different service provider, he may have made a very special sort of investment in the first relationship. He may have *reposed confidence in the relationship* by voluntarily allowing the service provider access to personal information or private communications on the faith of the service provider's promise that no such information would be disclosed to a third party without his knowledge and consent.

Reposing confidence in a relationship where both parties have invested love is risky enough. Fortunately for those who are in a close personal relationship, with love usually comes commitment, which, in the context of interdependence theory, means that both parties intend the relationship to persist, feel a long-term orientation towards it, and have a psychological attachment towards each other. Since there is no love lost between them, the same cannot be said of ISP-user relationships. Though one consequence of many ISP-user relationships is that the ISP becomes privy to all sorts of personal information and private communications belonging to the user, most ISP-user

relationships are not close personal relationships. Since an ISP does not generally feel a sense of commitment to its users, the unique kind of informational investment made by a user leaves him or her in a state of dependence.

ISP-User Interdependence

Interdependence theory asserts that, for most dyadic relationships, the well-being of each party is to an extent dependent on the well-being of their relationship.[86] Notice that this is *not so* in the case of ISP-user relationships. Though ISPs are commercially dependent on the existence of users in general,[87] they are not usually dependent on particular users. This creates a serious imbalance in most ISP-user relationships. From the perspective of an ISP, the user is but an (IP) number. Unlike when a husband or wife is confided in and is later pressured with a request to disclose personal or private information to a third party, the ISP is not *psychologically committed* to the relationship. Given the lack of interdependence in their relationship, the ISP will be inclined to give greater weight to furthering its own interests than it would to furthering the well-being of the user (or to furthering its relationship with the user). Since each individual user is in essence dispensable, the power structure of most ISP-user relationships will never reach a state of equilibrium. Consequently, the ISP will not usually be inclined to protect the user's interests as against its own or others. This puts ISPs in a position similar to banks and other commercial institutions that have care and control of their customers' personal information or private communications. The difference is one of degree. Given that ISPs often store and manage users' private communications on an unlimited number of subjects (not just financial information), the personal hold that an ISP may have over its users could make users even more dependent on the confidentiality of ISP-user relationships than would be the case with other commercial customers in their relationships with financial institutions.

As we have seen, Internet users are often forced to depend on the benevolence and good judgment of an ISP. But sometimes ISPs who have been reposed of trust or confidence on the basis of an undertaking not to disclose personal information do not carry out those undertakings. In such cases, an interesting question arises: when an ISP discloses a user's personal information or private communications, is this merely a breach of contract, or is it a breach of trust or confidence? The answer to this question requires a determination as to whether the relationship between Internet service provider and user is *merely* a relationship at arm's length.

Relationships of Trust and Confidence

For several centuries, the law has recognized that the preservation of society requires a vigilant protection of the trusting relationship.[88] "No part of the jurisdiction of the Court is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to one another."[89] To use the succinct words of one commentator, "the mischief to which the policy is directed is clear. Trusted parties may serve their own ends rather than those of the trusting party."[90] In order to avoid such mischief, the law of fiduciaries will sometimes protect those who have come to depend on others.

Through its willingness to impose duties on fiduciaries and its recognition that traditional categories of fiduciary relationships are not closed,[91] the law has been said to facilitate the development of interdependent relationships. In his well-known work on the fiduciary obligation, E.J. Weinrib characterized the fiduciary obligation as the law's realization of the economic importance of fostering incentive by protecting relationships of interdependence – relationships that he refers to as "the entrepreneur's business apparatus": "A sophisticated industrial and commercial society requires that its members be integrated rather than autonomously self-sufficient, and through the concepts of commercial and property law provides mechanisms of *interaction and interdependence*. The fiduciary obligation ... constitutes a means by which those mechanisms are protected."[92] According to Weinrib, the basic policy underlying the fiduciary obligation is the desire to preserve and promote the integrity of socially valuable relationships that arise as a result of human interdependence.[93] An interactive and interdependent society mandates the monitoring of trusting relationships in order to avoid their potential for abuse. Without a public policy that prohibits the abuse of another's trust, individuals would be less inclined to place themselves in relationships of dependence.

Although the policy underlying the law of fiduciaries is relatively uncontroversial, its definition and scope are less so. As one Supreme Court of Canada judge admitted in the midst of one of Canada's most important decisions on the subject, "there are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship."[94] Taking these remarks as a kind of judicial cue, it is beyond the scope of the present study to try to articulate a comprehensive explication of the fiduciary concept. The aim here is much more modest. It is restricted to a determination of whether any of the core notions underlying the fiduciary concept might plausibly be ascribed to ISP-user relationships.

The Fiduciary Concept

In the *Law of Trusts in Canada*,[95] D.W.M. Waters endorses the notion that fiduciary status is most often associated with trusts and "trust-like" relationships in which conflicts of interest and duty tend to arise. Within a trusting relationship, the trusted party is given discretion to affect the principal's interests. As a result, the principal is dependent on the trusted party. As Weinrib describes it, "the leeway afforded to the fiduciary to affect the legal position of the principal in effect puts the latter at the mercy of the former, and necessitates the existence of a legal device which will induce the fiduciary to use his power beneficially."[96] The reposing of trust and the resulting discretion places the trusting party in a state of dependency. After all, the trusted party may act indifferently or without care or diligence on behalf of the trusting party, or the trusted party may intentionally divert value away from the trusting party.[97] As we have seen, these mischievous possibilities are to be discouraged. To that end, the courts will impose a fiduciary obligation on the trusted party and control the use of his or her discretion.

If the relationship is not one in which trust or discretion arises, then there appears to be no reason for imposing fiduciary obligations. As noted by Weinrib, discretion and obligation are correlative concepts. "Accordingly, the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion."[98] R. Flannigan suggests that a fiduciary's discretion can usually be understood as part of a wider category of power held by the trusted party that includes any access that he might have to the trusting party's assets.

> "Discretion," by itself, is not the significant fact. In this context we are concerned with the abuse of the relationship. For this purpose discretion merely indicates that the trusted party has access to assets and, hence, the opportunity to abuse ... Trust which leads to the trusted party gaining "access" to assets will attract the fiduciary obligation. The presence of "discretion" is merely an indication in a particular case that such trust exists. It is the potential for the abuse of that trust which requires the obligation.[99]

Status-Based Fiduciary Relationships

The law of fiduciaries was originally premised on the principle of *uberrimae fidei* – a duty of utmost good faith. Traditionally, a duty of loyalty was imposed upon individuals who fell within a recognized list of categories of relationships. On this approach, when the nature of a

particular relationship was in dispute, the judicial analysis usually consisted of listing the traditional categories of relationships that attracted a fiduciary obligation, followed by an attempt to determine if the relationship in question fell within the scope of one of the listed categories. As one recent commentator has described it, "the nature of the particular relationship itself or the interaction of the parties involved in it was a secondary matter."[100]

The most commonly cited examples of traditional fiduciary relationships include: trustee-beneficiary, solicitor-client, principal-agent, director-corporation, partner-partner, employer-employee, guardian-ward, doctor-patient, parent-child, and confessor-penitent.[101] The traditional fiduciaries are sometimes described as "status-based" fiduciary relationships. Once a party is able to establish that the relationship in question falls within the scope of one of the recognized status relationships, then certain facts no longer need to be proven. So long as the relationship is of the appropriate status, there is no requirement to prove that the fiduciary is in a position of trust or is in a position to unilaterally exercise a discretion; the relationship will be deemed fiduciary in nature upon proof of its status.

The hallmark of all traditional fiduciary relationships is that one party is dependent on the other. This accords with the concepts of trust and loyalty, which stand at the heart of the fiduciary obligation. The word "trust" connotes a state of dependence and the correlative duty of loyalty arises from the level of trust and dependence that is evident in the relationship. The type of disclosure that routinely occurs in these kinds of relationships results in the trusted party's acquiring influence that is equivalent to a discretion or power to affect the trusting party's legal or practical interests.

Many of the categories enumerated above consist of relationships wherein the trusting party has sought the advice of the trusted party. Courts exercising equitable jurisdiction have repeatedly affirmed that clients in a professional advisory relationship have a right to expect that their professional advisors will act in their best interests, to the exclusion of all other interests, unless the contrary is disclosed. A person receiving advice should not need to protect himself from the abuse of power by his independent professional advisor when the very basis of the advisory contract is that the advisor will use his special skills on behalf of the advisee. As B. Welling puts it: "Imposing fiduciary obligations on the traditional licensed pillars of the community – doctors, lawyers, bankers, corporate directors – required them to dispense advice with due regard for the fact they were not dealing with customers of

equal bargaining power, but with trusting souls who were dazzled by their credentials and hung on their every word."[102]

Fact-Based Fiduciary Relationships

Although the use of traditional categories to determine fiduciary relationships was originally quite effective as an abbreviation of a difficult legal concept, some commentators subsequently recognized that this approach is subject to a hardening of the categories. As Weinrib writes: "The existence of a list of nominate relations dulls the mind's sensitivity to the purposes for which the list has evolved and tempts the court to regard the list as exhaustive and to refuse admittance to new relations which have been created as a matter of business exigency."[103]

On this basis, some courts have come to recognize that a variety of other relationships are also constructed on the same foundation of trust and loyalty as were the traditional status-based fiduciary relationships. In recognition of the inherent danger of unduly restricting fiduciary doctrine – especially given the fact that the fiduciary doctrine aims to protect, preserve, and encourage a number of socially and commercially valuable relationships – courts have not limited the fiduciary obligation to the fixed category of status-based fiduciary relationships.

The Supreme Court of Canada has declared that the categories of fiduciary relationships are not closed.[104] As Dickson J. held in *Guerin* v. *R.*: "It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary ... should not be considered closed."[105] As a result, fiduciary doctrine has expanded to cover other fact-based fiduciary relationships. More recently, writing for the majority of the Supreme Court of Canada, LaForest J. stated: "In summary, the precise, legal or equitable duties the law will enforce in any given relationship are tailored to the legal and practical incidents of a particular relationship. To repeat a phrase used by Lord Scarman, '[t]here is no substitute in this branch of the law for a meticulous examination of the facts': see *National Westminster Bank Plc.* v. *Morgan*, [1985] 1 All E.R. 821 (H.L.) at p. 831."[106] The identification of fact-based fiduciary relationships requires that the judiciary undertake, in addition to a status-based analysis, a fact-based analysis. As a result of the Supreme Court's adoption of this approach, other Canadian courts and legal scholars have since endeavoured to define the policies and principles that underlie the fiduciary relationship with the aim of identifying its constituent

elements. Over the last quarter century, the Supreme Court of Canada has spent a great deal of time wrestling with the principles, policies, and essential ingredients underlying the fiduciary relationship.[107]

The Constituent Elements of Fact-Based Fiduciary Relationships

Ever since the Supreme Court of Canada's decision in *Lac Minerals Ltd.* v. *International Corona Resources Ltd.*,[108] most fact-based fiduciary inquiries begin with an acknowledgment of the approach adopted by Wilson J. in *Frame* v. *Smith*:

> There are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> 1 The fiduciary has scope for the exercise of some discretion or power.
> 2 The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> 3 The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.
>
> It is possible for a fiduciary relationship to be found although not all these characteristics are present ... [however] the presence of conduct that incurs the censure of a court of equity ... cannot itself create the duty.[109]

Sopinka J. also identified "depending or vulnerability" as the one characteristic that was indispensable to the existence of a fiduciary relationship. LaForest J. dissented on the issue of vulnerability, finding that vulnerability, though often present in fiduciary relationships, is not a necessary ingredient. The indispensability of depending or vulnerability remained unchallenged until the Supreme Court of Canada's decision in *Hodgkinson* v. *Simms*.[110]

In his majority judgment in *Hodgkinson* v. *Simms*, LaForest J. restated and reasserted his earlier position from *Lac Minerals* that vulnerability is not a requisite part of every fiduciary relationship, stating that "the concept of vulnerability is not the hallmark of fiduciary relationship though it is an important indicia of its existence. Vulnerability is

common to many relationships in which the law will intervene to protect one of the parties ... while the doctrine of unconscionability is triggered by abuse of a pre-existing inequality in bargaining power between the parties, such an inequality is no more a necessary element in a fiduciary relationship than factors such as trust and loyalty are necessary conditions for a claim of unconscionability."[111] After reviewing *Guerin* v. *R.* and *Frame* v. *Smith*, LaForest J. concluded that a fact-based fiduciary relationship exists where "there is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party."[112] He reiterated that the oft-quoted dicta of Wilson J. is merely "a rough and ready guide in identifying new categories of fiduciary relationships,"[113] describing her three general characteristics as "indicia that help recognize a fiduciary relationship rather than ingredients that define it."[114] According to LaForest J., "the question to ask is whether, given all the surrounding circumstances, *one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject-matter at issue*. Discretion, influence, vulnerability and trust [are] non-exhaustive examples of evidential factors to be considered in making this determination."[115] Similar remarks have been made by legal scholars. For example, P.D. Finn has argued that:

> What must be shown is that the actual circumstances of a relationship are such that *one party is entitled to expect that the other will act in his interests and for the purposes of the relationship*. Ascendency, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out. But they will be important only to the extent that they evidence a relationship suggesting that entitlement. It must so align him with the protection or advancement of that other's interests that foundation exists for *the fiduciary expectation*.[116]

The requirement of a fiduciary expectation might be understood as a kind of judicial roadblock. It is meant to preclude a court from imposing fiduciary relationships *solely* on the basis that one party is vulnerable or dependent on another. As one judge readily acknowledged:

> The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of corporations and so forth. But "fiduciary" comes from the Latin "*fiducia*" meaning "trust." Thus, the adjective "fiduciary" means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, eg ... by

> entering into a contract with the client without full disclosure ... is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words.[117]

Other critics also share this point of view. Welling, for example, has suggested that "the time has come to rein in runaway fiduciary duties."[118] As Welling has argued: "Kidnappers don't owe fiduciary obligations merely because they can physically overpower their trussed up captives. A fiduciary is someone in a position of *legally* condoned power who can affect the legal position of someone else by *legal* means and who, *for those reasons*, is obliged to consider the best interests of that other person before doing so."[119] Through a judicial recognition that the basis for establishing a fiduciary relationship is more than just proving a relationship of dependence, Welling trusts that the court "has managed to stop the trendy nonsense by which every bit of corporate or professional nastiness became labeled a breach of fiduciary obligation."[120]

Those who share this point of view believe that "equity's blunt tool must be reserved for situations that are truly in need of the special protection that equity affords."[121] On this basis, some courts have been reluctant to find a fiduciary duty within an arm's length commercial transaction. Where the parties have had an adequate opportunity to prescribe their own mutual obligations, it is usually thought that contractual remedies will suffice.[122] This point has been recognized in a number of cases. As articulated by Dawson J. in *Hospital Products Ltd.* v. *United States Surgical Corp.*:

> The undesirability of extending fiduciary duties to commercial relationships and the anomaly of imposing those duties where the parties are at arm's length from one another was referred to in *Weinberger* v. *Kendrick* (1892) 34 Fed Rules Serv. (2d) 450. And in *Barnes* v. *Addy* (1874) 9 Ch. App. 244 at 251, Lord Selborne LC said: "It is equally important to maintain the doctrine of trusts which is established in this court, and not to strain it by unreasonable construction beyond its due and proper limits. There would be no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them."[123]

To quickly recap, it would seem that a proper judicial inquiry into the existence of a fact-based fiduciary obligation will include a number of constituent elements. First, the inquiry will consider all of the traditional hallmarks, including: whether the trusted party was in a position

to unilaterally exercise a power or discretion; whether the trusted party was thereby able to affect the trusting party's legal interests; and whether, as a result, the trusting party was at the mercy of the trusted party. Second, recognizing dependency as a necessary though not a sufficient condition, a proper inquiry will determine whether the trusting party is entitled to expect that the trusted party will act in his interests and for the purposes of the relationship. Presumably, this would require a demonstration that the relationship between the parties exists primarily for the benefit of the trusting party. On this basis, Canadian courts are far less likely to impose a fiduciary obligation in the case of a commercial transaction at arm's length.

ISP-User Relationships

Is the relationship between Internet service provider and user *merely* a relationship at arm's length? Or is it a relationship the nature of which might lead a court to impose special duties of loyalty on the part of the service provider? It should by now be evident that the manner in which these two questions have been posed is problematic. Since ISP-user relationships obviously are not within the traditional categories of fiduciary relationships, the answer will hang entirely on the specific facts underlying the parties' particular interaction. Given the inexhaustible range of available Internet services, the majority of which are governed by the private orderings of the parties, there will never be a single generalizable answer.

The better question is whether an ISP could *ever* be said to be a fiduciary. Without a doubt, a number of the constituent elements are present in many ISP-user relationships. As we have seen, Internet users are very often in a relationship of dependence on their service providers. The current architectures of the networked world allow ISPs access to their users' personal information and private communications in a manner unparalleled by even the most powerful financial institutions or arms of government. Access to these assets allows ISPs to exercise power to the benefit or detriment of their users. As we have seen, not only does this allow ISPs to control user behaviour, in some cases, it allows them to hold control over the destiny of their users. To paraphrase Weinrib, there are times when an ISP has the leeway to affect the legal position of its user, putting the latter at the mercy of the former. An ISP acting *male fides* has access and therefore could: convert a user's private communications to its own or to another's advantage; disclose confidential information to a competitor; or turn over otherwise privileged evidence in the course of criminal or private litigation, etc.

At the same time, it is not clear that the services offered by most ISPs are ever undertaken with a view towards acting primarily to the benefit of their users, let alone to their exclusive benefit. To take an extreme example, an employer who provides Internet services does not generally undertake to do so exclusively for the benefit of its employees. Offering such services to employees is but a means to the corporation's own ends. Even the most benevolent employer (whose policy permits employees to utilize its Internet services for personal use) does not offer such services for the exclusive benefit of the employees. If an employee uses those services to illicit ends or in any other manner that is not in the best interests of the corporation, how could it possibly be said that the employer is obligated to use the evidence that it has gathered to serve the employee's benefit, rather than serving the best interests of the corporation? In what meaningful sense can the employee be said to have expected a duty of loyalty from his employer that would trump its own corporate interests?

Similar arguments could be made in a number of other circumstances contemplated earlier in this chapter ("The Contractual Underpinnings of ISP-User Relationships"). Such circumstances will arise whenever an ISP has given clear notice that its allegiances are *not always* with its users. According to the broad categories of ISP contractual undertakings outlined earlier, this could occur when an ISP states in its contract that it will: (1) disclose whenever illegality is suspected; (2) disclose to protect the ISP or in extraordinary circumstances; or (3) volunteer disclosure and actively monitor.

These three categories of contractual undertakings are contemplated to be at arm's length. The case of *Weir*[124] discussed earlier ("The Gatekeepers") furnishes a useful illustration. Recall that Supernet's "Acceptable Use Policy and Liability Disclaimer" provided that it "will report to law enforcement authorities *any actions which may be considered illegal,* as well as any reports it receives of such conduct. When requested, [Supernet] will fully cooperate with law enforcement agencies in any investigation of alleged illegal activity on the Internet."[125] On the basis of signing this agreement, which explicitly stated that Supernet's loyalty was limited whenever illegality is suspected, is there any credible basis for Weir to assert that he believed his relationship with Supernet to be one in which he was entitled to expect that Supernet would act in his interests and for the purposes of the relationship? Could he possibly have thought that his ISP would remain loyal to him once it had inadvertently discovered that he was a regular consumer and distributor of child pornography?

The conclusion to be drawn from the above examples is not that ISP-user relationships are *always* at arm's length. In fact, other cases like *Aquacool_2000* v. *Yahoo! Inc.*[126] raise interesting possibilities. What happens when a service provider holds itself out as "committed to safeguarding your privacy online" and explicitly undertakes to notify you "at the time of data collection or transfer if your data will be shared with a third party," promising all the while that "you will have the option of not permitting the transfer," backing up each of these promises with certification representing that the service provider complies with the highest standards of trust and confidence on the Internet?[127] Further, what if the ISP is contemplating the transfer of your personal information, not for the purposes of legitimate law enforcement, but because of some corporate inducement to assist another corporation in its private crusade against its critics? In such a case, should the alleged facts prove to be true, there is an argument to be made that all of the constituent elements of a fiduciary relationship are present. In addition to the ISP's access to the user's personal information and private communications and its leeway to exercise discretion and thereby transfer user assets to the user's detriment, the alleged facts also support a characterization of a relationship that entitles the user to expect that his service provider will treat his personal information and private communications in a manner that comports with his interests.

If this is correct, then the idea that some ISPs might be held to owe their users a duty of loyalty with respect to the care and control of user information is an increasingly important consideration. In fact, the idea of ISP-as-fiduciary might become even more plausible as network technology (NT) becomes more advanced. Some Internet visionaries predict a networked world in which virtually all information is stored on Internet servers, manipulated through personal information management applications, and accessed through Internet appliances.[128] For example,

> Larry Ellison, CEO of Oracle Corporation believes that soon, personal computers will be replaced by new devices that rely almost exclusively on fast networks and have very little intelligence inside. "Fast, cheap networks mean computers will cost $500, not $5,000." He dubbed the new devices network computers, or NCs, as opposed to today's personal computers. Network computers and similar devices, such as the interactive video set-top box, contain almost no software, just a basic input/output system, and download a complete operating system when switched on. This whole process takes only seconds to complete ... In a world full of cheap, almost disposable, network computers, users will

> be able to carry a smart card to allow access to the network. Because all programs are downloaded from the network, and because everyone's personal data files and backups are stored on servers connected to the system it will be possible to slide a card into any NC and instantly begin work, as if the user were at home using their own machine.[129]

As Ellison himself described it, "network computers will not replace PCs, just as PCs didn't replace mainframes. But network computers will be the center of the world."[130]

If something like Ellison's vision becomes reality, the centre of the world will be wherever the leaders of NT choose to build it. Wherever that turns out to be, the end result is the same: the storage and management of all information will take place far away from the user. In a world where people have little or no control over the flow of their own information, users will be completely dependent on information service providers. Information service providers and information managers will become the stewards of personal information and private communications. In such a world, it would seem only reasonable to expect that the management of such information would be carried out in the best interests of the users. Thus, in a fully networked world, the relationships between information service providers and their users bear a much greater resemblance to a fiduciary relationship than they do to a relationship at arm's length.

Conclusion

ISPs are our gatekeepers. More and more, we come to rely on ISPs, not only to provide quality information services, but also to manage our information. By controlling an asset that is characterized more and more as the new currency of the so-called *knowledge economy,*[131] users depend on ISPs to safeguard their personal information and private communications. This gives ISPs power over their users: power to control their behaviour; power to alter their outcomes.

Currently, relationships between ISP and user are governed primarily by the law of contract. Given the increasing extent to which users repose trust and confidence in their ISPs, it is unclear whether the legal duties owed by ISPs to their users are also subject to the equitable principles governing the law of fiduciaries. It has been suggested here that this possibility is an increasingly important consideration. While it would be wrongheaded to conclude that ISPs are *always* fiduciaries – as if we could somehow generalize about a motley collection of private orderings – it would be equally misguided to conclude that ISPs are *never*

fiduciaries. The conclusion offered here is more modest than either of these. It is simply that *some* ISP-user relationships display all of the constituent elements of a fiduciary relationship.

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Notes

1 Yahoo!'s global audience is said to have grown to more than 145 million unique users worldwide, including 14 million users in Japan. Yahoo!'s global registration base has grown to more than 125 million cumulative registrations for Yahoo! member services. The company's traffic increased to a record 625 million page views per day on average during March 2000, online: Yahoo! <http://docs.yahoo.com/docs/pr/1q00pr.html> (last modified: 5 April 2000); see also G. Fontaine, "Internet Portals" online: idate <http://www.idate.fr/maj/multi/lpi/lpi.pdf> (last modified: 1 February 2000). This 1999 study revealed, inter alia, that Yahoo! was, at that time, the second largest portal, AOL being the largest. <http://www.internetwk.com/news0199/news012299-9.htm>.

2 See recently filed *Aquacool_2000* v. *Yahoo! Inc.* at United States District Court Central District of California (Plaintiff's complaint at para. 6) [hereinafter *Aquacool_2000*], online: Electronic Privacy Information Centre <http://www.epic.org/anonymity/aquacool_complaint.pdf> (last modified: 20 May 2000).

3 *Ibid.* at para. 7.97.

4 In order to subscribe to Yahoo!, a user must provide, inter alia, his zip code, gender, occupation, industry, and interests.

5 The US Supreme Court has firmly held that the First Amendment protects anonymous speech. See *McIntyre* v. *Ohio Elections Commission* (1995), 514 U.S. 334.

6 Macromedia is a graphics design company that specializes in dynamic web content. Plug-ins are computer applications that enhance a base program. In this case, the plug-in is used to enhance the user's web browser to allow it to view specialized content. See online: Macromedia <http://www.macromedia.com/> (date accessed: 21 May 2000).

7 See "What's in Them Cookies? Web Site Is Finding Out." *Privacy Times* (15 February 1999) at 1. online: Privacy Times <http://www.privacytimes.com>.

8 See online: DoubleClick <http://www.doubleclick.net> (date accessed: 21 May 2000).

9 *Ibid.*

10 Single quotation marks are used to indicate a qualified sense of the word voluntary. The architecture of the subscription routine in fact *requires* the disclosure of the requested information. It is, in the truest sense, a contract of adhesion. The failure to provide the relevant information will block the user's access to the

service portal. The only possible way that an individual could gain access to Yahoo! services without providing the information sought is to fraudulently enter false information into the Yahoo! system.

11 An IP address is the unique number assigned to an individual's computer by that user's ISP. It allows other computers to communicate with that computer directly, bypassing some of the delay of more tortuous routing. It can be set to change each time the user logs on to the ISP or remain constant throughout the user's dealings with the ISP. See Matisse Enzer, "Glossary of Internet Terms" (1996 - 2000), online: Matisse <http://www.matisse.net/files/glossary.html> (last modified: 4 May 2000); J.R. Levine and C. Baroudi, *The Internet for Dummies* (San Mateo, Calif.: IDG Books, 1994).

12 Cryptography is the means by which messages may be hidden or disguised in files such that they may not be accessed by the general public or may be confirmed as to have come from a particular source. "It works by mathematically transforming a plaintext (or cleartext) message or file into a disguised ciphertext, a process known as encryption. Decryption involves turning the ciphertext back into plaintext." See online: PC Guardian <http://www.pcguardian.com/software/encryption_faq.htm> (last modified: 9 May 2000).

13 Of course, encryption would be pointless for those, like Aquacool_2000, who wish to make pseudonymous public commentary. See *e.g.* G. Greenleaf and Roger Clarke, "Privacy Implications of Digital Signatures" (IBC Conference on Digital Signatures, Sydney, Australia, 12 March 1997), online: Privacy Implications of Digital Signatures <http://www.anu.edu.au/people/Roger.Clarke/DV/DigSig.html> (last modified: 10 March 1997). See also Pretty Good Privacy, online: PGP Security <http://www.pgp.com/> (date accessed: 17 May 2000).

14 *Aquacool_2001, supra* note 2 at para. 26.

15 See online: Yahoo! Privacy Policy <http://docs.yahoo.com/info/privacy> (last modified: 15 April 1994).

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*

19 TRUSTe is an independent, nonprofit privacy initiative dedicated to building users' trust and confidence in the Internet and accelerating growth of the Internet industry. TRUSTe has developed a third-party oversight "seal" program that alleviates users' concerns about online privacy, while meeting the specific business needs of each of its licensed Web sites. Were Yahoo! to breach its privacy commitments, it would lose its certification. Thus far, it remains certified. See particular verification for Yahoo! online: Truste Validation Page <http://www.truste.org/validate/361> (date accessed: 17 May 2000). See also online: Truste <http://www.truste.org/> (last modified: 24 April 2000).

20 *Aquacool_2001, supra* note 2 at para. 23.

21 Geocities is a Web hosting company that purports to build communities of interest. Their site is divided into various "neighbourhoods." A user can choose the location of his individualized site and communicate with like-minded others in the neighbourhood. Geocities also maintains mailing lists known as "clubs." These forums, moderated by other Geocities members, exist to enhance the community feel of Geocities. Geocities is currently owned by Yahoo! and is located online: Yahoo! Geocities <http://www.geocities.com> (last modified: 21 May 2000).

22 "FTC Takes Action on Privacy Enforcement" *McBride Baker & Coles: ITEC LAW ALERT* 8:5 (October 1998), online: ITEC Law Alert <http://www.mbc.com/newsletters/Itec/newsin85.html> (last modified: 21 December 1999).

23 D. Radcliff, "Companies Struggle with Privacy on the Web" *CNN* (20 May 1999), online: CNN <http://cnn.com/TECH/computing/9905/20/privacy.idg> (last modified: 21 May 2000).

24 For a more detailed account of this case, see D.M. McTigue, "Marginalizing Individual Privacy on the Internet" (1999) 5 B.U. J. SCI. & TECH. L. 5 at para. 6-16.

25 See *R.* v. *Weir* (1998), 213 A.R. 285 (Q.B.), leave to appeal to Alta. C.A. granted [1999] Alta. C.A 275.

26 *Canadian Charter of Rights and Freedoms,* s. 8, Part I of the *Constitution Act,* 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

27 Bill C-6, *Personal Information and Electronic Documents Act,* 2d Sess., 36th Parl., 1999, (assented to 13 April 2000, R.S.C. 2000, c. 5) [hereinafter *Bill C-6*]. See online: <http://www.parl.gc.ca./36/2/parlbus/chambus/house/bills/government/C-6/C-6_4/C-6TOCE.html> (date accessed: 14 May 2000).

28 Bruce Phillips, "The Evolution of Canada's Privacy Laws" (Canadian Bar Association – Ontario Institute, Toronto, Ontario, 28 January 2000), online: Privacy Commission of Canada <http://www.privcom.gc.ca/english/02_05_a_000128_e.htm> (last modified: 18 April 2000).

29 Of course, these categories are neither mutually exclusive nor jointly exhaustive.

30 See online: The Spark.com Purity Test <http://test.thespark.com/puritytest> (last modified: 9 April 2000).

31 See online: The Joe Cartoon Co. <http://www.joecartoon.com> (last modified: 17 May 2000).

32 See online: Mortgage Analyzer Calculator <http://www.themortgage.com/quickcalc.html> (last modified: 18 April 2000).

33 See I.R. Kerr, "Spirits in the Material World: Intelligent Agents as Intermediaries in Electronic Commerce" (1999) 22 Dal. L. J. 1; S. Segal et al., "The Validity and Enforceability of Web-Wrap Agreements and Assessing the Need for Legislation" (Uniform Law Conference of Canada, May 1999), online: Uniform Law Conference <http://www.law.ualberta.ca/alri/ulc> (last modified: 7 June 1999); F.M. Buono and J.A. Friedman, "Maximizing the Enforceability of Click-Wrap Agreements" (1999) 43 J. Tech. L. & Pol'y 3; J.C. Lin et al., "Electronic Commerce: Using Clickwrap Agreements" (1998) 15 Computer Law 10; J.S. Gale, "Service Over the 'Net': Principles of Contract Law in Conflict" (1999) 49 Case W. Res. L. Rev. 567; D. Mirchin, "Online Contracts" (1999) 563 PLI/Pat. 351.; T.J. Smedinghoff, "Electronic Contracts and Digital Signatures: An Overview of Law and Legislation" (1999) PLI/Pat 125.

34 See Lin et al., *supra* note 33; R.C. Balough, "Drafting Contract Provisions for E-Commerce Sites" (2000) 88 Ill. B.J. 40.; Mirchin, *supra* note 33; Gale, *supra* note 33; Smedinghoff, *supra* note 33.

35 See T.J. Smedinghoff, ed., *Online Law* (USA: A-W Developers Press, 1996) at para. 6.2; R.T. Nimmer, "UCITA: A Modern Contract Law for a Modern Information Economy" (1999) 574 PLI/Pat 221; US, National Conference of Commissioners on Uniform State Laws, *Uniform Computer Information Transactions Act* (draft approved 30 July 1999) [hereinafter *UCITA*], online: Uniform Law Commissioners <http://law.upenn.edu/bll/ulc/ucita/cita10st.htm> (last modified: 25 October 1999); US, National Conference of Commissioners of Uniform State Laws,

Uniform Electronic Transactions Act (draft approved 30 July 1999) at s.9 [hereinafter *UETA*], online: Uniform Law Commissioners <http://www.law.upenn.edu/bll/ulc/uecicta/uetast84.htm> (last modified: 26 October 1999); Canada, Uniform Law Conference of Canada*, Part 3: Uniform Electronic Commerce Act* (draft August 1999) at art. 20-23 [hereinafter *UECA*], online: Uniform Law Conference of Canada <http://www.law.ualberta.ca/alri/ulc/current/euecafa.htm> (last modified: 23 November 1999); *Uncitral Model Law on Electronic Commerce,* GA Res. 51/162, UN GAOR, 51st Sess., UN Doc. A/51/628, (1997) at IA6, online: UNCITRAL <http://www.uncitral.org/english/texts/electcom/ml-ec.htm> (last modified: 29 January 1999).

36 See Segal, *supra* note 33; Smedinghoff, *supra* note 35. See also *UCITA, ibid.* at s. 107.

37 Anyone who has conducted even the briefest appraisal of online user agreements will immediately recognize this assumption to be false. Most graphical interfaces for ISP "Terms of Service" are poorly designed and would probably be unenforceable according to *ratio* in *Tilden Rent-A-Car* v. *Clendenning* (1978), 18 O.R. (2d) 601 (Ont. C.A.). According to the court, an onerous or unusual clause is unenforceable in spite of a signature if the party seeking to enforce the clause fails to provide the other party with reasonable notice of its incorporation.

38 The list of ISP "Terms of Service" considered in this study included: online: Athome.com and Atwork.com <http://www.athome.com> (last modified: 28 April 2000); online: Acadia University <http://www.acadiau.ca/cs/pubdocs/policies.html> (last modified: 8 April 1998); online: Alberta Supernet <http://www.supernet.ab.ca> (last modified: 25 March 2000); online: AOL <http://www.aol.com/copyright.html> (last modified: 20 January 2000); online: AT&T Business <http://www.attbusiness.net/terms/index.html> (last modified: 15 March 2000); online: AT&T Canada <http://www.attcanada.ca/about/ncterms.html> (last modified: 16 May 2000); online: Bluelight.com <http://bluelight.com/company.privacy.shtml> (date accessed: 22 May 2000); online: Canada.com <http://www.canada.com/members/register.asp?/home> (date accessed: 22 May 2000); online: Concentric <http://www.concentric.com/privacy_policy.html> (last modified: 27 March 2000); online: Cyberlink <http:// webservices.cyberlink.bc.ca/acceptable_use_policy.html> (last modified: 27 February 2000); online: Demon <http://www.demon.net/info/helpdesk/aup/access.shtml> (date accessed: 22 May 2000); online: DeVRY <http://www.devry.ca/index.htm> (last modified: 22 December 1999); online: DirecPC <http://www.direcpc.com> (last modified: 19 May 2000); online: Geomail <http://www.geocities.com/svcagreement.htm> (date accessed: 22 May 2000); online: Globix <http://www.globix.com/support/aup.html> (last modified:14 April 2000); online: Imaginet <http://www.express.ca> (last modified: 15 May 2000); online: Inforoute (English) <http://www.inforoute.net/terms.html> or (Francais) <http://www.inforoute.net/francais/terms.html> (last modified: 19 December 1999); online: Interlog <http://www.interlog.com/terms.html> (date accessed: 22 May 2000); online: iPrimus <http://www.iprimus.ca/personal/terms/acceptable.htm> (last modified: 23 March 2000); online: Magma <http://www10.magma.ca/services/corporate/hosting/faq/acceptable%5Ffaq.html> <http://www.magma.ca> (last modified: 2 March 2000); online: Mindspring <http://www.mindspring.com/aboutms/aup.html> (last modified: 28 March 2000); online: MSN Hotmail <http:www.hotmail.msn.com> (date accessed: 22 May 2000); online:

Muskoka.com <http://www.muskoka.com/conditions.html> (last modified: 8 May 1999); online: NBTel (NBNet) <http://ww.nbnet.nb.ca/connect/accuse.shtml> (last modified: 20 January 1999); online: Nipissing University <http://kenm.unipissing.ca/uts/pollan.htm> (last modified: 29 September 1999); online: Pangea <http://www.pangea.ca/policy.html> (last modified: 13 March 2000); online: Sprint Canada <www.sprintcanada.ca/English/Terms.asp?Section=FORHOME> (last modified: 7 December 1999); online: Sympatico <http://www1.sympatico.ca/help/About/serviceagree.html> (date accessed: 22 May 2000); online: Telus (a subsidiary of BCTel) <http://www.telus.com> (last modified: 17 October 1999); online: Toronto Free-Net <http://freenet.toronto.on.ca> (last modified: 15 May 2000); online: University of Alberta <http://www.ualberta.ca/CNS/POLICY/Conditions.html> (last modified: 15 January 1998); online: University of Toronto <http://www.utoronto.ca/welcome.html/utordist/general/utormail.html#eligible> (last modified: 17 January 2000); online: UWO <http://www.uwo.ca/its/ftp/nic/security/AUP.html> (last modified: 10 October 1997); online: Verio <http://home.verio.com/company/aup.cfm> (date accessed: 22 May 2000); online: Yahoo! <http://docs.yahoo.com/info/terms> (date accessed: 22 May 2000).

39 The survey included international service providers (who offer their services worldwide through the use of local/national dial-up numbers into their international backbone); American service providers (who operate in Canada through either a North American backbone or through independent subsidiary providers in each country); Canadian national service providers (who offer nationwide services over a national backbone); Canadian provincial service providers (many of which are more accurately described as "regional" providers); and Canadian noncommercial/ institutional service providers (including various "Free-Nets," and government and university service providers); and workplace service providers (who may use any of the above service providers).

40 Of course, these categories are neither mutually exclusive nor jointly exhaustive.

41 See generally, N. Levine, "Establishing Legal Accountability for Anonymous Communication in Cyberspace" (1996) 96 Colum. L. Rev. 1526.

42 L. Detweiler, "Anonymity on the Internet" (13 May 1993) at 1.1, online: Electronic Frontier Foundation <http://www.eff.org/pub/privacy/Anonymity/net – anonymity.faq> (last modified: 11 May 1994).

43 See J. Quittner, "Requiem for a Go-Between" *Time* (16 September 1996) 75; Levine, *supra* note 41 at 1532.

44 Bill C-231, *Internet Child Pornography Prevention Act,* 2d Sess., 36th Parl., 1999, (1st reading 18 October 1999).

45 *Ibid.* at s. 6 (3)(c).

46 *Supra* note 44.

47 See Levine, *supra* note 41 at 1563. See also US, International Trade Administration Electronic Commerce Task Force, *International Safe Harbour Privacy Principles* (19 April 1999), online: US, International Trade Administration <http://www.ita.doc.gov./td/ecom/shprin.html> (last modified: 2 December 1999).

48 Levine, *ibid.*

49 American legislators have taken a similar tack. See *e.g.* the *Digital Millennium Copyright Act,* Pub. L. No. 105-304, 112 Stat. 2860 (1998), specifically Title II: Online Copyright Infringement Liability Limitation.

50 J. Sopinka, "Freedom of Speech and Privacy in the Information Age" (1997) 13 The Information Society 171 at 178-79 (emphasis added).
51 *Bill C-6, supra* note 27.
52 *Ibid.* at s. 7 permits an ISP to disclose without liability, which is different from requiring it to disclose *in order to avoid liability.*
53 It is unclear whether this federally enacted statute applies to Internet service providers. *Ibid.* at s. 4(1) provides that the *Act* "applies to every organization in respect of personal information that ... the organization collects, uses or discloses in the course of commercial activities." Though the *Act* is silent on whether it is meant to apply to Internet service providers, the Canadian Industrial Relations Board has recently ruled that the ISP division of Island Tel operated much like a telephone company and is therefore a federally regulated business: *Re Island Telecom Inc.* (2000), C.I.R.B.D. No. 12 (CIRBD Decision No. 59) [hereinafter *Island Tel*]. If the *Island Tel* ruling is adhered to, then *Bill C-6* will likely apply to ISPs.
54 *Supra* note 27 at s. 7(2)(a).
55 See online: University of Calgary Computing and Networks Policy <http://www.ucalgary.ca/ucs> (last modified: 7 September 1999).
56 See online: Demon Internet Access <http://www.demon.net/info/helpdesk/aup/access.shtml> (date accessed: 23 May 2000).
57 See online: America Online Rules of User Conduct <http://www.aol.com/copyright/rules.html> (last modified: 20 January 2000).
58 What makes the *Aquacool_2000* case controversial is the fact that Yahoo! represented its approach much differently in its "Terms of Service" document. According to its "Terms of Service," Yahoo! promised an approach more closely aligned with the category "Confidential within the Limits of the Law."
59 See online: Alberta Supernet <http://www.supernet.ab.ca> (last modified: 25 March 2000)(emphasis added). See also Sprint Canada's "General Terms of Service," which state that Sprint will provide "disclosure pursuant to a requirement or request of a government agency, subpoena or other legal proceeding, or disclosure required by law." See online: Sprint Canada <http://www.sprintcanada.ca/English/Terms.asp?Section=FORHOME> (date accessed: 23 May 2000).
60 Pursuant to s. 7(2)(b) of *Bill C-6, supra* note 27, disclosure of personal information for these sorts of reasons is also permitted.
61 See online: Verio Acceptable Use Policy <http://home.verio.com/company/aup.cfm> (date accessed: 23 May 2000).
62 See online: Muskoka.com Terms and Conditions <http://www.muskoka.com/conditions.html> (last modified: 8 May 1999).
63 J.C. McWhinnie, "The Internet and the Law" (10 January 2000), see online: <http://www.hawaiilawyer.com/articles/internetlaw_article_jcm.htm> (last modified: 8 May 2000).
64 See online: ICQ's Terms of Service <http://www.icq.com/legal/ircqnet.html> (date accessed: 23 May 2000).
65 *E.g.* the relationship between a commercial agent and principal or the relationship between solicitor and client.
66 L.A. Penner, "Interdependent Social Behavior," in *Social Psychology: Concepts and Applications* (St. Paul: West Publishing, 1986) 514.
67 See generally J.W. Thibaut and H.H. Kelley, *Interpersonal Relations: A Theory of Interdependence* (New York: Wiley-Interscience, 1978).

68 C.R. Agnew, P.A.M. Van Lange, C.E. Rusbult, and C.A. Langston, "Cognitive Interdependence: Commitment and the Mental Representation of Close Relationships" (1998) 74 Journal of Personality and Social Psychology 939 at 940.
69 J.W. Thibaut and H.H. Kelley, *The Social Psychology of Groups* (New York: Wiley-Interscience, 1978) at 124.
70 R.M. Emerson, "Power-Dependence Relations" (1962) 27 American Sociological Review 31.
71 See also K.S. Crook and M.R. Gillmore, "Power, Dependence and Coalitions," in E.J. Lawler and B. Markovsky, eds., *Social Psychology of Groups: A Reader* (Greenwich: JAI Press, 1993) 127.
72 Thibaut and Kelley, *supra* note 69 at 124.
73 *Ibid.*
74 C.E. Rusbult, "A Longitudinal Test of the Investment Model: The Development (and Deterioration) of Satisfaction and Commitment in Heterosexual Involvements" (1983) 45 Journal of Personality and Social Psychology 101.
75 Agnew et al., *supra* note 68 at 940.
76 Penner, *supra* note 66 at 515.
77 Agnew et al., *supra* note 68 at 940 (emphasis in the original). For an interesting application of the concept of commitment to the information technology setting, see S. Yoon, "User Commitment as an Indicator of Information Technology Use" (Association for Information Systems - Americas Conference, Phoenix, Arizona, 16 August 1996) [unpublished], online: Association for Information Systems - Americas Conference <http://hsb.baylor.edu/ramsower/ais.ac.96/papers/yoon.htm> (last modified: 27 September 1997).
78 Agnew et al., *ibid.*
79 Strictly speaking, not all Internet users are dependent on ISPs for access. Users with sufficient resources (*i.e.,* cash and know-how) can purchase equipment that would give them access to the Internet without the need for developing a relationship with an ISP.
80 Especially when one considers some of the Internet services that are currently popular; *e.g.,* cybersex forums, chat rooms, and online auctions.
81 See online: Integrated Justice Project <http://www.integratedjustice.gov.on.ca/> (last modified: 16 May 2000); See also G.J. Cohen, "Ontario's Integrated Justice Project" *Canadian Lawyer* (January 1999) at 19.
82 P.M. Schwartz, "Privacy and Democracy in Cyberspace" (1999) 52 Vanderbilt Law Review 1609 at 1619.
83 See *e.g.* online: Toronto Free-Net <http://www.freenet.toronto.on.ca> (last modified: 15 May 2000).
84 Including, as we shall see below (in Relationships of Dependence and Interdependence), promoting its own interests at the expense of the user's interests.
85 Even though some users may *perceive* themselves as *committed* to a particular service provider.
86 For an interesting application of interdependence in the context of group rights, see D.M. Johnston, "Native Rights as Collective Rights: A Question of Group Self-Preservation" (1989) 2 Can. J. Law & Jur. 19.
87 Schwartz, *supra* note 82 at 1620: "Network externalities are found in any product whose value depends on how many others make use of it; the more people who send and receive e-mail, for example, the more valuable it becomes for others to utilize this technology."

88 See *e.g. Welles* v. *Middleton* (1784), 1 Cox 112 at 124-25; *Parker* v. *McKenna* (1874), L.R. 10 Ch. 96 at 125.
89 *Billage* v. *Southee* (1852), 9 Hare 534 at 540.
90 R. Flannigan, "The Fiduciary Obligation" (1989) 9 Oxford J. Leg. St. 285 at 322.
91 See *e.g. Goldex Mines Ltd.* v. *Revill* (1974), 7 O.R. (2d) 216 at 224, 54 D.L.R. 672 (Ont. C.A.); *Guerin* v. *R.* (1984), 13 D.L.R. (4th) 321 at 340-341 (S.C.C.) [hereinafter *Guerin*].
92 E.J. Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1 at 11 (emphasis added).
93 See also L.I. Rotman, "Fiduciary Doctrine: A Concept in Need of Understanding" (1996) 34 Alta. L. R. 821 at 826.
94 Per LaForest J. in *Lac Minerals Ltd.* v. *International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.).
95 D.W.M. Waters, *Law of Trusts in Canada,* 2d ed. (Toronto: Carswell, 1984) at 710-15.
96 Weinrib, *supra* note 92 at 4-5.
97 Flannigan, *supra* note 90 at 287.
98 Weinrib, *supra* note 92 at 7.
99 Flannigan, *supra* note 90 at 308.
100 Rotman, *supra* note 93 at 825.
101 See *e.g.* Flannigan, *supra* note 90 at 294.
102 B. Welling, "Former Corporate Managers" (1990) 31 Les Cahiers de Droit 1075 at 1097.
103 Weinrib, *supra* note 92 at 5.
104 *Guerin, supra* note 91; see also *Frame* v. *Smith* (1987), 42 D.L.R. (4th) 81 at 97 (S.C.C.).
105 *Guerin, ibid.* at 341.
106 *Hodgkinson* v. *Simms* (1994), 117 D.L.R. (4th) 161 at 179-180 (S.C.C.).
107 See *e.g. Canadian Aero Service Ltd.* v. *O'Malley* (1973), 40 D.L.R. (3d) 371 (S.C.C.) (senior corporate officers/directors to corporation); *Jirna Ltd.* v. *Mister Donut of Canada Ltd.* (1973), 40 D.L.R. (3d) 303 (S.C.C.) (franchiser to franchisee); *Guerin, supra* note 91 (federal government to Indian band); *Frame* v. *Smith, supra* note 104 (custodial parent to noncustodial parent); *Molchan* v. *Omega Oil & Gas Ltd.* (1988), 47 D.L.R. (4th) 481 (S.C.C.) (partner to partner); *Lac Minerals Ltd.* v. *International Corona Resources Ltd., supra* note 95 (senior mining company to junior mining company); *Canson Enterprises Ltd.* v. *Boughton & Co.* (1991), 85 D.L.R. (4th) 129 (S.C.C.) (solicitor to client); *Norberg* v. *Wynrib* (1992), 92 D.L.R. (4th) 449 (S.C.C.) (doctor to patient); *M.(K.)* v. *M.(H.)* (1992), 96 D.L.R. (4th) 289 (S.C.C.) (parent to child); and *Hodgkinson* v. *Simms, supra* note 106 (investment advisor to client).
108 *Supra* note 94 at 627-9.
109 *Frame* v. *Smith, supra* note 104.
110 *Supra* note 106.
111 *Ibid.* at 173.
112 *Ibid.* at 176-7.
113 *Ibid.*
114 *Ibid.*
115 *Ibid.* (emphasis added). Given the current composition of the Court, it is perhaps useful to note that McLachlin J. (as she then was) rigorously dissented,

opining that the principle of vulnerability remains the hallmark of the fiduciary relationship.

116 P.D. Finn, "The Fiduciary Principle," in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 64.

117 *Per* Southin J. in *Girardet* v. *Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 at 366 (B.C.C.A). See also Waters, *supra* note 95 at 405, who argues that "not all relationships will be held to be fiduciary, even though they involve reliance upon integrity and the presumption that a party will fully disclose his position."

118 Welling, *supra* note 102 at 1097.

119 *Ibid.* at 1121 (emphasis in original).

120 *Ibid.* at 1124.

121 *Per* Dickson J. in *Guerin, supra* note 91 at 384.

122 See J. Kennedy, "Equity in a Commercial Context," in P.D. Finn, ed., *Equity and Commercial Relationships* (Sydney: Law Book Co., 1987) at 15.

123 *Hospital Products Ltd.* v. *United States Surgical Corp.* (1984), 156 C.L.R. 41.

124 *Supra* note 25.

125 *Supra* note 59.

126 *Aquacool_2001, supra* note 2.

127 *Supra* note 15.

128 See *e.g.* D.H. Rimer and P. Noglows, "Internet Appliances and Universal Access" (1999) 4 iWord 1 online: <http://www.iwords.com/iword41.html> (date accessed: 23 May 2000).

129 M. Williams, "Oracle's Vision of Networked Future," *Newsbyte News Service* (5 October 1995). For other network strategies, see J.M. McCann, "Technology Cybertrends" online: <http://www.duke.edu/~mccann/q-tech.htm> (last modified: 20 April 1997).

130 L.E. Ellison, "New Model on the Info Highway," *USA Today* (15 November 1995) 2B. For an example of a Web-based application that exploits this strategy, see online: <http://www.Personalsite.com> (date accessed: 23 May 2000).

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5
Law and Intimacy in the Bureaucrat-Citizen Relationship

Lorne Sossin

> Intimacy: The state of being personally intimate; closeness of observation, knowledge or the like; an inward quality.
>
> – *The Compact Oxford English Dictionary*[1]

At first blush, speaking of bureaucracy and intimacy in the same sentence might appear odd. When bureaucrats and citizens come together, it is typically for institutional, formal, and legal reasons. The focus is not on the personal interaction between these individuals, but on the benefit, claim, burden, penalty, or entitlement at issue. These are rarely ongoing relationships and sometimes may even be completely anonymous (for example, where the citizen and bureaucrat can only identify each other by a reference number on a form). Occasionally, the bureaucrat-citizen relationship is mediated by third parties, including social workers, doctors, lawyers, therapists, accountants, and guardians, resulting in virtually no direct contact between a decision maker and the party affected by the decision. This most impersonal of relationships is reinforced by an administrative culture and legal infrastructure that esteems objectivity and detachment, and a popular and political culture that portrays bureaucrats as remote, indolent, uncaring, and often adversarial. In short, not only would most observers conclude there is no possibility of intimacy in the bureaucrat-citizen relationship, many would likely conclude that even if such a relationship were possible, it would be far from desirable.

In my view, the remoteness, alienation, and objectification that characterize the present state of the bureaucrat-citizen relationship have impoverished our democratic system, and more specifically, have undermined the autonomy and human dignity both of bureaucrats and those people whose life opportunities are contingent on the discretion of bureaucrats. The current ideal of bureaucratic relationships reflects the belief that bureaucrats must remain detached from the subjects of their decision making and that citizens must not be dependent on the good graces of a particular bureaucrat. The current ideal, in other words,

denies an essential element of humanity in the administrative decision-making process. My goal is to restore the personal dimension to administrative relationships, and in so doing, to reconceptualize this relationship as one capable of engendering mutual respect and trust. The goal of this new approach to bureaucratic relationships is to replace the current model of detachment and dependency with a model of interdependence. Interdependence implies the exchange of knowledge between two parties that believe they need each other; intimacy implies not just the exchange of information *about one another,* but the exchange of information *about being the other.*

The bureaucrat-citizen relationship belies generalizations. It encompasses some of the most trivial interactions (for example, an anonymous conversation with a call centre operator or the act of a clerk processing a form) to some of the most invasive interactions a person will experience under the welfare state (for example, a caseworker investigating the sex life of a single mother on welfare, a doctor requiring a mental health patient to take medication, or a tax official reviewing an individual's household expenditures). Part of the challenge and the stimulus for further exploring this relationship is to construct a framework capable of reflecting this diversity of the bureaucrat-citizen experience. While bureaucrat-citizen relationships vary significantly, all such relationships are nonetheless distinct from other forms of service relationships (between, for example, consumers and retailers, or consultants and clients). This is due, at least in part, to the public interest factor, an unseen but always present third party in bureaucrat-citizen relationships.[2] An important facet of revitalizing public life is exposing the bureaucrat-citizen relationship to greater public scrutiny and evaluating that relationship in terms of the extent to which it furthers or hinders the public interest.

Traditionally, legal and political theorists have differentiated between bureaucratic discretion on the one hand, and adjudication by administrative or judicial bodies on the other. Jerry Mashaw has characterized the distinction in these terms: "Whereas administration seeks to implement chosen values, adjudication seeks to resolve conflict by choosing the value(s) to be preferred."[3] As Lon Fuller observed, adjudication on the judicial model is a profoundly public institution with a vitally important social function, as it is through the process of adjudication that reason is applied to the task of developing frameworks to order human interaction and to articulate public norms.[4] Is there any analogous function performed by ordinary administrative decision making? Are

bureaucrats who make ordinary administrative determinations and bureaucrats (tribunal or board members, for example) who make adjudicative determinations doing substantively different things? After all, whether adjudicating a dispute or exercising a discretion, public officials must similarly determine how to apply public values to particular facts and circumstances. From the standpoint of administrative law, the difference is simply one of context. The procedures that an administrative official must follow and the basis and standard on which that official's decisions may be reviewed by a judge all now turn on a contextual appraisal of the training, expertise, independence, and statutory purpose of the official and the power he is exercising. That a decision is adjudicative or discretionary is simply one among many factors to consider in developing a framework for guiding and regulating administrative action; it is not the defining feature. Similarly, administrative law will apply differently to decisions taken on the basis of statutory power than to decisions taken on the basis of the common law or a Crown prerogative.

The similarities between the various kinds of bureaucratic decision making arguably are more striking than the different contexts in which that decision making takes place. All public officials must abide by the rule of law, exercise authority according to specific statutory and common law mandates, and be able to justify their decision making as more than personal whim. All public officials are accountable, at least remotely, to the public through ministerial responsibility. Finally, every bureaucratic decision, whether it is a junior official making a recommendation as to whether a licence should be granted or an administrative board interpreting the *Charter of Rights,* represents both a political act and a personal judgment.

Law and humanity are inseparable elements of the bureaucrat-citizen relationship. These relationships may be coercive (for example, the penal bureaucracy), adversarial (for example, the tax collection bureaucracy), or intended to benefit a specific target group (for example, the children's aid bureaucracy). In many cases, the bureaucrat will have considerably more power than the citizen (for example, the social welfare bureaucracy); in some cases, this may be reversed (for example, a regulatory agency such as the understaffed drug approval bureaucracy in relation to the pharmaceutical industry). In every case, however, the bureaucrat and citizen approach one another with both specific legal constraints and a range of cultural, psychological, and social baggage. No simple approach can capture such complex dynamics.

With this complexity in mind, I seek to provide a more robust account of the potential of trust that can and should be nurtured between

bureaucrats and citizens, and to suggest that the result of these relationships will be to enfranchise citizens, to offer bureaucrats greater professional and social fulfilment, and to enhance the quality and accountability of the administrative state. Presently, the central barrier to such relationships is the legal regime governing administrative decision making, particularly the set of legal rights, entitlements, guarantees, and obligations that purport to protect individuals from arbitrary or discriminatory state action and bureaucrats from harassment and undue influence. While these legal constructs do not in fact eliminate arbitrary and discriminatory public decision making, they do make it nearly impossible for meaningful relationships to form between bureaucrats and citizens. Such measures toss out the baby, as it were, but leave the bath water intact.

The aim of my research is to articulate a legal regime capable of ensuring impartial, fair, and reasonable decision making by public officials, while also embracing relationships of intimacy between decision makers and those affected by their decisions. Those relationships take on added importance in situations where the life opportunities of a citizen may be contingent on a bureaucrat's decision. This contingency (and, sometimes, dependency) may be financial in nature (a welfare claimant's interaction with a caseworker), intellectual (a student's interaction with a teacher), emotional (law clinic staff with a client who has been wronged) or physical (a patient's interaction with hospital staff). In each case, the benefits of intimacy, and the costs of its absence, are heightened. In my view, it is in such settings that an alternative legal regime becomes both possible and necessary and has the potential to revitalize public life under the welfare state in the twenty-first century.

This chapter is divided into three sections. In the first section, I discuss the obstacles that administrative law places in the path of constructing personal relationships between bureaucrats and citizens. In the second section, I examine the potential to overcome law both in the formulation of administrative reasons and in the exercise of administrative discretion. Finally, in the third section, I explore the prospect and implications of developing personal relationships predicated on interdependence between bureaucrats and citizens.

The Problem of Law

How can a bureaucrat express empathy, compassion, consideration, and respect for a diverse range of individual claimants and yet remain impartial, fair, and reasonable in making his determinations? For many observers, these are simply mutually irreconcilable goals. They would

answer these questions by asserting that one should expect impartiality, fairness, and reasonableness from public officials, and seek the solace of intimacy and understanding from friends, families, and kindred spirits. Otherwise, how can one be sure that a bureaucrat who is kindred to one citizen is not displaying a bias at the expense of another? In the following section, I shall briefly discuss how each of the requirements of impartiality, fairness, and reasonableness have developed in Canadian administrative law, and the extent to which each requirement impedes the bureaucrat from establishing and developing relationships of intimacy with citizens.

Impartiality

The legal boundaries of administrative decision making are intended to preclude decisions being made on arbitrary, discriminatory, or improper bases. One of the main ways in which administrative law protects against such decisions is by allowing the parties to challenge a decision on the grounds that the decision maker was biased. Concerns over impartiality in administrative decision making may arise in two different ways. First, there may be a concern that a particular decision maker or tribunal member has an interest in a decision. Second, there may be a concern that a group of decision makers, or an entire administrative body, has a collective interest in a decision. In either case, a reasonable apprehension of bias may result.

The original common law principle of bias is that a judge should not decide his own case. A reasonable apprehension of bias may arise where a party or witness has a personal relationship with the decision maker. Relationships may be of a family, professional, or business nature. An administrative decision will be quashed by a court where the relationship is such that a reasonable person might fear that the decision maker would not approach the matter with an open mind.[5] As a result, not every "personal relationship" will result in a reasonable apprehension of bias. A purely professional relationship between two individuals, for example, may not rise to this standard if the decision makers are normally drawn from among the ranks of a particular profession. A pecuniary interest by a decision maker in one of the parties, however, will almost always raise the possibility of bias.[6] This is perhaps significant. The court appears to display greater concern about a decision maker's self-interest than the decision maker's interest in others' success or failure.

In addition to relationships of "personal" interest, bias may also arise where a decision maker may have an ideological or attitudinal relationship to the matter being decided. While all decision makers will have

opinions (whether expressed or not) about the subject matter of a decision, a lack of impartiality will result where those opinions are made public in some fashion and would compromise the objectivity of the decision maker (once again, in the eyes of the reasonable observer). For example, in the case of a human rights tribunal member who had published widely in the field of sex discrimination and was also a party to a human rights complaint on a similar issue, the court held that a reasonable apprehension of bias would result from having participated in similar litigation, but would not result from having written on the subject matter in question, which is expected of an academic expert in the field.[7] Thus, where public officials are expected to have strong opinions of a general nature about a case (as opposed to strong opinions about the case in particular), this will not amount to bias. Indeed, in certain circumstances, it may even be acceptable for the decision maker to have expressed strong opinions about the particular case. In *Re Paine and the University of Toronto,* the Ontario Court of Appeal held that it did not constitute bias for a faculty member on a tenure committee to have stated negative opinions about a tenure candidate.[8]

This approach underlies the reasoning in *Newfoundland Telephone Co.* v. *Newfoundland (Board of Commissioners of Public Utilities),* in which the Supreme Court held that where a utility commissioner was appointed because of past expertise in consumer activism, the commissioner's endorsement of a consumer perspective in public statements made prior to a hearing did not raise a reasonable apprehension of bias.[9] However, the commissioner's statements to the same effect during the hearing were held to constitute bias. The difference was that prior to the hearing, the commissioner could be presumed to retain an open mind to the evidence presented, whereas the statements during the hearing disclosed a closed mind to that evidence.

A further concern for the impartiality of decision makers may result from the conduct of the decision maker. Where a decision maker meets privately with one party outside the presence of the other, a reasonable apprehension of bias may result.[10] Similarly, where, during the course of a hearing, an antagonism is evident between the decision maker and one of the parties, the perception of bias may follow.[11] Context is important here as well. For example, a single inappropriate remark might not constitute bias, but a series or pattern of remarks may well do so.

What emerges from the case law on bias in administrative decision making is a complex spectrum of relationships between bureaucrats and citizens. Because this standard is based on what a reasonable person would conclude in the circumstances, it is also a shifting standard. Fifty

years ago, the presence of a spouse on one side of a case would surely have disqualified a decision maker on grounds of bias. Today, however, where spouses routinely interact in professional circles, a conclusion of bias would not necessarily follow.

Therefore, there is no legal impediment to strengthening or intensifying the personal nature of relationships between bureaucrats and citizens, so long as it does not compromise the ability of the bureaucrat to make decisions with an open mind. An open mind does not mean a blank mind, nor does impartiality require anonymity. Just as bureaucrats now have won the right to speak out on political issues, they should also have the freedom to speak openly to the citizens whose lives they are affecting.[12] Indeed, as I argue below, if one understands intimacy to mean people sharing a deeper and fuller knowledge about one another, it may well be that truly open-minded decisions only become possible through intimate relationships between bureaucrats and citizens.

Fairness

Perhaps the most important dimension of the personal relationship between administrative decision makers and those affected by their decisions is the obligation on public officials to observe the rules of natural justice, now referred to as the duty to act fairly. The law relating to procedural fairness has evolved rapidly in Canada in the past twenty years. In 1979, the Supreme Court released its decision in *Nicholson* v. *Haldimand-Norfolk (Regional Municipality) Commissioners of Police.*[13] With sweeping strokes, the court swept aside the distinction between administrative, quasi-judicial, and judicial decision making that had animated the scope of procedural fairness at common law until that point in time. Rather than exclude most of administrative decision making from the duty of fairness, the court saw that duty as a spectrum requiring varying levels of fairness, which correspond to a variety of contextual factors. Following *Nicholson,* it was no longer accurate to state that fairness did not apply to certain categories of administrative decision making (for example, an administrative as opposed to a judicial decision); rather, the context of decision making would determine how much and what kind of fairness might be appropriate to different decisions. This watershed in Canadian administrative law had significant implications for the threshold of fairness and the content of fairness. Each dimension of procedural fairness is discussed below.

The Threshold of Fairness

Not every governmental decision will engender an obligation of fairness.

For example, arguably the most significant category of governmental decision making is legislative in nature, which lies outside the scope of fairness. As the Supreme Court observed in *Inuit Tapirisat* v. *Canada (Attorney General),* purely ministerial discretion "on broad grounds of public policy" may be exercised without the participation of affected parties.[14] The Supreme Court has also held that fairness does not apply to decisions that engage executive prerogatives or Parliamentary privileges (for example, the decision of a minister to extradite a fugitive accused,[15] or the decision by Cabinet to introduce legislation).[16] The distinction between a decision subject to fairness and one not subject to fairness is not always easy to draw. For example, a municipal council may exercise both legislative and nonlegislative functions. A bylaw that applies to the residents of the municipality generally will usually be characterized as legislative, while a bylaw that applies to a single resident, or small group of residents, will usually be characterized as nonlegislative.[17]

While *Nicholson* established that administrative decisions will usually be subject to some duty of fairness, albeit a minimal one in some circumstances, there still remains a range of nonlegislative decisions that will not attract obligations of fairness. The Supreme Court has held that fairness obligations will arise only where a person's "rights, privileges or interests" are engaged.[18] This limitation will exclude trivial or inconsequential administrative decisions from the reach of fairness. It may also restrict the application of fairness to preliminary decisions,[19] unless the preliminary decision is given final effect through a process where recommendations are rubber stamped by a decision maker.[20] In other words, an investigation that will only result in a decision to prosecute may not give rise to a significant duty of fairness.

Finally, because the duty of fairness is a variable and contextual duty, it may be limited or excluded by a range of exigent circumstances. To take just one example, a prisoner may be entitled to fairness before a disciplinary penalty is imposed, but these procedural safeguards may be disregarded in emergencies such as a riot.[21] Similarly, unlawful labour disputes may have to be resolved quickly without permitting a full hearing.[22] The threshold of fairness thus is something of a patchwork quilt of exclusions and exceptions.

Fairness in some sense may be seen as a precondition of intimacy. As I have suggested above, an intimate relationship is one where the parties have knowledge about one another. Under this common law standard of fairness, a decision maker's duty to provide certain kinds of knowledge (for example, disclosure of an individual's case) and a citizen's right to put certain kinds of knowledge before the decision maker

(for example, the right to make oral submissions) will depend on a duty of fairness arising in the circumstances. Where that duty does arise, and where, consequently, intimacy is a possibility, administrative law further constrains the content of fairness (i.e., the substance and form of information that may pass between bureaucrats and those affected by their decisions), which in turn shapes the nature of any intimate relationship that might emerge.

The Content of Fairness

The content of the duty of fairness at common law is an elaboration of the well-known maxim, *audi alteram partem,* which provides affected parties to a decision the right to be heard. From the right to be heard, courts inferred a range of other specific procedural entitlements. For example, the right to be heard implied the right to notice that a decision was being made, which could adversely affect a party; the right to know the case against them, including the right to disclosure of, and cross-examination on, any evidence supporting that case; and finally the right to an oral hearing before an impartial decision maker. Together, these procedural entitlements became known as the rules of natural justice, and more recently, they have been characterized as the duty of fairness. The content of fairness is not static, but rather is flexible and variable. In one set of circumstances, fairness may require an oral hearing; in another set of circumstances, a written hearing may suffice; while a third set of circumstances may require no hearing of any kind. The duty of fairness is variable in another important sense. Like all rights derived from the common law, the duty of fairness can be altered or negated by statute.[23]

In determining the duty of fairness owed in particular circumstances, courts must balance policy considerations such as cost, volume, complexity, importance, and efficiency on the one hand, with the nature and gravity of the rights of the parties affected, and the public interest in a just administrative system. Administrative law, perhaps more so than other areas of adjudication, does not create rules and doctrines so much as establish frameworks to guide the exercise of judicial discretion.

The Supreme Court most recently addressed the duty of fairness in *Baker* v. *Canada (Minister of Citizenship and Immigration),* a case discussed in greater detail below.[24] In *Baker,* L'Heureux-Dubé J., writing for a unanimous court on this issue, identified certain factors that a court should consider in determining the duty of fairness owed in the circumstances of a case: "I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty

of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker."[25] Subsequently, she elaborated: "The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision."[26]

Four central factors were identified in *Baker* as providing a framework for the determination of what degree of procedural fairness is appropriate to a case: the nature of the decision; the nature of the statutory scheme; the importance of the decision to the affected person; and the choice of procedure made by the decision maker.

Fairness and intimacy should be complementary features of an administrative system (indeed, a relationship of intimacy between bureaucrats and citizens cannot arise without the guarantee of fairness). However, the duty of fairness that has developed thus far, contingent as it is on statutory interpretation and judicial review, serves to undermine the possibility of relationships of intimacy emerging between bureaucrats and citizens. This is because the procedural entitlements that comprise the duty of fairness are predicated on bureaucrats and citizens approaching each other as adversaries. Indeed, the rules of natural justice trace their common law roots to *Cooper v. Wandsworth Board of Works,*[27] a nineteenth-century English case that stood for the proposition that notice was required before a municipality could demolish a recently constructed building for failing to obtain the equivalent of a building permit from the municipality. Initially, in the wake of *Cooper,* the rules of natural justice were recognized only when the state threatened the property rights of individuals. While *Nicholson* expanded the scope of fairness, and *Baker* may well have enlarged its content, the adversarial premise of fairness remains. The procedural entitlements that the duty of fairness guarantees (notice, disclosure, etc.) are intended as analogous to the procedural protections of a criminal court. Given the vast tentacles of the welfare state, however, many if not most of which are benefit conferring, we should question whether this adversarial premise still makes sense.

To this day, the key question in an analysis of fairness remains: how much procedural fairness needs to be provided in order to render an

adverse decision legitimate? From a legal perspective, therefore, fairness arises in the negative. The *Charter of Rights and Freedoms,* which adds a constitutional dimension to the duty of fairness, illustrates this explicitly. Section 7 states that everyone has the right to life, liberty, and security of the person and is not to be deprived of those rights except in accordance with the "principles of fundamental justice" (a term that entrenches a constitutional version of the duty of fairness). Fairness, in this context, arises as an entitlement only when a fundamental right is being taken away. As long as fairness is seen as a means of justifying adverse findings, relationships of mutual trust and recognition between bureaucrats and citizens are unlikely to emerge.

Reasonableness

While fairness may be a double-edged sword for the relationship between bureaucrats and citizens, the requirement of reasonableness seems more straightforwardly beneficial. Clearly, no meaningful relationship can result from arbitrary, discriminatory, or unreasonable applications of statutory authority. However, reasonableness arises in the administrative process in a particular legal setting, that of judicial review of administrative action.

Judicial review of the substance of administrative discretion traditionally has involved an analysis of whether the exercise of discretion has exceeded the scope of the decision maker's statutory authority. Such a finding could be made on a variety of grounds, including that the discretion was exercised for improper purposes, that the exercise of discretion was based on irrelevant factors or ignored relevant factors, and that the exercise of discretion was arbitrary or undertaken in bad faith. In such cases, the decision is said to be ultra vires the jurisdiction of the decision maker. L'Heureux-Dubé J., writing for the court in *Baker,* reviewed this approach in the following terms:

> Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations: see, for example, *Maple Lodge Farms Ltd.* v. *Government of Canada,* [1982] 2 S.C.R. 2, at pp. 7-8; *Shell Canada Products Ltd.* v. *Vancouver (City),* [1994] 1 S.C.R. 231. A general doctrine of "unreasonableness" has also sometimes been applied to discretionary decisions: *Associated Provincial Picture Houses, Ltd.* v.

> *Wednesbury Corporation,* [1948] 1 K.B. 223 (C.A.). In my opinion, these doctrines incorporate two central ideas – that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction ... However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manouevre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli* v. *Duplessis,* [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc.* v. *Davidson,* [1989] 1 S.C.R. 1038).[28]

The effect of this holding in *Baker* is to expand the scope of judicial review over discretionary decision making. Courts are now to consider in broad terms whether an exercise of discretion meets the minimum threshold of reasonableness. L'Heureux-Dubé J. also challenged the distinction between discretionary decisions and nondiscretionary ones, observing:

> It is, however, inaccurate to speak of a rigid dichotomy of "discretionary" or "non-discretionary" decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making. To give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options. As stated by Brown and Evans, *supra*, at p. 14-47:
>
>> The degree of discretion in a grant of power can range from one where the decision-maker is constrained only by the purposes and objects of the legislation, to one where it is so specific that there is almost no discretion involved. In between, of course, there may be any number of limitations placed on the decision-maker's freedom of choice, sometimes referred to as "structured" discretion.[29]

In her view, the scope of judicial review over all administrative decisions should be analyzed within the "pragmatic and functional" approach, which recognizes that standards of review fall along a spectrum, with

certain decisions being entitled to more deference, and others entitled to less. Three standards of review that have been recognized by the Supreme Court are patent unreasonableness, reasonableness, and correctness.[30]

Reasonableness in this context is not used to determine whether an exercise of discretion was well reasoned in any sense accessible by the affected parties; rather, it is a standard exclusively used to determine when judges should intervene in the administrative process. The focus of this determination is not whether a decision was appropriate or desirable, but rather whether a decision maker's interpretation and application of his statutory authority was logical. In other words, the more vague the statutory power, the wider the ambit of reasonable interpretation will be. This is a subtle but key distinction. To the person affected, the question is whether the decision can be justified normatively on the grounds of fairness, consistency, and coherence. The law imposes no obligation on administrative decision makers to persuade affected parties that their determinations were reasonable – and this is precisely the problem. As in the case of fairness and impartiality, administrative action is designed to satisfy a standard of reasonableness imposed upstream (the judiciary) rather than to satisfy the concerns for reasonableness downstream (the citizenry).

Administrative law takes the values fundamental to an effective and just system of administrative decision making – namely, that decisions be rendered fairly, impartially, and reasonably – and turns them on their head into technical, legal standards. For bureaucrats, the minutiae of compliance takes the place of genuine concern for the appropriateness of the decision and the consequences it might have for the lives of those affected. It is perhaps an irony that attaining fair, impartial, and reasonable decisions requires first overcoming the legal regime created precisely to entrench such standards as requirements of lawful bureaucratic decision making.

Overcoming Law

Relationships of intimacy emerge from knowledge about each other's life experience and are deepened through mutual trust, mutual recognition, and mutual interest. Intimacy of the kind I describe in this paper is not necessarily new to bureaucracy. Personal relationships have been the glue that has held together bureaucratic power for centuries and that still animates the practice of public administration throughout most of the globe; seeking out a government service may mean seeking out a family member, coreligionist, friend, or member of the same political party. Bureaucracies function in such settings as large and complex

social networks intimately connected with the communities around them. And this, of course, was (and in many places still is) the problem. Patron-client networks, nepotism, and patronage are all familiar offshoots of systems of public administration built upon the foundation of personal relationships. Formal and centralized administrative management, hierarchical division of labour, dense legal procedures, meritocratic exams and evaluations, and the attempt to disentangle politics from administration, all were designed to remove personal relationships from bureaucracy and thereby render bureaucrat-citizen relationships equitable, efficient, and rational.

Knowledge has always meant power in bureaucracy. We often think of this knowledge in technical and rational-legal terms (e.g., knowledge of systems, knowledge of data, knowledge of rules, etc.) Traditionally, however, knowledge of people was as powerful a bureaucratic tool as any technological prowess. Just as Weber's "iron cage" of rational-legal administration held the danger of alienation and objectification of citizens, so personal relationships hold the danger of capricious and corrupt decision making. How can personal relationships be nurtured in the bureaucrat-citizen setting without sacrificing the impartiality, fairness, and reasonableness of administrative decision making? Put in slightly different terms, can impartiality, fairness, and reasonableness be assured without resorting to legal formalism, emotional detachment, and the threat of judicial review? These questions are addressed below through an analysis of reasons and discretion in the administrative decision-making process.

Administrative Reasons

There is a paradox to the form and function of reasons in administrative decision making. While decision making presupposes that an official will have to make some subjective determination, he can only justify that determination on objective terms. So, for example, an official who accepts a licence application that is late out of empathy for the applicant must find some regulation or rule that allows the receipt of late applications. In this way, hundreds of times each day, officials use rules, statutory provisions, policy statements, and other instruments that are intended to guide and constrain discretion to mask more human (and sometimes more humane) motivations. Of course, this means that many decisions are motivated by human frailties as well (e.g., discrimination, spite, laziness, and selfishness to just scratch the surface).

Rules, regulations, and surveillance are necessary because we simply cannot trust that a bureaucrat's common sense and good nature will

prevail, and because those subject to bureaucratic decision making deserve to know, in advance, the standards by which that decision will be made. This would be the end of the story if rules, regulations, and surveillance actually produced equitable and predictable standards. However, as alluded to above, what this legal regime actually gives rise to is artifice and deception; that is, making a decision for a complex set of reasons, but revealing only those motivations that are legally sanctioned. What would happen if we encouraged public officials to freely disclose the true range of motivations underlying their decision making? And what would happen if that encouragement came from those affected by the decision, rather than from the threat, and occasional enforcement, from the judiciary?

Presumably, if revealed, these motivations would look both complex and familiar. Bureaucrats, for the most part, reflect the communities over which they exercise authority; that is, they generally display the same attitudes about public and personal issues and share the same values as the communities from which they are drawn.[31] While they may appear more middle class and middle aged than the population at large, the striking revelation about bureaucrats is that they are not *them,* after all, but *us*. It should also be emphasized that bureaucrats themselves are citizens who must deal with bureaucrats in a variety of settings unrelated to their work. A lawyer with the policy branch of a government ministry, for example, must still wait in line for a driver's licence, negotiate with the local school board for special needs services for his daughter and file his taxes. Because of this, providing a discursive (if not physical) space where the multidimensional reasoning behind decisions could be revealed might resonate with both decision makers and those affected by their decisions. Adversely affected people may be more inclined to view such decisions as reasonable than if they were referred to an unassailable interpretation of an arcane statutory provision. For the moment, however, this space does not exist. Put simply, while intimacy begins with honesty, law, by contrast, begins with a fiction. The legal requirement to provide reasons for administrative decision making reflects this divide, and has taken on new prominence in Canada following the aforementioned *Baker* decision.[32]

In *Baker,* a Jamaican woman with Canadian-born dependent children was ordered deported on the basis of being an overstayer (someone who stays beyond the terms of a visa) under the terms of the *Immigration Act.*[33] She applied for an exemption from the provisions of the *Immigration Act,* based on humanitarian and compassionate considerations. Her application was denied. The reasons given for denying her application

took the form of informal notes jotted down by a junior immigration officer. The notes recommended that the application be denied and were passed on to the senior immigration officer with carriage of the application. These notes emphasized Mavis Baker's paranoid schizophrenic condition, her dependence on welfare, and her potential for violence. The form and style of the notes are as revealing as their contents; they were reproduced in the Supreme Court judgment as follows:

> PC is unemployed – on Welfare. No income shown – no assets. Has four Cdn.-born children–four other children in Jamaica – HAS A TOTAL OF EIGHT CHILDREN
>
> Says only two children are in her "direct custody." (No info on who has ghe [sic] other two).There is nothing for her in Jamaica – hasn't been there in a long time – no longer close to her children there – no jobs there – she has no skills other than as a domestic – children would suffer – can't take them with her and can't leave them with anyone here. Says has suffered from a mental disorder since '81 – is now an outpatient and is improving. If sent back will have a relapse. Letter from Children's Aid – they say PC has been diagnosed as a paranoid schizophrenic. – children would suffer if returned –Letter of Aug. '93 from psychiatrist from Ont. Govm't.Says PC had post-partum psychosis and had a brief episode of psychosis in Jam. when was 25 yrs. old. Is now an out-patient and is doing relatively well – deportation would be an extremely stressful experience.
>
> Lawyer says PS [sic] is sole caregiver and single parent of two Cdn born children. Pc's mental condition would suffer a setback if she is deported etc.
>
> This case is a catastrophy [sic]. It is also an indictment of our "system" that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE!
>
> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this kind of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.

> There is also a potential for violence – see charge of "assault with a weapon." [Capitalization in original] [34]

When the application was denied, counsel for Baker asked that reasons be provided. No formal reasons were written but the notes were provided to Baker in response to the request. The Supreme Court quashed this decision, both on the basis that the immigration officer had failed to consider the best interests of the children and that rendered the decision unreasonable (based on the reasonableness standard discussed above), and that the stereotypes indicated in the reasons of the officer demonstrated bias (based on the duty of fairness discussed above). On the issue of reasons, L'Heureux-Dubé J., for a unanimous court, held that the duty of fairness did arise in the circumstances of Baker's case:

> In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H & C decision to those affected ... militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.[35]

Having established that the immigration officer was under a duty to provide written reasons in this case, in part due to the gravity of the decision at issue, L'Heureux-Dubé J. next concluded that the duty to provide written reasons was satisfied by the informal notes taken by an immigration officer, which had been provided to Baker's counsel following the denial of her request. What is remarkable about the reasons provided in the *Baker* case is both the casual assumption that women who have children and mental health problems and are poor are not wanted in Canada, and the frankness and candour of the junior officer's communication of these assumptions.

As distasteful as they will no doubt appear to many, these notes reveal a rare glimpse into the real world of administrative decision making. I

do not mean to suggest that the real world is filled with biased and discriminatory decision makers (although the reasoning in *Baker* is likely more common than most of us would want to believe, at least in the immigration and refugee sector), but rather that discretion is often exercised on the basis of assumptions, value judgments, first impressions, and broader personal and ideological agendas that are rarely if ever disclosed. The immigration officer's notes move seamlessly and conversationally from descriptions of Baker's narrative, to commentary on Canadian immigration policy, to concern over media coverage of the case, to observations regarding internal bureau politics, to an assessment of the extrinsic evidence. The notes contain typos, mixed-up grammar, excessive capitalization for emphasis, and an oddly personal interest in Baker (especially given that Baker was never granted a hearing and so the notes are based on Baker's written file). At one juncture, the officer writes, "There's nothing for her in Jamaica – hasn't been there in a long time – no longer close to her children there – no jobs there – she has no skills other than as a domestic – children would suffer – can't take them with her and can't leave them with anyone here." Why was the decision maker in the *Baker* case so open about his real motivations? The answer is simple. He never expected his notes to see the light of day. They were written for internal circulation and specifically to serve as a recommendation for the more senior immigration officer whose duty it was to render a final decision in the case. From the fact that the senior officer simply passed along the notes with no other comments, we may infer (and the court certainly did) that the senior officer endorsed the reasoning and the result recommended by the junior officer.

Given the result in *Baker* (i.e., the quashing of the decision and the remitting of the application back to a different immigration officer for a redetermination consistent with the reasons of the Supreme Court), we are unlikely to see such candour in administrative reasons in the future. Indeed, *Baker* may well serve as an incentive to give as few and as unspecific reasons as permitted by law. Here again, we must overcome the paradigm of legal compliance in order to view reasons in a broader and potentially transformative light.

Reasons may be internal or external (or, perhaps more accurately, interior or exterior) – in each setting, they serve a somewhat different purpose. Reasons provided to an applicant, and/or made available to the public, serve the purpose of accountability for administrative decision making, and serve to educate the public more generally about the legal and administrative standards underlying the decision. Internal reasons may serve to clarify the policy concerns underlying decisions

and allow internal coherence without sacrificing confidentiality in sensitive areas of government action. The dilemma, as *Baker* illustrates, is that the most useful reasons are often the internal ones.

If it were possible for decision makers to discuss their internal reasons on a "without prejudice" basis (in other words, in a fashion that could not be used to prejudice either party in a future legal hearing), insights into the reasoning of bureaucrats might be commonplace. Better insights into the reasoning of citizens might emerge as well if parties were similarly invited to reveal their motivations for seeking public benefits or avoiding public burdens. Opening such discursive spaces for the free exchange of information about administrative decision making is of course fraught with danger. Ensuring that such exchanges are immune to legal consequences probably would require rewriting the *Constitution*.[36] In this highly legalized climate of administrative decision making, reasons will likely be circumscribed and partial. This is not to suggest there is no room for improvement.

The central flaw of the duty to provide reasons as it now is articulated is that it provides no standard on which to assess whether reasons are good or bad. As long as some indication is provided that discloses to the affected party the basis of the result in the circumstances of the case, the legal standard is met. On a standard of intimacy, by contrast, fuller, clearer, more comprehensive, more personal, and more genuine reasons will be preferable to the alternatives.

Reconceiving reasons as a measure of intimacy may not displace the influence of judicial review, or the Weberian, rational-legal model of public administration, but it would begin to illuminate the gap between the stated and unstated justifications for decision making. Rather than measure reasons against the standard of legal sufficiency alone, we might also measure reasons against the standard of meaningfulness, truth, and honesty. Injecting intimacy into the debate surrounding administrative decision making not only leads to different standards for measuring outcomes, it also leads to different ways of understanding what goes into these determinations.

Administrative Discretion

Discretion arises whenever bureaucrats have a choice as to how to exercise their authority. Construed broadly, virtually every administrative act contains some measure of discretion, especially when bureaucrats interact with citizens. Construed more narrowly, discretion is a discrete legal category comprised of statutory grants of power that contemplate

an administrative determination. Consider the statutory power at issue in the *Baker* case.

The junior immigration officer who penned the notes was making a recommendation as to how to apply s. 114(2) of the *Immigration Act,* which provides that "the Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations." This leaves immigration officers with a dauntingly broad discretionary power. With a view to guiding the exercise of this discretion, the ministry provided decision makers with guidelines as part of an *Immigration Manual*. The court characterized these guidelines as "instructions to immigration officers about how to exercise the discretion delegated to them." The guidelines were also available to the public.

In reviewing the exercise of discretion in *Baker,* the court considered a number of these guidelines.[37] Guideline 9.05, for example, directs officers to carefully consider all aspects of the case, using their best judgment and asking themselves what a reasonable person would do in such a situation. It also states that although officers are not expected to delve into areas that are not presented during examination or interviews, they should attempt to clarify possible humanitarian grounds and public policy considerations even if these are not well articulated. According to the court, the guidelines also set out two bases upon which the discretion conferred by s. 114(2) and the regulations should be exercised: public policy considerations and humanitarian and compassionate grounds. Public policy reasons include marriage to a Canadian resident; the fact that the person has lived in Canada, has become established, and has become an "illegal de facto resident"; and the fact that the person may be a long-term holder of employment authorization or has worked as a foreign domestic. Humanitarian and compassionate grounds include whether unusual, undeserved, or disproportionate hardship would be caused to the person seeking consideration if he had to leave Canada.

Based on these guidelines (and her interpretation of the statute), L'Heureux-Dubé J. concluded that the immigration officer was under an obligation to exercise his discretion "in a humanitarian and compassionate *manner*" (emphasis added). This, of course, is quite a different standard than an objective determination of whether humanitarian and compassionate grounds exist to justify an exemption (which the plain

meaning of s. 114(2) of the *Immigration Act* would seem to imply). By this subtle change in syntax, the Supreme Court appeared to transform a legal discretion into a purposive one. How can we know if a bureaucrat acts in a compassionate or humanitarian manner towards an applicant? Surely, to obtain this knowledge, we would need to know something inward about the bureaucrat and something inward about the applicant – purposive discretion, in other words, makes relationships of intimacy between bureaucrats and those affected by their decisions not only possible, but necessary.

Purposive discretion also clarifies the distinction between impartiality and advocacy to be clarified in the bureaucrat-citizen relationship. It strikes many as an oxymoron to speak of bureaucrat advocates, and yet our legal and administrative system is already replete with such figures. Just to take a sampling of Ontario's civil service, officials of the provincial Public Guardian and Trustee; the Children's Lawyer; the Family Responsibility Office; the mental health, consumer protector, and children's aid bureaucracies; and legal clinic lawyers all have in common a mandate to consider the best interests of vulnerable citizens. These officials are not just told what they have the power to do, but also, importantly, why they have the power to do it. For example, child welfare officers are not just empowered to remove children from their parents, but are empowered to take such action where the child is endangered. This presupposes that these officials know something about the children (and the parents, for that matter). Moreover, given the inherently subjective nature of decision making when the best interests of vulnerable citizens are at stake, why shouldn't purposive discretion also presuppose that the parties know something about the decision maker and the decision-making process?

While interpretive guidelines and commentaries are useful for gaining insight into the collective reasoning of a bureaucratic department, branch, or agency, this is no substitute, as the *Baker* case illustrates, for gaining insight into the individual reasoning of the bureaucrat rendering the decision in a particular case. In the immigration setting, we saw the use of interpretive guidelines to inform the discretion of particular officers. Providing bureaucrats with purposive mandates should also lead to institutional incentives (as opposed to legal requirements) to explain how specific decisions further that mandate. The act of exercising discretion, in that sense, should be seen as a medium of communication between the bureaucrat and the citizen.[38]

Discretion should be seen as a medium of communication. This communication begins with the legislature translating the public interest into

a specific statutory power. Through the statute delineating the parameters of discretion, the public interest remains an important but silent presence in the discursive relationship between bureaucrats and citizens. That discursive relationship typically begins with the citizen providing information to the bureaucrat in order to access some service or benefit, or avoid some penalty or burden. Whether this is culled from social insurance or tax records, or set down on forms or communicated orally, administrative discretion can only be exercised with the benefit of knowledge about the people who will be affected. This knowledge, however, is necessarily partial. Certain information is deemed relevant and other information irrelevant. Whether you have a spouse is relevant to tax officials, but not whether you are a roommate in a casual relationship. By contrast, whether you are in a casual relationship may be deemed relevant by social welfare officials. Citizens may manipulate information about themselves to satisfy certain eligibility criteria. For example, a refugee claimant who is told that victims of political persecution may be granted refugee status, but that victims of economic deprivation will not, might reinterpret a narrative of hardship to emphasize its political roots and downplay its economic roots. In this way, the nature and scope of the statutory power can shape (and distort) how affected parties communicate with bureaucrats. In such cases, the information withheld is usually as revealing as the information proffered.

Information about a citizen is the basis on which bureaucrats render discretionary judgments. It is not, however, the only basis. Knowledge of how similar cases have been decided in the past, knowledge of the government's policy agenda, concerns over volume, equity, and efficiency, directives from supervisors, and the administrative culture of the decision-making unit will all factor into how discretion is exercised. Finally, personality, personal values, and beliefs will often have a role in decision making. Thus, after digesting all this information, the immigration officer in *Baker* viewed the fact of the applicant's children as a reason to deny her application. The court, however, held that the fact of the children's interests in this case should have been viewed as a reason to grant her application. Would either the immigration official or the Supreme Court justices have viewed the decision differently if asked to put themselves in Baker's shoes, or if Baker were permitted to more fully understand their own perspectives?

By making a judgment about how best to exercise statutory power in light of all of the available information and in the circumstances of the case, the bureaucrat communicates something meaningful about himself. The more the bureaucrat is asked to explain, justify, and elaborate

that decision, the more the personal judgments inherent in this discursive relationship are exposed. As in all personal relationships, with exposure comes a measure of vulnerability. As the bureaucrat's values, assumptions, interests, and beliefs are subject to scrutiny, the citizen gains some degree of power over the decision maker. The decision itself becomes more a joint venture between the citizen and the bureaucrat, in which each has a stake and neither has complete ownership. This intertwining of discretion with interior as well as exterior forms of reasoning makes intimacy possible. A model of intimacy for the bureaucrat-citizen relationship thus may be seen as the convergence of vulnerability, knowledge, trust, and power in the decision-making process. Further, through ongoing public scrutiny of this relationship (as opposed to episodic judicial review of administrative decision making), legislators and administrative managers can better tailor discretion to accomplish particular public goals and purposes in specific decision-making contexts. However, is the model of intimacy suitable to every administrative setting? Is it applicable to each setting in the same way? It is to addressing these questions, and exploring the scope and implications of intimacy for the bureaucrat-citizen relationship, that I now turn.

In Search of Intimacy in the Bureaucrat-Citizen Relationship

As I have sketched above, the model of intimacy is not intended to undermine impartiality, fairness, and reasonableness in administrative decision making, but rather to enhance interdependence and engagement in the bureaucrat-citizen relationship. In order to nurture intimacy, it is first necessary to reconceive the bureaucrat-citizen relationship as one of mutual interest. Frameworks of legality that result in fragmenting the bureaucrat-citizen relationship must be supplanted with administrative spaces that allow both citizens and bureaucrats to see and recognize each other as real and whole individuals. Only then may "disenchantment" with the state (on the part of both bureaucrats and citizens) give way to engagement.[39]

Towards a Legal Theory of Intimacy

As discussed above, power flows from knowledge in bureaucratic settings. In the present system, virtually all knowledge flows from citizens to bureaucrats. Knowledge of citizens about the bureaucratic system, or about the bureaucrats themselves, is deemed either confidential or irrelevant. And, it is true, if a bureaucrat exercises no subjective role or judgment in the exercise of a statutory power, such knowledge would not serve a useful function. However, whenever bureaucrats and citizens

interact in the context of administrative decision making, a subjective element is inexorably injected into the process. Rather than pretend this is not so, and construct an administrative system on this legal fiction, we should recognize the reality of the bureaucrat-citizen relationship and develop incentives and structures to nurture it. To the extent that citizens are provided with knowledge about bureaucrats, how they decide and how they understand their authority, the power imbalance that characterizes many bureaucrat-citizen relationships may be ameliorated (although rarely, if ever, eliminated). Armed with this knowledge, citizens, especially vulnerable citizens (and their advocates) may achieve a greater level of accountability over decision makers, while also establishing meaningful connections to the decisions that so greatly affect their lives. Levelling the playing field of knowledge, in other words, enables bureaucrats and citizens to view administrative decision making from the perspective of the other more effectively. This exchange of experiences and perspectives is key to forming and maintaining relationships of intimacy, and such relationships of intimacy are the foundation of a just and empowering system of public administration.

While novel in some respects, the model of intimacy I am proposing builds on a tributary of legal theory that has sought to understand the remoteness of bureaucratic authority and how to overcome it, either through law or through alternatives to law.

The legal theorist Joseph Vining, for example, believed the problem with bureaucratic relationships flowed from the distinction between authoritative and authoritarian models of decision making.[40] Authoritative decisions are those that are complied with because they are perceived as legitimate, while authoritarian decisions are those that are complied with because they are backed by threats of violence or coercion. For Vining, words have meaning, but to be meaningful, words must reveal the workings of the speaker's mind and be intelligible to those they are spoken to. Vining applies this concern to bureaucratic speech. When bureaucrats explain decisions with a form letter or letter drafted by low-level officials, such texts do not convey meaning to those who receive them because they do not offer "access to the workings of a mind."[41] Vining contrasts this bureaucratic model with how reasons are disseminated in an appellate court (his focus is the US Supreme Court). He wonders what the consequences would be if the Supreme Court issued judgments in the same fashion as the Interstate Commerce Commission (his archetype for bureaucratic speech). In his view, the result would be a loss of prestige, trust, and, most importantly, authoritativeness for the court. When confronted with "bureaucratic speech," Vining

argues that lawyers (or their clients) approach the text strategically, seeking to manipulate it for instrumental ends, and only acceding to adverse decisions because they have no alternative. Bureaucracy, in other words, is the hallmark of authoritarian interaction, while courts and judicial decision making represent the hallmark of authoritative interaction.[42] For Vining, authenticity is the key to authoritative decision making. He elaborates: "A statement, document, or text is authentic when it can be taken seriously. If a statement is to be taken seriously the author of it must mean what he says. He must be speaking in what we call good faith and not thinking only of the reaction to what he says. He must not deliberately mean two incompatible things, be deliberately ambiguous with the intention of choosing later, after the reaction, the meaning best for his interests and treating that as if he had meant it all along."[43]

Whether judges always mean what they say is far from certain, but there is little doubt that bureaucrats rarely can do so. This is not because bureaucrats themselves are duplicitous but because the bureaucratic process is inauthentic, and it is this inauthenticity that the model of intimacy is intended to address. The importance of intimacy flows from the idea that we do not interact with institutions as isolated individuals but rather as social beings enmeshed in various relationships.

One of the first legal theorists to view institutional life in these terms was Lon Fuller. Fuller believed that the most basic unit of social life was not the isolated individual, but relationships of interaction among and between individuals.[44] Interaction was critical to Fuller's theory because of its connection to human reason: reason's full potential could be realized only by engaging the complex challenges possible in interactional settings.[45] While interaction is the framework through which administrative decision making takes on social meaning, an important aspect to any theory of intimacy is the innate or inherent value to an individual of participating fully in government decisions of consequence.

From a somewhat different vantage point, Jerry Mashaw has emphasized the important link between due process (i.e., an individual's legal right to participate in the administrative process) and the value of human dignity.[46] In his view, we share an intuitive sense that "process itself matters" irrespective of outcome. He concludes, "We *do* distinguish between losing and being treated unfairly. And, however fuzzy our articulation of the process characteristics that yield a sense of unfairness, it is commonplace for us to describe process affronts as somehow related to disrespect for our individuality, to our not being taken seriously as persons" (emphasis in original).[47] The Supreme Court of

Canada has reflected this approach in making the link between the constitutional guarantees entrenched in section 7 and the inherent or innate dignity of human existence.[48]

As Vining, Fuller, and Mashaw all would acknowledge, respect for human dignity, recognition of human freedom, and the facilitation of self-realization all become possible only within a system of institutional constraints. Moreover, from a practical perspective, governments can only address our social and economic needs through administrative structures based on technical competence. The choice, then, is not between more bureaucracy or less bureaucracy, or between less law or more law, but rather between bureaucrat-citizen relationships that enhance dignity, freedom, and self-realization, and bureaucrat-citizen relationships that thwart our humanity. The model of intimacy in the bureaucrat-citizen relationship explicitly embraces the humanity both of citizens and bureaucrats. That is this model's greatest strength, and perhaps its greatest weakness as well.

While it is relatively unproblematic to argue for a more authentic bureaucracy in which knowledge, and therefore power, is shared between bureaucrats and citizens, it is of course a different matter to begin to imagine the logistics and practical consequences of such a move. This reality check and some reflection on the limitations of intimacy are the subjects of the next section.

The Implications of Intimacy in the Bureaucrat-Citizen Relationship for Administrative Law

While governments of all stripes are increasingly paying lip service to the goal of democratic administration, they tend to be more interested in the symbols of participation and accountability and less interested in the substance. Similarly, courts are increasingly paying lip service to the goal of participatory rights in administrative decision making, as the *Baker* case demonstrates. Here, too, the focus appears to privilege symbols over substance. A court now may find a duty to act fairly, including a requirement to provide written reasons, for example, but this in no way guarantees that an affected party will gain any insight into the true motivations of the decision maker. Permitting a bureaucrat to explain why he believes a decision to be fair and consistent with his statutory mandate may be of greater value to an affected party than requiring him to provide written reasons confirming that certain specific statutory standards were or were not met.

Engagement and interdependence between citizens and bureaucrats would seem to be most suited to settings where citizens are relatively

advantaged (for example, regulatory settings in which government authorities interact with industry groups on relatively equal footing); this degree of mutuality is much more difficult to achieve where vulnerable groups are affected and where individuals may be dependent on a favourable administrative decision making for their welfare (for example, in the public housing or refugee settings). How meaningful is intimacy when one participant holds disproportionate power over the other? Where vulnerable individuals are the subjects of bureaucratic decision making, an advocate, intermediary, or guardian may provide crucial assistance in facilitating this exchange of knowledge. The key point is to seek ways to have bureaucrats and citizens come to know each other without resorting to the instrumentality of arguing who has the law "on their side."

Reorienting the bureaucrat-citizen relationship to one of interdependence and intimacy is intended to shift our focus from the form to the substance of participatory rights. What would administrative decision making look like if citizens and bureaucrats had an opportunity genuinely to know each other outside the limitations of legal strictures? What if all administrative discretion was purposive, disclosing not just the scope of the discretion, but the social, economic, moral, political, remedial, and policy goals that the statutory power was intended to further? What if the obligation to provide reasons meant the actual reasons for a decision, not just the reasons that meet the applicable legal standard? Obviously, such a brave new world of public life would have many and significant implications for both bureaucrats and citizens. Below, I identify just a few of them.

- A far broader range of public officials will have to be trained in communicative skills and be made accountable for how those skills are used. Governments, consequently, would have to place greater and different emphasis on who is hired to fill bureaucratic positions. The need for the demographic makeup of the bureaucracy to conform at least loosely to the demographic makeup of society would likely be heightened. While we may develop intimate relationships with people who are different from us, it will be more important for groups to perceive bureaucratic interaction in a welcoming fashion. The underrepresentation of certain groups in the ranks of the bureaucracy has historically been perceived as the result of an unwelcome climate for those groups. Moreover, when a person knows community members who are themselves bureaucrats, this may change how that person views and interacts with bureaucrats, in positive ways. The legal standards

relating to bias will have to be adapted to accommodate these kinds of personal attachments as appropriate to the bureaucrat-citizen relationship.

- The role of different actors in the administrative process both deepens and renders more complex the nature of intimate relationships between bureaucrats and citizens. While the ideal of intimacy may involve a single bureaucrat and a single citizen coming to know each other through the decision-making process, the reality is usually more elaborate, and almost always more crowded. Citizens may be represented by counsel, or may have a guardian, friend, or family member assisting them. Bureaucrats may work in teams or several bureaucrats from different branches of government may be responsible for different aspects of a single citizen's case (although such fragmentation of an individual's case may in and of itself undermine the development of personal relationships between bureaucrats and citizens). As each actor in the process gains more knowledge about the others, a single personal relationship inexorably becomes a web of many personal relationships. These relationships need to be monitored and managed in new ways. Much as a doctor interacts with a patient, the patient's family, and the patient's current and previous physicians, so bureaucrats will have to learn to consider citizens in more multifaceted contexts. To stretch the analogy, it may also be necessary in some cases to allow citizens facing especially grave consequences to seek a second opinion.
- Bureaucrats would have to reveal more of their reasoning in day-to-day decision making, especially what until now has been interior or internal reasoning. New technologies have made both recording and accessing greater volumes of decisions and commentaries possible and feasible. While oral hearings may be desirable in many settings, they may not be feasible in all such settings. Through email, video conferencing, and real-time electronic messaging, more settings than ever before might accommodate a greater level of personal interaction than was true in the past. While scarce resources inevitably will still have to be rationed, the model of intimacy creates a new set of priorities to guide that rationing. This model also depends, to some extent, on clear guidance from legislatures as to the purpose of a statutory grant of authority or discretion.
- Alternatives to current structures of judicial review would have to be developed and resources devoted to experimentation. Specialized administrative courts may be one alternative worth pursuing. Such courts could blend existing constitutional mandates to review administrative decision making with a specialized sensitivity to the goal of nurturing

personal relationships. Much as labour tribunals have sought to preserve a level of informality and pragmatism in the resolution of labour disputes, administrative courts could develop new standards of deference to bureaucrat-citizen relationships. While courts already exist that have primary carriage over judicial review (for example, Ontario's Divisional Court), they are staffed by ordinary judges. Specialized administrative courts would presumably require specialized jurists, ideally with first-hand experience in the administrative decision-making process. However, an ombudsperson model or citizen review panel model may be more appropriate for some settings. The key is to devise institutional arrangements that provide accountability without undermining the development of relatively uninhibited spaces where bureaucrats and citizens might come to understand each other's motivations, concerns, and interests.

The possible implications sketched above merely hint at some of the larger transformations to which nurturing relationships of intimacy between bureaucrats and citizens may give rise. It is important to emphasize, however, that the model of intimacy also has important limitations. For example, while many people are affected by government action, many others are affected by government inaction, which a model of intimacy cannot effectively address. Further, models of intimacy may not at first glance seem economical to governments in an era of restructuring. Permitting personal relationships to develop between particular bureaucrats and particular citizens may seem less attractive than routing all citizen inquiries to centralized call centres (which is now the policy of Citizenship and Immigration Canada, among others). Intimacy may also not be a feasible model where service delivery is contracted out by governments to the lowest bidder.

Conclusion

The foregoing analysis is not intended as a blueprint for administrative or statutory reform. Nor is it intended as a mere thought experiment. Rather, the model of intimacy in the bureaucrat-citizen relationship is intended to provide an alternative vision of how administrative decision making ought to be undertaken in a just and democratic society. It will not be easy for either bureaucrats or citizens to approach one another in a spirit of mutual trust, mutual recognition, engagement, interdependence, and openness. Both bureaucrats and citizens have been acclimatized to expect the opposite response. Yet the benefits of taking this risk are apparent. Some benefits will be tangible. Much of the waste,

duplication, fraud, and inefficiencies of our current system of public administration would be alleviated in a system in which bureaucrats and citizens shared knowledge about one another. Some benefits, however, will be intangible. It is hard to calculate the value of a re-energized public sphere on recruiting and retaining more talented and dedicated public officials. It is fair to say that assessing the merits of compassion and justice do not mesh easily with a cost-benefit analysis. And, to be sure, there would be tremendous costs involved as well.

We take for granted that our dealings with public authorities are usually colourless and anonymous. For lack of a better term, we tend to refer to such encounters as "bureaucratic." Rarely do we question why this is so, or whether it must be so. The modest hope of this chapter is to begin raising and addressing precisely these questions. Anyone who has experienced intimate relationships in their lives would attest to the fact that they require a significant investment of time, resources, and labour, and more than occasionally lead to feelings of being misunderstood or frustrated. However, those same people would no doubt concur that such relationships are almost always worth the effort. Viewing our public relationships as simply another form of personal relationship, I would conclude, is the first step to rendering bureaucrat-citizen encounters more meaningful, more productive, and more mutually fulfilling.

Notes

1 *The Compact Oxford English Dictionary,* 2d ed. (Oxford: Clarendon Press, 1991) at 869.

2 This is as much an ideological as a descriptive observation. In other words, I posit not only that the bureaucrat-citizen relationship is, as a factual matter, distinct, but also that, as a normative matter, it should remain distinct. This view is contrasted by the neoliberal agenda pursued by, among others, conservative governments in Ontario and Alberta, which includes a strong argument for reorienting bureaucratic behaviour towards citizens along consumerism lines. While it is beyond the scope of this chapter to explore this debate, for further discussion, see D. Savoie, *Thatcher, Reagan, Mulroney: In Search of a New Bureaucracy* (Toronto: University of Toronto Press, 1994) at 116-71.

3 J. Mashaw, *Due Process in the Administrative State* (New Haven, CT: Yale University Press, 1985) at 230.

4 See L. Fuller, "Forms and Limits of Adjudication" (1978) 92 Harv. L. Rev. 353 at 357 (noting that adjudication "should be viewed as a form of social ordering," not so much "as a means of settling disputes"); Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* William N. Eskridge and Philip P. Frickey, eds., (Durham, NC: Duke University Press,1994) at 102-3 (noting that the purpose of all institutional procedures, including adjudication, is "establishing, maintaining and perfecting the

conditions necessary for community life to perform its role in the complete development of man").

5 *Committee for Justice and Liberty* v. *National Energy Board,* [1978] 1 S.C.R. 369 at 394 (per de Grandpré J. dissenting); this test was adopted in *R.* v. *S. (R.D.),* [1997] 3 S.C.R. 484 at para. 11, per Major J.; at para. 31, per L'Heureux-Dubé and McLachlin JJ.; and at para. 111, per Cory J. See also *Newfoundland Telephone Co.* v. *Newfoundland (Board of Commissioners of Public Utilities),* [1992] 1 S.C.R. 623.

6 See *Re Energy Probe and Atomic Energy Control Board* (1984), 15 D.L.R. (4th) 48 (Fed. C.A.); see also *R.* v. *Broker-Dealer's Association (Ontario), Ex Parte Saman Investment Corp.,* [1971] 1 O.R. 355 (H.C.).

7 *Gale* v. *Miracle Food Mart* (1993), 12 Admin. L.R. (2d) 267 (Ont. Div. Ct.).

8 *Re Paine and the University of Toronto* (1981), 131 D.L.R. (3d) 325 (Ont. C.A.).

9 *Supra* note 5.

10 *Kane* v. *University of British Columbia,* [1980] 1 S.C.R. 1105 at 1113-14.

11 See, for example, *Yusuf* v. *Canada (Minister of Employment and Immigration)* (1991), 7 Admin. L.R. (2d) 86 (Fed. C.A.).

12 On the scope of the bureaucrat's freedom of speech, see *Fraser* v. *Canada (Public Staff Relations Board),* [1985] 2 S.C.R. 455 (in which Dickson, C.J. stated, at 466, that "public servants should not be ... silent members of society."); see also *Osborne* v. *Canada (Treasury Board),* [1991] 2 S.C.R. 69.

13 *Nicholson* v. *Halimand-Norfolk (Regional Municipality Commissioners of Police,* [1979] 1 S.C.R. 311. See also the antecedent to this decision in the U.K.; *Ridge* v. *Baldwin,* [1964] A.C. 40 (H.L.).

14 *Inuit Tapirisat* v. *Canada (Attorney General),* [1980] 2 S.C.R. 735.

15 *Idziak* v. *Canada (Minister of Justice),* [1992] 3 S.C.R. 631.

16 *Reference re Canada Assistance Plan,* [1991] 2 S.C.R. 525.

17 See *Homex Realty and Development Co. Ltd.* v. *Village of Wyoming,* [1980] 2 S.C.R. 1011. See also *Welbridge Holdings Ltd.* v. *Metropolitan Corporation of Greater Winnipeg,* [1971] S.C.R. 957.

18 *Cardinal* v. *Kent Institution (Director*), [1985] 2 S.C.R. 643.

19 *M.N.R.* v. *Coopers & Lybrand* (1978), 92 D.L.R. (3d) 1 at 7 (S.C.C.).

20 *Abel* v. *Penetanguishine Mental Health Centre* (1979), 24 O.R. (2d) 279 (Div. Ct.) affirmed (1980), 31 O.R. (2d) 520 (C.A.).

21 *Cardinal, supra* note 18.

22 *Tomko* v. *N.S. (Labour Relations Board),* [1977] 1 S.C.R. 112.

23 However, some parties affected by administrative decision making may also avail themselves of the constitutional guarantee in section 7 of the *Charter of Rights and Freedoms* that people cannot be deprived of the right to life, liberty, and security of the person unless the principles of fundamental justice are observed. These principles include, at a minimum, the equivalent of the common law duty of fairness. Where the constitutional guarantee applies (where, in other words, the right to life, liberty, or security of the person is engaged), it may not be displaced by statute unless the notwithstanding clause is invoked. See J. Evans, "The Principles of Fundamental Justice: the Constitution and the Common Law" (1991) 29 Osgoode Hall L.J. 51.

24 *Baker* v. *Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. 4th 193 (S.C.C.) [hereinafter *Baker*]. For a discussion of *Baker* in the context of the duty of

fairness, see L. Sossin, "Developments in Administrative Law: the 1997-98 and 1998-99 Terms" (2000) 11 Supreme Court L.R. (2d) 37.

25 *Baker, ibid.* at 211.

26 *Baker, ibid.* at 214.

27 *Cooper* v. *Wandsworth Board of Works* (1863), 143 E.R. 414.

28 *Baker, supra* note 24 at 224.

29 *Baker, supra* note 24 at 225-6.

30 *Canada (Director of Investigation and Research)* v. *Southam Inc,* [1997] 1 S.C.R. 748 at paras. 54-6.

31 For empirical data supporting this position, see C. Goodsell, *The Case for Bureaucracy: A Public Administration Polemic,* 3d ed. (Chatham, N.J.: Chatham House, 1994) at 104-15.

32 *Baker, supra* note 24.

33 R.S.C. 1985, s. I-2.

34 *Baker, supra* note 24 at 202.

35 *Ibid.* at 219-20.

36 In *Crevier* v. *Attorney General of Quebec,* [1981] 2 S.C.R. 220, the Supreme Court held that provincial legislation could not remove the right of judicial review on jurisdictional grounds from an administrative tribunal. Breaching the duty of fairness, rendering a biased decision, or exercising discretion in an unreasonable manner (assuming the standard of reasonableness was applicable to the circumstances) would each constitute a reviewable jurisdictional error.

37 *Baker, supra* note 24 at 208-9.

38 For a discussion of discretion as "dialogue," see J. Handler, "Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community" (1988) 35 U.C.L.A. L. Rev. 999; and L. Sossin, "The Politics of Discretion: Towards a Critical Theory of Public Administration" (1993) 36 Canadian Public Administration 364.

39 For a discussion of disenchantment in this context, see J. Vining, "Essay: Law and Enchantment: The Place of Belief" (1987) 86 Mich. L. Rev. 577. For further discussion on the concept of engagement in the bureaucrat-citizen relationship, see L. Sossin, "The Administration and Criminalization of the Homeless: Notes on the Possibilities and Limits of Bureaucratic Engagement" (1996) 22 N.Y.U. Rev. L. and Soc. Change 623; and L. Sossin, "Redistributing Democracy: Authority, Discretion and the Possibility of Engagement in the Welfare State" (1994) 26 Ottawa L.R. 1.

40 J. Vining, *The Authoritative and the Authoritarian* (Chicago: University of Chicago Press, 1986).

41 *Ibid.* at 12.

42 In line with this argument, Vining laments the rise of judicial clerks in the decision-making process of appellate courts, which he views as part of its creeping bureaucratization.

43 *Ibid.* at 42; see also G. Miller, "Survey of Books Relating to the Law: Law, Government and Society: The Glittering Eye of Law (book review of *The Authoritative and the Authoritarian*)" (1986) 84 Mich. L. Rev. 880.

44 L. Fuller, "Human Interaction and the Law," in K. Winston, ed., *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Durham, NC: Duke University Press 1981) 237.

45 While this aspect of Fuller's approach was apparently influenced by the sociologist Georg Simmel, it presages the rise of discourse ethics and communicative action in Jurgen Habermas' social theory. See J. Habermas, *Between Facts and Norms,* trans. William Rehg (Cambridge: MIT Press, 1996).
46 J. Mashaw, *Due Process in the Administrative State* (New Haven, CT: Yale University Press, 1985).
47 *Ibid.* at 163.
48 *Rodriguez* v. *British Columbia,* [1993] 3 S.C.R. 519 at 585.

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Contributors

Sue Campbell is Associate Professor, Philosophy/Women's Studies, Dalhousie University.

Nathalie Des Rosiers is President of the Law Commission of Canada and Professor in the Faculty of Law, University of Ottawa.

William Flanagan is Associate Professor in the Faculty of Law, Queen's University.

Ian Kerr is Associate Professor in the Faculty of Law, University of Ottawa.

Lucie Lauzière is Professor in the Faculty of Law, Laval University.

Lorne Sossin is Assistant Professor, Osgoode Hall Law School and Department of Political Science, York University.

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