Notes on FOUNDATIONS OF CANADIAN LAW

(For NCA Candidates)

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INTRODUCTION TO MY NOTES ON FOUNDATIONS OF CANADIAN LAW

Welcome to the August 2023 Version of my Notes on Foundations of Canadian Law. As you know, I did promise to regularly update my NCA notes in line with any NCA update of the syllabus, for the sake of countless NCA candidates who rely on them to pass their exams. So, naturally, when NCA updated the Foundations syllabus, I have to fulfill my promise in equally updating my notes.

The updates in the new syllabus are substantial. In fact, it is one of the most extensive updates in Foundations syllabus that I've seen in recent times. NCA removed 15 articles and 7 cases from the old syllabus and replaced them with about 19 new articles and 10 new cases. Now, in total, we have about 23 articles and 33 cases in the current syllabus. As peculiar with Foundations, articles and cases are required study materials and a must-read for candidates. This explains the reason why it becomes imperative to have them updated regularly whenever the syllabus is updated.

Again, it's always a herculean task trying to summarize or abridge the required articles and cases. By my count, all the articles in the syllabus amount to approximately 588 pages, without the cases. Just two cases alone, *Reference re Code of Civil Procedure*, and *Reference to the Court of Appeal of Quebec* are 198 and 203 pages respectively. So, how do you summarize or abridge articles and cases of close to 2000 pages into a note of just about 250 pages without missing out on the important points?

Nevertheless, the purpose of abridging the articles is to save time, by extracting only the points I considered necessary for you to understand the topic, because I am aware that most NCA candidates combine work with study and are sorely pressed for time. So, the abridged versions of the articles help candidates to save time and are also helpful for revision purposes so that they do not need to go through lengthy articles in the exam hall while looking for important points to include in their answers.

The required articles are one of the reasons why many candidates find Foundations tough. Unfortunately, you have no other option but to read them as NCA examiners may set their exam questions, wholly or in part, from the articles and cases. And God help that candidate who failed/omitted to read them.

Aside the articles, this Note also summarized all of the required cases in the syllabus. The relevant facts of each case are summarized to help you understand what the case is all about. Then the most important decisions (ratios) are listed, as relevant to the topics under which they appear. With these summaries, you become familiar with the facts and ratio in the cases, which will assist you during the exam.

For first timers, I must warn that you may not find Foundations exam questions, especially on the articles, really straightforward. All you need, however, is to calm down and understand what the question wants

you to answer on an article. In some cases, your opinion in support or in opposition to that expressed in the article is what is needed. If in support, you may make references to the contents of the article and even cite them. (Please remember to avoid long quotes). If against, you may also cite other authorities to back your opinion. But always remember to relate every aspect of your answer to the examiner's question.

The same goes for the cases. Always ensure you read all the required cases. I will never fail to recall my experience when I wrote my Foundations exam some years ago. One of the very few cases I left out in my study had a whole 25-mark question assigned to it. Honestly, that question would have been a bonus for me if I had read the case, because it was so easy and straightforward. But alas, I did not read that case. And this cost me many days of traumatizing fear of failure. Thank God I answered the remaining 3 questions well; otherwise I would have failed the Foundations exam that year. So, the lesson here is not to leave anything to chance. Ensure you cover all the required articles and cases and that you understand them fully.

Mind you, like I stated in my previous notes, some articles are still so difficult to understand even in this paraphrased or compressed state. Some, you may need to read the full articles for you to get a better understanding of the contents; one of the reasons why the link to the full articles have been included. I also endeavored to include the page counts to each article to let you know what lies ahead of you in advance. Note too that I have omitted references, footnotes, citations, etc., in all of those articles that I abridged.

I have dealt with ALL the topics as listed in the current syllabus and treated each of them serially, for ease of reference to the syllabus. I followed the syllabus by chapter and by topic, and added necessary notes, culled from several sources, including the required texts. This explains why the Note has increased in size.

Similarly, the syllabus makes references to a couple of legislation. I have only listed such legislations and inserted the link as to where to find them. I decided not to add the full content of such legislations to the Note since they are easily obtainable online. Otherwise, this Note would have become unmanageably voluminous, defeating the whole purpose of a concise and easy read.

As I've always stated, you may need to read the required texts to have a wider understanding of all the topics, although many candidates have told me they relied solely on my notes to pass their exams. More importantly, do not forget to print this note for your exam. It makes it easier for references. That is when you will appreciate the tremendous help derivable from this note, just like it's done for several other candidates who found it handy and easy to use.

In all, I wish you the best of luck in your Foundations exam.

Manuel Akinshola

CHAPTER 1

BASIC THEORIES OF LAW

a. Positivism and Natural Law

Positivism and Natural laws are two opposing theories about what is law and its relation to justice or morality. They are independent of each other.

For Positivism, the view is that law is as made by man for man, not what it ought to be. Law is set (posited) or socially constructed and valid because they are enacted by legitimate authority and accepted by the society as such. In Legal Positivism, there is no connection between the validity of law and ethics or morals. Law is made by the lawmakers of a community and that is what law is, no more.

On the other hand, Natural Law views legal rules as valid because they are rooted in moral or natural law. The term Natural Law is derived from the belief that human morality comes from nature. To Natural Law, everything in nature has a purpose, including human beings. And any law that is good is moral, and any moral law is good. Natural law connotes that what constitutes 'right' and 'wrong' is the same for everyone, and as such this concept is expressed in morality. An example of Natural Law is that it is universally accepted that to kill someone is wrong, and to punish a man for killing is right and even necessary.

Therefore, the basic differences between positive law and natural law are as follows:

1) Positive law must be in written form. On the other hand, Natural laws are unwritten.
2) Positive law is made by a government and relies on the government for its powers. Conversely, Natural law is not made by people but nevertheless has moral power, notwithstanding whether or not the government recognizes it and transforms it into Positive law.
3) Legal Positivism is a fairly new concept compared to Natural Law theory which has its root in ancient theories.

The following two cases represent the natural and positive views of the legal theories:

Re Drummond Wren [1945] O.R. 778 (Ont. H.C.)

The Worker's Education Association (WEA) purchased a lot restricted by a covenant that it was "not to be sold to Jews or persons of objectionable nationality." The WEA applied to have the covenant declared invalid because the covenant was void as against policy, and was a display of representations indicating intent to discriminate on the basis of race or creed.

The court held that the covenant was void because it was offensive to public policy.

- **Re Noble and Wolf [1948]**

  Individual cottage lots contained a covenant that the lands shall not be sold or transferred to any person of the "Jewish, Hebrew, Semitic, Negro or colored race or blood." On appeal to the SCC, the appeal was allowed and the racially restrictive covenant struck down, though on technical grounds without any discussion on the public policy implications of restrictive covenants.

b. Feminist Perspectives on Law

Feminist theory of law seeks to understand the basis of gender inequality between men and women. It focuses on gender politics, power relations and sexuality. In summary, feminist theory focuses on promotion of women's rights and interests.

Feminist legal theory comes in two folds: one, feminist jurisprudence seeks to explain ways in which the law played a role in the subordination or domination of women's status. Two, it is dedicated to changing women's status through reworking the law and its approach to issues of gender equality.

Feminist legal theory focuses on analyzing the various elements of gender inequality. These include the issues of discrimination, objectification (especially sexual objectification), oppression, patriarchy, stereotyping, etc. It also examines women and men's social roles, experiences, interests, and feminist politics in a variety of human endeavors, which include anthropology and sociology, communication, media studies, psychoanalysis, home economics, literature, education and philosophy.

Contemporary Feminist Theory

However, in the last forty years or thereabouts, feminist theories have advanced critical social theory which have challenged liberal feminist theory and engendered note-worthy developments. Modern feminist theories have raised issues which liberal feminist theory have ignored or resisted in terms of equality in class, race, sexual orientation, citizenship and physical ability. Modern feminist theories have taken on issues like lesbianism which emphasizes the sexual emotional bonds between women that exert priority in their lives. Others are issues like gender violence, reproduction, work/family rights, and even issues of political and economic rights.

- **Edwards v AG Canada [1930]**

  This case was filed by a group of women known as The Famous Five, contending whether the words 'qualified persons' in s. 24 of the British North America (BNA) Act included a woman, and consequently whether women are eligible to be summoned to and become members of the Senate of Canada.

  At the SCC, the five Justices who heard the case decided that the words did not include women.

At the Privy Council (then the court of last resort for Canada), however, it was established that Canadian women were eligible to be appointed senators, and that more generally, Canadian women had the same rights as Canadian men with respect to positions of political power. Second, it established what came to be known as the "living tree doctrine", which is a doctrine of constitutional interpretation that says that a constitution is organic and must be read in a broad and liberal manner so as to adapt it to changing times.

- **R v Morgentaler [1988]**

  Here, Morgentaler and 2 other doctors were charged with procuring a miscarriage contrary to s. 251 (1) of the Criminal Code without approval from a committee set up to screen request for abortions.

  A majority of the SCC found the provision to offend the Charter.

  Wilson J. (the first woman to be appointed to the SCC) in particular emphasized how section 251 violated a woman's personal autonomy by preventing her from making decisions affecting her and her fetus' life. According to her, the women's decision to abort her fetus is one that is so profound on so many levels and goes beyond being a medical decision; it is a social and ethical one as well. However, when you remove the women's ability to make the decision and give it to a committee, it becomes a clear violation of their liberty and security of person. She argued that the decision to abort is primarily a moral one, and preventing her from doing so violates a woman's right to her conscientiously-held beliefs.

Feminists heralded her judgment as showing, for the first time, a true understanding of the plight of women under Canadian law.

c. Critical Legal Studies

Critical Legal Studies (CLS) is a theory of law which states that law is necessarily intertwined with social issues. It states particularly that law has inherent social biases in that law supports a power dynamic which favors the historically privileged and disadvantages the historically underprivileged. To critical legal scholars, dominant legal doctrines and conceptions perpetuate patterns of injustice and dominance by whites, men, the wealthy, the employers, and the heterosexuals. They argue that law claims to accord justified, determinate and controlled expressions of power while in the real sense, law fails one each of these dimensions.

Though largely contained within the United States, CLS was influenced to a great extent by European philosophers like Karl Marx, Max Weber, etc.

Thinkers of the CLS want to overturn hierarchical structures of modern society and believe that law is the tool to achieve this. Founders of CLS also borrowed from non-legal fields such as social theory, political philosophy, economics and literary theory.

- **R. v. R.D.S. [1997] 3 S.C.R. 484**

  A black youth was arrested, allegedly for assaulting a police officer while he was attempting to arrest another individual. The police officer claimed that the black youth ran into him with his bike attempting to free the culprit while the black youth, on the other hand, alleged that he stopped his bike to see what the police officer was doing, as a crowd had amassed at the scene.

  The Youth Court judge, Sparks, determined that the youth should be acquitted. The judge remarked in response to a rhetorical question by the Crown, that police were known to over-react particularly with non-white groups, and that would indicate a questionable state of mind.

  At the SCC, the issue was whether a reasonable apprehension of bias arose from comments made by the trial judge in providing her reasons for acquitting the accused. The Court noted thus:

  > "A high standard must be met before a finding of reasonable apprehension of bias can be made. Troubling as Judge Sparks' remarks may be, the Crown has not satisfied its onus to provide the cogent evidence needed to impugn the impartiality of Judge Sparks. Although her comments, viewed in isolation, were unfortunate and unnecessary, a reasonable, informed person, aware of all the circumstances, would not conclude that they gave rise to a reasonable apprehension of bias."

d. Law and Economics

Law and economics differ from other forms of legal theories in two major ways:

1) The theoretical analysis focuses on efficiency. This means that a legal situation is said to be efficient if a right is given to the party who would be willing to pay the most for it.
2) Law and economics places emphasis on incentives and people's responses to these incentives. As an example, law and economic takes the view that the purpose of payments in accident (tort) law is not really to compensate the injured party, but rather to provide an incentive for potential injurers to take efficient (cost-justified) precautions to avoid causing accidents. In this case, individuals are rational and respond to incentives. When penalties for an action increase, people will undertake less of that action.

Under law and economics, the general theory is that law is best viewed as a social tool that promotes economic efficiency, and that economic analysis and efficiency as an ideal can guide legal practice. Law and economics also consider how legislation should be used to improve market conditions in return.

- **Bhadauria v. Board of Governors of Seneca College of Applied Arts and Technology [1981]**

  The Plaintiff was turned down for a job despite her qualifications. She therefore claimed discrimination. The Ontario Human Rights Code contained provisions for complaints on discriminations but the Plaintiff wanted to have a separate action for a tort of discrimination so that she can bring a civil claim for damages under this route instead of the administrative regime of the Code.

  On appeal to the SCC, it was held that discrimination by way of repeated denial of an employment opportunity on the alleged ground of racial origin does not give rise to a common law tort, especially when *The Ontario Human Rights Code* provides for an administrative inquiry and remedial relief and allows a wide appeal to the Court on both law and fact. It was open to the plaintiff to invoke the procedures of the Code and her failure to do so did not entitle her to sue at common law or to found a right of action on alleged breach of the Code.

❖ *Required Readings:*

(1) R. v. Morris (2021) ONCA 680

This is a decision of the Ontario Court of Appeal. This appeal requires the court to consider how trial judges should take evidence of anti-Black racism into account on sentencing.

Morris was found guilty of unlawful possession of gun. The trial judge concluded that Morris should receive 15 months in prison and 18 months of probation but made deductions for Charter breaches and pre-trial custody. So the net sentence remaining was 1 day in prison plus 18 months of probation.

Crown seeks leave to appeal the sentence as manifestly unfit and because the trial judge made errors in his reasons particularly as regards his treatment of the evidence led by Mr. Morris concerning the impact of overt and institutional anti-Black racism. The Crown accepted that the decisions of the court that an offender's personal circumstances, including those tied to overt and institutional racism and its multi-faceted effects can be relevant in determining an appropriate sentence. The Crown also accepted that the courts must frankly acknowledge the reality of those overt and institutional racism in the criminal justice system and take them into account in sentencing. However, in this particular case, the Crown argued that the trial judge allowed his consideration of those relevant factors to overwhelm all other considerations for a fit sentence, as a result of which the sentence failed to reflect the seriousness of Morris' offences and thus falls below the range of appropriate sentences established by the courts and the SCC.

Counsel for Mr. Morris, however, submitted that the trial judge properly admitted, considered, and assessed the detailed and cogent evidence of longstanding overt and institutional systemic anti-Black racism and how that racism negatively affected Mr. Morris. While not equating the sentencing of Black offenders with the sentencing of Indigenous offenders, counsel, however, argued that the use of social context evidence in fashioning the appropriate sentence for indigenous offenders should also be a factor in determining appropriate sentences for black offenders.

Counsel observed that the trial judge had access to a wealth of information as to the pervasive impact of racism on Morris throughout his life and its relevance in determining the appropriate sentence for him.

There were several interveners in the case, who supported the judge's approach. But the Aboriginal Legal Services argued that the detailed sentencing formula in **R. v. Gladue** (see below) which was developed for indigenous offenders cannot be applied to non-indigenous offenders. This is because the Gladue jurisprudence was developed in compliance with the restraint principle set out in s. 718.2(e) of the Criminal Code (CC).

In its judgment, the Ontario Court of Appeal varied the sentence and imposed two years less a day, to be followed by the probation. In making its decision on the important questions of general application in sentencing, the court held thus:

1) The trial judge's task in sentencing is to impose a just sentence tailored to the individual offender and the specific offence in accordance with the principles and objectives laid out in Part XXIII of the *CC*.

2) Social context evidence relating to the offender's life experiences may be used where relevant to mitigate the offender's degree of responsibility for the offence and/or to assist in the blending of the principles and objectives of sentencing to achieve a sentence which best serves the purposes of sentencing as described in s. 718 of the CC.

3) The gravity or seriousness of an offence is determined by its normative wrongfulness and the harm posed or caused by that conduct in the circumstances in which the conduct occurred. Accordingly, unlike when assessing the offender's degree of personal responsibility, an offender's experience with anti-Black racism does not impact on the seriousness or gravity of the offence.

4) Courts may acquire relevant social context evidence through the proper application of judicial notice or as social context evidence describing the existence, causes and impact of anti-Black racism in Canadian society, and the specific effect of anti-Black racism on the offender.

5) The *Gladue* methodology does not apply to Black offenders. However, that jurisprudence can, in some respects, inform the approach to be taken when assessing the impact of anti-Black racism on sentencing.

(2) 8573123 Canada Inc. v. Keele Sheppard Plaza Inc. (2021)

8573123 Canada Inc. was the tenant and operator of Elias Restaurant who took assignment of a 5-year lease from the Keele Sheppard Plaza, the landlord, with option to renew for an additional five year term. The notice to exercise the option to renew must be given by registered mail at least six months before the expiry of the lease. The tenant did not provide the written notice and the landlord attempted to terminate the lease. The tenant then sought equitable relief from forfeiture pursuant to s. 98 of the Courts of Justice Act which empowers courts to grant "relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just".

The application judge found that the tenant had actually initiated the lease renewal process by attempting to contact the landlord before the expiry date but was "studiously avoided" because the landlord sought to replace the tenant with a more "suitable" business. The Judge noted that the real issue is that the "Tenant is a Black-owned and operated business and caters to an Afro-Caribbean community". The Judge referred to this as "stereotypical labeling" and granted the tenant's application for relief.

The Ontario Court of Appeal dismissed the landlord's appeal, holding that the Application Judge was entitled to conclude that "anti-Black racism was relevant to the Landlord's refusal to negotiate a renewal of the lease, regardless of whether the Landlord's actions were consciously motivated by racism."

(3) R. v. Gladue (1999)

The accused, an Aboriginal young mother, killed her husband because she suspected him of having an affair with her older sister. She pled guilty to the charge of manslaughter. In sentencing her, the judge took many factors into consideration: no previous criminal record aside a conviction for impaired driving; remorse after the incident; her medical condition which caused her to overreact to emotional situations, and attendance at alcohol abuse counseling. The judge decided that there were no special circumstances arising from her Aboriginal status to be taken into consideration and concluded that the appropriate sentence was three years' imprisonment because the offence was a very serious one. The Appellant appealed against her sentence.

Dismissing her appeal, the SCC held that considerations which should be taken into account by a judge sentencing an aboriginal offender are as follows:

1) Part XXIII of the *Criminal Code* codifies the fundamental purpose and principles of sentencing and the factors that should be considered by a judge in striving to determine a sentence that is fit for the offender and the offence. In that Part, s. 718.2(*e*) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders.

2) The provision is not simply a codification of existing jurisprudence. It is remedial in nature and is designed to ameliorate the serious problem of over-representation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force.

3) Section 718.2(e) must be read in the context of the rest of the factors referred to in that section and in light of all of Part XXIII. In determining a fit sentence, all principles and factors set out in that Part must be taken into consideration. Attention should be paid to the fact that Part XXIII, through certain provisions, has placed a new emphasis upon decreasing the use of incarceration.

4) Sentencing is an individual process and in each case the consideration must continue to be what is a fit sentence for this accused for this offence in this community. The effect of s. 718.2(*e*), however, is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders. Section 718.2(*e*) directs judges to undertake the sentencing of such offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider:

    a. the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

    b. the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

5) In order to undertake these considerations the sentencing judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the systemic or background factors and the appropriate sentencing procedures and sanctions, which in turn may come from representations of the relevant aboriginal community. The offender may waive the gathering of that information. The absence of alternative sentencing programs specific to an aboriginal community does not eliminate the ability of a sentencing judge to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved.

6) If there is no alternative to incarceration the length of the term must be carefully considered. The jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence. However, s. 718.2(*e*) is not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed. It is also unreasonable to assume that aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal.

(4) "Law and Economics"

By Michael Trebicock

This article discusses the aspect the economic implications of almost every aspect of the legal system. Before 1960, when discussing about law and economics, many North American scholars only focus on the "old law" of anti-trust, public utility regulation and maybe, tax policies. But from 1960, the study of law and economics had blossomed into what is now known as "the new law', comprising many aspects of the old law and more. This enhanced focus on law and economics has produced many scholars on various aspects of the subject which in turn has provoked intense controversy which has helped in reinvigorating competing perspectives on law.

Below is a review of the distinctive characteristics of the major forms of law and economic scholarship and the suggestions of the kinds of insights each form may contribute to legal scholarship:

(1) Styles of Analysis – under conditions of scarcity, economics assumes that individuals and communities will attempt to maximize their desired ends by doing the best they can with the limited resources they have. Where resources are less scarce, the people or community can achieve more goals. It is in the same way that legal systems structures the choices that are available to individuals and groups in a whole range of settings. And to help law and economics scholarship analyze the choices available under conditions of scarcity, they employ two different kinds of analysis, as follows:

   a. *Positive Analysis* – positive economic analyst of legal issues tend to ask the following questions: if a particular (legal) policy is adopted, what are the likely economic impacts on the allocative and distributive aspects, given the ways people are likely to respond to the particular incentives or disincentives. Here, understanding the incentives effects of a legal regime is a necessary prelude to formulating normative judgments as to the merits of the regime under analysis relative to alternative policies that might be employed to pursue the same or alternative social goals. In the opinion of many law and economics scholars, while law and economics is powerful in its own right as an organizing and sorting tool, it will ultimately be judged on the empirical validity of its propositions.

   b. The second type of analysis – conventionally referred to as *welfare economics* - would tend to ask the question: Is it likely that this particular transaction or this particular proposed policy or legal change will make individuals affected by it better off in terms of how they perceive their own welfare (not as some external party might judge that individual's welfare)? In this context, two concepts of efficiency are of central importance, viz:

      i. Pareto efficiency – which would ask this question of any transaction or policy or legal: will this transaction or change make somebody better off while making no one worse off?

ii. Kaldor-Hicks efficiency – which on the other hand would ask: would this collective decision (e.g. a change in legal rules) generate sufficient gains to the beneficiaries of the change that they could, hypothetically, compensate the losers from the change so as to render the latter fully indifferent to it but still have gains left over for themselves?

(2) Limitations of the Economic Perspective – although many economists prefer the notions of Pareto efficiency to Kaldor-Hicks efficiency, there are limitations to Pareto as follows:

a. One objection to the concept of Pareto efficiency, even in its own terms, is that concepts of voluntariness, complete information, and (absence of) externalities upon which it is predicated are extraordinarily vague and to an important extent indeterminate.

b. Furthermore, it is also argued that Pareto efficiency is wholly insensitive to the justice or injustice of the prior distribution of endowments that parties bring to an exchange, but rather takes these endowments as given in evaluating the welfare implications of a given exchange.

c. Some of these objections are also directed against the concept of Kaldor-Hicks efficiency: it accepts all existing preferences (at least those supported by dollars) as equally valid.

Applications of Economic Analysis of Law

The following are samples of areas in which law and economics scholars have been active and a sketch of the kinds of issues and orientations reflected in their work:

(1) The Economic Role of Property Rights – The definition and specification of property rights is primarily the function of the law of property and to a lesser extent the law of torts (nuisance). The protection of property rights is principally the function of both tort law (nuisance, trespass, conversion, detinue) and the criminal law. Providing for the transferability of property rights is principally the function of the law of contracts. In defining and specifying property rights, an economic perspective would seek definitions and specifications that internalize as fully as possible to a property rights holder all the costs and benefits associated with utilization of the property rights in question. Failure to internalize costs may create negative externalities leading to over-utilization of the resources in question from a social perspective.

(2) The Economic Functions of Contract Law – neo-classical economists' predilection in favor of private exchange or market process in the allocation of resources does not speak to the economic role of contract law. From an economic perspective, at least four major functions of contract law can be identified, as follows:

a. containing opportunism in non-simultaneous exchanges

b. reducing transaction costs

c. discouraging carelessness in the exchange process

d. identifying Pareto superior exchanges

(3) Tort Law – much of US law and economics scholarship has largely focused on the debate between strict liability and negligence and on the kinds of defenses (e.g. contributory negligence, comparative negligence, *volenti*), that ought to be recognized under any liability regime, as well as to rules governing quantum of damages and awarding of non-pecuniary damages. With respect to damage calculations more generally in torts cases, especially personal injury cases, economists are now quite widely used as expert witnesses in both the U.S. and Canada in estimating expected economic losses from an accident, and applying appropriate discount rates to reduce future economic losses to a present value lump sum. In particular, law and economics scholars have tended to argue that viewing tort law as a risk-spreading or social insurance mechanism as opposed to a deterrence or corrective justice mechanism in part explains the destabilization of liability insurance markets, especially in the products liability and medical malpractice fields.

(4) Corporate Law - Over the last decade, law and economics scholarship in the corporate law area has burgeoned and this area is perhaps currently the most active area in law and economics scholarship. A wide range of issues has attracted attention:

- Literature on the theory of the firm has attempted to explain why we observe some firms contracting-out the supply of inputs, and in other cases integrating their production within the firm.

- Transaction cost economics has also focused on alternative modes of organization of the firm, by evaluating how alternative modes of legal organization of productive activities may minimize various kinds of costs, such as information costs, monitoring costs, chiselling costs, and other forms of opportunism (often referred to as agency costs).

- Another body of scholarship has focused on the economic case for limited liability, and has raised some serious questions as to whether, in some circumstances, limited liability permits firms inefficiently to externalize various kinds of costs of their activities to third parties.

- Another debate has surrounded the regulation of takeovers, and what forms of defensive tactics incumbent management should be permitted to utilize and whether acquirers should be required to leave their bids open for some minimum period of time so that other bidders may have an opportunity to bid for the control of the target firm.

- Other issues that have attracted analysis pertain to the nature of corporate constitutions.

- Another emerging set of issues is the privatization of state-owned enterprises in Eastern Europe, where alternative models of the privatization process clearly have very different efficiency and distributional implications.

(5) Competition Law – While competition or antitrust law is often viewed as one of the 'old' areas of law and economic, economic analysis has had a major impact, over the last two decades, on the evolution of North American competition law. Two areas of competition law, in particular, have been fundamentally rethought as a result of new economic thinking:

a. the highly mechanistic structural rules that focus predominantly on market share or concentration levels which dominated U.S. merger law through the 1950's and 1960's (reflected in notorious decisions like *U.S. v. Von's Grocery Co*.) have now largely been rejected in favour of a more dynamic and less static framework of analysis, that assigns central significance to factors such as barriers to entry and potential competition, including competition from foreign suppliers.

b. vertical restraints, such as exclusive dealing arrangements, tying agreements, and resale price maintenance, which previous economic thinking and legal doctrine viewed, with few exceptions, as anti-competitive.

The current economic thinking, reflected to an increasing extent in changes in legal doctrine, now views many of these arrangements as presumptively efficient and benign.

(6) International Trade Law - International trade law has attracted increasing attention from law and economics scholars, with scholarship focusing on the rationales for and design of trade remedy law regimes, such as anti-dumping laws, countervailing duty laws, and safeguards regimes. The bulk of the scholarship has tended to converge on the view that anti-dumping regimes have no coherent economic rationale and that countervailing duty regimes have little more economic justification. A burgeoning political discourse has developed, particularly in the U.S., over fair trade rather than free trade, and the alleged virtues of level playing fields under threat of unilateral sanctions. Another issue that has engaged attention relates to the rise of regional trading blocs and their relationship with the GATT Multilateral System.

(7) Criminal Law - While the criminal law area has attracted less attention from law and economics scholars than many others, some important work has been done, especially with respect to the determination of the optimal penalty for various kinds of crimes, especially white-collar crimes such as price fixing and securities fraud. Most of the empirical literature finds here that conventional criminal sanctions have quite modest deterrence effective, while exposure limiting regimes appear to be much more effective.

(8) Family law - In family law, various economic theories of marriage have been advanced, some focusing on the gains from division of labour and specialization, others on marriage law as a signaling device as to what kinds of relationships prospective marriage partners are seeking. In the light of these theories, assessments have been made of the likely impact of no-fault divorce reform on propensities to marry and behaviour during the marital relationship.

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(9) Access to Justice – A good deal of law and economics scholarship has addressed issues such as:

a. reasons for court delay and the modification of incentive structures for litigants and their lawyers to reduce these delays;

b. the case for contingent fees as a means of financing litigation;

c. the role of class actions as a way of achieving economies of scale in litigation;

d. the role of lawyers' advertising both in alerting citizens to the need for legal services in various contexts and in terms of competing down fee levels;

e. the role of para-professionals in enhancing the efficient provision of legal services and possible forms of firm organization that provide para-professionals with an ownership stake in law firms;

f. the role of pre-paid legal service plans.

(10) Immigration Law - Recent law and economics scholarship has focused on various aspects of immigration law that determine the total intake of immigrants and the composition of the intake in terms of whether the restrictions typically involved have any efficiency justifications for them.

Many other areas that have also attracted attention include: internal barriers to trade in federal systems; rationales for prohibiting private acts of discrimination; the rules governing commercial transactions, such as sales transactions and bankruptcy law; intellectual property and the appropriate design of patent, copyright, and trademark rules; and the organization of law firms.

III. Conclusion

Let me conclude by acknowledging that:

- any one-value view of the world is likely to prove, at the limit, self-defeating. It reflects a highly impoverished view of the world for economists to claim that they are only interested in maximizing the total value of social resources, without being concerned about how gains in the value of social resources are to be distributed and whether these gains are in fact making the lives of individuals better, (and whose lives), or while ignoring the impact of economic change on the lives of individuals or on the integrity or viability of long-standing communities.

- On the other hand, theorists committed only to concepts of distributive justice who proceed in their analysis by inviting us to assume a given stock of wealth, or a given increase in the stock of wealth, and then asking what a just distribution of that wealth might entail are largely engaging in idle chatter as long as the wealth creation function is simply assumed. Creating wealth is a necessary pre-condition to distributing it.
- Similarly, communitarians who stress values of solidarity and interconnectedness and discount values of individual autonomy and freedom risk pushing this perspective to an extreme where communitarian values become exclusionary, authoritarian, or repressive. In shaping a more congenial world, it is hard to imagine how economics could not play a prominent, albeit non-exclusive, role.

(Full article of 18 pages available at:
https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1680&context=dlj)

5) "Rethinking Baker: A Critical Race Feminist Theory of Disability"

By Alyssa Clutterbuck

Introduction

Baker v. Canada is widely regarded as a leading case in administrative law establishing a new standard for the review of administrative discretion and the duty of procedural fairness. However, many analyses of Baker erase the multiple sources of vulnerability that Ms. Mavis Baker, the appellant, faced. Ms. Baker was a Black woman immigrant from Jamaica, living in poverty as a single mother, and suffering from a mental illness. Even though her appeal was successful, her social position was largely absent from the decision of the Supreme Court of Canada ("SCC"). Understanding this case from a Critical Race Feminist perspective demonstrates the ways that even successful litigation can fail to unpack how administrative systems are violent towards people at the margins.

Ms. Baker's case was a challenge to the ruling of an Immigration Officer who denied her Humanitarian and Compassionate considerations ("H&C") application. Ms. Baker left her four adult children in her home country and entered Canada on a visitor's visa in 1981. While living in Canada, she had four children. After the birth of her final child in 1992, Ms. Baker began suffering from paranoid schizophrenia as a result of postpartum depression. She applied for welfare and underwent treatment as an in-patient at the Queen Street Mental Health Centre in Toronto for approximately one year.

Ms. Baker was without legal status and subject to an outstanding deportation order, which was issued in 1982. She received another deportation order in December 1992 after it was determined that she had worked illegally in Canada and overstayed her visitor's visa. In 1993, Ms. Baker applied for an exemption from the requirement to apply for permanent residency from outside Canada, based upon H&C considerations, pursuant to section 114(2) of what is now the Immigration and Refugee Protection Act. The application included a letter from the Children's Aid

Society, and a letter from her mental health professional, Dr. Collins. The documentation provided that although she was still experiencing psychiatric problems, she was making progress. It also stated that her deportation might trigger another bout of mental illness since treatment might not be available in Jamaica.

In 1994, Ms. Baker was denied permanent residency on H&C grounds without explanation in the notice sent to her. Only after persistent requests were the application notes (taken by Officer George Lorenz, and which formed the basis of Chief of Removals Officer Caden's decision) made available to Ms. Baker's publicly funded counsel.

Mr. Lorenz's notes, in part, stated that Ms. Baker should be denied state protection from deportation. Officer Lorenz's notes, written in his capacity as an executive member of the Canadian government, are now renowned as a demonstration of the improper use of discretion and decision-making authority in administrative law and immigration law, with the SCC's decision cited as a leading authority. Mr. Lorenz relied on stereotypes of Black women as hypersexual welfare queens, whose childrearing is in pursuit of greater social welfare services, draining the public coffers funded by responsible taxpayers.

The SCC's ruling that Ms. Baker's rights to procedural and substantive fairness were violated made clear pronouncements on the scope of procedural fairness, the duty to give reasons for dismissing an H&C application, and the requirements of decision makers to consider the best interests of children.

Despite a favorable ruling for Ms. Baker, the Court did not engage with the multiple justiciable vulnerabilities that afflicted Ms. Baker. Legal advocates and scholars have enunciated the ways the Court failed to address the role of racism in the immigration system and in the treatment of Ms. Baker. However, to date, almost no studies have examined the ways that Ms. Baker's disability contributed to her second deportation order. The circumstances of Ms. Baker's maltreatment by Canada's immigration system require an analysis of the multiple intersecting sources of vulnerability and the ways in which her life circumstances ("a paranoid schizophrenic […] on welfare") were used against her.

This essay forwards a Critical Race Feminist theory of disability. Critical Race Feminism ("CRF") illuminates the ways in which anti-discrimination and human rights doctrines and laws impact women of colour. Thus far, the experiences of women of colour with disabilities are largely absent in Critical Race Feminist perspectives. I contend that for women of colour the experience of disability is both compounded by the result of racist-sexist treatment, a multidimensional experience of subordination that makes their experiences of disability unique.

Ableism can be racist and sexist; sexism can be racist and ableist; racism can be ableist and sexist. I advance a theory of disability that is grounded in CRF and centres disability in women of colour's experiences with law and legal systems, experiences beyond the legal imagination.

In Part I, I demonstrate the inattention to disability in existing Critical Race Feminist perspectives. I show how antidiscrimination and human rights law remain ill-equipped to confront the contextual and intersecting realities of disabled women of colour.

In Part II, I apply a Critical Race Feminist theory of disability to consider the elements of Baker that are missing in the SCC judgment. I use Dean Spade's notion of administrative violence to analyze Ms. Baker's treatment and the

multiple vulnerabilities that positioned her as an undeserving member of Canadian society and a target for immigration officials.

PART I

A. Disability: The Margins of Critical Race Feminism

CRF accounts for and addresses women of colour's relation to the law. Emerging most solidly in the last 15 years, CRF followed a similar trajectory as Critical Race Theory ("CRT"), which emerged as a departure from Critical Legal Studies ("CLS"). CLS is an intervention into mainstream legal theory that attempts to challenge the status quo of legal academia and assesses how the law and the legal profession can be oriented toward social change.

As a legal intervention, CRF considers how race, gender, class, sexuality, and imperialism interact within a system of white male patriarchy and racist oppression to make the experiences of women of colour in law and society distinct.

- CRF rejects contentions in CRT that assume women of colour's experiences are in similitude to those of men of colour. CRF critiques have enunciated intra-racial/intra-gendered distinctions, refusing to advance analyses of race or gender to the exclusion of other bases of discrimination.
- CRF also rejects the emphasis on gender oppression within a system of patriarchy without examining the role of racism and classism in Feminist Legal Theory.
- It challenges the imperialism of representing the experiences of white, upper middle class, and well-educated women as the experiences of all women. Accordingly, CRF is highly critical of feminist claims that there is a universal female experience. Anti essentialist theorizing unpacks this notion that "a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.

CRF has been central to exposing the legal realities for women of colour, unearthing law's limited ability to understand how discrimination and oppression impact their lives. However, few CRF studies have seriously examined the role of disability in women of colour's social and legal disadvantages

CRF scholars Nimala Erevelles and Andrea Minear have pointed out the inattention to disability in their analysis of Patricia Williams' description of the murder of Eleanor Bumpurs in "Spirit Murdering the Messenger: The Discourse of Finger Pointing as the Law's Response to Racism." Ms. Bumpurs' death points to an important reality. The racialized and gendered experience of disability can have disastrous consequences for women of colour when they come into contact with legal authorities. Williams' inattention to Ms. Bumpurs' disability in her discussion leaves out a crucial factor that led to the fatal violence inflicted against her.

Michele Goodwin's essay, "Gender, Race and Mental Illness," is a rare work that centers disability within a Critical Race Feminist framework. Goodwin discusses the case of Wanda Jean Allen, a Black, queer, poor, and intellectually disabled woman who was the first Black woman since 1954 to be executed in the United States and the first Black woman to be executed in the state of Oklahoma since 1903. Goodwin's attention to the complicated web of identities and experiences in Wanda Jean Allen's life that led to her conviction and execution call for a deconstruction of "the essential Black woman" in Black feminist and Critical Race Feminist thinking: the tendency to essentialize a Black woman's experiences by privileging a discussion of race and gender without attendant intersections of class, sexuality, and disability. Goodwin's attention to the complicated web of identities and experiences in Wanda Jean Allen's life that led to her conviction and execution call for a deconstruction of "the essential Black woman" in Black feminist and Critical Race Feminist thinking: the tendency to essentialize a Black woman's experiences by privileging a discussion of race and gender without attendant intersections of class, sexuality, and disability.

Beth Ribet has advanced a theory of disability within a CRT framework that provides a key set of entry points for a CRF perspective of disability. Ribet argues that tactics deployed by people of colour to overcome systemic disadvantage can produce disabilities. She describes one common tactic as hyper-performance: over-performing as a means to rebut the presumption of incompetence or racial deficit.

Despite the limited accounts of race, gender, and disability within CRF perspectives, empirical research suggests that disabled people with multiple barriers face increased vulnerabilities in North America.

B. Intersectionalizing Disability

Disabled women of colour's experiences of discrimination pose unique challenges to law. The multidimensionality of their subordination is best understood through the lens of intersectionality, a theory introduced by Kimberley Crenshaw that illuminates the multiple and simultaneous sites of subordination and the limits of feminist, antiracist, and other critical discourses.

The theory has provided grounds for scholarly writing on women of colour, queer and trans people of colour, and groups with multiple and simultaneous experiences of oppression and structural marginalization. Crenshaw developed the notion of intersectionality in her early writings, where she focused on the experiences of Black women plaintiffs in race and sex discrimination cases in the United States. She demonstrated the incongruity of Black women's multidimensional experiences within dominant "single-axis" frameworks in anti-discrimination law that forced plaintiffs to prove one ground of discrimination.

Nitya Duclos applied Crenshaw's analysis to race and sex discrimination cases reported to Canadian human rights tribunals between 1980 and 1989 in an effort to reveal how they responded to discrimination claims brought by women of colour. She found that the reported cases often made it impossible to know if women of colour were involved in disputes. Even when it was clear, the cases were almost invariably treated as if the claimants were "raceless women or genderless racial minorities." She points out that as a complainant

departs from the norm of being a cis, white, able-bodied man, it is less likely their complaint will be held to constitute discrimination in law.

C. Intersectional Disability and the Limits of Law

Intersectional perspectives reveal the ways in which law and legal prohibitions against discrimination are incongruent with the lived experiences of people with multiple vulnerabilities. CRF, CRT and Feminist Legal Theory have pointed out the shortcomings of law and the limits of anti-discrimination and human rights doctrine. These doctrines understand discrimination in such limited way that it becomes exceedingly difficult to prove cases of discrimination and human rights claims. As formal equality frameworks, they fail to understand the historically rooted nature of oppression, discrimination, harassment, and the host of social and economic disadvantages that are distributed along systems of oppression.

Despite decades of criticism, single-axis frameworks and enumerated and/or analogous grounds analyses remain the prevailing approach to human rights statutes and antidiscrimination law. In Canada, section 15 of the Canadian Charter of Rights and Freedoms (the "Charter") was initially drafted with a finite list of enumerated grounds. The final version qualifies those grounds as "in particular," thereby opening the door for a broader application of section 15 when analogous grounds of discrimination are established. The development of section 15 jurisprudence has been unpredictable and the SCC has itself acknowledged that this provision is the most difficult to apply and yields variable decisions.

The narrow and individualized conception of harm, discrimination, harassment, and violence in anti-discrimination and human rights doctrine shapes even successful outcomes. Claimants with 'winnable' cases who have success are celebrated and these victories are touted as watershed moments that will engender widespread social change. However, as Dean Spade points out, in a sense these moments help naturalize the status quo by amplifying one form of legally recognizable and prohibited discrimination. Even when plaintiffs are successful, the core of their mistreatment is often not the subject of the successful judgment; their cases are won on legal technicalities, or courts rule according to procedural matters and ignore the issues of social inequality that were the basis of the case. Law, therefore, does not provide a totalizing remedy for racism, sexism, and/or ableism. It addresses only legally prohibited discrimination—observable and relatively discrete acts of individuals, narrow acts of "objective discrimination.

In Part II of this essay, I return to Baker, a case I contend is a paradigmatic example of the multiple intersecting barriers disabled women of colour encounter. Though some have explored issues of race and gender at play in Baker, little attention has been placed on the role of disability. I argue that Baker is an apt illustration of the inability of courts to recognize how people with intersecting vulnerabilities are targeted and attacked by administrative systems. I apply Spade's notion of administrative violence to understand the violence committed against Ms. Baker by Canada's immigration system and the epistemic violence of legal approaches that privilege procedural questions and ignore the centrality of race, gender, and disability as justiciable issues.