NEW BRUNSWICK WOMEN'S RIGHTS AND THE LEGAL IMAGINATION

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Introductory Poetics

On Passamaquoddy Bay, there is a beach full of dull crags of maroon siltstone, shale, and ancient volcanics. Walking there suits me because I rarely encounter anyone. As I hunt for sea glass, I walk the same path, probably dozens of times by now. And yet, I still encounter new pieces. It might be because what I thought was the same path was slightly different. It might be because the sea in the tumult of the surf churns up new glass, not revealing it until I come back again. Or it might be because the sun hit it at a different angle or that, either coming or going, I view the same spot slightly differently.

Sometimes I wonder why I hunger for it like I do. I have jars and vases and glasses filled with sea glass, even the rare hues of cobalt and lavender. When I pick one up, it feels like a gift and sometimes a talisman. But it only becomes lost in the hundreds of pieces when I drop it with the others. It's not about the having but the getting - losing oneself when searching for something else.

Still, something doesn't sit right with me, that I should get to keep it. Where it once moved with water and kelp, rubbed by sand, now it's captured and contained. Part crafted by humans, part by sea, it lives in a liminal space where laws do not exist. Nothing protects it or recognizes it. Patricia Williams presents a paradox: to make rights more meaningful, they can't be hoarded. They should be given away, to trees, to rivers, to rocks. We must "wash away the shrouds of inanimate-object status"[1] for everything, so that ascribing such status to human beings ever again – women, slaves – becomes ever more unthinkable. Why, then, are you imagining and then dismissing as ridiculous the faint voice asking, "what about the sea glass, then?"

Rights and New Brunswick Women

I became aware of notable cases on New Brunswick women's rights over a long period of time, from my law school studies (*In re Mabel French*)[2] to the recent controversy over the UNB Faculty of Law's former name, Ludlow Hall (Nancy's case).[3] It was not until now that I analyzed them together, forming a case study of New Brunswick women's rights adjudication. Unlike sea glass, when these cases are examined together, they remain distinctive. Nevertheless, they contain remarkable similarities. In all the cases, the applicable law was ambiguous and the outcomes far from certain. Additionally, the contrary outcomes, even in the early cases, cannot simply be dismissed as "products of their time." That woman (particularly, Black and Indigenous women) could have legal entitlement to the rights claimed was not unthinkable – obviously not to the claimants and often not to society at large.[4]

So, why weren't they decided differently? I agree with other feminist theorists that the structure of legal method (e.g., its emphasis on judicial separation and illusive "neutrality") and the reification of legal precedent are impediments to legal change for women and other subordinated groups.[5] And of course, being a paradigm that is framed for and by dominant groups, law is aligned with systems of power, such as patriarchy, colonialism, and white supremacy.[6] For instance, courts have refrained from questioning the "naturalness" of social roles as ascribed by philosophy, theology, or sociology, and accepted them as self-evident.[7] Accordingly, laws that are considered to "merely" reflect this difference

have been deemed unassailable and non-discriminatory. As feminist theorists have demonstrated, however, the social process of "naturalizing" certain configurations (like women's place in the domestic sphere) and judicial decision-making rewarding or penalizing subjects based on their conformity to gendered roles mutually reinforce one another and are not distinct phenomenon.[8] There is no such thing as a law "merely" reflecting social phenomenon, as law is a human technology.

However, I wish to analyze the effect of law on the judicial imagination rather than the impact of legal method on the interpretation of rights: a complementary but different undertaking. Inspired by an article by Jack Balkin, I maintain that these decisions demonstrate a failure of judicial imagination. While the influence of sexism of some male judges cannot be disregarded, this is not a full explanation:

> The problem was not the rogue judge [who could inject ideology into decision-making] but the sincere judge. This judge was always bound, not merely by doctrine but also by the limits of his or her political and legal imagination. Social construction caused individuals to understand the world in ways that made it difficult for them to envision alternative ways of ordering law and society.[9]

The outcomes to the New Brunswick women's cases may be explained, at least in part, by the manner in which law constrains creativity and excludes the "non-legal": i.e., the stuff and substance of the humanities, namely, affect and emotions like empathy or generosity; culture; relationship; politics.[10] Accordingly, the legal imagination impedes its holders from being open to ways law might support different, more equitable forms of being, living, and relating to others. In the past, issues such as domestic violence or marital rape have been framed by judicial decisions or legislation as "family matters" and not matters for legal adjudication.[11] More recently, courts have dismissed gendered constitutional claims on the basis that they are "political" or policy decisions, or otherwise not within their competence to adjudicate.[12] In 2021, the New Brunswick government attempted to use this conceit, albeit unsuccessfully, to encourage the provincial Court of Queen's Bench to dismiss a constitutional case challenging funding restrictions on abortions in Regulation 84-20, despite the fact the claim was framed very conventionally and supported by binding precedent.[13]

I argue that those whose thinking has been transformed by the "legal imagination" are trained to stop emancipatory ideas before they even reach the stage of conscious analysis that calls for using conventional legal tools.[14] In the name of objectivity and neutrality, the legal imagination discourages interpreters and decision-makers from adopting any positionality, which necessarily excludes attempting to see the world through the eyes of another who is dissatisfied with the way it is. Thus, the decisions of judges so affected facilitate retrenchment of the status quo or at best, only nibble around its edges.

While law is informed by the aforementioned systems of power, its own logics and boundaries are not completely defined by them. This is why the legal imagination is capable of expansion and legal tools may be applied in ways that do not necessarily serve their original masters. Marginalized groups may assist in the expansion of the legal imagination by undermining their legal construction and reasserting their subjectivity. In the last few decades, in large part due to the work of the LGBTQ+ rights movement, we have seen courts move from uncritically accepting the common law definition of marriage as "one man, one woman" as non-discriminatory (e.g., because a lesbian and a gay man could, in theory, marry one another), to recognizing that a "reasonable person" would find it discriminates on the basis of sexual orientation.[15] New Brunswick women's rights cases reveal evidence of this "self

help," and in cases where women were ultimately successful, the courts show evidence of empathetic adjudication and the expansion of the legal imagination.

Thus, I started this article very differently than the other articles I have written on women's rights, most of which are centred around an analysis of the law. I do not simply want to engage in a doctrinal critique, but rather suggest a tool for the expansion of the legal imagination so that future women's rights cases are not similarly impeded. And one potential tool for the judiciary I wish to focus on is poetry. In the process of writing, I am hoping to bring together parts of myself that I have held at a distance, the poet (a title I have nearly abandoned for almost thirty years) and the legal scholar.[16] Given New Brunswick's stature as the "birthplace of English Canadian poetry," it seems appropriate that I am making this argument in the *Journal of New Brunswick Studies*.[17]

Judges have a duty to adjudicate objectively. However, objectivity in the traditional sense has meant turning away from particularities of sex, race, class, disability, and other identity characteristics,[18] which in practice resulted in judges from privileged groups being absolved from having to consider any other perspectives. As movements like "Black Lives Matter" have shown, real objectivity means understanding and accepting the humanity of everyone, unmarred by historical oppressions that the law is built upon.

My proposal builds upon a number of existing movements in legal scholarship. There is a burgeoning law and literature movement, as well as "utopian studies" that reimagine the state-citizen relationship in law.[19] As well, legal scholars are theorizing the impact of emotion in legal interpretation and adjudication.[20] However, not much has been written recently on the employment of aesthetics as a means of expanding the legal imagination.[21] Openness to thinking in aesthetic terms may assist in revealing deeper truths than is possible with only the ascetic rules of legal analysis. We know this instinctively – that literal expression and the real sometimes fail to fully capture more profound truths. Art provides a means by which to see through the eyes of others and to understand others' inner worlds.

I am not necessarily proposing that aesthetics like poetry should be considered as a source of law (with the exception of Indigenous rights, where stories, songs, beads, and relations with the land *are* law).[22] Rather, my argument is that judges should consider poetry as a source to develop creative legal reasoning and overcome the strictures of the legal imagination. In tort law, judges are asked to envision what a person might have become if not for an accident; in contract law, what a party might have had but for a breach. Yet, judges adjudicate claims involving the section 15 right to equality or section 7 "fundamental justice" under the *Canadian Charter of Rights* without being able or required to envision what a more just world looks like, not simply involving "equal rights but…a new kind of being" entirely.[23]

The First Cases – Women's Humanity

Nancy's Case

In 1799, two Black women slaves challenged the legality of slavery in New Brunswick, with the case of "Nancy" (her last name is unknown), reaching the New Brunswick Supreme Court. The case followed several years of legal uncertainty about the status of slavery, slaves, and indentured servants. Over one thousand Black men and women came to New Brunswick after the American Revolution, half were free, and half were either indentured or enslaved by white Loyalists.[24] In 1786, Nancy had

attempted to escape from her owner who brought her to Fredericton from Maryland in 1785. Her *pro bono* counsel (one of whom later became New Brunswick's Chief Justice, Ward Chipman), brought a writ of *habeas corpus* seeking her release.[25] The panel of four judges were split on the issue of whether slavery was legal. Each side took opposing positions based on the significance they attributed to the absence of any statute nor any UK common law decision specifically ruling on its general illegality. Due to the deadlock, the judges defaulted to the status quo: Nancy was returned to the slaveholder.

Nancy as a figure in the accounts of her case is mute. We know of the "chivalrous" arguments of counsel against slavery.[26] However, she dissolves in an abstraction of humanity, which is to say, a mere object of legal argument.[27] There is no record about whether she testified at trial, or if she played any role. Indeed, there is little documentation about her at all.[28] But the end of slavery for Nancy[29] and for others in New Brunswick generally belied this mute, "object" status. Historian William Spray reports that slavery died out in New Brunswick, in part because frequent escapes by slaves depreciated their value as commodities. In other words, Nancy's community took for themselves what the law couldn't imagine, thereby paradoxically making themselves over as subjects in the process of being objectified. As Jacques Ranciere might characterize it, they "acted as subjects that did not have the rights that they had and had the rights that they had not…putting two worlds in one and the same world."[30]

Mabel French

More than 100 years after Nancy's case, Mabel French sought entry to the New Brunswick bar. Given the New Brunswick Barristers' Society's "confusion" about whether it was able to grant her admission, it referred the matter to the New Brunswick Supreme Court.[31] Chief Justice Tuck had no difficulty extending English common law precedents barring women in public office, to find French was ineligible to become a lawyer: "If I dare to express my own views I would say that I have no sympathy with the opinion that women should in all branches of life come in competition with men." Nevertheless, *In re French* stood less than a year before it was rendered obsolete by *An Act to remove the disability of women, so far as relates to the Study and Practice of the Law*,[32] helped by French's political and professional connections.

Modern Cases

Sandra Lovelace

Fast forward to the 1970s. Sandra Lovelace, a Wolastoqiyik (Maliseet) member of the Tobique First Nation, lost her Indian status after marrying a non-status man, pursuant to s.12(1)(b) of the *Indian Act*. She was denied housing on her reserve after her divorce, forcing her and her children to live in a tent.[33] Her legal options were limited: the Supreme Court in *Lavell v Canada (Attorney General)*[34] held the law was consistent with "equality before the law" under the *Bill of Rights* – essentially because all status Indian women were treated equally poorly.

In light of *Lavell*, Sandra Lovelace took her case to the UN Human Rights Committee, and was successful. In its 1981 decision, the Committee remarked on her continuing attachment to Tobique and because she still "belonged" to her community, the "marrying out" provisions violated her right to her culture under article 27 of the *Covenant on Civil and Political Rights*.[35] The Canadian government subsequently repealed the most blatantly discriminatory provisions against Indigenous women in 1985.

Jeannine Godin

In November 1993, Jeannine Godin was a twenty-nine year old mother on social assistance when her three young children were apprehended by New Brunswick Ministry of Health and Social Services from her home in Keswick, a small, rural community outside of Fredericton.[36] After one hearing extending the Ministry's custody, she appeared before the court again in December 1994 assisted by legal aid duty counsel, Thomas Christie. New Brunswick Legal Aid provided funding only for a fifteen-minute consultation by duty counsel if the Ministry was not seeking a permanent guardianship order. Even the children had counsel, appointed by direction of the trial judge. Christie was a new lawyer, at the bar only three years when he took on Godin's case. Christie initially relied on the visual image presented by Godin in court to illustrate the impact of her lack of representation: "I didn't know much about section 7 [of the *Charter* at that point]…I wanted someone to say that the picture of a woman on her own before a stable of government lawyers – you tell me that's fair."[37]

Justice Myrna Athey, hearing the application, suggested that the young lawyer make a motion for government funded representation. Encouraged to do so, he came up with the constitutional argument that lack of legal aid for child apprehension hearings violated Godin's liberty and personal security, contrary to *Charter* section 7, "off the top of [his] head."[38] The application was unsuccessful, though Christie continued his participation *pro bono*. On conclusion of the three-day hearing, the judge extended the custody order.

The Ministry ultimately returned Godin's children to her in the spring of 1995.[39] Christie nevertheless proceeded with the constitutional challenge to the lack of funding through the appellate levels: "I thought, 'What do I have to lose?'"[40] Once again, the law applicable to Godin was unsettled. Section 7 contains an internal limitation that deprivations of liberty and security of the person must be "in accordance with fundamental justice." The Supreme Court had ruled previously that fundamental justice required fairness in process and in substance if the state was going to intrude on these rights; however, no general right to legal aid had been recognized under that section or in the criminal context under subsection 10(b) (guaranteeing the right "to retain and instruct counsel without delay" upon arrest and detention).[41] As well, despite some encouraging dicta from members of the Supreme Court, it had not ruled definitively that the right to care and nurture children was protected by section 7.[42]

The New Brunswick Court of Appeal upheld the trial judge in a brief judgment. Chief Justice William Hoyt (together with two other judges) found that the matter was non-legal: it involved the "legislative policy making function," and to recognize a parent's right to state funded counsel would "unduly enlarge the scope of s.7."[43] The Chief Justice *et al* found "somewhat reluctantly" that it was only the legislature, and not the court, who had the power to rectify any unfairness.[44] Justice Bastarache dissented, finding that there was "no fixed definition of fundamental justice," no authoritative precedents and disagreed that the matter was outside the *Charter*'s scope simply because the remedy might require the government to expend funds.[45]

Despite the fact that Godin's name was anonymized in the court decisions to maintain her privacy, she agreed to be interviewed and photographed by *Maclean's* magazine prior to the Supreme Court of Canada hearing as part of its coverage, which put names and faces to the problem of access to justice in Canada.[46] The Court essentially agreed with Bastarache J., that the proceedings had the same impact on a parent as a person facing a criminal charge, and thus imported a test from the criminal law to determine whether state-appointed counsel was required in child apprehension proceedings under s.7:

"The more serious and complex the proceedings, the more likely it will be that the parent will need to possess exceptional capacities for there to be a fair hearing if the parent is unrepresented."[47] The majority decision of Lamer C.J. reveals an empathetic identification with the claimant, indicating that the "interests at stake in the custody hearing are unquestionably of the highest order. Few state actions can have a more profound effect on the lives of both the parent and child."[48]

The concurring decision of L'Heureux-Dubé J. underscored that the Court was attempting to "see through the eyes of the claimant" in its decision. She interpreted section 7 through the lens of section 15's equality guarantee, which the Justice stated meant paying attention to the gendered particularities of the claimant: "women, and especially single mothers, are disproportionately and particularly affected by child protection proceedings…Issues involving parents who are poor necessarily disproportionately affect women."[49]

These cases involved law that was ambiguous, with cogent arguments made by parties on both sides. However, where the claimant was successful, the decision-makers were able to stretch themselves to imagine her circumstances and make creative analogies, whereas in the failed cases the courts distanced themselves, undertook abstracted legal analyses, exaggerated the effect of dubious precedents and discounted relevant ones, and perceived legal issues as non-legal. The cases also show that despite the resistance of courts to their legal claims, these women engaged in effective, subversive strategies that communicated their subjectivity and personhood and helped them gain back some of what had been taken from them.

A Concrete Example of Regulation 84-20: Back to the Seaglass

With the above cases, I have no way of knowing what informed the judges' imagination: my thesis does not depend on showing, for instance, that the judges in Nancy's case were "aesthetically deprived" whereas sitting members of the Supreme Court of Canada in *G.(J)* were steeped in poetry. For whatever reason, however, judges in the cases where women were successful appeared willing to exercise empathy by looking through another's eyes and imagine a different world that mends some of the tears in our social fabric.[50] Ultimately, the wisdom of judges presiding over these successful cases was borne out. Therefore, how judges might cultivate true objectivity and broaden their legal imagination, using tools such as poetry, is worth exploring. To illustrate, I will use the current women's rights litigation in New Brunswick challenging Regulation 84-20.

In 2021, the Canadian Civil Liberties Association (CCLA) initiated a constitutional challenge against the New Brunswick government claiming that Regulation 84-20, which denies Medicare funding for abortions performed outside hospitals, violated the *Charter*.[51] Only three hospitals in New Brunswick perform abortions (two in Moncton and one in Bathurst). Consequently, large areas of the province, including Fredericton, have no local access to abortion services. Clinic 554 in Fredericton has provided abortion services for a fee (albeit subsidizing those who cannot pay); however, it is winding down its operations based in large part because of the lack of funding.[52] The CCLA's statement of claim asserts that Regulation 84-20 discriminates against women, girls, and transgendered persons by imposing significant barriers on a gendered health care service - abortion - requiring them to travel long distances with the accompanying cost, arrange child care and time from work, and rely on family or other personal support. It also states that these barriers and resulting delays interfere with bodily integrity and causes serious psychological stress in a manner that is contrary to section 7.

In 1988, the Supreme Court in *R v Morgentaler*[53] ruled unconstitutional section 251 of the *Criminal Code*, prohibiting abortions unless women received approval from a hospital-based Therapeutic Abortion Committee, in an unwieldy process that resulted in delay, along with attendant additional stress and physical health risks, without any health benefit. The majority found the criminal prohibition contravened *Charter* section 7 in a manner that was unjustified in a free and democratic society. While numerous *Charter* developments make it likely that funding restrictions on abortion would likewise be found unconstitutional,[54] there has been no definitive statement by any court to that effect.

There are different constitutional questions at play in evaluating a criminal prohibition versus a regulation deeming abortions outside clinics not medically necessary and therefore excluded from provincial funding. There is a risk of courts finding that funding for abortion is a "non-legal" issue – not a question of law but one of politics, of legislative policy. Or, instead of reading the funding exclusion against a backdrop of New Brunswick's historical antipathy towards women's reproductive autonomy,[55] the court could analyze Regulation 84-20 in the abstract. Without this context it could be upheld as non-discriminatory, "neutral and rationally defensible policy choice"[56] or as containing no distinction based on sex. New Brunswick women may find themselves in the same position as the claimants in the women's rights cases that came before, with an ambiguous state of the law and the need to rely on the judiciary to be able to envision the world differently.

How could aesthetics ensure that the court does not look past the impact of Regulation 84-20 on women's rights? I will address one aspect concerning *Charter* section 15. In the past, the Supreme Court has been reluctant to adopt multiple perspectives to inform the equality analysis. Instead, it insisted that courts could find discrimination only if the claimant demonstrated mistreatment in relation to another group that "mirrored" the characteristics of the claimant in every relevant way except for the ground claimed (e.g., if the ground claimed was sex, the claimant had to show as a woman that a group of similar men were not so affected). If that comparator group was difficult to ascertain or non-existent (or if the court resisted finding or distorted the "relevant" characteristics), then there was literally no vantage point from which discrimination could be visible. Either the problem was hyper-individualized, as "just you," or the claimant became lost in a sea of people who could be similarly affected but did not share sufficient "relevant" similarities with her.[57]

The Supreme Court of Canada now recognizes how "mirror comparators" encourages abstraction and improperly blocks equality claims where there is no one like the claimant or where "a group's experience of discrimination may not be discernible with reference to just one prohibited ground of discrimination, but only in reference to a conflux of factors."[58] Instead, the claimant simply has to be compared to "others," and the Court explicitly allows for multiple comparisons. However, the Court has never directly articulated a methodology by which to conduct this multiple-perspective analysis.

In my seaglass poetics above, I demonstrate how poetry can suggest both a method for judges to imagine the necessary perspectives but also how these perspectives could be used to assess a section 15 claim. On occasion, I've used the metaphor of searching for seaglass to show students the importance of different perspectives to assess disadvantage in the equality analysis – going a slightly different way on the same path travelled many times before may make what you're looking for suddenly visible; sometimes getting close or moving back is necessary; you find different things when a different kind of light shines on them. One can read the poetic method as requiring consideration of the perspective of the claimant as she looks at those closest to her and those with whom she shares more distant relationships (such as other women, spouses, co-workers). Arguably, such a poetic methodology has already been

applied by the Supreme Court of Canada albeit not consciously so. In *Fraser*,[59] only the second successful section 15 sex equality case by women heard by the Supreme Court of Canada, Madam Justice Abella wrote the decision for the majority. She found that the RCMP's failure to allow women to top up pension contributions that were reduced during temporary job-sharing for childcare reasons was unconstitutional sex discrimination, comparing the claimants with other full-time employees and also women and men in the workforce generally.

Assessing Regulation 84-20 against the constitutional standard of equality, one needs to both walk back through provincial history, look to other jurisdictions (no other province denies funding to abortion clinics),[60] and go back to read Regulation 84-20 (where clinic abortions are grouped together with excluded services like breast augmentation, vasectomy reversals, and contact lenses). It requires a decision-maker to look at the practical effects of inaccessible reproductive health care from where women are standing. In the cold light of day versus the fog of political rhetoric, it becomes clear that Regulation 84-20 communicates a negative message about women who seek to terminate their pregnancies.[61]

In the above poetics and poetry in general, one reads what is ordinarily an intimate expression of personal experiences (whether fictive or not) both to have a sense of another's inner life, but perhaps more importantly, to connect the poet's reflections to one's own life: to see the universal in the particular. The two are in dialogue: we read poetry through the lens of our own perceptions, but our own sensibilities may be altered in the encounter with a poem.

Fredericton had its own encounter with poetry in the controversy surrounding the launch of the constitutional challenge to Regulation 84-20. At the end of September 2020, coinciding with the announcement of the closure of Clinic 554 and the various community protests relating thereto, Fredericton's Poet Laureate read a poem before a City Council meeting. The poem by Conyer Clayton, entitled, "Those Who Need To Hear This Won't Listen," contains a reflection on the mixed feelings of relief, pain, sadness, giddiness, and empowerment that accompanies a young woman obtaining the procedure "in a country where you can get an abortion."[62] The poem is acutely private, but the narrator also situates herself as a one of many female citizens needing an abortion. Some male councillors criticized the Poet Laureate, Jenna Lyn Albert, for "politicizing *our* poems" [63] and ultimately the Poet Laureate role was changed such that poems will no longer be read at Council meetings except when invited.

While I have no proof, I cannot help but wonder whether the poem affected the judicial imagination of Chief Justice Tracey DeWare hearing the CCLA standing application. She granted the application against the objections of the New Brunswick government along with $5,000 in costs. In doing so, she rejected the government's arguments that the issue was not legal but political and the government's position that, alternatively, it ought to be a woman with an unwanted pregnancy bringing the challenge. She noted the "intimate and private nature" of the decision whether to bring a pregnancy to term and that it is unreasonable to expect a vulnerable member of a marginalized community of women, girls and trans persons to bring such an action.[64] Her decision is thoroughly conventional in terms of the law and yet appreciates both the constitutional significance of the case collectively for women in New Brunswick and at the same time the circumstances of individual women that make undertaking such litigation on their own difficult or impossible. It embodies what William Blake expressed when he wrote about seeing "a World in a Grain of Sand," but also later, that "We are led to Believe a Lie/When we see not Thro' the Eye."[65]

As a "non-legal, political" post-script, in the June 2021 Fredericton municipal elections, voters elected the most female councillors ever; they also elected its first female mayor, who deposed the male incumbent.[66] Of the two City Councillors who objected to the Clayton poem, Dan Keenan did not run again, and Steven Chase lost his seat.

To comment on this essay, please write to editorjnbs@stu.ca. Si vous souhaitez réagir à cet essai, veuillez soit nous écrire à editorjnbs@stu.ca.

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Notes

[1] "The Pain of Word Bondage" in Patricia Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge: Harvard University Press, 1992), 165.

[2] *In re Mabel P. French*, (1905) 37 N.B.R. 359.

[3] Jordan Gill, "The story of Nancy: Confronting New Brunswick's past with slavery" (29 February 2020), online: https://www.cbc.ca/news/canada/new-brunswick/story-new-brunswick-slavery-nancy-ludlow-hall-1.5477580.

[4] For instance, in 1793, prior to Nancy's case, discussed below, Upper Canada passed a law making it illegal to bring a person into the colony to be enslaved. There was an active movement to abolish slavery, and it was formally abolished in the British Empire by virtue of legislation passed by the UK Parliament in 1834.

[5] Mary Jane Mossman, "Feminism and Legal Method: The Difference It Makes" (1987) 3 Wis. Women's L.J. 147; Katherine de Jong, "On Equality and Language," (1985) 1 Can. J. Women & L. 119; Marguerite E. Ritchie, "Alice through the Statutes," (1975) 21 McGill L. J. 685 (1975); and Jennifer Nedelsky, *Law's Relation: A relational theory of self, autonomy, and law* (New York: OUP USA, 2011).

[6] Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989).

[7] Mossman, *supra* note 5 at 155 and 163.

[8] For a stark example of this phenomenon, see *Bliss v Canada*, [1979] 1 SCR 183 at 190 (concerning the exclusion of pregnant women from regular unemployment insurance benefits: "Any inequality between the sexes in this area is not created by legislation but by nature").

[9] Jack M. Balkin, Deconstruction's legal career (2005) 27 Cardozo L. Rev. 719 at 736-737.

[10] Jack M. Balkin & Sanford Levinson, "Law & the Humanities: An Uneasy Relationship" (2006) 135(2) *Daedalus* 105 at 113.

[11] Jennifer Koshan, "The Legal Treatment of Marital Rape and Women's Equality: An Analysis of The Canadian Experience" (September 2010), *The Equality Effect*, online: http://theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf

[12] *E.g., Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852; *Re Affordable Energy Coalition*, 2009 NSCA 17 [*Boulter*]; *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92.

[13] *General Regulation - Medical Services Payment Act*, N.B. Reg. 84-20 ["Regulation 84-20"] and *CCLA v. PNB*, 2021 NBQB 119.

[14] Mossman, *supra* note 5 agrees in relation to *Re French*, discussed below that the judges had choices and the legal method, in principle, did not dictate the result. She also describes how the malleability of legal method makes it nearly impervious to challenge from "outsiders."

[15] *Halpern v. Toronto (City)*, (2003) D.L.R. (4th) 529 (ONCA).

[16] Fragments of my poetry can be found in various places including: "Cameo" (2014) 36:3 *Contemporary Verse* 41; "Tradition," (Winter 1989) *Saskatchewan Multicultural Magazine* 5; "Patriots by Night" and "Prairie Wool" *Toronto Sun* (January 20, 1989); and various poems published resulting from my receipt of the Victor Jerrett Enns Award in (Fall 1989) 7:3 *Windscript: Saskatchewan High School Literary and Visual Art Magazine*, 11-12 and 34.

[17] Jennifer Andrews, "Re-Visioning Fredericton: Reading George Elliott Clarke's Execution Poems" 33(2) (2008) *Studies in Canadian Literature*, 115 and Tony Tremblay, *The Fiddlehead Moment: Pioneering an Alternative Canadian Modernism in New Brunswick* (Montreal & Kingston: McGill-Queen's University Press, 2019).

[18] *R v S (R.D.)*, [1997] 3 SCR 484.

[19] Regarding the law and literature movement, see Robin West, "Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory" (1985) 60 NYU L Rev. 145 and Robert M. Cover, "The Supreme Court 1982 Term— Foreword: Nomos and Narrative," (1983) 97 Harv L Rev 4. Davina Cooper is likely the most notable scholar concerning utopian legal/political theory: *Everyday Utopias: The Conceptual Life of Promising Spaces* (Durham: Duke University Press, 2014) and "Introduction," in Davina Cooper, Nikita Dhawan, Janet Newman, eds, *Reimagining the State: Theoretical Challenges and Transformative Possibilities* (London: Routledge, Taylor & Francis Group, 2019), 1.

[20] Emily Kidd White, "Till Human Voices Wake Us" (2014) 3:3 JL Religion & St 201 at 206.

[21] In the 19th century, however, law and poetry were seen as intimately connected as both drew inspiration from the divine: Devin Largent, "The Kinship and Demise of Poetry and Law: 1868-1927" (undergraduate arts research thesis, Ohio State University, 2012). For a few exceptions that approach similar topics concerning law and poetry, see Lawrence Joseph, "Theories of Poetry, Theories of Law" Vand. L. Rev. 46 (1993), 1227 and Edward J. Eberle and Bernhard Grossfeld, "Law and Poetry" (2005), 11 Roger Williams UL Rev. 11 (2005), 353.

[22] E.g., John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997), 155 and Leslie Hall Pinder, "The carriers of no" (1999) 28:4 *Index on Censorship* 65. Nevertheless, in the process of reconciliation, it is not unthinkable that settler law should be informed by Indigenous legal methods regarding the significance of stories, songs, and poems, rather than the "one way ratchet" of requiring that Indigenous peoples frame their cases "in terms cognizable to the Canadian legal and constitutional structure" (*R. v. Van der Peet*, [1996] 2 SCR 507 at para 49).

[23] Mossman, *supra* note 5 at 168, citing poet Adrienne Rich.

[24] D.G. Bell, J. Barry Cahill, and Harvey Amani Whitfield, "Slavery and Slave Law in the Maritimes" in Barrington Walker, ed. *The African Canadian Legal Odyssey: Historical Essays* (Toronto: Osgoode Society for Canadian Legal History, 2012), 363 at 365.

[25] W.A. Spray, "The Blacks in New Brunswick" in Elspeth Cameron, *Canadian Culture: An Introductory* Reader (Toronto: Canadian Scholars' Press, 1997), 339 at 344.

[26] Bell et al, *supra* note 24 at 368. Graham Nickerson references her counsel's brief against the legality of slavery, in the absence of a statutory or common law, as being based on "its [in]civility, its incompatibility with Christianity, and the fact that 'natural law' and the law of England did not recognize it." "Why Didn't They Teach That? The Untold Black History of New Brunswick" (Fall 2020) 12 *Journal of New Brunswick Studies* 15 at 19, n 6. I thank Mr. Nickerson for also directing me to the digitized version of the original brief held by the UNB archives.

[27] The only identifying characteristics I have discovered is one book, referencing an 1898 conference paper speculating that she was the slave referenced in certain bills of sale, which would have meant that she was thirty-six at the date of the hearing (William Renwick Riddell, "Chapter VII: Slavery in the Maritime Provinces" (1920) 5:3 *The Journal of Negro History* 359 at 370). She appeared to be accompanied by her four-year-old son: Harvey Amani Whitfield, *North to Bondage: Loyalist Slavery in the Maritimes* (Vancouver: UBC Press, 2016), 104.

[28] Jordan Gill, "The story of Nancy: Confronting New Brunswick's past with slavery" (29 February 2020) *CBC News*, online: https://www.cbc.ca/news/canada/new-brunswick/story-new-brunswick-slavery-nancy-ludlow-hall-1.5477580.

[29] It appears Nancy may have been able to parlay the jurisprudential ambiguity into a deal with her owner, made within days of the decision, that she serve fifteen years of indentured servitude in exchange for her release (Riddell, *supra* note 27 at 372). None of her lawyers are amongst those who witnessed the documents, suggesting she may not have received their assistance. Trading freedom for a period of indentured servitude was apparently not unusual towards the end of slavery in the Maritimes since slaveowners were "discouraged" by various court decisions against their interests: Whitfield, *supra* note 27 at 107.

[30] Jacques Rancière, "Who Is the Subject of the Rights of Man?" (1 July 2004) 103 (2-3) *South Atlantic Quarterly*, 297 at 304.

[31] Lois K. Yorke, "Mabel Penery French (1881-1955): A Life Re-Created" (1993) 42 UNBLJ 3 at 14. Given that much has already been written about Mabel Penery French, as well as the Sandra Lovelace case, my discussion of these cases will be abbreviated. Barry Cahill, "`Everybody Called Her Frank': The Odyssey of an Early Woman Lawyer in New Brunswick", *Journal of New Brunswick Studies*, Vol. 2 (2011): 55-70.

[32] *Ibid* at para 5 and SNB 1906, c 5.

[33] Janet Silman (Recorder), *Enough is Enough: Aboriginal Women Speak Out* (Toronto: Women's Press, 2003), 134.

[34][1974] SCR 1349 [*Lavell*].

[35] *Sandra Lovelace v Canada*, Communication No R.6/24, UN Doc Supp. No 40 (A/36/40) at 166 (1981). Article 27 reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

[36] The factual elements of Ms. Godin's story are derived from the article by Rae Corelli and Dale Eisler, "The Right to a Lawyer," *Maclean's* (24 November 1997), 130, unless otherwise indicated.

[37] Personal communication with Thomas Christie (now Justice Thomas Christie), 20 July 2021.

[38] *Ibid.*

[39] Factum of the Appellant, 9-10. The hearing was complex, involving fifteen witnesses. The Supreme Court later found that an "unrepresented parent will ordinarily need to possess superior intelligence or education, communication skills, composure, and familiarity with the legal system in order to effectively present his or her case" in such circumstances (*New Brunswick (Minister of Health & Community Services) v G. (J.),* [1999] 3 SCR 46 [*G.(J.),* SCC] at para 80.

[40] *Supra* note 37.

[41]*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Prosper*, [1994] 3 SCR 236.

[42] *B. (R.) v. Children's Aid Society of Metropolitan Toronto,* [1995] 1 SCR 315 (per LaForest J. in the minority but forming part of the majority on the ultimate outcome); *R. v. Jones*, [1986] 2 SCR 284 (per Wilson J. dissenting, but not on this issue).

[43] *New Brunswick (Minister of Health & Community Services) v G.(J),* (1997) 145 DLR (4th) 349 (NBCA) [*G.(J.)* NBCA] at paras 5 and 8.

[44] *Ibid* at para 8.

[45] *Ibid* at para 55, 66, and 85.

[46] "The Right to a Lawyer," *supra* note 36.

[47] *G. (J.),* SCC, *supra* note 39 at paras 89–90.

[48] *Ibid* at paras 76–79.

[49] *Ibid* at para 113.

[50] I thank my colleague Jason Maclean for pointing out the resonance of this idea with Emmanuel Levinas' concept of one's ethical responsibility towards the Other, as we come face-to-face: see Emmanuel Levinas and Richard Kearney, "Dialogue with Emmanuel Levinas," in edited by Richard A. Cohen, ed, *Face to Face with Levinas* (Albany: State University of New York Press, 1986), 13 and Emmanuel Levinas, *Otherwise than Being or Beyond Essence*, translated by A. Lingis (Boston: Kluwer Academic Publishers, 1981).

[51] "Canadian Civil Liberties Association v *Province of New Brunswick*" *Statement of Claim* (6 January 2021), online: https://ccla.org/cclanewsite/wp-content/uploads/2021/01/Filed-Statement-of-Claim-January-8-2021.pdf.

[52] "Civil liberties group launches legal action against N.B. for greater abortion access" (30 October 2020) *Global News*, online: https://globalnews.ca/news/7432254/legal-action-against-n-b-abortion-access/. Clinic 554 started as a clinic operated by Henry Morgentaler. After Morgentaler's death in 2013, the feminist community crowdfunded to keep Clinic 554 open.

[53] [1988] 1 SCR 30.

[54] E.g. Chris Kaposy and Jocelyn Downie, "Judicial reasoning about pregnancy and choice" (2008) 16 Health L J 281; Kerri A. Froc, "Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice" (2010–2011) 42 Ottawa L Rev 411; Joanna E. Erdman, "Constitutionalizing Abortion Rights in Canada" (2017) 49:1 Ottawa L Rev 221; and Emmett MacFarlane, "The Dilemma of positive rights: Access to health care and the Canadian Charter of Rights and Freedoms," (2014) 48:3 *Journal of Canadian Studies* 49.

[55] Katrina R. Ackerman, "'Not in the Atlantic Provinces': The Abortion Debate in New Brunswick, 1980–1987," (Winter/Spring 2012) 41:1 *Acadiensis* 75 and Lianne McTavish, "Abortion in New Brunswick" (2015) 44:2 *Acadiensis* 107.

[56] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 108.

[57]*Symes v Canada* ,[1993] 4 SCR 695 (burden of costs of childcare on the claimant as a working, self-employed mother was a "family decision," therefore non-deductability of these expenses from her income was non-discriminatory); *Boulter, supra* note 12 at para 83 (failure to have graduated rates for low income consumers not discriminatory on the basis of sex and other grounds associated with economically disadvantaged groups).

[58] *Withler v. Canada (Attorney General),* 2011 SCC 12 at paras 58 and 59.

[59] Fraser *v.* Canada (Attorney General), 2020 SCC 28.

[60] Similar regulations to 84-20 in Nova Scotia were struck down by the Supreme Court of Canada in *R. v. Morgentaler*, [1993] 3 S.C.R. 463.

[61] In a motion brought by a Liberal MLA calling upon the government to fund abortions at Clinic 554, women's health was cited by a number of government members as a reason to defeat the motion: Jacques Poitras, "Higgs government blunts opposition abortion motion, removes references to Clinic 554" (17 December 2020) *CBC News*, online: https://www.cbc.ca/news/canada/new-brunswick/higgs-government-negates-opposition-abortion-motion-1.5846194. In *R. v. Morgentaler* (1993), *ibid*, the Supreme Court of Canada found clinic abortions safer and more cost-efficient than those performed at hospitals.

[62] In "Poets Resist," *Glass: A Journal of Poetry* (12 December 2019), online: http://www.glass-poetry.com/poets-resist/clayton-those.html.

[63] Lauren Bird, "Fredericton city councillors question poet laureate's role after abortion poem read" (29 September 2020), *CBC News*, online: https://www.cbc.ca/news/canada/new-brunswick/fredericton-city-counil-poems-1.5742710 [emphasis added].

[64] *CCLA v. PNB, supra* note 13 at paras 2 and 19.

[65] "Augeries of Innocence," in J. Bronowski, ed., *William Blake*: *A Selection of Poems and Letters* (Middlesex, UK: Penguin Books Ltd, 1958), 67–71.

[66] Lauren Bird, "Fredericton swears in first female mayor, 70 years after first woman on council" (15 June 2021), *CBC News*, online: https://www.cbc.ca/news/canada/new-brunswick/fredericton-council-mayor-1.6065791.