

Foreword

Lorne Sossin*

It is my privilege to offer this brief foreword for the inaugural issue of the *Canadian Journal of Comparative and Contemporary Law* (CJCCL), launched in 2013 by Thompson Rivers University Faculty of Law. I will offer a word or two about the Journal and then a word or two about its first issue, which grapples with the complex interrelationship between health law and human rights.

Some might see this as a perilous moment at which to launch a new law journal. We are by any measure at the crossroads of significant change in the dissemination of ideas about law and justice. Those ideas may now be found in the blogosphere, in real time listserv debates or from your favourite scholar on iTunes as readily as within the pages of a venerable law review. Law journals wrestle with whether to move purely online, and if so whether to be open access or throw up subscription pay-walls. Authoritative voices have heralded the demise of the law review. Chief Justice Roberts of the US Supreme Court questioned their relevance with this widely circulated comment:

Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.¹

* Professor and Dean, Osgoode Hall Law School, York University.

1. "Law Prof. Ifill Challenges Chief Justice Roberts' Take on Academic Scholarship" *American Constitution Society: ACS blog* (5 July 2011), online: American Constitution Society for Law and Policy <<http://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts%E2%80%9999-take-on-academic-scholarship>>.

Follow up studies highlighted that by 2011, no major law review had more than 2,000 paying subscribers and arguably the top law review, the *Harvard Law Review*, shrank from 10,895 subscribers in 1963-64 to 1,896 by 2011.² Such statistics drove Walter Olson to pen a screed in *The Atlantic* entitled, simply, “Abolish the Law Reviews.”³ He referred to Judge Richard Posner’s oft-invoked anecdote that 90 percent of what is written in law reviews is useless but it is impossible to know which 90 percent. To this, Olson added:

What we do know is that the page volume of law reviews has proliferated beyond reason with no corresponding rise in compelling content. Even low-ranked law schools often publish six or eight of them. There’s no secret as to why: students crave the credential of having worked on law review, while faculty crave a high likelihood of being published. Legal educator Harold Havighurst nailed it half a century ago: “Whereas most periodicals are published primarily in order that they may be read, the law reviews are published primarily in order that they may be written.”⁴

While criticism of many law reviews may be merited (though this seems to blur with a general critique of “ivory tower” research which glosses over how so many of the legal doctrines lawyers and courts rely on had their origins in university-based research and writing), the metrics referred to above certainly miss the point. The measure of a law review’s relevance should be downloads and citations, not paid subscriptions – or, more elusively, the kind of influence that is more difficult to quantify. I would call this metric, “shaping the debate.”

Peter Hogg and Allison Bushell’s article on “The Charter Dialogue Between the Courts and the Legislatures (Or Perhaps The *Charter of Rights* Isn’t Such a Bad Thing After All)”⁵ was published by the *Osgoode Hall Law Journal* in 1997, and cited for the first time by the Supreme Court of Canada the following year in *Vriend v Alberta*,⁶ and frequently

2. Ross E Davies, “Law Review Circulation 2011: More Change, More Same” (2012) 1:1 J Legal Metrics 179 at 179, 185.

3. Walter Olson, “Abolish the Law Reviews!”, *The Atlantic* (5 July 2012) online: theatlantic.com <<http://www.theatlantic.com/national/archive/2012/07/abolish-the-law-reviews/259389/>>.

4. *Ibid.*

5. Peter W Hogg & Allison A Bushell, “The Charter Dialogue Between Courts and Legislatures” (1997) 35:1 Osgoode Hall LJ 75.

6. [1998] 1 SCR 493 at 565, 578.

thereafter. Few public law scholars (or lawyers) are indifferent to the “dialogue” debates as to whether judicial review under the *Charter* leads to unelected activist judges which undermines democracy, or vigorous and healthy exchanges between judges and legislators which strengthens democracy (or some variation of one of these themes or another). What is not in doubt is that this single law review article has shaped the public law debate in Canada. As the authors noted in a follow up piece on the tenth anniversary of the article’s publication, “[i]n short, a law journal article on ‘*Charter* dialogue’ has precipitated its own vigorous, multi-faceted dialogue.”⁷

In my view, this catalytic role for legal scholarship – to spark a dialogue (or debate) remains the goal of the best law reviews. We need more rather than fewer such publications. The achievement of this goal for a law review is not a matter of subscriptions, or even downloads or citations, but of influence. To invoke a twist on the Havighurst critique quoted by Olsen above, the point of law review articles should not be simply to be written, or simply to be read, but rather to be discussed and debated. Influence, in turn, is also a matter of quality and readability. Badly written and badly reasoned articles tend to slip into obscurity; great articles, by contrast, are woven into subsequent scholarly exchanges, academic conferences, judicial deliberation, classroom discussions and then become a necessary reference point. For example, few speak about the right to privacy without allusion to the simple but powerful reference to, “the general right of the individual to be let alone” in Samuel Warren and Louis Brandeis’ landmark article, “The Right to Privacy.”⁸

All this is to say not only is the idea of the law review alive and well, but its ideal has never been more important. Shaping the debate today consists not necessarily of bringing new information or ideas to light, but in filtering and sifting through the dizzying onslaught of information

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7. Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, “Charter Dialogue Revisited – Or, ‘Much Ado about Metaphors’” (2007) 45:1 Osgoode Hall LJ 1 at 6.
 8. Samuel Warren & Louis Brandeis, “The Right to Privacy” (1893) 4:5 Harv L Rev 193 (cited most recently by the Ontario Court of Appeal as they crafted the first recognition of the tort of “intrusion upon seclusion” in Canada). See *Jones v Tsige*, 2012 ONCA 32 at para 16.

and ideas in a digital and interactive world. The best law review articles provide the analytic perspective necessary to enable readers to reach their own conclusions and to enhance our understanding of the world around us in the process.

For this reason, the establishment of the CJCCL as a new open access law journal is particularly welcome. Law is best understood through its interconnectedness – whether to society, to history, to other disciplinary perspectives or to similar and contrasting developments in other jurisdictions. Making sense of law, in other words, requires both an insider and an outsider perspective. The CJCCL's mission is ideally suited to this venture. It is also significant that its home is Thompson Rivers University, one of Canada's newest law schools, and one dedicated to the pursuit of new perspectives on legal education.

The inaugural issue of the CJCCL does justice to these ambitions, both to shape the debate and to do so through melding insider and outsider perspectives on law. The setting for this examination is the intersection of health and law. Contributors tackle the legal dynamics of health from a number of perspectives, from access to health care services to the status of health benefits within the constitutional order. Issues ranging from the nature of consent to the privatization of health care dominate headlines and water cooler discussions alike. Law's relation to health, however, always has been complex and contentious.

Health debates have a way of polarizing both the public and the judiciary like no other issue. In *Chaoulli v Quebec*,⁹ Deschamps J observed:

In order to receive federal funds, a provincial plan must conform to the principles set out in the *Canada Health Act*, R.S.C. 1985, c. C6: it must be administered publicly, it must be comprehensive and universal, it must provide for portability from one province to another and it must be accessible to everyone. These broad principles have become the hallmarks of Canadian identity. Any measure that might be perceived as compromising them has a polarizing effect on public opinion. The debate about the effectiveness of public health care has become an emotional one. The Romanow Report stated that the *Canada Health Act* has achieved an iconic status that makes it untouchable by politicians (*Building on Values: The Future of Health Care in Canada: Final Report* (2002) (Romanow Report), at p. 60). The tone adopted by my colleagues Binnie and LeBel JJ. is indicative of this type of emotional

9. 2005 SCC 35.

reaction. It leads them to characterize the debate as pitting rich against poor when the case is really about determining whether a specific measure is justified under either the *Quebec Charter* or the *Canadian Charter*.¹⁰

As this passage reflects, health debates in the context of legal disputes often have a text and a subtext. The text might be whether, as in *Chaoulli*, a particular person has a right to a particular health service by virtue of a particular statutory or constitutional provision, but the subtext has more to do with broad social commitments and shared values. The universal nature of the health care system in Canada makes each individual decision in relation to health care (whether funding a service, limiting a doctor's discretion, holding a hospital liable, etc.) a matter, at some level, of public interest. Health, distinct among fields of legal interest, affects and matters to everyone. Policy, legal doctrine, principle and lived experience all inform debates over health and justice. For these reasons, in this field in particular, we need more interdisciplinary, comparative and conceptual scholarship.

I hope the articles within these pages are not only read but debated, and I look forward to this first issue of the CJCCL representing the arrival of a fresh and timely voice within the Canadian legal academy. I am confident the CJCCL will help shape the debate in the thematic areas of focus it selects for each year's special issue. I wish the CJCCL much success into the future!

10. *Ibid* at para 16.