An Interview with the Honourable Justice Ian Binnie

THE HONOURABLE IAN BINNIE, C.C., Q.C.

L'honorable Ian Binnie a obtenu un LL.B. de l'Université de Cambridge en 1963 et un LL.B. de l'Université de Toronto en 1965. Il a exercé en litige au sein de l'étude Wright & McTaggart et des cabinets qui l'ont remplacée entre 1965 et 1982, il a ensuite occupé les fonctions de sous-ministre adjoint de la Justice du Canada jusqu'en 1986. Après cela, il exercera à titre d'associé principal au cabinet McCarthy Tétrault jusqu'à son accession à la Cour suprême du Canada en 1998. Il a pris sa retraite de la magistrature en 2011. Au cours de sa remarquable carrière, M. Binnie a occupé les fonctions de conseiller juridique auprès du gouvernement de la Tanzanie, a représenté le Canada devant la Cour internationale de Justice, a plaidé devant les tribunaux dans la plupart des provinces canadiennes, a comparu à titre d'avocat devant la Cour suprême dans le cadre de nombreuses affaires importantes et, alors qu'il siégeait au sein du plus haut tribunal, il a été l'auteur de bon nombre de décisions qui ont fait jurisprudence.

Une équipe de la *Revue de droit d'Ottawa* composée de Michelle Bloodworth, Linden Gregory et Cigdem Iltan a rencontré M. Binnie à l'Université d'Ottawa. Au cours de cet entretien, M. Binnie fait part des réflexions que lui inspire sa longue et fructueuse carrière en droit et discute en outre des espoirs et des préoccupations qu'il nourrit à l'égard de l'avenir de la profession juridique et de l'évolution du droit au Canada.

The Honourable Ian Binnie received an LL.B. from Cambridge University in 1963 and an LL.B. from the University of Toronto in 1965. He practiced litigation at Wright & McTaggart and its successor firms between 1965 and 1982 and then served as Associate Deputy Minister of Justice for Canada until 1986. He was a senior partner with McCarthy Tétrault from 1986 until his elevation to the Supreme Court of Canada in 1998. He retired from the Court in 2011. Over the course of his distinguished career, Mr. Binnie served as legal counsel to the Government of Tanzania, represented Canada before the International Court of Justice, argued before courts in most Canadian provinces, appeared as counsel before the Supreme Court on many significant cases, and, while on the top court, authored numerous landmark decisions.

The *Ottawa Law Review's* Michelle Bloodworth, Linden Gregory and Cigdem Iltan met with Mr. Binnie at the University of Ottawa. In this interview, Mr. Binnie offers insights derived from the breadth of his vast experience in law and discusses his hopes for, and concerns about, the future of the legal profession and the development of Canadian law.

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January 7, 2013

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Ottawa Law Review [OLR]: *What prompted you to pursue a career in law?*
Ian Binnie [IB]: It was largely a matter of elimination of the alternatives. I had thought initially of psychiatry. I was then persuaded that this was a rather frustrating profession. I dallied a bit with journalism, but in the end it seemed that law was the most interesting of the talking professions.

OLR: *It was clear to you that you wanted to talk for a living?*
IB: Yes. I had gone from McGill[1] to Cambridge[2] and in both places I had done a lot of debating and enjoyed it.[3] I had also done quite a lot of theatre in my high

1 Justice Binnie received a Bachelor of Arts with a major in economics and a minor in history from McGill University in 1960. See Supreme Court of Canada, *About the Court, Judges of the Court: The Honourable Mr. JusticeWilliam Ian Corneil Binnie*, online: Supreme Court of Canada <http://www.scc-csc.gc.ca> [Supreme Court of Canada Biography, Justice Binnie].

2 Justice Binnie graduated from the University of Cambridge, where he was a student at Pembroke College, with a Bachelor of Laws in 1963. He obtained a Master of Laws from the University of Cambridge in 1988. See *ibid*.

3 Between 1957 and 1960, while he attended McGill, Justice Binnie participated in the McGill Debating Society. While studying for his Bachelor of Laws, he became the first Canadian to be elected President of the Cambridge Union Society, the University of Cambridge's debating society. See *ibid*.

school years and at McGill.[4] So it was a natural progression into the theatre of the courtroom.

M: *I'm interested to hear that you did theatre.Were you able to draw on aspects of your theatre experience when you went into litigation?*
IB: Yes. There is certainly a lot that has to do with creating a presence in a courtroom. In a theatre, of course, you have your lines, so it's all predetermined, whereas in a court, half the fun is its spontaneity. But in a sense, it's all performance.

OLR: *It seems that these considerations that drew you to the law are probably similar to what drew you to litigation specifically. Did you always know that you wanted to be a litigator or did that interest develop during law school?*
IB: I never really considered anything else, and what little attraction I felt for other areas of the law were dispelled when articling.[5] The idea of doing commercial closings with endless checklists and adapting forms and masses of boilerplate clauses just didn't appeal to me.

I articled with Bert MacKinnon, who eventually became Associate Chief Justice of Ontario.[6] He was a very prominent counsel through the 1950s, 1960s and early 1970s before he went to the Court of Appeal. I essentially spent my articling year following him around, which is why I am a great believer in mentorship. I think law is a craft. Certainly courtroom tactics have everything to do with seeing how other people do it, learning it and then eventually finding your own voice. And the fastest route into the mysteries of the courtroom lies through mentorship.

OLR: *This question of mentorship is quite timely. There has been a great debate recently in Ontario about the place of articling in the profession.*[7] *The Law Society of Upper Canada approved a pilot project where students will have a choice to undertake traditional articling or*

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4 Justice Binnie attended Trinity College School in Port Hope, Ontario from 1954 to 1957.

5 Justice Binnie articled with Bert MacKinnon, a senior partner at Wright & McTaggart, in 1965. Mr. MacKinnon had a general litigation practice with an emphasis on appellate work in the Ontario Court of Appeal and Supreme Court of Canada. See Kirk Makin, "Justice Ian Binnie's exit interview", *The Globe and Mail* (23 September 2011), online: The Globe and Mail <http://www.theglobeandmail.com>.

6 Bert MacKinnon sat on the Ontario Court of Appeal from 1974 to 1978 and was Associate Chief Justice of Ontario from 1978 to 1987. Judges' Library, *Former judges of the superior courts* [nd], online: Guide to Ontario Courts <http://www.ontariocourts.ca>.

7 In Ontario, the Law Society of Upper Canada (LSUC) is responsible for the regulation of lawyers and paralegals. Conventional licensing involves a ten-month articling term, during which students must apprentice with an approved Articling Principal. In response to a shortage of articling positions in Ontario, LSUC approved a three-year pilot program on November 22, 2012 to "allow lawyer licensing candidates to either article or complete a Law Practice Program (LPP), starting in the 2014-15 licensing year… Under the pilot project, candidates may either complete the traditional 10-month articling term with enhanced documentation, or an approximately four-month long LPP, which will also include an additional four-month co-operative work placement." Articling Task Force, *New alternative to traditional articling requirement approved* (22 November 2012) online: The Law Society of Upper Canada <http://www.lsuc.on.ca>.

a cooperative program with additional courses.[8] *A minority of the task force advocated doing away with articling altogether.*[9] *Do you feel that there is still an important place for articling in the profession or is it time to look to new alternatives?*

IB: No, I think articling is very important. In part for the reasons I mentioned, but in part because it's in the interests of the public that before a new lawyer is unleashed in their midst, there be a period of practical experience outside the classroom. I think the articling crisis—and it is a crisis—is self-inflicted.[10] At the time I began practicing, lawyers felt a professional obligation to take on articling students and they never considered that they should be making money out of them. In fact, I never kept dockets as a student. As I say, I followed my principal around from courtroom to courtroom. I think the idea has emerged in the last 10 or 15 years that everything in the law practice has to turn a profit, apart from a fairly minor component of pro bono work.[11] Now, articling students are seen in a totally different light. Lawyers should feel a professional obligation to give people coming into the profession the same benefits that they had, including articling.

OLR: *Is this professional obligation something that we can institutionalize or encourage in some way, or does it have to come from practicing lawyers themselves?*

IB: It has to come from practicing lawyers. But I know, for example, the Toronto Lawyers' Association has made a huge effort to spread the idea that taking articling students is a professional obligation that lawyers should respect.[12] But ultimately if the lawyers won't do it, they won't do it. That's what has landed the Law Society in this predicament. I think the problem with the majority proposal is there is going to be a Team A and a Team B: those who don't get articling positions will be stamped as not being attractive enough to be offered an articling job, and that stigma will be most unfortunate.

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8 LSUC's new LPP will include a skills-training program and a potentially unpaid "cooperative work placement." A minority of the Law Society's Articling Task Force criticized the LPP as a two-tiered system that will have discriminatory effects on many law students. Articling Task Force, *Pathways to the Profession: A Roadmap for the Reform of Lawyer Licensing in Ontario* (25 October 2012), online: The Law Society of Upper Canada <http://www.lsuc.on.ca>.

9 A minority of the Law Society's Articling Task Force recommended that articling be abolished and that new lawyers should instead be assisted through mentoring and "other regulatory oversight." *Ibid*.

10 The "articling crisis" refers to the situation in Ontario where a significant number of graduating law students do not find articling positions (12% in 2011, 15% in 2012). Jeff Gray, "Law profession faces an 'articling crisis'", *The Globe and Mail* (1 November 2011) online: The Globe and Mail <http://www.theglobeandmail.com>; Kendyl Sebesta, "Articling crisis gets worse", *Law Times* (7 May 2012) online: Law Times <http://www.lawtimesnews.com>.

11 Pro bono is professional work undertaken voluntarily for the public good. In Ontario, Pro Bono Law Ontario administers three streams of projects: Law Help Ontario (to help low-income unrepresented litigants), the Child Advocacy Project (to help at risk youth), and Volunteer Lawyers Services (to help charitable organizations with corporate law issues). See The Law Society of Upper Canada, *Access to Legal Services*, online: The Law Society of Upper Canada <http://www.lsuc.on.ca>.

12 In response to an e-mail from the Osgoode Career Development Team regarding the surplus of articling students for the 2012-2013 articling year, The Toronto Lawyers Association has urged firms to hire articling students as a professional obligation and has suggested innovative solutions. Sam Marr, *Share An Articling Student* [nd], online: The Toronto Lawyers Association <http://www.tlaonline.ca>.

OLR: *There was also discussion about the possibility of combining access to justice issues with the articling crisis by finding a way to encourage those who cannot find traditional articles to work in, for example, communities that do not have as many lawyers, for legal aid, or in areas of the law where there is a lack of lawyers.*[13] *Do you think that the Law Society's solution was a missed opportunity to tackle both issues at once?*

IB: It is a missed opportunity, but it raises a larger problem. Graduates from the law schools tend to want to go to Toronto or Ottawa or one of the major centres to article and work, while lawyers in smaller centres are crying tears because they can't find young lawyers to take over their practices. Well, if they don't offer articling positions, they aren't going to introduce young lawyers to the kind of community practice they have and they're not going to find replacements. So it's a vicious circle in these smaller communities and, as a result, the smaller communities are going to be very under-serviced for lawyers. At the same time, young lawyers coming into the profession are going to have their opportunities reduced.

OLR: *Is there anything that you wish, given the state of the law now, you had been able to learn in law school? Are there ways that you think that Canadian law schools are falling down?*

IB: Both. When I was at law school, the emphasis was very much on bread and butter topics. But they certainly forced you to take all of the relevant bread and butter topics. And when you emerged from law school, you had a reasonable background in tax and trusts, as well as all the usual subjects that are still regarded as essential. But we didn't have much exposure to the context in which law operated, whether it be the environment or the economics of business organizations or other areas of the law that are now very much the focus of law schools. I think, for example, the University of Ottawa prides itself on a focus on social diversity. Well, that would not even have been thought of at the University of Toronto in my day. The flipside, however, is that you can focus so much on the broader context in which law operates that you forget to learn the legal basics. I find it remarkable for example that you can emerge from law school without a background in trusts. It is simply so fundamental to the way private practice operates. To me, hanging up your shingle as a person qualified in the law without a background in that kind of subject is simply incredible.

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13 See e.g. letter from Vanessa Payne, Sack Goldblatt Mitchell LLP, to Sophia Sperdakos, Law Society of Upper Canada, "Re: Articling Task Force Consultation Report" (30 March 2012), online: The Law Society of Upper Canada <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147487546>: "Not only does [hiring articling] students free up senior practitioners to focus on more advanced aspects of the practice, but it is the most cost-effective arrangements (*sic*) for our trade union clients who are not corporations with unlimited resources and for whom this cost advantage makes a real difference in terms of their ability to secure access to justice for their members." See also Articling Task Force, *Summary of Submissions to the Articling Task Force Consultation* [nd] online: The Law Society of Upper Canada <http://www.lsuc.on.ca>.

OLR: *So do you think the pendulum has swung a little bit too far away from these black letter topics? Is there need for more balance?*
IB: I think there is a need for balance. I'm not familiar, for example, with the particular curriculum at the University of Ottawa law school as to what extent courses are considered part of the core curriculum and are required. But I do believe that the first requirement is that the individual emerging from a law school be a good lawyer and capable of giving reliable advice to clients. As part of that, to go back, I think articling is a necessary component to making that individual a good lawyer in dealing with the public. But I also hope that the University of Ottawa program is sufficient that students look up from what you describe as the black letter books and see the broader social, economic and environmental considerations, because the law has a responsibility outside itself. And the more that is understood of the broader context, the better.

I am particularly concerned, for example, about the scientific illiteracy of most lawyers, with of course many exceptions. You have judges determining, increasingly, issues of intellectual property, high tech and so on, who really have no idea how to assess what they are listening to. Somebody stands up and starts talking about nanotechnology and constructing subatomic particles; the judges simply have no way of coming to terms with that. Some of that work is now sliding into arbitration when you can pick judges who do have the particular background. But the courts are important. Intellectual property is a good example because only a court can declare a patent valid or invalid: it cannot be done in arbitration. So a way forward has to be found both in science and, for example, with sophisticated financial instruments. How does a hedge fund operate? What is a derivative? These are areas where judges are being called on to make determinations, despite the fact that the adversarial system, as we now understand it, does not really create an environment in which the judge can learn the basics in order to be able to come to grips with the particular matter in dispute. I think the courts have to think long and deep about the limitations of the adversarial process and modify it. An easy illustration of that is the way in which expert testimony is dealt with. Historically, the plaintiff puts in its case; experts are called. If it is a long trial, some months later the defendant's experts counter. Well, the trial judge is sitting there and can hardly remember what the plaintiff's experts said and is in a very difficult position to put together the perspectives of both the plaintiff and defendant's experts. One of the answers to that is called the Australian hot pot, where the experts from both sides are put in the witness box at the same time and debate each other, in effect, over the proper scientific rules applicable to the resolution of the dispute.[14] That gives the judge

14 Concurrent evidence (known colloquially as "hot tubbing") is a court procedure in which expert witnesses from opposing parties are permitted to testify together in a joint session to resolve disagreements on any material issues. During this procedure, experts have an opportunity to make comprehensive statements, comment on the evidence of another expert, and generally communicate directly with each other to clarify issues and resolve questions. See Megan A Yarnall, "Dueling Scientific Experts: Is Australia's Hot Tub Method a Viable Solution for the American Judiciary?" (2009) 88:1 Or L Rev 311.

a much better perspective from which to deal with the case. But that is a serious modification of the adversarial process. A lot of lawyers don't like it because they lose control over the expert. Your own expert might get persuaded by the other side, and that would be catastrophic. But from the systemic point of view, those kinds of changes are essential if the verdicts of the court are going to be respected as legitimate and based on a real understanding of the issues.

OLR: *You have had a fairly distinctive career in that you have held senior positions in both the public service and in private practice.*[15] *Can you speak about the differences between those experiences? What did you enjoy about each and what particular challenges did you find?*

IB: The essential difference is that in the public sector, there is an almost unlimited stream of extremely interesting work which no single private firm can match, particularly in litigation. There is also a sense of public service, although, very often when you are acting for the government, you're on the wrong side of the moral high ground, defending the indefensible. On the other hand, I think the problem with government is that it doesn't really value its lawyers as much as it should. When I went to the Department of Justice initially in 1980, it was on a program where they brought in lawyers from the private practice for a couple of years. Then, in 1982, I was offered the Associate Deputy Minister position and stayed on for four years. At that time, there would have been a dozen or so senior litigators who had spent their entire career with the Department of Justice and who embodied an invaluable institutional memory. I remember at one point we had a hostage crisis. My colleague, Don Christie,[16] who had been with the Department since the 1950s, drew on his experience during the FLQ Crisis in 1970,[17] saying "Oh, here's how we handled the hostage crisis at that time." He commented that at that time, they drew on the experience of people in the Department who had been around during the Gouzenko

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15 Justice Binnie practiced at Wright & McTaggart and its successor firms until 1982. While there, he was legal counsel for the Government of Tanzania from 1970 to 1971. He worked for the Government of Canada, representing the country before the International Court of Justice from 1982 to 1986. From 1986 to 1998, he was a senior partner at McCarthy Tétrault. In 1990, he acted as special Parliamentary Counsel to the Joint Committee of the Senate and the House of Commons on the Meech Lake Accord. See Supreme Court of Canada Biography, Justice Binnie, *supra* note 1.

16 Donald Henry Christie joined the Department of Justice in 1953. He was later appointed Chief Judge of the Tax Court of Canada from October 1983 to December 1984 and again from January to May 1999. Tax Court of Canada, *Former Chief Judges*, online: The Tax Court of Canada <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/tcc-cci_Eng/About/Former_judges>.

17 The Front de liberation du Québec (FLQ) was a group that engaged in terrorist acts in the name of promoting the emergence of an independent Québec. From 1963 to 1967, the FLQ set off approximately 35 bombs and they detonated another 50 to 60 more powerful bombs between 1968 and 1970. In their most famous action, the "October Crisis," one FLQ cell abducted James Cross, the British Trade Commissioner in Montreal, while another abducted Pierre Laporte, the Quebec Minister of Labour and Immigration. Laporte was killed while Cross was freed 60 days later after negotiations with his abductors. See Gérard Pelletier, *La Crise D'Octobre* (Montreal: Éditions du Jour Inc, 1971) at 87-91; Gustave Morf, *Terror in Quebec: Case studies of the FLQ* (Vancouver: Clarke, Irwin & Company Limited, 1970) at 164.

Affair.[18] So, in two generations of Justice lawyers, the experience went all the way back to the Second World War. Now the policy of the government is to make it very unattractive for young lawyers to spend their entire careers with the Department of Justice, and so the opportunities for promotion are very limited. The idea is to keep bringing in new lawyers at lower salaries and recycle them out of the Department, while having a very small cadre of lifetime Justice lawyers. The theory seems to be that you can call Toronto or Vancouver or Montreal, get a lawyer, give the lawyer the file and overnight the lawyer is up to speed. It just doesn't work that way. There are too many complexities in Crown law and in the public practice of law that a private practitioner is not exposed to and is not equipped to deal with.

On the other hand, in private practice there is much bigger stake in proceedings, because although the issues may not be as great in terms of national significance, they are of great importance to the litigants. In government, you often have the impression that your client couldn't care less whether you win or lose. In the private sector, there is a very personal relationship with your clients and you do feel that your judgment is being depended on and valued. That to me is a very important part of practice. You also, of course, have a huge independence, which is a very different situation than being part of a large government department.

OLR: *Other than Justice Sopinka,*[19] *you are one of the only modern Supreme Court justices that came directly from private practice without having previously sat as a judge. What were some of the advantages and disadvantages of coming from litigation straight to the highest court in the country?*

IB: I think the point of having nine judges on the Supreme Court is that there is diversity in background, in viewpoint and where the judges come from across the country. Therefore I have always thought it was a good idea to have at least one judge who had recently come from practice to give us an up-to-date view of what's going on in the litigation before the Court. For example, when I joined the Court, Chief Justice Lamer had been away from practice for the better part of 30 years.[20] Well, things were done differently in 1969, when he became a trial judge, and in 1998,

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18 Igor Gouzenko was a clerk at the Soviet Union's embassy in Ottawa. In September 1945, he sought political asylum in Canada, providing authorities with significant information on Soviet espionage activities. He was granted asylum and lived the rest of his life in Canada under police protection. See Amy Knight, *How the Cold War Began: The Gouzenko Affair and the Hunt for Soviet Spies* (Toronto: McClelland & Stewart, 2005).

19 Justice John Sopinka practiced law in Toronto for 28 years before he was appointed to the Supreme Court of Canada on May 24, 1988. He served on the Court for nine years, until his death on November 24, 1997 at the age of 64. See Supreme Court of Canada, *About the Court, Judges of the Court: The Honourable Mr. Justice John Sopinka*, online: Supreme Court of Canada <http://www.scc-csc.gc.ca>).

20 Chief Justice Antonio Lamer was called to the Bar of Quebec in 1957. He was appointed to the Quebec Superior Court on December 19, 1969, and then to the Quebec Court of Appeal on March 17, 1978. He was elevated to the Supreme Court of Canada on March 28, 1980 as a puisne justice and was named Chief Justice on July 1, 1990. He retired from the Supreme Court on January 7, 2000. After his retirement, he took on a senior advisory role at the law firm Stikeman Elliott LLP, and was appointed Associate Professor of Law at the Université de Montréal in 2000. Between 2003 and 2006,

when I joined the court. On the other hand, you wouldn't want to recruit an entire Supreme Court directly from practice because clearly experience as a trial judge and a court of appeal judge brings a lot of value to the discussion. What I would say is that in my practice, I argued many cases in the Supreme Court—constitutional cases, public law cases—and in many ways, my courtroom experience was more pertinent to the docket of the Supreme Court than the experience of the court of appeal judges.[21] They, for the most part, had much less exposure to the *Charter* than I had as a practicing lawyer. When I went to the Supreme Court, there really wasn't much of a mental transition. I was in the same courtroom, looking at the same kind of facta, hearing the same kind of arguments. The only difference was that I was on the other side of the bench. And it is only over a period of time that I began to understand what a profound difference it is to switch to the other side of the bench: my responsibilities, my outlook and my perspective were very different. But in terms of the subject matter, I probably had a leg up from most colleagues who come from the appellate courts.

OLR: *Did you find that there was great variation between the justices in their approach to deciding cases?*
IB: I think there were considerable differences among the judges. Some judges found it very easy to make up their minds as to the disposition, and took a very direct and straightforward route in the reasons for judgment. Other judges were much more concerned with the broader context. I tended to find that judges who had spent a lot of time in private practice exhibited great practicality, wanted to get to the heart of the case and deliver a judgment that would be easy for trial judges and practitioners to follow. Judges who came from an academic background had in mind colleagues in the law schools, and were far more inclined to produce discourse on the philosophic background of particular issues. They were much more concerned with comparative law, new doctrines, and so forth. So a judge's approach to reasoning depended not only on the case, but the background and the personality of the judge.

OLR: *Did you feel this practicality was your judicial philosophy? Or would you even characterize yourself as having a particular philosophy?*
IB: I don't think I had a philosophy in the sense we consider American judges having political ideology that they try to implement.[22] I certainly believe that the law is a

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he also served as Communications Security Establishment Commissioner. See Supreme Court of Canada, *About the Court: The Right Honourable Antonio Lamer*, PC, CC, CD, online: Supreme Court of Canada <http://www.scc-csc.gc.ca>.

21 Justice Binnie appeared before the Supreme Court of Canada on many occasions before his appointment to the Court. See e.g. *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154, 84 DLR (4th) 161; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319, 100 DLR (4th) 212; *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, (1994), 120 DLR (4th) 12; *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877, 38 OR (3d) 735.

22 See e.g. Cass R Sunstein et al, *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* (Washington: The Brookings Institution, 2006).

rational system and that built into Canadian law is a sense of decency, proportionality and balance, and that it is important that these values be reflected in the jurisprudence. I felt that the legal profession was not well served by judgments that were so long and complicated that they were essentially unread except by professors and the occasional law student. My approach to access to justice includes the accessibility of court judgments and the practicality of their application.

OLR: *You have been singled out as one of the finest legal writers in Canada.*[23] *Can you discuss the importance of legal writing as a skill for judges?*
IB: I think it's important for judgments to be readable and readily understood. Otherwise there is not much point in issuing them. My own style of writing really goes back to oral advocacy: I write the way I talk. I think people absorb oral communication better than written communication. Written communication tends to become too ornate and discursive, whereas if you are making an oral point, you tend to be much quicker to the point and simpler in your language. So, if you have a background as an advocate and in preparing facta and arguments that are intended to focus a court on the particular issue that you are dealing with, it is a fairly natural transition into writing judgments to try to bring the same focus as the lawyers to the actual point in dispute.

OLR: *For lawyers or judges looking to improve their written advocacy skills, is that what you would suggest: that they try to write as they speak?*
IB: I think so. I think it's disastrous in the Supreme Court when you have a lawyer stand up with some written argument that looked good in the hotel room the night before, but which is totally uninteresting after it comes in the latter part of a session in the Supreme Court. I am a great believer in spontaneity. I think a lawyer going into the Supreme Court should not have a written argument and should not rely on the factum. The lawyer should have a few points on a piece of paper to make sure that those points are covered. Very often you can root your argument in these condensed books which you file with the extracts of the evidence and authorities you particularly rely on.[24] But as criminal lawyers do with the jury, you keep your focus on looking at the judges and picking up the body language and responding to where you think the court wants to go, instead of trying to push in a counter-direction, which is very often highly unproductive.

OLR: *You have had the experience both of arguing a number of very significant cases before the Supreme Court and of sitting on the other side of the bench and watching how various*

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23 See e.g. The Governor General of Canada, News Release, "Order of Canada Investiture Ceremony" (21 November 2012), online: The Governor General of Canada <http://www.gg.ca/document.aspx?id=14837>; Kirk Makin, "Two Supreme Court judges announce retirement" *The Globe and Mail* (13 May 2011), online: The Globe and Mail <http://www.theglobeandmail.com>.

24 A condensed book contains excerpts from the record and book of authorities that a party will refer to in oral argument. See *Rules of the Supreme Court of Canada*, SOR/2002-156, s 45.

litigation strategies play out. What did you feel in both cases made for the most effective oral advocacy at the Supreme Court?

IB: First of all, I think oral advocacy is very important. Other judges take a different view. I always found it extremely helpful. Many young lawyers think, "Oh well, the only people who are being listened to in the Supreme Court are those with a lot of grey hair and experience." And that is not at all the case. Many lawyers with a lot of grey hair and experience will ramble around in circles and they are not of much help to the court. It's also important to understand that an argument at trial is very different from an argument at the court of appeal, which in turn is very different from an argument at the Supreme Court. In the court of appeal, because they have a much bigger docket and because most cases get to the court of appeal as of right,[25] a large part of their docket consists of cases that really don't have much merit, and the preparation is accordingly fairly modest. In the Supreme Court, because most of the cases have gone through the leave process,[26] it is qualified as a case of public importance and the level of preparation of the judges is much greater than in the courts of appeal, by and large. So what is important in the Supreme Court is focus—lawyers have to accept that the Court has mastered the essential outlines of the argument and their job is to push the bench in their direction by persuading the Court that the way they see the case is the proper approach. If you can persuade them of that, then they are likely to agree with you on the solution. At the same time, counsel's opponent is telling them to look at the case in a different way. So oral advocacy is essentially a contest between lawyers as to what the proper focus is for a particular appeal.

OLR: *Did you find that you were often convinced in the courtroom of this focus, or did you normally come into the courtroom on the day of oral arguments with a pretty clear idea of what you believed was the nexus of the case?*

IB: It varied enormously. Certainly in some cases I would come into court with a provisional view—ready to change my mind if necessary—but having a fairly clear concept of where I thought the law and the disposition should go. In other cases, I would come into court with a fairly good understanding of the position of each of the parties, but not at all clear as to the proper focus that should be brought to bear to reach the disposition. I'll give you an example: the *Sharpe* case dealing with child pornography.[27] At the trial level, the defence had persuaded the trial judge that

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25 For example, the *Criminal Code* provides that an individual convicted of an indictable criminal offence has an automatic right to appeal on a question of law alone. *Criminal Code of Canada*, RSC 1985, c C-46, s 675(1)(a)(i).

26 In most cases, a panel of three Supreme Court of Canada judges must grant leave to a party who would like to appeal the decision of a lower court. Leave to appeal is granted if the panel decides the case concerns a question of public importance, or raises an important point of law. See *Supreme Court of Canada Act*, RSC 1985, c S-26, s 43.

27 *R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45. This decision examined whether the right to freedom of expression protects possession of exploitative material, and whether the *Criminal Code* prohibition on possession of child pornography's infringement on liberty under s 7 of the *Charter* is justifiable.

artistic freedom was the proper focus and that the federal criminal provisions went too far.[28] When the case got to the British Columbia Court of Appeal, the Crown persuaded the Court that the proper focus was harm to children and that artistic freedom was really a fringe issue in terms of the validity of the legislation.[29] Then, when it got to the Supreme Court, the case had these two contending points of view pulling the court in the oral argument. So the great mistake in the Supreme Court is for the lawyer to be in the midst of an interesting debate with the judges as to the proper focus of a case and then to abandon the debate and try to move the judges onto something they are not interested in—for example, 50-year-old cases from the Supreme Court itself, or the Australian High Court, or what have you. In other words, they key to oral advocacy in the Supreme Court is to draw the judges into a debate and to move that debate in the direction that favours the outcome for which counsel is contending. It is not to give them the tools to support that conclusion because if lawyers persuade the judges that they are right about the conclusion, they will figure out how to get there.

OLR: *Now that you have had the benefit of 13 years on the Court, how would you evaluate your own performance as a litigator before the Supreme Court?*
IB: Certainly, the style of an advocate changes over time. I think the most significant point for me was the importance of the judges' conference immediately after the hearing of an appeal. Like most counsel, I thought that because the Supreme Court generally takes six or eight months to come down with a decision, they would go away and think about it, discuss the case and read material before even reaching a preliminary conclusion. That is why you often find lawyers in the Supreme Court saying, "Well, this particular contract or provision or testimony is crucial to my argument, but I won't take the trouble to have you read it now. I leave it to you to read it at your leisure." Well, they don't have much leisure. If it is something that is very central to your argument, your job is to make sure they understand it before they leave the courtroom, because they are going to go back into the judges' conference room and start talking about the case as soon as they sit down. So even if they did have leisure, they wouldn't have it between the time the lawyers finish oral argument and the time the judges start to discuss the case. So the compressed time frame within which preliminary decisions are made by the judges would have altered my approach to oral argument.

OLR: *Your approach would have been to be much more explicit?*
IB: My approach would have been to be very sure that absolutely everything that was central to my view of the proper disposition of the case had been put before the judges' noses and forcefully brought to their attention. There is a wonderful

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28 *R v Sharpe* (1999), 169 DLR (4th) 536, 22 CR (5th) 129 (BCSC).
29 *R v Sharpe*, 1999 BCCA 416, 175 DLR (4th) 1.

story of WN Tilley,[30] a very formidable advocate through the 1930s and 1940s, who was arguing a case in the Supreme Court. He started to read some evidence and he was stopped by the Chief Justice[31] who said, "No, no, Mr. Tilley, don't bother to do that. We will read it at our leisure." So Tilley said, "Will your lordship actually read this testament I'm about to present?" "Yes, yes." Then he looked at the other judges and said, "Well, will all your lordships read it?" And they said, "Yes, yes." So he said, "Well, let's all read it together." And so they did.[32] In those days, lawyers were not under the kind of time limits they are now. But it illustrates a point that Tilley understood better than I did: if it is important to the case, a lawyer just has to put the nose of judges right in it and don't let them off the hook, because it's the lawyer's responsibility to drive the point home. That's why it's important to weed out the extraneous stuff: there is a lot to get through in an hour, and if you go into the highways and byways of a case and lose the focus, you are wasting time and you are not going to cover what you have to cover.

OLR: *Were you generally impressed with the quality of the advocacy that you saw before the Supreme Court or do you think there was a lot of room for improvement with respect to the issues that you have been bringing up?*
IB: Oral advocacy in the Supreme Court is hugely diverse. You have exposure to some marvelous advocates, and the judges walk out of court marveling at how expertly the argument has been put. You have other lawyers who turn up half prepared. Some of them are in the Supreme Court for the first time and have not taken the trouble to come and listen to an argument, so they have no idea what they are in for when they stand up and start to deliver their maiden speech, so to speak. A very good source of Supreme Court advocates is the body of former clerks who have sat through enough arguments to see what works and what doesn't work. And they tend to be highly focused, highly directive, and very successful.

OLR: *You had the opportunity, while in government and in private practice, to litigate before international arbitration tribunals and the International Court of Justice.*[33] *Can you compare*

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30 WN Tilley was a top litigator and Law Society of Upper Canada Treasurer in the 1930s. Tilley was also director of several major Canadian corporations, including the Canadian Pacific Railway. Christopher Moore, *The Law Society of Upper Canada and Ontario's Lawyers, 1797-1997* (Toronto: University of Toronto Press, 1997) at 156.

31 Francis Alexander Anglin, Chief Justice of the Supreme Court of Canada between 1924 and 1933, was Chief Justice at the time. See John D Arnup, "Advocacy" (1979) 13 L Soc'y Gaz 27 at 31.

32 See *ibid*.

33 Justice Binnie appeared before the International Court of Justice for Canada when he was Associate Deputy Minister of Justice, from 1982 to 1986. Notably, he represented Canada in the Gulf of Maine dispute with the United States in 1984. In 1991, he also represented Canada in an international arbitration during the Saint-Pierre and Miquelon maritime boundary dispute. See Supreme Court of Canada Biography, Justice Binnie, *supra* note 1; *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)*, [1984] ICJ Rep 246 [*Gulf of Maine Case*]; *Case concerning the Delimitation of the Maritime Areas between Canada and the French Republic*, (1992) 31 ILM 1149 (Court of Arbitration constituted under an Agreement of 30 March 1989).

your experience in these fora to domestic litigation? Were they quite different or did you find it very much the same exercise but just in a different venue?
IB: No, it's a totally different experience. In the International Court of Justice, for example, everything is highly programmed. The argument is divided among counsel and if, for example, you have Tuesday morning to cover the economic impact of a boundary delimitation on the east coast of Nova Scotia, you're expected to finish your last sentence right on the dot at 1 pm. Therefore, there's a regimentation, a formality, a level of preparation. Submissions are timed, because a number of lawyers have different roles which interlock. There has to be a high level of coordination. It's much closer to a Broadway musical than it is to a scrap in the Elgin Street Court House.[34]

OLR: *Did you like this Broadway musical-esque experience?*
IB: Well, it's not nearly as enjoyable from a litigation point of view. It is hugely interesting and it has its own rules and protocols. For example, when judgment is handed down, the lawyers are expected to turn up and listen to it. When lawyers walk into the Peace Palace in The Hague,[35] there is a copy of the judgment sitting on counsel's desk. But they are not allowed to pick it up and look at the end to see who won. The protocol is that counsel wait for the judges to come in and then follow along as the judges read perhaps a 100-page judgment.

In fact, those who were used to appearing in the International Court knew that the trick is to turn more than one page at a time, so as the court turns a page, the lawyers turn about 25 pages and they get to the end very quickly. So, it's just a wholly different experience.

Another interesting aspect of the International Court is that when we were litigating against the Americans in the Gulf of Maine,[36] they called an expert biologist to deal with some fisheries questions.[37] He was ferociously cross-examined by Yves Fortier[38] on the Canadian side, and the Canadian team was exultant at the

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34 The Elgin Street Courthouse, or Ottawa Courthouse, is a building in Ottawa housing the Ontario Court of Justice and the Superior Court of Justice. It hears criminal, civil, family law, small claims, and estates cases. The building also houses the provincial land registry office. Community Information Centre of Ottawa, *e-Blue Book Record Details: Ministry of the Attorney General, Ottawa Court House*, online: Community Information Centre of Ottawa <http://ottawa.cioc.ca/record/OCR1266?UseCICVw=13&Number=1>; Service Ontario, *Service Location Finder – Ottawa-Carleton – Land Registry Office #4*, online: Service Ontario <https://www.services.gov.on.ca/locations/locationDetail.do?id=11346>.

35 The Peace Palace is located in The Hague, Netherlands, and is home to the International Court of Justice, the Permanent Court of Arbitration, the Peace Palace Library of International Law, and The Hague Academy of International Law. Carnegie Foundation, *Introduction* [nd], online: Carnegie Foundation <http://www.vredespaleis.nl>.

36 *Gulf of Maine Case*, *supra* note 34.

37 Dr. Robert Edwards was called by the United States as an expert in biology and oceanography. See *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)*, "Evidence of Dr. Edwards" (18 April, 1984), ICJ Pleadings (vol 6) 395.

38 A noted Canadian lawyer and diplomat, Yves Fortier was a member of the Permanent Court of Arbitration in The Hague from 1984 to 1989 and has represented Canada in maritime boundary disputes: the Gulf of Maine dispute with the United States in 1984 (*Gulf of Maine Case*, *supra* note 34)

success of the cross-examination. But it turned out later that the judges, who were European for the most part, were quite offended.[39] They weren't used to this kind of roughhouse cross-examination and they felt that the dignity of the witness had been unnecessarily denigrated, which of course was a reaction totally foreign to our experience. So for all sorts of reasons, international litigation is really a game of a wholly different sort than domestic litigation.

OLR: *Another noteworthy aspect of your career is that you were Special Parliamentary Counsel during the Meech Lake saga.*[40] *What role did you play in the Special Committee's work?*
IB: Our job was to sit through the hearings, which went on seven weeks,[41] to distill all of the arguments for and against the provisions of the Meech Lake Accord and to offer advice to the Parliamentary Committee as to whether the criticisms were justified or not. We drafted an extensive report, which quoted at great length from all of the different submissions, and tried to put it together in a way that could be released to the public so people who didn't have time to sit through the hearings could simply read it and get an idea of what the debate was and why the Committee reached the conclusions it did.[42]

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and the dispute with France over the Exclusive Economic Zone of Saint Pierre and Miquelon (*Saint Pierre and Miquelon Case*, *supra* note 34). He took a leave from the Canadian law firm Ogilvy Rénault to serve as Canada's Ambassador and Permanent Representative to the United Nations in New York from 1988 and 1992. He served as counsel to many Canadian Royal Commissions and Commissions of Inquiry and was a negotiator for the Government of Quebec with the Cree Nation. In 2011, he left Norton Rose (the successor firm to Ogilvy Rénault) to set up his own law practice. He is currently a resident arbitrator at Arbitration Place in Toronto. See Foreign Affairs and International Trade Canada, *Mr L Yves Fortier*, online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/odskelton/yvesfortier_bio.aspx?lang=eng&view=d>; Drew Hasselback, "Yves Fortier to leave Norton Rose", *Financial Post* (24 October 2011), online: National Post <http://business.financialpost.com>.

39 The judges presiding over this case were Judge Ago (Italy), Judge Gros (France), Judge Mosler (Germany), Judge Schwebel (United States of America), and Judge Cohen (Canada). See *Gulf of Maine Case*, *supra* note 34 at 247.

40 The Meech Lake Accord was a failed attempt at a series of amendments to the Canadian Constitution intended to convince the Quebec government to endorse the 1982 constitutional amendments. Negotiated in 1987 by the Government of Canada and the provincial governments, the Accord failed to receive the necessary endorsements by 1990 and was not implemented. See Patrick J Monahan, *Constitutional Law*, 3d ed (Toronto: Irwin Law, 2006) at 207ff.

41 The Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord was created on March 27, 1990, and released its recommendations on May 17, 1990. Library of Parliament, *The Constitution Since Patriation: Chronology* (November 2010), online: Parliament of Canada <http://www.parl.gc.ca>.

42 House of Commons Canada, *Report of the Special Committee to Study the Proposed Companion Resolution to the Meech Lake Accord* (Ottawa: House of Commons Canada, 1990) [*Report of the Special Committee on Meech Lake*]. The House of Commons set up the committee in March 1990, which was chaired by Jean Charest, the former Leader of the Government in the House of Commons, to receive public input on the "companion resolution" to the Meech Lake Accord, put out by the New Brunswick Government in an attempt to save the accord.

OLR: *And did that give you a different perspective on what was going on?*
IB: Yes, although I came to the view that the objections were largely a tempest in the teapot, because the reality is that Quebec is a distinct society.[43] On numerous occasions, the Supreme Court of Canada has recognized it as distinct—for example, in the language cases and in the education cases.[44] The Meech Lake Accord was essentially a political settlement without any legal bite, so far as I was concerned, and it was defeated purely for political reasons that had nothing to do with its merit.[45] The whole objection to asymmetrical federalism is foolish. While the Constitution applies in the same way to every part of Confederation, in practice, different provinces have different institutions and different traditions. The Quebec Civil Code[46] and provinces' different arrangements on a practical level mean that we do have a regionalized country, and anybody who pretends this is not so simply has not spent enough time studying the subject.

OLR: *If it had passed, do you think it would have had any legal implications?*
IB: I don't think we would have seen any difference. You would have seen a different array of arguments. Lawyers would have argued that a distinct society has meaning, but the concept was so vague as essentially to be meaningless. It would not have driven the outcome of a case one way or another in my view. It's a little bit like recognition in the *Charter* that Canada is a multicultural society.[47] As far as I know,

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43 The proposed redrafted subsection 2(3) of the *Constitution Act, 1867* read as follows: "The role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(b) is affirmed." Canada, *Strengthening the Canadian Federation: Constitution Amendment, 1987* (Ottawa: Queen's Printer, 1987).

44 See e.g. *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712, 54 DLR (4th) 577; *Solski (Tutor of) v Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 SCR 201.

45 As per the amending formula in the Constitution Act, 1982, the Meech Lake Accord required approval by the federal Parliament as well as all provincial legislatures within three years (*Constitution Act, 1982*, ss 38-49, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*]). Support for the Accord unraveled in many provinces. On December 19, 1988, Manitoba Premier Gary Filmon withdrew the resolution supporting ratification from the Manitoba legislature. In 1990, New Brunswick Premier Frank McKenna said the province's support for the Accord was dependent on support for a companion accord. The Special Committee of the House of Commons struck to examine the idea, headed by Jean Charest, supported New Brunswick's proposed accord (*Report of the Special Committee on Meech Lake*, *supra* note 44). Yet the Charest Report was rejected by Quebec, and prompted several Quebec Members of Parliament to leave the governing Progressive Conservative Party. Elijah Harper, the Manitoba legislature's sole aboriginal member, denied the unanimous consent of members necessary to dispense with public consultations, citing the Accord as another example of Canada's historical exclusion of aboriginal peoples. This unanimous consent was required for Manitoba to re-approve the Accord before the three-year deadline expired. Newfoundland subsequently adjourned the debate in its legislature, leading to the death of the Accord on June 23, 1990. See Patrick J Monahan, "After Meech Lake: An Insider's View" (Thomas G. Feeney Memorial Lecture, delivered at the University of Ottawa, 13 October 1990), Kingston, ON: Institute of Intergovernmental Relations, 1990.

46 *Civil Code of Quebec*, SQ 1991, c 64 (CCQ).

47 "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." *Canadian Charter of Rights and Freedoms*, s 27, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

that has never played any dispositive role in any case.[48] It's very occasionally thrown into the mix, but it is a political statement that is hung on the constitutional Christmas tree like an ornament that has no real impact.

OLR: *You have been very outspoken about the need for mechanisms to enforce corporate accountability for both international human rights and environmental abuses,*[49] *and your firm, Lenczer Slaght,*[50] *is currently representing Ecuadorian plaintiffs who are attempting to enforce a judgment of the Ecuadorian courts against Chevron in Ontario.*[51] *Part of the difficulty in this case and in others is the complex structure of multinational corporations. Do you think that we need legislation in Canada to ensure that parent corporations have at least some responsibilities for due diligence towards subsidiary pieces of their corporate structure?*

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48 See e.g. *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 337-38, 18 DLR (4th) 321. In its decision, the Supreme Court noted that "to accept that Parliament retains the right to compel universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multicultural heritage of Canadians. To do so is contrary to the expressed provisions of s. 27…" While the invocation of section 27 supported the Court's interpretation of freedom of religion in section 2(a) of the *Charter*, it was not dispositive in the case.

49 See e.g. Ian Binnie, "Legal Redress for Corporate Participation in International Human Rights Abuses: A Progress Report" (Summer 2009) 38:4 *The Brief* 45. In this report, Justice Binnie noted that transnational companies today "have power and influence approaching and sometimes exceeding that of the states in which they operate but without the public law responsibilities of statehood. This has created a challenge for the international community as it seeks to develop remedies for harms arising out of the involvement of such companies in human rights abuses." See also Cristin Schmitz, "Binnie calls for corporate accountability", *The Lawyers Weekly* (29 August 2008), online: Lawyers Weekly <http://www.lawyersweekly-digital.com>.

50 Lenczner Slaght Royce Smith Griffin LLP is a Toronto law firm in specializing in civil litigation.

51 In November 2012, Lenczner Slaght Royce Smith Griffin LLP founding partner Alan Lenczner asked the Ontario Court of Justice to recognize and enforce an Ecuadorian court's $18.3-billion (US) judgment against Chevron Corporation for oil pollution. See Jeff Gray, "Ontario should recognize Ecuadorian ruling against Chevron: lawyer", *The Globe and Mail* (30 November 2012), online: The Globe and Mail <http://www.theglobeandmail.com/>. The dispute began in 1993 when groups of Ecuadorians brought similar suits against Texaco (which was later acquired by Chevron) in American district courts for alleged environmental damage around the Lago Agrio oil field. District courts in Texas and New York dismissed the case on the basis of *forum non conveniens* (*Sequihua v Texaco*, 847 F Supp 61 (SD Tex 1994); *Aguinda v Texaco*, 142 F Supp 2d 534 (SDNY 2001); *Jota v Texaco*, 157 F3d 153 (2nd Cir 1998)). The plaintiffs then filed suit in Ecuador and, in 2011, were awarded $18.3-billion in damages (for an official English translation of the case, see "Judgment of the Lago Agrio, Ecuador Court, dated February 14, 2011", *Chevron Toxico* (22 February 2011) online: Chevron Toxico <http://chevrontoxico.com/assets/docs/2011-02-14-judgment-Aguinda-v-ChevronTexaco.pdf>). Meanwhile, in September 2009, 18 months before the Ecuador court issued its decision, Chevron filed a claim in the Permanent Court of Arbitration (PCA). Chevron claimed that the Ecuadorian proceedings were in contravention of the United States-Ecuador bilateral investment treaty—in particular, its guarantee of fair and equitable treatment for investors (*Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment*, 27 August 1993, (entered into force 11 May 1997), online: US Department of State <http://www.state.gov/documents/organization/43558.pdf>; *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador*, Claimants' Notice of Arbitration (Permanent Court of Arbitration, 23 September 2009), online: Chevron <http://www.chevron.com/documents/pdf/EcuadorBITEn.pdf>)). In 2011 and 2012, the PCA issued two orders for interim measures, directing Ecuador to ensure that the decision of the Ecuadorian court not be recognized and enforced within or outside of Ecuador.

IB: Yes I do. I think the way in which corporate organizations are structured has a lot to do with taxes, and has a lot to do with operating in a number of different jurisdictions to which different legal rules apply. But by and large, these multi-national companies have an overall coherence and structure and are directed from the centre. It seems to me that the doctrine of the corporate veil was created for a very appropriate purpose: to facilitate utility in commercial transactions.[52] But the way in which those structures are now being used is to have profits taken from the bottom level corporations, sucked up to the top, then using the corporate veil to leave responsibility at the bottom, where there is no money left. It strikes me that, looking at the corporate structure as a whole, there is something wrong with that picture. The difficulty for judges is that they are burdened with years and years of domestic corporate law that has worked out doctrines for totally different purposes. It takes courage for a judge to say, "Those precedents don't apply in this situation," using the jurisdiction of necessity argument[53] or various other legal doctrines that can be deployed, but it would certainly be a lot easier if there were legislation.

OLR: *So you think we need legislative action; we cannot count on judges to have the courage to forge ahead?*

IB: Judges don't like being reversed and they are reluctant to go too far out on a limb without legislative support. I look back in our history to judges like Ivan

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(*Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador*, Order for Interim Measures (Permanent Court of Arbitration, 9 February 2011), online: Chevron <http://www.chevron.com/documents/pdf/ecuador/TribunalInterimMeasuresOrder.pdf>; *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador*, Second Interim Award on Interim Measures (Permanent Court of Arbitration, 16 February 2012), online: Chevron <http://www.chevron.com/documents/pdf/ecuador/SecondTribunalInterimAward.pdf>). In February 2013, the PCA found that Ecuador violated the arbitration panel's previous order by not preventing the plaintiffs from seeking recognition and enforcement of the Ecuadorian judgment in Argentina, Canada, and Brazil (*Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador*, Fourth Interim Award on Interim Measures (Permanent Court of Arbitration, 7 February 2013), online: The Amazon Post <http://www.theamazonpost.com/wp-content/uploads/Fourth-Interim-Award-on-Interim-Measures.pdf>). See generally Sarah Joseph, "Protracted lawfare: the tale of Chevron Texaco in the Amazon" (2012) 3:1 JHRE 70.

52 Lifting the corporate veil refers to the concept where liability may be imposed on the shareholders of a company instead of the company itself. See *Kosmopoulos v Constitution Insurance Co of Canada*, [1987] 1 SCR 2 at 10, 34 DLR (4th) 208. Where the major shareholder is another corporation, the corporate veil can protect the parent corporation from liability for the subsidiary's actions.

53 The jurisdiction of necessity doctrine—or forum of necessity—confers jurisdiction on a forum where there is no other forum in which the plaintiff may reasonably seek relief, despite the absence of a real and substantial connection between the plaintiff and the forum in question. Forum of necessity has been incorporated into the legislation of many European countries in addition to many provinces in Canada. For example, in Switzerland, the original objective of the provision, according to its authors, was to prevent victims of crimes from being denied international justice. See Frank Vischer, "Drafting National Legislation on Conflict of Laws: The Swiss Experience" (1977) 41 L & Contemp Prob 131. See also *Van Breda v Village Resorts Limited*, 2010 ONCA 84, DLR (4th) 201, aff'g [2012] 1 SCR 572 [*Van Breda*, ONCA], in which the Court notes the adoption of the doctrine by the Quebec Civil Code (Article 3136), the Uniform Law Conference of Canada's model *Court Jurisdiction and Proceedings Transfer Act* and both the European Union and the United Kingdom.

Rand[54] deciding *Roncarelli*, who went out on a limb in terms of his use of the rule of law to forge a liability where nobody before had thought one existed.[55] I think that kind of courage has characterized common law judges over the years, and I hope it will continue to do so. In the absence of legislation, I hope Canadian judges will see the need to modify some of the traditional corporate doctrines to give relief to these people, because one of the most fundamental precepts of our legal system is that if there is a wrong there should be a remedy. And at the moment, these people in the third world have no remedy.

OLR: *To date, these corporate accountability cases in Canada have not got beyond the jurisdictional stage. You mentioned the forum of necessity doctrine, which the Ontario Court of Appeal discussed in Van Breda, but which was not dealt with by the Supreme Court in that case.*[56] *Do you think that this doctrine offers some hope for plaintiffs who are trying to have Canadian courts take jurisdiction or have foreign judgments enforced in a Canadian jurisdiction?*

IB: Yes, I think it is one of the tools available to the judges. There is a big difference, of course, between trying a case on the merits in Canada and enforcing foreign judgment. In the Ecuador case that you mentioned, Chevron argued for years in American courts that this is not a matter that should be dealt with in the United States; it should be dealt with in Ecuador.[57] So the litigation moved to Ecuador, and they got a bit of a shock with the adverse result. Now they are arguing that the Ecuadorian judgment shouldn't be enforced.[58] That raises a whole different series of issues about the presence of assets in the jurisdiction, and so on. An example is the

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54 Ivan Cleveland Rand was born in Moncton, New Brunswick, on April 27, 1884. Justice Rand received his LL.B. from Harvard Law School before he was called to the bar of New Brunswick in 1912. Justice Rand was named Attorney General of New Brunswick in 1924 and was a member of the Legislative Assembly from February to June 1925. On April 22, 1943, he was appointed to the Supreme Court of Canada. Justice Rand developed what was known as the "Rand formula," a mechanism for levying union dues, while acting as arbitrator in a Ford labour dispute. Justice Rand retired from the Court on April 27, 1959 and died on January 2, 1969 at the age of 84. Supreme Court of Canada, "Judges of the Court: The Honourable Mr. Justice Ivan Cleveland Rand", online: Supreme Court of Canada <http://www.scc-csc.gc.ca>; William Kaplan, *Canadian Maverick: The Life and Times of Ivan C. Rand* (Toronto: University of Toronto Press, 2009).

55 In *Roncarelli v Duplessis*, the Supreme Court of Canada held that Quebec Premier Maurice Duplessis could not revoke the liquor licence of Frank Roncarelli solely because the latter was providing bail for jailed Jehovah's Witnesses; doing so violated the rule of law. In his reasons, Justice Rand spoke forcefully against the exercise of arbitrary power by public officials: "…that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure." *Roncarelli v Duplessis*, [1959] SCR 121 at 142, 16 DLR (2d) 689, Rand J.

56 See *Van Breda*, ONCA, *supra* note 55; *Club Resorts Ltd v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572.

57 John Spears, "Ecuadorans look to Ontario court for damages against Chevron", *Toronto Star* (30 November 2012) online: Toronto Star <http://www.thestar.com>; *Sequihua v Texaco*, 847 F Supp 61 (SD Tex 1994) at 63.

58 Ed Crooks & Naomi Mapstone, "Chevron's Ecuador case takes new twist", *The Financial Times Ltd* (4 January 2012), online: The Financial Times <www.ft.com>.

Kiobel case, now before the Supreme Court in the United States, having to do with Royal Dutch Shell in Nigeria and atrocities that appeared to have been committed in the oil fields by the Nigerian security forces, but with the alleged complicity of Royal Dutch Shell.[59] Well, for Canadian courts, or American courts, or British courts to say, "Go back to Nigeria: that's the proper forum to resolve the merits of your dispute," doesn't seem to me a useful response. By definition, the governments are the main delinquents in the fact situation, and Nigerian law is not apt to penalize the Nigerian government for conduct undertaken in the oil fields.[60] So you find people who have suffered greatly, usually at the hands of government security forces, occasionally private security forces, who have no remedy in the country where the damage was inflicted. I think our ordinary principles of liability and tort law suggest that the cost should be spread amongst those who benefit. The effect of the present system is that there are a number of Nigerians who have enormous uncompensated losses, which ought to be reflected in the price of oil that we pay for.

OLR: *Do you think that there is a need for greater practicality by judges? In private international law, there is usually a reluctance to undermine the principle of comity by casting aspersions on foreign courts.*[61] *But is there a need for judges to recognize that often, while a foreign court might be theoretically the most appropriate jurisdiction, there is simply no practical avenue there for litigants?*

IB: Yes, I think the courts have to be realistic that when they send a case to be tried in the country where the damage was inflicted, they may well be consigning the complainants to an absolutely meaningless remedy. I think that particularly when Canada is the host to the head office of the corporate structure that is alleged to have inflicted the damage, there is some responsibility on Canada's part to have the case heard on the merits. That does not mean that all these allegations are true or that the corporation ought to always lose. *Talisman Energy* is an example. They were

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59 The *Alien Tort Statute*, 28 USC § 1350 (1789) allows American courts to take jurisdiction over the claims of non-American citizens for torts "committed in violation of the law of nations or a treaty of the United States." In the 1990s, Royal Dutch Petroleum conducted extensive oil drilling operations in Nigeria. A number of Nigerian residents peacefully protested the drilling operations because of the severe environmental and health consequences flowing from the unregulated drilling. In *Kiobel v Royal Dutch Petroleum*, currently before the American Supreme Court, the plaintiffs allege that Royal Dutch Shell supported the use of violent means by the local government to quell the protests. One of the legal issues to be addressed is whether the *Alien Tort Statute* allows the United States to recognize a cause of action for international violations occurring outside American jurisdiction. See *Kiobel v Royal Dutch Petroleum Co*, 621 F3d 111 (2d Cir 2010), cert granted.

60 See e.g. Tineke Lambooy & Marie-Eve Rancourt, "Shell in Nigeria: From Human Rights Abuse to Corporate Social Responsibility" (2008) 2 Human Rights & International Legal Discourse 229 at 251.

61 In private international law, comity refers to "the deference and respect due by other states to the actions of a state legitimately taken within its territory." It was discussed as an analogy by the Supreme Court of Canada in *Morguard Investments Ltd v De Savoye*, which dealt with the recognition and enforcement of extra-provincial judgments. See *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 at para 29, 76 DLR (4th) 256).

sued in respect of activities in the Sudan and it was held that in fact the head office had absolutely no knowledge of what was going on in the Sudan, and therefore was exonerated.[62] What I'm advocating is not that there be some sort of arrangement in Canada where these allegations are presumed to be true; I just want the cases to be heard.

OLR: *You have also spoken in previous interviews about how you took personal satisfaction deciding Aboriginal law issues because of the importance of reconciling Aboriginal and non-Aboriginal populations.*[63] *How successful do you think the Supreme Court has been in trying to achieve this reconciliation?*

IB: I think the Supreme Court has moved the debate considerably. I have some concerns. I think the fact the Supreme Court took on the Aboriginal agenda as a result of section 35 of the *Constitution Act, 1982*,[64] but before that in the *Guerin* case, where they invoked the idea of an enforceable trust in favour of the reserve Indians, has removed a lot of the heat from the politicians.[65] Many of these issues are much better resolved politically than in the courts. The courts, of course, have to deal with one-off disputes. A political settlement can apply generally, and it can deal with the socio-economic needs of First Nations. One-off litigation, on the other hand, depends on whether a particular First Nation is sitting on an oil well or sitting on rock and gravel somewhere in the middle of the Maritimes. One of the disadvantages of the Court stepping up to the plate to deal with Aboriginal issues is that the politicians tell First Nations, "Well you've got your legal rights, so go take your complaints to the courts, and we'll abide by whatever decision is made." On the other hand, the courts, particularly in developing this duty of consultation, have given these First Nations very effective means of being heard at a time when it is important to be heard, and at the moment, there is a much more level playing field than there had been before the courts got into the picture.

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62 Affirming a holding by the United States District Court for the Southern District of New York, the United States Court of Appeals for the Second Circuit held that "to establish accessorial liability for violations of the international norms prohibiting genocide, war crimes, and crimes against humanity, plaintiffs were required to prove, *inter alia*, that Talisman provided substantial assistance to the Government of the Sudan with the purpose of aiding its unlawful conduct." The Court dismissed the case "on the ground that plaintiffs have not established Talisman's purposeful complicity in human rights abuse." The United States Supreme Court declined to grant a writ of certiorari in the case. See *The Presbyterian Church of Sudan v Talisman Energy, Inc*, 582 F (3d) 244 (2d Cir 2009), cert denied.

63 Kirk Makin, *supra* note 5.

64 "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." *Constitution Act, 1982*, *supra* note 47, s 35(1).

65 In this case, the Supreme Court of Canada ruled that the Indians' interest in their land is a pre-existing legal right that is not reliant on any executive order or legislative provision. Therefore, Aboriginal peoples could enforce their rights under the concept of breach of trust. See *Guerin v Canada*, [1984] 2 SCR 335 at 351, 359, 13 DLR (4th) 321.

OLR: *The duty to consult has been one of the key Aboriginal issues that the Court has dealt with in the last decade and it has become a fairly well developed legal doctrine.*[66] *But do you think it is doing anything to contribute to the well-being of people in Aboriginal communities?*[67]
IB: The duty to consult has made an enormous difference, because there are many more settlements now than there had been earlier; many resource developments involve Aboriginal participation and Aboriginal employment. Much faster progress is being made in those communities than would otherwise be the case. I think your point is more pertinent to the more general substantive area of Aboriginal law having to do with Aboriginal title and Aboriginal rights—even treaty rights. Because if you look at the track record over the last 20 years or so, Aboriginal people have not had tremendous success at the eventual establishment of substantive rights. In litigation over, for example, commercial fishing rights or timber rights,[68] which of course takes years and years, as well as enormous amounts of money to pursue, they have not been as successful as they expected.

OLR: *You have commented that you feel that the rise of arbitration in commercial disputes has been taking too much commercial work from the courts.*[69] *Do you think there is a way to come to a balance where the legal system itself has enough commercial cases for the jurisprudence to evolve but we also recognize the will of parties to resolve their issues on their own terms and maybe more efficiently than is often accomplished through judicial means?*
IB: I think a balance of a sort is worked out not by the courts but by the parties, because the parties themselves will consider whether they think it is important to have an appeal in the courts and that will play a role in whether they go to arbitration in the first place. So, if there are important legal questions, the parties might tend to opt to go the courts, provided court procedures are sufficiently efficient to move the case forward to disposition in a reasonable time. So, if the courts make their procedures as user-friendly as possible, this will increase the flow of commercial work into the courts. But at the end of the day, the clients will decide where they want to go, whether it be the arbitration route or the court route.

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66 See e.g. *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*]; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew Cree First Nation*]; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650.

67 See generally The University of British Columbia, Faculty of Law, "The Canadian Constitutional Duty to Consult Aboriginal Peoples: *Platinex Inc. v Kitchenuhmaykoosib Inninuwug First Nation*", online: The University of British Columbia <www.law.ubc.ca>.

68 See *Mikisew Cree First Nation*, *supra* note 66; *Haida Nation*, *supra* note 66.

69 A "troubling change" noted by Justice Binnie "is the rapid growth in private arbitration of corporate contract disputes, a development which threatens to 'impoverish' courts' access to important business cases." Jacquie McNish, "The Supreme Court's retired, but hardly retiring, Ian Binnie", *The Globe and Mail* (10 April 2012) online: The Globe and Mail <http://www.theglobeandmail.com>.

OLR: *Do you think there is still a lot of work to be done in making the rules of civil procedure more user-friendly?*
IB: Yes. I think the biggest problem in the courts at the moment is case management.[70] In Toronto, for example, if you have a complicated piece of litigation that is not on the commercial list and is not being micromanaged by a particular judge, you will have different motions at different times before different judges, which makes it highly inefficient: you have to explain the whole case to a new judge every time there is another step in the proceeding. I heard the other day of a case in Vancouver that was supposed to go for six weeks starting today and the lawyers were told a couple of weeks ago that the case is not proceeding because they don't have a judge, and so the case is going to go over until the fall. Well, that is just unacceptable; at that stage, preparation is in high gear. In that particular instance, witnesses were already on their way from India in order to give testimony in Vancouver, and it is simply not acceptable for the court administration to say, "I'm sorry, we don't have a judge, so go away." That does not arise in arbitration. If the arbitrator is booked, the arbitration goes ahead.

OLR: *How has the legal profession as a whole has changed over the course of your career?*
IB: Well, we have already discussed how I think the Department of Justice has changed. In terms of private law, there is the common complaint, which I share, that its business aspects are overtaking its professional aspects. We discussed articling—I think that is a good example. Too much effort is made to squeeze the last dollar out of a practice. When I began practicing, nobody really thought they were going to become rich, certainly not from doing litigation. I think the expectations of young lawyers are now very different. The growth in the firms has added an element of an impersonal environment. When I began to practice, Blake Cassels was the largest firm in Canada, with about 65 lawyers.[71] That would today be considered a mid-size law firm. There is a lack of mutual loyalty. As a friend put it to me the other day, when we began at the Bar, joining the firm was like joining a regiment,

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70 The Ontario *Rules of Civil Procedure* set out the jurisdiction of case management masters and judges to preside over settlement and trial management conferences. These conferences are designed to facilitate a cost-effective and expedient process through which parties may reach a fair and just resolution to their dispute. It provides parties with an opportunity to consolidate or narrow issues to simplify proceedings and allocate trial resources more efficiently. The court is also encouraged to participate actively to facilitate the timely resolution of disputes. *Rules of Civil Procedure*, RRO 1990, Reg 194, rule 77.

71 In 1856, Edward Blake and his brother Samuel Hume Blake formed Blake & Blake in Toronto. With 24 lawyers and a growing international reputation, the firm decided to change its name to Blake, Cassels & Graydon LLP in 1953. In 1970, roughly the period when Justice Binnie was called to the bar, Blake, Cassels & Graydon LLP had 66 lawyers. Today, Blakes employs 60 lawyers in Montreal, 99 in Vancouver, 287 in Toronto, and 103 in Calgary. See Blake, Cassels & Graydon LLP, "Tradition of Excellence", online: Blake, Cassels & Graydon LLP <http://www.blakes.com/>; NALP Canadian Director of Legal Employers, "Blake, Cassels & Graydon LLP", online: NALP Canadian Director of Legal Employers <http://www.nalpcanada.com>.

and you fought for that regiment for your entire career. If you were a soldier in the Black Watch[72] you didn't join the Princess Pat's[73] because they offered more money. The regiment was your regiment. I think young lawyers feel much less loyal to the law firms and tend to shift around more easily and look for better deals elsewhere. Law firms, in turn, seem to show less loyalty to the young lawyers. So you have this unprecedented level of turnover amongst young lawyers at different firms. There are many different aspects of the practice of the law that have changed. I think those who are supportive of the present system will say that the law has changed as a result of forces that had no counterpart when I was a young lawyer, and to some extent that is true. I don't think it's a blame game. I think it is simply a fact that law is a very different environment today than it was when I began to practice in 1967.

OLR: *Thank you so much for giving us some of your time today.*

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72 "The Black Watch is the oldest highland regiment in Canada. Volunteers have served since the regiment's inception in Montreal on January 31st, 1862 as the 5th Battalion, Volunteer Militia Rifles of Canada. The rise of American military strength during the Civil War concerned Canada. The government authorized formation of militia regiments. Each of six Montreal Scottish chieftains responded by raising an infantry company for the 5th Battalion. Eventually, eight companies were raised for border service. Since then, thousands of Canadian citizens have served in the Black Watch. In addition to Canadian border security, they have fought in the Boer War, WW1, WW2, Korean War; bolstered NATO operations in Europe and UN peacekeeping worldwide; and provided aid-to-the-civil-power, most recently during the Quebec and Eastern Ontario ice storm disaster." See generally The Black Watch, "Introduction", The Black Watch Royal Highland Regiment of Canada, online: <http://www.blackwatchcanada.com>.

73 "Princess Patricia's Canadian Light Infantry (PPCLI) is one of Canada's most famous infantry regiments. Founded at the outbreak of World War One, the PPCLI quickly established a reputation for groundbreaking leadership, service and sacrifice. The PPCLI distinguished itself in both World Wars, Korea, Afghanistan and on numerous operations in support of the United Nations and NATO. The Regiment has been awarded 39 Battle Honours, a United States Presidential Distinguished Unit Citation and two Commander-in-Chief Commendations for its overseas service." See generally Land Force Western Area, "About PPCLI", online: Department of National Defence <http://www.army.gc.ca>.