

CFLS 2016 SPRING LECTURE SERIES

NOT JUDGING:

Restraint and Refusal in the Exercise of Legal Judgment

Theories of legal judgment are concerned with the question of what criteria we should use to assess the quality of legal judgment: what counts as good legal judgment? In exploring this question, I have encountered examples where it seems that the strength, value, or legitimacy of a legal judgment lies, in part, with the fact that a judge has not decided something. These examples have prompted a number of questions:

- Is there a difference between a failure to judge, and the legitimate deferral of judgment?
- What is the relationship between the scope of the duty to judge impartially, and other related questions about justiciability, jurisdiction, legitimacy and capacity?
- Should the criteria for good legal judgment include the notion that sometimes judges in a common law court should decide not to judge?
- What is the value, if any, of thinking about it in this way?

I will explore some of these questions in the context of the 2015 Supreme Court of Canada decision in *Kahkewistahaw First Nation v Taypotat*. Set against the Calls to Action of the Truth and Reconciliation Commission and the multi-judicial nature of law in Canada, my presentation will explore whether not judging might be a component of legal judgment that can foster relationships of justice and reconciliation.

PATRICIA COCHRAN

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I am an Assistant Professor at the Faculty of Law, University of Victoria. In 2013, I completed my PhD in law at the University of British Columbia, where I explored the meaning and consequences of the term "common sense" when it is invoked in legal judgments. I have completed graduate studies in both law and political theory, and continue to teach and research at the intersections of those two disciplines.

I have practiced human rights and administrative law with the BC Public Interest Advocacy Centre, and have volunteered with anti-poverty and feminist organizations in British Columbia.

My research interests include constitutional law, the law of evidence, social welfare law, and legal and political theory.



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12:30PM

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