

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**

*Assistant Professor, Faculty of Law, University of Victoria*

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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