ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

May 2013 **Aboriginal Law Section**

A Conversation with Justice LaForme

On Thursday, February 7, 2013, following his address to the Aboriginal Law Section at the OBA Institute in Toronto, Justice Harry LaForme kindly sat down with Julie Jai (section chair), and Richard Ogden (newsletter co-editor), and answered some questions arising from his speech, *Resetting the Aboriginal Canadian Relationship – Musings on Reconciliation*. A copy of the text prepared for that speech is available **here.**

Julie As a Court of Appeal Judge, how are you going to deal with the legal fiction of the Doctrine of Discovery?

LaForme J. Well, I don't get a lot of these cases in front of me. We, the court, bind ourselves by *stare decisis* and precedent and I think if it's going to be done it has to be acknowledged on a political level, and then there's going to be that major shift that is required in government policy, that's what it's going to take. This is not a novel idea. That's what the Charlottetown Accord was all about. So we just need to find our way back there.

Richard During your speech you referred to Pontiac's Uprising (1763-1764) as resetting the political relationship. And I presume that you refer to that in the context of the Idle No More movement and you're talking about the limitations of the law. Is political pressure the only means of resetting the current relationship?

LaForme J. No, but what I think Idle No More is trying to do is educate the public. You see, I'm a firm believer that if the Canadian public at large knew this cycle of history that they would not oppose a shift in policy, they would not oppose a new relationship. In 1982 we thought we could go back to first principles, of the contact, of the original intent. We thought that we could design a way that Aboriginal people *could be* self-governing. It didn't work out because the First Ministers conferences that followed the patriation of the Constitution just couldn't do it. That didn't mean the process was *wrong*, it just meant that it couldn't accomplish this in two years. And so the process, I think, is still there and it's still a good one.

In the early '90s I chaired an organization called the Indian Commission of Ontario. It brought together ministers of both federal and provincial governments and chiefs and we talked about issues like policing on

reserves because the federal and provincial jurisdictions overlap and overlapping means "who pays?", and "where does the money come from?" You'd get these disputes all the time: "well, it's your responsibility Feds because of 91.24", and they'd say "no, it's yours because of Section 92". But that didn't mean that you didn't make progress. You did. You just had to keep at it and I know that a process like that works. When you put Aboriginal people, representatives of the province, and representatives of the federal government together and they all put their legislative jurisdiction together in the middle of the table, you've got the totality of jurisdiction in Canada. You could start divvying that out any way you wanted and carving it up. There's no reason the process can't work. I was part of that process, I chaired that process and I know it works. It may not be a process that gives results that are fast and furious but the results will come and they can be graduated, they can accommodate communities that don't have much ability to those who do have a lot of ability like Six Nations.

But when Canadians hear Idle No More and that we've got to reset the relationship, Canadians don't know what that means. They don't know what the original intention of the settlement of this territory was. We're not educating Canadians enough about "this was the beginning, this is where we went off track, and this is how we can get back on track".

Julie I agree that education is so important because Canadians don't realize that they are part of the relationship, that they are treaty people as well.

LaForme J. I couldn't agree more, all Canadians are treaty people, and I think that if Canadians ever got the real sense of that… you know, I've been involved in decisions out of our court where public opinion was contrary to what the position of the court was and then as soon as the Canadian public appreciated that what we said was right, their position's just entirely changed on this subject, and equal marriage is the one that I was thinking about.

Julie I was involved in that and there was a really interesting interplay where the politics and the courts played complimentary roles, and I'm wondering: what is the role the courts can play in advancing that by education?

LaForme Whatever the court's role can be, I'm just not sure it can be the leading one. For the simple reason that what we will continue to do and what we *have* to do as courts which is to build on the jurisprudence and, building on that jurisprudence isn't going to improve things to the degree required. You know, just because you've got the legislative authority under Section 91.24 to develop a new school system for Aboriginal children, and you don't call it residential schools, that doesn't make your ability to do that any *less*. It's still patronizing and still keeps Aboriginal people in that

place of dependency, complete dependency, and *that's* the one that's got to go.

Richard In your speech you talked about government ability to make changes to laws that affect Indigenous peoples in Canada. Do you, as an Aboriginal, resent the existence of that power?

LaForme J. Yeah. I do. As an educated Aboriginal person, I resent it. *Deeply*. As an example, *none* of my colleagues have to worry that if some Minister of the Crown doesn't like the will that I've made on my death that they can take it over and administer it the way that they see fit. And don't have to even give a reason. None of my colleagues have to worry about it, that doesn't happen to them. It does *me*. That's who I am. I'm a creation of the *Indian Act*.

Richard Another personal question – how do you marry that feeling with your commitment to the "Queen's law", your lifelong, continuing commitment to it?

LaForme J. I don't have any difficulty with it, for the simple reason that as judges – and our system embraces this and in fact invites it – we *want* people like me and *should* want people like me on the court because we *do* want their life's experiences to be injected into the interpretation of what laws should be and how they impact people. I've seen it on my court, people take a little more time with things that involve Aboriginal people and indeed other racial minorities, just simply because of your presence and the constant awareness or reminder that somebody's there, and it does, and *should*, impact on how you interpret law. Because all of us are interpreting as you say the Queen's law, in order to bring about, and to be compatible with, a just society. And if people are pained by something that's going on, that's not just. And so we need to change it. And in order to change it, we need differing opinions. And, you know, opinions from those that are suffering the pain. So I don't think there's anything inconsistent about it at all, and in fact I think diversity is an absolute bonus to the justice system.

You know, no Aboriginal people were present in *any* of these old cases: *Johnson v. McIntosh* [8 Wheaton 542 (1823) (USSC)] didn't have any, *St. Catharine's Milling* [*and Lumber Co v. The Queen* (1888), 14 AC 46 (PC)] didn't have any, so Aboriginal people weren't a party to the proceedings; they didn't *file* legal briefs or anything like that. So here's these judges and Lords sitting there listening to non-Aboriginal lawyers filing their legal briefs and having to decide their case. And *the lawyers* were saying, "Hey, look, we've got this great doctrine of discovery here." They didn't say, "Oh, you might want to consider that it's a legal fiction." No, they said, "The Supreme Court of the United States did it. You can do

it. No reason why you can't. It's there, it's been applied; all over the world."

You know, you don't look at that and you don't say the *judges* did this because they're mean-spirited and wanted to treat Aboriginal people as savages. They didn't. They took legal briefs and legal arguments and made the decision on what was argued. And we have a system of justice that relies almost exclusively on *stare decisis* and precedent. Bang! The next thing you know, you're a couple of hundred years later and this thing is not just rooted anymore, it's got this big tree with all these horrible branches that come off it.

Richard In your speech you said that the relationship was broken and beyond repair and you referred to the rotten roots of the tree. There was a degree of sadness perhaps about *your* ability to make change as a judge.

LaForme J. If you detected that, you were right on. I am sad, I am sad. Because when we're dealing with treaty and Aboriginal rights we're dealing with very narrow principles that start this. And all I'm saying is that what they allowed that foundation to become… you see, 91.24 didn't have to be interpreted the way it became interpreted which was to say we get to define who an Indian is. But they did. They chose that path. Unilaterally, as I say for economic expediency and some talk about it in terms of greed, all the other things. They chose to say we're going to be able to define who these people are, what they can do, where they can live, how their lives are going to be lived, what happens when they die, where they have to go to school, where they have to go to church …

They didn't have to pick that path but they did and *that's* what we're living with today. If that path had have been different, in 1867, we might not even be having this conversation. The talk that I gave was sprinkled in almost every place, with "wards of the state" and *that's* the position that I find so utterly offensive. It's that unlike you, I'm a legislated responsibility of the Canadian government.

They made me. I don't know how you inject respect into that. Now you can *treat* people respectfully, but the relationship isn't respectful.

In *R v. Sparrow* [[1990], 1 SCR 1075] and other cases we talk about the duty to consult, the honour of the Crown, the fiduciary relationship, those are all different ways of saying the same thing. They just *say* we'll consult with you and everything but remember at the end of the day, we can do what we want. That's still true.

Julie But it's going to be hard to undo 150 years of, you know, damaged, bad policy…

LaForme J. No it's not.

Julie So you're hopeful, though, about working through the political system.

LaForme J. In my view, that's the *only* way. As a member of the court, I know when courts are saying, "Look, you should not be deciding these things in this court." I don't know how many times the Supreme Court has said that when an Aboriginal issue has been in front of it. These should not be decided here. I know what they're saying. I mean they're so limited in their ability to *do* that. You know, decisions don't get made because people care about Aboriginal people across the country; they get made because *this* group is having a problem with this company.

And the duty to consult gets defined through that simple relationship. That's what courts do. Their hands get tied. It's dependent on the facts; it's dependent upon whatever the law is that gets applied at the time.

And that's been the history of the effort. You know, university professors have talked about in the early days, in the '70s, when we started bringing these issues to court, we brought them on property principles. I remember being part of that wave of lawyers that conducted that litigation. I don't ever remember thinking that we were doing this on a principle of property law, we didn't *do* that. But now these profs, they can break it all down and say, "So now what we need to do is, we need to shift from property principles into human rights principles, or something like that. That's the *new* way now, we're going to fight it that way." That's just academic speak. That's not how these things get fought. They get fought because *this* reserve is having a fight with this company or with this part of government. *That's* how they get fought.

Watch what happens to the duty to consult over time. Once you start layering and thinking that you can put bows and ribbons on principles of law, you watch how that all of a sudden, just moves into virtually nothing. That's what courts do. They fashion a principle of law one way or another to deal with the litigation that's in front of them. And that can have *enormous* implications across the country.

Julie So you're optimistic about the Idle No More movement?

LaForme J. I'm optimistic about what the Idle No More movement is about and what it talks about because it's a subject that's near and dear to my heart which is, let's reset the relationship. You know, we're here and this is not where we meant to be. You know, we never signed a treaty because one of these days we wanted to be the complete and utter responsibility of the federal government; that we wanted to be treated like children and people with mental incapacities. That's not what we wanted. That was *never* the intention. And yet, here we are. Here we are. And so, people talk about all

this legislation going through about Aboriginal people. You're right. I get offended when I sit in an audience and listen about that. How would *you* feel? If they said, "Okay, we've got six pieces of legislation to deal with young men who have blue eyes and wear airplane cufflinks"? Six pieces of legislation. Sit there and wonder what the hell did I *become* or how did I get here? I know I find it very offensive.

Julie Do you have any final words?

LaForme J. I am the eternal optimist... But things like equal marriage make me positive because before that decision something like a majority of the population disapproved. Now, a majority of the population wonder "What? Why didn't we do this sooner? Of course it's right."

And so that's why Idle No More is so important, because their solution is the correct one. They're saying: "This wasn't the original intent, there was a break-down in the relationship, and we are here".

And if Canadians *knew* that, and if they knew what we are talking about when we say, "You broke the treaty."… It's not that you broke the treaty because you wouldn't let me catch a perch out of season. They're talking about the big picture and that is, you promised *us* equality and respect and *joint* accommodation. We promised each other that. And what did we do? We ended up as wards of the state. Now I think if the Canadian public knew that, they would embrace the change and say, "*Of course* these people are right, they need to change this. And besides which we want to honour what we originally intended here. And if we can do it, let's do it." And I think we can do it.

Julie Well, thank you very much, Justice LaForme. This has been a really interesting dialogue. I hope we can continue in some way.

LaForme J. Sure! My pleasure.