QUEER JUDGMENTS: HOMOSEXUALITY, EXPRESSION AND THE COURTS IN CANADA. By Bruce MacDougall. University of Toronto Press, 2000. Pp. 360 ($60.00 in Cloth, $24.95 in Paper).

In *Queer Judgments*, Bruce MacDougall examines the reasons for, and reasoning behind, the decisions made by Canadian judges over the last forty years in cases which raised lesbian/gay issues or in some way referred to lesbians or gays.[1] MacDougall looks at these decisions, not in terms of outcome, but in terms of what they say and reflect about judicial attitudes to and assumptions about lesbians and gays. MacDougall's approach is a valuable one, a compelling reminder of how frequently a positive-seeming decision is undermined by the perspective and the language of the judge – what is said about us, about who we are and what we do, about our desires, about our lives, about our sexuality, about the choices we make or whether we have choices to make. *Queer Judgments* exposes the legal construction of homosexuals and of homosexuality. Not surprising to anyone who works in this area or is sympathetic to lesbian/gay rights, MacDougall finds that "there has been a remarkable persistence of general judicial attitudes towards homosexuality, even if the details of those attitudes change."[2] Two hundred and thirty-eight pages of text; *Queer Judgments* is a sombre read.

In terms of the outcomes of the cases, MacDougall is much more positive than I tend to be. He describes the courts' recent track record on homosexual rights cases as, on the whole, quite good, and the Canadian judiciary as having "had a positive influence in the achievement of equality for homosexuals."[3] His reference to the achievement of equality for homosexuals here is, I am sure, inadvertent. The book as a whole attests to the fact that MacDougall recognizes that we are far from having attained equality. But this slip reflects what I consider to be an unduly optimistic gloss on the case results. This more positive outlook I expect is, in part, a function of the author's separation of the outcome of the case from the decision, something which is difficult to do when you actually read the decision and see the result in context. Reasoning and result are inextricably intertwined. Critically examining case results is not MacDougall's project – fair enough. Nonetheless, I would have liked for him to canvass a little more fully the numerous and strong critiques, by both scholars and activists, of the results in these

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[1] I refer exclusively to lesbians and gays without including bisexuals and transgendered people because MacDougall's discussion makes only passing reference to bisexuals and transgendered people. They are not the subject of this book and the references to them I regard as mostly token. This is in part a function of the cases themselves and a function of MacDougall's choices and approach. I personally think that this is fine; that it is perfectly legitimate to look at lesbian/gay issues without including bisexuals and transgendered people with respect to whom the analysis and concerns might be quite different. However, I do think that it is important for the author to be clear about who and what is the subject of his inquiry. MacDougall has a lengthy discussion of language in his introduction and as the subject of the first chapter – What's in a Name? – and then in my view cops out by opting to adopt the language of the courts and use the term "homosexual". In this regard I find the title of MacDougall's book annoyingly misleading. *Queer Judgments* is a catchy, current title that is not at all reflective of the contents of the book; there is nothing queer about it.

[2] B. MacDougall, *Queer Judgments: Homosexuality, Expression and the Courts in Canada* (Toronto: University of Toronto Press, 2000) at 11.

[3] *Ibid.* at 3.

cases. Instead, he simply adverts to them in passing while asserting his belief in "the progressive hypothesis of Canadian law"[4] – that we are traveling down a linear path toward full legal equality for lesbian and gays in Canada.[5]

The chapter headings under which MacDougall chooses to explore the judgments are a refreshing and thought-provoking break from the traditional legal categories under which lesbian/gay cases are usually discussed and which have dominated the academic, as well as practice-focused, Canadian legal literature to date. We have tended to look at these cases as, for example, benefits cases, marriage cases, criminal cases and custody cases, thus allowing traditional legal discourse to define the category and the issue. In keeping with his focus, MacDougall has organized his discussion around different types of judicial expression and non-expression in chapters on terminology (What's in a Name?), silencing (Censoriousness and Censorship), silence (Silence in the Classroom), hostile speech (Homophobic Expression) and what he sees as an appropriate context for judicial silence (Outing). This approach exposes the connections and patterns in the assumptions and approaches displayed by judges, regardless of the legal issues before them.

For the purposes of this study, MacDougall looked at all of the lesbian/gay cases,[6] reported and unreported, that he could find in the period between 1960 and mid-1997, about eight hundred cases in total. This was a huge amount of research and an accumulation of a wealth of valuable data for other studies. However, the book does not contain a list of the full 800 cases; it includes only a list of cases cited, not all of which fall within the 800 that were the subject of the study. I found it endearing that MacDougall chose the starting point for his case review as 1960, in part, because that was the year he was born, which made these cases poignantly relevant and meaningful to him. There are a few of these personal asides in the book and I liked them all.

MacDougall chose not to present the cases in chronological order. He refers to case dates when he considers them relevant but the order in which he presents the cases is based solely on the connections he is making about judicial assumptions and language. For example, on one page, he discusses a 1992 case, then a 1968 case, and then a 1989 case.[7] Similarly, he is not concerned with the level of the court making the decision, whether or not the decision was overturned, or whether the judgment he is discussing is in dissent or the majority. He provides all of this information, but it is not relevant to his analysis. While I understand his point in doing this, and find the uniformity in judicial attitude that he exposes disturbing and depressing, I found this approach a little frustrating and very decontextualized. There has been considerable change for lesbians and gays since 1960 and I want to know how judicial attitudes have changed in that time period. I am interested in patterns and trends and knowing if, where and why there has been movement. When MacDougall draws connections between a 1968 case and a 1989 case, I want to know if the '89 case is a throw back to

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[4] *Ibid.* at 10.

[5] As MacDougall notes, this is a notion that is challenged by M. Eaton, "Lesbians, Gays and the Struggle for Equality Rights: Reversing the Progressive Hypothesis" (1994) 7 Dal. L.J. 130.

[6] For ease, I refer to these as lesbian/gay cases in what follows, even though MacDougall included in his study cases that had only some minor "homosexual aspect": *supra* note 2 at 10.

[7] *Ibid.* at 152.

the sixties or if there really has been no perceptible change in attitude on that issue since that time.

MacDougall's point is that there really has been no significant change at all, regardless of the subject or legal issue before the court. But I am not fully persuaded. I accept his general thesis that the cases reflect judicial attitudes and assumptions that are largely, and consistently, homophobic throughout this time period. But it seems to me that the form and content of that judicial homophobia has changed and that those changes are significant. The change may sometimes have been for the better and sometimes for the worse and sometimes not easily characterized as either, certainly not a linear progression from negative to positive. I think these changes mirror changes in social attitudes more generally and I think that these changes matter, just as the chapter headings matter in providing different ways of seeing and understanding the attitudes and assumptions presented in that chapter.

My discomfort with MacDougall's approach is, in part, because I do not have a full picture from which to be able to draw my own conclusions and to assess his conclusions. He provides a case-by-case discussion. There is no breakdown of the 800 cases or an overview of how many of the cases are grouped under each of his chapter headings; and there is no mention of the cases that did not fit under these headings. MacDougall has selected the cases and the excerpts. I do not know how many of the 800 cases he actually refers to over the course of the book; certainly considerably less than half, and he actually discusses considerably less than half of these. This is, of course, necessary given the vast quantity of material that he was working with, but, given that vast quantity, I needed more information on why these cases were chosen and how representative they are. While MacDougall does not claim them as representative, the nature of his discussion in some way makes them so. MacDougall discusses the same cases a number of times under different headings. He employs the same quote from one case in at least four different places and a number of quotes appear more than once. Again, this is not a problem in and of itself, as the quote is always relevant to what he is discussing and adds to that discussion. However, it does exacerbate my concern about the cases that are chosen and the cases and comments that are missing.

Further, my scepticism of MacDougall's thesis of unrelenting and unchanging judicial homophobia is partially due to the fact that I do not think that it is an accurate description in relation to at least one area, that is lesbian custody cases. Bad as they still are, attitudes of judges toward lesbian mothers have changed and the risks, problems, and characterization of the issues for lesbian mothers have changed.[8] In the early sixties, to be out (or outed) as a lesbian mother in a custody battle almost definitively meant losing custody. Slowly, lesbianism was deemed not to be an absolute bar to custody, but only if the lesbian mother did absolutely nothing to disclose that she was a lesbian – no partner, no "lesbian life style", no lesbian(ism). Gradually, partners were tolerated, as long as the relationship was "discrete", that is, there was no sign of affection or evidence of sexuality displayed in front of the children. Then the judicial language shifted to concerns of lesbian mothers "flaunting" their sexuality and/or being

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[8] For discussion of these issues, see K. Arnup, "Living in the Margins: Lesbian Families and the Law" in K. Arnup, ed., *Lesbian Parenting: Living with Pride and Prejudice* (Charlottetown: gynergy books, 1995) 378; S. Boyd, "What is a 'Normal' Family? C v. V (A Minor) Custody Appeal" (1992) 55 Modern L. Rev. 269; and J. Millbank, "Lesbians, Child Custody and the Law" in S. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 280.

politically active on lesbian issues. The impact on the children, in terms of their (assumed natural hetero)sexuality being subverted, has been a fairly consistent focus. More recently though, the concern has shifted to the negative impact of social disapprobation on the innocent children of lesbian mothers. I am not sure that one would want to characterize any of these attitudes or assumptions as any more or less homophobic, but they are different. And the differences are, I think, significant in terms of understanding the problem, and in terms of strategy and outcome in trying to address it. It is important, but not enough, to recognize, name and explain the underlying homophobia and to characterize it as a form of censorship.

MacDougall raises lots of interesting questions about the role of judges, particularly in relation to their freedom of expression. Early on in the book, MacDougall argues that:

> Freedom of expression is one of the most valuable freedoms recognized by society .... In many cases, however, freedom of expression can only be ensured when the judiciary is not too free in its own speech about any particular subject matter.[9]

Further on in the book, in the chapter on censorship, he draws a parallel between the judiciary as a system of censorship and other systems of censorship, such as customs. He draws the parallel in relation to three specific aspects: "facelessness and systemic attitudes, heterosexuality of the decision maker, and difficulty in identifying expression."[10] In relation to the first parallel, he points out that, unlike the anonymous censor, we do at least know the name of the judge and could possibly find out some further information about him or her. However, beyond this we do not know anything. "[W]e remain unaware of what motivates a judge to assume a particular attitude about something like homosexuality."[11] He cites as possible examples a bad homosexual experience in the judge's past, disapproving religious beliefs and shame over a lesbian daughter. His examples are all negative, downplaying the possibility of a lesbian daughter of whom the judge is proud and from whom s/he has learned a great deal, not to mention the possibility of a lesbian or gay judge, a possibility MacDougall does refer to in passing in another context. I am fascinated by the question as to whether we should, or whether we even want to, know these things about our judges and with the question of how this relates to the restrictions on judicial freedom of expression that MacDougall earlier advocates. I understand MacDougall to be saying at one point that judges should be extremely circumspect in saying what they think and why they think it and, at another point, saying that we need to know more about what judges think and why they think it. I do not read this as a contradiction but more as an interesting tension that is, in some ways, at the heart of his book. If we are going to change judicial attitudes and assumptions, it is surely essential to know what they are and what they are based on. Yet, it is hateful and hurtful when those attitudes are freely expressed; furthermore, their expression by a judge condones and promotes those attitudes, giving

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[9] *Supra* note 2 at 10-11 (footnotes omitted).
[10] *Ibid.* at 63.
[11] *Ibid.* at 65.

others permission to think and say similarly or even more oppressive things.[12] And, even if we do want this information, we cannot require that judges expose themselves and their views in this way. Some judges will be more forthright than others. Similar questions have been raised by Justice Bastarache's recent interview with *The Lawyers Weekly* in which he gave his views on the application of the Charter in criminal law cases and on Aboriginal rights.[13] These discussions aptly expose the myth of judicial neutrality and objectivity but, at the same time, they raise the not-so-easily answered question as to where we go from here.

MacDougall explicitly treats the Canadian judiciary as a single unit. Despite his concern that we do not know enough about the individual judge in any specific case, he tells us nothing about any individual judge; he treats their differences as irrelevant. He treats them all as one and in so doing, he makes a serious mistake in my opinion. The judicial homogenization of "homosexuals" is a major critique repeated throughout the book. It is unfathomable how MacDougall can then do the same thing with respect to judges and their judgments. It is an inconsistency that MacDougall himself acknowledges in the last page of his book:

> This study has at times made generalizations about judges. It is of course unfair to overgeneralize about judges, just as I have argued that judges should not make generalizations about homosexuals. Not all judges have engaged in generalization and the other practices I have detailed and commented on in this study. But it is fair to say that judges have often done so and to the extent that they have, they are rightly taken to task.[14]

I agree with MacDougall on this and so I in turn take him to task for his generalization of judges and judgments. Except in the context of the eleven-page concluding chapter in which he refers to some of post-1997 decisions, virtually all of the judgments that MacDougall describes reflect extremely negative attitudes and assumptions. His infrequent references to more positive decisions are almost always as an aside and provide no detail. Again, more positive[15] assumptions and attitudes are not his subject, but it is somewhat misleading to talk exclusively about the negative without putting them in context. This is rendered even more problematic, I think, by MacDougall's refusal to differentiate the judges. The Canadian judiciary, sadly, is largely homogeneous with respect race, class, (dis)ability and sexual orientation and also with respect to gender, although less so than with the other categories. Nonetheless, there are significant attitudinal differences among judges and it is worth thinking about and speculating on the roots of the differences. MacDougall refers to gender seeming to make a difference:

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[12] As was the case with Justice McClung's decision in *Vriend* v. *Alberta* (1996), 181 A.R. 16, 132 D.L.R. (4th) 595 (C.A.), rev'd [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385, which MacDougall discusses at length.

[13] C. Schmitz, "The Bastarache interview: reasoning to results at SCC" *The Lawyers Weekly* (26 January 2001) 19; C. Schmitz, "Bastarache's candid comments bring both high praise and condemnation" *The Lawyers Weekly* (2 February 2001) 1. Bastarache J.'s comments have given rise to calls for his resignation, as well as a complaint to the Judicial Council.

[14] *Supra* note 2 at 239-40.

[15] I hesitate to actually use the word positive in this context, although there are some judgments, such as Justice L'Heureux-Dubé's dissent in *Egan* v. *Canada*, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609, that I think could be described as positive.

> Curiously, as far as I can tell, female judges have not made any of the negative comments that form the subject of this book. In part, of course, this owes to the comparative scarcity of women in the judiciary, but some of the most sensitive reasons have been given by female judges. Awareness of their own group's treatment by (male) judges in the past may make female judges more sensitive to the language used to describe and attitudes towards other historically disadvantaged groups, like homosexuals.[16]

I am not sure that this speculation would turn out to be accurate if MacDougall had followed up on it – or at least, I suspect, that the difference would not be as stark as he postulates. But he does not follow through at all. This would be an easy "difference" to explore and raise more questions about in the context of a study such as this one and I am disappointed that MacDougall chose instead to treat the judges as one.

MacDougall is, I think, a bit uncomfortable with and oblivious to gender issues. The discomfort seems perfectly right and legitimate to me and I appreciated his disclaimer at the beginning that he would probably make mistakes in the course of the book in generalizing gay male experience to lesbians.[17] However, I did find it difficult that he did not carry this questioning and thoughtfulness through the book. For example, his section on "history and homophobia" is largely a history of the criminalization of gay male sexuality, with no questions raised about attempts to criminalize or regulate lesbian sexuality.

Discomfort is understandable, but obliviousness is harder to take. MacDougall makes some rather significant – significant to a feminist reader at least – gaffs in relation to gender issues. For example, in discussing a custody case, he critiques the judge's gratuitous and unfounded concern about a gay father's tendency toward promiscuity. He goes on to say that no such concerns were raised about the mother – in MacDougall's words "[s]he was heterosexual, so promiscuity was not to be contemplated."[18] I do not expect MacDougall to be familiar with custody cases and critical custody literature which details how phantom promiscuity has been used against heterosexual women in custody fights and decisions since custody became a legal issue. Many a heterosexual woman has lost custody of her children because of her assumed promiscuity while heterosexual men are never labeled as promiscuous no matter how sexually active they are. But I would have thought it impossible not to know in the year 2000 that the label promiscuity has been, and continues to be, a major tool to keep women, whether lesbian or heterosexual, in (sexual) line. I almost gasped when I read that line. Further, in relation to gender in the custody context, I was fascinated and a little troubled that, on my estimation, at least half of the custody cases that MacDougall discusses involve gay fathers rather than lesbian mothers. The problem here lies in the fact that the vast majority of "homosexual" custody cases involve lesbian mothers. This raises one potential question, among many others, of whether the courts are even more resistant to gay fathers than to lesbians. However, MacDougall does not comment on the fact that he has disproportionately chosen gay father custody cases. I cannot be sure that he is even aware of it.

I am probably not used to reading work on lesbian/gay legal issues generally that does not come from a human rights/equality perspective. So MacDougall's book

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[16] *Supra* note 2 at 22 (footnotes omitted).
[17] *Ibid.* at 13.
[18] *Ibid.* at 116.

was an interesting and refreshing change for me, but also, from my viewpoint, somewhat superficial in its discussion of equality issues and analysis. Intersectionality, the notion of intersecting identities of race, gender, class, (dis)ability and sexual identity that all impact and transform each other, is key in contemporary critical equality analysis. MacDougall makes a few passing references to this issue as part of his critique of judges treating homosexuals as a monolith, but it does not form part of his analysis or critical approach to the judgments he examines. The sources which he references in his discussion of the *Charter* and equality are pretty mainstream and traditional and he does not engage with the current debates in this area. He ostensibly rejects the formal approach to equality in favour of something he refers to as equivalency. I do not know what he means by this but I think it is pretty close to formal equality. He repeatedly rejects any notion of different/special/preferential treatment and describes "reverse discrimination" as compounding the problem. But he does not really talk about these concepts. If equivalency is something other than same treatment then it is different and will be described as different/special/preferential treatment by its critics. I am really interested in what MacDougall thinks about these difficult questions, but to me, he largely sidesteps them by promoting notions like inclusion and accommodation without explaining what in practical terms these might look like and without addressing the critiques that terms like these perpetuate hetero-dominance. I find MacDougall employing a similar lack of critical engagement and positioning around the issue of language and his choice to follow the courts in using homosexual as the primary descriptor of the subject(s) of his book.

As MacDougall describes it himself, *Queer Judgments* is largely descriptive and a little bit prescriptive. I would have liked it to be more analytic. I would like to know more about what MacDougall thinks and why. I would like him to enter into and contribute to some of the debates swirling around so many of the issues raised in this book. But MacDougall is a chronicler rather than an analyzer and I should be more than content with this. He is a good writer. The book is an enjoyable and interesting read and provides valuable information. He discusses a number of cases I have not heard of – from quirky to odd to devastating to hopeful – all important resources. Every once in a while he produces a fabulous sentence that just captures "it". One of my favourites is early on in his introduction when he states – "Homosexuals are always knocking at the door of a heterosexual court asking for its benevolence."[19] Oh yes – it so feels like that. I would hope that this book would be read by homosexual skeptics and resisters who would learn a great deal from this book. It will, I expect, be read mostly by those who work in the field. But we too will learn a great deal from this book and we will be sparked to move from it to our own debates and analyses in which I hope, and expect, that Bruce MacDougall will fully participate.

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[19] *Ibid.* at 4.