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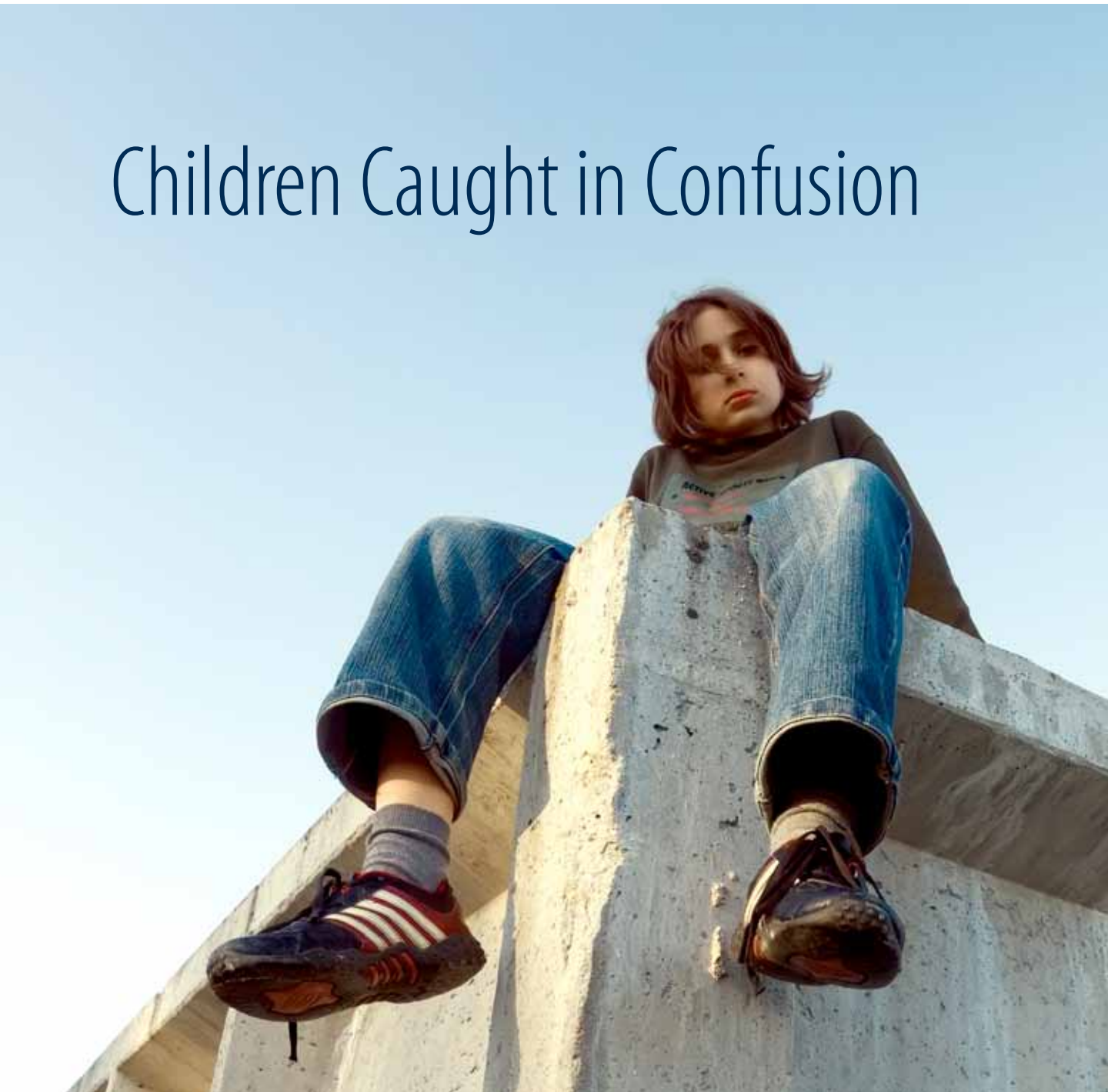
Children Caught in Confusion



Feature Report on Children Caught in Confusion

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Special Report: Constitutional Challenge to Law

Extras

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Linda McKay-Panos

A History Lesson about Provocation

Teresa Mitchell

The Supreme Court of Canada had an opportunity last November to hear the appeal of a tragic case of murder that occurred in Edmonton in 2004. Its judgment combined two worlds: facts that could have been lifted from a 20th century soap opera, with legal history dating back to the 1500s. Its decision encapsulates 21st century Canadian notions of honour and reason.

An Edmonton man, Thieu Kham Tran, was estranged from his wife. He knew that she was seeing another man, so one afternoon he let himself into her locked apartment with keys that she didn't know he still possessed. There, he discovered her in bed with her boyfriend. In a frenzy of anger, he repeatedly stabbed them both, killing the boyfriend. At trial, Mr. Tran used the defence of provocation against a charge of murder, arguing that he lost all self-control after witnessing the sight of his wife in bed with another man.

Provocation as a defence can only be used in cases of murder. It is a partial defence only, to be used to reduce a conviction from murder to manslaughter. In Mr. Tran's case the trial judge accepted his argument of provocation and convicted him of the lesser offence of manslaughter. The Crown appealed, and the Alberta Court of Appeal set aside that verdict and substituted a conviction for second-degree murder. Mr. Tran appealed that decision, and the case went to the Supreme Court of Canada.

The issues before the Supreme Court were the legal principles and requirements for the defence of provocation. Madame Justice Marie Charron wrote the unanimous decision.

For students of legal history, the judgment makes interesting reading. The Court reviewed the development of the defence of provocation in English common law, beginning in the sixteenth century. It was originally called *chancemedley*, meaning "done by chance upon a sudden brawle, shuffling or contention." In the seventeenth century, English courts created a separate offence of manslaughter, as a response to the severity of the death penalty for murder. This separate offence was meant to take human frailty into account, and one such concession to human frailty was provocation. In the eighteenth century, the defence of provocation became more fully developed, with judges creating specific categories of provocative events, considered significant enough to cause a person to lose control. One such case was that of a husband catching a man in the act of adultery with his wife, wherein the judge wrote: "jealousy is the rage of a man, and adultery is the highest invasion of property."

For students of legal history, the judgment makes interesting reading. The Court reviewed the development of the defence of provocation in English common law, beginning in the sixteenth century.

The defence of provocation came to this country in 1892 when it was adopted and codified in the *Criminal Code of Canada.* Section 232 remains more or less the same to this day: "Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation."

It defines provocation as "a wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control…if the person acted on it on the sudden and before there was time for his passion to cool".

The Court noted: "The wording of s. 232 remains substantially unaltered. The same cannot be said of the social context in which it is embedded." Justice Charron wrote that the defence is not frozen in time and should evolve to reflect contemporary social norms and *Charter* values. She stated …the defence of provocation is necessarily informed by contemporary social norms and values. These include society's changed views regarding the nature of marital relationships and the present reality that a high percentage of them end in separation."

The Court then turned to the elements of the defence of provocation in contemporary Canadian law. Justice Charron stated that there are two elements; one objective and one subjective. The objective element is a wrongful act or insult of such a nature that it is

sufficient to deprive an ordinary person of the power of self control. The subjective element requires that the act resulting from the insult occurs suddenly and before passion has a chance to cool. What is meant by "ordinary person" is determined by contemporary societal standards and values, while also taking into account relevant personal characteristics of the accused. For example, it would be relevant to take into account the accused's racial background if a racial slur was part of the insult. However, Justice Charron noted "…there can be no place in this objective standard for antiquated beliefs such as "adultery is the highest invasion of property" nor, indeed for any form of killing based on such inappropriate conceptualizations of 'honour'".

> Justice Charron wrote that the defence is not frozen in time and should evolve to reflect contemporary social norms and *Charter* values. She stated …the defence of provocation is necessarily informed by contemporary social norms and values.

What was the outcome of all this deliberation for Mr. Tran? The unanimous Court concluded that the events that unfolded that afternoon did not pass the objective test of an "insult" and Mr. Tran's actions did not meet the subjective test of "suddenness". Justice Charron noted that the two victims were alone in the privacy of her bedroom, and not expecting Mr. Tran to suddenly appear. She characterized their behavior as lawful, discreet, private, and entirely passive with regard to Mr. Tran. As to suddenness, she noted that Mr. Tran showed up at his wife's apartment specifically because he suspected she was seeing another man, had kept her under watch, and eavesdropped on her private conversations. The surprise was entirely on the part of the victims, not Mr. Tran. The Court concluded that there was no air of reality to Mr. Tran's defence of provocation. It upheld the Alberta Court of Appeal's verdict of second-degree murder.

This decision is an interesting study in how venerable legal constructs must evolve to reflect present day Canadian standards of behavior and values. Surely there is no place in 21st century Canada for such antiquated notions of what constitutes insult and honour.

R. v. Tran http://scc.lexum.umontreal.ca/en/2010/2010scc58/2010scc58.html

Brian Seaman

Assisted Human Reproduction: Should sperm donor anonymity be maintained?

On October 23, 2008, Olivia Pratten, a 26-year-old British Columbia woman, filed a lawsuit that is unique in its subject matter: she is seeking access to the identity and medical/social history of an unknown, to her, medical student who donated sperm at least 27 years ago, which was then placed in cold storage in a doctor's office. That donor's DNA accounts for half the genes in Olivia Pratten's body. She wants to know who he is and his medical history for reasons of personal identity, equality and the need to know her full genetic history.

Olivia has known ever since she was a young girl that she came into the world differently from most other people: her parents never hid the truth from her about how she was made. Their physician suggested anonymous donor conception as an alternative path to parenthood because of her father's infertility.

Tens of thousands of Canadians – those who came into the world through assisted human reproduction, their parents, donors, medical ethicists, and health care professionals who work in the AHR field – are following developments in Olivia Pratten's case with considerable interest.

The secrecy regarding donor information seems to violate the equality rights of thousands of Canadians conceived through assisted human reproduction. While there is also secrecy regarding the identities of biological parents in adoption cases, adopted children may, in accordance with legislation in B.C. and other provinces, access their records when the health, safety or well-being of the child is at stake. To deny access in cases of donor-conceived children represents discrimination by mode of conception and is, arguably, illegal discrimination contrary to the equality provision, section 15, of the *Canadian Charter of Rights and Freedoms*.

Increasingly these days, family is a social construct: current legal definitions of parent or guardian recognize different social realities; there are blended families where partners bring children from a previous marriage; there are children adopted or brought into the world by heterosexual or same-sex couples. Some single people also opt to adopt or have children.

A genetic predisposition to life-limiting conditions – such as cystic fibrosis, sickle cell anemia, Huntington's disease, or Tay-Sachs disease – is not, however, a social construct but empirical reality, which lies in genes on a chain of human DNA. And, as such, these conditions are capable of being passed on to a new baby, whether she or he is the result of copulation, *in vitro* fertilization, or from donated sperm or ova. It is for these reasons that donor offspring must know their full genetic history.

Health-care professionals have a legal and ethical obligation to maintain strict confidentiality of their patients' health records. However there are certain exceptions where, in accordance with law, threats to public health or safety will trump this obligation. For example, if a patient has a serious communicable disease such as hepatitis or is HIV positive, the disease or condition as well as the identifying information of the patient must be reported to public health authorities. Another example: if a patient was threatening to kill another person such information must be communicated to the police.

Less clear, and thus still a matter for litigation, are those instances where genetic screening of a patient for a condition such as Huntington's disease, for example, yields the gene responsible for that condition. Does the physician notify the patient's family, if the patient has indicated that he or she does not wish to disclose such information?

In any event, the traditional stance of physicians and clinics offering assisted human reproductive services to assert confidentiality over donor information should not apply as far as the genetic/medical and social histories of such donors go. Confidentiality is supposed to apply to patient records.

In the case of a woman seeking to become pregnant through donated sperm or an egg, who is the patient? It is not "Sperm Donor Y" or "Egg Donor X." Surely, a prospective mother should be first in line to assert a right to know, at the very least, the genetic/medical and social history of the person who is contributing half the genes to her future child.

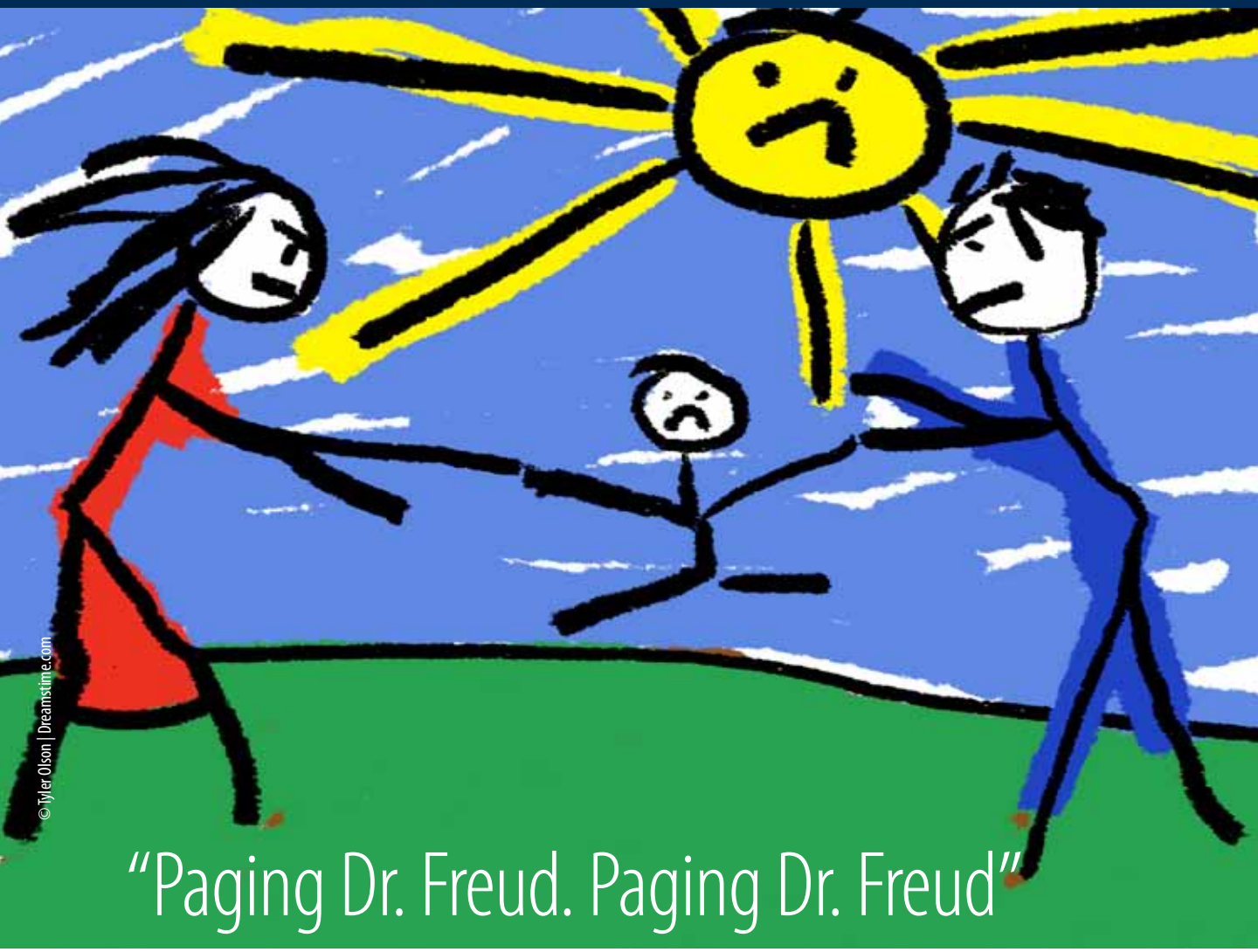
Furthermore, those thousands of Canadians who came into the world thanks to donations of sperm or ova have a right to know, at the very least, the genetic/medical and social histories of such donors. It is a misapplication of the ethical duty of patient confidentiality to deny parents and donor-conceived children access to this information. It also violates the right to personal security guaranteed by section 7 of the *Charter*. Knowledge of genetic history is vital because it will influence the choices a person makes in life, not the least of which is whether to bring another child into the world.

Tens of thousands of Canadians – those who came into the world through assisted human reproduction, their parents, donors, medical ethicists, and health care professionals who work in the AHR field – are following developments in Olivia Pratten's case with considerable interest. On October 15, 2010, the British Columbia Supreme Court dismissed an application by the Attorney General of British Columbia and the College of Physicians and Surgeons of British Columbia for an order to dismiss Ms. Pratten's claim and refused to adjourn her claim, which was set for a summary trial to begin on October 25, 2010. As of the date this article was written, the Court had yet to release its decision on the merits of the claim.

As well, the Supreme Court of Canada released a decision just before breaking for Christmas that had a significant bearing on the Pratten case, not to mention the interests of

the many Canadians with personal and/or professional stakes in the matter: donor-conceived people, their parents and health care professionals alike. In this other legal challenge, the Province of Quebec had argued that parts of the relevant federal legislation, the *Assisted Human Reproduction Act, S.C. 2004, c.* 2, were *ultra vires* the federal government's power under s. 91 of the *Constitution Act* to legislate in the field of criminal law. The impugned sections were found to be attempts to regulate the practice of medicine and research within the area of assisted human reproduction rather than being examples of the valid exercise of criminal law making in their pith and substance so were struck down. In the wake of this decision, Canada is left with regulatory uncertainty in this most fundamental of matters: the creation of human life through assisted human reproduction technologies.

Brian Seaman is a research associate with the Alberta Civil Liberties Research Centre in Calgary, Alberta.



"Paging Dr. Freud. Paging Dr. Freud"

Rosemarie Boll

So said Mr. Justice J.W. Quinn, of the Ontario Superior Court of Justice, in the now-infamous case of *Bruni v. Bruni*[1]:

> This is yet another case that reveals the ineffectiveness of Family Court in a bitter custody/access dispute, where the parties require therapeutic intervention rather than legal attention. Here, a husband and wife have been marinating in a mutual hatred so intense as to surely amount to a personality disorder requiring treatment.

It is a classic case of hating your partner more than loving your children.

Catherine and Larry *said* they were in court fighting over their separation agreement and their two children (daughter Taylor, age 13, and son Brandon, age 11), but mainly they were fighting each other. Neither had a lawyer, and both needed one to keep their wrath in check. Along the way, various parties tried to reason with them, including the local Children's Services, a lawyer appointed to represent the children, and the court. Nothing worked. After twelve interim applications and a trial that stretched over seven months, the trial judge knew the situation was hopeless. He decided to write a judgment laying bare the parties' outrageous conduct. He called it like he saw it:

- Larry was an inept parent with a "near-empty parenting toolbox." For example, Larry told his daughter: "You put shit in this hand and shit in this hand, smack it together, what do you get? Taylor."
- "When the operator of a motor vehicle [Larry] yells "jackass" at a pedestrian, the jackassedness of the former has been proved, but, at that point, it is only an allegation as against the latter."
- "A finger is worth a thousand words and, therefore, is particularly useful should one have a vocabulary of less than a thousand words." [Larry]
- Even after going to three counselling sessions, Catherine texted her daughter while she was at her father's – "Is dickhead there?"
- Catherine's parental-alienation behaviour was evil and cruel, and showed she had no respect for the legal system and Larry's parental rights. She was her own law.
- The judge asked Catherine: "If you could push a button and make Larry disappear from the face of the earth, would you push it?" She smiled like she had just won the lottery.
- Both of them "splatter[ed] their spleens throughout cyberspace" with text messages, emails, and Facebook pages. It made it easy for the judge to assess their true characters.

There is a notable difference between the Ontario *Family Law Act* and the federal *Divorce Act*. Section 33(10) of the *Family Law Act* allows a judge to look at spousal misconduct in deciding the amount of support (not so under the *Divorce Act*).

Despite his scathing comments, the judge didn't shirk his responsibility to judge the case on its merits and apply the law to the proven facts. He thoughtfully analysed Ontario law on child support and the validity of separation agreements. The case is a rare example of

a situation in which Catherine's behaviour – in this case her parental alienation – was so egregious as to essentially disqualify her from receiving spousal support. There is a notable difference between the Ontario *Family Law Act* and the federal *Divorce Act.* Section 33(10) of the *Family Law Act* allows a judge to look at spousal misconduct in deciding the amount of support (not so under the *Divorce Act*). But few judges had ever applied this section, and the ones that did interpreted it to create an extremely high threshold for the kind of bad behaviour that would have an impact on support. In this case, Catherine crossed it:

> The parental alienation in this case reflects an intent by Catherine to destroy the relationship between Taylor and Larry; it is shocking conduct. It also amounts to a hideous repudiation of the relationship between Catherine and Larry as co-parents of Taylor. The harm here probably is irreparable.

Based on her misconduct, the judge reduced Catherine's support to $1 per month.

Justice Quinn also made pithy observations on what the justice system cannot do in bitter custody/access disputes:

- hatred devours reason; hatred has no legal remedy.
- "The legal system does not have the resources to monitor a schedule of counselling (nor should it do so). The function of Family Court is not to change people, but to dispose of their disputes at a given point in time. I preside over a court, not a church."

The judgement is funny to read but the case is profoundly sad. Wouldn't you hate to be Taylor or Brandon?

The function of Family Court is not to change people, but to dispose of their disputes at a given point in time. I preside over a court, not a church."

Notes

1 2010 ONSC 6568 (CanLII) Want to find the case quickly? Go to the CANLII site http://www.canlii.org/ and search 'dickhead.' Read through the entire case, including footnotes.

Rosemarie Boll is Staff Counsel with the Family Law Office of Legal Aid Alberta, in Edmonton, Alberta, and the author of a young adult novel about family law and domestic violence entitled "The Second Trial," published in 2010.

Disinheriting Adult Independent Children under the B.C. *Wills Variation Act*

Trevor Todd and Judith Milliken, Q.C.

As long as testamentary freedom exists, there always will be parents who try to disinherit their adult children.

Indeed, it seems such cases are increasing as the modern makeup of families changes. For example, with more divorces and remarriages, testators may wish to provide for a second spouse and/or for younger children, rather than older children.

In British Columbia, it is possible for a parent to disinherit an adult independent child. If doing so by means of their last Will, however, parents must plan carefully or run the risk that the court will ultimately vary the Will.

In this article, we examine the legislation and review some of the factors the courts consider relevant in deciding whether the disinheritance should be permitted.

. . . it is possible for a parent to disinherit an adult independent child.

The *Wills Variation Act*

In British Columbia, the *Wills Variation Act* permits the court, in appropriate cases, to rewrite a Will to make provision for designated family members. Eligible claimants under this Act include the testator's spouse and/or children – both biological and adopted. Common law spouses and same-sex partners are also potential claimants if they have cohabited with the deceased for at least two years. Stepchildren are not included among the class of eligible family members.

The heart of the B.C. *Wills Variation Act* is found in section 2, which sets out the statutory basis for varying a Will. This section provides that if, in the court's opinion, a Will fails to make adequate provision for the proper maintenance and support of the testator's spouse or children, the court has the power, in its discretion, to vary that Will.

In such a case, the court is given the power to make the provision that the court considers adequate, just, and equitable in the circumstance. Those two tests have been described as two faces of the same coin (see *Tataryn* below).

What is Adequate Provision?

The *Wills Variation Act* was examined by the Supreme Court of Canada in the 1930 case of *Walker v. McDermott* (1931) 1 D.L.R.662, where the Court decided that a child did not have to demonstrate financial need as a prerequisite to a successful claim.

The Court interpreted the Act as creating a moral obligation for a parent to provide for his or her adult independent children, and that "proper maintenance and support" is not limited to the bare necessities of existence.

Such a parental duty is accepted as the norm in most of the non-English-speaking world where testamentary freedom does not exist.

The *Wills Variation Act* was re-examined by the Supreme Court of Canada more recently in *Tataryn v. Tataryn Estate* (1994) 2 S.C.R. 807.

In *Tataryn*, McLachlin J. (now C.J.C.) identified two fundamental interests protected by our Act, as follows.

1. The statutory objective of the adequate, just, and equitable provision for surviving spouse and children.
2. The testator's testamentary freedom

Under B.C. law, this testamentary freedom is subordinate to the main statutory objective. In other words, a testator enjoys testamentary freedom only so long as he or she makes adequate provision for the surviving spouse and children protected by the *Wills Variation Act*.

In *Tataryn*, McLachlin J. clarified the moral duty of a testator to make proper provision. She wrote that the question of whether a testator has acted judiciously as a parent or spouse should be measured by an objective standard taking into account both the prevailing societal legal and moral norms.

Legal obligations can involve, for example, claims based on unjust enrichment or other claims based on a testator's duty to provide for a spouse or infant children.

McLachlin J. opined moral duties are found in "society's reasonable expectations of what a judicious person would do in the circumstances, by reference to *contemporary community standards*" (page 822, emphasis added).

If the estate is large enough, then all claims should be satisfied. Otherwise, the court must prioritize the various claims. Legal claims will take priority over moral claims – they must be satisfied first.

Legal claims will take priority over moral claims . . .

The Chief Justice noted that although the moral claims of adult children may be more tenuous than that of the spouse or dependent child, where the size of the estate permits, some provision for such children should be made, *unless there are circumstances that would negate such an obligation* (*Tataryn* at page 822, emphasis added).

In cases where several adult children bring WVA claims, the court will weigh the strength of each claim. As Smith J. (as she then was) said in *Ryan v. Delhaye Estate* 2003 BCSC 1083 paragraph 67, "In the absence of express reasons for an unequal distribution, contemporary standards create a reasonable expectation of children sharing equally in a parent's estate."

Section 5 *Wills Variation Act*: Reasons for Disinheritance

To be given effect by a court, the testator's reasons for disinheriting an adult child must be *valid* and *rational*.

Section 5 of the *Wills Variation Act* reads as follows.

5(1) in an action under section 2 the court may accept the evidence it considers proper of the testator's reasons, so far as ascertainable,

a) for making the dispositions made in the will, or
b) for not making adequate provision for the spouse or children, including any written statement signed by the testator.

5(2) In estimating the weight to be given to a statement referred to in subsection 1, the court must have regard to all the circumstances from which an inference may be reasonably drawn about the accuracy or otherwise of the statement.

"homosexuality is not a factor in today's society justifying a judicious parent disinheriting or limiting benefits to his child."

Cases Disinheriting Adult Children

The more traditional B.C. model of enquiry used in examining the disinheritance of a child was set out in *Bell v. Roy Estate* (1993) 75 BCLR (2d) 213.

In this decision, the testator had disinherited her daughter, stating she had contacted her only sporadically over the years and had provided no comfort or support.

The daughter's claim to vary the Will was dismissed. In doing so, the appeal court held that the weight accorded to the reasons for disinheritance depends on their accuracy and not by whether the reasons were morally acceptable. The court also confirmed the plaintiff bore the burden of showing the enunciated reasons were false or unwarranted.

This approach was reiterated in *Kelly v. Baker* 15 E.T.R. (2d) 219 (B.C.C.A.). Applying the Bell analysis, the court concluded that the testator had valid and rational reasons for disinheriting the claimant, basically because he had chosen to abandon the family and live a morally unacceptable life.

The Court of Appeal dismissed the appeal and again held that the testator's reasons for disinheriting the child need not be justifiable. The court observed that the law merely requires that the reasons are valid, meaning based on fact, and rational in the sense that there is a logical connection between them and the act of disinheritance.

In these older cases, the B.C. Court of Appeal confined itself to determining whether the decision to disinherit was based on "true facts," as opposed to "inaccurate" facts, and "rational" in the sense that there was a logical connection between the reason and the act of disinheritance.

This approach has been evolving more recently with the B.C. courts putting themselves in the place of a "judicious" parent and examining whether or not the reasons for disinheritance are justifiable.

Madame Justice Ballance, in *McBride v. Voth*, 2010 BCSC 443, at page 142 observed, "there appears to be a growing trend in the authorities decided in the aftermath of *Kelly* to favour a rejection of objectively insufficient reasons to disinherit a claimant on the pretence that they are simply not rational."

Offending Community Standards

Increasingly, it seems disinheritances will not be permitted when they offend community standards.

The decision of *Prakash and Singh v. Singh* 2006 BCSC 1545 involves such a case. Most of the mother's estate went to her sons and very little to her daughters. The sons received $260,000 each; the daughters, $10,000 each.

Mr. Justice Eric Rice increased the daughters' bequests to an almost equal share with the sons. In doing so he stated at paragraph 58,

> In modern Canada, where the rights of the individual and equality are protected by law, the norm is for daughters to have the same expectations as sons when it comes to sharing in their parents' estates. That the daughters in this case would have this expectation should not come as a surprise. They have lived most of their lives, and their children have lived all of their lives, in Canada.

Peden v. Peden 2006 BCSC 1713 is a similar case involving a deceased who had three sons – two "straight" and one "gay." His Will provided outright gifts of two-thirds of his estate to his two heterosexual sons, to the exclusion of his third son. The gay son was to receive income only on the third share, with the residue passing after his death to the two heterosexual sons. Based on evidence from the drafting solicitor, the court concluded that it was the son's sexual orientation that led his father to exclude him from sharing equally in his estate.

The court varied the Will to provide an equal share to the third son. In so doing, the court observed "homosexuality is not a factor in today's society justifying a judicious parent disinheriting or limiting benefits to his child."

> . . . there must be a connection between the reasons and the disinheritance.

Objectively Insufficient Reasons

There is an apparent incompatibility between the reasoning of the B.C. Court of Appeal in *Bell* and *Baker supra* and the reasoning of the Supreme Court of Canada in *Tataryn*. The B.C. appeal decisions seemed to exclude an objective examination of the testator's reasons to see if they were justifiable from the standpoint of the contemporary judicious parent referred to in *Tataryn*.

Many trial decisions skirt around that apparent conflict. Notably, in the recent decision of *LeVierge v. Whieldon* 2010 BCSC 1462, Sewell J. reconciled the two lines of cases.

In this case, Mrs. Whieldon died at age 76 with an estate of about $1.225 million. Her Will divided her estate equally between her two sons and disinherited her daughter. The

court found the disinheritance was largely due to the daughter manipulating her father into transferring his home to her, thereby excluding her brothers from inheriting any share.

The court held that the plaintiff had failed to establish that her mother did not have a valid reason to disinherit her and therefore refused to vary the Will.

After referring to the *Tataryn* and *Kelly* decisions, Sewell J, said as follows.

> [61] The above formulation of the task facing the Court must be understood in the context of the fundamental duty of the Court to satisfy itself that the actions of the testator are consistent with society's reasonable expectations of what a judicious parent would do in the circumstances by reference to contemporary community standards. *Thus, I consider that it is appropriate to intervene, even if the testator acted on true facts and there is a logical connection between the decision to disinherit and those facts, if the result of such disinheritance would be inconsistent with an objective standard of what a judicious parent would do in these circumstances.*
>
> An illustration of this principle is *Peden v. Peden* 2006 BCSC 1713, in which this Court concluded that a judicious person applying contemporary community standards could not be said to be acting in accordance to his moral duty when he discriminated against one of his children on the basis of that child's sexual orientation.

Factors to be Considered in Weighing the Moral Duty

In *Clucas v. Clucas Estate*, 25 E.T.R. (2d) 175, [1999] B.C.J. No. 436 (S.C.), Satanove J. at paragraph 12 says as follows.

> 7. Examples of circumstances which bring forth a moral duty on the part of a testator to recognize in his Will the claims of adult children are: a disability on the part of an adult child; an assured expectation on the part of an adult child, or an implied expectation on the part of an adult child, arising from the abundance of the estate or from the adult child's treatment during the testator's life time; the present financial circumstances of the child; the probable future difficulties of the child; the size of the estate and other legitimate claims.

In *McBride v. Voth*, 2010 BCSC 443, Balance J., at paragraphs 129 to 142, listed the following additional factors to be considered:

- Contributions by the claimant to the accumulation of assets by the deceased;
- *Bona fide* expectation by the claimant to receive a benefit on death;
- Misconduct or poor character disentitling the claimant to relief;

- Estrangement, which may or may not negate the moral duty, depending on what role the testator played in the breakdown of the relationship;
- Childhood neglect, which may give rise to a moral duty;
- Lifetime gifts or benefits outside of the Will; and
- Unequal treatment of children.

Conclusion

For any parent who is really determined to disinherit an adult child in his or her last Will, it is important for the parent to prepare a detailed written memorandum setting out the reasons for disinheritance. That memorandum should accompany the Will.

It is best to include examples to illustrate the reasons.

For example, instead of saying merely "he was abusive," a more effective memorandum would include illustrations such as "during the year before his father's death, our son never once came to visit him" or "after Christmas 2005, my daughter returned all of our Christmas presents unopened." Such examples paint the picture for the court in a fashion that a mere general description never can. The reasons must be accurate and there must be a connection between the reasons and the disinheritance.

Additionally, however, the courts will also scrutinize the reasons to ensure they do not offend objective contemporary community standards. This objective standard is now a legal criteria in examining any purported disinheritance in our province.

Trevor Todd restricts his practice to Wills, estates, and estate litigation. He has practised law for 34 years and is a past chair of the Wills and Trusts (Vancouver) Subsection, B.C. Branch of the Canadian Bar Association, and a past president of the Trial Lawyers Association of B.C.. Trevor frequently lectures to the Trial Lawyers, CLE, and the B.C. Notaries and also teaches estate law to new Notaries. His Website includes 30 articles on various topics of estate law.

Judith Milliken QC has practised law for 33 years in the areas of commercial law, criminal law, and most recently estate litigation. She practises estate litigation together with her husband Trevor Todd.

Canada and the United Nations Convention on the Rights of the Child: How do we measure up?

Brian Seaman

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance … Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity …[1]

The *United Nations Convention on the Rights of the Child (Convention)* is over 20 years old and every member of the United Nations, except for Somalia and the United States, are States Parties to it. As an example of a statement in idealism, the *Convention* ranks up there with every other declaration, convention or covenant that has ever issued from that organization; the *International Declaration of Human Rights* and *the International Covenant on Civil and Political Rights* to name but two. However, as with so many other United Nations statements of principles that purport to be of moral, if not fully legal, significance for the internal legal systems of member-states, the gap between the typically ringing idealism of the language and the actual practices in many countries is huge.

For example, the last report about the Democratic Republic of the Congo, dated July of 2008, revealed the continued use of child soldiers in ongoing strife in that country, which has seen over five million people killed in conflict that began in 1996, and continues to this day in the east of the country, notwithstanding a peace treaty that was concluded in 2003.

Monitoring compliance with the *Convention* is part of the mandate of the *Office of the United Nations High Commissioner for Human Rights* (OHRC), specifically through its *Committee on the Rights of the Child (Committee)*. This committee is comprised of independent experts who monitor how States Parties have been implementing the Convention's provisions; they also monitor how States Parties have been implementing two optional protocols to the *Convention* that address, respectively, the use of children as soldiers and the trafficking in children, child prostitution, and child pornography. States Parties to the *Convention* are required to submit initial reports to the *Committee* two years after ratification, and then every five years after that. The *Committee* examines these reports and offers up their written assessments as to how the states are complying with the provisions of the *Convention*. Perusing these various state reports on the OHRC website reveals disturbing information, even if it is written in the bland, *bureaucraticspeak* of international diplomacy. For example, the last report about the Democratic Republic of the Congo, dated July of 2008,[2] revealed the continued use of child soldiers in ongoing strife in that country, which has seen over five million people killed in conflict that began in 1996, and continues to this day in the east of the country, notwithstanding a peace treaty that was concluded in 2003.

Canada, however, rates highly as one of the minority of United Nations members that can actually claim a solid record of compliance, for the most part, with the provisions set out

in the *Convention*. Some of the more important of these are: Article 3, which requires States Parties to ensure that institutions, services and facilities for the care or protection of children are in keeping with standards set by competent authorities; Article 19, which requires States Parties to have laws and measures in place to protect children from physical and sexual abuse; Article 32, which requires States Parties to protect children from economic exploitation; and Article 35, which requires States Parties to actively prevent the abduction of children and the trafficking in children for any purposes.

> . . . the principles and provisions of conventions and other international instruments may be utilized by Canadian courts as interpretive aids in rendering decisions based on Canadian law.

Canada's record of compliance is set out in the third and fourth reports to the *Committee*, in a document dated November 20, 2009 and covering the period from January of 1998 to December of 2007.[3] In preparing the report, the views of more than 100 non-governmental organizations (NGOs) were canvassed in respect of how well the various levels of government in Canada and the relevant service agencies that provide support to Canadian children in need were conforming to the normative values and provisions of the *Convention*. What emerged was not only an extremely high level of compliance but also an improving situation for children in Canada. For example, the percentage of children living in low-income families declined during the reporting period, from 19 percent in 1996 to 13 per cent in 2004. The reports also indicate compliance in terms of education mandated by law for children until they turn 16 and also laws that prohibit or restrict the employment of children in work that is likely to put their life, health, education, welfare and physical development at risk.

Now, strictly speaking, the provisions of international conventions, including the *Convention on the Rights of the Child*, are not enforceable in domestic courts unless they are incorporated into Canadian law by way of either of the following:

- The convention at issue is, in whole or in part, appended to relevant Canadian legislation; or
- The convention, in whole or in part, is referred to in Canadian laws and policies as being of relevance.

However, the principles and provisions of conventions and other international instruments may be utilized by Canadian courts as interpretive aids in rendering decisions based on Canadian law. So, in the instance of such a universally ratified document as the *Convention*, it would, arguably, carry an important persuasive status in a case pertaining to the rights and interests of children particularly as it applies to any assessment of the "best interests" of a child or children.

Unfortunately, notwithstanding Canada's high level of compliance with the *Convention* generally, there are two areas where Canada is failing to fully measure up. Firstly, there are provisions in Canada's *Youth Criminal Justice Act*[4] (YCJA) that have not, as of the date this article was written, been amended to bring the statute in line with the normative principles of the *Convention* but also, even more importantly, to make the legislation congruent with a 2008 decision of the Supreme Court of Canada. Secondly, proposed amendments as set out in *Bill C-49: an Act to Amend the Immigration and Refugee Protection Act* would, if passed into law, have the effect of violating both the spirit of the *Convention* as well as some of its Articles.

In *R v D.B.*,[5] by a narrow 5-4 majority, the Supreme Court struck down the reverse onus provisions in the YCJA as unconstitutional violations of the liberty interest of young people pursuant to s. 7 of the *Canadian Charter of Rights and Freedoms*. At trial, the 17-year-old defendant had pleaded guilty to a manslaughter charge arising out of a fight at a mall that saw a young male die after being punched to the ground by the defendant. Under the YCJA, manslaughter is one of a small number of very serious offences where lengthier adult sentencing provisions are presumed unless the defendant can show the judge why an adult sentence is inappropriate. Defence counsel argued that the defendant's right to life, liberty and security of the person as guaranteed by s. 7 of the *Charter* was compromised because of this reverse onus he faced in having to convince a court why he should be sentenced as a young person rather than as an adult. Because the liberty interest of a young person – who is deemed by virtue of youth to have a diminished moral capacity – was at stake, the onus should be on the Crown to show the judge why an adult sentence was appropriate based on the circumstances of the case. The trial judge allowed the *Charter* challenge and sentenced the defendant to the maximum youth sentence – a term that included rehabilitative custody and a supervision order for three years. The sentence was upheld by the Court of Appeal. As a matter of legislative house-keeping, then, the YCJA needs to be amended to bring the legislation in line with this decision. As it now stands, it is bad optics when the YCJA as un-amended is read against article 40 of the *Convention,* for example, which says, among other things, that a child who has committed a criminal offence be treated in a manner that takes account of his/her age.

> Of more pressing concern for advocates for refugees coming into Canada are proposed amendments to Canada's immigration and refugee legislation, especially as these would impact on the rights of children.

Of more pressing concern for advocates for refugees coming into Canada are proposed amendments to Canada's immigration and refugee legislation, especially as these would impact on the rights of children. *Bill C-49* has the purported goal of combating human trafficking, which is superfluous, since human trafficking is already a serious criminal offence attracting a penalty of up to life imprisonment pursuant to s. 279.01 of our *Criminal Code*. Under the proposed amendments, immigration authorities would have the power to arbitrarily detain for years, without charges, refugees deemed to have entered Canada by way of human traffickers. The proposed amendments create a new category of refugee known as a "designated foreign national" who would be detained for one year without being subject to review. The refugee claim is subject to a review every six months after that. From the perspective of fundamental fairness, this is simply wrong, as it, in effect, *criminalizes* people desperate enough to pay money to human traffickers to get them out of their countries of origin in the first place. Consider this analogy: imagine somebody desperate enough for whatever reason (really bad credit, for example) to borrow money from a loan shark. It is illegal in this country to practice loan-sharking; i.e. charge a criminal rate of interest, which is defined in s. 347 (2) of our *Criminal Code* as more than 60% on the credit advanced. We quite rightly target for prosecution rapacious loan sharks who prey on vulnerable people. However, we don't consider their desperate victims to be criminals.

> In conclusion, it seems the federal government is bent on creating a new category of refugee, that of a "designated foreign national," which does not exist under international law.

It is beyond the scope of this article to discuss how these proposed amendments would, were they to be enacted into law, undoubtedly breach Canada's obligations under international law pertaining to refugees. So my comments are restricted to how these proposals are offensive when examined against the moral suasion of various articles of the *United Nations Convention on the Rights of the Child*. A list, by no means exhaustive, of the relevant articles would include:

- Article 22, which among other things requires States Parties to "take appropriate measures" to ensure the "appropriate protection and humanitarian assistance" for refugee children;
- Article 28, which among other things requires States Parties to provide an education for *all* children (refugee children are *not* excluded);
- Article 29, which among other things requires States Parties to ensure that the education of children "shall be directed to …the development of respect for human rights and fundamental freedoms"; and

- Article 40, which among other things requires States Parties to "recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth…."

In conclusion, it seems the federal government is bent on creating a new category of refugee, that of a "designated foreign national," which does not exist under international law. Furthermore, if the amendments in *Bill C-49* become law, immigration authorities and law enforcement agencies would have at their disposal a powerful new piece of legislation that effectively stigmatizes, indeed *criminalizes*, the weak and vulnerable among us, the refugees desperate enough to pay money to human traffickers to help them get out of countries where they face persecution. Given that there is already a provision against human trafficking in our *Criminal Code* that carries stiff sentencing provisions, the only reasonable conclusion one can make is that the federal government is targeting a tiny minority of people for craven political purposes.

Notes

1. Preamble to the *Convention on the Rights of the Child* (United Nations General Assembly Resolution 44/25, November 20, 1989.
2. *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.OPAC.COD.1_fr.pdf
3. Canada's Third and Fourth Reports on the Convention on the Rights of the Child, http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-CAN-3_4.pdf
4. *Youth Criminal Justice Act*, S.C. 2002, c. 1.
5. *R v.D.B*. [2008] 2 S.C.R. 3.

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Prostitution and the Constitution

Linda McKay-Panos

In a comprehensive decision (*Bedford v Canada*, 2010 ONSC 4264) released on September 28, 2010, Justice Susan G. Himel of the Ontario Superior Court of Justice ruled that three prostitution-related provisions of the *Criminal Code of Canada* (RSC 1985, c46) ("*Criminal Code*") are unconstitutional. Terri Jean Bedford, Amy Lebovitch and Valerie Scott applied for an order declaring that *Criminal Code* ss. 210, 212 (1)(j) and 213(1)(c) violate s. 7 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"), and for an order declaring that s. 213(1)(c) violates s. 2(b) of the *Charter* and is also unconstitutional. The Attorney General of Ontario, together with the Christian Legal Fellowship, Real Women of Canada and the Catholic Civil Rights League intervened in support of the respondent Attorney General of Canada.

At the outset, Justice Himel made it clear that prostitution in itself is not illegal in Canada. She also said that the case was not about deciding whether there is a constitutional right to sell sex . The case was about whether the above-noted sections of the *Criminal Code* violate section 7 ("life, liberty and security of the person") and/or section 2(b) ("freedom of expression) of the *Charter*, and whether these provisions are saved under *Charter* s. 1, as being reasonable limits in a free and democratic society.

The challenged sections of the *Criminal Code* read in part:

["Bawdy-House Provision"]

Keeping common bawdy-house

210. (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Landlord, inmate, etc.

(2) Every one who

(*a*) is an inmate of a common bawdy-house,

(*b*) is found, without lawful excuse, in a common bawdy-house, or

(*c*) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,

is guilty of an offence punishable on summary conviction.

["Procuring Provision"]

Procuring

212. (1) Every one who

…. (*j*) lives wholly or in part on the avails of prostitution of another person,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

["Communicating Provision"]

Offence in relation to prostitution

213. (1) Every person who in a public place or in any place open to public view

…

(*c*) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person

for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

Definition of "public place"

(2) In this section, "public place" includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.

Justice Himel dealt with a number of preliminary issues before addressing the *Charter* issues. First, she had to determine whether the parties had private interest or public interest standing to bring the case. Second, she had to weigh copious amounts of evidence ("over 25,000 pages of evidence in 88 volumes") submitted by the parties, some of which was conflicting. Finally, she had to address whether the Supreme Court of Canada's decision in the *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 SCR 1123 (*Prostitution Reference*) which dealt with the constitutionality of the prostitution provisions, was still binding.

Justice Himel arrived at the following conclusions on the preliminary issues.

- First, because Ms. Lebovitch was currently involved in prostitution, and Ms. Bedford and Ms. Scott indicated that they had genuine plans to return to prostitution-related activities, Justice Himel concluded that all three individuals had private interest standing in the case. She would not have found that Ms. Bedford or Ms. Scott had public interest standing because there were other reasonable methods of bringing the matter before the court.
- Second, she weighed and summarized experts' evidence, lay persons' evidence, government reports, government debates, House of Commons Committee reports, and international evidence. In some cases, Justice Himel dealt with conflicting evidence and drew conclusions based on her interpretation of it.
- Finally, in the *Prostitution Reference*, the SCC found that while the communicating provision of the *Criminal Code* violated s. 2(b), it was saved by *Charter* s. 1. In addition, the SCC found that while both provisions infringed the right to liberty, the infringement was in accordance with fundamental justice, and the constitutional challenge failed.

Justice Himel noted that a law grounded in morality could be a proper legislative objective—provided it is in keeping with *Charter* values. She also noted that adult prostitution has never been a crime in Canada. Rather, Parliament has chosen to control prostitution indirectly through criminalizing many of the acts related to prostitution.

The applicants successfully argued that this case dealt with legal arguments that were not considered in 1990. Further, they argued that the impugned laws violate both liberty and security of the person and are not in accordance with the following four principles of fundamental justice: "arbitrariness, overbreadth, gross disproportionality and what the applicants refer to as 'the rule of law'" (para. 69). In addition, the law involving *Charter* s. 7 has evolved since 1990. Thus, Justice Himel concluded that the analysis conducted in the *Prostitution Reference* could be revisited owing to vast amounts of evidence collected in the twenty years since that case was decided, including information from several western democracies that have decriminalized prostitution (para. 83).

In determining the *Charter* infringement issues, Justice Himel examined the history, interpretation and legislative objective of each of the impugned provisions. Justice Himel noted that a law grounded in morality could be a proper legislative objective—provided it is in keeping with *Charter* values. She also noted that adult prostitution has never been a crime in Canada. Rather, Parliament has chosen to control prostitution indirectly through criminalizing many of the acts related to prostitution.

With respect to the bawdy-house provisions, Justice Himel stated that morality was one of the original objectives, but that the provisions were also intended to address common or public nuisance concerns, such as health, safety and neighbourhood disruption. Justice Himel concluded that the bawdy-house provisions apply to all direct participants in prostitution. Finally, "bawdy-house" has "been interpreted broadly to include any defined space if there is localization of a number of acts of prostitution within its boundaries" (para. 255).

The procuring provision was intended to prevent the exploitation of prostitutes and profiting by pimps from prostitution. While a parasitic relationship is required in order to make out the offence, the determination of what is parasitic appears to be different "depending on whether the person lives with a prostitute, or provides business services to a prostitute. In the former circumstance, parasitism is found solely on the basis that the service is provided to a prostitute because they are a prostitute. No proof of exploitation is required".

The communicating provision was determined by the Supreme Court of Canada to have the purpose of controlling social nuisance associated with street prostitution. Justice Himel noted that "the provision

She noted that evidence garnered over the last twenty years indicates that street prostitution goes beyond being "a simple exercise of economic liberty" and that, for the most part, individuals engaging in street prostitution are at a high risk of being victims of crime.

applies to a broad range of expressive behaviour … and it applies to a broad geographical area".

After determining the legislative objective of the provisions, Justice Himel discussed whether these laws violate the applicants' *Charter* s. 7 rights to life, liberty and security of the person and the right not to be deprived of them except in accordance with the principles of fundamental justice.

Justice Himel noted that the evidence suggested to her that there are ways in which the risk of violence towards prostitutes can be reduced.

Because breaching any of the provisions could result in imprisonment, Justice Himel held that all three provisions deprive the applicants of liberty.

With respect to security of the person, the applicants recognized that the impugned provisions do not directly cause harm to prostitutes because it is generally the male clients who directly inflict violence on female prostitutes. However, they argued that the three provisions materially contribute to the harm faced by prostitutes by creating legal prohibitions "on the conditions required for prostitution to be conducted in safe and secure settings". The respondent argued that there is no causal connection between the provisions and the harm alleged by the prostitutes, as prostitution is inherently dangerous and harmful, and that many of the harms stemmed from violations of the provisions. Refusing to comply with the law and experiencing adverse consequences from the criminal justice system are not harmful effects that support a finding of constitutional invalidity. Justice Himel noted that the evidence suggested to her that there are ways in which the risk of violence towards prostitutes can be reduced. She also concluded that there was sufficient evidence to conclude that the applicants had proven on a balance of probabilities that the impugned provisions sufficiently contribute to a deprivation of their security of the person. Justice Himel also stated that "the two factors that appear to impact the level of violence against prostitutes are the location or venue in which the prostitution occurs and individual working conditions of the prostitute". The three provisions prevent prostitutes from taking precautions that can decrease the risk of violence towards them. Prostitutes are faced with "deciding between their liberty and their security of the person". The law plays a sufficient role in contributing to the prostitute not taking steps that could reduce the risk of violence from clients.

Justice Himel next analyzed whether the deprivation of liberty and security were in accordance with the principles of fundamental justice. She considered each of the impugned provisions under the four factors argued by the applicants: arbitrariness, overbreadth, gross disproportionality and the rule of law. Here is a summary of Justice Himel's findings.

Arbitrariness

A law is arbitrary if it "bears no relation to, or is inconsistent with, the objective that lies behind it" (quoting Justice McLachlin from *Chaoulli v Quebec (Attorney General),* [2005] 1 SCR 791.

With respect to the **bawdy-house provisions** (aimed at nuisance, public health and safety), there is some real connection of the facts to the objective, and so the provisions are not arbitrary.

The bawdy-house provision makes the safest way to conduct prostitution illegal, and therefore exacerbates the nuisance that Parliament is seeking to eradicate.

Because the **procuring provisions** prevent prostitutes from legally entering into business relationships that can enhance their safety, prostitutes are forced to choose between working alone or working with a form of illegal protection. This is not connected to Parliament's objective of preventing the exploitation of prostitutes and is therefore arbitrary.

The **communicating provision** is not arbitrary, even though it has only minimally met its objective: to reduce social nuisance resulting from the public display of the sale of sex.

However, the impugned provisions, acting together, have the effect of being arbitrary. The bawdy-house provision makes the safest way to conduct prostitution illegal, and therefore exacerbates the nuisance that Parliament is seeking to eradicate. Justice Himel noted that a similar argument can be made with respect to the communication provision when it's looked at in conjunction with the other provisions. Moving prostitutes off the street in order to combat social nuisance might exacerbate the harm that the bawdy-house provisions are aimed at, if prostitutes are then forced to move indoors. Because prostitutes cannot hire security guards or drivers, conducting their work on an out-call basis would be a risk to their safety.

Overbreadth

The applicants argued that all three provisions were overbroad as their enforcement of the provisions extends far beyond the objectives of dealing with nuisance and exploitation. It is a principle of fundamental justice that criminal legislation cannot be overbroad. If the State, in pursuing a legitimate legislative objective, uses means that are broader than necessary to accomplish the objective, then the principles of fundamental justice will be violated. However, when deciding whether a provision is overbroad, the courts will apply a measure of deference to the legislatures and Parliament, and it must be clear that the legislation infringes life, liberty or security of the person in a manner that is unnecessarily broad (citing *R v Heywood*, [1994] 3 SCR 761).

Because the **bawdy-house provisions** assign criminal liability to those direct participants who do not contribute to neighbourhood disorder, or threats to public health or safety, they are overly-broad as they restrict liberty and security of the person more than is necessary to accomplish their goal.

The **procuring provisions** are also overbroad, because they do not just apply to those who exploit prostitutes, but also to those who live with a prostitute or provide business services to prostitutes. Thus, they restrict the liberty interests of these people "for no reason".

The **communicating provision** is necessary to achieve the objective of eliminating social nuisance that is caused by the concentration of visible prostitution activities in any one area and is therefore not overbroad.

Grossly Disproportionate

In discussing whether a law is grossly disproportionate, one must determine whether the impugned law pursues a legitimate state interest, and then consider the gravity of the alleged infringement of the *Charter* in relation to the state interest pursued (citing *R v Malmo-Levine; R v Caine,* [2003] 3 SCR 571 ("*Malmo-Levine*)"). Justice Himel asked the following questions to apply the principle of disproportionality:

a. Does the law pursue a legitimate state interest?
b. Are the effects of the law so extreme that they are *per se* disproportionate to the state interest?

All of the provisions were held to pursue a legitimate state interest.

In assessing the effects of the law, Justice Himel found the following facts with regard to the evidence presented:

1. Prostitutes, particularly those who work on the street, are at a high risk of being the victims of physical violence.
2. The risk that a prostitute will experience violence can be reduced in the following ways:
    a. Working indoors is generally safer than working on the streets;
    b. Working in close proximity to others, including paid security staff, can increase safety;
    c. Taking the time to screen clients for intoxication or propensity to violence can increase safety;
    d. Having a regular clientele can increase safety;
    e. When a prostitute's client is aware that the sexual acts will occur in a location that is pre-determined, known to others, or monitored in some way, safety can be increased;

f. The use of drivers, receptionists and bodyguards can increase safety; and
g. Indoor safeguards including closed-circuit television monitoring, call buttons, audio room monitoring; financial negotiations done in advance can increase safety.

3. The bawdy-house provisions can place prostitutes in danger by preventing them from working in a regular indoor location and gaining the safety benefits of proximity to others, security staff, closed-circuit television and other monitoring.
4. The living on the avails of prostitution provision can make prostitutes more susceptible to violence by preventing them from legally hiring bodyguards or drivers while working. Without these supports, prostitutes may proceed to unknown locations and be left alone with clients who have the benefit of complete anonymity with no one nearby to hear and interrupt a violent act, and no one but the prostitute able to identify the aggressor.
5. The communicating provision can increase the vulnerability of street prostitutes by forcing them to forego screening customers at an early and crucial stage of the transaction.

> . . . there was evidence that in other countries legislation has been introduced that addresses the social nuisance associated with street prostitution without curtailing the fundamental rights and freedoms of prostitutes. Canada's communication provision is therefore no longer in step with the international response to prostitution

Justice Himel concluded that the effects of all three impugned provisions were *per se* disproportionate to their legislative objective, and therefore not in accordance with fundamental justice. She noted that: "The overall effect of the impugned provisions is to force prostitutes to choose between their liberty interest and their personal security".

Rule of Law

Because Justice Himel found that the provisions are not in accordance with the principles of fundamental justice, it was not necessary to consider whether the provisions offend the principle that the state has an obligation to obey its own laws and promote compliance with the law (para. 438-9).

With regard to whether the violation of *Charter* s. 7 could be saved by *Charter* s. 1, Justice Himel held that since she had found that all of the impugned provisions were grossly

disproportionate, and some were arbitrary and overbroad, it was not possible to hold that the provisions could be saved by s. 1.

Charter s. 2(b) and the Communicating Provision

Next, Justice Himel noted that in the *Prostitution Reference*, the SCC had found that the communicating provision violated freedom of expression under *Charter* s. 2(b). She found that there was no reason to revisit this finding and moved directly to determine whether the provision could be saved by *Charter* s. 1, which states:

> The *Canadian Charter or Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Justice Himel applied the framework set out in *R v Oakes*, [1986] 1 SCR 103 ("*Oakes*") to determine if the provision could be saved by s. 1. First, Justice Himel held that combating social nuisance was a valid legislative purpose of pressing and substantial concern and that the communicating provision is rationally connected to the social nuisance it is aimed at curtailing. She noted that evidence garnered over the last twenty years indicates that street prostitution goes beyond being "a simple exercise of economic liberty" and that, for the most part, individuals engaging in street prostitution are at a high risk of being victims of crime. Much of this evidence was not before the SCC in 1990. Further, the communicating provision and the threat of criminal sanctions leads street prostitutes to forego proper screening of their customers, making hasty decisions which can result in a compromise of their personal safety. She noted that when the state prevents communication that might reduce the risk of harm, the burden on the government to present justification for the prohibition is high. Because the impugned provision prohibits *all* communication for the purpose of engaging in prostitution, not merely those communications which contribute to social nuisance, and because some of the communication being curtailed might reduce the risk of harm to street prostitutes, Justice Himel found that the communicating provision does not minimally impair the freedom of expression of the applicants and thus cannot be upheld as a reasonable limit under *Charter* s. 1. Also, there was evidence that in other countries legislation has been introduced that addresses the social nuisance associated with street prostitution without curtailing the fundamental rights and freedoms of prostitutes. Canada's communication provision is therefore no longer in step with the international response to

She noted that evidence garnered over the last twenty years indicates that street prostitution goes beyond being "a simple exercise of economic liberty" and that, for the most part, individuals engaging in street prostitution are at a high risk of being victims of crime.

prostitution. In sum, the communicating provision failed the proportionality test set out in *Oakes.*

In the final stage of the *Oakes* analysis, one must weigh the purpose of the impugned law against its effects, both intended and unintended. Justice Himel noted that while neither the law nor its purpose had changed since 1990, the available evidence about the effects of the law had grown in the past twenty years. With regard to the salutary effects of the communication provision, Justice Himel was impressed by evidence (including government reports) that had indicated that the law actually had not been effective in curtailing social nuisance associated with prostitution. Although the respondent argued that the law allows the police to direct prostitutes towards social service supports or to capture pimps on occasion, Justice Himel concluded that the salutary effects of the communicating provision in combating social nuisance are minimal (para. 498). The harmful effects of the communication provision include the increase of bad dates, the pushing of prostitution underground and the prevention of communication that might reduce the risk of harm to prostitutes. She concludes that the "communicating provision so severely trenches upon the rights of prostitutes that its pressing and substantial purpose is outweighed by the resulting infringement of rights". Thus, the communication provision fails to meet the proportionality test in *Oakes* and represents an unjustifiable limit on the right to freedom of expression, and could not be saved by *Charter* s. 1.

Justice Himel noted that while neither the law nor its purpose had changed since 1990, the available evidence about the effects of the law had grown in the past twenty years.

Justice Himel then struck down *Criminal Code* ss. 212(1J) and 213(1)(c) and struck the word "prostitution" from the definition of "common bawdy-house" in s. 197(1) as it applies to s. 210. She declined to delay the application of the decision for 18 months, but did stay her decision for 30 days to allow the parties to make submissions to her about further delaying the implementation of the ruling. The Ontario and federal government have indicated that they intend to appeal this ruling.

Of particular interest is Justice Himel's discussion of the various alternative legislative regimes enacted in other countries to deal with prostitution, and their positive and negative effects. Perhaps Parliament will closely examine this information when looking at the best legislative response to this long-standing issue.

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Three Years On, Canada Endorses the UN *Declaration on the Rights of Indigenous Peoples*

John Edmond

On September 13, 2007, The United Nations General Assembly adopted the *Declaration on the Rights of Indigenous Peoples* by a vote of 114 to 4, with 11 abstentions. Canada, Australia, New Zealand, and the United States voted against. The *Declaration* contains 46 articles, ranging from such universal principles as non-discrimination to, controversially, a bald "right to self-determination," as well as "the right to own, use and develop" traditionally occupied lands. On November 12, 2010, Canada reversed itself and endorsed the *Declaration*. In that, it was preceded by Australia and New Zealand, and last December the United States announced that it would do so also.

The UN Permanent Forum on Indigenous Issues estimates there are more than 370 million indigenous people in some 70 countries worldwide. In Canada, the indigenous peoples are known in our Constitution as "Aboriginal," said, oddly, to "include" the Indian, Inuit and Métis. "Include," in contrast to "means,"is generally used by drafters to list examples of members of an open set; it is unlikely that there are as yet undiscovered Aboriginal peoples in Canada.

Adoption of the *Declaration* was the culmination of a quarter-century of effort, starting with the establishment in 1982 by the UN's Economic and Social Council of the "Working Group on Indigenous Populations," with a mandate to develop a set of minimum standards to protect indigenous peoples. According to the Working Group, "The process moved very slowly because of concerns expressed by States with regard to some of the core provisions of

the draft declaration, namely the right to self-determination of indigenous peoples and the control over natural resources existing on indigenous peoples' traditional lands."

The *Declaration* was adopted by the U.N. Human Rights Council in June 2006, and recommended to the General Assembly, where it was adopted just over a year later. U.N. Secretary-General Ban Ki-moon described the *Declaration*'s adoption as "a historic moment when UN Member States and indigenous peoples have reconciled with their painful histories and are resolved to move forward together on the path of human rights, justice and development for all."

The four states to oppose the *Declaration* initially were those with substantial indigenous populations that are among the most advanced and least oppressed, and are known to take their international responsibilities seriously. United Nations members with no indigenous populations, and those with limited commitment to their endorsements, could be expected to hesitate less before signing on. Nevertheless, at least 14 other states, most of which supported adoption, registered concern that the *Declaration* should not violate territorial integrity, and that self-determination and collective rights generally should be given limited interpretation.

As a matter of international law, it is not disputed that such declarations are not customary law and in the absence of ratifying legislation are non-binding. (Customary law refers to rules derived from state practice, which, unless they conflict with statute law, are considered part of the common law.) As Canada put it in a position statement, "Since Declarations are non-binding, they are often drafted with aspirational language." Nevertheless, Canada's objections were numerous. They are perhaps best summarized in this excerpt from a June 2006 statement to the Working Group by Ambassador Paul Meyer, who headed Canada's delegation:

- The current provisions on lands, territories and resources are broad, unclear and capable of a wide variety of interpretations. They could be interpreted to support claims to broad ownership rights over traditional territories, even where rights to such territories were lawfully ceded by treaty;
- The provisions could also hinder our land claims processes in Canada, whereby Aboriginal land and resource rights are premised on balancing the rights of Aboriginal peoples with those of other Canadians, within the Canadian constitutional framework - our framework for working together;
- The concept of free, prior and informed consent is used in many contexts within the Draft Declaration. It could be interpreted as giving a veto to indigenous peoples over many administrative matters, legislation, development proposals and national

defence activities which concern the broader population and may affect indigenous peoples;

- In relation to self-government provisions, the text does not provide effective guidance about how indigenous governments might work with other levels of government, including laws of overriding national importance and matters of financing.

He concluded:

> Canada has a long and proud tradition of not only supporting, but actively advancing, Aboriginal and treaty rights at home and is fully committed to working internationally on indigenous issues. Regretfully, however, Canada must vote no to the text which has been put before us. For clarity, we also underline our understanding that this Declaration has no legal effect in Canada and does not represent customary international law.

It may well be asked, if the *Declaration* is non-binding, what is the concern? Canada's answer is, "a declaration is an expression of political commitments, and Canada takes its political commitments made at the international level seriously."

The concept of "free, prior and informed consent" referred to in six articles, was troublesome. Article 19, for example, requires such consent to "legislative or administrative measures that may affect" the indigenous peoples. Since most measures enacted by Parliament or taken by government are likely to affect all Canadians in some way, the *Declaration* would seem to require Aboriginal consent in advance of most governmental steps. Resource development similarly requires free, prior and informed consent to development of "mineral, water or other resources" (Article 32). This would go well beyond the Crown's "consultation and accommodation" duty laid down by the Supreme Court of Canada in 2004 and 2005, where the Court stipulated that the duty does not confer a veto on the Aboriginal group.

Article 3 on its own, with its unqualified "right to self-determination," could imply a right to secession and independent sovereignty. Canada expressed concern at the lack of provision for an issue such as paramountcy of laws in Canada's Constitution, which it viewed as ignoring the need for "harmonious relationship of laws between federal, provincial and Aboriginal government laws."

As to land, Canada objected to Article 26, which states, "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired". This statement is difficult to reconcile with Canadian recognition of a range of Aboriginal rights in relation to lands, from rights of use such as

hunting and fishing, to Aboriginal title. There could also be attempts to use such language to support Aboriginal claims to ownership rights over much of Canada, even where such rights have been dealt with lawfully in the past.

Minister of Indian Affairs Chuck Strahl described the document as "unworkable in a Western democracy under a constitutional government." In August 2007, Canada, New Zealand, Colombia and the Russian Federation presented a package of possible amendments focussing, on "a limited number of Articles [13], with a view to providing clear and tangible adjustments to the text using a minimal change approach." This did not receive support.

By the time of the UN vote on September 13, 2007, Canada's objections remained. As Ambassador John McNee put it in his statement to the General Assembly:

> Canada's position has remained consistent and principled. We have stated publicly that we have significant concerns with respect to the wording of the current text, including the provisions on lands, territories and resources; free, prior and informed consent when used as a veto; self-government without recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between the rights and obligations of indigenous peoples, member States and third parties.

In casting Canada's vote against adoption, Ambassador McNee reiterated Canada's "understanding that this *Declaration* is not a legally binding instrument." He continued, "It has no legal effect in Canada, and its provisions do not represent customary international law."

Canada's position was greeted with anger by First Nations and by many supporters. The Assembly of First Nations responded with a "flyer" that adopted the view that the *Declaration* would have legal effect in Canada: "The Declaration is now considered to be international law. Canada should act immediately to accept and implement the provisions of the Declaration. … First Nations in Canada, however, do not need to wait for this to happen."

It may well be asked, if the *Declaration* is non-binding, what is the concern? Canada's answer is, "a declaration is an expression of political commitments, and Canada takes its political commitments made at the international level seriously." The government was concerned that the *Declaration* would be used despite its non-binding status, and might be found persuasive by domestic courts and tribunals, as well as internationally. Endorsement by Canada would enhance that effect. Statutes are presumed not to violate international law, so pleading the *Declaration* on behalf of an Aboriginal group might well tilt the balance in case of ambiguity. To that extent, the AFN position that First Nations "do not need to wait" for Canada to accept the *Declaration* was well-founded. Finally, one cannot discount the

ideological inclinations of the current government, with a strain in both cabinet and caucus not especially predisposed to Aboriginal aspirations.

Which raises the obvious question, having lived with the fallout from rejection for three years, why change? Australia was the first objector to reverse its position. Prime Minister Rudd's Labor government endorsed the *Declaration* in April 2009. This was followed a year later by New Zealand, which had come under severe criticism from the Maori and others. A U.S. President likely to be more sympathetic to the situation of "native Americans" was elected in 2008. Canada would hardly want to be the last holdout, especially when a seat on the Security Council was at issue in October 2010. And, with the apologies over residential schools and Inuit relocation, launch of the Truth and Reconciliation Commission and a new Specific Claims Tribunal, doubtless the government would not wish political momentum to be lost over a declaration that is, after all, non-binding.

Whether the objections will turn out to have been a tempest in a teapot, or whether the hand proffering the cup of reconciliation will be scalded, remains to be seen.

Thus, on November 12, 2010, Canada issued a Statement of Support endorsing the *Declaration.* The ministers of Indian Affairs and of Foreign Affairs issued a statement of support of the broad purposes of the *Declaration*, hedged with caveats on the particulars. At least, the new Indian Affairs minister no longer found the document "unworkable in a Western democracy under a constitutional government." Reiterating Canada's concerns, the Statement said,

> However, we have since listened to Aboriginal leaders who have urged Canada to endorse the Declaration and we have also learned from the experience of other countries. We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework.

Whether the objections will turn out to have been a tempest in a teapot, or whether the hand proffering the cup of reconciliation will be scalded, remains to be seen. But the endorsement of this *Declaration* will be of consequence. On the day of the announcement, Assembly of First Nations National Chief Atleo stated: "Now is our time to work together towards a new era of fairness and justice for First Nations and a stronger Canada for all Canadians, guided by the Declaration's core principles of respect, partnership and reconciliation."

Grand Chief Stan Beardy of the Nishnawbe Aski Nation (NAN) of northern Ontario similarly applauded the decision with the prophetic words:

> Although the UNDRIP is not legally binding it has a legal effect as it allows the Supreme Court of Canada to have a liberal interpretation of our social, cultural, economic, political, spiritual and environmental rights. It contains important language with regards to the free, prior and informed consent of indigenous peoples – which will be a useful tool in any discussions that involve development on our homelands. We congratulate Canada for taking this important step.

Grand Chief Beardy's Deputy, Les Louttit, took a harder line, invoking the *Declaration*, and implicitly challenging the Supreme Court's "no-veto" rule:

> In the NAN territory, governments and industry must obtain the free, prior and informed consent from NAN First Nations before any significant steps are taken pertaining to developments in their traditional territory.

And consider a call by a school trustee, law graduate, and member of the Ktunaxa Nation, for Aboriginal people in British Columbia to establish a new political party. His recent "Open Letter to All British Columbians" reads as follows:

> I Troy Donovan Hunter, J.D., member of the Ktunaxa First Nation, believe British Columbia should have an Indigenous political party with MLA's and MP's democratically voted into office and that the founding charter of such political party be based on the United Nations Declaration of the Rights of Indigenous Peoples, especially including, Article 5, whereas, "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State".

Where else the *Declaration* will lead we shall see.

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Character Evidence: Lifestyle on Trial

Deborah Hatch

Imagine this:

You find yourself accused of having committed a serious theft. You are, obviously, very concerned. First, you must defend yourself with respect to the very serious charge you are facing. But second, you are gravely concerned with what the judge or jury hearing the case will think about your past – the kinds of things you used to be involved in and the people you used to associate with. Years ago, you were addicted to drugs and you did a lot of things that you never thought you would do. You associated with some pretty unsavoury characters with whom you did what you needed to do to acquire more drugs.

Are your concerns warranted/realistic? The first certainly is. If there is a reasonable likelihood of conviction, the state, with all its resources, will prosecute your case. If you are contesting the charge, then you must defend it. There are many rules of evidence, developed over decades and in some instances, hundreds and even thousands of years (some evidentiary rules, such as the requirement for corroboration in certain limited circumstances, stem from Biblical days).

There are also many statutes and a voluminous body of relevant legal precedent with which you will need to be familiar to defend yourself. You will require trained legal representation if you are to have any realistic hope of defending yourself against the charge. But what about your second concern...what will the judge or jury think when they hear evidence of your past activities and associations? Surely they will reason that, by virtue of your unsavoury past, you are the type of person to have committed the crime you are now charged with having committed.

The law in Canada, however, recognizes this problem. As a result, the general rule is that such evidence is inadmissible and therefore cannot be considered. This is so because it is understood that there is a very real danger that a trier of fact would very likely be influenced by what is referred to as "bad character evidence", and that the focus of deliberations would be whether you are the type of person to commit crime (moral prejudice) or the type with a propensity (or likelihood) to commit the specific crime charged (reasoning prejudice). Our modern legal tradition is founded on a recognition that the accused ought not to be forced to defend his entire life, but only the crime with which he is charged. Such a premise is one which each one of us would appreciate were we faced with a criminal charge.

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The policy reasons for such a principle were stated succinctly by the late Mr. Justice Sopinka in *R. v. B.(C.R.)*, 1990 CanLII 142 (S.C.C.):

> "The principal reason for the exclusionary rule relating to propensity is that there is a natural human tendency to judge a person's action on the basis of character. Particularly with juries there would be a strong inclination to conclude that a thief has stolen, a violent man has assaulted, and a pedophile has engaged in pedophiliac acts. Yet the policy of the law is wholly against this process of reasoning".

There are however, as in most areas of law and life, exceptions to the general rule.

One example is where the accused raises evidence of good character. This is due to the recognition that it would be unfair to allow the accused to testify that he would never commit a particular act due to his good character, while preventing the Crown from presenting evidence of bad character. This would present an unfair picture to the trier of fact. Other exceptions to the rule exist as well.

The rule prohibiting admissibility of bad character evidence relating to an accused person is a sensible and thoroughly considered one. It is one which serves to protect all of us from the very real danger that such evidence, if introduced, "swift as quicksilver...courses through the natural gates and alleys of the body" (*Hamlet*, Act 1, Scene V) and corrupts the decision-making process.

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Off-Work Activities Are "Always On"

Peter Bowal and Brandon Heenan

The idea that employees are free to do what they want off-work and on their own personal time is a myth. It turns out that off-work activities are well within the reach of the employer's disciplinary process. This article briefly describes the three categories in which Canadian employers may legally expect employees to be 'always on' their good behaviour.

Off-Work Behaviour Cannot Directly Conflict With an Employment Obligation

One of the best illustrations of this rule is that an employee must show up for work at the employer's prescribed hours. If the employee engages in some high risk activity outside of work, is injured as a result and cannot get to work because, for example, he is recovering in the hospital, there may some flexibility for sick leave. But if he is in police custody on criminal charges when he should be at work, his off-work behaviour can be seen to interfere with his employment obligations and the law will be less sympathetic.

A truck driver, Brissette was convicted of drunk driving and temporarily lost his license to drive. His job required him to maintain a valid driving license. His firing for cause was upheld in 1993, even though the crime of drunk driving happened off-site and off-hours. Employees' behaviour on their own time must not interfere with their obligations to their employers.

Off-Work Behaviour Cannot Have Adverse Effect on Employer and Industry

If an employee's after-work conduct indirectly interferes with public perceptions of the role of the employee, the employer may invoke discipline. In the 1980s, John and Ilze Shewan, married school teachers in Abbotsford, BC, entered a contest where Mr. Shewan photographed his wife in the nude. With both parties consenting, the photo was submitted to *Gallery* magazine, and it was published in the February 1985 edition.

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Once the employer school board became aware of this, both were suspended for six weeks. The suspension was appealed to the British Columbia Court of Appeal which upheld it. The Court in 1987 concluded that the Shewans, despite not having contractually agreed to refrain from this specific behaviour, had a duty to act in a manner consistent with the best interests of the school board. This photo contest had compromised their roles as educators. The Court said, "[t]he publication of such a photograph of a teacher in such a magazine was bound to have an adverse effect upon the educational system to which these two teachers owed a duty to act responsibly, and therefore the circumstances clearly justified a finding of misconduct…"

The Supreme Court of Canada came to the same conclusion in 1996 in a case involving a New Brunswick school teacher, Ross, who for years published racist and anti-Semitic views in 4 books, pamphlets, letters to newspapers and a television interview. His views were not expressed in the classroom.

After a parent complained, the school board investigated and found Ross to be in violation of the provincial *Human Rights Act*. It recommended Ross be disciplined as a teacher. Ross lost in the Court of Appeal where the disciplinary decision was upheld. The Court noted the "poisoned" educational environment and stated, "Ross' off-duty comments undermined his ability to fulfil his teaching position."

There was no substantial proof of harm to the employer or to anyone else in particular from the teacher's off-work pursuits. Factors which may have contributed to this outcome include the higher standard expected of professionals such as teachers, the captive public audience with which Ross worked and engaged, and the distractions his private endeavours caused.

Tobin, a Consulting Psychologist, met a female subordinate (HM) at work in the Correctional Service of Canada in 2001. They soon developed an intimate relationship. Eventually HM claimed Tobin berated, degraded and verbally abused her for two hours while

both were off-duty. He was arrested and charged with criminal harassment, to which he pleaded guilty in 2007. As a result he was fired from his job.

Tobin challenged the firing on the grounds that the incident was unrelated to his position at the Correctional Service of Canada. As far as we can determine, Tobin is still fighting his dismissal. In 2009, the Federal Court of Appeal sent the matter back for a rehearing with the instruction that the adjudicator might find, without evidence, that Tobin brought discredit to the employer. This decision makes the case for an employer stronger. It may assert that an employee's actions have brought hardship or embarrassment upon the employer without proof.

Off-Work Behaviour Cannot Criticize the Employer

At common law, there is a general duty of loyalty of employees to their employers. There are few recent judicial decisions in Canada that test the contours of this loyalty in modern terms. Most cases have to do with not competing with your employer and not divulging confidential information. The issue that arises is whether one can publicly express criticism of one's employer.

Fraser, a unit supervisor for Revenue Canada in Kingston, Ontario, was an outspoken critic of his employer's policies relating to metrification and the *Charter of Rights*. The Supreme Court of Canada would eventually describe some of Fraser's criticisms as vicious. His boss warned him about his public criticisms. As they persisted, he was suspended twice. When this did not deter him, he was fired. At issue was whether a public servant could express highly critical views of his public employer, even about issues unrelated to his work.

To the Supreme Court of Canada in 1985, this came down to finding the correct balance between individual free speech and the employee's duty to do his job properly. Oppositional speech by public servants on public issues will be tolerated, but it is not an absolute right. A civil service job involves more than tasks. It carries public perceptions and the public service must continue to be seen as impartial, which in turn dictates general loyalty. In this case, Fraser's sustained and highly visible attacks on major government policies constituted disloyalty to the government employer. The Court concluded he was properly fired for his ongoing public criticisms of his employer.

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Fraser was a public sector employment case where the *Charter* right of free speech enjoys its greatest prominence. One may safely assume that employees of private companies will be granted far less latitude than described in *Fraser* to criticize the employer.

Conclusion

Employees are free to act and speak as they please outside of their work on their own time. If they wish to avoid disciplinary sanctions at work, they should be careful to not do or say anything that prevents them from physically and legally carrying out their jobs, or which has adverse effects on the employer, or implicitly compromises reasonable public perceptions of their work role. Injury to the employer's reputation or public expectations will be readily inferred without proof. We also observe that employees will be granted little leeway by employment law to criticize and embarrass the employer.

Not all off-duty transgressions within these three categories will necessarily support summary dismissal of the employee. Progressive discipline and specific circumstances continue to be taken into account in each case. The judicial decisions in these three categories demonstrate that employees would be unwise to consider their off-duty activities beyond the reach of employment discipline.

This analysis will serve as the framework for an upcoming article on the "always on" use and effects of blogs and social media as they relate to employment law in Canada.

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Family Law Resources in French in Alberta

Adriana Bugyiova

Recently, I was gathering information on Family Law resources in French and I thought it useful to share the results. Going through separation, divorce or adoption is a very emotional time and not being able to access relevant information in one's first language can be trying and stressful. For French-speaking citizens in Alberta, there are now resources that could help to make this task somewhat easier and the legal process more understandable.

For starters, I would like to steer attention to Internet resources. Statutes and regulations governing the legal process are available in French through the Department of Justice Canada website (http://laws.justice.gc.ca/fr/index.html) under the tab "Lois du Canada", where one can find them through a simple search:

- Loi sur le divorce (1985, ch. 3 (2e suppl.))
- Loi d'aide à l'exécution des ordonnances et des ententes familiales (L.R., 1985, ch. 4 (2e suppl.))
- Loi sur la saisie-arrêt et la distraction de pension (L.R., 1985, ch. G-2)
- Lignes directrices fédérales sur les pensions alimentaires pour enfants (DORS/97-175).

Also available on the Department of Justice Canada website is one of their most visited sections – "Supporting Families" section ("Initiative Soutien des familles"; www.justice.gc.ca/fra/pi/fea-fcy/index.html) providing a wide range of bilingual resources and publications in html or pdf format on divorce and separation, parenting arrangements, spousal and child support,

enforcement and property division, and federal child support amounts. And children are not forgotten: the Department of Justice has a booklet for children between the ages of nine and twelve to help them learn about family law and understand their emotional response to their parent's separation. The "What Happens Next" calendar (le calendrier "Qu'est-ce que ça veut dire pour moi?"), which accompanies the booklet (html or pdf format) helps children adjust to new circumstances by encouraging them to keep track of events in their new routines. Also on the same website, the "Family Violence Initiative" publications ("L'initiative de lutte contre la violence familiale") should be mentioned.

Another great online source on family law topics to visit is the newly launched LawNet Français (formerly ACJNet at www.lawnetfrancais.ca/LawNetFrancais/default.aspx), a portal of links to law-related information and educational resources on justice and legal issues, which also contains information on family law from all jurisdictions in Canada in both official languages.

Also available on the Department of Justice Canada website is one of their most visited sections – "Supporting Families" section ("Initiative Soutien des familles"; www.justice.gc.ca/fra/pi/fea-fcy/index.html) providing a wide range of bilingual resources and publications in html or pdf format on divorce and separation, parenting arrangements, spousal and child support, enforcement and property division, and federal child support amounts.

Most online services provided by the Government of Alberta offer information in English only (like "Family Justice Services"), but do refer to documents available in French, or guide the user to other websites. For example, the Government of Alberta website (www.bonjour.alberta.ca/7.html) contains some information, like FAQs, "Vos droits et vos responsabilités" under the tab "Services juridiques", but refers to another website for more resources.

But the most comprehensive source of family law information in French is definitely the Association des juristes d'expression française de l'Alberta (AJEFA) website. Under the tab "À votre service" – "Droit de la famille" (www.ajefa.ca/ressources/famille.php), one can find a wide range of publications, like booklets by Alberta Family Justice Services and the Maintenance Enforcement Program, forms and toolkits (Family Law Kit) that have been translated and prepared by the Association in collaboration with the Justice Department of Canada and the Institut Guy Lacombe de la famille. All documents on this website can also be found at the Family Law Information Centres (FLIC), at Family Justice Services and at the offices of Legal Aid Alberta. A visit to this Centre could be of great benefit to anyone trying to navigate their

way through the process. In addition, the Alberta Family Mediation Society website (www.afms.ca) could be of use if one is looking for French-speaking lawyers.

Finally, I would like to mention some print resources for those who would like to read more about specific topics in family law:

- *Jurisclasseur Québec – Personnes et famille* (Butterworths, LexisNexis Canada, 2010), 2 vols. loose leaf, for information on Canada's *Divorce Act:*
- *La parole de l'enfant en matière de garde* / Luce Bourassa (Butterworths, LexisNexis Canada, 2007), 335 p., for legal rights specific to children, parental authority, custody and access rights; and
- *Développements récents en droit familial 2010* / Barreau du Québec (Éditions Yvon Blais, 2010), 482 p., for recent developments in family law.

I hope that this article will provide some guidance to all those who seek information on family law in French, and offer some help to all those dealing with difficult family issues.

Adriana Bugyiova worked for 11 years as Law Librarian (Alberta Justice) and is currently Public Services Librarian at University of Alberta Libraries (Bibliothèque Saint-Jean), in Edmonton, Alberta.

Alberta Court of Appeal Decides Syncrude was not an Employer under Human Rights Legislation

Linda McKay-Panos

It is perhaps ironic that in a decision where the Human Rights Panel ("Panel", currently referred to as "Tribunal") found that there had been no discrimination, one of the respondents used the occasion to appeal the finding that it was an employer under the (then) *Alberta Human Rights, Citizenship and Multiculturalism Act* ("Act"; currently *Alberta Human Rights Act*, RSA 2000, c A-25-5), and therefore subject to the Act. Since the structure of the "employment" relationship at issue in this case *(Lockerbie & Hole Industrial Inc v Alberta (Human Rights and Citizenship Commission, Director)*, 2011 ABCA 3; www.albertacourts.ab.ca/jdb/2003-/ca/civil/2011/2011abca0003.pdf) is commonly practiced in Alberta, the Court of Appeal ruling on whether Syncrude was an employer could have a significant impact on Alberta human rights law.

In brief, Donald Luka was denied access to the Syncrude site in Fort McMurray because he failed a drug test. He had been a long-term employee of Lockerbie & Hole, when they decided to transfer him to the Syncrude site. Lockerbie & Hole had contracts with general contractor Kellogg, Brown and Root to perform work on the Syncrude site. However, Syncrude had a policy that contractors could not bring workers onto the site unless they passed a drug test. Mr. Luka, who failed the required drug test, was a recreational drug

user, but was not disabled by an addiction to drugs. The Panel concluded that he was not discriminated against, and thus, the Panel did not have to consider any defence put forward by Lockerbie & Hole, such as an argument that drug testing is a *bona fide* occupational requirement. The Panel also concluded that Lockerbie & Hole was an employer of Luka because they were in a master and servant relationship. In addition, since "employment" under human rights legislation is not limited to master and servant relationships, it could also include other relationships that involved the "utilization" of services. Because Syncrude was indirectly utilizing the services of Luka through Lockerbie & Hole, the Panel concluded that there was an employment relationship. Thus, Syncrude was properly named as a respondent.

The Court of Appeal noted that "employment" is not defined under the Act, and, that the starting point for its meaning is therefore the common-law definition.

On appeal, Court of Queen's Bench Justice T.D. Clackson concluded that the Panel had been in error in concluding that Syncrude was an employer. He held that while "employer" in the human rights context is not necessarily the same as in the common-law definition (master and servant), it was not wide enough to cover the relationship between "the owner of an industrial site, and the employees of arm's length contractors working on the site." In particular, there was no express or implied contractual link between Luka and Syncrude.

The Director of the Alberta Human Rights Commission appealed to the Alberta Court of Appeal. The Court of Appeal reviewed the meaning of "employment" under the Act. The Act prohibits discrimination in the area of employment on any prohibited ground (e.g., race, colour, gender, and disability). The Court of Appeal noted that "employment" is not defined under the Act, and, that the starting point for its meaning is therefore the common-law definition (para. 13). It also noted that remedial statutes such as the Act require flexible and contextual interpretation. Further, case law has recognized that remedial statutes often intend a wider meaning of "employment" than exist at common-law (para. 15). This is in keeping with a number of decisions in which relationships that were not traditional "master and servant" relationships had been found nevertheless to amount to employment under human rights law.

The following are examples of cases in which relationships have been held to be employment under human rights law, largely based on the notion that the respondent exercised "control" over or utilized the services of the complainant:

- A taxi driver-owner and taxi company: *Sharma v Yellow Cab Ltd.* (1983), 4 CHRRD/1432 (BCHRT); *Pannu v Prestige Cab Ltd.* (1986), 47 Alta LR (2d) 56 (CA);

- A regular customer of the complainant's employer and the complainant: *Jalbert v Moore* (1996), 28 CHRR D/349 (BCCHR);
- An actress auditioning for a movie role and a film production company: *Fernandez v MultiSun Movies Ltd.* (1998), 35 CHRR D/43 (BCHRT);
- An applicant for volunteer training and a feminist organization sponsoring the training: *Nixon v Vancouver Rape Relief Society* (2002), 42 CHRR D/1 (BCHRT), reversed on other grounds *Nixon v Vancouver Rape Relief Society*, 2003 BCSC 936, affirmed *Nixon v Vancouver Rape Relief Society (No. 2)* (2005), 42 CHRR D/20 (BCCA), leave to appeal to S.C.C. refused SCC No. 31633 February 1, 2007;
- A live-in caregiver and the brother of the patient: *Milay v Athwal (No. 1)* (2004), 50 CHRR D/386 (BCHRT);
- A police officer (considered at common law to be a public officer rather than an employee): *Re Prue* (1984), 33 Alta LR (2d) 169 (QB);
- An army cadet and Canada's armed forces: *Canada (Attorney General) v Rosen,* [1991] 1 FC 391 (CA)
- A cook hired by Smith Ltd to cook for its only customer, CP and the customer: *Fontaine v Canada Pacific Inc.,* [1991] 1 FC 571 (CA)

The Court of Appeal noted that in many of the cases in which the relationship was considered to be employment, the complainant was self-employed. The Court also said that those cases expanding the common-law meaning of employment did not generally involve circumstances where the complainant was "employed" by two different persons.

The Court relied on *British Columbia (Ministry of Health Services) v British Columbia (Emergency Health Services Commission*), 2007 BCSC 460, where an ambulance paramedic was held to be employed by the Emergency Health Services Commission but not co-employed by the British Columbia government. The relationship between the paramedic and the government was "too remote to fall within the concept of 'employment'".

The Court of Appeal noted that where the complainant potentially has two employers, it will be "rare that the concept ["employment"] can be extended so far as to encompass employment by two different parties in [these] circumstances". It also noted that the Court of Queen's Bench had concluded that there must be an express or implied contractual link between the complainant and the entity alleged to be the employer. The CA stated that requiring a contractual link would exclude many relationships that had been previously included as "employment" under human rights law. Nevertheless, the CA held that the presence or absence of a direct contractual link is "a significant factor". Also of significance is whether the alleged employer benefits from or utilizes the services of the complainant "with a significantly close nexus, although mere benefit is not sufficient".

The Court of Appeal set out a list of factors which must be taken into consideration when determining whether a particular relationship qualifies as "employment" under the Act. Although the Court does not specifically state where these factors originate, it appears that they are derived from a survey of relevant cases:

The Court of Appeal set out a list of factors which must be taken into consideration when determining whether a particular relationship qualifies as "employment" under the Act.

- whether there is another more obvious employer involved;
- the source of the employee's remuneration, and where the financial burden falls;
- normal indicia of employment, such as employment agreements, collective agreements, statutory payroll deductions, and T4 slips;
- who directs the activities of, and controls the employee, and has the power to hire, dismiss and discipline;
- who has the direct benefit of, or directly utilizes the employee's services;
- the extent to which the employee is a part of the employer's organization, or is a part of an independent organization providing services;
- the perceptions of the parties as to who was the employer; and
- whether the arrangement has deliberately been structured to avoid statutory responsibilities.

Where it is alleged there is more than one co-employer, the following factors are also relevant:

- the nexus between any co-employer and the employee, including whether there is a direct contractual relationship between the complainant and the co-employer;
- the independence of any alleged co-employer from the primary employer, and the relationship (if any) between the two;
- the nature of the arrangement between the primary employer and the co-employer,
- for example, whether the co-employer is merely a labour broker, compared to an independent subcontractor;
- the extent to which the co-employer directs the performance of the work.

The Court of Appeal concluded that while Luka was clearly an employee of Lockerbie & Hole, he had no contractual relationship with Syncrude, he was not part of the organization, nor did he report to Syncrude, and Syncrude did not direct his work. Thus, his relationship with Syncrude was too remote to justify a finding of employment, even under an extended meaning given to "employment" under human rights law. Thus, the burden

of protecting Luka's human rights under the Act fell on Lockerbie & Hole.

The Court also determined that Syncrude was a private property owner and that human rights law does not extend to access to private property under the Act.

Finally, because this was a situation involving potentially multiple employers in the chain (Syncrude, Kellogg Brown and Root, Marsulex and Lockerbie & Hole), the Legislature could not have intended that all of those parties be considered "employers" for the purpose of the Act. It is, however, important to note that the complaint did not bring the other contractors in the chain into the action; the named respondents were the immediate employer and the company (Syncrude) that had the drug testing policy. It is therefore not clear that this "chain" concern would actually translate into reality.

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While the reasoning in this case may be seen to be logical, I wonder if the result would have been different if the basis of discrimination had not been drug testing and disability (with the safety concerns being quite important), but another ground. What if Syncrude had a policy that persons who worked on its site could not be female? This would mean that if Lockerbie & Hole decided it needed the business and thereby implemented the policy, it would then be discriminating against their female employees. Could it then argue the defence of *bona fide* occupational requirement? Could it say that it would be undue hardship because its would lose a lucrative contract by refusing to abide by the policy?

The Court of Appeal noted that the Panel had been concerned that Syncrude had "downloaded" its policy on the contractors. Thus, there would potentially be no remedy if Syncrude (a landowner) excluded persons from private property based on a discriminatory policy. The Court of Appeal noted that human rights law does not extend to private property owners (unless they are employers, landlords or service providers), and that the burden of protecting the employees was on Lockerbie & Hole. However, it is not entirely clear that Lockerbie & Hole would necessarily provide human rights protection if it came at the cost of undue hardship.

In the end, it appears that the flexible interpretation doctrine may have given way to an overly legalistic interpretation that was more concerned with the possibility of multiple entities being subject to human rights laws than with providing the employee with protection from discrimination.

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Cutting fair process?

Peter Broder

Keynesian economics enjoyed an unexpected resurgence in the wake of the 2008 economic crisis. There was wide consensus that governments should spend to make up for the drop in demand resulting from the stock market and housing price meltdowns. Politicians' affinity for ribbon cutting ceremonies being what it is, some concern was raised at the time that all this spending was more weighed to physical infrastructure projects than to work to build social and human capital. Opening a new road is invariably sexier than bolstering the capacity of an immigrant services agency.

But, in retrospect, operating in that environment might have been better than dealing with the one on the horizon.

Now that the zeitgeist has shifted, and the new mantra is returning budgets to balance, voluntary sector groups are at high risk of severe cuts in the name of the need for financial restraint. Funding of social or human capital is often easier to drop than funding of nuts and bolts.

A less obvious but even more unfortunate side effect of this change in the landscape is that it offers government decision-makers the opportunity to use fiscal prudence as a smokescreen for advancing political agendas that are based more on ideological or electoral considerations than spending.

The recent kerfuffle over the procedural oddities surrounding the federal government's move to defund the aid agency Kairos shows how murky the line between fiscal and political decisions can become, and of the need for safeguards against arbitrary conduct. Recent

months have also featured enigmatic decisions around funding of immigrant support programs and other cutbacks for which no strong policy rationale was offered. In this context, developments in administrative law dealing with the obligations of government officials to act fairly and properly in taking decisions bear watching.

Although not concerning a spending matter, Justice Hughes' February 2011 holding in *Public Mobile v. Attorney General of Canada* quashing a Cabinet decision varying a Canadian Radio-television and Telecommunications Commission (CRTC) decision about the eligibility of a particular company to operate as a telecommunications common carrier in Canada re-iterated that decision-makers (in this case, the Governor-in-Council) must act fairly and with due attention to the legislative framework for their actions.

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A recent British case addressed spending decisions more directly. In *Luton Borough Council and others v. Secretary of State for Education*, Justice Holman of the Administrative Court of the High Court of Justice (Queen's Bench Division) considered ministerial duties and obligations related to spending cuts and the lawfulness with which those cuts were made. Canadian law in this area does not fully parallel that of Britain, but the decision is nonetheless timely and instructive.

In the case, complainant local authorities sought judicial review of a number of decisions related to withdrawal of funding for school infrastructure projects. These decisions were taken by a Minister in the newly-elected government of David Cameron and were part of its broad efforts to curtail spending. The grounds on which the decisions were challenged included that they were irrational, that the decision-making process had fettered the discretion of the Minister, that they breached the substantive legitimate expectations of the claimants, that the claimants were entitled to be consulted on the decisions and that the Minister had failed to do so and, lastly, that the Minister failed to discharge statutory duties under equality legislation applicable to the decisions.

The courts generally show a great deal of deference to elected officials in the choices they make where political, economic and social considerations have to be balanced. It is well-established that courts ought not, in the words of one case cited by Justice Holman, "become an umpire of a social and economic controversy that has been settled by due political process." So it is not surprising that he declined to interfere with the decisions on the first three grounds put forward by the complainants.

On the last two grounds, however, Justice Holman upheld the complaints. In the circumstances of the case, even though the language of the documentation around the funding arrangements made clear that underwriting of the various projects was subject to further approval processes, he ruled that the long-term nature of the dealings between the local authorities and the sums involved in the arrangements, required that there be a consultation process before the Minister took a final decision on terminating or continuing the funding. Indeed, he called the failure to consult in these circumstances an "abuse of power".

He further ruled that the decisions had not been taken by the Minister with due regard to their impact on women, minorities and the disabled under the applicable equity laws. Various British acts require that public authorities consider whether decisions they take will advance specified legislative objectives with respect to fair treatment of these groups. Justice Holman found that the Minister had not fulfilled his duties under these statutes.

In the result, the decisions were sent back to the Minister to be reconsidered after appropriate consultation and adequate consideration being given to the potential impact of the cuts on the specified disadvantaged groups.

It remains possible that after doing so the Minister will end up back at his original conclusions. As well, because in Canada the legislative framework is different and we have our own administrative law jurisprudence, it is not clear that Justice Holman's ruling would apply here.

That said, the case is a welcome reminder that, notwithstanding fiscal imperatives, governments are not free to act capriciously or arbitrarily in spending decisions. If charities and not-for-profit groups do face heavy cuts as federal and provincial governments seek to trim their budgets in the coming years, Justice Holman's ruling also suggests they should vigorously explore making use of the courts to ensure that public authorities have acted fairly and reasonably in such decisions.

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The Seal of Confession: *I Confess* and *La Confessional*

Rob Normey

Alfred Hitchcock's rather underrated 1953 film *I Confess* takes as its starting point a fascinating problem that makes for gripping courtroom drama. In Quebec City in 1953 a priest, Father Michael Logan (played by Montgomery Clift), enters church late one evening and encounters a man who indicates he wishes to confess a sin. The pair enters the confessional and the man, known to Father Logan as the caretaker at the church, Otto Keller, confesses to murder.

The plot that develops thereafter hinges on the seal of the confessional in the Roman Catholic Church. What is said in confession binds a priest to absolute secrecy. An edict in this regard was published as far back as 1151 by Gratian. The prohibition on divulging details, even of a serious crime, are set out more formally in Canon 21 of the Fourth Council of the Lateran (1215). Even if a priest faces a risk to his own life he cannot reveal directly or indirectly what he has learned. The penalty to this day would be excommunication. The only exception would be with the penitent's permission and always without revealing his or her identity.

In *I Confess* Father Logan cannot go to the police nor answer questions about the crime during an interrogation by Inspector Larrue (Karl Malden), who is heading up the investigation. The murdered man was a rich lawyer, Villette. It turns out that Villette himself had, over the preceding months, been attempting to blackmail Ruth Grandfort (Anne Baxter), who is married to a prominent politician. Ruth had been involved in a brief sexual relationship with Logan before he became a priest and Villette had found out about it.

Thus, there is reason to suspect that Logan may have been involved in the murder. Possible evidence is brought forward against him, including the fact that a man wearing a priest's cassock was seen by two school girls leaving the lawyer's house the night of the murder. That very cassock is later found in the priest's trunk. Other apparent facts help convince Larrue that Father Logan is indeed the real culprit, including his unwillingness to provide honest accounts of his whereabouts.

Before we turn to the trial, which constitutes one of the last scenes of the film, and before what amounts to two climaxes, it is worth our while considering some of the context in which the film was developed and then made. The script is based on Paul Anthelme's 1902 play, *Nos Deux Consciences.* The original plot involved the priest and the Ruth character having an affair, with Ruth then giving birth to an illegitimate child. The priest was found guilty in the ensuing trial and executed. The original script adapted from the drama retained these elements and as a result was rejected out of hand by Warner Brothers. It was felt that this was just too shocking for middle America.

New scripts were developed until, by the end, upwards of a dozen writers were said to have had a hand in the process. One was a Canadian writer recruited to hang around the set and contribute "Quebec atmosphere" for Hitchcock. It is interesting to note that Hitchcock was fully prepared to accept the changes dictated by the studio, changes that his original screenplay writer, George Tabori, refused to consider, resigning instead. One can compare Hitchcock with the great Orson Welles, who would engage in an intense battle over the production of *A Touch of Evil* in the late 1950s, culminating in his famous 58 page memo, a real *cri de coeur*, to Universal Studios. That film, involving some pretty shady police work in furtherance of "justice" includes the famous exchange between Welles (as corrupt detective Hank Quinlan) and Marlene Dietrich (playing his old flame): "Read my future." "You haven't got any." "Huh?" "Your future's all used up."

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It is true that Hitchcock and his creative team worked with the changes imposed to create a fine film. It would nonetheless have been fascinating to have seen the original script

filmed – arguably it would have been a deeper, more haunting film. That being said, I think we must give Hitch credit for making the most of the plot changes imposed on him by the studio. In fairness as well, one must concede that many viewers would undoubtedly have felt that had the priest been convicted of murder in such circumstances this would have been either implausible or deeply unsatisfying. The change pertaining to the presence of an illegitimate child is rather more difficult to accept.

In the final analysis we have the film that was shot. At least we do in parts of Canada other than Quebec. It turned out that even the scenes clarifying that Logan and Ruth had engaged in a sexual relationship before he became a priest were too much for the powers that be in the Catholic Church in Quebec. They demanded and got cuts. Shades of Cinema Paradiso! (The film was also banned in Ireland).

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A number of the actors give first-rate performances, including in my view, Montgomery Clift. Clift is considered to have given a sub-par effort by a number of Hitchcock scholars. Some claim that his Method-style of acting clashed with Hitchcock's fluid and dynamic film-making. I don't think the criticisms are at all valid. Clift provides a sensitive and nuanced performance and perfectly captures the anguish of a man aware of human frailty. He is wholly sympathetic for instance, towards Ruth, who yearns to renew their affair even as he firmly explains that it is impossible. He authentically displays compassion for the penitent Keller who has provided false statements to the authorities implicating Father Logan himself.

I was impressed with Hitchcock's direction and the script's narration of Father Logan's trial. I got the impression that this was no doubt how a trial might have unfolded in 1950s Quebec City, although I presume that Quebecois would have generally been the key participants. The Crown Prosecutor attempts to trap the unfortunate priest when he takes the stand on the question of his supposed propensity for violence. He gets Logan to admit that he had been violent with Villette when the lawyer made an imputation of lewdness against Ruth, pushing him to the ground. The prosecutor then suggests that even greater violence, i.e. murder – would have been perpetrated at the point the accused learned that Villette had been attempting to blackmail Ruth and, if necessary, expose the liaison between the two. Logan provides a firm response but he and we viewers are clearly worried over the potential impact this will have.

Interesting statements are made by both the jury foreman and the judge at the conclusion of the trial. The foreman reports that the jury has grave suspicions as to guilt but doesn't believe sufficient evidence was provided that Logan wielded the murder weapon. The judge rather amazingly weighs in with the comment that, while the jury has done its duty, he must express personal disagreement with the verdict of not guilty.

This clearly leaves Father Logan with a tarnished reputation, and as he descends the steps to exit the courthouse, abuse is hurled at him, including the demand that he take off his collar. A large crowd mills around and many display considerable animosity for several tense moments. We then move toward the final climax where much is explained to the police officers and the good citizens of Quebec.

While I lack the space to explore Robert Lepage's excellent 1995 film *La Confessional* in any depth, I would urge you to seek it out not merely as a companion film but as a vibrant and moving cinematic experience in its own right. It moves back and forth between 1989 and the year 1952 when Hitchcock and his creative team are filming *I Confess*. The story involves a quest by two brothers (Pierre played by the great Lothaire Bluteau and Marc played by Patrice Goyette) to determine who Marc's true father is. A fascinating "confession" is made at the end of the film of the wrongdoing which leads to a terrible tragedy. The taxi driver makes this confession not to a priest, but to a film maker, none other than Hitchcock himself, who responds that the tale is not a suspense story after all, but a Greek tragedy. The film won a Genie Award for Best Canadian Film and the Critics' Prize at the Istanbul Film Festival. It also contains a strong performance by Kristin Scott Thomas as Hitchcock's key assistant.

The film's intertwining plots are ingenious and this is surely an ambitious work by any standard, with many piercing visual images. The opening line is particularly resonant: "In the city where I was born the past carries the present like a child on its shoulders." A critical component of *La Confessional* is the recurring consideration of the confession made to a priest by a young woman facing an unwanted pregnancy. Once again, the seal of the confessional creates a troubling burden.

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