LAWNOW

Relating law to life in Canada

Issues in Criminal Law

Criminal law has both public and private significance. For individuals charged with crimes, the outcomes are life-altering. For society, the outcomes can affect public policy, our sense of security, and even our history.

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Feature: Issues in Criminal Law

Special Report: The Law and Public Policy

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LawNow contributor Deborah Hatch has decided the time has come to hand over her criminal law column to a new writer. We are very grateful to her for her excellent work over the last several years, and her generous contribution of her time and expertise to LawNow. Deborah even helped us select her successor, distinguished Edmonton lawyer Philip Lister Q.C. We welcome Phil and are looking forward to working with him, and bringing his insights to LawNow readers.

LEAF Arguments Accepted by Majority of Supreme Court of Canada

Joanna Birenbaum, Elizabeth Sheehy, and Susan Chapman

The Supreme Court of Canada rendered its decision today in the case of *R. v. J.A.*, a case in which an accused charged with the sexual assault of his unconscious common-law spouse argued that the complainant had consented to the sex "in advance". Women's Legal Education and Action Fund (LEAF) intervened in the appeal to argue that there can be no such thing as "advance" consent to unconscious sex. Consent must always be active, voluntary, ongoing and contemporaneous with the sexual act. In a 6–3 decision, the Supreme Court of Canada agreed.

"The Court reaffirmed the last 20 years of equality-driven developments in the law of sexual assault" explains LEAF Legal Director, Joanna Birenbaum. "The decision confirmed what is already clear in the *Criminal Code* and what is, or should be, common sense. When a woman is unconscious she is not sexually available. Any sexual act perpetrated on an unconscious woman, who is unable to say "yes" or "no", is assault. This is a simple proposition. And it is uncontroversial."

The facts of the case involve an abusive spouse who strangled the complainant into unconsciousness and, while she was unconscious, bound her and penetrated her anally with a dildo, at which point the complainant came to. The accused argued that the complainant had consented to the strangulation and had consented "in advance" to the sexual acts performed on her body while unconscious. The trial judge convicted the accused of, among other charges, sexual assault. The Ontario Court of Appeal overturned the conviction on the basis that the complainant had consented in advance to the sexual acts performed on her while unconscious.

The Supreme Court of Canada restored the conviction and held that "an individual must be conscious throughout the sexual activity in order to provide the requisite consent" and that "the definition of consent … requires the complainant to provide actual active consent throughout every phase of the sexual activity. It is not possible for an unconscious person to satisfy this requirement."

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"This decision offers important protection for women who are most vulnerable to sexual assault" explains LEAF counsel Elizabeth Sheehy. "Women who are unconscious because of drugs or alcohol, whether taken voluntarily or involuntarily, or because of disability, are sexually assaulted at shockingly high rates, often with impunity for the offenders. This decision ensures that predatory men cannot rape unconscious women and then say "well, she said it was OK before becoming unconscious."

Birenbaum adds that "the decision also affirms the law, taken for granted by most if not all Canadians, that a wife can say "no" to sex with her husband. Consent cannot be assumed from the spousal relationship. The fact that a spouse, or any woman, said "yes" at some point in the past, is not a perpetual consent to sex. Sexual partners have an obligation to ensure consent on an ongoing basis. Women must always have the right to withdraw consent at any moment. Withdrawal of consent is simply not possible when a woman is unconscious. "

LEAF's intervener factum can be found at
http://leaf.calwordpress/wp-content/uploads/2011/03/Factum Finale JA Filed SCC.pdf

Joanna Birenbaum is Legal Director, and Elizabeth Sheehy and Susan Chapman are co-counsels at Women's Legal Education and Action Fund (LEAF) in Toronto, Ontario. This article is reprinted with permission from from the Women's Legal Education and Action Fund.

A Canadian Symbol Brought to Court: Victims of Moose Crashes sue Newfoundland in Class Action Suit

Lydia Guo

On May 26, 2011, the international publication *The Economist* featured an article about moose in Canada. In particular, they focused on moose in Newfoundland and Labrador. These "lumbering giants" are wreaking havoc on the roads, resulting in over 700 collisions every year, many of which are fatal. Having no natural predators, their population has soared to 150,000, and the residents of Newfoundland are becoming increasingly weary of their new neighbours.

Six months ago, a St. John-area lawyer filed a class action lawsuit against the province of Newfoundland and Labrador. The lawyer, Ches Crosbie, claims that the provincial government is responsible for the injuries suffered by motorists who crash into moose on the road.

Justice Richard LeBlanc of the Supreme Court of Newfoundland and Labrador supported certification of the case. Thus, Ches Crosbie and the victims he represents were given the green light to proceed with their class action lawsuit, which may have wide legal ramifications for class proceedings and for the duty of care owed by public authorities.

A Novel Statement of Claim

The statement of claim that Ches Crosbie is putting forward has no legal precedence that either side is aware of. None of the allegations noted have ever been tested in court.

At the heart of Crosbie's case is the population of moose in Newfoundland and Labrador. Specifically, the plaintiffs point to the fact that these animals are not native to the province. Because they are alien species brought in by earlier settlers, the government is responsible for controlling the growth of the species. "Wildlife practices of the defendant have allowed the moose population on the Island to reach numbers in the range of 120,000 to 200,000 … multiplying the danger of moose collisions for users of the highways," reads the statement of claim. The statement of claim also adds: the "government made a decision to bring this non-native invasive species here about a hundred years ago," but the government has "avoided taking responsibility for managing the hazard it created."

At the heart of Crosbie's case is the population of moose in Newfoundland and Labrador. Specifically, the plaintiffs point to the fact that these animals are not native to the province. Because they are alien species brought in by earlier settlers, the government is responsible for controlling the growth of the species.

Accordingly, the plaintiffs demand that the Newfoundland and Labrador government take actions to cut the population of moose by half as a means to protect drivers. As well, moose near roads should be allowed to be killed by officials and fences should be installed along roads to keep them out.

Certification of Class Proceeding

Another big question raised by this case is the requirements of class proceedings. Although Justice LeBlanc backed the certification of the case, he did raise questions about who could be considered in the class. Initially, the class was restricted to those who were involved in vehicular accidents on provincial roads that needed hospital treatment. These victims must also be residents of Newfoundland and Labrador. Justice LeBlanc questioned why victims who received outpatient care or who reside outside of the province should be excluded from the class. In response to this inquiry, the lawyer responded: "Restricting the class definition to make it more manageable to a lower number of the most deserving people in terms of their injuries was something that we thought was wise to do in an environment where there'd be a lot of skepticism… But in light of the judge's comments now, and in light of the fact that this class action seems to have a lot more credibility … we're going to have to have another look at that." As it stands, there are approximately 69 to 100 victims represented by Crosbie, all of whom needed hospital care after the accident in the last ten years. If Crosbie takes LeBlanc J.'s advice to heart, then the class could easily balloon to thousands of people. (The government of Newfoundland and Labrador has not yet filed a statement of defense, and the government lawyers have not blocked any initiatives to enlarge the class of plaintiffs.)

The victims whom Crosbie is working with are seeking not only personal injury and general compensation, but also actions from the government, including moose fencing, a cull of the herd, etc.

Duty of Care Owed by Public Authorities (*Just v. B.C.*)

At first glance, this case may seem sensational. Upon further examination, though, the legal issue at the heart of this case should remind us of a case that was heard some 20 years ago. The legal analysis will turn on the duty of care that is owed by public authorities. The guiding case is the 1989 Supreme Court of Canada case of *Just v. B.C.* In the earlier case, the issue of governmental liability was raised when a boulder fell on a car, killing one passenger and seriously injuring another. The plaintiff claimed that the government had neglected to properly maintain the highway. At the trial and Court of Appeal levels, the judges held the government of British Columbia to not be liable in tort, as the entire inspection system and its implementation are policy matters.

What ultimately comes out of the *Just* case is a test for when governmental actions are exempt from liability, so as to allow government actors to exercise their duty to formulate public policy without intervention from the courts. This is fundamental to the division of powers in our country.

First, the majority of the judges on the Supreme Court found there to be general proximity because "the Department of Highways could readily foresee the risk that harm might befall users of a highway if it were not reasonably maintained." Once general proximity was established, the Court turned its attention to statutory exemptions and the difference between an operational decision and a policy decision. That forms the crux of the *Just* test. "Government agencies may be exempt from the application of the traditional tort law duty of care if an explicit statutory exemption exists or if the decision arose as a result of a policy decision," summarizes the Court.

The Court found that there was no statutory exemption, so it proceeded to distinguish policy decisions from operational decisions, explicitly noting that the former concern budgetary allotments for departments or government agencies. This kind of investigation usually includes an inquiry into where on the governmental hierarchy the decision was made, whether it was done with advanced planning as opposed to being executed on the ground, etc.

While it was a policy decision to have safeguards on the highway, the majority of the Court found that the government failed to exercise due care in the operation of the policy – in the manner and quality of the inspection system. Having found no statutory exemption and having dismissed it as a policy decision, the Court ordered a new trial in *Just* to more fully investigate the facts of the case (i.e. budgetary restraints, availability of personnel, etc.).

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Budgetary Considerations

"I think that resources will be the key issue, [as in] to what extent can the government plead straitened fiscal circumstances in a negligence claim?" states Prof. Allan Hutchinson.

Following the decision in *Just v. B.C.* and the earlier *Anns* test, the Supreme Court of Newfoundland and Labrador will likely find there to be a proximate relationship between the government and the motorists injured or killed in moose accidents. It is foreseeable that moose, left unfenced, will run onto the road and get hit by cars. Similarly, there would be no statutory exemptions in this case. So, the case ultimately rests on the distinction between policy and operational decisions – the *Just* test. In trying to plead that it is a matter of policy, the government is likely to point to economic hardships and the provincial deficit. Due to constraints on its budget, the provincial government could not have taken additional measures to maintain the moose population and keep them away from roads and highways, or so the argument would go. Depending largely on the facts of this case, that line of reasoning may or may not succeed.

On the other hand, some scholars argue that this case will probably settle out of court. The legal issues raised are not entirely novel, and the litigation process can become drawn out and increasingly expensive.

Lydia Guo wrote this article for The Court, an online resource for debate and data about the Supreme Court of Canada, and an initiative of the Osgoode Hall Law School. Her article was first published on June 14, 2011 and is reprinted pursuant to a Creative Commons Attribution License. For more articles please visit www.thecourt.ca.

Look Back In Sorrow: The October Crisis

Robert Normey

One of the darkest and most dramatic sequences of events in Canadian history culminated in October, 1970. The kidnappings of James Cross and Pierre Laporte by the *Front de libération du Québec* (FLQ) in Montreal led to a resolve by the Canadian government to fight this particular brand of separatist terrorism with stern measures. The Liberal government of Pierre Trudeau determined that it would not negotiate with FLQ kidnappers for the release of "political prisoners" in exchange for the release of Cross, and later Laporte, and that it would order deployment of a large number of Canadian forces troops. Key politicians and officials were put under armed guard. The government also invoked the *War Measures Act,* the only time this has been done in peace time (although it should be noted that certain orders enacted under the *Act* were allowed to continue after WWII).

I would like to examine the use of the *War Measures Act* as a response to the FLQ's actions primarily through the eyes of Pierre Trudeau, F.R. Scott and Tommy Douglas. I take it as a given that, in general terms, a strong and resolute stance by Trudeau and his government was entirely appropriate in the circumstances. Therefore it is not my purpose to question decisions by the federal government, such as not entering into negotiations for the release of prisoners, or calling up the army, or providing bodyguards for public officials. The issue that remains to be examined is whether, indeed, it was necessary to take what some would see as the extreme step of invoking the *War Measures Act* in the crisis.

Background To the Kidnappings and The Government's Response

It is certainly necessary to be aware of the magnitude of the problem presented by the FLQ for civil society in the years leading up to the events of October. The FLQ set off at least 95 bombs in Quebec between 1963 and October of 1970. A number of these were in mail boxes but others were at the Montreal Stock Exchange, Montreal City Hall, RCMP recruitment offices and other public locations. FLQ members also brazenly stole several tons of dynamite from various military and industrial sites and engaged in a number of bank heists.

As of 1970, 23 members of the FLQ were behind bars. Four members had been convicted of murder. Earlier in 1970, a police raid of an FLQ member's home yielded firearms, ammunition, dynamite and a draft of a ransom note to be used in a kidnapping. Charges against the individuals involved were pending at the time of the October crisis. In the same year, two men were arrested after they were discovered with a sawed-off shotgun and a communiqué intending to announce the kidnapping of the Israeli consul. The men were released on bail, whereupon they disappeared.

On October 5 two members of the "Liberation Cell" of the FLQ attend at British Trade Commissioner James Cross' house, disguised as delivery men. With the help of a rifle and a revolver, they kidnap Cross and soon issue a communiqué demanding the release of various prisoners, being convicted or detained FLQ members, and that the CBC broadcast the FLQ Manifesto. They also request a large sum of money, that certain police informants be identified, an aircraft to take them to Cuba or Algeria and the rehiring of the Lapalme postal truck drivers. Naturally, they also demand that all police search activities cease. The government decides eventually to concede on the question of the broadcast and the Manifesto is read on a number of French and English media outlets throughout Quebec.

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On October 10, with the first deadlines established by the FLQ having come and gone, René Lévesque, leader of the Parti Québécois, publishes an article in the newspaper in which he

appeals to the kidnappers to forsake violence. Only on this date does Premier Bourassa return to Quebec from a trip to New York where he was promoting investment opportunities. The "crisis" wasn't until this time considered to be sufficiently serious to warrant his return. With another deadline set by the terrorists passing without the release of the "political prisoners", the Chenier cell of the FLQ kidnaps Pierre Laporte, the provincial Minister of Labour. The following day, the Chenier cell issues communiqués threatening death to Laporte if all six of the group's demands are not met. Their tone suggested a more militant approach by this cell. Laporte sends a letter to Premier Bourassa pleading for his life.

As we know, the federal cabinet met to discuss the FLQ demands and early on decided to adopt a firm position of little or no compromise. Remember that the 1970s were turbulent times of change and upheaval. The historical record shows that in the first nine months of 1970, there were more than 12 kidnappings of foreign diplomats and officials in Central and South America. Some of these governments attempted to enter into full negotiations with kidnappers and to release a number of prisoners in order to save lives. This did not appear to stop further kidnapping or terror, according to William Tetley in his book *The October Crisis, 1970*. Fully aware of the real threat of a continuing spiral of kidnappings, release of prisoners followed by further kidnappings, Trudeau no doubt felt that a firm refusal to negotiate was the only acceptable response.

In addition to calling in the army and protecting public officials, the Prime Minister appears to have invited Premier Bourassa to seek substantial federal assistance. The perception in Ottawa was that the Bourassa government was weak and indecisive and showing signs that it might crack under the pressure. This no doubt led it to move quickly in its deliberations over imposition of the *War Measures Act*. The Quebec government was requested to and did send a letter indicating that it considered that there was a state of "apprehended insurrection." A similar letter was obtained from the Mayor of Montreal, Jean Drapeau. These requests were considered essential because the *War Measures Act* could only be invoked in a time of war or in the face of an "insurrection, whether real or apprehended."

An interesting question that we will return to later is whether it can now be said that there was at the time a state of actual or apprehended insurrection, and whether the evidence available to the federal government in October, 1970 would reasonably support its contention that there was an apprehended state of insurrection. It may be proper to accord the Trudeau government a "margin of appreciation" on this question. That is a term employed by the Supreme Court of Canada in relation to government efforts to justify a limitation imposed on a *Charter* right under s. 1 of the *Charter of Rights*. This accords to government a zone of discretion in meeting important objectives. Similarly, with respect to utilizing the *War Measures Act*, we may wish to conclude that a certain amount of leeway is called for in assessing the response. The

Within 48 hours of the proclamation over 250 people were arrested, including 38 members of Réne Lévesque's Parti Québécois. These arrests, together with further arrests by the end of the year, resulted in 468 persons being arrested. Of those, 408 would be released without charge. Only two would ever be found guilty of any charge.

situation was urgent and there was no other "emergency" legislation ready at hand for the government to invoke on short notice. (Note that years later, Ottawa enacted the *Emergencies Act* (S.C 1988, c. 29), which refers to a "public welfare emergency" and a "national emergency" rather than an apprehended emergency).

As an indication of the combative approach the Prime Minister was to adopt, he was interviewed on October 13 by CBC reporter Tim Ralfe. He made his famous statement about letting bleeding hearts go on and bleed. He stated: "I think that society must take every means at its disposal to defend itself against the emergence of a parallel power which defied the elected power in the province." Asked just how far he would go, Trudeau ended the interview on a defiant note: "Just watch me." By invoking the *War Measures Act* he went very far indeed! So, even granting a margin of appreciation on this question, that should not be confused with a willingness to grant *carte blanche*.

The *War Measures Act*

The *Act* was brought in by way of an Order-in-Council and Regulations were issued under it. The preamble to the Order stated that "conclusive evidence existed that insurrection, real or apprehended, exists and has existed." Under the Regulations, the FLQ was declared an unlawful organization. A member or a person supporting it in some fashion became liable to a jail term not to exceed five years. A person arrested for such a purpose could be held without bail for up to 90 days. Various forms of ties to or support for the FLQ would amount to proof that a person was a member of the organization, absent proof to the contrary. The first polling on the introduction of the *Act* revealed an approval rating across Canada of approximately 89%. Of course, many Canadians would likely take on faith the statement in that preamble that conclusive evidence of an insurrection, real or apprehended, did exist.

F.R. Scott, the great constitutional scholar, lawyer, poet and civil rights advocate, famously supported Trudeau's decision to invoke the Act. He assessed the situation much as the Prime Minister had.

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Les Ordres. I saw this first in my Criminal Law class at university, with a handout from the great lawyer and civil libertarian Burke Barker that said: "*The War Measures Act*: *Canada's Real Constitution*." That is clearly an overstatement but gets at the fact that civil liberties for those "suspected" by police (but suspected of what exactly?) were suspended in whole or in part.

What happened next was, tragically, the "fury" that John English tells us exploded in the Chenier cell of the FLQ (in his biography of Pierre Trudeau, *Just Watch Me).* Members of the cell strangled the kidnapped Pierre Laporte with the crucifix he wore on a chain around his neck. An abandoned vehicle was found by police in the parking lot at Saint-Hubert Airport. Laporte's body was in the trunk. Trudeau remained steadfast in his support for the use of the *Act* in the upcoming weeks and in later years when interviewed on the subject.

One of the very few individuals to speak out courageously against the suspension of civil liberties occasioned by the calling forth of the Act was Tommy Douglas, leader of the New Democratic Party. The bantam fighter Douglas stood up in Parliament after the Prime Minister's presentation to indicate his opposition to the draconian measure.

On November 2, 1970 the original Regulations under the *Act* were replaced by a new *Public Order Temporary Measures Act, 1970.* It was slightly less draconian. For instance, it specified that those arrested could have immediate access to counsel; no such provision had existed in the earlier Regulation. A person could now be held three days without charge, a period which could be extended to seven days at the request of the Attorney General. Under s. 14 of that *Act*, offences committed under ss. 4, 5 and 6 of the earlier Regulations were deemed to be an offence under the new legislation and it goes on to speak of how any investigation, etc. conducted under the Regulations shall be deemed to have been done under this *Act*. This was apparently intended to safeguard all processes conducted under the hastily enacted Regulations.

Criticism and Defence of Invocation of the *Act*

One of the very few individuals to speak out courageously against the suspension of civil liberties occasioned by the calling forth of the *Act* was Tommy Douglas, leader of the New Democratic Party. The bantam fighter Douglas stood up in Parliament after the Prime Minister's presentation to indicate his opposition to the draconian measure. Facing derisive heckling, he stated that "we are not prepared to use the preservation of law and order as a smokescreen to destroy the liberties and freedoms of the people of Canada. The government, I submit, is using a sledgehammer to crack a peanut." He pointed out that existing *Criminal Code* provisions gave the government broad powers to deal with the actions of the FLQ and their supporters. If these were seen to be inadequate, he suggested that the proper approach would be to request greater powers from Parliament. I think Douglas was absolutely right to raise his concerns and to ask for an explanation respecting the apprehended insurrection. It may be a bit of a rhetorical flourish to talk about cracking a peanut – there was a real threat of some magnitude – but nonetheless he expressed a valid concern about

what might be the need for a suspension of civil liberties. The government could and probably should have addressed his concerns by, at a minimum, enacting regulations under the *Act* that limited police powers. After all, they ended up doing that to a too-limited degree with the *Public Order Temporary Measures Act, 1970* a few weeks later (introduced on November 2 but assented to December 3, 1970). An obvious problem that any fair-minded observer should be prepared to grant is that it was left to police to round up suspects – one is tempted to say the usual suspects – but that might be a tad unfair. Police used their broad powers to round up individuals who clearly were not terrorists or potential supporters of the FLQ. An examination of s. 3 of the *War Measures Act* makes it crystal clear that the federal Crown in the person of the Governor-in-Council possessed massive powers deemed necessary or advisable to respond in virtually any way to the "insurrection." This would include, if desired, limiting the powers of police to balance security needs with civil liberties.

As the years have passed however, something of a shift in thinking has occurred, at least amongst all those, whether intellectuals and lawyers or not, who believe in the protection of fundamental rights. Many have become critical of use of the Act, particularly since there would seem to be a paucity of evidence to support the notion of a state of insurrection in Quebec in October.

F. R. Scott, the great constitutional scholar, lawyer, poet and civil rights advocate, famously supported Trudeau's decision to invoke the *Act*. He assessed the situation much as the Prime Minister had. He considered that a truly dangerous threat was being made to the rule of law and the ability of the federal and Quebec governments to rule with authority. He saw the force of revolutionary separatism gaining strength. Scott pointed out later to friends, and in some cases, former allies that the *Criminal Code* was inadequate to deal with the situation because individuals could not be arrested due to lack of existing evidence. Even if one is prepared to grant that point, however, that would not explain why clear limits on police powers were not imposed through Regulations under the *Act*.

The apparent inconsistency in Scott's views on civil liberties, generally, and the use of the *War Measures Act* in 1970 specifically, might best be explained by his belief that the rule of law, which underscores and allows for the assertion of individual rights in a democracy, was, in his view, under serious threat. Trudeau and Scott clearly had the support of the great majority of the Canadian public for some time thereafter. As the years have passed however, something of a shift in thinking has occurred, at least amongst all those, whether intellectuals and lawyers or not, who believe in the protection of fundamental rights. Many have become critical of the use of the *Act*, particularly since there would seem to be a paucity of evidence to support the notion of a state of insurrection in Quebec in October 1970. The mere fact that, in the short term, use of the *Act* did bring a sombre state of quiet, perhaps even paralysis, does not really answer the question of whether the *Act* should have been employed. It can be concluded that use of the *Act*, while not acceptable to those who support the affirmation of civil liberties, was perhaps something that the government felt it had to do given the need to act quickly and the lack of a clear and easily available alternative legal instrument.

Fortunately, the situation did return to a kind of normality in the weeks and months thereafter. Note, however, that there was no guarantee that such would be the case. If it had not, would the *Act* have been kept in place for lengthy periods of time? What would have been the consequences for Canadian democracy? One could hardly expect a militant group like, say, the Basque separatists, to have ceased all revolutionary activity merely because strong legislation was brought to bear on their actions. Issues of this kind confront Canada and the United States today as stern measures are enacted to fight the "war on terror", which by all indications, could prove a very lengthy war indeed.

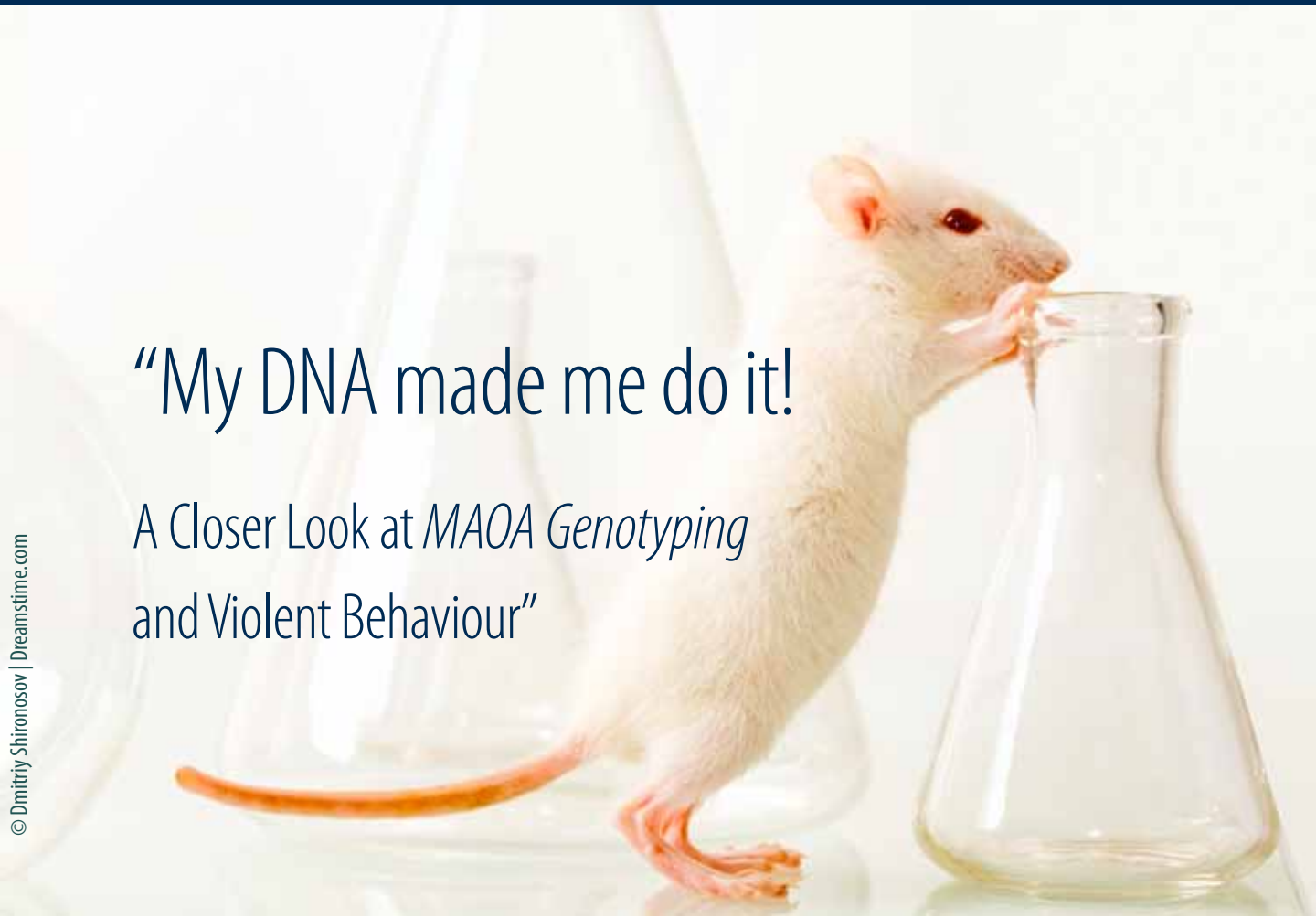
Speaking of terror, hasn't its threat been with us in the West since at least 1907, when Joseph Conrad wrote his great novel *The Secret Agent*? This was fiction that was set in the year 1886 and was inspired by Conrad's knowledge of anarchist and revolutionary groups operating in London in that era. The novel was noted to be one of the three works of literature most cited by American media two weeks after the events of September 11, 2001.

Speaking of terror, hasn't its threat been with us in the West since at least 1907, when Joseph Conrad wrote his great novel *The Secret Agent*? This was fiction that was set in the year 1886 and was inspired by Conrad's knowledge of anarchist and revolutionary groups operating in London in that era. The novel was noted to be one of the three works of literature most cited by American media two weeks after the events of September 11, 2001.

In Canada, severe repression has occurred at various times in our troubled 20th century, such as the response of police and government to the "Red Scare" at the immediate end of World War I, canvassed with great skill and insight by Daniel Francis in his book *Seeing Reds: The Red Scare of 1918-1919, Canada's First War on Terror.*

Returning to the October Crisis, I would echo Donald Brittain's resounding verdict on Tommy's words and actions during those dark days in the NFB film biography *Tommy Douglas: Keeper of the Flame*, directed by Elise Swerhone (writer Donald Brittain). They were indeed the man's finest hour.

Robert Normey is a lawyer with the Constitutional and Aboriginal Law Branch of Alberta Justice in Edmonton, Alberta.



"My DNA made me do it!

A Closer Look at *MAOA Genotyping* and Violent Behaviour"

Janne A. Holmgren, PhD and John A. Winterdyk, PhD

Attempts to explain criminal behaviour on the basis of certain physical characteristics can be traced back to the work of the German physician Franz Joseph Gall (1758–1825) and his direct academic descendant, Italian criminologist Cesare Lombroso (1835–1909). While phrenology and other physical characteristics have since been scientifically discredited as a cause or explanation for criminal behaviour, these men did help pave the way for more modern theories. Interestingly, Gall's studies around brain function were later proved scientifically valid, but not in the way his theory of phrenology had suggested. Nevertheless, the interest in biological explanations for criminal behaviour has remained constant since the early works of Gall and Lombroso. In fact, with the advancements of both forensic technologies and medical science in general, we continue to look to biology for answers.

At the recent 2011 Annual American Academy of Forensic Sciences Meeting in Chicago, Illinois, USA, the author attended a session titled *MAOA, the Warrior Gene: Skirmishes, Battles, and Truce*, presented by James S. Walker and several of his colleagues. This presentation unveiled recent developments in the relationship between genetics and violent behaviour. In essence, the topic question was whether or not some people are born to be more violent than others. In addition, if we take this question one step further, can we, given our current scientific knowledge about behavioural genomics, present this material as potential evidence in a court of law? After the session, it was apparent that this question would be valuable but would also be fraught with skepticism should this kind of evidence be entered in a Canadian courtroom. Thus, the objective of this article is to provide the reader with a brief overview of monoamine oxidase A (MAOA) genotyping and what might be some questions and implications to consider from a Canadian perspective.

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Cells, DNA and Genomes

The characteristics of a living cell are determined by its genetic makeup, that is, by the instructions contained in a collection of biological messages called genes. The genetic makeup of genes is passed on from one generation to the next, so that offspring inherit a range of individual traits from their parents. The complete genetic blueprint of an organism is contained within every cell of that organism. The coding system underlying the blueprint of genetic information of all cells is based on deoxyribonucleic acid (DNA). Two types of cells, somatic cells and gametes, make up the human genome. "The term genome is used to describe the totality of the chromosomes unique to a particular organism (or any cell within the organism), as distinct from genotype, which is the information contained within those chromosomes (or DNA)" (Singer & Berg, 1991, p. 21). The somatic cells comprise the vast majority of cells in the body. DNA is organized into 46 complex structures called chromosomes, each of which contains a single DNA molecule.

The DNA chromosomes within each molecule are composed of two separate polynucleotide strands, each arranged with 23 pairs of homologous chromosomes. These comprise 22 pairs of autosomes and one pair of sex chromosomes which looks like two wires twisted around one another. This structure is referred to as a double helix. An individual inherits one strand from the father and the other from the mother. The genome is an organism's complete set of DNA. The human genome has some 3 billion chemical (DNA) base pairs and is estimated to contain between 20,000 – 25,000 genes (Human Genome Project, 2003). The actual genes only account for about two per cent of the human genome. The other 98 per cent of the genome consists of non-coding regions.

To put it simply, genotyping is the process of determining a small fraction (usually 10 or 20 genomic regions) of an individual's genes (DNA) using various DNA technologies. As the entire genome has some three billion base pairs, it is not currently possible to determine one person's entire genotype.

What is MAO-A genotyping?

Increasingly we are witnessing the legal system embracing the use and findings of science in the courtroom. For example, the criminal courts have accepted genotype designates throughout the world for different medical diagnoses for years (e.g., Down's syndrome). The MAOA gene is located on the X chromosome and is involved in the metabolism of biogenic amines, including dopamine, norepinephrine and serotonin (Shirh, Chen & Ridd, 1999). Medical scientists and other researchers have known for years that these chemicals (neurotransmitters) can affect balances in the central nervous system and consequentially can change or alter a person's behaviour and thought processes (e.g., mood).

While the research (monoamine oxidase A genotyping) is focusing on how the MAOA gene might be influenced by one's environment, it by no means suggests that one's genes determine behaviour. The proposed theory looks at the MAOA gene as a risk factor in violent behaviour when this gene is fuelled by one's environment. The popular literature refers to this interaction as the G x E interaction (Rutter, Moffitt & Caspi, 2006). This interaction, however, is *only* a risk factor and not a direct cause of violence.

MAOA Genotyping and the Court

Genetic dispositions have been introduced in various forms in multiple criminal cases throughout Canada and the United States, but the proposed G x E interaction is just beginning to be heard in the United States. Of course, the issue of genetics as a basis for criminal behaviour is fraught with skepticism and, again, may only account for a partial explanation for violent behaviour. Thus, the evidence has only been presented as a *limited capacity defence* in several criminal trials throughout the United States. In 2009, Bradley Davis Waldroup was found guilty of voluntary manslaughter rather than first-degree murder as a result of Vanderbilt University psychiatrist Dr. William Bernet's testimony. Bernet had tested Waldroup for the MAOA gene and had found that Waldroup's low MAOA activity in combination with an environment fuelled with maltreatment was one of the reasons Waldroup"exploded."[1]

In Canada, to an extent, a limited capacity defence has been used with, for example, Fetal Alcohol Spectrum Disorder (FASD) cases.[2] However, to date, we have yet to uncover a complete link between a defendant's criminal act and his/her biological makeup.

Increasingly we are witnessing the legal system embracing the use and findings of science in the courtroom. For example, the criminal courts have accepted genotype designates throughout the world for different medical diagnoses for years (e.g., Down's syndrome).

Considerable research that suggests that individuals with low MAOA gene activity and a history of serious child maltreatment are more likely to be antisocial and commit violent crimes than individuals who have neither of these risk factors may mean that MAOA analysis is coming to Canada.

Conclusion

Criminal behaviour and normative behaviour are presumably the result of interaction among a person's genetic constitution, life experiences, and personal choices. As neuroscientists have rapidly advanced our understanding of the human mind through the study of behavioural genomics and brain imaging, challenging questions have arisen. What is the neuroscientific basis for our experience of "free will?" Should jurisprudence take neuroscience into consideration when addressing criminal responsibility? When sentencing occurs, should some G x E interactions be considered mitigating factors, while others are aggravating factors? How will Canadian criminal courts address further neuroscientific explanations of criminal behaviour?

We might be able to drawn on genomics when it comes to explaining certain types of criminal behaviours. For example, the reasons why some people who have grown up in abusive homes have not become violent while others have, might have more to do with their genetics than previously thought. These are some issues for Canadian jurisprudence to consider in relation to the advancement in the research on MAOA genotyping, also referred to as the "warrior gene," and the implications it can potentially have on the Canadian criminal justice system as a whole.

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Notes

1. *State of Tennessee v. Davis Bradley Waldroup Jr*. (2009).
2. See *R. v. Taylor* (1992), 77 C.C.C. (3d) 551 (Ont.C.A.). In this particular case, FASD was considered a disease of the mind, based on Justice Dickson's ruling in *R. v. Cooper* (*R. v. Cooper*, [1980] 1 S.C.R. 1149).

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Access to Justice and Legal Aid

Graham B. Robertson and
Elizabeth C. Robertson

Funding for legal aid has again been a topic of debate in Alberta. Although the recent provincial budget in February 2011 gave the program an additional $5 million in funding, critics say that the increase is not enough to replace the funding that has been lost.[1] Various groups, including the Criminal Trial Lawyers Association and the Law Society of Alberta, have expressed deep concern about the ability of low-income Albertans to access the justice system.

Given these recent cuts, it is worth considering how the organization serves the community. One could perhaps characterize legal aid as an occasionally used fallback, but in reality, for many Albertans it is their only source of proper legal representation. If we value the right of equal access

to the law, then we must recognize that most people require a lawyer when appearing in court. Restricting the ability of low-income citizens to get a lawyer is, in effect, severely hampering their access to the justice system itself.

But first, let's consider some facts about legal aid in Alberta and the recent cuts. The first program to assist low-income citizens with legal costs was established eighty years ago. The present program was established by the province and the Law Society in 1963. Legal Aid Alberta provides help with legal representation for certain criminal and civil cases. There is free assistance by duty counsel for most first court appearances in a criminal case. An individual may also apply to have a lawyer assigned to represent her. To have a lawyer appointed, a person must be within the income guidelines set by the program and have a legal problem that falls within the program. A person who receives legal aid has to pay the government back over time except in cases where this would cause severe hardship.

Most of the lawyers appointed to represent individuals are lawyers in private practice who are paid by Legal Aid Alberta for their services. The amount that a lawyer receives from Legal Aid Alberta is much lower than the fees usually charged by lawyers in private practice. In addition, there are staff lawyers in Edmonton and Calgary who provide help with family law problems and youth criminal charges.

In March 2010, Legal Aid Alberta lowered the eligible income level by 30 percent. This was due to a serious drop in its funding. Funding for legal aid comes from the province, the federal government and the Alberta Law Foundation. The Law Foundation receives the interest from lawyers' trust accounts. The recent economic downturn and low interest rates had a major impact on the amount of funding the Law Foundation was able to contribute to the legal aid program. Funding to legal aid has decreased by more than 20 percent in the last few years.[2]

The first program to assist low income citizens with legal costs was established eighty years ago. The present program was established by the province and the Law Society in 1963.

It is important to remember that the funding issues we are discussing are not simply making Legal Aid Alberta as an organization less effective, the new regulations have in fact taken away a particular group's access to aid where they previously had it. But these are not individuals who generally have the funds to hire a lawyer themselves. The maximum monthly income for a single person to apply for a lawyer to represent them is $919. This means that Albertans who receive Assured Income for the Severely Handicapped (AISH) do not qualify for legal aid.[3] A 2010 survey of legal fees in Canada found that the average charge in the western provinces for a one-day criminal trial was $3735. The average hourly charge by a lawyer with 10 years experience in the West was $327.[4] So, it is simply a brute fact that certain Albertans will no longer be able to acquire legal counsel because of these changes. Many middle-class Canadians would find it difficult to afford a lawyer. It is not even worth debating that low-income Albertans cannot afford to hire a lawyer.

A possible response is to claim these new policies do not infringe on any rights. That not qualifying for legal aid is somehow merely a matter of bad luck. But the justice system should, of course, be for everyone. Equality before the law – a right which all loudly declare fundamental to a proper justice system – is nothing without unfettered access to that system. More specifically, while everyone may represent him or herself, the reality is that the legal system has become so convoluted that without the counsel of a professional lawyer an ordinary citizen cannot adequately navigate it. For most people, no lawyer means inadequate access to the justice system.

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There are two parts to the previous claim which need to be examined to properly flesh it out. Firstly, there is the matter of self-representation. Most people will know someone who adequately represented themselves in court, perhaps even won a case. So if an individual cannot afford legal counsel, they could just represent themselves. That being said, representing oneself takes a large amount of preparation. The legal system is full of deadlines, conventions and a myriad of difficult to understand procedures. Deciphering a certain statute or gleaning a precedent from a previous ruling is no small task. Many individuals, especially those with low incomes, are generally unequipped with the time or resources to prepare themselves for a case. Furthermore, in terms of legal aid, many of the cases under discussion are criminal ones, so any mistakes carry the threat of punishment. People trying to represent themselves under the pressure of criminal charges would spend more time navigating court proceedings than preparing a defence. Entering the world of legal proceedings as a beginner – especially when a prison sentence is perhaps at stake – is a ridiculous undertaking. There is simply too much to learn in too short a time to adequately defend oneself. When people try to represent themselves, the potential for wrongful convictions increases, there are fewer cases settled outside courts, and there is extra work for judges and lawyers.

A possible response is to claim these new policies do not infringe on any rights. That not qualifying for legal aid is somehow merely a matter of bad luck. But the justice system should, of course, be for everyone. Equality before the law – a right which all loudly declare fundamental to a proper justice system – is nothing without unfettered access to that system.

The second part to the argument is the broad scope of legal counsel. As we previously suggested, often the relevant cases here are criminal ones. A defence lawyer does not simply show up for her client's court date. Beyond preparation for the case, she may offer other avenues of support, such as recommending other government services, visiting clients who have been detained and securing what is needed for the client. Furthermore, a professional lawyer is, sadly, in a better position to deal with officials, as a low-income individual with charges pending against him or her may be confronted with prejudice a lawyer would not. While unfortunate,

a lawyer in a suit is needed to ensure proper treatment. In general, lawyers provide support and services that most individuals cannot obtain on their own.

Given these previous arguments, it seems that a lawyer is often essential for preparing an adequate defence. Thus, there are now many individuals who, thanks to the changes, are unable to properly participate in the justice system. While they can still appear in a court or file a case, their lack of both counsel and resources hampers their ability to do so fairly. So if we are to continue declaring our devotion to equal access to the law in this province, we must rectify this mistake and ensure that legal aid is properly funded by the Province of Alberta.

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Notes

1. Jason Van Rassel, "Critics say legal aid funding still falls short" *Calgary Herald* (February 25, 2011).
2. CBC News, "Funding cuts limit access to legal aid" (March 31, 2010), online: www.cbc.ca
3. Jason Van Rassel, "Critics say legal aid funding still falls short" *Calgary Herald* (February 25, 2011)
4. Robert Todd, "The Going Rate" Canadian Lawyer (June 2010) at 36-43.

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At Issue: A Homeowner's Expectation of Privacy

Brian Seaman

The November 2010 decision of Canada's Supreme Court in *R. v. Gomboc* has come to represent one of two things in the divergent views of its critics and supporters. For critics from a civil libertarian perspective, our highest court's approval of a power company's act, pursuant to a warrantless police request, of monitoring a homeowner's electrical usage and then providing that information to police engaged in a criminal investigation represents yet another example of a culture of authoritarianism that seems to be creeping into Canada's judiciary. On the other hand, for the "law and order" crowd, especially those who see warrants as pesky obstacles to simply letting the police just do their jobs, homeowners have no reasonable expectation of privacy over information about their electrical usage. They think the Supreme Court's decision that an authorizing warrant was not required is spot on. Furthermore, even if there was a breach of any privacy interest a person may have, then it was so trivial that any fuss over it is unwarranted.

The facts that led to Daniel Gomboc standing trial on serious drug-related charges are straightforward. A Calgary police officer who was in Mr. Gomboc's neighbourhood on an unrelated incident noticed something unusual about his house. Although it was winter, there was no snow on the roof (unlike all the other homes in the area), there was heavy condensation on the windows and the curtains were stained with moisture. The officer referred the matter to the drug unit, which assigned two officers to investigate. They made similar observations, detected the scent of "growing marijuana," and described the house as sweating profusely. Taking these as indicia that the dwelling was possibly being used as a marijuana grow-op, police subsequently placed the home under surveillance, questioned Mr. Gomboc's neighbours, and then asked Enmax (the local power supplier) to place a device called a digital recording ammeter (DRA) on the property to monitor the power cycling for it. This request was made without a warrant and the utility complied. Five days after placing the device on the power line to the house, Enmax released the data to the police, explaining that the DRA had shown unusual power cycling that was inconsistent with typical household usage. Based on all the evidence, the police obtained a warrant to search Mr. Gomboc's home. They found marijuana plants, several bags of harvested marijuana in the freezer, and various other items associated with the production and sale of marijuana. Mr. Gomboc was charged with possession of marijuana for the purpose of trafficking, production of marijuana and theft of electricity.

At trial, defence counsel made an application to exclude the evidence obtained from the search of the dwelling based on the argument that the installation of the DRA was made without a prior warrant. However, the trial judge decided to admit the evidence, based on the *Code of Conduct Regulation*, Alta. Reg. 160/2003, made pursuant to Alberta's *Electric Utilities Act*, SA 2003, c.E-5.1. This authorizes a utility company to hand over customer information to law enforcement authorities when the customer is the subject of a criminal investigation, unless the homeowner had specifically informed the company beforehand that s/he did not want such information to be shared. Based on the evidence before her, Justice M.C. Erb convicted Mr. Gomboc on the drug charges. However, on appeal, the Alberta Court of Appeal decided 2-1 to order a new trial. It found that Mr. Gomboc had a subjective expectation of privacy in the power consumption and power cycling information that the DRA disclosed and this expectation was, moreover, objectively reasonable (2009 ABCA 276 per Justices Peter Martin and Ronald Berger, Justice Clifton O'Brien dissenting). Furthermore, the majority held that the Regulation could not be interpreted to imply a homeowner's consent to allow a utility to collect information at the request of a law-enforcement agency unless the homeowner had expressly said s/he did not want such information to be disclosed. I will return to this point later, as it represents in my view an interesting analytical point that could very well resurface as an argument in cases similar to Mr. Gomboc's in the future.

A Calgary police officer who was in Mr. Gomboc's neighbourhood on an unrelated incident noticed something unusual about his house. Although it was winter, there was no snow on the roof (unlike all the other homes in the area), there was heavy condensation on the windows and the curtains were stained with moisture.

By a 7-2 majority (Chief Justice Beverley McLachlin and Justice Morris Fish dissenting), the Supreme Court of Canada overruled Alberta's Court of Appeal and restored the trial judgment. For Justices Marie Deschamps, Louise Charron, Marshall Rothstein and Thomas Cromwell, the pivotal factor on which this case turned was the extent to which DRA technology reveals private information. For them, the information obtained from conventional, non-intrusive investigatory methods of police observation and their discreet enquiries of neighbouring residents supported the inference that marijuana was being grown in Mr. Gomboc's home. Thus, the information about power usage and cycling that the DRA revealed was simply one more piece of information to support the warrant to search the premises and was, moreover, information that revealed nothing about the intimate details of what was going on inside Mr. Gomboc's home. It simply showed the amount of electricity being used and how it was being cycled. For these four justices, Mr. Gomboc's pattern of electrical consumption was simply one more piece of information along with other indicia (for examples, no snow on the roof, heavy condensation on the windows), obtained by non-intrusive means, that in its totality supported the warrant to conduct an intrusive search of the premises. They drew a distinction between the incidental, non-intrusive information disclosed by the meter placed on the power line and the biographical core data about the dwelling's occupants. The latter would constitute an occupant's privacy interest and thus attract the constitutional protection afforded to it by section 8 of the *Canadian Charter of Rights and Freedoms*, which guarantees the right to be secure from unreasonable searches.

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Justices Ian Binnie, Louis LeBel and Rosalie Abella, agreeing in the result in a separate opinion, also discussed the issue of a person's privacy interests in their own dwelling. Then, rather significantly in my view, they acknowledged that a concern about the warrantless use of DRA technology in aid of a police investigation was "well founded". They even went so far as to suggest that they might have decided the case differently but for the fact that the relationship between Mr. Gomboc and Enmax was governed by a provincial law that allowed him to request that his customer information (which includes the pattern and amount of his electrical use) be kept confidential. His failure to make this request, when combined with his counsel's failure to challenge the constitutionality of the relevant provincial legislation, operated, in the honourable Justices' view, to remove any objective expectation of privacy in the information yielded by the DRA device.

With respect to the majority view of the Supreme Court, I think the dissent of Chief Justice McLachlin and Justice Fish, along with the majority decision of Alberta's Court of Appeal, leaves the door open to criminal defence lawyers in future cases similar to Mr. Gomboc's to make a tenable argument that the Regulation at issue is unconstitutional because it is *ultra vires* the purpose of its enabling legislation.

According to section 10(3)(f) of the *Code of Conduct Regulation*:

> 10(3) Customer information may be disclosed without the customer's consent to the following specified persons or for any of the following purposes:
>
> …
>
> (f) to a peace officer for the purpose of investigating an offence **if the disclosure is not contrary to the express request of the customer**;…. [emphasis added]

It is a trite rule of statutory interpretation that all parts of legislation, including regulations, must be read in accordance with the section that sets out the purpose of the legislation. The enabling legislation is the *Electric Utilities Act*. A reading of section 5, which sets out the purposes of the *Act*, indicates nothing pertaining to the gratuitous and warrantless disclosure of any kind of customer information, be it personal identifiers or otherwise, to law enforcement authorities. Not surprisingly, section 5 talks about things like providing Albertans with an energy grid; one that is efficient and market-driven, based on fair and open competition. There is nothing in the purpose section to indicate a public utility in Alberta must act as the gratuitous agent of a law enforcement agency when asked to do so by the police.

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Justice Martin, writing a majority judgment at the Alberta Court of Appeal, said, rightly in my view, that the Regulation had to be strictly construed. It should not be interpreted to impose an implied consent on a homeowner's part to the power company gathering data on behalf of law enforcement in a matter that is not relevant to his or her relationship with the power supplier, unless the homeowner has expressly objected to the release of such information (at para. 24). He characterized such an action as trespassing on the homeowner's property and pointed out, again rightly so, that such conduct is something the police are not permitted to do in the absence of a warrant. That being so, how could a Regulation made pursuant to legislation regulating the sale and distribution of power be interpreted to give law enforcement agencies authority to do what they would not otherwise have the power to do under the supreme law of the land, the *Canadian Charter of Rights and Freedoms*? In the eloquent words of Martin, J.A.:

> If it were otherwise, the police could recruit any agency with limited access to a home to exploit that access to gather information for them. For example, the mailman to look into the windows while at the house delivering mail and report his observations; or the cable TV provider to report the viewing habits and preferences of the subscriber. **Such unauthorized state surveillance of its citizens is offensive to the basic tenets of our society and would render the protection of a reasonable expectation of privacy over one's home, illusory.** (at para. 25, emphasis added)

Interestingly, Chief Justice McLachlin was also of the view that the Regulation could not be interpreted to give a utility broad powers to act as an agent of law enforcement for the purpose

of spying on its customers. Furthermore, she argued that it was unreasonable to impute to consumers prior knowledge of the particulars of a complex regulatory framework, especially a Regulation that included a presumption of such awareness that, in its application, diluted constitutional rights and freedoms.

By way of conclusion, I argue that it offends the rules of traditional statutory interpretation, and is repugnant as well to principles of natural justice and indeed the *Charter of Rights and Freedoms* itself, to give a public utility the power to gratuitously act as an agent of law enforcement as part of a criminal investigation. This also invites the observation that the Regulation at issue trenches on a power that should ordinarily fall within the ambit of federal lawmaking responsibility under section 91 of the *Constitution Act 1867*. Defenders of the Regulation may argue that if there is an intrusion on federal powers and if there is an offence to individual privacy and liberty, it is merely incidental to the interest of a utility in monitoring how power is consumed for billing purposes and thus serves the statutory purpose of the market efficiency of the power grid. Any acknowledgment of that position would be of mere rhetorical significance since, as it turned out, the liberty of a power grid customer, Daniel Gomboc in this case, was indeed eventually taken away by the state. Therefore, because a conviction under Canada's *Criminal Code* carries with it the prospect of a loss of liberty, especially for more serious offences like drug trafficking, this is all the more reason for a court in the future to examine the *Electric Utilities Act*'s *Code of Conduct Regulation* with a much more critical eye than the majority of the Supreme Court of Canada did in the case of Mr. Gomboc.

> . . . how could a Regulation made pursuant to legislation regulating the sale and distribution of power be interpreted to give law enforcement agencies authority to do what they would not otherwise have the power to do under the supreme law of the land, the *Canadian Charter of Rights and Freedoms*?

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Helen and her father, Eugene Forsey, Newfoundland, 1983

Serving the Common Good – The Role of Government

Helen Forsey

"Governments in democracies are elected by the passengers to steer the ship of the nation. They are expected to hold it on course, to arrange for a prosperous voyage, and to be prepared to be thrown overboard if they fail in either duty. This reflects the original sense of the word 'government', as its roots in both Greek and Latin mean 'to steer'."

From the introduction to *How Canadians Govern Themselves*

The late Senator Eugene Forsey – trade unionist, academic and inveterate writer of letters to the editor – was one of Canada's foremost constitutional experts and an ardent advocate for progressive public policy. His daughter, writer and activist Helen Forsey, has written about his legacy in her book *Eugene Forsey: Canada's Maverick Sage*, to be published this year by Blue Butterfly Books/Dundurn Press.* The following is an excerpt from the book.

There's a line in a Newfoundland folk song that reflects the proper order of things aboard Canada's ship of state. It says: "The captain's below making tea for the crew." Likewise, in my father's view of government, the captains are there to serve the passengers and crew. The fundamental duty of every government is to pursue the public interest, and every government, whatever its stripe, is ultimately responsible to the people.

Eugene Forsey spent his life sailing Canada's political waters, and he had a master seaman's knowledge of governmental navigation and the law of the constitutional sea.

Eugene Forsey spent his life sailing Canada's political waters, and he had a master seaman's knowledge of governmental navigation and the law of the constitutional sea. His understanding of the role and purpose of government provides an important basis for public discourse at a time in our history when many people treat "government" as almost a dirty word.

The principle that the state exists to serve the people is part of a longstanding Canadian tradition in which governments play a wide-ranging and creative role in our national life. This view stands in sharp contrast to the notion – prevalent in the United States and increasingly being pushed on Canadians – that the less "government" there is, the better.

Dad had no use for that approach. His definition of political economy was "the management of the public household, the community" and for him the ideal society was a "co-operative commonwealth," with all sectors working together for the common good.[2] The business of government was to implement those concepts – a mandate as challenging as it was broad.

***

In the introduction to *How Canadians Govern Themselves*, my father elaborated on the multitude of ways in which our everyday lives are affected by government policies and activities. His list of examples could be rather intimidating, but given the needs of a complex modern society, it makes sense.

> We cannot work, eat or drink, buy or sell or own anything, go to a hockey match or watch TV without feeling the effects of government. We cannot marry or educate our children, cannot be sick, born or buried without the hand of government somewhere intervening. Government ... sets the conditions that affect farms and industries; manages or mismanages the life and growth of cities, [and] is held responsible for social problems, pollution and sick environments.[3]

The idea of government as an active and positive force is far from new in Canada. It was well established from early in our history as a country, and was accepted and implemented by parties of differing views. In a more comprehensive and radical form, it was a key element in the vision that Dad and his colleagues in the Canadian Commonwealth Federation and the League for Social Reconstruction (LSR) put forward in the 1930s,[4] and a basic assumption underlying the demands of the trade union movement in the years that followed.

Eugene Forsey, Parliament Buildings, 1968

In his work with the Labour Congresses, Dad hammered away at the need for comprehensive economic planning and strong government programs in the area of social security. Through speeches, articles, and the Labour Research bulletin, he shared information and analysis that would help workers and other citizens press effectively for positive change. It was, in fact, this kind of cumulative citizen pressure that forced governments to improve the old age pension, unemployment insurance and welfare systems, and eventually to create programs such as low-rental housing, disability benefits, and public health care.[5]

His job gave him plenty of opportunity not only to watch government at work, but also to observe the range of public attitudes towards it. He took issue with some of the negative attitudes toward the state that prevailed in many quarters during the Cold War era. "I must strongly dissent from the assumption that the extension of state action necessarily limits freedom," he declared. "It can, but it doesn't have to. The big state has developed largely as a defence of the freedom of the common people against big business. Much of the big state's action is designed to give the common people economic freedom – freedom from fear – without which the other freedoms will not mean very much to large masses of our citizens.[6]

His job gave him plenty of opportunity not only to watch government at work, but also to observe the range of public attitudes towards it.

Speaking to a young audience in 1960, he was even more direct. "I find sometimes a tendency for people to think that if a public authority spends money it is a terrible thing, but if it is spent by some private body, then that is magnificent. [They think] that taxes are an unmitigated evil; that public activity of any kind is something to be cut down to the smallest possible proportion; that private enterprise is always good and public enterprise is always bad. These seem to me extraordinarily silly and irrational attitudes, which may be disastrous for us.[7]

Before Saskatchewan's medicare concept finally became a national program, Dad spoke at a meeting of the medical profession to push for a comprehensive national health plan. After outlining the crying need for such a plan, he addressed the arguments that were being used against it. One was that medicare would be "socialistic." My answer to that is, "Oh! Fudge!" So are public sewage and garbage disposal, public water supply, public highways, the public post office, public education. The only sensible question to ask about any of them is not, "Is it socialistic?" or "Is it free enterprise?" but, "Will it do the job, and do it better than any alternative plan?"

Let's not be frightened, either way, by labels. Labour isn't frightened ... We want to preserve, and indeed increase, personal freedom. But we are not afraid of asking our governments, which we choose and can control, to provide for us services which no one else can.[8]

The kind of government activity my father believed in was, and still is, anathema to right-wing ideologues. They take the line that governments should exist only to maintain an army, a diplomatic corps, and a currency, all of which should be geared to serving corporate interests. In some circumstances, they would require a few other functions, such as providing public funds to bail out those same private corporations when their capitalist house of cards shows signs of collapse. But the vision they put forward is all about "free enterprise," with the state standing on the sidelines applauding the "invisible hand" at work.

One need not be a socialist to recognize the truth of what Dad and his LSR colleagues wrote about this in *Social Planning for Canada*:

> Canadian business men are fond of demanding that governments should "let business alone." [But] ... while it would be delightful [for them] to get rid of workmen's compensation, factory acts, minimum wage laws and so forth, it would be anything but agreeable to be deprived of tariff protection, bounties, interest-free loans [and] guarantees of bonds and bank loans, ... or to be asked to repay the enormous gifts from public treasuries to private concerns. Any serious attempt to carry out such a program would throw the whole economy into chaos.
>
> In practice, of course, our business leaders put a good deal of government interference water into their *laissez faire* wine. Nowhere more freely than in Canada have business groups insisted on governmental aid in finding and keeping markets, in transporting goods to these markets, in financing business expansion.[9]

These days, we could add many more examples to the list of government initiatives that serve private interests at public expense – "contracting out" and "public-private partnerships," tax breaks for domestic and foreign mining companies, "Team Canada" tours by public officials to promote business interests overseas, not to mention the billions in bail-outs handed over to industry when the cracks in the system begin to show.

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Nonetheless, the disingenuous appeal for "less government" has again become a rallying cry for the right wing in Canada. A massive deception being perpetrated upon a weary people ironically by governments themselves-in a multi-faceted campaign to favour corporate interests by denigrating government in the public mind.

The 2009 *Canada Year Book*, put out these days on a business-oriented "cost recovery" basis by Statistics Canada, is one example of how this false minimalist approach is being promoted. Its twelve-page "Government" section is buried somewhere in the middle of the book and consists almost entirely of charts and tables showing public revenues and expenditures. The introductory paragraph neatly disposes of its subject: "The three levels of government provide Canadians with services that cannot easily be offered by private companies," it says. "The federal government

is responsible for national defence and international diplomacy, the provinces and territories ensure that Canadians have access to health care and education, and local governments keep our streets clean and our communities safe."[10]

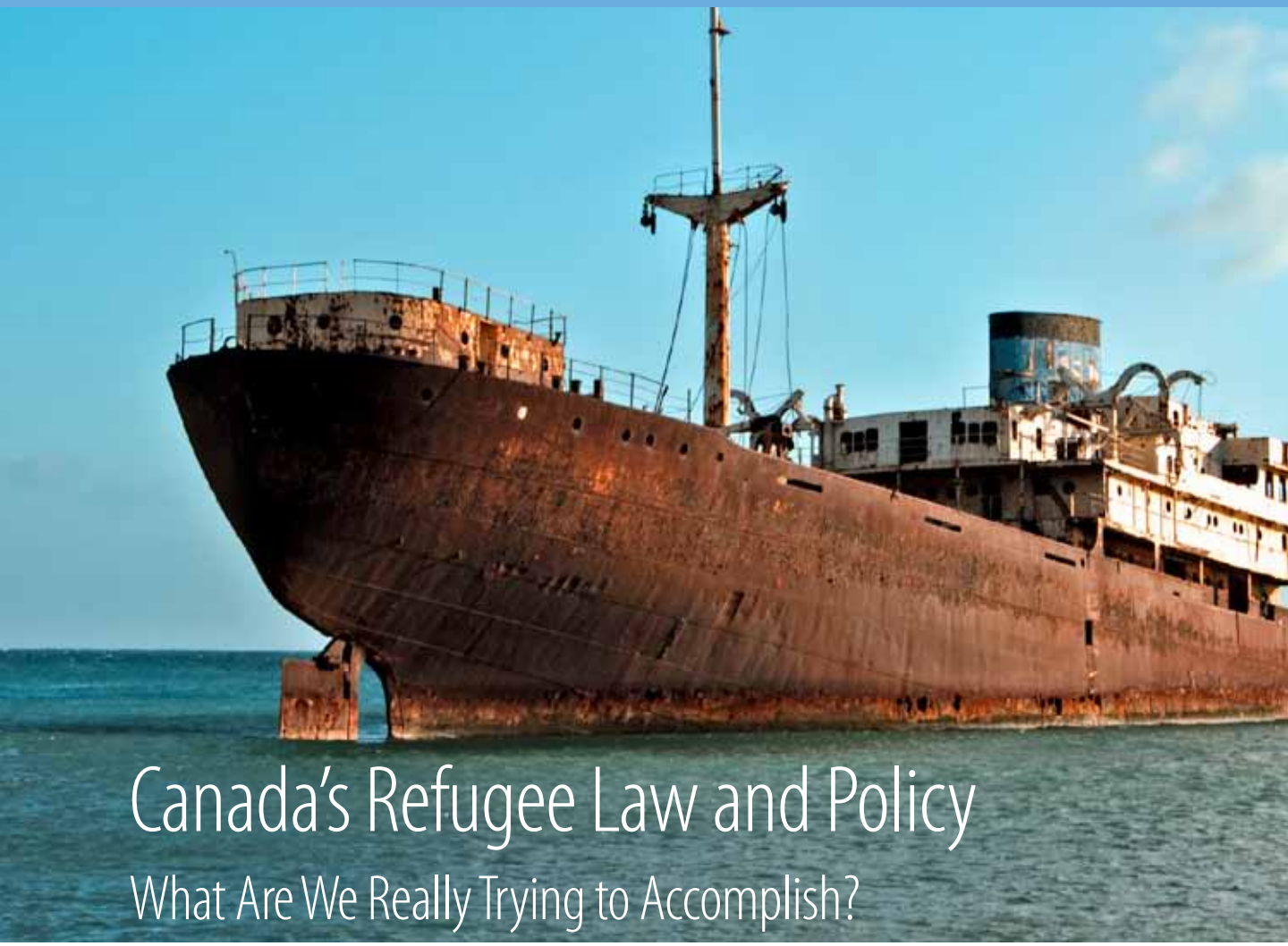
There you have "government" in a nutshell – or so the public officials who authorized this insulting portrayal would have us think. My father would have been quick to denounce it as a hoax, and to point us to the real role government plays in our society – not as an occasional reluctant substitute for "private companies," but as a vital economic and social force for the public good.

"I find sometimes a tendency for people to think that if a public authority spends money it is a terrible thing, but if it is spent by some private body, then that is magnificent."

Notes

1. *How Canadians Govern Themselves*, 1.
2. *TCR*, 99, and "Planning from the Bottom – Can It Be Done?" *Forum*, March, 1945, 277-279, and April, 1945, 20-23.
3. *How Canadians Govern Themselves*, 1.
4. *SPC*, especially Chapter VI and all of Part II.
5. See, for example, "Employment and Income", *The Canadian Unionist*, August, 1945, 190-193, 195-196; "Old Age Security", *Labour Research*, April-May 1950; "Housing – Unfinished Business", *Labour Research*, May 1949, 1-4; "Housing – A National Emergency", *Labour Research*, January-February 1950, 1-8; "Unemployment Again", *Labour Research*, February-March 1952, 1-6.
6. "The Outlook for Freedom in the Garrison State", Couchiching Conference, August 14, 1952, audio tape 520814-1, CBC Radio Archives, Toronto.
7. "Labour and National Development", speech to Canadian Federation of University Students National Seminar, University of British Columbia, August 3, 1960, EFP Vol.8.
8. "Labour and National Health", speech to Quebec Division of the Canadian Medical Association, Ste Adèle, Quebec, May 3, 1957, *Canadian Labour*, June 1957, 42-47, Canadian Labour Congress Library, Ottawa.
9. *SPC*, op. cit., 144.
10. *Canada Year Book 2009*, Industry Canada, 191.

The late Senator Eugene Forsey – trade unionist, academic and inveterate writer of letters to the editor – was one of Canada's foremost constitutional experts and an ardent advocate for progressive public policy. His daughter, writer and activist Helen Forsey, has written about his legacy in her book *Eugene Forsey: Canada's Maverick Sage*, to be published this year by Blue Butterfly Books/Dundurn Press. This article is an excerpt from the book. It was published online on February 7, 2011 by StraightGoods.ca and is reprinted with the permission of the author.



Canada's Refugee Law and Policy

What Are We Really Trying to Accomplish?

Linda McKay-Panos BEd, JD, LLM.

Canada has long been regarded as a safe haven for those escaping persecution. In fact, Canada signed and ratified the international *Refugee Convention* and its protocol, which indicates that signatories will provide a safe haven for those who face persecution on grounds such as race, religion, and group membership. Over the years, Canada has developed laws and policies that are intended to address this obligation (e.g., the *Immigration Act*). However, Canada's refugee laws, policies and procedures appear to be largely influenced by real or perceived public sentiments towards asylum seekers. Reactive refugee policies (those that respond to public sentiment rather than those that strive to achieve our international legal obligations) often result in unfair, unprincipled practices that adversely affect people who are escaping persecution.

For example, while Canada has procedures for dealing with refugees who make claims either from overseas or once they arrive in Canada, refugees who arrive in Canada before making their refugee claims are often considered "suspect" and somehow jumping the queue (i.e., they are cheating the system). At best, they are presented as the victims of human smugglers. The government treats these refugees more harshly than it does those who make claims before arriving. Canada's officials often respond by imprisoning these asylum-seekers (including children), with or without their other family members. Those refugees who make their claims overseas through foreign offices, moving at the slow pace of Canada's officials, are seen to be more legitimate, and are treated differently. These refugees are not usually detained when they arrive in Canada. Yet, refugees who make a claim after they arrive in Canada may have legitimate reasons for following this path.

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In 2002, the *Immigration and Refugee Protection Act* (*Immigration and Refugee Protection Act* SC 2001 c27) ("IRPA") came into force. This was the first time refugees were recognized in the title of legislation. The objectives are stated:

3. (2) The objectives of this Act with respect to refugees are

(*a*) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;

(*b*) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;

(*c*) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;

(*d*) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;

(*e*) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;

(*f*) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada;

(*g*) to protect the health and safety of Canadians and to maintain the security of Canadian society; and

(*h*) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.

These stated objectives reflect Canada's international obligations under the *Refugee Convention*. Our refugee policies should reflect these expressed objectives rather than real or perceived public sentiment about refugees.

Canada's immigration and refugee legislation was amended in 2010. In order to appreciate the difference in treatment of refugees who claim outside of Canada and those who make claims upon arrival, it is useful to examine the procedures under the IRPA.

Claims made from outside Canada are usually brought to the attention of the Department of Citizenship and Immigration Canada (CIC) by the United Nations High Commissioner for Refugees, other referral organizations and private sponsorship groups. (Citizenship and Immigration Canada, The Refugee System Online: www.cic.gc.ca/english/refugees/index.asp).Under the IRPA, once an individual is identified as a person needing asylum, a Canadian visa officer (overseas) then decides whether the person meets the requirements of Canada's Refugee and Humanitarian Resettlement Program and whether they should be admitted into Canada. Successful applicants are provided with a permanent residency visa and a confirmation of permanent residence form, together with photo identification. People who are unsuccessful in making a claim cannot appeal that decision, but they can re-apply for refugee status using the same process.

Eligible claimants are those who fear persecution and are unwilling or unable to return to their home country. No person who has previously been denied refugee status in Canada (e.g., through the overseas process), who is deemed to be a serious criminal or a threat to security, who has participated in human rights abuses, or who arrives directly or indirectly via a safe third country is permitted to make a claim (IRPA, s. 101).

Claims from within Canada are made when the individual arrives in Canada at a port of entry, such as a border crossing, airport or seaport, or at a CIC office. If an agent of CIC or Canadian Border Services decides a claimant is eligible to make a refugee claim, that individual will be referred to the Immigration and Refugee Board for a hearing and decision. An immigration officer will conduct an initial interview to gather information about the claimant and determine whether he or she is eligible to make a claim for refugee status. Eligible claimants are those who fear persecution and are unwilling or unable to return to their home country. No person who has previously been denied refugee status in Canada (e.g., through the overseas process), who is deemed to be a serious criminal or a threat to security, who has participated in human rights abuses, or who arrives directly or indirectly via a safe third country is permitted to make a claim (IRPA, s. 101).

An eligible claimant fills out a personal information form, and a division of the Immigration and Refugee Board conducts an initial review. If circumstances merit, the claim is forwarded to an expedited process where an interview is held, and a decision is normally made within a few weeks. Before the 2010 amendments were made, claims processed through the usual non-expedited procedure took anywhere from a few months to a year. The delay was due to the number of claims received and

the shortage of refugee determination officers (Stacey A. Saufert, "Closing the Door to Refugees: The denial of due process for refugee claimants in Canada" (2007) 70 Sask L Rev 27 at 34 ("Staufert")).

During the non-expedited process, an oral hearing is held by a refugee determination officer, where both the claimant and the Minister of Citizenship or Immigration (or his/her representative) have the opportunity to present evidence, to question witnesses and to make representations (Staufert). The decision must include reasons, and if a refugee claim is denied, there must be *written* reasons. If a positive decision is rendered, the claimant may then apply for permanent residence. If the claim is rejected, the claimant has 15 days to apply to the Federal Court for leave to have the decision judicially reviewed (Staufert). A judicial review is a limited review of the reasonableness of the procedure that was followed by the refugee determination officer, but does not address the merits of the decision.

If an application for refugee status is denied, a removal order is issued against the rejected claimant. Before deportation, the claimant can submit an application for a pre-removal risk assessment. This gives the claimant one last chance to present reasons for not being deported (e.g., if there exists new evidence or changed circumstances in the home country since the refugee hearing) (Staufert).

It is clear that refugees who make claims upon arrival in Canada, face a long, complex process in having their claims adjudicated.

On June 29, 2010, new legislation was passed regarding refugees: The *Balanced Refugee Reform Act* (Bill C-49, *An Act to Amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Maritime Transportation Security Act*. For the most part, the refugee determination process remains the same as it was. The main changes to the existing legislation include:

- the first level refugee determination decision-maker is a public servant (thus answerable to the government for his or her decisions) and is no longer appointed by the Governor- in-Council (thus more independent in refugee decision-making);
- the existence of a new initial interview stage within eight days of making the claim, then within 60 days the refugee protection division would have its hearing (e.g., while the refugee claimant has the right to be represented by counsel at any hearing on the merits of the claim, it will be very difficult for a claimant to find, retain and get advice from counsel within eight days);
- the implementation of the refugee appeal division for some claimants;
- the ability of the government to designate some countries as "safe" so that claimants from those countries will have no ability to appeal to the refugee appeal division;
- refugee claimants will not have access to a claim based on humanitarian and compassionate grounds for at least one year after their refugee claim is denied;
- limited access to pre-removal risk assessments and temporary resident permits; and
- an increase in the number of federal court judges (Canada Library of Parliament Legislative Summary *Bill C-11: An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act (Balanced Refugee Reform Act)* May 12, 2010 at 1).

The Minister of Citizenship and Immigration, Jason Kenney, claimed these amendments were introduced to make the refugee determination system faster and fairer. (Citizenship and Immigration. News Release: "The *Balanced Refugee Reform Act* moves closer to becoming law" Online: http://www.cic.gc.ca/english/department/media/releases/2010/2010-06-15a.asp). However, these amendments have been criticized for focusing on the front-end of the determination process rather than dealing with how failed claimants are removed. Currently, because the government doesn't remove failed claimants in a timely fashion, these failed refugee claimants develop other avenues for staying in Canada. This includes making new applications based on their establishment in Canada, upon which the government takes years to decide. This has resulted in failed refugee claimants remaining in Canada for years (Erin Roth, "Is the Proposed *Refugee Reform Act* Balanced?" (2010) 86 Imm L.R. (3d) 168 ("Roth"). Erin Roth believes the amendments, which seek to weed out unfounded refugee claims, will "create intolerable levels of institutional bias", at the cost of procedural fairness and natural justice in the process. In addition, she believes that the goal of some of the provisions is clearly to make Canada's refugee system less attractive by limiting the legal options available to some refugee claimants, especially those who are seeking safe haven on humanitarian and compassionate grounds. Thus, the amendments appear to be reacting to the idea that there are too many unfounded refugee claims made, rather than the reality that the process is bogged down by the failure of the Canadian government to expeditiously remove failed claimants (Roth).

Over the past two or three decades, there have been reactive laws and policies resulting from incidents involving refugees who arrive in Canada before making their claims, or from real or perceived public concerns about potential refugee claimants.

The Reactive Nature of Refugee Law and Policy: Examples

Over the past two or three decades, there have been reactive laws and policies resulting from incidents involving refugees who arrive in Canada before making their claims, or from real or perceived public concerns about potential refugee claimants.

In December, 2004, the *Safe Third Country Agreement* between Canada and the United States came into effect. This agreement denies refugee claimants the right to make a refugee claim in Canada or the U.S. if they have already passed through the U.S. or Canada. The Canadian Council for Refugees, the Canadian Council of Churches and Amnesty International were unsuccessful in launching a legal challenge to this agreement (*Canadian Council for Refugees v R,* 2008 FCCA 229). These advocates argued the United States was not a safe country because refugees are "carefully selected and brought to the country. Those who enter the U.S. before making a claim are not always so welcomed, including individuals from Islamic countries, abused women and those claiming asylum based on sexual orientation. These processes and results are distinctly different from Canada's refugee determination system" (Chris Pullenayegem, "Dismantling the Safe Third Country Agreement" (December 13, 2007) Online: http://www.cpj.ca/en/content/dismantling-safe-third-country-agreement).

The development of the *Safe Third Country Agreement* illustrates that Canada is perceived by some (i.e., the United States) as not having control of its borders. These countries characterize the Canadian refugee system as dysfunctional and lax with respect to allowing terrorists into Canada. Further, after the events of September 11, 2001, Canada has been especially pressured to address American fears that this lack of border-control renders the U.S. vulnerable to terrorist infiltration. While international obligations require Canada not to return people to territories where their lives or freedom will be threatened, Canada must also appease its neighbour's sentiments by deterring the arrival of claimants on Canadian soil before they have made their refugee claims (Penny Becklumb, Parliamentary Information and Research Services, *Canada's Inland Refugee Protection System* September 16, 2008 at p 2).

Another example of Canada's reactive refugee policies occurred after October 2009, when 76 Tamils arrived on a ship, the Ocean Lady, off the coast of British Columbia. All of the passengers were arrested but were eventually released pending resolution of their refugee claims. The Tamil claimants were found to be eligible to make refugee claims (Canadian Press, *Migrant ships and Canada: A Brief History* August 13, 2010.) Thus, our initial reaction that they were somehow suspect was not supported in the end.

In August 2010, approximately 490 Tamils arrived by boat on the West Coast claiming refugee status. As Peter Showler noted, Public Safety Minister Vic Toews indicated that passengers might include Tamil Tigers wanting to infiltrate Canada and this arrival was orchestrated by criminal human smugglers. At least originally, this incident was viewed by some as an attempt by refugee claimants to jump the queue. On the other hand, these individuals endured a difficult three month voyage to Canada. Sri Lanka was suffering through a violent civil war involving documented civil rights abuses by both sides: the Tamil Tigers and the Sri Lankan government. Three hundred thousand Tamil citizens were displaced and interred in camps where there have been alleged human rights abuses. The Tamil region is still under military control and many people on the boat suffered physical injuries, arbitrary arrest and imprisonment, loss of family members, loss of civil rights, and even torture. At the time of writing, these refugee claims had not yet been determined. We must hear their claims before we know whether these are legitimate claims (Peter Showler, "Tough Talk on Boats and Refugees" 20 August 2010 *Ottawa Citizen* online: www.cdp-hrc.uottawa.ca/.../refugee.../ToughTalkonBoatsandRefugees.doc).

In what seems to be (at least in part) a response to this incident, Canada introduced Bill C-49, which will amend the IRPA and the newly proclaimed *Balanced Refugee Reform Act*. Bill C-49, *Preventing Human Smugglers from Abusing Canada's Immigration System Act,* has been criticized for punishing refugees rather than smugglers. Bill C-49 allows the Minister of Public Safety to declare a group of migrants coming into Canada to

The development of the *Safe Third Country Agreement* illustrates that Canada is perceived by some (i.e., the United States) as not having control of its borders. These countries characterize the Canadian refugee system as dysfunctional and lax with respect to allowing terrorists into Canada.

be an "irregular arrival," if he has reasonable grounds to suspect they have been aided in coming without a passport or other acceptable documentation. Refugees may then be jailed for a minimum of one year. Refugee children are among those who may already be detained (Canadian Council for Refugees, "Government Bill Punishes Refugees" News Release October 21, 2010 Online: http://www.ccrweb.ca/en/bulletin/10/10/21). Those caught by an "irregular arrival" cannot apply for permanent residence for five years (once they have obtained refugee status), nor can they sponsor family members for five years. The background notes accompanying the Bill refer to some refugee claimants as "queue jumpers".

The incident with the Tamils and Canada's legislative reaction illustrate how public sentiments such as fear often affect Canada's refugee objectives more than the principle of providing a safe haven for those who have been persecuted. It appears that those refugees who wait patiently overseas are considered preferable to those who come to Canada first before making a claim, thus jumping an imaginary queue. The fears are Canada will be inundated with refugee claims and will become a destination for human traffickers (Public Safety Canada).

Why should it matter how a refugee arrives in Canada if he or she is fleeing persecution in another country? This question forces us to re-visit the ultimate purpose of our refugee laws and policies. It must be remembered that Canada has signed the *Refugee Convention*, which prioritizes providing a safe haven for those facing persecution. With regard to refugee policy, security seems to have become a priority at the expense of human rights. We should be working to preserve security while continuing to focus on the overarching objective of providing a safe haven. This may mean developing a better system for processing refugee claims for those arriving at our borders. The first step is not to suspiciously regard refugee claimants as somehow beating the system or jumping the queue. This reactive approach to refugee policy-making is discriminatory and it does not help Canada meet its obligations under international law as it pertains to human rights and refugees.

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While Canada certainly has a good reputation as a welcoming country for refugees, when we look at our statistics – approximately one out of ten refugees who are resettled in a year are settled in Canada – and then at our recent legislative and regulatory responses to refugees, it could be argued that we are not as welcoming as others may think.

Linda McKay-Panos, BEd. LLB, LLM is the Executive Director of the Alberta Civil Liberties Research Centre in Calgary, Alberta.

A National Securities Regulator?

No way! says the Alberta Court of Appeal

Alastair Lucas, Q.C.

Case considered: *Reference Re Securities Act (Canada)*, 2011 ABCA 77

Can the federal government pass legislation to establish and empower a national securities regulator? Essentially, this is the question referred by the Alberta Cabinet to the Alberta Court of Appeal. Specifically, the question relates to the draft *National Securities Act,* Sessional Paper No.8 525-403-10. The *National Securities Act* would mean federal regulation of participants in the Canadian securities industry, federal disclosure rules and limits for raising money from the public, federal regulation of the trading of securities, and federal monitoring and enforcement of these rules to protect the public.

This question, the Alberta Court of Appeal answered with a resounding "No".

The Court's reasoning (per Justice Frans Slatter, with Justices Jean Cote, Carole Conrad, Keith Ritter, and Clifton O'Brien concurring) can be described in a word – OK, two words – "constitutional balance". It honed in on the idea that the proposed legislation would regulate exactly what provincial securities legislation regulates now and has traditionally regulated, with no evidence of fundamental problems. To permit this federal move into overall regulation of the Canadian securities industry would be an unprecedented expansion of federal constitutional jurisdiction over economic matters. It would be a tectonic shift in the essential constitutional division of legislative powers.

Why was this so obvious to the Court of Appeal? In this age of globalization, we are accustomed to hearing about the national economy and about investment and investment trends. Particularly since

the fmancial markets crisis of 2008, we have been aware of the potential for broad disruption of capital markets – the risk of system meltdown. Indeed, this was how the federal government framed its argument in this *Reference.* Canada argued that a *National Securities Act* is fundamentally about addressing this "systemic risk" (at para. 7).

The problem with this, said the Court, is that the draft federal act contains nothing "concrete" about systemic risk (at para. 21). It does not focus primarily on dubious and irresponsible investment decisions that can create this kind of risk. Nor, the Court noted, does it "do anything that is not already being done (in a co-ordinated and co-operative way) at the provincial level" (at para. 23). Securities regulation is not something that can only be done effectively at the national level (at para. 40). Nor does the legislation seek to regulate capital flows (at para. 25). The latter is done by the Bank of Canada – authorized specifically by federal jurisdiction over "Banking and Bills of Exchange".

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What these systemic risk issues come down to, cautioned the Court, is regulating specific investment contracts. This is on-the-ground local activity that is the essence of provincial constitutional jurisdiction over "Property and Civil Rights in the Province", and not federal jurisdiction over "Regulation of Trade and Commerce".

The parties purported to agree that the pith and substance or leading feature of the proposed *National Securities Act* was regulation of participants in public capital markets and of transactions for the raising of capital. But they really did not agree. Each put a different spin on the Act that amounted to a different pith and substance. For the federal government it was "comprehensive national securities regulation" – investment risk and capital flows (at para. 17). The province saw the pith and substance as concerning investment transactions – fundraising and trading that occurs locally (at para. 19). The Court's implicit conclusion was that true pith and substance was closer to the provincial formulation (at para. 24).

The next step in the federalism analysis under the *Constitution Act* 1867 is classification of the law in its pith and substance to the most appropriate federal or provincial power. Here, the Court concluded that the core of regulating the raising of investment funds is regulation of particular investment contracts. The securities traded are a form of property. In constitutional language, "civil rights" created by investment contracts and "property" represented by securities is involved – matters of property and civil rights that fit the exclusive provincial power over "Property and Civil Rights in the Province" (at para. 19).

This may involve some regulatory offences, in themselves classifiable as criminal law. But, said the Court, as a whole, the legislation is a response to economic, not criminal concerns. To support the pith and substance of the entire securities regime proposed as criminal law would be "constitutional bootstrapping" (at para. 32).

The federal government argued forcefully that the legislation is in relation to Regulation of Trade and Commerce. But the problem here is that this federal power has, since the Privy Council's decision

in *Citizens' Insurance* v. *Parsons,* [1881] 7 App. Cas. 96, been interpreted as not extending to regulating contracts of a particular business or trade. This criterion was carried forward as one of the Supreme Court of Canada's five "indicia" in *General Motors* v. *City National Leasing,* [1989] 1 S.C.R. 641, of a matter coming within the "general" trade and commerce branch of the power.

The Court of Appeal concluded that the proposed national securities legislation does not meet three of these indicia:

(1) It does not concern trade as a whole, but rather a particular industry – one involving a small number of businesses that raise money from the general public (at para. 40).

(2) Nor are the provinces incapable of regulating this industry. They have, as the Court pointed out, been regulating it successfully for decades. The vehicle of general regulation is the "Passport" system that the provincial regulators have developed and agreed upon (at paras. 12,40).

(3) Exclusion of some provinces from the overall regime does not jeopardize its operation in other provinces. The fact that the proposed federal legislation involves provinces opting into the scheme supports this conclusion (at para. 40).

The Court's value-laden phrases leap off the page: "long occupied by the provinces"; "does not meet the traditional tests"; "intrusion" of the federal government; "area long occupied by the provincial government's 'local powers'"; "local diversity"; promotion of "local interests"; "paradigm shift"; "reallocate" (at paras. 47, 48). Theories are not difficult to divine: the constitutional compact fosters and guarantees local autonomy. Perhaps, though unmentioned, there are wisps of subsidiarity in the Court's decision – the idea, dusted off by members of the Supreme Court in the December 2010 *Assisted Human Reproduction Act Reference,* (2010 SCC 61, para 183 per Lebel and Deschamps JJ), that decisions are to be taken by governments closest to concerned citizens.

So, the suspense deepens. Similar References are before the Quebec Court of Appeal and the Supreme Court of Canada. Ultimately, of course, the Supreme Court will rule. Meanwhile this is the first shot – the Western shot – in the national securities regulation legal battle.

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Mandatory Retirement

Linda McKay-Panos

There are currently no laws in Canada that force a person to retire. The federal and most provincial governments prohibit age discrimination in their human rights legislation. Nevertheless, mandatory retirement does exist in Canada, and whether you are forced to retire and when, depends on where you live.

Civil servants who work for the federal government cannot be forced to retire. However, under current federal human rights legislation, mandatory retirement may be allowed for non-civil servants who work for an employer in a federally regulated industry. The *CHRA,* section 15(1)(c) provides that it is not a discriminatory practice if an individual's employment is terminated because "that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual".

Recently, Air Canada pilots George Vilven and Neil Kelly, succeeded in challenging Air Canada's mandatory retirement policy. Mandatory retirement for Air Canada at age 60 has been a company policy and part of their pension plan since 1957. Since the early 1980s, provisions mandating retirement at age 60 have been part of the collective agreement between Air Canada and the Air Canada Pilots Association ("ACPA") (*Vilven v Air Canada; Kelly v Air Canada*, 2009 FC 367).

Vilven had been a pilot for Air Canada for a number of years. He turned 60 in 2003, and in accordance with the mandatory retirement provisions of the collective agreement, was required to retire on September 1 (*Vilven v Air Canada; Kelly v Air Canada*, 2009 FC 367). There was no suggestion of job performance-related issues or medical fitness issues. The sole reason for Vilven's employment termination was the mandatory retirement provision in the collective agreement.

In August 2004, Mr. Vilven filed a complaint against Air Canada with the Canadian Human Rights Commission, alleging discrimination on the basis of age, contrary to sections 7, 9 and 10 of the *CHRA*. Likewise, Mr. Kelly filed a complaint against both Air Canada and ACPA in March 2006. A group of current and former Air Canada pilots wanting to eliminate mandatory retirement ("Fly Past 60 Coalition") was granted *interested party status* in the case. This group filed a Notice of Constitutional Question, challenging the constitutionality of subparagraph 15(1)(c) of the *CHRA* on the basis that it violated the *Canadian Charter of Rights and Freedoms ("Charter")* section 15(1).

Civil servants who work for the federal government cannot be forced to retire. However, under current federal human rights legislation, mandatory retirement may be allowed for non-civil servants who work for an employer in a federally regulated industry.

The Canadian Human Rights Tribunal ("Tribunal") dismissed Vilven's and Kelly's complaints, and also found that *CHRA* section 15(1)(c) did not contravene *Charter* section 15(1) (*Vilven and Kelly v Air Canada and Air Canada Pilots Association*, 2007 CHRT 36 ("*Vilven and Kelly Tribunal 2007*"). The Tribunal accepted evidence that 60 was the "normal age of retirement" for persons working in positions similar to Vilven and Kelly. While the Tribunal determined that the complainants had made out a *prima facie* claim that they had been discriminated against under *CHRA*, it also held that Air Canada had established that 60 was the normal age of retirement, and thus, the policy did not amount to a discriminatory practice.

Vilven and Kelly applied to the Federal Court for judicial review of the Tribunal's decision. Madam Justice Anne Mactavish of the Federal Court first found as reasonable the Tribunal's conclusion that the normal age of retirement for persons in positions similar to those occupied by Vivien and Kelly was 60 and thus was not discriminatory. Thus, the fact that they were required to retire at 60 in accordance with the collective agreement was not a discriminatory practice under section 15(1)(c) of the *CHRA*.

Next, the Federal Court examined whether section 15(1)(c) violated *Charter* s. 15(1). The Federal Court concluded that it did, because it denies older workers the equal protection of the law, and has the effect of perpetuating the group disadvantage and prejudice faced by older workers in Canada. In addition, the provision perpetuates the view that older workers are less capable, or less deserving of recognition or value as human beings or members of Canadian society.

Since the Tribunal had determined that section 15(1)(c) of the *CHRA* did **not** offend *Charter* section 15(1), it had not addressed the question of whether the section could nevertheless be justified under *Charter* section 1. The Federal Court set aside the Tribunal decision and sent it back for reconsideration. If the Tribunal eventually determined that section 15(1)(c) is not saved by *Charter* section 1, the Federal Court instructed the Tribunal to decide whether the mandatory retirement provision was nevertheless a *bona fide* occupational requirement under *CHRA* sections 15(1)(a) and 15(2).

In reconsidering the issues, the Tribunal first dealt with whether *CHRA* section 15(1)(c) could be saved by *Charter* section 1. The Tribunal relied on the test set out in *R v Oakes*, [1986] 1 SCR 103 to determine whether the impugned provision is a "reasonable limit prescribed by law as can be justified in a free and democratic society."

However, the Tribunal also discussed some more recent decisions. In these cases, courts have indicated that the social and economic context in which theMcKinney decision was rendered had changed sufficiently to leave the Supreme Court of Canada's decision in McKinney inapplicable to today's circumstances with respect to Charter s. 1. The Tribunal noted:

. . . the Supreme Court had underlined the importance of assessing the capabilities of each individual up to the point of undue hardship, rather than submitting to the concerns about individual accommodation in the collective bargaining process.

- Mandatory retirement is no longer as prevalent in Canada as it was when McKinney was decided;
- Expert evidence before it questioned many of the concerns raised in McKinney; and
- The loss of work can have a detrimental impact on an individual's sense of self-worth and well-being.

The Tribunal held that that it can no longer be said that the "goal of leaving mandatory retirement to be negotiated in the workplace is sufficiently pressing and substantial to warrant the infringement of equality rights." Further, the "normal age of retirement" criterion is not rationally connected to the goal of negotiated mandatory retirement, and instead the alternative of applying the defence of the *bona fide* occupational requirement would be less intrusive. The Tribunal noted that in the *British Columbia (Public Service Employee Relations Commission) v BCGSEU,* [1999] 3 SCR 3 ("*Meiorin*") decision, the Supreme Court had underlined the importance of assessing the capabilities of each individual up to the point of undue hardship, rather than submitting to the concerns about individual accommodation in the collective bargaining process. Finally, the Tribunal concluded that the negative effects of the infringement (depriving individuals of the protection of the *CHRA)* outweighed the positive benefits associated with section 15(1)(c). Thus, section 15(1)(c) was not a reasonable limit on the complainants' equality rights under *Charter* section 15(1). In sum, the offending provision of the *CHRA* could not be saved by *Charter* section 1.

Next, the Tribunal dealt with whether the mandatory retirement provision in the collective agreement was a *bona fide* occupational requirement ("BFOR") within sections 15(1)(a) and 15(2) of the *CHRA*. Tribunals and courts apply the three-step *Meiorin* test in order to determine whether an employment practice is a BFOR.

1. The mandatory retirement provision must be adopted for a purpose that is rationally connected to the performance of the job.
2. The mandatory retirement provision must be adopted in the honest and good faith belief that it is necessary to the fulfillment of a legitimate work-related purpose.

3. The mandatory retirement provision must be reasonably necessary to the accomplishment of the legitimate work related purpose. It must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer or the union.

In this case, at issue was the third *Meiorin* factor. Air Canada and ACPA argued that reinstating the two pilots would cause undue hardship. First, there were age limitations on flying internationally and also, ACPA argued that removal of mandatory retirement would limit the number of positions available to pilots under age 60. Also, the removal of the age 60 provision would require ACPA and Air Canada to renegotiate their collective agreement. The Tribunal noted (*Vilven and Kelly Tribunal 2007* at para 133) that removal of the mandatory retirement provision would likely result in a delay but not a denial of progression in the careers of younger pilots. Also, the international age requirements could be met if the two pilots flew as first officers rather than captains. Finally, the Tribunal noted that the respondents had not provided sufficient evidence that the renegotiation of the collective agreement would constitute undue hardship. Thus, the Tribunal concluded that the respondents had not established that mandatory retirement was a BFOR under the *CHRA*.

Air Canada and ACPA appealed the case to the Federal Court and Justice Anne Mactavish also dealt with the second appeal. When the case arrived at the Federal Court for the second time, Justice Mactavish ruled that the Tribunal had acted unreasonably when it failed to acknowledge and analyze the evidence Air Canada had submitted to support its claim that an age limit of 60 for airline pilots is a BFOR.

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The Tribunal had applied the three-part test set out in *Meiorin* (above) for consideration about whether the age limit was a BFOR. In considering the third factor—whether it is impossible to accommodate an employee without imposing undue hardship on an employer—factors considered by the court include cost, safety, employee morale, interference with other employees' rights, and disruption of the collective agreement. However, *CHRA* section 15(2) states:

> (2) For any practice mentioned in paragraph (1)(*a*) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph (1)(*g*) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering **health, safety and cost.** [emphasis added]

In 2007, the Tribunal held that it was not limited by the factors listed in *CHRA* section 15(2) (health, safety, and cost) and could also consider other factors, such as employee morale and mobility (etc.). Justice Mactavish ruled that the Tribunal's interpretation of section 15(2) was unreasonable, noting

that the wording of the statute indicated Parliament's intention to limit the factors to be taken into account in an accommodation analysis under the *CHRA*. Justice Mactavish noted that the wording of section 15(2) indicated that strong inference could be made that these three specific matters are exhaustive. However, Justice Mactavish also noted that the breadth of the factors considered had no bearing in this case because the issue of BFOR and undue hardship related to cost-related operational matters. Thus, the issue of the factors of undue hardship to be considered under section 15(2) is not yet settled.

Justice Mactavish returned the matter to the Tribunal for reconsideration a second time because she held that the Tribunal was unreasonable in failing to acknowledge and analyze the evidence that Air Canada had submitted to support its claim that age 60 is a BFOR. She was concerned about the Tribunal's treatment of evidence about the unworkability of scheduling pilots who are over 60. It appears then, that section 15(1)(c) of the *CHRA* is unconstitutional, as it was found by the Federal Court to violate *Charter* section 15(1), and then found by the Canadian Human Rights Tribunal as not saved by *Charter* section 1. Nevertheless, mandatory retirement provisions may be found **not** to be discriminatory if they are *bona fide* occupational requirements. It will usually be up to respondents to demonstrate that they cannot accommodate the individual to the point of undue hardship. This will have to be done on an individual assessment basis rather than by relying on a blanket policy or one that provides for the "normal age of retirement" for a particular profession.

In the meantime, Vilven is now 67 and Kelly is 65, and their case does not seem to be close to being resolved.

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The Glacial Evolution of the Legal Definition of Charity in Canada

Peter Broder

Nearly a half-century ago, Lord Wilberforce, considering a House of Lords case which touched on the definition of charity, commented on the imperative "to keep the law as to charities moving according as new social needs arise or old ones become obsolete or satisfied." In Canada, the pace with which the definition of charity is moving can only be described as glacial.

This past June the Federal Court of Appeal weighed in again on the issue of what qualifies as charitable in Canada for purposes of eligibility for registration under the *Income Tax Act.* For those familiar with Canadian jurisprudence in this area in recent years the result was unsurprising.

The case of *News To You Canada v Minister of National Revenue* (*News To You Canada*) dealt with the refusal of the Canada Revenue Agency to grant registered charity status to an organization mandated to research, produce and deliver news and current affairs programs and information over a variety of media to the general public in an objective and unbiased manner. It sought registration either as advancing education or, alternatively, as charitable under the head of "other purposes beneficial to the community as a whole in a way which the law regards as charitable".

The Court rejected registration under either category.

In doing so, it found that the organization neither met the expanded definition of education endorsed by Justice Iacobucci in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* nor satisfied the requirement that

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"others purposes" (commonly known as "fourth head") charities be beneficial to a sufficient segment of the public and the same as, or analogous to a purpose previously recognized as charitable.

The United Kingdom has relied increasingly over the years on its Charity Commission to determine what should qualify as a charity, and in 2006 enacted a statutory definition of charity. A number of other common law jurisdictions have either adopted a codified definition or have developed jurisprudence that is more reflective of evolving community needs and values.

In Canada, because there is no statutory definition of what constitutes a charity, it falls to the courts to determine, based on the common law, whether the purposes of an organization make it a charity.

Although the approach to charity law in the United States is somewhat different from that taken in other jurisdictions, in the context of the *News To You Canada* case it is worth mentioning that under U.S. law, ProPublica – a group mandated to produce and publish investigative journalism – qualifies as a 501(c)(3) organization, which is broadly the equivalent of a registered charity in Canada.

In Canada, because there is no statutory definition of what constitutes a charity, it falls to the courts to determine, based on the common law, whether the purposes of an organization make it a charity. In the case of organizations seeking federal registration as a charitable organization or foundation, this determination is made by the Federal Court of Appeal (FCA).

Provincial courts make the determination when the question in issue is a property and civil rights matter or otherwise within the scope of provincial authority over charities as set out in the Constitution. The Supreme Court has considered only a handful of cases in this area over the last fifty years.

After rejecting *News To You Canada* as advancing education since its activities were not sufficiently structured for educational purposes, the FCA distinguished two earlier Canadian cases that the appellant sought to rely on as authority for its purposes being recognized as charitable in Canada. Those two cases, though dating from the 1980s and 1990s, represent perhaps the high water mark in the evolution of the definition of charity in Canadian law.

In 1986 in *Native Communications Society of B.C. v Canada (M.N.R.) (Native Communications*), the Court found that production and dissemination of information through various media for a native audience was charitable. Because the activities sustaining the purposes of News To You Canada were targeted at the general public rather than a population occupying the special legal position of natives in Canadian society, the FCA held that the fact that the B.C. Society was charitable could not be used as grounds for finding *News To You Canada* charitable.

Ten years later, the Court held in *Vancouver Regional Freenet Association v M.N.R.* (*Freenet*) that provision of free access to the "information highway" was charitable. The Court ruled that providing facilities and support for access to electronic information was analogous to providing the physical public infrastructure, which had previously been recognized as charitable.

However, the FCA distinguished this from *News To You Canada* by noting that it was the infrastructure supported by *Freenet* that was charitable, rather than the content carried by that

infrastructure. Thus, even though it was targeted at the general public, rather than a specific population, a distinction could be drawn between *Freenet* and *News To You Canada.*

With respect, while it is difficult to quibble with the logic of the analysis of these two cases, one wishes the FCA would have brought the same alertness of evolving needs and social realities that informed the *Native Communication* and *Freenet* decisions to its consideration of *News To You Canada*. As the establishment of ProPublica in the United States shows, the economics of gathering and disseminating news are rapidly changing. In the face of that change we ought to be open to new ways of doing things. And at something more than a glacial pace.

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The Spousal Support Advisory Guidelines

Part One – Understanding the Formulas

Rosemarie Boll

The Spousal Support Advisory Guidelines (SSAGs) have been with us for three years. Although they are gaining acceptance in Canadian courts, there is still a lot of confusion about them. I believe part of the problem arises from the name. People are familiar with the Child Support Guidelines (CSG). The application of the CSGs is universal, mandatory and automatic. In uncomplicated cases, you pin down the parents' incomes, add in the children's extraordinary expenses, run your finger down the table, and there is the magic number – to the penny.

The SSAGs are very different. Notably, they are 'advisory' only – no judge is bound to apply them. Secondly, there are no tables and no magic numbers. Child support can be calculated with accuracy, but spousal support can only be narrowed to a range of reasonable possibilities. The SSAGs are two short formulas followed by 150 dense pages of policies and directions. There is much debate about how to apply those policies and directions. The most favourable interpretation can lead to an award many thousands of dollars higher than the least favourable one. This is why I believe it would be better to omit the word 'Guidelines' and rename them the 'Spousal Support Advisory Formulas.'

There are two basic formulas – the 'With Child Support' formula and the 'Without Child Support' formula. Having dependent children changes everything. One of the most common errors is using the wrong formula. Also, the SSAGs do not automatically apply to all spouses the way the CSGs automatically apply to all children. Claimants must first prove they are entitled to support. Once you have established eligibility, you can use the formulas to find out how much you might get.

Applying the correct formula generates a range of support options. The ranges are framed in two ways: 'quantum' (amount) and 'duration.'

With Child Support

The **'With Child Support' formula** is, confusingly, a whole set of formulas that take into account different custodial arrangements (sole, shared, and split custody, support paid for adult or step-children, and so on). In every case, the first step is to calculate the *amount* of spousal support:

1. Determine the Payor's Individual Net Disposable Income (INDI), which is:
   a. his Guideline Income (as per the Child Support Guidelines),
   b. *minus* his taxes, deductions, and the child support he pays.
2. Determine the Recipient's INDI, which is:
   a. her Guideline Income,
   b. *minus* the child support she receives,
   c. *minus* her taxes and deductions,
   d. *plus* her Government Benefits and Credits.
3. Apply the appropriate 'With Child Support' formula:
   a. add the Payor's INDI and the Recipient's INDI.
   b. the spousal support amount should be a figure that:
      i. leaves the Payor with 54% – 60% of the combined INDIs and
      ii. gives the Recipient 40% – 46% of the combined INDIs.

So, it is important to note that the formula generates a *range* of amounts, not a fixed figure.

The second step is to determine the *duration* of support – how long should support be paid? The SSAGs include two formulas.

1. The *length-of-marriage* test, generally applied to marriages of more than 10 years:
   a. the upper end of the range is 1 year of support for each year of marriage; and
   b. the lower end of the range is .5 year of support for each year of marriage.
2. The *age-of-children* test, generally applied to marriages of fewer than 10 years:
   a. The upper end of the range is the date when the last child finishes high school; and
   b. The lower end of the range is the date the youngest child starts attending school full-time.

Where there are different results in applying the two formulas, choose the longer one.

However, many judges do not impose a time limit at all. This is because there are so many variables – remarriage, second families, the Recipient's progress towards self-sufficiency, and so on. Rather than trying to make a prediction in the face of so many uncertainties, the judge can say the Order is reviewable at a specific time (e.g. when the Recipient completes training or a child reaches a particular age). Alternatively, the judge can leave it for either party to apply to vary the Order when there is a change in circumstances.

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Without Child Support

The **'Without Child Support' formula** starts with different figures. It doesn't use Guideline Income, it uses *gross* (before tax) *income.* Secondly, the duration is calculated according to the years of co-habitation, not just the years of marriage (for simplicity's sake, I will still call it 'marriage').

First, to determine the *amount* of spousal support:

1. Calculate the *gross income difference* between the parties,
2. Determine the percentage of income-sharing according to the length of marriage:
    a. For marriages of fewer than 25 years, multiply the length of the marriage by:
        i. Upper range – 2% per year;
        ii. Lower range – 1.2% per year;
        iii. Then multiply the *gross income difference* by this percentage (1.2% – 2%) to obtain the amount of spousal support. The maximum sharing is 50/50.
    b. Marriages of 25 years or more are treated differently. Do not factor in the years of marriage. This formula jumps directly to a percentage of the *gross income difference*:
        i. Upper range, calculate 50% of the gross income difference;
        ii. Lower range, calculate 37.5% of the gross income difference.

Next, determine the duration.

1, For marriages of fewer than 20 years, calculate .5 to 1 year for each year of marriage.
2. For marriages of 20 years or longer, the duration is indefinite. 'Indefinite' does not mean forever, it means there is no set end date – each case must be assessed on its own facts.

Ultimately, you will arrive at the range of support – the maximum and minimum amounts and the maximum and minimum duration. When you compare the high estimate with the low estimate, the difference can be huge – so how do you decide where you fit in the range? Many people take the easy road and just settle for the middle number, but end up short-changed. The SSAGs set out an extensive list of exceptions, limitations, and qualifications that can push the award past either end. And there are other considerations – should you trade off quantum for duration? What about a lump sum? A careful analysis can profit you immensely. The July 2008 Spousal Support Advisory Guidelines[1] are 166 pages long, and the March 2010 *New and Improved User's Guide* [2] is 56 pages long. It is a lot to go through, but it will be well worth it if you want to put forward your best possible case.

In my next column I will highlight some of the arguments you can make to maximize your entitlement or minimize your exposure for spousal support.

Notes

1. The Spousal Support Advisory Guidelines 2008
   http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/pdf/SSAG_eng.pdf
2. The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version
   http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/tool-util/topic-theme/ug_a1-gu_a1

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The Supreme Court of Canada

Philip Lister Q.C.

The Supreme Court of Canada has been in the news lately. Two of the judges have announced their impending retirement, so they need to be replaced. They are from Ontario, so in keeping with the practice of having three of the nine members of the Court from Ontario and three from Quebec, the replacement judges will also be from Ontario. By law three of the nine judges must be from Quebec. By tradition, the other seats are geographically appointed, three to Ontario, one to B.C., one to the Prairie Provinces and one to the Maritimes. Who will they be? Speculation is rife. Those who know aren't talking and those who talk aren't knowledgeable is the usual rule. Suggestions for reform are rife and the Government did effect some modest changes a few years ago with the appointment of Justice Rothstein who was interviewed by a Commons Committee on TV. It reverted to the old system with the most recent appointment, Justice Thomas Cromwell.

The Supreme Court was itself created by a federal statute in 1875 and was initially just an intermediate step in the litigation process, a pit stop between the provincial courts of appeal and the Privy Council in the "mother country", England. But appeals to the Privy Council were abolished and the SCC became the final appeal level throughout Canada in 1930 for criminal cases and in 1949 for civil cases. The last Canadian appeal at the Privy Council was heard in 1960, as the case had been started in 1948.

Usually Supreme Court of Canada appointments come from the members of that province's appeal court, although by law, trial judges or provincial judges are also eligible, as are practicing lawyers of over 10 years standing.

There seems to be little support for the American system where judges are extensively grilled on everything they have ever written or said since law school, on live TV. They survive this process by evasive and general answers as much as anything, since the process trivializes what a judge's job actually entails, and for that matter, a lawyer's too.

A lawyer's job is to advocate for the client's position and needs, not to write an essay on their own views. A judge's job is to interpret the words of a law that Parliament has passed, whether it's the *Criminal Code* or the Constitution.

Many Canadians have taken to parroting American rhetoric about wanting "strict constructionist judges". This is an American expression which is mistaken there (the Founding Fathers in 1776 expressed no opinions on regulating the Internet, aviation, electrical or nuclear power, or credit cards). These things didn't exist then ... but slavery did. And it is inapplicable here, as many of the authors of our Constitution are still alive and have written biographies telling us what the discussions, which are in any event well documented, were. Societies evolve and so must Constitutions, or any living thing.

It has also proved the case that lawyers who were former prosecutors nevertheless sometimes become strong advocates for fair procedure or civil rights of suspects (to access counsel, to not be mistreated while being interrogated) when they move to the Bench. And former defence counsel sometimes become harsh interpreters of defence arguments. In other words, judges aren't predictable and (like most humans) have the capacity to grow into a new job.

So the concept that a different selection process can "improve" or tilt the results for a future generation doesn't necessarily make sense. Indeed, if there is a flaw at all in the current process it's that so many people and so many single issue groups have input into the names that eventually emerge onto the Prime Minister's short list, that anyone who has ever expressed a controversial idea or represented a controversial client gets weeded out.

Parliamentary hearings would exacerbate, not reduce that problem. But they make good TV.

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Canadians Blessed with Reliable Legal Information Online

Marilyn Doyle

Canadians are fortunate to have a wealth of reliable legal information online. A key source is a core of dedicated non-profit public legal education organizations across the country. These are organizations whose main purpose is to make legal information accessible and understandable to everyone. Their mission statements say such things as:

- "promoting understanding of, access to, and confidence in our justice system";
- "assist the public in identifying and understanding their legal rights and responsibilities";
- "[enable people to] solve legal problems with informed choices";
- "provide understandable and useful information about our laws and the justice system"; and
- "increase the ability of individuals to deal competently with legal issues".

To achieve these goals, each organization uses a unique combination of activities which often involve working effectively with other partners in the legal system. The creativity shown in their online presence is impressive.

This article will examine five types of online public legal education activity: portals, topic-specific websites, sites designed for specific audiences, publications and videos. A complete exploration of the activities of each organization is impossible in one article, so hopefully this will whet your appetite to investigate these organizations further. An annotated list of links to these organizations can be found at www.lawnetalberta.ca/help/orgcanada.aspx.

Legal Information Portals

A portal could be described as a library of links. The resources come from many different sources, are presented with descriptive listings and are organized by subject. A portal can be a great starting point for discovering the range of information that is available on a given topic. Here are three portals of note.

1. Clicklaw (www.clicklaw.bc.ca) is sponsored by a network of organizations in British Columbia and is operated by the Courthouse Libraries BC. It features legal information and education designed for the public from 24 contributor organizations, as well as selected others.
2. The Legal Resource Centre of Alberta manages a set of three portals which provide information for Alberta, Canada and French Canadians respectively. From the provincial homepage (www.lawnetalberta.ca/LawNetAlberta/default.asp) you can access the other two portals from title-links on the right-hand side of the top banner. On these sites, all of the links to information and organizations are chosen and evaluated by librarians, and descriptive abstracts contain information pulled directly (where available) from the organizations' own websites.
3. Community Legal Information Ontario operates CLEONet (http://cleonet.ca) with resources, news, events, and webinars produced by community organizations and legal clinics across Ontario.

Topic-specific websites

A website devoted to a single topic can present detailed information in easily digestible bits using a variety of media. For example, two sites that help people to understand court procedures in their provinces are:

- SupremeCourtBC (http://www.supremecourtbc.ca) from the Justice Education Society and
- Cotécour (http://www.educaloi.qc.ca/en/cotecour) from Éducaloi in Quebec.

The many aspects of family law are explored on these two sites:

- Family Law in British Columbia (www.familylaw.lss.bc.ca) developed and maintained by B.C.'s legal aid services provider, the Legal Services Society; and
- Family Law NB (www.familylawnb.ca/english/index.php), an initiative of the Public Legal Education and Information Service of New Brunswick.

Sometimes a website can focus in on a very particular issue while at the same time having sections for specific audiences. The Legal Resource Centre explains the laws about renting in Alberta on the website Laws for Landlords and Tenants in Alberta (www.landlordandtenant.org): one section addresses the point of view of landlords and the other speaks to tenants. Similarly, the Gang Prevention site (www.gangprevention.ca) from Justice Education Society has one side for "Youth, Families and Community" while the other is for "Service Providers and Educators".

Sites designed for specific audiences

Another approach is to create a website that addresses multiple topics of particular interest to a specific audience. For youth, there are often snappy designs which include activities and games.

- Youth Zone/L'espace jeunesse (www.jeunepourjeunes.com/en) from Éducaloi covers information about a variety of legal topics as well as careers in justice.
- Another bilingual site from the Public Legal Education and Information Service of New Brunswick, Youth Justice/Justice pour les Jeunes (www.youthjusticenb.ca) addresses youth criminal justice, dating violence, bullying, sexual harassment in schools, and youth rights.
- The *Youth Criminal Justice Act* is a topic addressed by two other maritime organizations. The Legal Information Society of Nova Scotia presents Youth and the Law (http://youthjustice.ns.ca) while the Community Legal Information Association of Prince Edward Island has the Youth Criminal Justice System Module accessible in either English or French at www.cliapei.ca/content/page/resources_online .

At the other end of the age spectrum, a site devoted to older adults is Oak-Net, the Older Adult Knowledge Network (www.oaknet.ca) which offers information about elder abuse, planning for the future, family relationship matters, consumer issues and housing. Another targeted audience is teachers and students. The Justice Education Society offers Law Connection (www.lawconnection.ca), while the Legal Resource Centre presents resources relevant to the Alberta school curriculum at ABCLawNet (www.abclawnet.ca). A quite distinct audience is registered charities across Canada whose staff and boards can learn about the law governing their activities from Charity Central (www.charitycentral.ca), also a project of the Legal Resource Centre.

Publications

From pamphlets to booklets, self-help guides, and posters, publications are a staple of public legal education and now most are available to read online or download. A visit to the website of any of the organizations (use the link at the beginning of this article) will reveal a section devoted to publications. Popular topics are family law, criminal law, court procedures, abuse, housing and property, wills and estates, and consumer issues. Sometimes they are targeted to a specific population e.g. youth, seniors, consumers, people with disabilities. Two organizations have expanded their outreach through a series of newspaper articles in community newspapers, which are also made available online: Public Legal Education Association of Saskatchewan's "A Look at the Law" (www.plea.org/legal_resources/newspaper_articles) and People's Law School (B.C.) (www.publiclegaled.bc.ca/section.asp?catid=139&pageid=76). Many organizations have paid attention to the need for information in other languages, both for immigrant communities and aboriginal peoples.

Videos

Video has long been seen as an engaging alternative to information in print. Now video is even more accessible with many people having enough bandwidth to view videos online. Several organizations have taken advantage of this and have videos embedded on their websites for online viewing. Éducaloi has a YouTube channel called Éducaloi-TV. (www.youtube.com/educaloi) A series of unique animated videos from People's Law School teaches about credit cards, debt, identity fraud and bankruptcy. (www.publiclegaled.bc.ca/section.asp?catid=167).

In addition to all of this online information, these organizations offer various direct services such as legal information lines, lawyer referral services, legal clinics, workshops for the public, training for community workers, speaker's bureaus and school programs. All of these are promoted on their websites.

This is only a taste of what is provided by this amazing network of PLE organizations. So get online and see for yourself how blessed we Canadians are!

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