May/June 2015

Circumpolar Inuit Declaration

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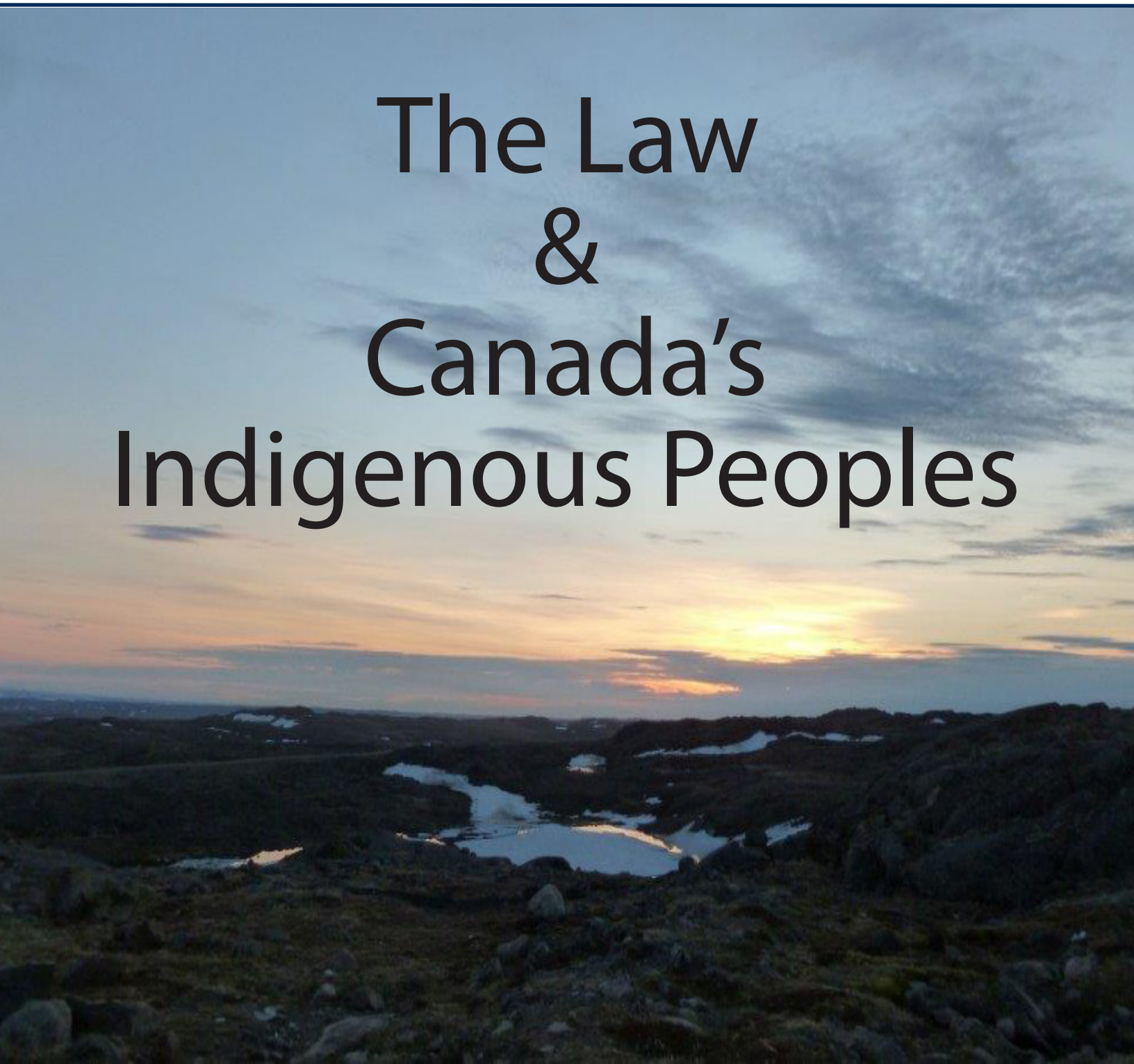


The Law & Canada's Indigenous Peoples

Vol 39-5: The Law and Canada's Indigenous Peoples

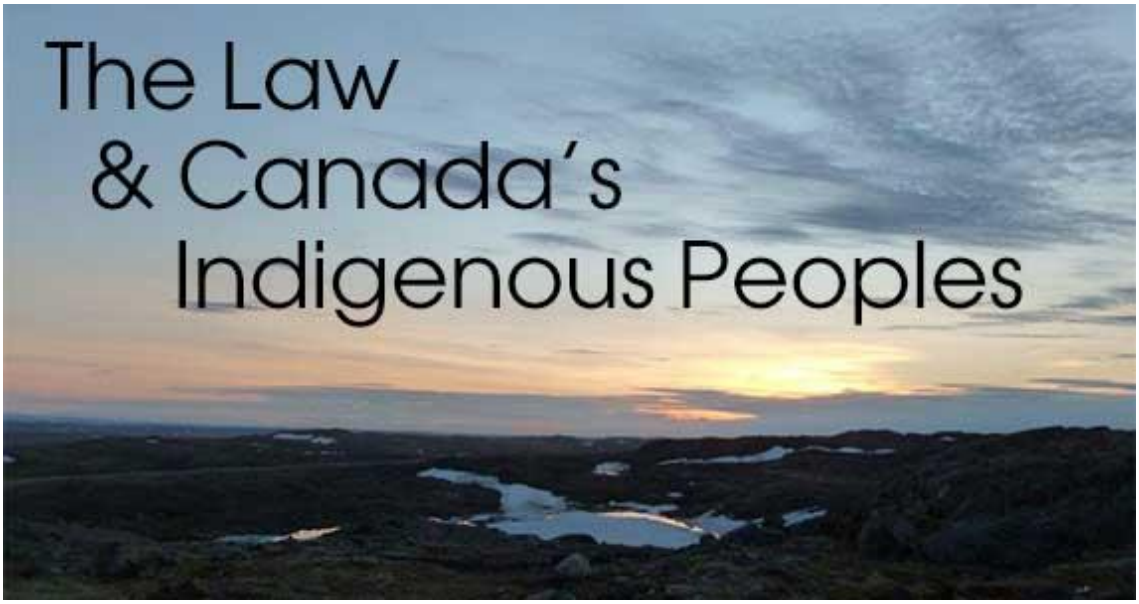


Table of Contents

Featured Articles: The Law and Canada's Indigenous Peoples

The Inuit live in Canada, Greenland, Russia, Denmark, and Alaska. They are a proud Indigenous people who have been living in the Arctic since time immemorial.

Special Report: Tough Decisions

Departments

Viewpoint

Columns

Human Rights Law

Criminal Law

When Prosecution Met Defence: The Michael Bryant Case

Mark Smith

Employment Law

Quitting and Giving Notice: What Employees Need to Know

Peter Bowal and Stephen Moore

Online Law

Resources for Termination of Employment

Marilyn Doyle

A Famous Case Revisited

Whatever happened to…U.S. v. Burns: Extradition and the Death Penalty

Peter Bowal and Preet Saini

Law and Literature

Vaclav Havel and the Meaning of Tragedy in Politics and Law

Robert Normey

Inuit Rights to the Arctic

Posted By: *Senator Charlie Watt*

As I continue my work on the issue of Inuit rights to the Arctic, my guiding principles are that Inuit must be equal partners in decision-making in the Arctic, resource development must promote the health of Inuit communities, and the environment must be protected.

I am currently looking at what impact the melting ice has on our agreements with Canada and other nations. As the ice melts, the seabed resources are more accessible and therefore attractive to corporations and governments from around the world. Although many are debating the boundaries of the continental shelf, for me, the bigger issue is: who owns, governs and benefits from the Arctic seabed and its resources?

I have been thinking about the larger issues of sovereignty and Inuit control of the Inuit homeland for many decades, but have been actively working with international partners on this file for over five years. Prior to this, issues of Indigenous human rights were our priorities at home and on the international front.

Since the 1970s, Inuit have been working to advance our rights in Canada and to support Inuit across the north. We have worked with Indigenous peoples from other nations to help them achieve recognition from their own governments and from the international community.

The Inuit have strong land claim agreements in place. In my region of Northern Quebec we have the *James Bay and Northern Quebec Agreement (JBNQA)*. This was signed in 1975 and is considered the first modern treaty in Canadian history. To date, there are four Inuit regions in Canada and all of these areas are coastal northern regions: Inuvialuit (in the Northwest Territories), Nunavut, Nunavik (northern Quebec) and Nunatsiavut (northern Labrador).

In addition to our land claim agreements, which confirm that Canada and Inuit will work together as partners in the north and that Canada will respect Inuit rights, we have additional protections in section 35 of the *Constitution*, and Canada has a duty to consult with Inuit on matters that have the potential to affect our rights.

The Arctic Ocean Ice is part of the Inuit Homeland

As Inuit we have always lived on the ice, and the ice is our winter "highway" across the tundra and from one shore to another. We have historic links across the Arctic from Greenland, to Nunatsiavut (Northern Labrador), the northern part of Canada and Alaska and even across the Bering Strait to Russia and the Scandinavian countries. We continue to keep these relations through organizations like the International Circumpolar Council (ICC) and the Arctic Council, and the many agencies of the United Nations (UN).

As the ice melts, however, our relationship with our territory is changing and the Arctic is becoming more accessible to the global community. As a result, we are dealing with huge changes in our home communities and fighting new battles in the international arena.

Where others might see empty space, we see our traditional homeland, the inheritance we will leave for our children. Because the tundra is my home, I rely on the land and sea for survival. My meals come from the land in the form of caribou, bear, and reindeer and the sea provides fish, seal, and shrimp. We collect eiderdown in the summer to make sleeping bags and parkas and we hunt for ptarmigan and geese, which are like our turkeys.

Although the Arctic sea ice and water is part of our territory, it lays outside of the territory included in our land claim agreements. We have not given explicit right of use to any government, nor have Inuit given Canada the right to claim the sole right to the resources in the extended continental shelf of the Arctic Ocean when it makes its submission to the Commission.

Because the nations of the world are vying for their piece of the Arctic, this is the time for Inuit to assert our right to the Arctic Ocean within our homeland, but beyond the existing land claims agreements.

Recognition for Inuit Rights to the Arctic

Currently, Canada, Denmark, Russia, Norway and the United States, the Arctic coastal States, are all trying to establish their sovereignty over the natural resources in the Arctic Ocean, in areas known as the "extended continental shelf". All but the United States have agreed to submit the boundaries of their extended continental shelf claim to the Commission on the Limits of the Continental Shelf, a body created under the *United Nations Convention on the Law of the Sea (UNCLOS).* The Commission will assess if the boundaries claimed by Canada, Denmark, Russia and Norway conform to the rules set out in UNCLOS and if enough evidence has been provided to support each State's claim.

I am very concerned that the Arctic coastal States' focus on using the law of the sea as their framework risks marginalizing Inuit and other Indigenous peoples' rights to the Arctic Ocean. From my perspective,

there is a major problem with the Arctic coastal states relying on the UNCLOS system to claim portions of the Arctic Ocean as their own, as UNCLOS does not explicitly protect Indigenous peoples' rights. Neither UNCLOS nor the customary law of the sea specifically reference the rights of Indigenous peoples. An additional problem is that, unlike the Arctic Council, the UNCLOS system does not provide a mechanism to ensure the participation of Indigenous peoples in any matters relating to the law of the sea, even when these directly affect Indigenous peoples' rights.

At the time that these laws and UNCLOS were developed, Indigenous rights were less recognized than they are today. The last thirty years have seen dramatic changes in the area of international law and Indigenous rights. Indigenous peoples were not given the opportunity to have a voice in the making of UNCLOS, as they have with other international conventions, such as the 1992 *United Nations Convention on Biological Biodiversity*, made only a decade after UNCLOS came into being. The UNCLOS system needs a serious update to reflect the international laws and standards that respect and protect Indigenous peoples' rights. Today, we have the *United Nations Declaration on the Rights of Indigenous (UNDRIP)*, which specifically recognizes Indigenous peoples' rights to their territories. Canada signalled its support for UNDRIP in 2012, and has committed to working towards better processes to include Indigenous participation. This means that Canada should also be respecting Inuit rights to the Arctic Ocean, as should all Nation-States. I do not believe that it is right for Canada to use the UNCLOS system as a way to get around the rights of Inuit and other Indigenous peoples to the Arctic Ocean.

As Inuit, we are concerned that Canada may claim areas of the Arctic Ocean that rightfully belong to Inuit (even those areas beyond existing Canadian territorial boundaries) and because it's our territory, we are looking for ways to participate in the dialogue at the international level. We are trying to work with Canada to ensure that Inuit Aboriginal title to the ice and waters within our homeland is recognized and protected. This includes portions of our homeland that lie outside the boundaries of the land claims agreements.

The issues of hunting and sustainability are important to us, and we are also concerned about environmental issues like oil spills and chemical pollutants in the food chain. Resource extraction and development can threaten our livelihood and our rights to access healthy foods, so finding clean energy sources is important.

The need for Indigenous inclusion is an issue for UNCLOS and for other UN processes, and is highly problematic for Indigenous peoples around this world.

In response, the Indigenous delegates at the United Nations are challenging this exclusion – and are developing protocols to ensure Indigenous rights are not ignored in existing or future protocols.

Canada's Missed Opportunity

The UNCLOS process and Arctic Sovereignty come under the direction of the Department of Foreign Affairs and Trade Development (and to a much lesser degree National Defence). The question we have asked Canada is why the government isn't including Inuit perspective or knowledge in its submission to the Commission. By not working with Inuit, Canada is missing an opportunity to strengthen its rights in the Arctic Ocean, as Inuit historical use and occupancy of the Arctic is a strong argument for Canada's sovereignty in the region.

Looking forward

We insist that future development of the Arctic includes Inuit – that we are not left outside the decision-making process. If there is an economic boom in our territory, it must benefit the Inuit people and not be done at our expense. Canada should not be able to claim portions of the Arctic Ocean that Inuit have historically occupied unless Inuit give consent. We are looking at our options in Canada and in the international system.

As Canadians we need to focus on our national processes to ensure Inuit are included in decisions that affect the Arctic.

My hope is that future Senate appointments will include Indigenous people from across Canada so that Inuit voices will be represented in the Canadian legislative system. Particularly, we need to see appointments from the regions most impoverished, and from groups that are under-represented in the House of Commons. We are the original residents of Canada and we are deserving of respect. As the founding peoples of this nation, we deserve to have a place at the table.

Nakurmiik,

Senator Charlie Watt

An Introduction to Inuit Rights and Arctic Sovereignty

Posted By: *Robin Campbell*

The rapidly changing climate in the Arctic is opening up the possibility of exploiting the natural resources contained in the Arctic Ocean seabed. Arctic and non-Arctic States are angling to gain control over these resources that were previously locked below the sea ice. What cannot be forgotten in the focus on State sovereignty over the Arctic are the rights of the Indigenous peoples who have lived in the Arctic, including the ice covered Arctic Ocean, long before the rest of the world turned its attention north.

Inuit Rights to the Arctic Ocean

Over the last five years, Senator Charlie Watt has been drawing attention to the rights of Inuit to Arctic Ocean areas of their homeland, called *Inuit Nunaat*, focusing on the parts of the territory that cover the Arctic Ocean. *Inuit Nunaat* includes lands in Canada, the United States (Alaska), Denmark (Greenland) and Russia. Importantly, it also covers large portions of the Arctic Ocean and some northern areas of the Atlantic Ocean, the exact areas where the world is now turning its attention. Until recently, much of the Arctic Ocean within *Inuit Nunaat* was covered by ice for most, if not all, of the year. This has made it possible for Inuit to live on and use the frozen ocean waters as part of their territory. Ice-based territory is unique to Indigenous peoples of the Arctic. Unlike anywhere else in the world, these areas of the ocean have supported human populations and are a vital part of Arctic Indigenous peoples' homelands.

International and Canadian law provide support for Inuit having territorial rights over Arctic waters, ice, as well as the resources that lie above and below the ice. As Indigenous peoples, Inuit rights to *Inuit Nunaat* are affirmed in the *United Nations Declaration on the Rights of Indigenous Peoples* (the *Declaration*) which provides that Indigenous peoples have the right to the lands, territories, and resources which they have traditionally owned, occupied or otherwise used or

acquired. The *Declaration* also requires States and international bodies to respect and protect Indigenous peoples' right to their territories. While it is true that the *Declaration* is not an international treaty binding on States, the reality is that these rights and the corresponding obligations on States have been upheld by international tribunals, including the Inter-American human rights system. Many of the rights have the status of binding customary law. Further, Canadian law provides constitutional protection to Indigenous peoples' rights to their territories through section 35 of the *Constitution Act, 1982*. Since 1973, the Supreme Court of Canada has confirmed that Aboriginal peoples hold Aboriginal title to their lands, based on their occupation and governance. The courts have specifically affirmed that Inuit hold Aboriginal title to their territories in Canada.

It is also increasingly recognized in Canadian and international law that portions of an ocean or sea can be included as part of Indigenous peoples' territories. The *Declaration* affirms that Indigenous peoples have the right to maintain and strengthen their spiritual relationship with their waters and coastal seas and other resources. In Canada, the same principles that apply to finding Aboriginal title to land could equally apply to establishing Aboriginal title to ocean or sea areas.

Within Canada, large areas of *Inuit Nunaat* are covered by treaties between Canada and Inuit, including the land claims agreements. Within the areas covered by the treaties, Inuit have consented to transfer their Aboriginal title to Canada. Many Inuit view the land claim agreements and other treaties as agreements to share their territories, rather than a full extinguishment of their Aboriginal title within these areas. The treaties cover not just land, but also areas of the ocean. For instance, the Labrador Inuit Land Claims Agreement protects Inuit rights to 18,800 square miles of tidal waters and an area of the seabed within the treaty area. In entering treaties with Inuit, Canada recognized that Inuit had rights to the Arctic lands and waters covered by the treaties. They create an on-going treaty relationship between Inuit and Canada and set up co-management regimes for the treaty areas. Importantly, they established a treaty partnership between Canada and Inuit that has the potential to be mutually beneficial.

Other areas of *Inuit Nunaat*, including areas within Canada as well as areas beyond the reach of any State, are not covered by treaties. Inuit have title to these areas, unless they have otherwise agreed to share or transfer it to Canada or another State. Some of these areas include large portions of the Arctic Ocean that are now being claimed by Canada and the Arctic Coastal States as part of their continental shelf claim.

Establishing State Sovereignty over the Arctic Ocean Continental Shelf

The rights of Inuit have been largely ignored by Canada and the other Arctic coastal States as they attempt to establish their sovereignty over large portions of the Arctic Ocean seabed through the law of the sea and the process set up under the *United Nations Convention on the Law of the Sea (UNCLOS)*.

Canada, Russia, Denmark, United States, and Norway, known as the five Arctic Coastal States, are the States are all claiming sovereignty over large areas of the Arctic Ocean seabed. In 2008, they agreed to use the law of the sea to determine the extent of each of their boundaries within the Arctic Ocean, in what is known as the *Ilulissat Declaration*. This is to their advantage, as under UNCLOS, a coastal State has automatic sovereignty over the natural resources contained in the seabed from the shore to a distance of at least 200 nautical miles (nm) or, if the continental shelf extends beyond 200 nm, to the outer limit of the "extended continental shelf".

The UNCLOS rules for how to calculate the outer limit of the extended continental shelf are fairly complex. They require that a State determine the extent of its continental shelf by looking at both the topography and geology of the seabed floor. Only the relatively shallow areas of the continental shelf are within the coastal State's sovereignty. UNCLOS imposes a limit on the outer boundary of the extended continental shelf, specifying that it cannot extend beyond the greater distance of either 350 nm from shore or 100nm beyond where the continental shelf dips below 2,500m.

To ensure that the rules are properly applied and that States do not claim more than they are entitled to, any State that has signed on to UNCLOS must submit its claim to the extended continental shelf to the Commission on the Limits of the Continental Shelf (the Commission). This technical body's role is to verify if the coastal State's claim is in conformity with the technical requirement of UNCLOS.

Many of the Arctic coastal states have made submissions to the Commission. Russia made one in 2001, but in 2002 the Commission recommended it collect more data to support the area it claimed. Norway made its submission in 2006 and Denmark made its submission in 2014. The United States cannot make a submission to the Commission, as it is not currently a signatory to UNCLOS, but it is nevertheless collecting data on the extent of its continental shelf.

Canada was required to make its submission to the Commission in 2013, but delayed handing over information regarding its Arctic continental shelf. Its Partial Submission, made on December 6, 2013, provided to the Commission within the time limit imposed by UNCLOS, covers only the Atlantic Ocean continental shelf claim. (No claim will be made for an extended continental shelf in the Pacific Ocean). At the time, then Minister Baird indicated that a delay was required to allow for additional work to ensure that, when it is submitted, Canada's claim to the Arctic continental shelf would include the North Pole. This delay has also given Canada the opportunity to assess Denmark's 2014 claim without revealing its hand, although this advantage was gained at the risk of annoying the international community – and in particular the Arctic coastal States – by not playing by the rules.

Recognizing Inuit Rights to the Arctic Ocean

Inuit rights to the Arctic Ocean ice challenges the sovereign claims of five Arctic Coastal states as well as other States trying gain access to the resources in the Arctic Ocean. International and domestic law supports Indigenous peoples' rights to their territory and could be used to argue that Inuit rights to the Arctic Ocean ice are just as strong as their rights to their land-based territory. In addition, under the law

of the sea and UNCLOS, a State's right to the continental shelf is based upon recognized sovereignty over the coast. However, in Canada, the northern coast is covered by either Aboriginal title or treaties.

Arguably, Canada's right to the extended continental shelf is completely tied to the rights it gained through the treaties with Inuit. Under this view, it is its treaty-partnership with Inuit that solidifies Canada's sovereignty over these portions of the Arctic relative to the other Arctic States, by basing its sovereignty on Inuit's historic use and occupation of these areas of their homeland. For both Canada and Inuit, the treaties ensure that Canada and Inuit both have a role to play in the governance of the Canadian Arctic. As a result, Canada should be engaging in in-depth consultations with its Inuit treaty partners over its claims to the Arctic Ocean seabed. Canada is required to engage with Inuit as partners in Arctic sovereignty issues, ensuring Inuit are fully informed and are given the opportunity to meaningfully participate in the decision-making that affects their rights.

A Circumpolar Inuit Declaration on Sovereignty in the Arctic

Posted By: *Inuit Circumpolar Council*

We, the Inuit of Inuit Nunaat, declare as follows:

1. Inuit and the Arctic

1.1 Inuit live in the Arctic. Inuit live in the vast, circumpolar region of land, sea and ice known as the Arctic. We depend on the marine and terrestrial plants and animals supported by the coastal zones of the Arctic Ocean, the tundra and the sea ice. The Arctic is our home.

1.2 Inuit have been living in the Arctic from time immemorial. From time immemorial, Inuit have been living in the Arctic. Our home in the circumpolar world, Inuit Nunaat, stretches from Greenland to Canada, Alaska and the coastal regions of Chukotka, Russia. Our use and occupation of Arctic lands and waters pre-dates recorded history. Our unique knowledge, experience of the Arctic, and language are the foundation of our way of life and culture.

1.3 Inuit are a people. Though Inuit live across a far-reaching circumpolar region, we are united as a single people. Our sense of unity is fostered and celebrated by the Inuit Circumpolar Council (ICC), which represents the Inuit of Denmark/Greenland, Canada, USA and Russia. As a people, we enjoy the rights of all peoples. These include the rights recognized in and by various international instruments and institutions, such as the Charter of the United Nations; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Vienna Declaration and Programme of Action; the Human Rights Council; the Arctic Council; and the Organization of American States.

1.4 Inuit are an indigenous people. Inuit are an indigenous people with the rights and responsibilities of all indigenous peoples. These include the rights recognized in and by international legal and political instruments and bodies, such as the recommendations of the UN Permanent Forum on Indigenous Issues, the UN Expert Mechanism on the Rights of Indigenous Peoples, the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and others. Central to our rights as a people is the right to self-determination. It is our right to freely determine our political status, freely pursue our economic, social, cultural and linguistic development, and freely dispose of our natural wealth and resources. States are obligated to respect and promote the realization of our right to self-determination. (See, for example, the International Covenant on Civil and Political Rights [ICCPR], Art. 1.)Our rights as an indigenous people include the following rights recognized in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), all of which are relevant to sovereignty and sovereign rights in the Arctic: the right to self-determination, to freely determine our political status and to freely pursue our economic, social and cultural, including linguistic, development (Art. 3); the right to internal autonomy or self-government (Art. 4); the right to recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with states (Art. 37); the right to maintain and strengthen our distinct political, legal, economic, social and cultural institutions, while retaining the right to participate fully in the political, economic, social and cultural life of states (Art. 5); the right to participate in decision-making in matters which would affect our rights and to maintain and develop our own indigenous decision-making institutions (Art. 18); the right to own, use, develop and control our lands, territories and resources and the right to ensure that no project affecting our lands, territories or resources will proceed without our free and informed consent (Art. 25-32); the right to peace and security (Art. 7); and the right to conservation and protection of our environment (Art. 29).

1.5 Inuit are an indigenous people of the Arctic. Our status, rights and responsibilities as a people among the peoples of the world, and as an indigenous people, are exercised within the unique geographic, environmental, cultural and political context of the Arctic. This has been acknowledged in the eight-nation Arctic Council, which provides a direct, participatory role for Inuit through the permanent participant status accorded the Inuit Circumpolar Council (Art. 2).

1.6 Inuit are citizens of Arctic states. As citizens of Arctic states (Denmark, Canada, USA and Russia), we have the rights and responsibilities afforded all citizens under the constitutions, laws, policies and public sector programs of these states. These rights and responsibilities do not diminish the rights and responsibilities of Inuit as a people under international law.

1.7 Inuit are indigenous citizens of Arctic states. As an indigenous people within Arctic states, we have the rights and responsibilities afforded all indigenous peoples under the constitutions, laws, policies and public sector programs of these states. These rights and responsibilities do not diminish the rights and responsibilities of Inuit as a people under international law.

1.8 Inuit are indigenous citizens of each of the major political subunits of Arctic states (states, provinces, territories and regions). As an indigenous people within Arctic states, provinces, territories, regions or other political subunits, we have the rights and responsibilities afforded all indigenous

peoples under the constitutions, laws, policies and public sector programs of these subunits. These rights and responsibilities do not diminish the rights and responsibilities of Inuit as a people under international law.

2. The Evolving Nature of Sovereignty in the Arctic

2.1 "Sovereignty" is a term that has often been used to refer to the absolute and independent authority of a community or nation both internally and externally. Sovereignty is a contested concept, however, and does not have a fixed meaning. Old ideas of sovereignty are breaking down as different governance models, such as the European Union, evolve. Sovereignties overlap and are frequently divided within federations in creative ways to recognize the right of peoples. For Inuit living within the states of Russia, Canada, the USA and Denmark/Greenland, issues of sovereignty and sovereign rights must be examined and assessed in the context of our long history of struggle to gain recognition and respect as an Arctic indigenous people having the right to exercise self-determination over our lives, territories, cultures and languages.

2.2 Recognition and respect for our right to self-determination is developing at varying paces and in various forms in the Arctic states in which we live. Following a referendum in November 2008, the areas of self-government in Greenland will expand greatly and, among other things, Greenlandic (Kalaallisut) will become Greenland's sole official language. In Canada, four land claims agreements are some of the key building blocks of Inuit rights; while there are conflicts over the implementation of these agreements, they remain of vital relevance to matters of self-determination and of sovereignty and sovereign rights. In Alaska, much work is needed to clarify and implement the rights recognized in the Alaska Native Claims Settlement Act (ANCSA) and the Alaska National Interest Lands Conservation Act (ANILCA). In particular, subsistence hunting and self-government rights need to be fully respected and accommodated, and issues impeding their enjoyment and implementation need to be addressed and resolved. And in Chukotka, Russia, a very limited number of administrative processes have begun to secure recognition of Inuit rights. These developments will provide a foundation on which to construct future, creative governance arrangements tailored to diverse circumstances in states, regions and communities.

2.3 In exercising our right to self-determination in the circumpolar Arctic, we continue to develop innovative and creative jurisdictional arrangements that will appropriately balance our rights and responsibilities as an indigenous people, the rights and responsibilities we share with other peoples who live among us, and the rights and responsibilities of states. In seeking to exercise our rights in the Arctic, we continue to promote compromise and harmony with and among our neighbours.

2.4 International and other instruments increasingly recognize the rights of indigenous peoples to self-determination and representation in intergovernmental matters, and are evolving beyond issues of internal governance to external relations. (See, for example: ICCPR, Art. 1; UNDRIP, Art. 3; Draft Nordic Saami Convention, Art. 17, 19; Nunavut Land Claims Agreement, Art. 5.9).

2.5 Inuit are permanent participants at the Arctic Council with a direct and meaningful seat at discussion and negotiating tables (See 1997 Ottawa Declaration on the Establishment of the Arctic Council).

2.6 In spite of a recognition by the five coastal Arctic states (Norway, Denmark, Canada, USA and Russia) of the need to use international mechanisms and international law to resolve sovereignty disputes (see 2008 Ilulissat Declaration), these states, in their discussions of Arctic sovereignty, have not referenced existing international instruments that promote and protect the rights of indigenous peoples. They have also neglected to include Inuit in Arctic sovereignty discussions in a manner comparable to Arctic Council deliberations.

3. Inuit, the Arctic and Sovereignty: Looking Forward

The foundations of action

3.1 The actions of Arctic peoples and states, the interactions between them, and the conduct of international relations must be anchored in the rule of law.

3.2 The actions of Arctic peoples and states, the interactions between them, and the conduct of international relations must give primary respect to the need for global environmental security, the need for peaceful resolution of disputes, and the inextricable linkages between issues of sovereignty and sovereign rights in the Arctic and issues of self-determination.

Inuit as active partners

3.3 The inextricable linkages between issues of sovereignty and sovereign rights in the Arctic and Inuit self-determination and other rights require states to accept the presence and role of Inuit as partners in the conduct of international relations in the Arctic.

3.4 A variety of other factors, ranging from unique Inuit knowledge of Arctic ecosystems to the need for appropriate emphasis on sustainability in the weighing of resource development proposals, provide practical advantages to conducting international relations in the Arctic in partnership with Inuit.

3.5 Inuit consent, expertise and perspectives are critical to progress on international issues involving the Arctic, such as global environmental security, sustainable development, militarization, commercial fishing, shipping, human health, and economic and social development.

3.6 As states increasingly focus on the Arctic and its resources, and as climate change continues to create easier access to the Arctic, Inuit inclusion as active partners is central to all national and international deliberations on Arctic sovereignty and related questions, such as who owns the Arctic, who has the right to traverse the Arctic, who has the right to develop the Arctic, and who will be responsible for the social and environmental impacts increasingly facing the Arctic. We have unique knowledge and experience to bring to these deliberations. The inclusion of Inuit as active partners in all future deliberations on Arctic sovereignty will benefit both the Inuit community and the international community.

3.7 The extensive involvement of Inuit in global, trans-national and indigenous politics requires the building of new partnerships with states for the protection and promotion of indigenous economies, cultures and traditions. Partnerships must acknowledge that industrial development of the natural resource wealth of the Arctic can proceed only insofar as it enhances the economic and social well-being of Inuit and safeguards our environmental security.

The need for global cooperation

3.8 There is a pressing need for enhanced international exchange and cooperation in relation to the Arctic, particularly in relation to the dynamics and impacts of climate change and sustainable economic and social development. Regional institutions that draw together Arctic states, states from outside the Arctic, and representatives of Arctic indigenous peoples can provide useful mechanisms for international exchange and cooperation.

3.9 The pursuit of global environmental security requires a coordinated global approach to the challenges of climate change, a rigorous plan to arrest the growth in human-generated carbon emissions, and a far-reaching program of adaptation to climate change in Arctic regions and communities.

3.10 The magnitude of the climate change problem dictates that Arctic states and their peoples fully participate in international efforts aimed at arresting and reversing levels of greenhouse gas emissions and enter into international protocols and treaties. These international efforts, protocols and treaties cannot be successful without the full participation and cooperation of indigenous peoples.

Healthy Arctic communities

3.11 In the pursuit of economic opportunities in a warming Arctic, states must act so as to: (1) put economic activity on a sustainable footing; (2) avoid harmful resource exploitation; (3) achieve standards of living for Inuit that meet national and international norms and minimums; and (4) deflect sudden and far-reaching demographic shifts that would overwhelm and marginalize indigenous peoples where we are rooted and have endured.

3.12 The foundation, projection and enjoyment of Arctic sovereignty and sovereign rights all require healthy and sustainable communities in the Arctic. In this sense, “sovereignty begins at home.”

Building on today’s mechanisms for the future

3.13 We will exercise our rights of self-determination in the Arctic by building on institutions such as the Inuit Circumpolar Council and the Arctic Council, the Arctic-specific features of international instruments, such as the ice-covered-waters provision of the United Nations Convention on the Law of the Sea, and the Arctic-related work of international mechanisms, such as the United Nations Permanent Forum on Indigenous Issues, the office of the United Nations Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous Peoples, and the UN Declaration on the Rights of Indigenous Peoples.

4. A Circumpolar Inuit Declaration on Sovereignty in the Arctic

4.1 At the first Inuit Leaders' Summit, 6-7 November 2008, in Kuujjuaq, Nunavik, Canada, Inuit leaders from Greenland, Canada and Alaska gathered to address Arctic sovereignty. On 7 November, International Inuit Day, we expressed unity in our concerns over Arctic sovereignty deliberations, examined the options for addressing these concerns, and strongly committed to developing a formal declaration on Arctic sovereignty. We also noted that the 2008 Ilulissat Declaration on Arctic sovereignty by ministers representing the five coastal Arctic states did not go far enough in affirming the rights Inuit have gained through international law, land claims and self-government processes.

4.2 The conduct of international relations in the Arctic and the resolution of international disputes in the Arctic are not the sole preserve of Arctic states or other states; they are also within the purview of the Arctic's indigenous peoples. The development of international institutions in the Arctic, such as multi-level governance systems and indigenous peoples' organizations, must transcend Arctic states' agendas on sovereignty and sovereign rights and the traditional monopoly claimed by states in the area of foreign affairs.

4.3 Issues of sovereignty and sovereign rights in the Arctic have become inextricably linked to issues of self-determination in the Arctic. Inuit and Arctic states must, therefore, work together closely and constructively to chart the future of the Arctic.

We, the Inuit of Inuit Nunaat, are committed to this Declaration and to working with Arctic states and others to build partnerships in which the rights, roles and responsibilities of Inuit are fully recognized and accommodated.

On behalf of Inuit in Greenland, Canada, Alaska, and Chukotka
Adopted by the Inuit Circumpolar Council, April 2009

Signed by:
Patricia A.L. Cochran, ICC Chair
Edward S. Itta, ICC Vice-Chair, Alaska
Tatiana Achirgina, ICC Vice-Chair, Chukotka
Duane R. Smith, ICC Vice-Chair, Canada
Aqqaluk Lynge, ICC Vice-Chair, Greenland

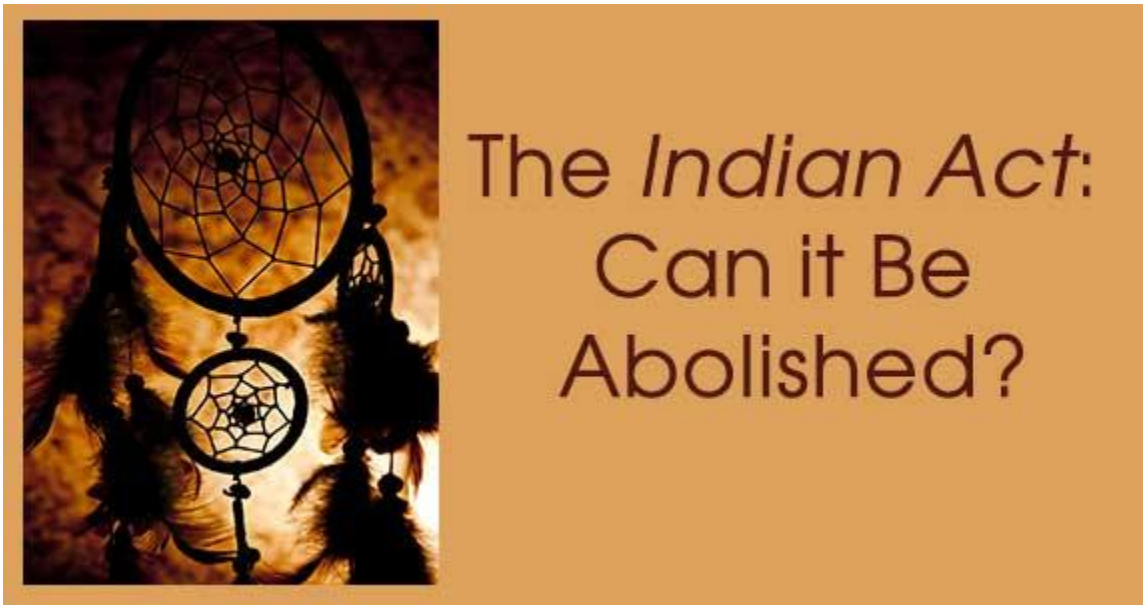
This declaration can be viewed as a PDF at the website of the Inuit Circumpolar Council Canada [2].

Inuit Circumpolar Council [3]

The Inuit Circumpolar Council (ICC) is an international non-government organization representing approximately 150,000 Inuit of Alaska, Canada, Greenland, and Chukotka (Russia). The organization holds Consultative Status II at the United Nations.

The Indian Act: Can it be abolished?

Posted By: *John Edmond*



Two simple observations are made so often about the *Indian Act* as to amount to clichés: That the 1876 Act is still with us, and that it should be "abolished." The first of these is technically false; the 1876 Act was repealed in 1951, and replaced with the Act we have today, though it has been amended countless times. The more interesting question is, to what extent does the Act of today resemble that of 1876 (the implication of critics being that there has been little if any change since 1876)? The question of abolition, known to drafters as "repeal," is even more complex in its ramifications.

A recent example is from an article by Michael Den Tandt, a national columnist with Postmedia papers, writing on Sir John A. Macdonald: "The bigotry in Macdonald's speeches is reflected in the 1876 Indian Act, in many places almost word for word. And the Indian Act remains the law of the land in 2015. Though no political party claims to like it, none has made an urgent matter of its abolition. How can that be, if we're as evolved as we like to imagine?"

The Act of today is not Macdonald's *Indian* Act, any more than, say, the original *Criminal Code* of 1893 is still in force. In 1951, a complete redrafting of the *Indian Act* was undertaken, the 1876 Act fully repealed and replaced by a statute thoroughly modernized by the standards of the day.

A principal change was to give structure to band governance. While the basic structure of band and reserve were carried forward, a municipal model of governance was adopted: each band would henceforth have a council consisting of one (and only one) chief, and one councillor for every one hundred members, up to 12 councillors, unless the Minister "declared" otherwise "for the good government of the band". Tenure was two years. The reserve could, by vote, have up to six ward-like "electoral sections." Meeting regulations were made. Councils had powers to make certain by-laws on the use of the reserve, subject to ministerial disallowance; some bands, with approval, could tax, budget

and spend. There was an escape hatch: bands could choose to select a chief and council "according to the custom of the band." With the resurgence in recent years among First Nations of pride in culture and language (*LawNow, Jan/Feb 2011*), custom selection has become more popular. Opt-in legislation, the *First Nations Elections Act*, came into force this April. It will allow First Nations that choose it considerably more scope, including four-year terms.

The term "Indian" has fallen into disuse in the last couple of decades, in favour of "First Nation," giving the *Indian Act* an even more archaic flavour. When the landmark recognition given "existing aboriginal and treaty rights" in the *Constitution Act, 1982* was drafted, "Indian" was the term of choice. By 1999, when 57 bands agreed to establish their own land codes and self-management regimes, the effecting statute was entitled the *First Nations Land Management Act*, and "First Nations" is now consistent in official usage. The trend is toward independence of management of their own affairs by First Nations, though the road is by no means smooth: witness the rejection by many chiefs of the 2014 education agreement worked out between the Assembly of First Nations and the government, leading to the resignation of the National Chief.

Driven by s. 15 of the *Charter*, the equality provision, the rule that women but not men lost Indian status by marrying a non-Indian was abolished in 1985. What came to be famously known as Bill C-31 retroactively restored thousands of women to the rolls. Whatever its limitations, the *Indian Act* is hardly that of 1876.

What is meant by the call for abolition of the Act? What would be the effect of simple repeal, with no replacement legislation – which is what seems to be glibly suggested by some calls for abolition? With the Act repealed, Indians would be in anarchic limbo. Repeal of the Act would not alter the *Constitution*: They would not simply become citizens of a province or territory, because they would still be "Indians" under s. 91(24) of the *Constitution Act. 1867*, a federal power – "Indians, and Lands reserved for the Indians" – so excluded from provincial jurisdiction in many respects, but without federal legislation. Similarly, with reserves abolished by repeal of the Act, the legal morass would employ platoons of lawyers and judges for decades.

As with most social issues, simple remedies do not exist. There is no call for repeal from First Nations or their organizations, which may account for the lack of political appetite for change, even with a plan. Whenever provincial assumption of some program is suggested, First Nation opposition is vehement; special federal status is not to be tampered with. Among the 29 policy topics on the Assembly of First Nations website, "Indian Act" is nowhere to be found. Themes of self-government, program funding, regional and local control of education, and recognition of Aboriginal and treaty rights dominate. The 1996 Royal Commission on Aboriginal Peoples rejected "tinkering with the *Indian Act*"; instead, "What we propose is fundamental, sweeping and perhaps disturbing – but also exciting, liberating, ripe with possibilities." Recommendations included recognition of an Aboriginal order of government, with an advisory Aboriginal parliament, but no "tinkering."

There is an almost 50-year history of nibbling at the edges. The publication in 1967 of the comprehensive *Hawthorn Report* on Indian economic, social, and educational needs led to a period of consultation on its recommendations. Pierre Trudeau's first government then came to power; a detailed plan for complete repeal of the Act replaced consultation. Trudeau saw the constitutional separation of Indians as a precedent for Quebec separation, and held that a state should not have treaties with its own people. In 1969, Minister of Indian Affairs Jean Chretien tabled a "Statement of the Government of Canada on Indian Policy" that would have not only repealed the *Indian Act* but eventually abolished Indian constitutional status: "Legislative and constitutional bases of discrimination must be removed." This document set out a detailed road map by which Indians would become indistinguishable from other Canadian citizens; "Indian" would effectively disappear from the legal lexicon. Education and health would become provincial responsibilities, though funds were promised to ease the way. Parliament should "take such legislative steps as may be necessary to enable Indians to control Indian lands and to acquire title to them." The bar to mortgage or sale is a handicap, and would be gone. Treaties would be "equitably ended." Land claims, on the other hand, "are so general and undefined it is not realistic to think of them as specific claims capable of remedy." Legal assimilation would be complete.

The Indian response was sharp. They were not just citizens; they were "Citizens Plus," the title (borrowed from *Hawthorn*) of what came to be known as the 1970 Red Paper. The "plus" was not to be lost. As citizens of Canada, Indian people had access to the same services as other Canadians, but they also had treaty rights and legislative privileges, including certain tax exemptions. "Only Aboriginals and Aboriginal organizations should be given the resources and responsibility to determine their own priorities and future development lines." Finally, "The Indian Act should be reviewed, but not repealed. It should only be reviewed when treaty rights issues are settled and if there is a consensus among Aboriginal peoples on such changes regarding their historical and legal rights."

The plan was abandoned. Following the Supreme Court split decision in *Calder* [9] in 1973, on whether the Aboriginal title to Nisga'a territory in B.C. had been extinguished, Trudeau accepted that land claims had merit and had to be dealt with. Thus began the modern era of First Nation – government relations. Broad consultation on revising the Act occupied the mid-70s without either First Nations consensus or government agreement. Consultation respecting lands and resources, and issues of title now dominate the landscape. On the legislative side, "sectoral" statutes with focused targets, such as the *First Nations Land Management Act*, occupy both Aboriginal and government policy makers.

Several broad legislative proposals since 1990 have been rejected as too limited. Only one – a private member's bill supported by government – has succeeded. The *Indian Act Amendment and Replacement Act* , initiated by Rob Clarke, MP for the huge majority-Aboriginal northern Saskatchewan riding of Desnethé—Missinippi—Churchill River, himself a member of the Muskeg Lake First Nation, became law December 16, 2014. Its preamble calls the *Indian Act* "an outdated colonial statute." Overdue changes were made, such as deleting the need for ministerial approval of by-laws and repealing religious and residential schooling references, but the bill was criticized by First Nations for being imposed with insufficient consultation.

The most notable provision requires the minister, "Within the first 10 sitting days of the House of Commons in every calendar year, [to] report to the House of Commons committee responsible for Aboriginal affairs on the work undertaken by his or her department in collaboration with First Nations and other interested parties to develop new legislation to replace the *Indian Act*." The minister's 2015 response in February noted, "there is no clear consensus on a way forward for large-scale, comprehensive change to the *Indian Act*." It reviewed modern land claim successes, and focused on legislative and self-government progress from 2006 on. For an annual report, review of the previous decade works only the first time; next year's will need some 2015 specifics to respond to the obligation to report on "work undertaken … to develop new legislation to replace the *Indian Act*." We shall see.

Wholesale change is not on the public policy agenda. Aboriginal Affairs minister Valcourt praised the Clarke bill for its "incremental" approach. Fundamental overhaul, though, has its advocates. In 2000, Tom Flanagan at the University of Calgary published the prize-winning but controversial *First Nations, Second Thoughts*, followed in 2010 by *Beyond the Indian Act: Restoring Aboriginal Property Rights* [13]. Flanagan argues, as did the 1969 White Paper, that property rights, meaning individual title to reserve property and the ability to alienate, are central to First Nations prosperity.

Gordon Gibson, assistant to Pierre Trudeau at the time of the White Paper and now a senior fellow at the Fraser Institute, has published *A New Look at Canadian Indian Policy: Respect the Collective – Promote the Individual*(2009). The White Paper described the constitutional identification of an ethnic group as discriminatory; Gibson calls it "racist." The reserve system, he writes, is "both a fortress and a prison," the escape from which is to promote the individual by "giving money to individuals, rather than chiefs, [an approach] ignored by governments."

A contrary view is that of John Ralston Saul, in *The Comeback: How Aboriginals Are Reclaiming Power and Influence*(2014). Canada's Aboriginal peoples, he argues, are a resurgent power due to the emergence of an educated middle class able to take advantage of constitutional rights and favourable court decisions. *Haida* in 2004, required consultation and, where necessary, accommodation in advance of resource development. Last year's declaration of Aboriginal title in *Tsilhqot'in*, with its exclusive right to decide how the land is used and the right to benefit from those uses, has transferred enormous power to at least some First Nations, especially in B.C. In 2005, *Mikisew Cree* extended the *Haida* doctrine to the treaty areas of other provinces. Saul points to the engagement of First Nations, often as full partners, in developments such as northern Ontario's Ring of Fire. All of this is a "comeback" because he sees First Nations reclaiming the place of leadership they had in shaping Canadian attitudes in the country's early history.

Gibson and Saul are hardly ideological soulmates, but both are correct that calls for a recast of the relationship of government with Aboriginal people are ignored, which may have been Den Tandt's point. Certainly it is easier for both governments and opposition to deal with issues as they arise than to take on sweeping change.

Medical Care and Children: Law, Ethics and Emotions Collide

Posted By: *Charles Davison*

While I imagine that being a judge is never easy, some situations and cases present more difficult decisions than others. And I imagine that the most troubling rulings a judge must make are those which may be expected to lead directly to the death of another person. While Canada does not have the death penalty – and thus, such decisions are not usually made in the realm of criminal law – judges are nonetheless sometimes call upon to address disputes having to do with the provision of medical care and the fatal results if that care is not given or continued.

In this article I want to address two situations where these very difficult issues arise. Both involve cases of children in need of medical care, where the court has the power to intervene and to make decisions for children when no other person is in a position to properly do so. The first scenario I will address is where medical treatment is necessary to keep the child alive, but is being declined, either by the parents or the child herself. The second is the reverse of the first: where doctors are of the opinion that further medical treatment is pointless and as a result, propose to end their efforts to prolong the life of a child who is by then in a permanent vegetative state.

Like any other decision a judge must make, these rulings are made by following principles and guidelines which have been established over centuries of legal development. The most fundamental of these is that of the “best interests of the child”.

A judge who is asked to decide something as important as medical treatment for a child must always make the decision, based upon what is shown to be in the best interests of the child, regardless of the impact upon, or feelings of, any other person. This is an area in which law, ethics and emotions collide. Applying legal principles dispassionately and objectively, and resolving issues where dire results will follow, must surely be one of the most trying challenges a judge will ever face.

Refusing Medical Treatment for a Child

Many disputes which come to court involve competing rights and values. This is certainly the situation when parents, usually for religious or cultural reasons, do not wish their children to undergo recommended necessary medical procedures. The most frequent scenarios seem to involve Jehovah's Witnesses who, in accordance with their religious beliefs and principles, do not wish a child to undergo a blood transfusion even though that procedure is necessary to keep the child alive.

In 1995, the Supreme Court of Canada made a ruling in a case where Jehovah's Witnesses parents opposed a blood transfusion for their newborn daughter (*B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC)). Doctors had tried to treat the baby (who was by then in the care of Ontario child welfare authorities) by means other than transfusing, but her condition had deteriorated. They were concerned that she might suffer heart failure, and a blood transfusion would then be urgently required to keep her alive. The parents argued that their "liberty" as enshrined in Section 7 of the *Canadian Charter of Rights and Freedoms* included the right to make decisions about the essential medical care to be given their daughter, and that their freedom of religion under Section 2 allowed them to do so in accordance with their fundamental religious beliefs.

The Supreme Court ruled against the parents and permitted the blood transfusion to take place. When it came to assessing the Section 7 liberty interests of the parents, the nine judges who heard the case could not agree. The majority held that while parents have extensive rights when it comes to making decisions for their children – including the right to make decisions about medical care to be provided – that liberty was properly curtailed by the power of the state, and the courts, to protect persons who are unable to make their own decisions and protect themselves. Section 7 of the *Charter* permits our liberty rights to be restricted so long as this is done "in accordance with the principles of fundamental justice." One of those principles allows the state to override the wishes of parents if this is done to protect the well-being of a child, after taking proper account of the parents' input and values, and after allowing them an opportunity to be heard. This group of judges decided that, although the order for treatment infringed upon the liberty of the parents, this was in accordance with the principles of fundamental justice and therefore, acceptable.

The Court also divided 5 to 4 when it came to considering the parents' freedom of religion. The five-member majority of the Court held that the freedom of religion of the parents included the right to raise their child in accordance with their beliefs and values. Allowing the state to perform a blood transfusion on the baby was therefore contrary to their freedom of religion under Section 2 of the *Charter*, but this was a limit upon their freedom which was justified and acceptable in a free and democratic society such as ours.

The other four members of the court held that a parent's freedom of religion does not include the right to impose those beliefs on a child where doing so might endanger her own safety, health or life. Because of her extremely young age, the baby in question had not yet adopted the religious views

of her parents, and was entitled to live long enough to make her own decisions about religion (including whether she was going to follow one at all).

A similar situation was considered by the Court approximately 14 years later, when, in 2009, it dealt with a case involving an older Manitoba girl also in need of a transfusion (*A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 (CanLII) [3]). She was almost 15 years old at the time, and had by then chosen to be a devout Jehovah's Witness. She and her parents rejected the suggestion of blood transfusions. Because the girl in question was under the age of 16 years, the trial judge ruled that transfusions should take place until she reached that age. The girl and her parents challenged the law on the basis that it infringed on their freedom of religion under Section 2 of the *Charter*; their liberty and "security of the person" rights under Section 7; and their equality rights under Section 15.

The Supreme Court dealt with the issues within the context of the "mature minor" doctrine. Contrary to more traditional principles which presumed an inability to make such important decisions for anyone under the age of majority, this doctrine recognizes that it is neither appropriate nor fair to treat all young persons the same. When it comes to decisions about medical treatment, the role of the courts must accommodate the views and input of young people as far as possible; the older, and more intelligent, informed and mature the young person, the greater the weight to be given her opinions and wishes as the court decides what is in her "best interests".

The majority of the Court held that the laws in question did not violate any of the rights of the young girl or her parents. Permitting her to provide evidence of her maturity and development so a judge could take those factors, and her wishes, into account in assessing what was in her best interests, preserved her liberty and security of person rights under Section 7; her right to the equal treatment, benefit and protection of the law under Section 15; and her freedom of religion under Section 2.

Ending Necessary Medical Care

If ordering medical treatment for a child or whose family does not wish it is difficult, making a decision to the reverse effect – ordering or permitting the withdrawal of life-prolonging care or procedures in the face of family wishes that they be continued – must be even more challenging. Yet that is a situation which judges must face, from time to time, in circumstances which are truly heart-breaking. Sometimes the medical reality is that further efforts are pointless: in some situations the condition of a patient is such that if kept alive they will be forever in a comatose state, and doctors therefore propose to withdraw or end their efforts – usually by removing the patient from the various machines which are by then performing the essential functions of the human body, including breathing itself.

This is not a situation the Supreme Court of Canada has yet seen fit to address in the context of child patient. However, some guiding principles have been developed by the lower courts. The courts in Alberta faced such a situation in 2012 when they were called upon to consider the case of an emaciated 2-year-old infant whose doctors were of the opinion that she had suffered "profound and irreversible

brain injury" and would never again regain consciousness (*Alberta (Child, Youth, and Family Enhancement Act, Director) v D.L.*, 2012 ABQB 562 (CanLII)).

The complicating factor in this case was that both her parents were charged with serious criminal offences as a result of the condition of their daughter. They were being held in custody at the time of the court proceedings and were refusing to accept the recommendations of the medical team that life-prolonging procedures be ended. Although the parents gave evidence that they were relying upon their religious beliefs in insisting that their daughter continue to receive treatment to keep her alive, they also stood to suffer a serious legal disadvantage if she were to die, because they would then likely be charged with either manslaughter or murder.

Child Welfare authorities in Edmonton asked the Provincial Court to make an order for the withdrawal of medical care based upon the opinions of the doctors, but that Court found that its own enabling legislation did not permit it to do so. Proceedings were then brought in the Court of Queen's Bench, which considered the issues of the parents' religious beliefs, and examined what other courts had decided in similar situations. In addition to other Canadian rulings, the judge noted the comments from a British House of Lords decision in 1993, when one of the Law Lords had observed that the issue in such situations is not whether it is in the best interests of the patient that he die, but rather, whether it is in his best interests that his life be prolonged by continuation of medical treatment. Because of the clear conflict of interest of the baby's parents – their own legal interest in keeping her alive, even where this meant she would almost certainly remain forever in a coma – the judge agreed their wishes should not be given much weight or influence in this case.

The judge considered carefully what was truly in the best interests of the child, and noted that recent court decisions addressing similar situations had come to reflect a general understanding in society that artificially supporting and continuing a life which would be lived unconscious, and entirely supported by machines, is usually not in the best interests of any patient, of any age. She observed that society now expects that before intrusive medical procedures be undertaken for someone who cannot make the necessary decisions for herself, there be at least a potential benefit for the patient. In this case, not only was the baby reliant on technology to continue to live, but she was expected to continue to suffer worse and worse medical situations which would mean her medical care would become ever more intrusive as the years went by. In this case, based upon the medical information from the doctors, the judge concluded that it was in the best interests of the little girl that the life-sustaining treatment be withdrawn, and that she be given only palliative care from that point forward.

Because of the urgency of the situation, an appeal brought by the baby's parents was heard by the Court of Appeal five days later. The higher court refused to intervene. The little girl died within hours of the Court's decision, when life-prolonging medical procedures were ended.

Contrary to some of the public criticisms sent their way from time to time, it is to be remembered that judges are human too, and carry with them the usual range of human emotion and feeling. I am confident no judge is "pleased" or "happy" to have to make a decision which will lead to the ending of

someone else's life, especially when that other person is an innocent child. But judges are the persons we have asked, in our society's structure and composition, to make such determinations when no other individual is able or willing to do so. In such situations, they must leave their own emotions and values at the door of the courtroom and make their decisions dispassionately, in accordance with the law which governs and applies in the circumstances of the matter before them. These, I imagine, are the days when it is most difficult to be a judge.

Essential Services and the Right to Strike

Posted By: *Matt Gordon*

On January 30, 2015, the Supreme Court of Canada decided *Saskatchewan Federation of Labour v Saskatchewan*("*SFL*"). In a 5-2 decision, the Court determined that the *Public Service Essential Services Act*("*PSESA*"), in restricting certain public sector workers' rights to strike, violated freedom of association rights under section 2(d) of the *Canadian Charter of Rights and Freedoms*("*Charter*"). Another piece of impugned legislation, the *Trade Union Amendment Act* ("*TUAA*"), which focuses on the union certification process and employer-employee communications, was found to be in accordance with the *Charter*.

The Supreme Court grappled with a central question that occupied most of the decision, both for the majority and dissent: does restriction on the right to strike violate s 2(d) of the *Charter*, and why? This past January, the majority of the Supreme Court came through with an emphatic decision that the workers' right to strike is a fundamental Canadian value. This is a tough decision because it engages two contrasting Canadian values: the necessity for Canadians to have essential services like police officers and firefighters available at a moment's notice, and the importance of employee voice in the workplace.

The extent of s 2(d) on labour relations has a tumultuous recent history, having been considered twice earlier by the Supreme Court since 2007. The Supreme Court's decision in *SFL* demonstrates the difficulty associated with the application of Canada's highest law to conditions of employment. There are still questions left unanswered which will likely be the impetus for upcoming litigation.

Background

SFL dates back to 2007, when Saskatchewan's provincial government passed these two statutes. Both came into force on May 14, 2008. The Saskatchewan Federation of Labour and other unions challenged the constitutionality of *PSESA* and *TUAA* on the basis that they interfered with their right to freedom of association under s 2(d) of the *Charter*. The right to collective bargaining rooted in good faith negotiation was confirmed in 2007 in the *BC Health Services* case. By the time *SFL* went to trial in 2012, the Supreme Court had decided *Ontario (Attorney General) v Fraser*("*Fraser*"). In *Fraser*, the Court clarified the rights accorded in *BC Health Services* through the determination that workers do not have

the right to a particular type of collective bargaining or substantive outcome but still have the right to a good faith bargaining process of some kind.

The Saskatchewan Court of Queen's Bench allowed the unions' action with respect to *PSESA* but not with respect to *TUAA* [6]. The Saskatchewan Court of Appeal, in a 3-0 decision [7], allowed the government's appeal but not the union's, declaring both *PSESA* and *TUAA* constitutional. At no point did any court consider *TUAA*'s certification process modification or newfound ability for employers to communicate "facts or opinions" to unionized workers to run afoul of freedom of association.

The SCC's Decision in *SFL*

Justice Abella, writing for the majority, identified four key areas in which *PSESA* was either vague, overbroad, or invalid procedurally:

- an unclear definition of "essential services", determined unilaterally by the government;
- an overly broad definition of "public employer", encapsulating any of the various Government of Saskatchewan agencies;
- no recourse for the Saskatchewan Labour Relations Board to review these definitions; and
- no explicitly stated alternative to the prohibited right to strike, such as a dispute resolution mechanism like arbitration.

She also delivered more philosophical reasons for the Court's ultimate decision to enshrine the right to strike in the *Charter*:

- It is consistent with an overarching trend in the courts leaning more toward workers' rights ever since *Reference Re Alberta Public Sector Employee Relations Act*("*Re PSERA*"), which *SFL* mostly overturned;
- It is consistent with moderation of the employer-employee imbalance in Canadian labour relations; and
- It is consistent with Canada's international obligations, as well as the laws and constitutions of like-minded industrialized countries worldwide.

The majority's arguments are best summarized in this one sentence: "The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. It seems to me to be the time to give this conclusion constitutional benediction."

The dissent, written by Justices Rothstein and Wagner, affirmed *Re PSERA* while putting *SFL* into a more procedural context. Their crucial points were that enshrining the right to strike in the *Charter*:

- ignores the Supreme Court's statement in *RWDSU v Pepsi-Cola Beverages Canada (West) Ltd* that courts should leave "delicate or political" labour relations questions to the legislatures;

- extends the wording of s 2(d) of the *Charter* far past its limited "freedom of association", especially in light of the absence of a codified right to strike in that section;
- departs from the *BC Health Services* and *Fraser* decisions insofar as adds striking to the collective bargaining process where it was not there before; and
- places too high a value on unclear international and irrelevant comparative law in shaping Canadian law.

These two intractably opposed positions are grounded in the constant struggle between employer and employee, judiciary and legislature, and precedent and evolving law.

Although *SFL* raises many questions in the areas of labour relations, constitutional and international law, as well as statutory interpretation and public policy, one of the labour relations questions looms large: Did the Supreme Court have to enshrine the right to strike in the *Charter* in order to acknowledge workers' rights in Canadian society?

Arguably, the majority could have simply created a "strike or explain" doctrine in which any statute removing the right to strike for essential services employees must comply with certain criteria already set out in the majority's decision. Rather than say that such a statute presumptively violates s 2(d) of the *Charter*, placing the burden entirely on the government, the Court could have set out that such a statute without a dispute resolution mechanism or labour board oversight violates s 2(d). *PSESA* still would have been struck down, accomplishing the result of the day, but the decision would not overtly question the constitutionality of other, more balanced essential services statutes. An example is Ontario's *Crown Employees Collective Bargaining Act, 1993*, which contains a limited right to strike, detailed essential services definitions and a labour relations board section, but is not used as a comparison by either the majority or the dissent in *SFL*. Put simply, rather than guarantee the presumptive right to strike, the majority could simply have guaranteed the availability of some form of dispute resolution. This is one of many possible alternate routes to upholding *Charter* values.

The majority's view, however, was that the right to strike holds a special place in labour relations. In reaching this conclusion, the Court cited *Mounted Police Association of Ontario v Canada (Attorney General)* [11] in discussing statutes that "disrupt the balance between employees and employer". To the majority in *SFL*, in summary, "The right to strike is essential to realizing these [*Charter*] values and objectives through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse." It is solely the removal of the ability to withdraw services that factors into their s 2(d) analysis.

What Now?

This past January, the majority of the Supreme Court came through with an emphatic decision that the workers' right to strike is a fundamental Canadian value. Beyond labelling *PSESA* an unclear statute that does not properly explain how it plans to honour *Charter* rights, the majority also discussed Canada's evolving domestic and international obligations. The dissent was wary of expanding a bedrock document

like the *Charter* past its original wording, and was also concerned with moving too much power from the legislatures to the judiciary. The swath of recent case law on the subject indicates that *SFL* may not be the last time the Supreme Court hears this sort of issue.

There will doubtless be future litigation over the meaning of *SFL* and any legislative exceptions to it. It may be dangerous to have, for example, healthcare workers engaging in large-scale strike activity, as was the case in Saskatchewan in 2001. The balance between essential services and the newly minted *Charter* right to strike presents more questions that can be answered in a single decision.

A Judge Balances Controversy with Compassion

Posted By: *Teresa Mitchell*

No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing it was wrong.

– *Criminal Code of Canada*, Section 16

This is known as the "Not Criminally Responsible" principle, or NCR. Deciding that an accused person is not criminally responsible is one of the most controversial and difficult decisions that a trial judge must make. Cases involving NCR often attract a great deal of media attention due to sensational fact situations, and the reasoning behind an NCR finding can be mystifying to the public. Examples include the Vincent Li case, where Mr. Li butchered a fellow traveller on a Greyhound bus, and the case of a Calgary wife who shot her well-known oilman husband. Another such case was heard in Nova Scotia in 2014 (*R. v. Race*, 2014 NSSC 6 (CanLII)) and the trial judge, Justice Kevin Coady, gave some insight into how a judge reaches this conclusion and his own sensitivity to the emotions and frustrations of the families involved.

Glen Race murdered two Halifax men, Paul Knott and Trevor Brewster in 2007. He pled guilty to both charges and then made an application to be found not criminally responsible (NCR) under s. 16 of the *Criminal Code.* Justice Coady of the Supreme Court of Nova Scotia reviewed the law and the legal requirements for a convicted person to be found not criminally responsible. He concluded that Mr. Race suffered from a mental disorder which made him incapable of knowing that his actions were wrong. Three psychiatrists, both for the Crown and the defence agreed that Mr. Race qualified for a finding of NCR.

An agreed Statement of Facts from the three doctors stated that he suffered from schizophrenia and that he believed that he was a vampire slayer and a godlike entity ordered by angels to cleanse the world of demons and sin. Justice Coady wrote: "After considering all of the evidence, I am satisfied that Mr. Race qualifies for an NCR defence…he suffered from a mental disorder on both occasions, that being schizophrenia. I am also satisfied that Mr. Race, as a result of his mental disorder, did not realize that

these actions were morally wrong. I am satisfied that he really believed that they were necessary to achieve his psychotic mission."

The reactions of the families of Mr. Race and the murdered men give some insight into how difficult NCR decisions can be. The victim impact statement from the sister of one victim said "I hate him for what he did to our families. We have to go to a graveyard and talk to a cold gravestone. It doesn't seem fair to me." Mr. Race's mother said: "We hope that the families, the Brewster and Knott families, will find forgiveness some day in their hearts, and they can go on and be peaceful." These two statements reveal the deep and painful divide between the two sides in cases such as these. It seems impossible that there could ever be any understanding or empathy between the families. Perhaps this is what motivated Justice Coady to make some interesting and compassionate observations in his written reasons.

First, he reached out to the families of the murdered men and said that in the context of a NCR finding:

> *I want to add to the bottom line in an effort to assist the victims' supporters, and the general public, to understand why NCR is the proper outcome for Mr. Race. It is important to realize that Mr. Race, his family and friends are victims as well. They are victims of the cruel and unforgiving illness of schizophrenia. Given that there is no cure and that Mr. Race's case is so severe, their victimization will continue for the rest of their lives. This in no way minimizes the pain and loss the Knott and Brewster families have, and will continue to experience. These homicides are different from most killings in that the perpetrator and the victim are victims.*

Justice Coady added:

> *It is important to note that an NCR finding is not an acquittal. Mr. Race will be held responsible for killing Paul Knott and Trevor Brewster. There will be consequences for those actions and those consequences will continue for the rest of his life. Instead of a jail cell Mr. Race will be detained in a secure hospital under the control of the state until such time as he is no longer a threat to public safety. He will remain in custody until the professionals are certain that he is no longer dangerous. The evidence of the experts in this hearing suggest that any kind of release is unlikely to happen soon.*

In his judgment, Justice Coady reached out to both families with sympathy and understanding. He also made it clear that he understood the concerns of the public. He explained why the NCR designation was appropriate in this case and reassured the community that public safety was of paramount concern. His remarks reveal the struggles that trial judges experience when addressing difficult cases

Almost always, judges decide NCR cases in the full glare of media attention, with sometimes harsh and inaccurate commentary. Families are anguished and heartbroken. They may react with anger and bitterness, and express frustration and contempt for the justice system. Politicians often weigh in, as has repeatedly happened in the Vincent Li case. Judges are not immune to the pressures that all this

brings to bear. However, in order to avoid an “eye for an eye” justice system and maintain the rule of law, we need to support and acknowledge judges such as Justice Kevin Coady and the tough decisions they must make.

Viewpoint 39-5: Hundreds of recommendations go unimplemented

Posted By: *Women's Legal Education and Action Fund*

Legal Strategy Coalition demands greater government commitment and accountability to ending violence against Indigenous women and girls

An alarming study released recently shows that governments in Canada have repeatedly ignored expert recommendations to stop violence against Indigenous women and girls.

Researchers with the Legal Strategy Coalition on Violence Against Indigenous Women reviewed 58 reports dealing with aspects of violence and discrimination against Indigenous women and girls, including government studies, reports by international human rights bodies, and published research of Indigenous women's organizations. The reports cover a period of two decades. Shockingly, researchers found that only a few of more than 700 recommendations in these reports have ever been fully implemented.

"How many Indigenous women and girls would have been found or would still be alive if governments had acted on more of these recommendations?" asked Grand Chief Stewart Phillip, President of the Union of BC Indian Chiefs. "This is yet another piece of irrefutable evidence that governments in Canada have breached their fundamental moral and legal responsibility to ensure the safety of all women, without discrimination."

The reports examined in this study include 40 listed by Federal Justice Minister Peter MacKay as evidence of why a national public inquiry into missing and murdered Indigenous women is not needed.

"The federal government has gotten it all wrong," said Cheryl Maloney, President of the Nova Scotia Native Women's Association. "The fact that governments have been sitting on these reports, leaving important, life-saving recommendations unimplemented, is exactly why we need the intervention of an independent commission of inquiry."

"A national inquiry is needed to examine why there has been so much resistance by successive governments to implementation of known and recommended measures to address the issue", noted LEAF Legal Director Kim Stanton.

Christa Big Canoe, the Legal Director of Aboriginal Legal Services of Toronto said, “A properly established inquiry, backed by a clear commitment by government to act on its findings, would provide the kind of accountability to the public that we so sorely lack.” She also stated, “Families of missing and murdered women need to have a hand in the creation of an inquiry process and most importantly in establishing the mandate of an inquiry to ensure that the voices of the survivors is heard throughout the whole process, from the beginning to the implementation of recommendations or findings.”

The coalition study found broad consensus among the reports that the root causes of the high levels of violence against Indigenous women and girls lie in a history of discrimination beginning with colonization and continuing through laws and policies such as the Indian Act and residential schools.

“This history laid the foundations for pervasive violence and created the risks Indigenous women face today,” says Sharon McIvor of the Canadian Feminist Alliance for International Action. “In this way, the reports directly refute the claim made by the federal government that this is a matter of individual crimes, not a ‘social phenomenon’.”

“Better policing and community safety measures are important, but they’re not the whole picture,” said Alex Neve, Amnesty International Canada. “We need to address the root causes that put Indigenous women and girls in harm’s way. Unfortunately, despite the analysis set out in all these reports, the federal government still maintains that historical facts and broad sociological patterns can be dismissed and ignored.”

Aimée Craft (Mikinaak Ikwe), Indigenous law professor and lawyer, Treaty One, said, “In Winnipeg, our young indigenous women and girls are still disappearing and being victimized. The information and recommendations that have been gathered to date have not prevented further harm against us. We need a commitment to act and an Inquiry process that will give voice to our social circumstances and the hope that we can live good and safe lives.”

Mary Teegee, Executive Director, Child and Family Services, Carrier Sekani Family Services said, “Our ultimate goal is to have in place the kind of comprehensive, well-informed and well-resourced national action plan that’s needed to stop the violence. But as this study makes clear, we’re not going to get there unless there’s some way to hold governments more accountable.”

The study was endorsed by the following individuals and organizations which are members of the Legal Strategy Coalition:

- Aboriginal Legal Services Toronto
- Amnesty International Canada
- Canadian Association of Elizabeth Fry Societies (CAEFS)
- Canadian Feminist Alliance for International Action (FAFIA)

- Carrier Sekani Family Services
- Law Office of Mary Eberts
- Constance MacIntosh, Director, Dalhousie Health Law Institute, Associate Professor, Schulich School of Law, Dalhousie University
- Nova Scotia Native Women's Association
- Kim Pate, Sallows Chair in Human Rights – Faculty of Law, University of Saskatchewan
- Union of British Columbia Indian Chiefs
- Women's Legal Education and Action Fund (LEAF)
- West Coast LEAF

The following links lead to PDFs from the website of the Women's Legal Education and Action Fund: An executive summary of the report is here.

The full report analysing the implementation of past recommendations is here.

A spreadsheet summarizing the previous reports is here.

A list of the recommendations contained in the previous reports is here.

This article was originally published as a News Release, February 26, 2015 from the Women's Legal Education and Action Fund, and is reprinted with permission.

Role of the Organization of American States in Canadian Human Rights: Part 2
Posted By: *Linda McKay-Panos*

This is a continuation of an earlier column about the *Report on Murdered and Missing Indigenous Women in British Columbia, Canada* which was issued in December 2014 by the Inter-American Commission on Human Rights (*"IACHR*") of the Organization of American States.

The Report concludes with a series of recommendations to Canada [emphasis added]:

> 304. The IACHR makes the following recommendations, based on its close analysis of the situation of missing and murdered indigenous women in British Columbia. The IACHR notes the willingness and openness of the Canadian State, at both the federal and provincial levels, to discuss the situation, its causes, and how it can be further addressed. The IACHR also recognizes the steps already taken by the Canadian State, at both the federal and provincial levels, to address some of the particular problems and challenges that indigenous women and girls in Canada, and British Columbia specifically, must confront, a number of which have been identified in this report.
>
> 305. The disappearances and murders of indigenous women in Canada are part of a broader pattern of violence and discrimination against indigenous women in Canada. The fact that indigenous women in Canada experience institutional and structural inequalities resulting from entrenched historical discrimination and inequality is acknowledged by the Government of Canada and by civil society organizations. There is also agreement on certain root causes of the high levels of violence against indigenous women and the existing vulnerabilities that make indigenous women more susceptible to violence.
>
> 306. Addressing violence against women is not sufficient unless the underlying factors of discrimination that originate and exacerbate the violence are also comprehensively addressed. The IACHR stresses the importance of applying a comprehensive holistic approach to violence against indigenous women. This means addressing the past and present institutional and structural inequalities confronted by indigenous women in Canada. This includes the dispossession of indigenous lands, as well as historical laws and policies that negatively affected indigenous people, the consequences of which continue to prevent their full enjoyment of their civil, political, economic, social and cultural rights. This in turn entails addressing the persistence of longstanding social and economic marginalization through effective measures to combat

poverty, improve education and employment, guarantee adequate housing and address the disproportionate application of criminal law against indigenous people. These measures must incorporate the provision of information and assistance to ensure that indigenous women have effective access to legal remedies in relation to custody matters. Specifically regarding Prince George, the IACHR urges the Canadian State to immediately provide a safe public transport option along Highway 16.

307. The IACHR recognizes the existence of a wide variety of initiatives to address the situation of violence against indigenous women in Canada. **However, based on the information received and analyzed, the IACHR strongly urges the need for better coordination among the different levels and sectors of government. The IACHR stresses that both federal and provincial governments are responsible for the legal status and conditions of indigenous women and girls and their communities.**

308. Initiatives, programs and policies related to indigenous women should be tailored to their needs and concerns, including whether they are living on reserve or off reserve. Their consultation is crucial for the success of any initiative, especially given the context of historical and structural discrimination. In this regard, Canada should adopt measures to promote the active participation of indigenous women in the design and implementation of initiatives, programs and policies at all levels of government that are directed to indigenous women, as well as those that pertain to indigenous peoples more broadly. The selection of indigenous women to participate in these initiatives should be made in consultation with recognized associations of indigenous peoples and of indigenous women and their leadership.

309. **The IACHR strongly supports the creation of a national-level action plan or a nation-wide inquiry into the issue of missing and murdered indigenous women and girls, in order to better understand and address the problem through integral approaches**. The IACHR considers that there is much more to understand and to acknowledge in relation to the missing and murdered indigenous women. This initiative must be organized in consultation with indigenous peoples, particularly indigenous women, at all stages from conception, to establishing terms of reference, implementation and evaluation.

310. **The IACHR recommends the development of data collection systems that collect accurate statistics on missing and murdered indigenous women, by consistently capturing the race of the victim or missing person.** Capturing accurate data is the basis for moving forward in any initiative.

311. **The IACHR recommends that the State implement a policy aimed at ensuring an appropriate response when a report of a missing person, in particular an indigenous women, is filed.**

312. The IACHR considers that full compliance with the already established recommendations of the Oppal report is necessary and will bring about important advances. Drawing from those recommendations, the IACHR stresses the importance of appointing a new Chair of the Advisory Committee on the Safety and Security of Vulnerable Women as soon as possible. Canada should ensure that the different policing services in BC understand their jurisdiction and responsibilities when conflicts of policing jurisdiction arise. **Canada should also establish or strengthen accountability mechanisms – preferably through independent bodies – for officials handling investigations and prosecutions, and should provide access to legal aid and support services to the families of missing or murdered indigenous women, with the families being able to freely choose their own representative.**

313. **The IACHR also recommends that police officers, including both RCMP and Vancouver Police, and public sector functionaries, such as prosecutors, judges and court personnel, receive mandatory and ongoing training in the causes and consequences of gender-based violence in general and violence against indigenous women in particular.** This includes training on the police duty to protect indigenous women from violence.

314. Regarding the ongoing investigations of missing and murdered women, the IACHR stresses the importance of the principle of due diligence. In this regard, the State should:

- Give special judicial protection and guarantees to family members and relatives, especially by improving mechanisms to ensure that such parties have access to information about the development of the investigation and about their rights in any legal proceedings. Effective access by indigenous people to such protection is especially important given the context of historical and structural discrimination.

- Guarantee that family members or other affected parties of missing and murdered indigenous women can obtain legal aid that is effective and with which these parties feel comfortable, again taking into account the context of discrimination and marginalization.

- Ensure adequate oversight of officials responsible for responding to and investigating crimes of violence against women, and ensure that administrative, disciplinary or criminal measures are available to hold such officials accountable.

- Provide indigenous women and their relatives who are seeking assistance from officials with an available and effective procedure to file complaints in the case of noncompliance by such officials with their duties under the law, and information on how to initiate and pursue that procedure.

- Provide integral social and support services to all family members of missing and murdered indigenous women, as well as to indigenous women who want to remove themselves from an abusive situation.

- Further develop the steps taken to provide reparations to families of missing and murdered indigenous women in cases where the State has failed to exercise due diligence.

315. In light of the State's commitment to improve the rights and circumstances of indigenous women, the IACHR hopes that the conclusions and recommendations offered in this report may assist the State in putting its commitment into practice.

The Report includes an extensive section with Canada's response to the concerns raised by the IACHR (Chapter 5). While there has been some reluctance in Canada to launch an inquiry into the situation, perhaps the Report's international focus on the issue of missing and murdered indigenous women will provide a fresh impetus for effective government responses. The IACHR has provided an extremely useful compilation of data that addresses the issues and responses. Canada should be grateful for the extensive work performed by the OAS.

When Prosecution Met Defence: The Michael Bryant Case

Posted By: *J. Mark Smith*

Facts of the Case

At 9:47 p.m. on Aug. 31, 2009, former Ontario attorney general and CEO of Invest Toronto Michael Bryant, driving home after dinner with his wife, had a violent encounter with a younger man on a bicycle, Darcy "Allan" Sheppard. Sheppard was drunk, and at a traffic light on Bloor St. W. pulled his bicycle to a stop in front of Bryant's Saab convertible. The ex-politician, for reasons that have never been satisfactorily established, drove into the cyclist. The force knocked Sheppard back onto the hood and dragged his bicycle some distance beneath the Saab. Sheppard rolled off, stood up, ran around the car and jumped onto the driver's side, holding onto the window frame (or possibly the driver's seat headrest). Bryant reversed, drove around the downed bicycle, and accelerated down Bloor into the oncoming lane, which was free of traffic. After a few seconds, Sheppard was thrown from the car. The left side of his torso was torn open, probably by a fire hydrant; but he died, according to the coroner, from the blunt impact trauma of his head hitting the road or sidewalk. Bryant drove to the Hyatt hotel a few blocks along Bloor, where he spoke with a doorman and (three minutes after arriving) phoned 911. The Toronto police charged Bryant with criminal negligence causing death and dangerous driving causing death. He spent the night in jail.

Bryant appeared the next day for a press conference in a crisp suit, hired the public relations firm Navigator, and retained top criminal lawyer Marie Henein as his defence attorney.

It emerged that Sheppard, who was Métis, had been a ward of the child welfare system in Alberta. He worked as a bicycle courier in Toronto. He had a lengthy criminal record in both Alberta and Ontario, mostly for petty and substance abuse-related offences.

The Ontario attorney general's office, in order to avoid the appearance of bias, appointed a prominent B.C. defence lawyer, Richard Peck, to serve as Special Prosecutor in the case.

The Dropping of Charges and the Special Prosecutor's Public Statement

On May 25, 2010, the Special Prosecutor, concluding there was no reasonable likelihood of conviction, dropped the charges against Bryant. (A scanned copy of the proceedings can be found at The Darcy Sheppard Files a site maintained by the victim's father.)

The procedure was unusual in that the announcement of the dropping of charges against Bryant was accompanied by a lengthy public account of the Crown's reasons (including analysis of evidence) for doing so, even though those reasons and that evidence had never been tested by a trial. Also surprising was the effect that the submission by the defence of pre-trial "Scopelliti" evidence had upon to the prosecution's case.

A Successful Pre-Trial "Scopelliti" defence

In Canada, the name "Scopelliti" attaches to the tactic by which a deceased victim's character is impugned in order to strengthen the claim that the accused killed him in self-defence. In 1979, Antonio Scopelliti, an Italian immigrant who spoke almost no English, shot and killed two unarmed 17-year-old boys he believed were attempting to rob his Orillia, Ontario convenience store and gas bar. There were no witnesses and no video camera evidence. Scopelliti claimed self-defence, and his lawyer – Edward Greenspan – bolstered that claim by producing evidence of what he said was a pattern of prior aggressive and threatening behaviour by the two teenagers. The judge presiding over the Scopelliti trial ruled that evidence to be admissible.

Bryant's defence team, after intensive detective work around Toronto, gathered affidavits from six motorists who claimed that they had been harassed by Darcy Sheppard in previous months and years. They also produced two compelling photos: one of a shirtless man who looked very much like Sheppard angrily confronting a motorist in a BMW; the second of the same man perched on the running board of the same vehicle, hanging from the side window. In the court proceedings, Special Prosecutor Peck declared that he, himself, found the "probative force" of these exhibits undeniable. But the relevance of those exhibits was never ruled upon by a judge. Nor had the circumstances in which they were gathered been tested in a trial.

Greenspan, reflecting on his precedent-setting case in a 1987 autobiography, made this comment: "The victim may not always be the party that is the most grievously hurt. Guilt or innocence do not depend on the severity of injuries and cannot be determined by medical reports alone. We cannot judge solely by the *outcome* of an incident who is to blame for it, or who is to blame for it more. Nor can we decide it on the basis of who complained first, who started crying "Thief!" or "Rape!", or who has been charged by the police. If we could, we wouldn't need courts and judges. These questions can only be answered by a judicial process in which all relevant evidence is placed before the triers of fact, according to law."

Light Thrown on the Case by FOI Release of Police Investigation Materials

Soon after the Crown dropped its charges against Bryant, Darcy Sheppard's adoptive father filed a freedom of information request with the Toronto Police. Among the documents the police sent to Allan, Sr. in late 2012 was a collision reconstruction report. Its lead author was Detective Constable J. Vance; more than fifty other officers contributed to it. That report concludes: "Mr. Bryant and Mr. Sheppard *shared responsibility* in the death of Mr. Sheppard" [italics added]. It notes that [in the first two sequences of the accident] Bryant "struck Mr. Sheppard not once, but twice from a stopped position. Mr. Bryant's final actions in the third collision sequence [the one that culminated in Sheppard striking a fire hydrant and his being thrown a further 25 feet or so along Bloor St. West] led to the death of Mr. Sheppard. Mr. Bryant's failure to stop the Saab when Mr. Sheppard deliberately hung on to the side of the Saab, and driving [*sic*] his vehicle on the opposite side of the road in an attempt to dislodge Mr. Sheppard from the vehicle gave the appearance of a deliberate act according to witnesses." Vance's conclusion, anticipating Bryant's claim that he had acted in self-defence, adds "[t]here was no physical evidence, or independent witness statements suggesting Mr. Sheppard affected the steering of the Saab, or anything to suggest he physically attacked Mr. Bryant." Vance goes on, "Mr. Sheppard also is responsible for his actions that led up to the *concluding* incident [italics added]. All of these actions were unfortunate and avoidable." (See The Darcy Sheppard Files) The court proceedings of May 25, 2010 made no mention of the existence of this report.

Further Light Thrown On the Case Since 2010

In 2012, Bryant published a memoir, *28 Seconds: A True Story of Addiction, Tragedy and Hope*. It revealed the author's hidden alcoholism during the years he served as a provincial cabinet minister. (Bryant claimed he had been sober for some time before the fatal incident.)

It also disclosed a more legally relevant detail: the statements made by Bryant and his wife concerning the night of Aug. 31, 2009 were not officially recorded until seven months after Darcy Sheppard's death. They were set down in a "no-prejudice" setting.

The interviews took place (separately) in early April, 2010, and only after Henein's team had shown the prosecution their entire Scopelliti file. The interviews, with defence lawyers present, were conducted under "without prejudice" conditions by Mark Sandler, the Toronto lawyer who was counsel for the Crown. Surely, much was at stake for Bryant in Henein's first approach to the Special Prosecutor. Nevertheless, by early April both the defence and the prosecution had agreed that the account Bryant and his wife gave to Sandler could not be used against Bryant in a trial. (That is the legal meaning of a "without prejudice" interview.)

Possibly because *28 Seconds* did no favours to Bryant's public credibility, Marie Henein's essay "Split-Seconds Matter" reiterates in broad brush the argument she made in 2010. She recalls an "overwhelming" pressure in 2009-10 "to get the right result" [i.e. to win the case]: "The truth is that

Michael Bryant was well-loved by the legal community. Many identified with him, many knew him personally, and many were utterly grief-stricken over his situation."

Notes:

1. Edward Greenspan and George Jonas. Greenspan: The Case for the Defence. Toronto: MacMillan, 1987. 326

2. Marie Henein. "Split-Seconds Matter." *Tough Crimes: True Cases by Top Canadian Lawyers*. Eds. C. D. Evans and Lorene Shyba. Calgary: Durance Vile Publications, 2014.

Quitting and Giving Notice: What Employees Need to Know

Posted By: *Peter Bowal*

Introduction

Since employees like to be in control of their lives, they think they can quit an employer any time it suits them. But woe to the employer who feels the same way about terminating employees. Somehow employees think employers cannot freely dismiss employees but employees can dismiss employers as they choose.

As it turns out, there is more legal mutuality in the relationship than employees would like. They also have to be careful about quitting employers. Usually, employers can and will think 'good riddance' to disloyal workers and find replacement ones rather quickly. They rarely pursue employees who quit them. But this is changing.

This article considers what obligations the employee has to the employer when he or she quits. Does an employee need to provide notice? If so, how much notice must the employee provide to avoid liability for breach of the employment contract?

The Basics of Quitting

Employment law is found in legislation and the common law.

Labour Relations Codes

Labour relations legislation sets out the framework for unions and management to negotiate a collective agreement which governs the working relationship between employees and employer. Quitting the relationship by employer or employee is often regulated in the collective agreement, which is enforceable by grievance and ultimately arbitration.

Employment Standards Codes

The approximately two-thirds of employees who are *not* part of a labour union enjoy an array of minimum employment protections, as well as a few legal duties, in employment standards legislation.

Alberta's *Employment Standards Code*, RSA 2000, c E-9 [2], (Part 2, Division 8) is typical. It covers the subject of termination of employment by both employee (quitting or resignation) and by the employer (dismissal).

Section 58 states that to terminate employment an employee must give the employer a *written* notice of termination of *at least* one week if the employee has been employed between three months to two years, or *at least* two weeks if the employee has been employed for longer than two years. This short written notice of quitting is not onerous for most employees, yet many still quit on shorter notice, including no notice when they choose to never return to work.

Even then, section 58 notice is not required if:

- there is an established practice in the industry to give less quitting notice;
- the employee is quitting for personal health or safety reasons;
- the job has become impossible for the employee to perform due to causes beyond the employee's control;
- the employee is temporarily laid off or does not have work due to a strike or lockout at the job site; or
- the employee is quitting due to the employer's denial of his or her legal minimum rights.
- For probationary employees working their first three months, no quitting notice is legally required.

It is natural for an employer to resent a quitting employee. The employer may think 'well, if you are going to quit anyway, why not just go now?' Firing workers who are quitting is how vindictive employers demonstrate their ultimate power over employees.

The legislation also addresses that scenario. Section 59 says once an employee gives proper minimum notice and the employer wants to dismiss that employee sooner, the employer must still pay the employee salary to the end of the employee's notice period. To discourage employers' retaliation in this way, if the employee gave longer than minimum notice, and the employer asks her to leave before then, the employee is entitled to the much longer notice (or damages in lieu) that the employer would have needed to furnish in order to dismiss that employee.

Another way for employers to retaliate against quitting employees is to reduce their wages or hours (or any other term) after the quitting notice has been received. Section 61 also prohibits this. The employer, however, can still give full termination pay or terminate for a legitimate reason. A written quitting notice has no effect if somehow the quitting employee continues to work for the same employer after the stipulated quitting date.

Common Law

It is very important to remember that these statutory notice periods are the legal *minimum*. Occasionally, employer and employee may have contracted to be bound by this minimum legal notice, but most often they will not have made any such agreement. In many circumstances, employees will be expected to provide the employer with more notice of quitting. This is called *reasonable notice*.

A fundamental principle of contract interpretation is that if there is no endpoint to the contract, it may be brought to an end by either party giving reasonable notice to the other party of that intention. The courts have held that quitting employees generally need to give less notice to employers than employers need in order to dismiss employees.

In most cases, an employee's reasonable notice of quitting will be longer than the minimum statutory notice set out in section 58. The difficulty now lies in prescribing how much quitting notice should be, because that depends on several factors.

Today workers in highly complex jobs are more indispensable; harder to replace. How much time would an employer need to find a suitable replacement employee? This is the standard of what reasonable notice ought to be given. It includes:

- the nature of the work;
- the experience and seniority of the worker;
- availability of replacements; and
- the time it takes to train new employees to a satisfactory level.

In the 1992 case of *Tree Savers International Ltd. v. Savoy,* 1992 CanLII 2828 (AB CA), although the employee had provided the two-week minimum period of notice, the Alberta Court of Appeal found that 18 months (or $146,200 in lieu) was appropriate reasonable notice.

In *Bradley v. Carleton Electric Ltd.,*1998 CanLII 7140 the Ontario Court of Appeal determined three months of quitting notice should have been rendered by a key employee who resigned after 18 months on the job. Perhaps the most famous case is *GasTOPS Ltd. v. Forsyth,* 2012 ONCA 134. Four employees were ordered to pay nearly $20 million in damages to the employer for breaching fiduciary duty, soliciting existing employees and business from the employer, and quitting without reasonable notice, which was determined to be 10 to 12 months.

Conclusion

Employers have historically been reluctant to pursue former employees who leave them in a lurch without adequate notice. That is changing as they invest significantly in selection and training and much work is highly specialized. Statutory minimum quitting notice triggers protection for the departing employee. Employees should also consider the employer's interests, as well as their own reputation,

when departing. As far as possible in the circumstances, they should supply generous and reasonable quitting notice.

Resources for Termination of Employment

Posted By: *Marilyn Doyle*

The Edmonton Journal recently reported layoff notices way up in 2015: “Between Jan. 1 and Feb. 10, 18 Alberta employers disclosed plans to terminate a total of 4,544 workers.” Further, “Statistics Canada figures show the province gained 13,700 jobs in January, but lost 1,000 in the natural resources sector (it includes oil and gas, mining and forestry) and another 3,700 in the “professional, scientific and technical” jobs category, which includes geologists and engineers working in the energy sector.

If you are laid off, your first question may be whether you were given appropriate notice or termination pay. If you belong to a union, the collective agreement will spell out the requirements as well as a grievance process. Otherwise, you will want to determine whether Alberta’s employment standards apply to you. The Government of Alberta provides a fact sheet on Termination of Employment and Temporary Layoff that outlines the rules. If you residing elsewhere in Canada, you can find the contact information for your employment standards department on this webpage: Labour standards in Canada.

The Government of Canada has pulled together a full set of resources to address the concerns that arise when you have lost your job. From this page you can access resources to:

- See if you qualify for Employment Insurance (temporary financial assistance to unemployed Canadians who have lost their job)
- Use a checklist about things to do if you lose your job to help you cope financially through these difficult times.
- Check out tools to help you find a job, create a résumé, choose a career, and assess your skills.
- Explore education and training opportunities, public and private sector job opportunities and hiring programs.
- Learn more about education, training, financial assistance and the skills needed to find and keep a job.

If you are carrying significant debt, a job loss can leave you wondering how to manage your payments. Money Mentors provides services across Alberta, while the Credit Counselling Society has locations in BC, Alberta, Saskatchewan, Manitoba & Ontario and toll-free phone service to the Yukon, Northwest Territories & Nunavut. These organizations can provide credit counselling, orderly repayment

of debts program, and education and tools for managing your money. They have phone, in-person and online chat services; their websites include a variety of tip sheets and tools such as financial calculators

Finally, as you go through this transition it can be challenging to stay positive and motivated. Many people find inspiration in Ted Talks. Here are four that may fit the bill:

- What happens when you lose everything (David Hoffmann)
- A kinder, gentler philosophy of success (Alain de Botton)
- How to find and do work you love (Scott Dinsmore)
- Measuring what makes Life Worthwhile (Chip Conley)

And for some specific tips for moving forward, check out this blog post: Reinvent Yourself – 37 Ways to Stay Marketable.

Whatever Happened To…U.S. v. Burns: Extradition and the Death Penalty

Posted By: *Peter Bowal*

The Death Penalty Around the World

About 140 countries have permanently abolished the death penalty. Some 50 countries have it on the books but don't use it; 36 countries continue to use the death penalty, and 22 of these carried out executions in 2013.

Japan and the United States are the only two industrial democracies that use the death penalty. Notably, in the United States, the death penalty for serious felonies was introduced as part of English law that continued after independence. In 1972 the U.S. Supreme Court struck it down as unconstitutional, but it was reinstated in 1976 which, coincidentally, was the same year it was abolished in Canada. Today, the death penalty continues in 34 states, in federal criminal law and in military law in the United States for aggravated murders committed by sane adults.

The 1930s saw the most executions at almost 170 per year. Since 1976, there have been 1394 executions, of which only 15 were women. In 2013, there were 39 executions in the U.S. and 3035 people remain on death row today. Over 98% of executions and death row inmates are male.

Extradition

Due to the relative ease of crossing the border, occasionally persons who commit death penalty crimes in the U.S. will flee to Canada and, once captured there, will resist extradition to the United States. In 1991, the Supreme Court of Canada in the *Charles Ng* case decided that extradition from Canada would be allowed in cases where the death penalty was a possibility. Was this about to change?

In *United States v. Burns* [2001] 1 SCR 283, two 18- year- old men were accused of brutally murdering three family members of one of them. The murders happened in the state of Washington, and both accused quickly fled to British Columbia.

Facts

Atif Rafay and Sebastian Burns were friends and classmates who attended West Vancouver High School together. When Rafay's family relocated to Bellevue, Washington midway through his Grade 12 year for his father's work at an engineering firm, he decided to finish high school in Vancouver.

On July 7th, 1994 Rafay and Burns travelled by bus from Vancouver to Bellevue to visit Rafay's family. Six days later at around 2 a.m. Burns made a 911 call from the Rafay home reporting the deaths of Rafay's family. The parents had been beaten to death. His disabled sister also died later that night.

Both stood outside the home and did not help the sister who was then still alive. They did not seem interested in knowing whether any family members might be alive. Their demeanor that evening was nonchalant.

Large amounts of blood were found in the shower enclosure; an effort had been made to wash this blood away. Virtually all hairs in the shower were Caucasian, inconsistent with any of the victims, and matching Burns.

Before they could be arrested, Rafay and Burns, both Canadian citizens, bolted to Vancouver and started spending Rafay's inherited money. The family estate was valued at a half million dollars and life insurance pushed that higher.

The teens confessed to RCMP in B.C. through an elaborate "Mr. Big" sting. Burns bragged about stripping down to his underwear in order to wash off the blood before doing the baseball bat bludgeoning. The violent force spattered blood on all four walls and the ceiling. The parents were beaten to death in their bedroom. Asked why he wanted his own family dead, Rafay said, "I felt it was a necessary sacrifice… to achieve what I wanted in this life." The Crown believed they killed for the money. Burns participated in exchange for a share of the money.

With the Rafay and Burns confessions in hand, proceedings to extradite them to face trial in Washington began. This took six years (including two years and two re-hearings at the Supreme Court of Canada) to change the Canadian law of extradition for criminals facing the death penalty in the United States.

Extradition Treaty Subject to the *Charter of Rights*

Under a treaty between Canada and the United States, the federal Minister of Justice in Canada can approve extraditions. The Minister *may* seek assurances the fugitives would not get the death penalty if convicted in the U.S. The Minister of Justice did *not* seek such assurances for Rafay and Burns. Plans were made to extradite the pair.

The lawyer for Rafay and Burns challenged the Minister's decision by arguing their *Charter* rights were violated.

Supreme Court Decision

Section 7 of the *Charter* guarantees that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." A unanimous Supreme Court of Canada concluded extradition into a jurisdiction with capital punishment violates the principles of fundamental justice in a way that shocks the conscience. It ruled that "The Minister is constitutionally bound to ask for and obtain an assurance that the death penalty will not be imposed as a condition of extradition."

The Court considered the youth of the accused and the "death row phenomenon" of how convicts suffer psychological harm while on death row for decades as mitigating circumstances, as well as development of international law favouring abolition of the death penalty. The Court left room for "exceptional cases" where assurances do not need to be sought, but did not elaborate.

The Court's decision was that extradition of fugitives in Canada to a jurisdiction that might impose the death penalty is prohibited by section 7 of the Canadian *Charter of Rights*. If one is extradited to an American state to be prosecuted, that state must first assure Canada that the accused will not be executed.

Where are they now?

Within a month of the Supreme Court's decision, Rafay and Burns were extradited to Washington. The Prosecutor in charge of the case promised that he would not seek the death penalty for the two accused, and on that basis, the Canadian Justice Minister signed the papers for their extradition. Their trial did not start for three more years. Almost a decade after the crime, both were convicted of three counts of aggravated murder and sentenced to three consecutive life sentences with no possibility of parole. They are housed with other violent long-term offenders in the Washington State Penitentiary in Walla Walla.

In July 2014, the Supreme Court reconsidered the constitutionality of Mr. Big stings, and limited the admissibility of some confessions obtained from them, especially in the case of very young or vulnerable suspects. Being two of the youngest people ever targeted in such an undercover operation, Rafay and Burns have filed an appeal on this basis. Now 39 years old, each also has responded differently to incarceration.

Rafay

Atif Rafay

He advocates for prison educational programs and has published an essay, "On the Margins of Freedom" in which he discusses the decline of his life behind bars in *The Walrus*, a Canadian journal.

Burns

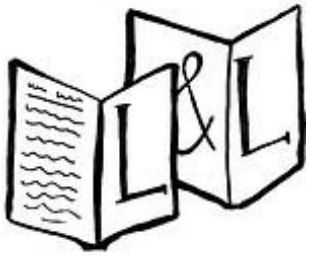
Sebastian Burns

Burns carried out the killings and was the first to be induced into the "Mr. Big" sting. He has struggled in jail where he allegedly has been involved in several infractions. He has been assaulted by inmates and has been penalized for fighting and stealing. He has suffered from an eating disorder and underlying mental-health problems. He has refused to eat, has been force-fed, has been restrained and spends much of his time in solitary confinement.

Photos are from the Fifth Estate, Mr. big Stings: Cops, Criminals and Confession, Jan. 16, 2015. cbc.ca

Vaclav Havel and the Meaning of Tragedy in Politics and Law

Posted By: *Rob Normey*



Vaclav Havel, who died in Prague shortly before Christmas in 2011, was a great dissident hero and champion of civil liberties who played a vital role in opposing the Communist regime in Czechoslovakia. He became a powerful rallying voice in the peaceful overthrow of the totalitarian political system that had for so long seemed indomitable and impervious to change. This remarkable period has gone down in history as the Velvet Revolution of 1989. Up to that point, Havel was first and foremost a playwright. His works had gone underground following the brutal suppression of the Prague Spring, in 1968, when Soviet tanks rolled into Prague to put an end to all thoughts of creating "socialism with a human face". The initial phase of the Velvet Revolution culminated with the breathtaking turnaround whereby Havel, the dissident who had been harassed and often imprisoned by the state, was elected the first post-Communist President. He would go on, improbably, to an important second career as a four-time President and a moral beacon who aspired to a new form of democratic politics that was based on principles of inclusion, tolerance, and full respect for the fundamental rights of all citizens.

Given Havel's many achievements, including his highly regarded essays on politics and moral conduct, his published speeches and the high standing he obtained in the world , it is quite difficult for we who admire him so greatly to consider his political career to have ended in failure. But one of his biographers, John Keane, in **Vaclav Havel: A Political Tragedy in Six Acts** (2000) clearly views his later career to have involved squandered opportunities and concludes that his political vision was not realized. In homage to Havel's marvellous skills as a dramatist, Keane, a well-known Australian political scientist, has tried his hand at a biography written at least in part as a drama – the drama of Havel's life against the backdrop of the enormous changes that convulsed Czechoslovakia throughout the twentieth century. Hence, some of the tragedy is really the tragedy of his nation: the Nazi invasion and domination during WWII: the Soviet "liberation" followed by a Communist electoral victory and then liquidation of the democratic order; the Dubcek reforms and the savage suppression of all attempts to liberalize the political order.

The last quarter of the biography makes the argument that Havel's time as President, after a return to democracy and a free and open society, can also be viewed in many ways as tragic. In this view, the idealism and rhetoric calling for a true participatory democracy can be shown to have failed to lead to tangible benefits and, indeed, has had serious unintended consequences.

Those of us who continue to hope for a progressive politics, committed to a ringing affirmation of fundamental rights and freedoms, will be disposed to think well of the diminutive playwright who helped slay the Communist giants. Havel first came to the attention of the West with his absurdist plays such as **The Garden Party** and **The Memorandum**. The latter won a drama award for best foreign play from the New York Theatre Critics in 1968. **The Memorandum** takes place in an office where bureaucratic excess is clearly the preferred way of doing things. The main character, Managing Director Gross, stares at an office memorandum written in a new language that he can't possibly grasp. He feverishly endeavours to learn how to understand the papers now written in "Ptydepe" but repeatedly fails to succeed in having them translated. In a classic Catch-22 situation, this can only happen if he makes the request using Pytdepe. The many contradictions and ambiguities that pile up in this absurdist drama help create a dark but scarily hilarious satire of Communist bureaucracy to be sure, but also of power trips in various political organizations and office environments where complete organizational control is attempted. A dazzling production was put on here in Edmonton last year by the Studio Theatre at the University of Alberta, which revelled in the zany plot and was truly relished by those of us who have worked as civil servants and shaken our heads at bafflegab masquerading as communication.

Keane provides us with a striking description of Havel's unique response to the severe repression of the Communist regime in the years after Prime Minister Dubcek was deposed. Havel conceived of a number of inventive but also truly courageous ways of protesting against the loss of civil liberties, including writing open letters to Dubcek and then to the new Communist Party President. Havel gathered with a small number of dissident thinkers to form Charter 77. This happened a short time after a theatrical troupe had surreptitiously organized a performance of Havel's politically charged adaptation of John Gay's **The Three penny Opera**. Once word of the performance got through to the authorities it was only a matter of time before Havel would be arrested and subjected to surveillance and intimidation tactics.

On January 7, 1977, the very day that Havel was re-arrested for a second round of questioning over his subversive activities, the people of Czechoslovakia and around the world awoke to read of the petition known as *Charter 77*. It was a clarion call for the state to respect the fundamental rights listed in the *Helsinki Accord*, signed by several hundred prominent dissidents. Havel had been instrumental in writing a draft of the document and then circulating it in search of potential signatories. It was an important blow against the empire and was a key development in the movement of citizens to fight for the end of the totalitarian power exercised by the Soviet-dominated political leaders.
Havel continued to play a leading role in this movement despite continual harassment and several stints in prison; the longest a four- year term. In an interview in this period, he told a BBC reporter that his support for the moral rightness of the *Charter* would not diminish and that the *Charter* was having a tangible effect on the Czechoslovak population. It had helped to awaken society's conscience, he maintained, uniting dissidents with the sleeping giant, which was the ordinary citizenry from whom so much had been concealed.

As Keane tells the story, Havel's presidency surely started on a strong and exciting note, as he did what he could to make the workings of the President and his staff in the Castle that dominates the skyline of

Prague a more hospitable and open place. Early on, for instance, he held a Festival of Democracy on the Castle grounds and a number of musicians, mimes and jugglers entertained ordinary citizens and engaged them in a buoyant celebration of democratic values and freedom of expression. The well-known, strongly leftist playwright Harold Pinter was invited by his friend Havel to Prague to oversee the performance of his play **The Caretaker**. Efforts were made to encourage and support the arts, as vital to the emerging democratic society.

As time went on, however, Keane records criticisms of Havel's approach to government. He was said to manipulate others and become rather aloof from former colleagues in the Civic Forum movement. Some commentators questioned whether or not he was truly open to the development of parliamentary government, with a significant role for all elected members or whether he tried too hard to maintain a strong executive. After his wife Olga died and he became romantically involved with the talented actress Magdalena Vasaryova, critics claimed she assumed too great an importance in the Castle.

Matters of more substance that Keane explores include the drift towards dissolution of the country itself, leading to the referendum decision by Slovaks to withdraw and form their own nation. This outcome was one Havel fervently wished to avoid, but his powers as President were limited and he was unable to forge strong relations with leading Slovak politicians and intellectuals. A second matter that veers closer to genuine tragedy was the serious debate about the type of democratic nation the Czech Republic would become. Prime Minister Vaclav Klaus, a fierce believer in the absolute power of a free-market, mostly unregulated, economic system seems to have prevailed over the contrary views of Havel. By establishing this as the dominant ideology, Klaus as parliamentary leader created harsh conditions for many citizens lacking bargaining power and influence. Finally, Havel did appear as a rather naïve statesman in his uncritical support of the Bush administration as it pursued its imperialist ambitions in Iraq.

However, on balance it can be said that Havel's career as President of first Czechoslovakia and the Czech Republic was tragicomic in nature. His insistence on the need for a new way of engaging in politics, one that was more transparent and based on idealism and good faith, continues to stand as a noble goal worth pursuing, even if it remains a long way from being fulfilled in the Czech Republic or elsewhere. His career does exhibit an unwavering commitment to human rights and he did initiate policies that affirmed those rights. He was an eloquent defender of the Roma and other minorities. All in all, we can be thankful that such a talented and dedicated individual made such commitments to public service in our time.