



A FESTSCHRIFT
CELEBRATION FOR THE
GOLDEN ANNIVERSARY
- OF THE -
BC CIVIL LIBERTIES
ASSOCIATION

EDITED BY KATE MILBERRY



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Foreword

by Robert D. Holmes *oc*

As we approached our 50th anniversary, the Board of the BC Civil Liberties Association decided to endorse a project of inviting contributions to a Festschrift in honor of the association and its work. This edited collection is the result. A Festschrift is a collection of essays and other writings published so as to recognize and celebrate the work of someone. Usually that someone is a notable academic, author or public figure. But here, we do this for an organization. Usually, such an anthology is published on the occasion of someone's retirement. But here, we do so simply to mark the passing of half a century. The work of the BCCLA will continue as long as there are principled individuals, interested in and committed to civil liberties prepared to devote their time to it.

This collection is one that the BCCLA is proud to publish. The contributors have obviously put in a great deal of time and effort. Their messages range from academically oriented pieces that focus on a particular issue to personal reminiscences of the place of the BCCLA or of a civil liberties issue in their own lives. I have enjoyed reading each. I have found some provocative, some descriptive and some wistful. I trust you will enjoy reading them. And I would be remiss in not extending the invitation made to everyone to continue providing contributions. Just as the work of the BCCLA is ongoing, the association would be pleased to receive further articles and will consider how best

to organize those in an online or other repository, accessible by all.

I had the honor of serving as President of the association for the past four years. It was, to put it mildly, a tumultuous time. The issues the association has covered have been wide and varied. But on each, we drew upon the commitment and principles that the association defined early as its mission. Having those at hand made speaking out on different matters somewhat easier. When I first became President, an issue arose about the use of tasers by the police. We spoke out against use of such weapons. That varied from their use by transit police—including some instances where they were used against escaping fare evaders—to their use against Robert Djiekanski at the Vancouver Airport by RCMP officers. During my time as President, there were several commissions of inquiry on police conduct.

As well, we saw the Olympics come and go from Vancouver in 2010. Issues relating to free speech, assembly and other rights came to the fore. When authorities sought to create pens for demonstrators and applied the euphemism to them of being "free speech zones," our Executive Director, David Eby, told the press that the BCCLA thought all of Canada was a "free speech zone." In 2011, there was a follow-on to that in relation to issues arising from the "Occupy"

movement. Along the way, however, there were other, more isolated, examples of the BCCLA speaking out on free speech matters. Those included criticism of government action barring persons from entering Canada to speak.

We maintained a watchful brief and initiated legal proceedings on matters relating to the government's anti-terrorism laws and actions. That included everything from pursuing access to information relating to participation in rendition, handing people over to forces known to engage in torture, and failing to adhere to international legal standards governing military action, to intervening in legal proceedings relating to repatriation of Canadians held or stranded abroad. We spoke out on issues relating to human smuggling and refugee claims. Whether the issue was accountability of government or due process for those affected by government action, we were there.

Privacy issues are another front on which the BCCLA has long been active. Sometimes it has been a matter of government surveillance (on the internet, through CCTV, through police databases on millions of individuals, or through more traditional searches of persons and property) for criminal law purposes. Sometimes, it has been information gathering by government (such as with e-Health) for professedly benign purposes of enhancing health care, education, tax collection or whatever else. Sometimes it has not involved government, but has involved employers or other institutions assembling data on people without their knowledge or consent. It is plain to see that civil liberties issues arise in such matters.

The BCCLA has been fortunate through the years to have many individuals come forward and help out. I hope I will be forgiven by those who are not mentioned, for their work and contribution are greatly appreciated. But two I will mention here are Reg Robson and John Dixon. Reg Robson always stands out as a pioneer of this organization. As president, his time included when the October Crisis was upon us in Canada. The Trudeau government imposed the *War Measures Act* in 1970 and hundreds were arrested and held without due process or anything that would pass for reasonable cause. The Canadian public at large rallied around the government of the day. The spectre of a threat from without or within has that effect—at least initially. Reg Robson spoke out against it. The idea that there was an “apprehended insurrection”—which was the legal premise for invoking such extraordinary powers—was not on. Abrogating the rights and liberties of everyone was not justified. Incarcerating many people on no real grounds for suspecting criminal activity, but rather because of their political sympathies and associations, was repugnant. Reminding us all of the best things we stood for took courage and conviction. Reg Robson had both.

He followed that with talks and commentaries on many more issues that arose, from mandatory detention of drug addicts, to freedom of expression, to the plight of the marginalized and forgotten in society. The BCCLA, under his leadership, pressed for recognition and protection of rights and freedoms in the *Canadian Constitution* when it was patriated in the early 1980s. The advent of constitutional rights guarantees as a thoroughgoing part of our law was a significant change for Canada.

John Dixon is another former president of the organization. He served in the 1980s and again in the 2000s. Even when not president, he has been an active spokesperson for the association. His range of interests has been very broad. He and I worked together on democratic rights issues—voting, elections, free speech and such—on many cases. In the 1980s, as a young lawyer, I had the opportunity to act in *Dixon v. AGBC*, with John Dixon as my nominal client, advocating against the electoral districting laws that BC had. Those laws provided for such disproportionately populated districts that some voters had 14 times the weight of others. In decisions by Chief Justice MacEachern and Chief Justice McLachlin (then of the BC courts and more recently Chief Justice of Canada), the principle of ensuring effective representation by paying due respect to equality of voters was confirmed as a legal requirement.

John Dixon pursued applications of civil liberties values in the context of catastrophic illness. As the AIDS epidemic swept throughout North America and the rest of the world, he reflected on stark questions challenging how a fair-minded society could insist on rigid adherence to “generally accepted as safe” and “generally accepted as effective” standards for new drugs when dealing with a disease like AIDS. At the time, the choice for AIDS patients was between trying a new drug that offered some hope and almost certain death. Choices made in catastrophic illness cases required recognition of the context. Telling patients to wait until lengthy drug safety testing protocols were passed was unjust when the wait itself meant death. John Dixon addressed other issues arising from the epidemic as well, including privacy rights of patients.

Additionally, through litigation such as the Little Sisters cases, John Dixon pressed for protection of free speech rights. Having customs officials arbitrarily sift through erotic literature and decide what was permitted and what was not to come into Canada failed to provide appropriate legal protection for free expression. The courts ultimately agreed and told the border agency that standards had to be real, had to respect constitutional rights and had to be consistently applied.

I could carry on with a litany of other issues the BCCLA has covered. Some have been the subject of recent press—like laws touching upon right to die, polygamy, anti-terror and other laws. Others have involved case work that attracts little or no public attention. The history of the organization in dealing with matters such as detention of mental health patients and the availability of services for such individuals is one example of that. The “arrest handbook,” the publications on immigration and privacy rights, all these expand the coverage of civil liberties issues by the BCCLA and provide practical help to those who need it and useful information to those who simply want to learn.

Another issue for the BCCLA, of course, has been the “police investigating police” brief. The BCCLA for decades questioned the propriety of having police officers, sometimes from within the same department, sometimes drawn from another police agency, investigate each other when death or serious injury resulted from interaction with police or when allegations of criminal acts were made against the police. We participated in commission

after commission. Finally, after the Frank Paul and Djekanski commissions, there was success in getting reform. The government established a civilian investigative agency to deal with investigations of the police. Hopefully, that will lead to solid results and increased public confidence in law enforcement.

But, as we all know, monitoring police conduct will always be required. The work of the BCCLA continues, particularly in relation to policing in northern and remote communities in BC. Issues there involve as much consideration of “community” as they do “policing” in relation to the concept of “community policing.” In urban centres there have been many studies on effective and appropriate policing methods over the past few decades, resulting in a shift from policing models that value the number of arrests to models that focus instead on maintaining the peace. This is not necessarily the case for all of BC, however. As a consequence, issues relating to poor relations with and inappropriate treatment of First Nations persons by the police recur all too frequently. The BCCLA has published reports investigating racial issues in policing and will no doubt continue to monitor that.

It is thus with a sense of achievement and accomplishment that the BCCLA looks at the broad array of issues it currently covers, the cases and projects it has pursued and the history and record that it has developed. The association’s 50th anniversary allows for a moment to pause and reflect on all of that.

The first meetings of the organization’s founders in the early 1960s in Michael Audain’s modest student’s apartment got things started. The BCCLA was dreamt up as a project to have for BC something similar to what existed south of the border. Issues that sparked such a dream ranged from arrests and prosecutions of Doukhobors—a religious sect that seemed all too regularly to get caught up in legal confrontations with the government—to unease over what Canada had done during World War II interning Japanese Canadians, or how Jehovah’s Witnesses were being treated in Quebec, or how Communists and others were singled out for surveillance and worse. The world as a whole had recently suffered a global conflict against fascism and was going through a Cold War between nuclear superpowers.

The *UN Declaration of Human Rights* was still a relatively recent document. The *Canadian Bill of Rights* was just making its way through our own Parliament. There seemed to be heightened concern for understanding, discussing and writing down the rights and freedoms of each individual. Articulating what we really stood for as free people in a free country likely seemed a reasonable enough response to having fought wars against totalitarian states. For the BCCLA, the original constitution and

bylaws of the association made clear that the French *Declaration of the Rights of Man*, the British *Bill of Rights*, the American *Bill of Rights*, the *UN Declaration*, the *Canadian Bill of Rights* and similar models were all sources of inspiration.

The association committed itself to education, advocacy and promotion of civil liberties and human interests. That would have both a general and a particular aspect. The general part was one of talking about the importance of understanding rights and freedoms and having legal protections for those. The particular part was being available to focus upon individual cases and problems. Those arose from time to time and often the police, the courts, and the public seemed to need a reminder that civil liberties issues were engaged. Having a voice not hitched to one or another participant’s direct interests seemed helpful. It could provide one still, small voice of calm, when passions rose and tempers flared. Doing so to ensure civil libertarian principles were applied was a useful mission.

It is all too human a trait to profess commitment to principles and causes in general and to forget them when caught up in the particular. Speaking out about due process and fundamental justice is all well and good in the abstract, but when the target of a prosecution is someone accused of heinous crimes, the temptation to take shortcuts can be great. Speaking out about protection of human expression is easy when not tethered to a particular message that many, or most, find repugnant. Yet commitment to civil libertarian principles is best shown when tested. And, like muscles that require exercise to maintain strength and flexibility, discussion and debate about how civil libertarian values apply in different contexts help strengthen both our ability as a society to recognize when such issues arise and our resolve to adhere to them.

I like to think that those who founded the BCCLA would be generally content with how the association has developed and what it has achieved. But at the same time, I know that they would want to know that no one was “resting on their laurels” and that ongoing efforts to spread information, engage in dialogue and advance understanding of civil liberties issues were being pursued. This Festschrift is, hopefully, one part of that.

Discussion and debate are important. Some get turned off. Some get energized. As a matter of political and public education, we need to work on having a citizenry that tends more to the latter. At the least, even if not “energized,” we have to insist that citizens in our democracy are equipped with a basic understanding of how a free and democratic society works. How our government is established, how laws get made, how rights get protected and how freedoms are allowed to flourish are all essentials. Having that understanding is, after all, part

of the toolbox of knowledge for membership in a "sovereign citizenry."

I am fond of a line Michael Oakeshott, the noted 20th century English political philosopher and skeptic, wrote about the continuity of what he called "the conversation of mankind."

As civilized human beings, we are the inheritors, neither of an enquiry about ourselves and the world, nor of an accumulating body of information, but of a conversation, begun in the primeval forests and made more articulate in the course of centuries. It is the ability to participate in this conversation, and not the ability to reason cogently, to make discoveries about the world, or to contrive a better world, which distinguishes the human being from the animal and the civilized man from the barbarian.

The image of a conversation is, I expect, one that civil libertarians are apt to find congenial. The point is not to get to "the end," but to participate, both by speaking and by active listening. The point is not necessarily to "agree," but to enjoy the flow of what is said, who says it, and what timbre, tone, meter, volume and pitch are displayed. Indeed, in another passage, Oakeshott speaks tongue-in-cheek about humans being descended from apes who sat around talking so long that they wore their tails off.

I will bring this perhaps overly long foreword to a close with a poem. This time, however, I am not going to borrow someone else's lines. For whatever it is worth, I have taken a stab at writing something myself.

I should preface it by saying that along the way towards planning this Festschrift I thought on naming it "Speak-easy." I wanted everyone who had anything to say to feel they could say it. The image of a speakeasy was one that fit. Feeling free to express oneself and to listen to others was what this organization has aimed for and this particular project reflects that.

Now, for the poem...

Speakeasy

*Speakeasy to me, I'll find your words worthwhile,
I want to hear what moves you, to sadness or to smile.
Speakeasy to me, your voice alone tells much
Its tone and cadence rolling, like a wandering touch.*

*Give me in turn your ear, and listen to what I say
With open mind and purpose, respect for whatever may
Turn attention to cognition, then recognition too
As thought received enmeshes, and becomes a common sense.*

*Speakeasy to me, even when I make you boil
When what I say offends you, and passions start to roil.
Speakeasy to me always, don't make up rules to say
That words and thoughts are outlawed, pushed off the path and way.*

*And if you find me foolish, not worth your precious time,
Allow me still a soapbox, to see if others may
Afford me time to listen, and respond to what I say
In conversation moving, each of us engaged.*

*For stopping me from talking, and others talking too
Injures us for some time, but blocks and limits you
From sensing vital freedom, coursing in exchange
So choose respect for voices, and respect for you will flow.*

*When people feel they're hampered, constrained by rules from some
Who tell them what to do, and how their lives should run
Speakeasies form among those, who live and want to choose,
And not from lack of choosing, would leave to have it done.*

50th Anniversary Reflections

01

by Stephen Owen QC, PC

It almost goes without saying to anyone interested in civil liberties that the BC Civil Liberties Association has been a class act in Canada, and its 50 years of tradition and contribution to the defence of our freedoms and the protection of our rights is unparalleled in advocacy and activism.

By definition, advocacy is not silent and activism is not passive. But the role is not simply agitated noise. The strength and importance of the BCCLA and active advocacy is that they are practised with discernment over bombast and discipline over sophistry.

Why should a democratic public need a civil liberties advocate and activist in a mature and hard won free society? Because democracy atrophies without exercise, and our defence weakens without challenge. But liberty is exacting, not a lazy populism which can be no more than a coalition of otherwise unaligned negatives. It is idealism tempered by pragmatism; and yet it is not necessarily the advocacy of any individual complaint, but rather of public fairness under democratic law. This is the hallmark of the BCCLA.

My first formal introduction to the association was in 1986 delivered by then BCCLA President, John Dixon, intellectual and spiritual leader of the association, putting his well polished cowboy boots on my newly

occupied Ombuds office coffee table declaring: "Owen, we have work to do." And he ensured we did.

Quarantine under the *Health Act*; threatened testing and general withholding of AZT for AIDS sufferers; challenging the infiltration of the Morgentaler Vancouver Association supporting a free standing abortion clinic; militating for a federal Ombuds office; challenging the Canadian Airborne's murderous behavior in Somalia; promoting a national dialogue on the rights of and wrongs to women in Canada; and many more issues that Dixon championed and led the way; not easy to follow!

And the issues were not new even if their expression and exercise of rights were in a new and demanding way. As F.R. Scott has said, "No citizen's right can be greater than that of the least protected group." And Justice Thomas Berger adds, "The confrontation between the institutions of the state and minorities and dissenters reveals the true force of Canadian democracy."

Privacy and Civil Liberty

Photo radar was introduced by the NDP government of the early 1990s to reduce the carnage of speeding drivers. This was accomplished by cameras taking a picture of the back of speeding vehicles and sending the photo plus the fine notice to the owner's address,

identified by the licence plate. It was an absolute offence, based on the owner of the vehicle. The problem was that with articulated trucks the cab was rarely owned by the owner of the trailer. On complaint, the BC Information and Privacy Commissioner conceded the point to the Ombuds office and the BCCLA and ordered that the front only be photographed. The picture identified the driver, and the right to privacy was trumped by a breach of the law in a public place.

Another difficult issue of civil liberty is the use of closed circuit television and other cameras to monitor the actions of people in public places, such as during the Stanley Cup Riots in Vancouver in June 2011. One initial instinct is to claim a breach of privacy and vigilante justice. This has been contentious in the UK. People may expect to be filmed 100 times as they go about their daily business in London and other cities. The balance of liberty and privacy was matched against the identification of the "Brixton Bomber" in London in the mid 1990s when he appeared on CCTV cameras at three different sites of lethal bombings, and was convicted of murder.

So let's fast forward to late 2011 and the "Occupy" Movement across North America in protest against the severe divisions between the wealth of the few and the exclusion of the many. Where is the line between the right to assemble and exercise free speech, and the right to security of the person, privacy and to own and protect property?

Militating for a Federal Ombuds Office

When Kim Campbell became the federal Minister of Justice, she wisely lured John Dixon as her personal expert to Ottawa to cast his keen eye to ensure that federal policy and law as practiced conformed to the highest standard of fairness. While an Ombuds office exists in each province, there is no federal office. John asked me to draft a model for one that would supplement without encroaching on provincial jurisdiction.

Kim Campbell became Prime Minister for a brief time in 1993 and she placed the federal Ombuds proposal on her election platform. While this, I trust, was not the cause of the majority Conservative government being reduced to two seats, it was a minor footnote to Canada's experience with such offices.

Challenging the Canadian Airborne's Murderous Behaviour in Somalia

During Ms. Campbell's time as Defence Minister earlier in 1993, the atrocious torture and murder of Shidane Arone occurred in Somalia by a small and racist cell in the Canadian Airborne. The Opposition took no time to place blame on the Minister. Such are politics!

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Dixon drew me into the first inquiry as legal advisor to the Board of Inquiry under the *National Defence Act*, led by one Air Force and two Army Generals. The murder was the ultimate breach of civil liberty. Interestingly, the Deputy Defence Minister who was directly responsible for creating the onsite inquiry in Somalia and my appointment was Robert Fowler, who in 2008 was to suffer the capture and imprisonment by al-Qaeda of the Maghreb for 130 days, blessedly released.

Challenging the Infiltration of the Morgentaler Vancouver Association

And so back to the 1980s, and the partnership of the BCCLA and Ombuds office in investigating and challenging the infiltration of a Vancouver group promoting a standalone abortion clinic by Henry Morgentaler, a practitioner of abortions elsewhere in Canada. The pro life and the pro choice opinions on abortion were never realistically going to be reconciled. However, the potential for reconciling a good proportion of good faith members from each group just might be an example of common ground understanding across determined lines of division. Say for instance that each group was asked the question, "Who believes that an unwanted pregnancy is an unfortunate situation?" I suggest that a majority of pro choice and pro life advocates would agree with the statement. Similarly, "Who supports young people having accurate information about the consequences of having sexual relations?" And also, "Who supports the availability of healthy, loving and well administered adoption services?" These are the pillars of common cause deliberation and are not the dogma of any particular group with demonstratively opposing life choices.

This was the dilemma that faced the BCCLA and the Ombuds office when we each received complaints from the Morgentaler clinic organization that they were being infiltrated by a group promoted by the Attorney General and overseen by a senior litigation lawyer. The operation was intended to bring evidence of a planned breach of the law by operating a free standing abortion clinic before a court to seek a peremptory injunction. The investigation disclosed the inappropriate behaviour and the action was halted by the Attorney General.

Post 9/11 Security Legislation

A major challenge for our country and the world was the murderous suicidal killings of September 11, 2001 in the US by forces of al-Qaeda. Was this merely the exasperated expression of the root cause of Muslim anger? I say no. It was pre-meditated mass murder of innocents by suicide terrorists for their own evil intentions and expressions of hate. The aftermath of this outrageous killing has shaken the world order to this day.

It has also energized a counter attack of implicated groups, areas and countries. The civil libertarian response has been sensitive, vigilant and balanced; but it has been a major challenge to the international, lawful right of oppressed people from colonialism to self defence against oppression and existential destruction.

As a newly elected MP in Ottawa, I had a role in the drafting and passage of C-36, the Canadian anti-terrorist legislation that became law on December 24, 2001. It is a rational and proportional response to the threat of transnational, suicidal terrorism.

This security legislation, C-36, was passed by Parliament in December, 2001 within three months of the terrorist attacks on the World Trade Towers and the Pentagon. While the legislation went through Parliament in record time, it also heard more hours of testimony in Parliamentary Committees, the House of Commons and the Senate than perhaps any others in modern Parliamentary history.

Democracy is a balance between security and freedom. Human security is the first human right. However, total security is prison and total freedom is anarchy. The balance is contextual and our post-September 11 awareness of vulnerability justifies a shift. But how far?

The imperative of change lies in risk management—the product of the likelihood of an occurrence and consequence of an occurrence. If the latter is catastrophic then our criminal and other security laws must shift from post-crime investigation and prosecution to preventative intelligence and action. Easy to say; difficult to legislate.

Anti-terrorism legislation, even as it provides greater security, will only be justified and effective within our democracy if it respects some basic principles which, in my opinion, include the following:

- + All provisions should comply with the *Charter of Rights and Freedoms* without override by the “notwithstanding” clause 33.
- + It should not be used for any purpose other than to investigate, prevent and prosecute the most serious crimes for which traditional charges under the *Criminal Code* and normal police and prosecution powers are inadequate.
- + Dissent, protest, advocacy and non-violent civil disobedience, even if unlawful, should not be investigated or prosecuted as terrorist offences.
- + It should protect against hatred, generalized profiling and other improper discrimination.
- + The normal rules of evidence that protect witnesses in criminal or civil trials and public inquiries apply to investigative hearings.
- + Actual knowledge or criminal negligence is required for conviction of a terrorist offence.
- + Ministerial responsibility for authorizing extra powers or actions under anti-terrorism legislation should be personally exercised, judicially reviewable and publicly reported.
- + In any judicial proceeding, it is the obligation of the presiding judge to ensure a fair trial and to dismiss charges, exclude evidence, order the

appointment of counsel, or otherwise, if a fair trial in accordance with the principles of fundamental justice cannot be ensured.

I believe that Bill C-36 passes this test, and subsequent anti-terrorism legislation should respect the same principles. Consider some of the major concerns expressed about C-36, for example:

+ INADEQUATE PARLIAMENTARY DEBATE? Time allocation was moved on the Third Reading Debate so that security provisions would be in place before the December 2011 adjournment of Parliament. Moreover, terrorism and the legislative response received significantly more attention by the House of Commons than most legislation—50 hours of special debate on terrorism, 92 hours of public hearings by the House Committee on Justice and Human Rights, and 26 hours of debate at Second and Third Reading. The Third Reading vote approving Bill C-36 was 189 to 47, far beyond the government’s majority.

+ NO THREAT OF TERRORISM IN CANADA? The worst terrorist act in aviation history prior to September 11 was the Air India bombing in 1985. The bombs were planted in Vancouver, and the 329 people killed, including 82 children, were mostly Canadians. To appreciate the difficulty in investigating terrorist crimes, consider that the trial of the accused terrorists did not commence until the Fall of 2002, 17 years after the tragedy occurred.

+ PREVENTATIVE ARREST AS OPPRESSIVE? This preventative tool is not unique. It closely resembles the normal peace bond provisions of the *Criminal Code* and a judge’s common-law jurisdiction to place conditions on a person’s behaviour, even though there has been no charge, where there is a reasonable fear of harm to another.

+ INVESTIGATIVE HEARING AND THE RIGHT TO SILENCE? This provision does not affect people’s right to remain silent in their own criminal trial, and any evidence given cannot be used against them except for perjury. Nor can the provision be used to force a lawyer to break the legal duty not to disclose information about a client. Investigative hearings are no different than public inquiries, for example when Ontario Premier Mike Harris was required to give evidence at the Walkerton inquiry.

+ PROTESTS AS TERRORISM? The definition of “terrorist activity” has been amended to specifically exclude even intentional, serious and unlawful interference with an essential service as a result of advocacy, protest, dissent or stoppage of work, so long as it is not intended to cause death or serious bodily harm, endanger life or cause serious risk to the health and safety of the public. In short, such activity may be prosecuted as mischief, trespass or otherwise, but not as terrorism.

No law is failsafe. Law achieves justice only if it operates within a democracy: the pluralistic respect for citizens empowered to self govern within the rule of law. We all have the participatory responsibility—as citizens, lawyers, parliamentarians, academics, journalists, judges, police—to vigilantly use the tools of ministerial accountability, judicial review, police oversight and citizen complaint commissions, annual reports to Parliament, three-year parliamentary review, and five-year sunset provisions to insure against any abuse of power or injustice arising from anti-terrorism legislation.

The C-36 provisions for preventative arrest and investigative hearings were the most contentious in Parliament and among civil liberties groups, including specifically the BCCLA. In response, the government agreed to a five year sunset clause for these provisions which would require further legislation to extend. These provisions expired in 2007, largely because they had not been used to any positive extent. However, the Conservative government announced in September 2011 that it would reintroduce preventative arrest and investigative hearings, but without the safeguard of a sunset clause that provides a set date to vote to extend the provisions.

The BCCLA challenged the need for and severity of C-36, which began a broad and deliberative dialogue in my Vancouver Quadra constituency. In my opinion, these discussions demonstrate the best of principled and respectful common ground dialogue. The constituency discussion began with the occupying of my MP's office by a group of sincere and dedicated opponents to the legislation. I returned from Ottawa to join them in discussion, all of which was videotaped by the protesters. This began a discussion of common principles, discussed above, and then at community meetings held at the United Church at UBC; at Magee Secondary School with a debate with myself, John Russell, Executive Director of BCCLA, and Bev Busson, Deputy Commissioner of the RCMP for British Columbia and the Yukon, together with a spirited audience of several hundred; at the Richmond Mosque; at the Taiwanese Center in South Granville; and at an event organized by the BCCLA in downtown Vancouver.

The meeting at the Richmond Mosque was particularly poignant, addressing the question of Muslim stereotypes. An airline pilot whose surname was Mohamed described in emotional terms how he had been asked by his airline not to mention his name Mohamed when he welcomed passenger at the beginning of a flight. His was an emotional plea for tolerance and understanding.

Physician-Assisted Suicide

The BCCLA has brought a case before the Supreme Court of British Columbia in 2012 to legalize physician assisted suicide by challenging the *Criminal Code of*

Canada that makes it a crime.

The case revisits the constitutional challenge to the *Criminal Code* brought in 1993 on behalf of Sue Rodriguez, a woman suffering from ALS and experiencing imminent, certain and painful death.

While assisted suicide is a complex, ethical issue, the criminal law has not stopped it. It is well known that physicians across Canada regularly apply morphine to provide relief from excruciating pain to patients who face imminent death with no chance of a cure. The increasing application of morphine, knowingly, will cause the death of the patient. And yet we live with an ethical/legal fiction.

Amending the Federal *Elections Act*

Civil liberty is not always clear cut. I was involved when the amendment of the federal *Elections Act* in 2006 was considered by a Parliamentary Committee. The issue was to limit the times one person could vouch for the identity and residence of others for voting purposes. This was necessary particularly for homeless people, those in shelters, and those living in Aboriginal communities where addresses were not common.

The BCCLA took the understandable position before the Committee that not to allow multiple vouching would disenfranchise many people without identity and fixed addresses.

The difficulty was that this practice was considerably less strenuous than Canadian monitors regularly apply when judging the fairness of elections in newly democratized countries.

Perhaps a better solution ensuring greater fairness would be electoral officials putting greater energy into identifying the homeless and shelter dwellers, and in developing identity cards with the Chief and Councilors of Aboriginal communities.

Finally, and with great respect, I would caution those of us who take on the responsibility of holding others to high standards (ombudsmen, civil libertarians, human rights advocates, parliamentarians, judges, juries) that we stay within our mandates. Straying outside can discredit the validity of our narrow mandate, especially where it is seen to be political and outside our expertise.

The Swerve, or Theories of Change

by Maureen Webb

...but it is the minute swerve in the atoms, taking place at no definite time or place, which keep the mind itself from being governed by an internal necessity in all its actions, and from being as it were subdued by this necessity so as to be merely a passive subject.

From De Rerum Natura by Lucretius

*If the world were made by habit and not a big bang,
Or the bang were a culminating event of habit's ever-deepening,
side-slipping groove
—marking the start of a new evolving cycle—
No physical law immutable
Everything repeated ever-changing
by chance, memory, tendency, force field
What hope is there for you and me
to change our lives by some tweak of habit?
By when we rise or how we listen,
where we take our meals or what we tell ourselves and others,
By the flat stone or the round
thrown into the sounding pool?
Not by force of will
but form's imprint on process
Some changing pattern
we sense, only darkly.*

*And what hope for all of us
if the single finch,
learning to use a tool,
transmits the aptitude in the moment
to the whole race?
Or the seed takes the form of a tree,
not by DNA,
but by some shaping resonance?*

Acting Queerly

03

by barbara findlay QC

“The Supreme Court of Canada has directed that when we consider issues of equality, we must do so from the perspective of the person who is alleging discrimination,” I said to the BC Court of Appeal. “In this case, Kimberly Nixon is a transsexual woman. I have thought hard about ways of inviting this Court to consider the world from Kimberly Nixon’s perspective. The best I can do is to invite you to imagine that you wake up tomorrow, and find to your horror and dismay that every indicator of your gender is wrong. If you are male, that you suddenly have a vagina and breasts; if you are female, that you have a penis. But worse, everyone who knows you treats these wrong gender markers as if they reflect who you are. If you have breasts, you are female. Nothing you say about who you really are makes a dent in their conviction that you are the gender of your genitalia.”

When the BC Civil Liberties Association invited me to contribute to its 50th anniversary commemorative book, that case came to mind. I have been advocating for the rights of queer people—lesbians, gay men, bisexual, trans, intersex and questioning people—for 40 years, in the courts, in political advocacy, in community organizing, and in public opinion. I want to talk about the lessons I have learned about advancing equality, in acting for lesbians, of whom I am one; and for transgender people, of whom I am not one.

Location, Location, Location

I am a sixty-ish, fat, white, cisgender¹ lesbian lawyer with disabilities. My childhood was working class, anglophone, and Christian. I have no criminal record. I am a survivor of mental hospitals.

Canadian society treats each of those characteristics of mine in ways which either privilege me, or disadvantage me. By reason of being an overeducated, white, cisgendered lawyer with an anglophone and Christian heritage, I can count on not being turned away from any door in the country.

Conversely, as a lesbian, as a woman, as an aging person, as a fat person, as a woman with disabilities, as a survivor of mental hospitals, I am disadvantaged in Canada, and I have been targeted for harassment, ostracism, misunderstanding, and mistreatment.

We must always, I think, locate ourselves in the discussion. We lawyers, in particular, who are called upon to re-present the lives and experiences of others to the courts and to the state, must be conscious of our location. If we fail to know our own location, and the ways that our experience is similar to or different from our clients, we risk assuming that “equality” for our clients means being PLU: people like us. Unless we know where

our own privilege blinkers us, we risk failing to inquire about the experience and the aspirations of people who ask us to secure their equality.

From the Margin at the Centre

When I came out as a lesbian, being “homosexual” was by definition a mental illness. It was also a crime. I was put in a mental hospital, my psychiatrist’s stated goal being to “turn me into a normal girl.” (Because of that homophobic incarceration, the Law Society required I get a certificate that I was sane when I applied to be called to the Bar.) So as a lesbian in the late 1960s, I understood myself to be crazy, criminal, and evil.

And I understood that I was the problem. I had no concept of a homophobic culture. Indeed, I was unspeakably crazy/criminal/evil. The only information about people like me was in courses called “Deviance.” This process of internalizing society’s malignant stereotypes as truths about oneself is internalized oppression.

Since I have been called to the Bar, I have three times watched the Supreme Court of Canada find a reason to deny equality rights to lesbians and gay men: in 1979, when they decided that a classified ad in a newspaper was not a public service,² thereby avoiding the question of whether sexual orientation could be a proper basis for discrimination; in *Mossop*,³ where the Court decided that since the federal government had deliberately chosen not to include “sexual orientation” when it amended its human rights legislation, *Mossop* could not claim human rights protection as a gay man, and in *Egan*,⁴ where the Court said that, although a gay man was entitled to *Charter* protection from discrimination on the basis of sexual orientation, he was not entitled to relief because, in his case, the discrimination was permissible.

The experience of being a lawyer—and therefore a member of a privileged group in Canadian society—who did not herself have the same civil and human rights as everyone else in the country has been a central paradox of my life and my lawyering. It is a backdrop for my preoccupation with understanding how someone is both privileged and oppressed at the same time, and the consequences of that.

Being Normal

In the early 1980s, I went to an unlearning racism workshop. It changed my life in the same way that feminism had. I got a conceptual framework that helped me to understand the way that I, as a white person, contribute to the establishment and maintenance of racism in this country, regardless of my conviction that I was “not racist.”

Just as I internalized negative cultural stereotypes about women, lesbians, fat people, survivors of mental hospitals, and working class people as internalized oppression, I also internalized this culture’s ideas about white, well-educated, professional, anglophone, middle class, cisgendered people.

As one of those white, Christian-raised, well-educated, middle class, professional, cisgendered, people, I am a “real Canadian.” My ancestors, I was taught in school, were the pioneers, the settlers, bravely carrying the truth of Christianity to the Indians. In the prairie city where I was grew up, there were lots of aboriginal people, almost no other people of colour. There were a very few Jewish people; and no Muslims as far as I knew. As a matter of course, Quebecois were regarded as less-than other, “real” Canadians.

Internalized dominance⁵ is the conceptual counterpart to internalized oppression. By virtue of my internalized dominance, I never have trouble entering a room, anywhere in Canada, because of the colour of my skin. No one asks me the first time they meet me “where are you from” and mean “from what country did you come.” I don’t have to call ahead to see if the meeting room is wheelchair-accessible, and, if so, whether the washrooms are too; or whether I will be “permitted” to use the washroom of my gender identity without risk. If someone suggests we hold a meeting in a coffee shop I don’t have to beg off because I can’t afford a cup of coffee.

This “normality” is the unexamined measure against which we assess inequality. We assume that when people achieve equality they, too, will be “like us”—and that they will want to be “like us.”

People who are in a dominant group with respect to one aspect of their identities feel, and are treated as, normal in relation to that aspect. We feel, and are treated as if we belong. We feel, and are treated as if we are entitled to be well treated.

People who are in the target group for inequality and oppression with respect to one aspect of their identities feel and are treated as being on the outside. We feel, and are treated as if, we do not belong. We do not expect to be well treated; often we are not. We will be laughed at, ostracized, excluded, assaulted, or killed. It will certainly be the case that the stigmatized aspects of our lives will not be part of the history books, or even the dinner conversation.

Everyone is targeted both for disadvantage, inequality and oppression and everyone carries socially-conferred privilege, in this country, but in many different combinations of ways.

Mistakes

I remember co-facilitating an unlearning racism workshop in which we were dividing people along other axes of inequality: in this case, sexual orientation. When it came time to divide the straight people from the lesbians, the question arose about where the bisexual people belonged. We facilitators were taken by surprise since it had not occurred to us to think about this question in advance. I was adamant: lesbian feminist orthodoxy held that bisexual people did not belong in the lesbian group, because they “participated in male privilege” and “did not share the same experience as lesbians.” I am embarrassed to say that I “won” the argument, and the bisexual woman was put into a caucus group by herself.

I was, we lesbian feminists were, wrong.

We were wrong because we did not understand that what united us, lesbian and bisexual, was our common experience of heterosexism (the conviction that heterosexuality is the only natural form of human sexual expression) and homophobia (the fear and loathing of anyone not heterosexual).

Women-only groups, lesbian-only groups, women of colour groups, groups of women with disabilities—all were absolutely critical to our understanding of ourselves. They still are. Nothing takes the sting out of the experience of being humiliated because you are female, or because you are lesbian, than hearing other women or other lesbians describe the same thing happening to them. It is quite literally the only way to re-draw the boundaries of self that were violated by the sexism or the homophobia. And it is one of the most effective and efficient ways for members of a group targeted for oppression in one way to develop an understanding of how the oppression operates, in their own lives and in the lives of other targeted people.

Lawyering for Equality

As a lesbian lawyer taking equality cases for gay, lesbian and bisexual people, I needed a sense of what direction the community wanted to take. So I participated in co-founding the December 9 Coalition, a working group on lesbian, gay, bisexual, and (later) transgender issues. That group did four things: community organizing, internal education on issues like racism, sexism, transphobia, classism etc.; political advocacy; and media events. We organized many community consultations about what equality looked like to our community. By doing that, we were able to develop strategies that included all queers: not just a white, able-bodied, Christian-raised, middle class, well-educated, straight-looking, subset.

It was at the community’s behest that we adopted a strategy of seeking first “spousal benefits,” and later

marriage. That was not an uncontroversial strategy. Some queers believed the strategy reinscribed the oppressive institution of marriage, and we should have nothing to do with it; others passionately believed that marriage, specifically, was a basic civil right.

The Law Works

Though I have watched the Supreme Court of Canada deny my rights as a lesbian, I have also watched that court transform the legal situation for gay men and lesbians in the country. In *Vriend*⁶ that court said that if a province was going to offer human rights protection at all, it could not protect only some marginalized groups. The court read in “sexual orientation” to the list of protected grounds in the Alberta *Individual Rights and Protection Act*. In *M v. H*,⁷ the court held that it was contrary to the equality guarantees in the *Charter* to offer a protective regime on relationship breakdown to heterosexuals, but not to gay or lesbian partners. And in *Barbeau*,⁸ BC decided—as did Ontario and Quebec and, ultimately, the rest of the country—that to deny to the civil right of marriage to someone because their intended shared their gender, was unconstitutional.

Within a breathtakingly short 11 years in British Columbia, lesbians and gay men went from having no human rights, federally or provincially, to the elimination of all legalized discrimination. Today there is no piece of legislation, federal or provincial, which affects gays and lesbians in this province in a discriminatory manner.

The sea-change of the status of lesbians and gay men in the law has been thanks to section 15 of the *Charter*, of course, as well as human rights protection on the ground of sexual orientation, which has been in effect in BC only since 1992⁹ and federally since 1996.¹⁰

In my job as a lawyer, I have gone from having to advise my family law clients that if their ex-husbands learn who is acting for them, they will assume that my client is a lesbian, to being able to assure clients that their sexual orientation is not something a court will be affected by; from never winning a custody or access case brought by a lesbian to being able to cement the non-biological lesbian mother’s role by recording her on the birth certificate and having her adopt the child she had with her same sex partner; from having no right for a gay or lesbian person to sponsor their partner to come to Canada, to having that right conferred only on a discretionary basis, to having that right be written into the law; from telling my clients they have no entitlement on the basis of their same sex spousal relationships under any BC or federal statutes to being able to tell them how to marry.¹¹

As each of those legal changes occurred, so did social attitudes. Each newly-won case made headlines, talk

*Each new
victory made
more queers
feel safe.*

shows, and precipitated often furious public debate. Each new victory made more queers feel safe to come out; and made more people realize that queers were everywhere.

The marriage case caused many non-queer Canadians to choke. The essence of marriage, they believed, was that it was between a man and a woman. To permit same sex partners to marry would alter the institution beyond recognition.¹² The opponents of marriage were correct. Just as overturning anti-miscegenation laws irrevocably affected the institution, so did same sex marriage. It was this victory that blasted through the dominant assumption that same sex relationships were inferior to heterosexual relationships.

The importance of achieving marriage as a civil right can be measured in two ways: by the degree of resistance there was to the idea; and the degree of attitude change in favour of queers in the wake of the achievement of it.

So I believe in the power of law to work change.

From the Centre to the Margin: Trans Issues

I am a cisgendered woman. Like all non-trans people, when someone asks me my gender, I know that I am female but I cannot say how I know. I just know. All trans and intersex people, whether transsexuals, cross dressers, or other gender variant people, do not have that monolithic sense of gender identity. So in relation to trans people, I am in the dominant place.

I came to working on trans¹³ issues by accident. A trans woman phoned me in a panic the day before she was to leave for her sex reassignment surgery to see if I could speed the production of the necessary bureaucratic approval for her surgery in time for the operation to proceed.

I intervened with no clue about what I was doing, how the system worked. I was successful only because the approval had already been granted, and I was able to convey good news to my client.

It was 1994.

Shortly after that I was approached by the High Risk Society, an organization offering emergency services to transgendered street people in Vancouver's Downtown Eastside. They wanted to write a report on transgendered people and the law. There was, at the time, exactly one piece of writing on that topic in all of Canada. It was 1994.

High Risk gathered together representatives from various parts of the gender variant communities: cross dressers, transgendered people, pre- and post-operative

transsexuals. After examining what trans people were doing in other, primarily American, jurisdictions, the committee chose deliberately to use the word "transgender" as the umbrella term to include all gender-variant people.

Language, naming, is critical to the struggle of any marginalized group. It is critical that the group decide for itself what words come closest to describing their experience. I did not attend the committee meetings at which language was considered, because as a non-trans lawyer I would have had a disproportionate impact on that discussion.

Finding Our Place,¹⁴ as the Law Foundation-funded report was titled, concluded that trans human rights complaints could be advanced for transsexuals under the head of "disability," since "gender dysphoria" was recognized as an illness under the DSM. But the risk of proceeding in that manner was that only transsexuals, and not other gender variant people, would be entitled to human rights protection. There was also controversy among the trans community about the claim that gender dysphoria—the diagnostic term for transsexualism—was a disability. Some thought that gender variance, like homosexuality, was not a "disability" at all, but a normal variation in the human condition. Others worried that if transsexuals described themselves as non-disabled, they would lose access to publicly-funded gender identity treatment and sex reassignment surgery.

In American jurisdictions, trans equality rights were beginning to be advanced under "sexual orientation" and under "sex," pretty much equally.

The report considered whether "sex" would be an adequate ground under which to advance human rights complaints, and concluded that it was not a sure fire outcome since protection on the grounds of "sex" was customarily applied in situations which assumed a bi-gendered reality. Sexual orientation seemed inapt. And so the report recommended that "gender identity" be added as a protected ground under the *Human Rights Code*.

Meanwhile, on the legal front, there had begun to be successes. The first case, *Sheridan v. Sanctuary Investments*,¹⁵ concerned a pre-operative transsexual woman who had been denied the use of the women's wash-room in a gay bar in Victoria. Her complaint was on the ground of sex (gender) and physical or mental disability. After her complaint was filed, she made an application to amend her complaint to proceed on the ground of "gender identity;" the tribunal held that it did not have jurisdiction to add a ground to the *Code*. The respondent said that he was acting on complaints of other women, lesbians, patrons of the bar who objected to "a man in the washroom."

In order for transsexual people to qualify for sex reassignment surgery they must live full time for at least one year in the target gender. *Sheridan* was within that one year qualifying period.

She won.

Sheridan had also been refused entry to the bar on one occasion on the ground that her drivers licence photo (still male) did not look like she did (female). Though she had a letter saying that she was enrolled in the gender clinic, she was not admitted.

She lost.

There was both jubilation and consternation in the trans community when *Sheridan* was announced. From a legal perspective, a victory in the women's washroom was a significant victory: it was the quintessentially taboo place for a "man" to be. It was particularly significant since Ms *Sheridan* had not yet had her sex reassignment surgery.

Simultaneously with the organization in 1999 of the Justice and Equality Summit for transgender people, there were meetings between the community and representatives of the Attorney General about amendments to the BC *Human Rights Code* to add "gender identity" as a prohibited ground of discrimination. Hope was in the air. The main concern of the Attorney General was spaces where people were naked together, such as change rooms and bathrooms. They proposed that the exception for "public decency" remain in the *Code*.

I advocated for that solution. In meetings with trans people, and then at the Justice and Equality summit, I argued strongly for that solution as a stepping stone to full equality. I explained that since there were provisions with respect to "public decency" in the Criminal Code, we should accept the AG's proposal.

I was wrong, for three reasons. First, it was my own transphobia that made me certain that a solution which included the possibility of a penis in a women's change room would not, could not fly. Second, it was not my place, as a non-trans person, to be advocating for one position or another. Third, my voice—my experienced lawyer voice—inevitably spoke louder than it should have. I was acting out of my privilege and, without intending to, I was silencing trans people. I pulled out of the discussion.

In fact, no legislative changes have been made in BC or federally. As I write this article, there are federal and provincial bills pending that would add "gender identity and gender expression" to human rights legislation in both jurisdictions.

Trans people have nevertheless been consistently successful in advancing human rights cases on the ground of "sex."

The early trans battles were mostly about gendered spaces. The most contested of these was *Nixon v. Rape Relief*.¹⁶ Kimberly Nixon was a post-operative transsexual woman whose birth certificate showed her to be female. She was accepted as a volunteer trainee by Rape Relief, a women's shelter, but then expelled when they learned she was transsexual. Legally, the question boiled down to who had the right to decide who was, or was not, a woman: Nixon, the state who had given her a corrected birth certificate, or Rape Relief.

Here is the conundrum.

Being safe, and comfortable, and welcome in the world is the goal of work against oppression.

But... feeling safe, and welcome in the world is also what characterizes internalized dominance.

While her case was wending through the court system, both Nixon and I participated actively and everywhere in feminist communities to argue for the inclusion of transwomen in women's organizations. Transwomen after all face violent discrimination as women, and additionally as transwomen on almost every front when they are discovered to be "trans."

Ultimately Nixon lost the battle, but won the war. By the time the BC Court of Appeal decided that human rights legislation did not apply to Rape Relief,¹⁷ all women's emergency shelters in British Columbia had adopted trans-inclusive policies.

During the period of that case, I settled six wrongful dismissal cases for Nixon: every time she was in the newspaper, she was fired from another job. I was myself described as betraying the women's movement and expelled from some lesbian feminist groups because I acted for Nixon.

Gender Markers

The focus of trans equality work has shifted from gendered spaces to gender markers. Gender markers are everywhere: on our birth certificates, drivers licences, and passports. Most recently, Transport Canada has passed a regulation requiring an airline to deny a flight to anyone whose gender does not appear to match the gender marker on their identification.¹⁸

The requirement of gender markers on any identity documents is a set up for danger for transgender people, whose gender may be indeterminate, changing, or other than one of "male" or "female." Transsexual people, who are required by the "Real Life Test" which is a condition precedent to sex reassignment surgery to live in their target gender for year before they can get the surgery, end up having to travel with documents with gender markers that do not match their gender presentation. A male-to-female transsexual will appear female; her passport will describe her as male.¹⁹

But gender markers are a very basic norm in our society. We cisgendered people experience gender shock when our gender assumptions are challenged. We expect

- + that a child's gender is knowable, immediately at birth, by inspection of their genitalia
- + that there are two genders
- + that there are only two genders
- + that the genders are "opposite" each other
- + that the genders are perfectly complementary to each other

- + that the natural form of human bonding is male-female pairing
- + that gender is immutable²⁰

The first time someone said, in a group I was part of, that they didn't care which pronoun I used in reference to them since they were equally male and female, my immediate reaction was "but how can we identify the men who oppress women, if we don't know which is which?" I was reacting from my internalized dominance. Once again I was wrong. We cannot insist on a gender marking system which predictably exposes many people to violence and exclusion.

Trans people will have achieved equality not simply by being "permitted" to use the washroom of their gender identity, or other gendered spaces, but when the entire notion of two, and only two, genders is broken down and we understand gender in a new way.²¹

Clients of mine are currently mounting challenges of the passport gender markers, and of the Transport Canada regulations. There has been significant consultation among the trans communities in Canada; and there is consensus that they do not want a "third option" solution: male/female/other—since that is just to put a target on their forehead and to out them as trans every time they show identification. Instead they want gender markers removed.

Not so long ago in Canada, one's race and one's class (by reference to one's father's employment) were both included on one's birth certificate. Just as those markers are gone, so too will gender markers become obsolete. We now know that it is not in fact possible to determine gender by visual inspection at birth; so it cannot be reasonable to record gender at that moment.

The degree of difficulty that you have in imagining a world where there are no gender markers is the measure of how deep-seated our cisgendered internalized dominance is.

Human Rights Paradigms

Human rights legislation invites us to think in categories. Either male/or female. Either white/or not white. Either able-bodied/or disabled.

Decoded, human rights legislation directs Us to treat Them as if they were like Us. The unarticulated Norm is a straight, white able bodied man who was raised Christian and middle class, who is neither too old nor too young, who is well-educated and has neither a criminal nor a psychiatric record. Norm, and his wife Norma.

Human rights legislation constructs those of us with spoiled identities as being like Norm, but for our race,

gender, sexual orientation, religion, age, ability, etc. etc.

We are offered neither language nor paradigms to understand our lives if we happen to experience—for example—racism and sexism and homophobia because we are lesbians of colour.

Some people talk about the “intersection” of oppressions or inequalities. Intersection has even grown a suffix and become “intersectionality.” But if you unpack “intersection” you find a word which describes two lines crossing. Oppressions are not lines. Oppressions or inequalities do not “intersect.” I may live at an intersection but I am not an intersection. To so describe the compounding impact of experiencing society’s disadvantage over several areas of one’s life—for example, as a working class lesbian of colour who has disabilities—is worse than unhelpful. It is misleading, obfuscatory. It hides much more than it illuminates, because it focuses on categories (race, gender, sexual orientation) rather than on people’s lives.

We are offered neither language nor paradigm to understand the most complex facts about identity: that we are all part of the mainstream, the norm; and we are all, or have been as children, part of the disadvantaged minority. We are as adults both privileged and disadvantaged.

This culture privileges some human traits and circumstances and devalues others, ignores more still. But a combination of privileges and oppression manifests differently than any privilege, any oppression on its own.

The privilege of education inflects the oppression of homophobia, so that one is seen as eccentric, not crazy. Racism manifests differently compounded with poverty than it does compounded with wealth.

And we are offered neither language nor paradigm to understand our lives if life changes parts of our identities. If we grew up being treated as white, and discover as adults that we were adopted from the reserve into a white family...what are we? If we were married and had children before we came out as lesbians, does that mean we were always lesbians, though mistaken? Or did we “used to be” straight? What is a “disability?” If person with poor eyesight can see with the help of eyeglasses, does s/he have a disability? In Canada, where eyeglasses are relatively available? In Rwanda, where they are not?

Characteristics of Oppression and Inequality

Oppression, or socially sanctioned inequality, has these characteristics.

It is relational. Oppression does not exist except between people.

Oppression exists in a country’s ideology, its commonly-accepted view of itself. It is a socially sanctioned idea about who is better than whom.

That socially constructed merit/demerit system is one that we absorb as part of who we understand ourselves to be. We take in the disparaging ideas that a culture has about us as someone whose race is not white, whose sexual orientation is not heterosexual, whose religion is not Christian, or whose language is not English.

But the enactment of oppression and inequality is not a one-way phenomenon. It is reflexively constructed by our individual and collective reactions to the experience of oppression, of ourselves and of others. I am not simply a passive recipient of the (mis)information of this oppressive culture. I am also a participant in that culture. Every time that I hear a racist remark and do not contradict it, I offer my agreement and support to the continuation of the racism. Every time I hear a homophobic remark and do not object, I am reinforcing my own inequality.

So it is not only the case that I am oppressed; I am also an agent in the oppression of myself and others. I am also an agent for, or an agent against, this society’s oppressions. Those are the only choices, since there is no neutral place.

Oppression or inequality is usually discussed as if it is about privileged, bad people oppressing one person/many people. Perhaps discriminating against them; perhaps calling them names; perhaps simply not taking them into account.

That description is fundamentally mistaken.

Each of us who is oppressive has also been oppressed.

That is not to say that at a particular moment one socially-privileged person is not oppressing, or harming, or assaulting, or discriminating against, or calling names at, a person who is disadvantaged by this society. But it is to say that to understand classes of people as oppressors, and other classes of people as oppressed, oversimplifies and obfuscates day to day dynamics of oppression and inequality in a dangerous way.

I was for a time a member of the Canadian Bar Association’s National Equality Committee. We were developing an equality award, and casting about for a name. The “Clara Brett Martin Award” came to mind. But when the committee realized that Clara Brett Martin had been not only Canada’s first lawyer, but (like the rest of the profession) anti-Semitic, it rejected that choice. The committee

wanted a hero, and Clara Brett Martin's anti-Semitism disqualified her.

In my view we need to stop looking for "heroes" who are perfect, or creating heroes by whitewashing their mistakes. Instead we must recognize both their achievements and their flaws. We must respect each other in the same ways, as we work towards ridding ourselves of the internalized dominance to be able to envision a world of true equality.

I think about a situation in an unlearning oppression workshop which I was co-facilitating with a white person who had a disability, and an aboriginal person who was able bodied. The able bodied aboriginal person proposed to smudge and to acknowledge that the land we were meeting on was first nations land. The disabled white person pointed out that smudging—smoke—could be harmful to anyone with compromised lungs.

A heated argument ensued. The aboriginal person said that they had never heard of anyone in their community getting sick from smoke, and in their view this was just one more way for white people to forbid aboriginal people from performing their traditional rituals. The person with disabilities responded that disability issues were never taken seriously, that only issues of race seemed to count as true issues of oppression because no one ever thought about the physical consequences for people

with disabilities of things like smoke and scents.

Who was right? They were both right.

If we assume for a moment that the aboriginal person and the person with disabilities have, between them, the most power in the room or the situation, and that we must solve this issue in order to accord them both respect, we can free up our imaginations to come to creative solutions.²²

Oppression is not simply bad treatment by one person of another. If that were so, then all mistreatment would resolve into "that's life," "happens to all of us."

A fundamental feature of oppression is that the oppressor is the person who, in relation to that feature of their identity, is in the dominant group. By definition, they start with the socially-conferred power of being part of the norm.

Conversely, a fundamental feature of being oppressed is that the person who is being oppressed is, in relation to that part of their identity, in the target group, the out group, the non-dominant group, the oppressed group, in society. By definition, they start with the disadvantage of being part of the margin-al, the stigma-tized in society with respect to that aspect of themselves.

Every time that I hear a racist remark and do not contradict it, I offer my agreement and support to the continuation of the racism. Every time I hear a homophobic remark and do not object, I am reinforcing my own inequality.

Oppression is not simple. It is not the case that “homophobia is homophobia is homophobia,” nor that “racism is racism is racism.” Straight people react differently to gay men than they do to lesbians. White people react differently to rich people of colour than they do to poor people of colour. The reactions are homophobic/racist—but the treatment is likely to be different.

Human rights legislation cannot touch those pieces of our lives.

Unless and until we develop a conceptual analysis which is both useable and responsive to the complexity of the diversity of this society, human rights legislation will continue to become less and less relevant in Canada.

Conclusion

The lessons I have learned as a lesbian lawyer working on equality issues for queer people are these.

Unless I understand both the nature of inequality, and the nature of privilege, in my own life I will be certain to make mistakes advocating for equality for others. Those lessons are ones I must learn not from books, but from my own experience; and cannot be learned only with my head, though my head is indispensable to the learning.

Even having and applying an analysis of inequality, I and we will all make mistakes. It is crucial to incorporate that idea so that acknowledging a mistake is seen as one of the steps forward.

It is crucial to start with the lives of people, rather than to start with a legal issue. Many of us lawyers look for a case with “perfect facts” to advance an argument, missing the step of listening intently and humbly to what arguments the community wants us to make.

Law does not make social change by itself. It is one part of a strategy which must also include community organizing and consultation, and a public education/media strategy.

Thanks

I want to thank my many teachers, among them Aerlyn Weissman, Celeste George, D.D. Bloom, Dorrie Brannock, Gloria Yamato, jacquie allen, Janet Sawyer, Joanne Arnott, Haruko Okano, Kate Nonesuch, Kimberly Nixon, Leah Decter, Monika Chappell, Nym Hughes, Ricky Sherover-Marcuse, Theresa Tait-Day, Gloria Yamato. And I want to thank my partner, Sheila Gilhooly, without whose sense of humor and shared (un)reality I could not do the work I do.

1 In gender studies, cisgender is a class of gender identities where an individual's gender identity matches the behaviour or role considered appropriate for one's sex. Cisgender people experience their gender as a seamless part of who they are. Eli Green, "Debating Trans Inclusion in the Feminist Movement: A Trans Positive Analysis," (2006) 10:1/2 *Journal of Lesbian Studies* 231.

2 *Gay Alliance Toward Equality v. Vancouver Sun*, [1979] 2 SCR 435.

3 *Mossop v. Canada (Attorney General)*, [1993] 1 SCR 554.

4 *Egan v. Canada*, 1995 SCC 49.

5 The phrase "internalized dominance" was developed by Janet Sawyer and Dorrie Brannock in 1986, but I have since seen it emerge independently in other work.

6 *Vriend v. Alberta*, [1998] 1 SCR 493.

7 *M. v. H.*, [1999] SCJ 23.

8 *Barbeau v. British Columbia*, 2003 BCCA 406.

9 *Human Rights Code*, RSBC 1996, c 210.

10 *Canadian Human Rights Act*, SC 1985, c H-6.

11 25 per cent of the statutes of British Columbia bear directly or indirectly on the status of spouses or families: barbara findlay, "All in the Family Values," (1997) 14:2 *UBC Law Review*.

12 The trial Court in *EGALE Canada Inc. v. Canada* held that the only word in the Canadian constitution that was not susceptible to the "living tree" constitutional doctrine to evolve as social circumstances changed was the word "marriage," which could only be between one man and one woman. See: *EGALE Canada Inc. v. Canada (Attorney General of)*, 2001 BCSC 1365, *Barbeau v. British Columbia (Attorney General of)*, 2003 BCCA 251, and *Barbeau v. British Columbia*, 2003 BCCA 406.

13 "Transgender" is a term which has developed as an umbrella term for gendervariant people. It includes anyone whose experience does not fit into the traditional binary of "male" and "female." Much of the popular focus, and almost all of the legal cases, concern transsexual people. Transsexual people experience themselves as being born in the wrong body. They experience acute lifelong distress at having the body of, and being treated as, a member of the gender opposite to the gender they know themselves to be. Currently the only treatment for transsexual people is sex reassignment, a radical, arduous, and expensive hormonal and surgical process which brings the person's body into line with their innate sense of gender. Preoperative and nonoperative transsexuals are people who would be eligible for sex reassignment surgery; but have not yet had the surgery, or will not have the surgery for whatever reason. "Transgender" also includes cross-dressers, formerly known as "transvestites." Crossdressers are people, most often heterosexual men, who from time to time cross dress as women as a form of sexual arousal. Crossdressers also do not challenge a binary gender: they understand themselves to be of one gender (usually male) acting as the other (usually female). 12. Drag kings and drag queens are women and men, respectively, who imitate the gender they were not assigned, often as entertainment. Drag kings are usually lesbian; drag queens are usually gay; but for the same reason as crossdressers they do not challenge a binary gender order. Other transgender people may identify as both, or neither, male or female: claiming an identity that is neither binary nor, necessarily, fixed over time. And they have many names: bois, genderqueer, drag kings, transmen, trans, gender variant... And it is these people whose existence and claimed identity challenges our most fundamental understandings of the world and how it operates. (from "Gendering the Law: Most Little Boys Have Penises, Some Little Boys Have Vaginas; Most Little Girls Have Vaginas, Some Little Girls Have Penises" © Canadian Bar Association 2004.

14 barbara findlay, *Finding our Place: "Transgendered Law Reform Project"* (Vancouver: High Risk Project Society, 1996).

15 *Sheridan v. Sanctuary Investments Ltd.* (c.o.b B.J.'s Lounge), [1999] BCHRTD 43.

16 *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601, *Vancouver Rape Relief Society v. Nixon*, 2004 BCCA 516, *Vancouver Rape Relief Society v. Nixon et al.*, 2003 BCSC 1936, *Nixon v. Vancouver Rape Relief Society doing business as Rape Relief and Women's Shelter*, 2002 BCHRT 1; and barbara findlay, "Real Women: Kimberly Nixon v. Vancouver Rape Relief," (2003) 36:1 *UBC Law Review*.

17 By virtue of section 45 of the *Code*, which exempts from its application any group the primary purpose of which is to advance the interests of a group protected by the *Code*, Rape Relief and all other ameliorative organizations are exempt from the application of human rights legislation. This means that disability groups can exclude people who are HIV+; that aboriginal groups can exclude people who "look white," and so on. It is a badly drafted section of the legislation.

18 *Identity Screening Regulations*, SOR/2-7-82.

19 In BC it is possible for transsexual people—but not necessarily for other trans people—to get photo identification (driver's licence or BC ID) in their correct gender identity, without having to have the gender on their birth certificate changed first.

20 Canadian Bar Association, Newsletter, "Gendering the Law" (May, 2006).

21 The washrooms at Allard Hall, UBC's new law school, have no gender markers but only an icon of a toilet on their doors.

22 In this case, we could move outside for a smudging ceremony.

The Root of Human Rights is the Dignity and Inherent Worth of All People

by Grand Chief Stewart Phillip

04

Reg Robson Award winner Grand Chief Stewart Phillip of the Union of BC Indian Chiefs (UBCIC) welcomed attendees at a forum on sobering centres hosted by the BC Civil Liberties Association and the UBCIC in late 2010.

The forum arose from a recommendation by Mr. Justice William Davies, the Commissioner of the Frank Paul Inquiry, that a system of civilian sobering centres be established in the province to reduce the risk of in custody death as a result of drug or alcohol overdose. The Commissioner was particularly concerned about the vulnerability of marginalized alcoholics who consume “non-beverage” alcohol like rice wine and mouth-wash. Both the BCCLA and the UBCIC had standing at the Frank Paul Inquiry, supported it, and continue to advocate for the implementation of its recommendations. Many of the Inquiry’s recommendations remain unimplemented, including the recommendations around sobering centres and managed alcohol programs.

The following is the text of Grand Chief Stewart Phillip’s welcome to the assembled representatives of the community, police and government at the sobering centre forum on December 9, 2010 at Simon Fraser University, Harbour Centre.

(Greeting in the [Okanagan] Insilychen language)

Good morning everyone. I would like to begin by acknowledging the Coast Salish peoples on whose ancestral lands we have the privilege of being today. In particular I would like to acknowledge the Squamish and Tsleil-Waututh peoples.

I would like to commend the organizers for bringing us together this morning for this important discussion that we’re about to embark on this morning. This is quite an impressive group. I think it’s important to note we have five police agencies here today.

Thank God I don’t have any outstanding warrants.

The issue of civilian sobering centres is incredibly important. It is most certainly a life and death issue.

As we were on our way across town, Don Bain, the

Executive Director of the UBCIC, and myself, were listening to the news. The lead story was about the Mayor of Coquitlam whose home has been vandalized three separate times in the last week, all because of Coquitlam city council's decision to open a permanent homeless shelter in Coquitlam.

I believe that vandalism is the root of the issue we're going to be discussing here today. The root is the attitude of some in our society in relation to the homeless, in relation to marginalized people, in relation to people who live in the Downtown Eastside. The attitude that certain groups in our society are disposable. We must pull that attitude out by the root, and replace it with the idea that all people have value, and their inherent dignity must be respected.

The UBCIC is a political advocacy organization that has a long proud history, since 1969, of being a rights-based organization pursuing the human rights, the Indigenous rights, the inherent rights of Indigenous peoples throughout the province of British Columbia. The human rights and value of all people, no matter where they reside, is important to us. That's why we became involved in the Frank Paul issue 12 years ago.

Frank Paul was rejected from the drunk tank of the Vancouver Police Department. He was simply disposed of in an alleyway where he succumbed to the elements.

We all know there was a public inquiry that took 10 long years of marching through the streets to bring about. Thank goodness for the community activists like Kat Norris who was a central figure in organizing marches, candle light vigils and rallies to keep alive the memory of Frank Paul and to remind people of the tragic way that he died.

There have now been a number of recommendations from that hard-won inquiry. Many of those recommendations relate to people in the situation of the late Mr. Paul, people who are treated as disposable.

Too often when we have public inquiries the reports are issued, gather dust on a shelf somewhere, and we keep repeating the same behaviours with the same outcomes. At some point in time, we have to dig out the root that permits these attitudes to continue. I see this forum as an opportunity for that to take place. I commend all of you for taking the time to be here.

The attitude that certain groups in our society are disposable. We must pull that attitude out by the root, and replace it with the idea that all people have value.

The Decline of Violence and the Expansion of Human Rights: Reflections on Social Change, 1962 to 2012

by Neil Boyd

05

In 1997, as Vice President of the National Citizens Coalition, Stephen Harper set out his views on a number of issues that impact human freedoms: sexual orientation, access to abortion, the Canadian multicultural mosaic, and universal health care. As the following excerpt suggests, our current Prime Minister in his former role questioned protection within these realms as a responsibility of government.

"It (the Liberal government) believes in gay rights, although it's fairly cautious. It has put sexual orientation in the Human Rights Act and will let the courts do the rest. ...before the Reform Party really became a force in the late '80s, early '90s, the leadership of the Conservative party was running the largest deficits in Canadian history. They were in favour of gay rights officially, officially for abortion on demand. Officially—what else can I say about them? Officially for the entrenchment of our universal, collectivized, health-care system and multicultural policies in the constitution of our country."¹

The BC Civil Liberties Association celebrates 50 years of existence in 2012, an opportune moment to reflect on the contributions of human rights initiatives during that passage of time. This essay describes the cultural changes of the past five decades, challenging the often

stated assumption that a focus on human rights has detracted from effective crime control and created greater risks of serious violent crime within our culture.

In 1962 Canadian society was markedly different from what it is today. There were few women in the workplace and very few women working in the professions, or enrolled in the law and medical faculties of our universities. Even as late as 1973 less than 20 per cent of Canadian law school students were women.² Corporal punishment was routinely administered in Canada's public school systems, and until 1969 the practice of homosexuality remained a criminal offence.³

The late 1960s and early 1970s were a time of profound cultural change, not only within Canada, but also in most other western industrialized states. Crime rates increased dramatically in virtually all categories, most notably, perhaps, in the realms of homicide and illegal drugs. The homicide rate in Canada in 1962 was about 1.3 per 100,000 Canadians and in 1977, just 15 years later, it had more than doubled—to about 3.0 per 100,000.⁴ In 1962 there was a total of approximately 1,000 convictions nationally for the possession, distribution and importation of illegal drugs (principally cannabis, cocaine and heroin). By 1976 there were 40,000 convictions annually for possession of cannabis alone.⁵

What happened between 1962 and 1977? The birth control pill, first made widely available in the early 1960s, gave women a new ability to control the risk of pregnancy, changing the norms of sexuality and employment. For example, in one study, the rate of first sexual experience for unmarried 17 year old women within the United States almost doubled between the late 1960s and the late 1970s—from less than 25 per cent of the population to almost 49 per cent.⁶ Coincident with this increase in sexual freedom—flowing from the ability to control pregnancy—there were also more economic choices emerging for women. In Canada, for example, the number of women in the workforce more than doubled, from a total of 2.3 million in 1966 to more than 5.5 million in 1975. One recent US study suggests that the birth control pill (and its ability to allow women to control the timing of pregnancy) can account for 10 per cent of the convergence in male-female wages during the 1980s and 30 per cent of the convergence during the 1990s.⁷

In the midst of this increasing sexual and economic autonomy for women, it is instructive to note that both men and women were drinking more; the rate of alcohol consumption per capita rose by more than 50 per cent in Canada between 1966 and 1975.⁸ Perhaps it was not surprising, given such a backdrop of relatively abrupt social change in male-female relationships, that the rate of divorce in Canada also rose dramatically, increasing by more than 400 per cent between 1966 and 1975 (from about 50 per 100,000 Canadians to more than 200 per 100,000 Canadians). In large measure this increase was driven by a change to the *Divorce Act* in 1968, permitting divorce after three to five years of separation (prior to 1968 divorce could only be granted on a ground of fault, typically mental or physical cruelty, alcoholism, drug addiction or incarceration).

The changes in the late 1960s and early 1970s were often referred to as the sexual revolution, or in less flattering terms, as a time during which “the permissive society” emerged. There were also other indicia of cultural conflict: opposition to the Vietnam War and the ongoing possibility of nuclear holocaust, epitomized by the slogan “make love, not war,” and “tune in, turn on, drop out,” an invitation to indulge in mind-active drugs, principally cannabis, a drug that had historically been viewed as fundamentally different from mainstream cultural indulgences in alcohol and tobacco. The globalization of travel in the 1960s and 1970s had made marijuana more accessible. North Americans and Europeans travelled to India, the Middle East, and South America, coming into contact with people and cultures that had markedly different traditions of mind active drug use.

The initial response to massive increases in cannabis use was far from permissive. In the late 1960s more than half of those convicted of possession of the drug

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were sentenced to a term of imprisonment. In the face of this “get tough” approach, however, use increased dramatically. By 1975 there were more than 40,000 annual convictions for possession and it was no longer practical to put more than half of these offenders in jail (the jail population in Canada would have had to double, in order to accommodate 20,000 cannabis possessors). New sentencing options of conditional and absolute discharges were applied to many, and the percentage of those going to jail dropped to less than five per cent of all convicted.⁹

Since the early 1970s support for the legalization and regulation of cannabis has increased markedly in both Canada and the United States, rising from a low of about 10 per cent of the population to more than 50 per cent by 2010.¹⁰ Further, our culture has moved to an understanding of marijuana use as a public health issue rather than a criminal law problem of morality. While cannabis is not benign, it appears that the violence of the illegal trade is more problematic than its consumption—and that the relative harms of cannabis pale in contrast to those of the more commonly used drugs, alcohol and tobacco.¹¹

Unfortunately, the federal government has not lately been receptive to any science relating to mind-active drugs or, more specifically, to relevant data regarding cannabis. The government enacted legislation that will mandate a minimum six month term of imprisonment for any person who grows six marijuana plants or more, irrespective of whether there is any violence associated with the enterprise.¹²

The Rise and Fall of Violent Crime: In Search of an Explanation

Just like the “get tough” approach to cannabis, the rapid climb in rates of violent crime between the mid 1960s and the late 1970s did not last.

By the late 1980s Canadians (and Americans) began to experience a long and relatively precipitous drop in not only homicide rates, but in rates of all forms of violent crime. The homicide rate peaked at 3.0 per 100,000 Canadians in 1977; by the mid 1990s it had dropped to 2.0 per 100,000 and by 2010 it had dropped to 1.62 per 100,000, its lowest level since 1966.

A commonly offered explanation can be found in what criminologists call the age-crime curve. In every global jurisdiction today and in every era of human history, violent crime has been highly correlated with young men between the ages of 15 and 29. The age crime curve points to criminal activity that begins in the late teens and drops off dramatically during the 20s; this criminal activity is also almost exclusively male.

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Put differently, demographic shifts in the nature of the population can help to explain both the rise and the fall of rates of violent crime. The baby boom generation—those born between 1946 and 1964—entered their crime prone years in the early to mid 1960s and left their crime prone years in the early 1990s. There were, in proportionate terms, a lot of young men in the population between the mid 1960s and the early 1990s, and there has been a significant decline in their per capita contribution to the population since that time. More specifically, in 1961 approximately 21 per cent of the Canadian population was between the ages of 15 and 29, in 1980 approximately 29 per cent, and in 2000 approximately 20 per cent.¹³

What is clear from these data is that not all of the increase or decrease in homicide rates (or rates of violent crime) can be linked to population change. The increase in the homicide rate between 1961 and the late 1970s was about 150 per cent; the increase in the relevant population rate was only about 40 per cent. Similarly, the decline in the specific age cluster was about 30 per cent, but the decline in the homicide rate has been closer to 50 per cent.

A number of authors have suggested that cultural changes and changes in our collective values—a civilizing influence—can best account for first, the increase and second, the subsequent decrease in rates of violent crime.¹⁴ We have already discussed some of the cultural changes of the late 1960s and early 1970s, changes that might suggest an increase in violent crime: increased rates of alcohol consumption, increases in the divorce rate, cultural conflicts over war, peace and illegal drugs, and the emergence of relatively large unregulated industries of illegal drug importation and distribution. Not surprisingly, for example, the number of unsolved gangland killings in Canada increased from approximately 20 in the period 1961 to 1967 to more than 120 in the period 1968 to 1974.¹⁵

The Decline in Violence: A Triumph for Human Rights

But, as mentioned at the outset of this article, there has been a counterweight to such conflicts. The past 50 years have seen a remarkable expansion of human rights, most notably in the realm of women's rights—reproductive freedoms, access to the professions, increasing intolerance of domestic violence, and enhanced property rights within and outside of marriage. As Steven Pinker suggests, the revolution in women's rights is only one of a series of rights revolutions that have taken place in the last 50 years of the 20th century. Pinker writes of children's rights and the documented decline in infanticide, spanking, child abuse, and bullying; gay rights, the decriminalization of homosexuality, the decline of gay-bashing, and increased acceptance of gay marriage, and, finally of animal rights—the decline of cruelty to animals and the prosecution of those who commit acts of animal cruelty.

There is perhaps no realm that is more dramatic and more noteworthy than that of domestic violence. In both Canada and the United States the rates of intimate partner homicide have been declining since the late 1970s, and survey evidence reveals that women in the 1990s and beyond were less likely than women in the mid 1970s to be the victims of domestic violence. While domestic violence remains a significant problem, the decline in the rate of victimization of women is significant, and appropriately linked to the increasing rights of women (and, ultimately, the acceptance of such changes by most men).¹⁶

When I was attending elementary school in Canada during the 1960s, corporal punishment was a commonplace. I recall one teacher who would arbitrarily slap students on the back of the head as he walked down the aisle and another who threatened to give the strap to every male student in the class if the person responsible for making a mess in the washroom did not own up to his "crime" and submit to several lashes. It was also not uncommon during the 1960s to see mothers or fathers slap or hit their disobedient or simply difficult children in public; the corporal discipline of the child was viewed as acceptable correction. My wife recalls routine questions during employment interviews regarding the possibility of pregnancy—whether she was likely to "start a family." It was socially acceptable to ridicule homosexuals as "faggots" and to treat them with contempt.

As a probation officer during the 1970s I watched a young man go to jail for almost a year for his crime of possession of several ounces of marijuana. In the early 1980s, when I argued on a radio program for the decriminalization of marijuana, I received a number of phone calls—one from an anonymous RCMP officer who said I should be beaten up and another who demanded that I retract my comments, or be fired.

It is a time to reflect upon the accomplishments of those who advocate for civil and human rights, and upon how much has changed since the BC Civil Liberties Association began its work in 1962. The expansion of the rights of women has worked to diminish violence within our culture, as have similar changes with respect to the rights of children, homosexuals, and animals. It is because of increasing social support for these rights that we have become a less violent society. We have come to internalize women's rights, gay rights, children's rights and animal rights as an important part of our social fabric.

We are living in a rather different world in 2012 than we were in 1962, though new federal government policies that erode rights threaten to take us back to the much darker days of intolerance; vigilance in countering such an erosion of rights remains necessary. And what of the most recent concerns of the BCCLA:—police accountability; the treatment of addiction as a medical condition, not a crime; increasing education regarding human rights and equality; supporting the rights of prostitutes to work safely and with dignity? These are all critical issues, demonstrating the need for our organization to continue its work. We can only hope that the next 50 years will see as much substantive progress in the protection of rights and liberties as the last 50; that would be quite an accomplishment.

- 1** Stephen Harper, June, 1997, Montreal, Speech to the US Council for National Policy
- 2** Joan Brockman, *Gender in the Legal Profession: Fitting or Breaking the Mould*, (Vancouver: UBC Press, 2001).
- 3** *The Criminal Law Amendment Act*, 1968-69, SC 1968-69 c 38.
- 4** See: Statistics Canada, *Homicide in Canada 2010* by Tina Hotton Mahony, (Ottawa: Statistics Canada Catalogue, no. 85-002-X, October, 2011).
- 5** Neil Boyd, *High Society: Legal and Illegal Drugs in Canada*, (Toronto: Key Porter Books, 1991).
- 6** M. Zelnik & J. Kantner, "Sexuality, Contraception and Pregnancy Among Young Unwed Females in the United States," *Research Reports Volume 1, Commission on Population Growth and the American Future*, (Washington, D.C.: US Government Printing Office, 1980).
- 7** Martha Bailey, Brad Hershbein & Amalia Miller, "The Opt-In Revolution? Contraception and the Gender Gap in Wages," *National Bureau of Economic Research Working Paper No.17922* (Cambridge, Massachusetts: National Bureau of Economic Research, 2012).
- 8** See: Statistics Canada, *Sales of Alcoholic Beverages by Volume and Per Capita*, CAT: 63-202, Annual, 1966-1984; and Statistics Canada *Labour Force, Canada, Females, 15 years and over*, CAT 71-201.
- 9** Patricia G. Erickson, *Cannabis Criminals: The Social Effects on Punishment on Drug Users*, (Toronto: Addiction Research Foundation, 1981).
- 10** See: Frank Newport, "Record-High 50% of Americans Favor Legalizing Marijuana Use" Gallup Politics (October 17, 2011), online; Gallup—www.gallup.com/poll/150149/record-high-americans-favor-legalizing-marijuana.aspx.
- 11** David Nutt et al., "Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse," 369:9566 *The Lancet* 1047-1053.
- 12** Bill C-10, *Safe Streets and Communities Act*, 1st Sess., 41st Parliament, 2011, (Royal Assent on March 13, 2012).
- 13** Martin Andresen, Greg Jenion & Michelle Jenion, "Conventional Calculations of Homicide Rates Lead to an Inaccurate Reflection of Canadian Trends," 45 *Canadian Journal of Criminology and Criminal Justice* 1.
- 14** Marc Quimet, "Explaining the American and Canadian Crime Drop in the 1990s," 1 *Varia*. For a very detailed analysis of this issue see: Steven Pinker, *The Better Angels of our Nature: Why Violence Has Declined*, (New York: Viking, 2011).
- 15** See: Statistics Canada, *Homicide in Canada: A Statistical Synopsis*, (Ottawa: Statistics Canada, 1976). See particularly Chapter 4, "The Types and Circumstances of Murder."
- 16** Department of Justice Statistics and Research Division, Canada, *Examination of Declining Intimate Partner Homicide Rates: A Literature Review* by Myrna Dawson (Ottawa: Department of Justice, 2001). See also: Murray Straus & Richard Gelles, "Societal Change and Change in Family Violence from 1975 to 1985, As Revealed by Two National Surveys," 48:3 *Journal of Marriage and the Family* 465.

A Celebration of Civil Liberties in Canada and the World

Our Legacy of Criminal Law: Advancing Liberty in the Face of Intransigence?

by The Hon. Michael Kirby AC CMG

06

The English Laws on Sodomy

There is a particularly unlovely legacy of the criminal law of England, namely the sodomy offence. I have dealt with it in several earlier papers, one of them on the religious influences that originally gave rise to the law,¹ and others on the dead end that we appear to have arrived at in securing repeal and reform of this law in the newer countries of the Commonwealth of Nations.²

I choose this topic for this celebratory collection, not to put a damper on the work of the BCCLA but because the subject presents a mixture of quaint legal history, oppressive current operation of the criminal law, high matters of public policy, international engagement of the English heritage in criminal law and issues of cruelty and injustice perpetrated in the guise of law that should be of interest to all people concerned about civil liberties.

The ultimate origin of the sodomy offence in the English criminal law was a series of provisions in the Old and New Testaments of the *Bible*. These provisions were interpreted as forbidding, under pain of death, sexual penetration by one male of another male. The principal and earliest sources of this instruction are to be found in passages in the first book of the *Old Testament*, *Genesis*, wherein an account is given of the way the men of Sodom, in ancient Israel, surrounded the home of Lot,

who was there sheltering two mysterious visitors to the city (thought possibly to be angels). The dwellers of Sodom demanded that Lot should bring out his guests in order that they might “know” them.³ The Hebrew verb “to know” is “*yd*.” It possesses a number of meanings, just as it does in English. Sometimes these meanings have a sexual connotation. This is how the scriptural passage in question has long been interpreted.

The *Book of Leviticus* contains an extensive “Holiness Code.” It was designed to control all manner of activities of the people in ancient Israel. Amongst these, a specific passage appears which is generally taken as a clear indication of divine disapproval of what we now describe as male “homosexual” activity:⁴

If a man... lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon you.

To these passages in the *Old Testament*, can also be added a number in the *New Testament* which are said to re-affirm the divine prohibition on same sex activity.⁵

As chance would have it, I recently launched, at St. Paul’s Anglican Cathedral Chapter House in Melbourne, a new work written by five experienced Anglican theologians,

examining the foregoing passages of scripture.⁶ Later in the same week, by another coincidence, the national conference of the Australian Labor Party debated a motion designed to amend the platform of the party, so as to commit it to amendment of the *Marriage Act 1961* (Cth) to “open up” marriage in Australia to make it available, as in Canada and other countries, to all persons, irrespective of their sex or sexual orientation, who are committed to that form of relationship.⁷

The proposition advanced by the theologians is (to oversimplify things) that the interpretation of the scriptures, adopted in the past by the Abrahamic religions, to support the sodomy offence, and to criminalize male homosexual conduct, has been (or at least may have been) a serious theological mistake. That the passages, properly analysed, do not support the prohibition and divine disapproval. That the interpretation has been a needless infliction upon the small minority of people in every society who are same sex attracted. And that other and better interpretations are available which should be preferred.

Lawyers, who grow up in the world of interpretation of written texts, many of them old and some of them even ancient, are familiar with debates of this kind. In a sense, the arts of theology appear to be quite similar to those of constitutional interpretation. The texts are typically brief, vague, sometimes poetic and often ambiguous. In hermeneutics,⁸ it is sobering to read the theological analyses and conclusions and to keep in mind that, upon the basis of the unravelling of the Biblical texts, many human beings over the centuries have been put to death and even more have been oppressed, shamed and punished by the criminal law inspired by these texts and shunned by society. Some today still are.

The early English law committed the punishment of sodomy to the ecclesiastical courts, conducted by the clergy, representing the universal Christian church. A strict separation between church and state had not developed in medieval times. The Church took upon itself the punishment of those who committed ecclesiastical offences and thereby endangered social peace and defiled the kingdom. A survey of the English laws, published in Latin in 1290, during the reign of Edward I, specifically mentions sodomy.⁹ Another description of English criminal laws, written shortly afterwards in Norman French, describes the punishment for the offence as burning alive. Being an offence seen as being against God’s will and a supposed source of social defilement, it attracted condign punishments.¹⁰

The foregoing arrangements were partly altered by Henry VIII’s break with the Church of Rome. The trial of ecclesiastical offences had then to be transferred to the Royal courts in England for secular disposition. Accordingly, in 1533, a statute was enacted by the English Parliament providing for the crime of sodomy under the description of “the detestable and abominable Vice of Buggery committed with mankind or beast.” Death was the punishment prescribed for the offence.

When Henry VIII died and was eventually succeeded by his older daughter, Mary I, his statute was repealed. The crime of sodomy reverted to the Ecclesiastical courts. However, with the accession of Elizabeth I, the Ecclesiastical courts were again abolished and in 1563 the secular offence was re-enacted.¹¹

Once the law attained this tortuous lineage, it was described and lauded by the taxonomists of English law, Edward Coke¹² and William Blackstone.¹³ It was through Blackstone’s analytical *Commentaries on the Laws of England* that much of the jurisprudence on the sodomy offence

passed into the United States, including after the independence of that country following the revolution of 1776. Several of the foundation American colonies already had enactments of their own, substantially repeating the language of the offence of Henry VIII.

It was in this way that the sodomy offence found itself as a key provision both of English and colonial law. Its spread to the vast empire of Britain that expanded in the seventeenth to twentieth centuries was assured. Yet nothing made assurance more certain than the mode by which the British colonialists and administrators secured the export of their criminal laws to the countries brought under allegiance to the British Crown.

The end of the eighteenth century had witnessed a move in France to reconsider all of the Royal laws of that country and to codify the French common law, so as to make it more accessible to, and suitable for, the people. As part of this process, the sodomy offence in France was abolished by the revolutionary legislature in 1791. This abolition was preserved and extended by the Napoleonic codifiers who drafted the French *Penal Code* of 1810. In consequence of these amendments, most of the newly emerging nation states of the Continent followed the French *Penal Code*. In the result, neither they, nor their overseas empires, inherited the sodomy offence. Criminalization of sodomy was not a feature of the French Empire, nor of the German, nor the Spanish or Portuguese, nor the Netherlands, Belgium, Scandinavian or Russian Empires. Thus, the Netherlands penal code in what is now Indonesia never contained such an offence. It still does not. The sodomy offence was, however, most certainly a feature of the British Empire, which had not enjoyed the benefit of the revolutionary repeal in France and throughout Europe.

On the contrary, the self-same process which had led to the codification of French law in the early years of the nineteenth century produced an equivalent movement in England, seeking to codify the English common law, including the common law of crime. Supporters of this codification movement included notable legal philosophers and reformers such as Jeremy Bentham, John Austin and J.S. Mill.¹⁴ The moves to obtain the codification of the English criminal law in England eventually failed (although reforms were achieved concerning the law of criminal evidence). However, the attempt to express that law in the form of criminal codes was to prove greatly influential.

A clear requirement of any colonial power, in exerting its rule in a colony or settlement beyond the seas, was to provide a functioning system of criminal law. This the British did by implementing one of four major criminal codes in all of their overseas colonies. These codes were:

- + The Indian *Penal Code* of 1860, drafted by Thomas Babington Macaulay;¹⁵
- + The Stephen *Penal Code*, based on the draft of Sir James Fitzjames Stephen;¹⁶
- + The *Griffith Criminal Code*, named after Sir Samuel Griffith, first Chief Justice of the High Court of Australia who, as Chief Justice of Queensland, had drafted his own criminal code drawing on earlier British attempts and on the criminal laws adopted at that time in Italy and New York;¹⁷ and
- + The *Wright Penal Code*, based on the work of R.S. Wright, intended for the colony of Jamaica. This Code was not eventually implemented in Jamaica but, in the peculiar ways of the British Empire at that time, it was implemented on the other side of the Atlantic Ocean in the Gold Coast (now Ghana).¹⁸

There were many variations and differences in the implementation of the foregoing codes in the many colonies and dominions of the British Crown. However, a common feature of them all was the inclusion of an offence of sodomy. So it was that this offence became a universal feature of all jurisdictions of the British Empire, including Canada and Australia. It was law in force by statute in New South Wales, for example, at the time that Mr. Vernon Treatt QC taught Murray Gleeson and me criminal law at the University of Sydney Law School in 1958.

Legislative Reform Peters Out

With varying degrees of directness, Jeremy Bentham and J.S. Mill had cast doubt on the appropriateness and utility of preserving the sodomy offence. They did so by reference to their concepts about the proper limitations of the criminal law in a civilized society. Still, it required the writings of early leaders in the discipline of psychology, and research of important scientists such as Alfred Kinsey, to place the acceptability of the sodomy offence on the active agenda of law reformers.

Kinsey's influential reports on human sexuality were published in 1948 and 1953.¹⁹ They occasioned a great deal of public and media discussion about the sodomy offence, with the growing recognition of the apparent fact that significant numbers of otherwise lawful citizens were being exposed to prosecution for committing the offence. This was not a tiny fraction of evil-doers. Eventually, a Royal Commission of Enquiry was established in the United Kingdom, chaired by Sir John Wolfenden, a university vice chancellor. The report of this Commission (the *Wolfenden Report*) proposed repeal of the sodomy offence, so far as it concerned adults, acting by consent and in private. In language that reflected the earlier approaches of Bentham and Mill, the Wolfenden Committee concluded:²⁰

Unless a deliberate attempt is made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.

Legislation to give effect to this conclusion was first enacted in England in 1967.²¹ Reform followed in Canada (1969),²² Australia (1974-97), New Zealand (1986), Hong Kong (1990) and the Fiji Islands (2005). It was achieved by a decision of the Constitutional Court in South Africa in 1988.²³ Later, in a constitutional decision, the United States Supreme Court, following an earlier false start in *Bowers v. Hardwick*,²⁴ struck down the sodomy offence in *Lawrence v. Texas*²⁵ in 2003.

In the course of the struggle to conclude the repeal of the sodomy offence in Australia, a communication was taken to the Human Rights Committee established under the First Optional Protocol of the *International Covenant on Civil and Political Rights*. This is a treaty and protocol to which Australia is a party. In resolving that communication, the Human Rights Committee found that, by maintaining the sodomy offence in the State of Tasmania, Australia was in breach of its obligations under the treaty.²⁶ Armed with the precedent of repeal in the country from which the law had initially come; the absence of such a law in most countries of the world; the arguments of philosophers; the reports of the Royal Commissioner; the common non-prosecution of the offence; and the agitation of informed public opinion, it might have been expected that the sodomy offences would quietly, and relatively quickly, have slipped out of the penal laws of the countries of the Commonwealth of Nations. Not so.

Resistance to Repeal and Response

In 2006, in Singapore, the Law Society of that city state delivered a report proposing repeal of s377A of the *Singapore Penal Code*. Repeal seemed assured because the "Minister Mentor" and Prime Minister of Singapore (Lee Kuan Yew) indicated his personal support for reform. Nevertheless, the bill to implement the Law Society's recommendations failed in the Singapore Parliament. It was said by opponents that it would undermine "social cohesiveness" and "force homosexuality on a conservative population that is not ready for homosexuality."²⁷

Reform was achieved in one or two jurisdictions of the Commonwealth of Nations (such as The Bahamas). Pressure to introduce the sodomy law was resisted by the newest member of the Commonwealth that had a French penal code background (Rwanda). Nevertheless, the process of reform basically ground to a halt. African leaders in Zimbabwe, Kenya, Uganda and Nigeria competed with one another for the vehemence of their condemnations of Western attempts to persuade them

to get rid of the law. This is the situation in which the Commonwealth of Nations now finds itself. Forty-one of the 54 countries of the Commonwealth still criminalize sodomy. A number of these countries (e.g. Sri Lanka and Singapore) have actually extended the offence to apply to women or to remove the application of the offence in the case of heterosexual married couples. Far from being repealed, the crimes have been expanded. The reform movement seems to have faded and collapsed.

It is in this context that some new developments have taken place that need to be noted by those interested in this unhappy relic of English criminal law. One of them is an important decision of the Delhi High Court in India in *Naz Foundation v. Delhi & Ors.*²⁸ That decision upheld a challenge to the constitutional validity of s377 of the Indian *Penal Code* dealing with the offence of sodomy. The judges of the Delhi High Court (A.P. Shah CJ and Muralidur J) concluded that the provisions of s377 were contrary to the guarantees of human rights in the Indian Constitution, specifically guarantees of privacy and equality of status of all citizens.

The decision in *Naz* is presently subject to an appeal to the Supreme Court of India which awaits hearing and determination. However, the Government of India did not lodge an appeal against the decision of the Delhi High Court and it is being brought by religious bodies. The outcome of the Indian litigation will be of potential importance for many countries of the Commonwealth of Nations, given that virtually all of them, in the new *Commonwealth*, have a provision similar to s377 of the Indian *Penal Code*. Most of them have constitutional provisions on the basic civil rights of individuals, similar to those invoked successfully in the Indian Court.²⁹

Meantime, three further developments have occurred that place the spotlight on the still operating sodomy offences in the majority of Commonwealth countries:

The Commonwealth EPG report: The first is the publication of a report of the Eminent Persons Group (EPG) on the future of the Commonwealth.³⁰ I served as a member of the EPG, as did Senator Hugh Segal of Canada. It decided to tackle the issue of the remaining sodomy offences, but in the context of another special Commonwealth problem involving the HIV/AIDS epidemic. Statistical evidence provided to the EPG by the United Nations Development Programme (UNDP) indicated that the levels of HIV in Commonwealth countries are at least twice as high as those in non-Commonwealth countries, including in Africa. A contributing factor to this worrying statistic was considered to be the state of the law in Commonwealth countries dealing with sex, specifically homosexual conduct and the criminalization of prostitution (sex workers). The problems of the continuing global financial crisis; the declining funds available for the provision of anti-retroviral drugs; and the ongoing

rates of infection in developing countries make it urgent that these Commonwealth countries should address their special problem. Unfortunately, at the Commonwealth Heads of Government Meeting (CHOGM) in Perth in October 2011, there was no sense of urgency on the part of Commonwealth leaders. The central recommendations of the EPG on responses to the AIDS epidemic were postponed to be considered by officials and to be reviewed by the Foreign Ministers of the Commonwealth in September 2012. It might be hoped that realism and an appreciation of the dangers of HIV for millions of citizens of Commonwealth countries will encourage a sense of urgency. But this is by no means assured.

The UNDP Global Commission on Law: Another body on which I serve, the Global Commission on HIV and the Law, is preparing a report on the legal impediments to successful strategies necessary to combat the continuing spread of HIV. This report will be addressed to the entire world and not simply to Commonwealth countries. The final meeting of the Global Commission took place in Geneva in December 2011. The report, expected in mid 2012, should address specifically the legal impediments that include the laws on homosexuals and sex workers; but also on other vulnerable groups, including women's legal disempowerment, the laws on injecting drug users and the laws of intellectual property that increase the costs of essential treatments. The follow-up to this report in Commonwealth countries will draw attention to the continuing existence and stigmatizing effect of the sodomy offences surviving there.

UN and other leaders: In addition to these initiatives, the leaders of the United Nations, from the Secretary-General (Ban Ki-moon) down have been speaking with one voice of the imperative need to repeal the laws that interfere with successful strategies against HIV/AIDS, notably the laws on homosexuals providing for the sodomy offence. In an address to the Human Rights Council of the United Nations in January 2011, the Secretary-General said:³¹

I understand that sexual orientation and gender identity raise sensitive cultural issues. But cultural practice cannot justify any violation of human rights. ... When our fellow human beings are persecuted because of their sexual orientation or gender identity, we must speak out. That is what I am doing here. That is my constant position. Human rights are human rights everywhere, for everyone.

With a growing unanimity and strength, leaders of the United Nations and of individual countries are thus speaking out. They are calling for the sodomy offence to be repealed and for an end to the stigma and the oppression of the homosexual minority that is a direct result of the survival of this unlovely feature of inherited colonial criminal laws. So why is nothing happening? How can

law reform proposals be translated into action so as to promote civil liberation on this subject world-wide?

Conclusion: A Puzzle and Dilemma

We need to break the impasse that has arisen that impedes the reform process that began with Jeremy Bentham and gathered momentum with the *Wolfenden Report*, the statutory reforms in the United Kingdom and the later reforms in the old Dominions of the British Empire, including Canada and Australia.

The adoption of those reforms in the newer countries of the Commonwealth has reached a complete blockage. Leaders of those countries resist reform. They denounce it as a new kind of Western imperialism, seeking to reassert the influence that "white" people held over their countries in the time of Empire. This is their perception of the issue.

On the other hand, observers in the developed countries see the urgency of the AIDS epidemic and the futility of responding to the epidemic by criminalising, shaming and stigmatizing a minority because of their sexual orientation, which they did not choose and cannot change. The persistence with the sodomy offence appears to these observers to be similar to the former persistence of the apartheid regime in South Africa, with the racial laws that existed in that country before the election of the Mandela Government. These laws were often justified by reference to supposed scriptural texts. The sodomy offence is a kind of apartheid law, directed not at race or skin colour, but to another indelible feature of human nature, namely sexual orientation. Sadly, the very same nations that denounced and fought against racial apartheid are now often leaders in resisting the calls for the reform of the laws that enforce sexual apartheid. In 41 of the 54 Commonwealth countries, sexual apartheid survives. So what can be done to move the logjam?

At present, the way ahead is by no means clear. Resistance to affirmative action is very strong. Effective means of persuading those who resist are difficult to find—particularly so because of the pressure of religious voices that often reinforce political causes for inaction and resistance.

The sodomy offence is a British imperial export to countries still found in every part of the world that is proving very difficult to erase. The full story of this unlovely export is yet to be finally written. Before the last full stop is inscribed on the page, many victims of this law will die, including many infected with HIV/AIDS who are driven by shame and fear away from protective knowledge and treatment. Much violence, hatred and discrimination will take its toll before these laws are all repealed. The puzzle and challenge of unheeded calls for law reform are given a special urgency because of their relevance

The sodomy offence is a kind of apartheid law, directed not at race or skin colour, but to another indelible feature of human nature, namely sexual orientation.

to successful strategies to address the new peril of HIV. Ironically, the dangers of HIV are specially present in the very countries that most vehemently resist the calls for law reform.

The challenge of converting law reform proposals into action is one that I have faced over nearly 40 years of public life, starting with my years in the Australian Law Reform Commission in 1975. On an international level, the difficulties are magnified. The forces of resistance and inactivity are increased. We cannot force reform. But we must redouble our efforts of persuasion. Because the present law is a vehicle of human oppression and repression, it falls to judges and lawyers throughout the Commonwealth to give the lead and to raise their voices in favour of reform. As earlier they did against racial discrimination.

Canada and Australia must be leaders in the calls for reform—not only for the pragmatic reasons of disease control. But also because of the need to secure equal dignity and civil liberties for people everywhere who are oppressed because of their sexual orientation. Civil liberties today are no longer solely the concern of a state or province. Or even of a nation. Civil liberties today occasion a global movement for justice and equality for human beings everywhere.

Justice of the High Court of Australia (1996-2009); Member of the Eminent Persons Group on the future of the Commonwealth of Nations (2010-11); Commissioner of the UNDP Global Commission on HIV and the Law (201-12). Parts of this text are derived by the author's Paul Byrne Memorial Lecture, delivered at the Sydney University Law School on November 28, 2011.

1 M.D. Kirby, "The Sodomy Offence: England's Least Lovely Criminal Law Export?" (2011) *Journal of Commonwealth Criminal Law* 23.

2 M.D. Kirby, "Lessons from the Wolfenden Report" (2008) 34 *Commonwealth Law Bulletin* 551; M.D. Kirby, "Homosexuality—A Commonwealth Blind Spot on Human Rights" (2007) *CHRI News* Vol.14(4) 6; M.D. Kirby, "Discrimination on the Ground of Sexual Orientation—A New Initiative for the Commonwealth of Nations" (2007) *Commonwealth Lawyer* 36.

3 *Genesis* 19:5.

4 *Leviticus* 20:13.

5 See e.g. *Romans* 1:26-27; 1 *Corinthians* 6:9-10; and 1 *Timothy* 1:8-11.

6 *Five Uneasy Pieces: Essays in Scripture and Sexuality*, (TF Ltd, Adelaide SA, 2011) (essays by Megan Warner; Richard Treloar; Peta Sherlock; Alan Cadwallader and Gregory C. Jenks).

7 Subsequently, on December 3, 2011, the National Conference of the ALP voted to amend the *Platform of the Party*; but to preserve the right of Members of the Australian Federal Parliament to vote according to conscience against any such measure. Because the Federal Opposition is opposed to a conscience or free vote, this outcome guarantees defeat of any immediate attempt to amend the *Marriage Act* 1961 (Cth).

8 Hermeneutics is the art or science of interpretation, especially of Scripture.

9 Fleta, *Seu Commentarius Juris Anglicani* was a survey of English law produced in the Court of Edward I in 1290 (Ed. and trans. H.G. Richardson and G.O. Sayles, London, Quaritch, 1955). See Human Rights Watch report 13.

10 The offence is contained in a work by Britton which is described in H. Brunner, *The Sources of the Law of England* (Trans. Williams Hastie, Edinburgh, T.T. Clark 1888). See also H.L. Carson, "A Plea for the Study of Britton" 23 *Yale Law Journal* 664 (1914).

11 M. Hyde, *The Love That Dared Not Speak Its Name: A Candid History of Homosexuality in Britain*, Boston, Little Brown, 1970. The *Buggery Act* 1533, after its original repeal, was re-enacted as the *Buggery Act* 1563 during the reign of Elizabeth I.

12 E. Coke, *The Institutes of the Laws of England* (3rd part), cap. X *Of Buggery, or Sodomy*, 1797, 58.

13 W. Prest, *Blackstone and His Commentaries: Biography, Law, History*, Hart, Oxford, 2009, 3.

14 H.L.A. Hart, *Jeremy Bentham* in A.W.B. Simpson (Ed), *Biographical Dictionary of the Common Law* (Butterworths, London, 1984) 44. *Ibid*, 45. See also J. Anderson, "J.S. Mill" in A.W.B Simpson, *ibid*, 364-5.

15 M.B. Hooker, "Macaulay" in A.W.B. Simpson, *ibid*, 330.

16 S. Uglo, "Stephen" in A.W.B. Simpson, *ibid*, 486.

17 A.C. Castles, "Griffith" in A.W.B. Simpson, *ibid*, 216 at 217.

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19 A. Kinsey et al, *Sexual Behaviour in the Human Male*, (1948); Kinsey et al, *Sexual Behaviour in the Human Female*, (1953).

20 Report of the Committee on Homosexual Offences and Prostitution (Wolfenden Report), CMND247, HMSO, 1957. See also M.D. Kirby, "Lessons From the Wolfenden Report" (2008) 34 *Commonwealth Law Bulletin* 551.

21 *Sexual Offences Act* 1967 (UK).

22 *Criminal Law Amendment Act* 1968-69, s7.

23 *National Coalition for Gay and Lesbian Equality v. Minister of Justice* [1998] 3 LRC 648; 1999(1) SA 6 (SACC)

24 478 US 186 (1986).

25 539 US 558 (2003).

26 *Toonen v. Australia* (1994) 1 *International Human Rights Reports* 97 (No.3).

27 M. Aidil, "Re-Scoping Sec.377A: A Juxtaposition of Views," *Juris Illuminae*, Vol.3, No.3, (January, 2007) (Singapore).

28 [2009] 4 LRC 835 (Delhi High Court).

29 By the time of printing this book, *Naz* had unfortunately been overturned by the Supreme Court of India, Civil Appeal No. 10972 of 2013, 11 December 2013.

30 Commonwealth, Eminent Persons Group, *A Commonwealth of the People: Time for Urgent Reform* (Commonwealth Secretariat, London, 2011). See at 98-102.

31 Ban Ki-moon, Secretary General of the United Nations, Remarks to the Human Rights Council, Geneva, January 25, 2011, TSPT.

What About *Students'* Academic Freedom?

by Jeffrey Foss

07

The Basis of Academic Freedom in the Education of Adults

The role of academic freedom in society was given its very first big moment in the historical spotlight when the Athenians put Socrates to death in 399 BCE for the crime of corrupting youth—a clear denial of what we would now consider academic freedom, as well as the basic human right to freedom of thought and speech. It was Socrates' most famous follower, Plato, who founded his Academy, the very first academy so-named because it was located on the fields of Academus, a rich and famous athlete (some alliances haven't changed)—and it was there, significantly, that the concept of academic freedom first took root. I am tempted, as a philosopher, hence an intellectual descendant of Plato, to praise him fulsomely as a champion of individual liberties but I can't, because it would ring as hollow as the fake wood on my car dashboard. Plato's Academy was an elitist, sexist institution in an elitist, sexist world. Nevertheless, it was in the Academy that the seed of academic freedom was first planted—however unintentionally—by Plato, not as a doctrine or principle, but in his method of teaching: *dialectic*. My goal here is to excavate this ancient root of academic liberty just enough to show its relevance today. Of course, the principle of academic freedom of professors is so well established no further argument is needed for it. Instead, I want to show that *students'*

academic freedom is an essential component of academic freedom that is universally ignored—at our peril.

Let me be perfectly open about my own leanings: I am deeply committed to the ideal of human freedom and the modern legal rights we in the first world enjoy. I am deeply convinced that academic freedom is a good thing—in no small part because I have been protected by it, even as I have professed ideas that run directly contrary to those held by many if not most of my fellow citizens and enshrined in both law and in public education. But I also know that Plato's most famous student, Aristotle, left the Academy and started his own school at least in part because of irreconcilable differences with Plato, who would have rejected academic freedom faster than a rotten carp. It was Plato, after all, who professed in his vastly influential *The Republic* (rightly or wrongly) that only the best people, the men of gold (and women of gold too, it seems, though men are those mentioned explicitly due to the predominance of the masculine pronoun) are to be taught the deep truths revealed by the academic quest for wisdom, i.e. philosophy. The lower scholarly classes, the men of bronze and the men of iron, were to be kept in the dark when it came to the deep philosophical truths reserved for the golden men of the ruling class, and taught instead either the bronze (white-collar) curriculum or the iron (blue-collar) cur-

riculum—plus whatever war-craft necessary to protect the city-state.

Plato believed, as did all wise men of his era (and as I do now) that the primary function of schooling—including that which is supported from the public purse and directed by the state—is *training*, not education. If we mean by “education” leading a person out of mental darkness and into the full light of day (Plato’s poignant image of philosophy’s path), then that was clearly not accessible to everyone, in part because not everyone was capable of the rigors of the study, but also because not everyone could rise to the elite level of social leaders. From time immemorial, the best roles have been reserved for the best among us, the most “noble,” to use that most telling of terms—one which still rings pleasantly today in such phrases as “noble human rights warrior,” despite its obvious connotation of the ruling class. If, on the other hand, we mean by “education” turning a newborn human being into one of us, whether we are ancient Athenians, modern Americans, or hunter gatherers, then this must be made available to everyone. The infant *Homo sapiens* can acquire vastly different forms of life, making us the renegades of the biological domain, our big brains virtually empty slates at birth waiting to be programmed, giving us adaptability to almost any econiche—and incidentally rendering us the only organisms who could ever make a pizza or dream of nuking the neighbours.

I want to show that students’ academic freedom is an essential component of academic freedom that is universally ignored—at our peril.

So first our child must become one of us, absorb our words and ways, be trained up by our loving attention, our home-schooling. We are a social species. We share the Darwinian struggle for survival by distributing tasks and responsibilities. The best hunters hunt, the best gatherers gather, and both teach the most apt children their trade, who in turn pass on the art—giving it their own twist on the way. The first form of schooling, which normally is done unknowingly by parents in the mere act of looking after their children, invests the child with a “culture.” Our scientists, social scientists, and other philosophers all agree: culture is an *essential* aspect of human nature. You cannot rip the sled and harpoon out of the hands of an ice-cap hunter without injury to those hands and the intelligence which gives them their skill—nor rip the computer out of the hands of a modern youth without the same result. So, in education as elsewhere, first things first: children are taught the language, lore, leanings, and abilities needed to be a member of the society in which they live. This is mostly a matter of training, and occupies the child till adulthood. For the vast bulk of human history, this first form of education was all that existed. But over the last few millennia, education of some young adults became routine, until now something like half of young adults in developed countries engage in “post-secondary” education. Plato’s Academy, once the preserve of the elite, now has become the province of the many. By the time our offspring have entered the academy, they are adults.

This would seem to be obvious, but in case it is not, let me state it as a claim to truth, or thesis:

SUB-THESIS 1: Students of the academy are adults and have the basic rights and liberties of all adults.

You needn't read further if you are in disagreement—for that is your right as an adult. However, *if you were* my student you could be required to read it—though you could not be forced to read it (and might not read it and still get a perfect A+ for the course). I say this only to put you in my students' shoes for a minute, as it were, to gain your sympathy for Sub-thesis 1. I could be teaching you that the thesis is true. Do you think you should have the right to disagree with me about that, imagining all the while you are my *adult* student (of whatever age you happen to be)? If you say yes, then you explicitly agree with Sub-thesis 1. And if you say no, then you implicitly agree in your very act of rejection (without contradicting yourself, for the thesis is perfectly comfortable with its own denial logically speaking). In any case, I shall assume Sub-thesis 1 in what follows.

Does Students' Academic Freedom Contradict Professorial Authority?

What follows is somewhat problematic. The teacher must have some authority over students, and yet Sub-thesis 1 seems to deny that authority. If the academic teacher, the *professor*, has no more rights than the student, on what authority can the professor demand that the student accept what he or she teaches? One reply that finds much favor today, notably among ministries of education and university administrators, portrays the academy as a department store of intellectual wares in which the student shops, buying what he or she wants, and ignoring the rest. Though this solves the problem of the basis of the professor's authority—by denying its existence—it also attacks the academy by denying the very idea of adult education, the idea that students have a far better idea of what they really want, i.e., what is really worthwhile, when they leave the academy than when they arrive. Providing the information, insight, and understanding to make this possible is one essential task of the academy as such. Of course, you may not agree, but let me state a smaller, supporting thesis in order to focus the subsequent discussion:

SUB-THESIS 2: The job of a professor is not merely to teach but also to profess.¹

In other words, professors do not merely teach facts that have the absolute certainty of "2+2=4" or the common sense certainty of "Planet Earth is spherical." They may also venture into the (vastly more interesting) realm of what for most people is opinion—precisely because they must take such matters on authority

alone, lacking the specialist training to decide them firmly on their own merits. Professors are seen as authorities, and many, if not most, people accept much of what professors tell them. Professors in turn teach many, *many* things. For instance, some professors teach—and thereby give the stamp of official knowledge for those people who merely believe—that the universe began 13,700,000,000 years ago (latest figure, according to Wikipedia) in the mother of all explosions, the "Big Bang." Professors also teach—and thereby officially bless the many people who believe—that the ideal form of political organization is one in which each of us has basic liberties (or not!), including the right to amass riches without legal limit (or not), or to own property (or not) including the shirt one is wearing (or not)...and so on for a plethora of popular and unpopular beliefs.

If you do not think that professors have the right to teach such things, then you should avoid colleges and universities and advise your children to do the same. Post-secondary education has always been (and hopefully will always be) a place where professors profess and students acquire doctrines that inform their thinking—and thereby their actions—for the rest of their lives. Right or wrong, it's a fact. So, imagine yourself a student (and an adult) in a university class where the professor has for the last week presented persistent, persuasive argument in favor of a political, religious, or moral ideal that you reject. The students have mainly sided with their professor against you, and your challenges have been met with professorial criticism and passionate student rebuttal. If you do not accept what the professor is teaching, you will probably get a poor grade. If you drop out now, well into the term, you will get an F on your transcript that will pull your grade average down. What can you do?

Believe me, you would not be alone. I know this as a fact from uncounted student narratives. The point of this essay is to argue that you *should* have every right to stick to your guns and refuse to believe what your professor is teaching, without any negative impact on your grade. Having thus set the stage, let me introduce my main point, my central contention, the bottom line of my argument:

THESIS Students should have the same academic freedom as their professors.

Let me be the first to profess that one of the most persistent and powerful criticisms of philosophy is that its wheels fail to touch the ground. I am also the first to protect the right of philosophers to wander freely in the realm of their ideals seeking a glimpse of our beloved wisdom—"our" because I too am a seeker, and worse (or better?) than that a professor of philosophy. Begging your leave to pass but swiftly over the logical tensions in the very idea of a *professional* philosopher, let me

instead try to put some wheels on my thesis (i.e., THESIS) and, hopefully, land it safely here on Earth. For it is in the attempt to put your money where your mouth is, philosophically speaking, that you find out what your philosophy really is, if anything at all, and what it's really worth, if anything at all. One way to bring my thesis to reality (and reality to my thesis) is via a test case. I ask you to consider the case of Student Smith, a young adult student of the academy (university or university-level college), who has two professors teaching him/her things which contradict (logically) his/her beliefs. Professor Cosmos, a science prof, is teaching Stu that the universe began in the Big Bang 13,700,000,000 years ago, while Professor Phil, a philosophy prof, is teaching Stu that all income beyond \$1,000,000 per annum should be taxed at 100 per cent.

The Big-Bang theory contradicts Stu Smith's religious belief that the universe is of much more recent origin, while 100 per cent taxation on any legally obtained income conflicts with Stu's politico-economic philosophy. Stu Smith has the inalienable right to freedom of belief and freedom of religion theoretically, constitutionally, legally, and according to the people in the streets in Canada, Britain, Brazil, and too many other countries to list here. I propose that Smith's academic freedom be realized this way: Stu has the right to deny both propositions without any academic loss by way of reduced grade or academic certification. On the other hand, Stu is responsible for knowing the Big Bang theory (theory, as opposed to fact, as Stu sees it) as taught by Professor Cosmos, and for knowing whatever theory Professor Phil is teaching, along with the reasons they give for them. Knowing what one is taught—learning—is precisely what is most desired by most students of the academy, as well as its justifying purpose in the eyes of taxpayers. Having their beliefs or those of their children shaped or changed against their will is *definitely* not wanted or tolerated.

Should Students Have the Right to Deny Facts?

Many professors will object that I have vastly exaggerated the realm of opinion. Mathematics professors have the strongest case, for the truths of mathematics are unobjectionable and, if not immutable, change but slowly (it took *centuries* for geometers to accept the fourth dimension seriously). I admit that I do not think that math students are likely to truly feel their math lessons contradict their human rights (though we could imagine a PhD math student charging her professor with stifling her innovative discoveries in the infinitesimal theory of calculus because said professor was a fervent adherent of the opponent limit theory of calculus). Those professors (whether in mathematics or history or chemistry) who do not in fact venture beyond certain truth and into the realm of opinion, are not professing their subjects in the sense at issue: the sense in which their teaching needs the protection of academic freedom. But there are clear cases where professors do profess in the dictionary sense, to openly declare or claim something, whether or not they can convince others generally that it is so. This is precisely why the protection of academic freedom is so important—and I daresay one of the smartest ideas of modern civilization.

Philosophy professors, like myself, are among the clearest cases for such protection, for we openly profess things which even our professional communities do not accept, much less the world at large. We're famous (if somewhat laughably) for our readiness to deny the reality of sounds made by trees falling unheard, or the reality of material objects, or God Himself. And yet every great idea starts out sounding crazy. The simple common sense truth, that the world is round, had to overcome the simple common sense truth

that the world is flat—and not so long ago. Philosophy has the longest experience with the business of professing in the sense which results in the professors needing the legal protection of academic freedom. Plato understood the need not just because his teacher, Socrates, was executed, but also because freedom of thought and expression was the core of Socrates' own method of teaching. Plato realized that Socrates' method, *dialogue*, is essential to philosophy: those who claim wisdom are sought and warmly welcomed, and then questioned to within an inch of their cognitive lives.

So Plato encouraged a light touch in the Academy, since the participants (especially those with large professional reputations to protect) can get worked up about being contradicted and, however tragically, made fools of. There was generally a break for wine part way through a Platonic dialogue, where the participants could reaffirm their fellowship as lovers of wisdom, make a few jokes (puns being a favorite), rest up (or gang up with their own ilk) before going on to the second half. Self-deprecating humor was the meta-mood. A good gag always made a nice ending, reminding all participants (and readers in the case of published dialogues) that Socrates' first wisdom is the realization that one is not wise. A much retold (perhaps apocryphal) dialogue was the one where Plato proposed that human beings must be classified as featherless bipeds, whereupon Diogenes (the first cynic) threw a plucked chicken into the debate, bringing it to an end beyond words. The cynic's chicken was a perfectly valid argument within the tradition of Plato's method, which we call dialectic.

Dialectic does not require the student to agree with the professor. Indeed, it is required that the two *disagree*, at least to begin with. Points are scored, ultimately, to the participants for exposing error and for discovering insight (in roughly the proportions to the awarding of points in hockey: one for an assist (stick-handling through ignorance) and two for a goal (a glimpse of wisdom)). The essential skill is training in logic and rules of evidence, especially scrupulous avoidance of irrelevancies such as name-calling, beatings, or death by hemlock (the so-called informal fallacies of *ignoratio elenchii: ad hominem*, and *ad baculum*). It is, so to speak, a logical error to suppose you can refute a stubborn philosophy professor by denying his salary increase or firing him—that is, violating or terminating his tenure. And what is logic for the goose is logic for the gander too: it is equally fallacious to suppose a recalcitrant student can be refuted by a low grade or expulsion from the class. Truth cannot be protected by the power of authority, much less be discovered by it. It can only be discovered, hence appreciated for what it is, by the mind that is free to think what it chooses.²

Such is the power of dialectic—and such is the ultimate justification of academic freedom. But I am not here

*Dialectic does
not require
the student to
agree with
the professor.*

to justify academic freedom. I'm here to extend it to students, since their freedom of thought and belief is a basic human right, and concomitantly good for the academy—though you may search the literature on academic freedom and find scarcely a mention of its equal applicability to students.³

Won't Academic Freedom for Students Create Chaos in the Academy?

"That's all very well for you philosophers," Professor Cosmos, my scientific colleague, will say. "You teach opinion, but I'm stuck with teaching the real nitty gritty, the nuts and bolts, or as we like to call them over here on the reality-based side of the university, facts. It's fine for philosophy professors to present arguments on both sides of every issue, but in the natural sciences we don't have that luxury. My students are here to learn about dinosaurs, quasars, transistors, and anthropogenic climate change. It's not going to help them one bit to have to study the theory that the world began at some ridiculously recent date, or that the sun is responsible for climate change instead of the gigatons of carbon dioxide we willy-nilly pour into our finite atmosphere—fact! —as if there's no tomorrow (and maybe there won't be, the way we're going!)." ⁴

To which I say: My dear Cosmos! You have completely misunderstood my argument. To the extent that what you teach is required information for your students, and your sole job is to inject a certain body of information into their brains, I am not suggesting you must consider the absurd theory that the Earth is flat for even a nano-second! But if Stu Smith's uncle, an eccentric gentleman by the name of Eddy, whom Stu and his siblings have nicknamed "EUE" (acronymic for "Eccentric Uncle Eddy") ever takes your class, don't try to make him *believe* that the world is round, because he believes it is flat. That is his opinion, and he has a legal right to hold it come what may—fact! Don't worry about what Eddy believes. You are not even in the business of professing anything to him. You are merely filling him with information, which is achieved whether or not he believes that information.

Professor Cosmos has a ready reply: "Climb down off your high horse for just a dang minute, won't you? No one has the right to yell 'Fire!' in a crowded theatre. You start spreading your *doctrines* around here, and I'll have my students standing on their desks insisting I teach flat-Earthism and mythical creationism in my biology classes. The idea that every absurd theory—as you yourself so penetratingly put it—has equal time in the academy is to incite the 1960s all over again. That may seem the norm to old-timers like you, but it's a waste of precious time to fill students' heads with nonsense—to indoctrinate them, as we call it on my side of the campus."

Please let me respond once again, and in the process bring my philosophical essay in civil rights firmly down to Earth. If Eddy puts his hand up and says you are a fool, and demands you give his flat-Earth theory equal time, I recommend you ask him to sit down, and then explain that you are there solely to teach the facts as understood by physical science, not to debate them—and then add one tiny polite qualification that has all the magic of "please" and "thank you" in our multicultural world: "But you, Mr. Smith, are welcome to believe what you like. Just make sure you restrict your answers in the exam to the facts as taught in your science classes, for that alone is what your grade will be based on." I'm sure Eddy will understand, and sit down. Eddy is just eccentric; not stubbornly outspoken. If he doesn't sit down, tell him you will call the campus police so you can continue teaching—and then call the campus police if he won't. That is entirely within your rights as I understand them. And please, Cosmos, don't get mad if I quip that profs calling the campus cops is just the sort of pleasant memory I do have of the 1960s—fact!

Even in a Worst Case Scenario, Students' Academic Freedom Is a Good Thing

Having thus touched down one wheel on each side of the Sciences—Humanities Fault that runs through the centre of the modern academy, I could be forgiven for thinking that I have brought my philosophical flight back down on the ground. But that would be hasty, for the (Hegelian?) middle is where the really difficult cases are found. What about the social scientists? How are they supposed to accommodate Smith's view that all income beyond \$1,000,000 per annum should be taxed at 100 per cent (a view that Smith seems to have picked up from Professor Phil)? For, unlike Professor Cosmos, social scientists *should* go beyond facts and into values, and profess their views of whatever falls within their areas of expertise. Moreover, if Stu Smith wants to argue for a million dollar wage ceiling, and they see this as unwise, they *should* argue with Stu, and try to show what's wrong with a million dollar wage ceiling.

Political scientists and economists in particular should *profess* their views—that's what we hire them to do. Stu Smith's wage ceiling obviously falls within the boundaries of the disciplinary expertise of each of them. Indeed, their fellow social scientists in sociology, psychology, anthropology, etc., may have views and takes on Stu's wage ceiling hypothesis as well. For, as I have argued elsewhere,⁵ though social sciences are more dis-unified than the physical sciences, they are united by their singular subject matter, the human being—though each studies our species through its own distinctively different disciplinary lens. Physics unifies the physical sciences (physics, chemistry, organic chemistry, microbiology, biology, sociobiology, etc.) far more tightly (ontologically, methodologically, and logically) than the

social sciences, which are united solely by their differing views, as 'twere, on the same subject: us. Consequently, the moral and legal onus upon the social scientist is far more tightly secured than that of the physical scientist. For freedom of thought has proven to be most valuable when it is one's own human nature, and its place in the universe, that is the subject matter. Our human nature is an issue of ongoing religious, political, social, ethical and philosophical discussion. Freedom of thought in this domain, which did so much to advance civil society, is still protected under law. It is not forfeited simply because science is now engaged in the discussion.

So, given the appropriate professional specialization, when Smith raises his hand in class to present his income-ceiling theory, there are some social science professors who are duty bound to discuss it with him seriously (rather than plead lack of time to the overruling necessity to fill him with completely independent "facts"). And yet, being self-proclaimed *scientists*, they must believe their own beliefs are far superior to those of their students—if not true, then better supported by evidence and reason. As a professor in the root sense of the term myself, let me admit that's just how I feel when my students begin to disagree with what I profess—though I invite you (and everyone) to disagree if so inclined: that's your right. And in that spirit, I would enjoin my colleagues in the social sciences to argue with Smith: there may be something pretty obviously wrong with his million dollar income-ceiling, which, if only he heard it, would lead him to abandon it entirely—or transform it into something different that avoids the problem you present. This is what I call education in my more Platonic moments, in the (Latin) root sense of the term: a leading of someone outside of their own point of view so they can see a bigger picture.

Once outside, students can, and often do, return to their original opinions, the ones that you led them out of, armed now with responses to your own arguments that they believe are superior to your own thinking, despite your academic authority and reputation. This can be a disappointment, especially if you have presented arguments that you think are compelling. Speaking from my own experience, it can be much worse than mere disappointment: it can be excruciating if you feel the student has rejected reason and evidence in favor of the comforts of harmful, irrational, or deceptive doctrine. I admit that at that point I am tempted to feel I have failed in my most important mission, namely to give students the *skill* to form his or her *own* opinions on the basis of reason and evidence.

The skill needed for this is often called "critical thinking" or "critical reasoning," which amounts to the ability to move around the terrain of human conviction, to travel beyond the dictatorship of biology-and-culture, to escape the bullying of nature-and-nurture, to take the measure of what is there, and experience freedom of thought, and even happiness with a belief one chooses for oneself. Critical thinking, as it is now called, grew out of *dialectic*, the method Plato defined so very long ago, and which distinguished the Academy from other schools headed up by the Sophists. The Sophists (Protagoras, Parmenides, Gorgias, etc.) professed to be wise (*sophos* meaning wisdom), and taught their students what they themselves believed and professed. Plato instead taught no doctrine, but a *skill* he called "dialectic," which came from the Greek word for dialogue. Plato published his work in a new form of drama, in which two or more people gather to argue for or against some "thesis," or statement of belief (or opinion—how can we tell, after all?). In Plato's dialogue *Protagoras*, for example, Protagoras makes claims (states theses) which "Socrates" (who takes a Platonic point of view) criticizes. A lengthy argument ensues, full of word-play and drama, and citations of authorities of stature in religion, poetry, politics, law, and society itself. But no winner is ever declared! The end is often enigmatic in Plato's dialogues,

with Socrates himself reduced to his famous *aporia*—his wisdom of knowing his own unwisdom.

Amongst professional philosophers the art of dialectic—or the exercise of *logic*, as we call it—can turn into the most awesome professional competition that you could ever imagine. In the professional journals of philosophy, every thesis faces a counterthesis, and the resulting contests cite enchanting evidence and make sweet logical manoeuvre that get the hearts of philosophic aficionados pounding like a Stanley Cup final. Usually, however, the mood is more restrained. I remember a warm spring afternoon seminar when we students around the seminar table began to actively agree on a number of issues. Bob Butts, our professor, interrupted us with the following pantomime: “Well I think that’s a good idea. Thank you very much. I think that’s a good idea too. What’s the matter with you people?!! Let’s get on with it!” In those days, graduate student seminars were oft called “blood-letting sessions”—and not only in philosophy, either. A degree was by no means guaranteed, quite the contrary. The failure rate was high, and a matter of professional pride. The rule was: many are called, few are chosen. And so we fell in once again, crossing swords logically speaking, finding evidence and logic that undercut what someone else was claiming or—hopefully—supported our own view.⁶

That sort of training gives you an edge that serves you well all the rest of your life, particularly when it comes to winning arguments. Though that’s why many people praise critical thinking as a university-taught skill, winning arguments is not what critical thinking actually teaches. Critical thinking actually teaches you to always oppose every opinion or purported matter of fact—including your own—with the very best arguments that you can find, and to accept no hypothesis beyond the shadow of reasonable doubt. Just how far that shadow extends is solely up to the student of critical thinking herself or himself to decide (by dialectic—*unparadoxically*). Philosophers are those who seek wisdom under the strictures of logic, submitting their beliefs (their professions, so to speak) to the tender criticism of their colleagues. That criticism is as likely as not to be negative. By this definition, all of my colleagues in the academy are philosophers, no matter in which faculty, department, or subject. For we all submit our professional work, our research, our theories, to the tender evaluations of our own professional colleagues, which are as apt to be negative as positive.

We all realize that what we give to our students is our subjects themselves: the facts, theories and skills required to engage in the discipline. Just as our professional colleagues may disagree with us, so may our students. And just as actual belief—personal commitment to the truth of something (as opposed to acceptance of it for academic purposes)—is a personal matter for us, hence a matter of our individual rights and liberties, so too is belief a personal matter for our students.

SUB-THESIS 3: No student’s grade or progress may suffer solely because he or she disagrees with his or her professor.

I can’t remember any of my own professors explicitly professing Sub-thesis 3, but it was implicit in the fact that I often disagreed with my professors, both in class and in my submitted work, and got great grades nevertheless. Now, as a professor, I believe that the one student who disagrees with you is worth 10 who do not. Standing up to you will encourage her or him—and all the others—to think of evidence and devise arguments against you. This will force you to defend your thesis (not yourself as such) against their counter-arguments (and without refuge in undefined professional jargon), and from

this all (professor included) will learn.

I hasten to add that I am not recommending that all university professors should *argue* with students who disagree with them in their classes, or anywhere else for that matter. My colleague, the biology professor, Professor Evo, need not fend off creationist critiques among her students: she can legally require their silence in class (so she can get on with teaching them information and skills they must master), in the office and/or laboratory (so she can get on with research, administration, and other professional duties) or outside the academy (a basic right). When Evo is illegally cut off from her lab by animal rights activists, she will be provided police support, so she can continue her work, save her animals, keep her staff working, and so on. And of course, Evo's home is just as much her castle as the homes of her students and protesting protagonists (whether students or otherwise) are theirs.

We Need to Recognize Students' Academic Tenure

In the final analysis, there is no essential conflict between students' academic freedom and that of professors, because each form of freedom amounts to nothing other than freedom of thought as it applies to the different roles played by students and professors within the academy. Freedom of thought is a good thing, and neither party would really want to deny it to the other, even though this freedom can, and sometimes does, lead to tension, confrontation, and even disruption within the academy, just as it does outside. If we agree that freedom is worth this price, then surely we can agree that thought control or coercion has no place within the academy. The lesson that Plato learned from the execution of Socrates and embodied in the dialectical method of the first academy will not explicitly be denied in any descendent academy worthy of the name today. It is in this spirit that I offer the next sub-thesis:

SUB-THESIS 4: Academic freedom protects the equal right of the student and the professor to remain active in their own roles within the context of basic human rights and freedoms.

In the case of professors, the right to remain a professor is the street value of academic freedom. It is most prominently expressed in the tradition of *academic tenure*: the professor's right to continue teaching (imparting information to students), studying (researching), and professing (arguing for or against matters of belief) whether or not what is professed is in agreement with the views of others, and whether on campus or off.

In the case of students, the right to remain a student is the street value of academic freedom. Its expression demands a new form of academic tenure, *student tenure*

(as contrasted with faculty tenure), which I suggest may be expressed like this:

SUB-THESIS 5: Academic freedom protects *student tenure*, the right of students to continue unimpeded in their studies whether or not their beliefs, expressed or otherwise, are in agreement with the beliefs of others, including the beliefs of their own professors and fellow students.

As we have seen, the distinct roles of student and professors require distinct forms of academic freedom, and I am proposing that we protect these with distinct forms of academic tenure.⁷ These distinct roles, freedoms, and tenures are nevertheless interdependent: put very simply, professors need students just as much as students need professors. Yes, professors need freedom of thought when it comes to research and teaching, but students need the same freedom when it comes to study and learning. If either freedom is curtailed, then to that extent the true academy ceases to exist, and is instead transformed into an institute of post-secondary ideological training.

So the question, I suggest, is not whether academic freedom is just as necessary for students as for professors, but rather how it can be protected within the modern world. Such protection is essential, especially in these times when so many colleges and universities, notably in areas of the world scarcely touched by ideals of civil liberties, have strayed so far from the academic ideal. It is essential when even post-secondary institutions here in Canada, where civil liberties are valorized, are often charged by students and other citizens with engaging in propaganda, censorship, and mind-control. In the world today, students' academic tenure is not only a way to protect students' academic freedom, but also a way to defend true academies and academicians from false accusations.

I offer this profession of students' academic freedom for the consideration of students, professors, and policymakers everywhere, asking only that, if they reject it, they do so freely and with good reason.

1 Louis Menand (1996) presents a delightfully persuasive argument for this thesis. As he pithily puts it, "Should professors attempt to put across their own point of view about the material they teach in the classroom? Is this really a serious question? Of course we should. What else could we do? It is because we have views about the our subjects that we have been hired to teach them. Our ethical constraint is only that we teach what we honestly believe the significance of the material to be".

Louis Menand, "Culture and Advocacy," in Patricia Meyer Spacks, ed, *Advocacy in the Classroom*, (New York:St. Martin's Press, 1996) at 116.

2 The *philosopher* Isaac Newton (for he called himself a philosopher of nature, back in his day, long before the word "science" came to be used for such geniuses as he was) claimed to have proven (with the help of God) the truth of his splendid, epoch-making physics, the science that launched the world on its advance to nuclear physics, moon-landings, and internet dating. A few decades later, another philosopher (more famous among philosophers than Newton himself) by the name of David Hume, argued that it was impossible to prove any such thing, and that Newton was, to put it politely, pretending to support his physics with metaphysics. More decades pass, when another philosopher-physicist (or physicist-philosopher, if you prefer) by the name of Ernst Mach came under the influence of Hume's ideas (via Kant), and began trying to purge Newton's physics of such metaphysical entities as absolute space and absolute time (inspired in part by Leibniz). His student, Albert Einstein, took Mach's ideas and ran with them, giving us relativity theory, $E=mc^2$, the transformation of mass into energy, the red-shifting of light as proof of the expansion of space itself, and the Big-Bang. We are glad that Mach didn't just teach Einstein the physics previously taught to him, but also *professed* his view of that physics, and taught his *philosophy* of physics. We should be glad that Mach's professor, and his professor's professor before him were professors in the full sense of the term. Truth is oft found way outside the box of common knowledge.

3 I have found only two references to students' academic freedom, both from distant history. Guy Neave informs us that in 12th and 13th century Bologna, the notion of university autonomy "applied to the student constituency. It consisted in the freedom of the individual to learn" (1988, p. 33), but does not elaborate, leaving one to wonder what such freedom could amount to in that era of enforced orthodoxy. In an excellent essay, Walter P. Metzger (1978, p. 94) tells us that the (mainly late 19th century) "German concept of academic freedom...comprised a trinity of principles, *Lehrfreiheit*, *Lernfreiheit*, and *Freiheit der Wissenschaft*," freedom of teaching, learning, and science. Metzger goes on to say that students' freedom to learn allowed them to choose their own classes and professors, but also allowed "a disclaimer by the academic institution of any authority over the student," thus lightening the responsibilities of the academy (p. 95). He goes on to say that American universities followed the German model, but abandoned student academic freedom in the face of parents' demands that universities act *in loco parentis*, thus taking significant responsibility for the moral and social guidance of students while they were away from their parents at academies often far from home.

Walter P. Metzger, "Academic Freedom and Scientific Freedom," in Gerald S. Holton & Robert S. Morrison, eds, *Limits of Scientific Freedom*, (New York: W. W. Norton and Co., 1978) at 93.

Guy Neave, "On Being Economical with University Autonomy: Being an Account of the Retrospective Joys of a Written Constitution," in Malcolm Tight, ed, *Academic Freedom and Responsibility*, (Berkshire: Open University Press, 1988) at 31.

4 Let me admit here that I disagree with the so-called scientific consensus concerning global warming, as I explain in considerable detail in my book (Foss, 2009). I support my colleagues right to teach the orthodox view, and require their students to learn it, even as I support their students' right to not accept or believe the theory. The unfolding history of this planet will decide whether they or I am right about global warming—but not whether they or I have the right to force our beliefs on our students.

Jeffrey Foss. *Beyond Environmentalism: A Philosophy of Nature*. (Ontario: Wiley and Sons, 2009).

5 Jeffrey Foss, "Are the Social Sciences Really—and Merely—Sciences?," Ch. 1 in *Social Sciences and Cultural Studies—Issues of Language, Public Opinion, Education and Welfare*. Asuncion Lopez-Varela, ed., Rijeka: InTech, at 3-18, 2012.

6 The dynamic Bob Butts, then my PhD supervisor, was once taken aback by my brash dismissal of one of his colleagues as a mystic, a follower of Alfred North Whitehead, hence someone who stood out like a hippie among the analytic ranks of the philosophy department. Butts replied that the colleague in question had published one of the best papers he had ever seen on Whitehead, a brilliant argument in favor of Whitehead's (admittedly bizarre) unified-field theory of consciousness and reality. While Butts was clearly defending his colleague, that was hardly a straightforward endorsement, and so I pressed on, saying he himself admitted Whitehead's theory was bizarre, and that surely he agreed with me that it had no cognitive content, that it was literally meaningless (as positivism demanded, I thought). Butts replied that "we" (here referring to the philosophy faculty and students) needed a Whitehead scholar in order to understand David Bohm's philosophy of quantum mechanics. "You are in the philosophy of science program, so you should be thankful," he told me. "But it's *nonsense*," I protested. Butts sighed, took a drag on his cigar, smiled, and said: "Jeffrey, you'll learn a hell of a lot more from one good paper that contradicts you than from ten that only rock your hobby horse." Butts never ceased disagreeing with me, and I learned a hell of a lot from him.

7 Like Thomas Hobbes (1588-1679), I believe that an unforced law is not really a law. If the law prescribes a penalty of death for murder, then as Hobbes points out, we can hardly fault the murderer (or charge him with irrationality) if he decides not to turn himself in for punishment. We need police and courts to enforce the law, or else murder, rape, theft, and violence will become the norm, and the real law will be that of the jungle rather than our own. Likewise, I am assuming that student tenure can (and hopefully will) be enforced—though I leave the question of the means of enforcement to others.

The *Charter of Rights and Freedoms* and Equality in Electoral Districting Laws

by Robert D. Holmes *oc*

08

Introduction

Representative democratic elections come in many forms. There is no decisive advantage to territorially-based electoral districts, whether of a single or multi-member variety. The same is true about party-based proportional representative elections. The same is true of elections based upon local precincts electing caucus members who elect district representatives who become part of a provincial or state or national legislature. With each, arguments can be marshaled as to their effectiveness in ensuring that a consensus or majority of views prevails on legislation and policy, that governments have at least some stability and endurance so as to manage and plan, and that accountability is sufficiently regular and open that the population has confidence that it can change who is in charge if it decides that is for the best.

In an ideal world, each of us would have sufficient leisure time to study and come to understand complex issues of governance. Technology would advance to the point where communications allowed for debate about issues to be “attended” by all, with everyone having not just the right, but the ability to participate “real time” in debate and, ultimately, in a vote on each bill or policy that the nation, a province or a city may choose to consider. That kind of direct democracy is not practical in mass democracies.

Even in classical times, in Athens for example, not every adult in the polis was eligible to attend and vote. Women and slaves were excluded. Not every adult found it worthwhile doing so; participation was not compulsory, travel and business might take someone away for extended periods and communications were primitive. Even in the archetype of democracy—that of the democratic city-states of ancient Greece—perfection was not the standard. Neither would such a standard of perfection be particularly efficient as a use of citizens’ time and talents. So we compromise. Instead of the “ideal,” we accept representative rather than direct democracy.

Two pairs of concepts vie for predominance in relation to representative democracy. The first pair is a contest between viewing a vote as a right or a trust. The former is one associated with voting based on self-interest. The latter is associated with voting based on a judgment of what is in the best interests of all. The second pair is a contest between viewing democracy as representation of voters instead of the election of representatives.

The two pairs form a matrix in which democracy can be viewed as a relation where (a) the public votes its self-interest and representatives follow whatever the majority of that requires; (b) the public votes on a trust-like basis, with each voter incorporating their own judgment as to the collective best interest and representatives follow

People are people. They do not gain an additional status in a democracy allowing for greater say in how democratic institutions ought to be run due simply to where they live.

whatever the majority of that requires; (c) the public votes its self-interest but representatives they elect make their own judgment as to the collective best interests; or (d) the public votes on a trust-like basis, with representatives they elect following whatever the majority requires.

The reality of any democratic system is that not all voters vote either based upon self-interest or a trust-like sense of what is in the national best interests and neither do elected representatives. But nuances exist as between different models of democratic elections and differences through time are to be expected as well. Given that power is exercised on a daily basis by representatives and only at election time by voters, the focus of attention is usually more on the former than the latter.

Representative democracy theory thus ordinarily underscores the division between advocates of representation of the “will” of those who are represented and advocates of a more trust-like representation where the representative votes according to what he or she thinks is in the best interest of the population as a whole. Advocates of the former stress that it is the purest kind of representation—representatives reflect the interests of the represented based upon what the represented actually believe.

Given the use of sound public opinion sampling techniques, it is possible to assess what a given the populace prefers as public policy. Where the collective views of the population can be demonstrated through such polling, representatives should ordinarily be hard-pressed to do otherwise than their constituents desire. Or so the argument goes. The concept of will-based representation is that when representatives engage in trust-like representation, they are acting in a paternalistic manner. It is anti-democratic for a representative to usurp power reposed in him or her to vote otherwise than how the represented require. Each person is best suited to assess their own interests and that of the nation. Aggregating individual assessments is the surest way to reach the best (or at least what passes for a more truly “representative”) outcome.

Against that, the trust-like representation model suggests that each elected representative is duty-bound to consider the best interests of the nation as a whole and vote accordingly, even if it runs contrary to the self-interest of a majority of their constituents. Where a perhaps transient majority of voters prefers a policy based on self-interest notwithstanding that it runs contrary to the best long-term national interests, then the representative, whose full-time job is to study and consider policy issues, should vote according to those national interests. That is either because voters are presumed to be likely to agree with those national interests if they spent more time thinking on it and focused more closely on national instead of individual

self-interest or because voters are taken to have opted to accept the judgment of someone who focuses upon national interests instead. In the latter case, voters are like Odysseus instructing his colleagues to tie him to the mast as they approached the Sirens. They recognize that preferring transient siren songs appealing to their self-interest is unlikely to be beneficial in the long run.

Drawing a bead to our own situation in British Columbia and Canada requires that we take as given that we have a representative democracy based upon territorially based electoral districts and a system more inclined historically to the trust-like model for representatives than the direct democracy model. That does not preclude reform of such a system in time. Indeed, as we will show in this chapter, the introduction of the *Charter of Rights and Freedoms* was held by the courts to require a new way of looking at things. But for the time being, and for the purposes here, we will accept as the status quo the territorial-based, representative democracy model that is the British Columbia and Canadian “norm,” albeit as modified by the requirements of the *Charter of Rights and Freedoms*.

Overview—Equality is the Primary Principle

As a starting point, we have these as fundamental aspects of our law:

- + Section 3 of the *Charter* provides that “Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.”
- + Section 15 of the *Charter* provides that “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”
- + The Canadian *Bill of Rights* in section 1(b) recognizes and confirms “the right of the individual to equality before the law and the protection of the law.”

The *Charter* requires, in order to ensure an effective vote for each person, that to the extent possible, relative voter parity ought to be the primary consideration in how electoral district boundaries are set.

While other considerations, such as transportation links, community and regional boundaries, distance and the like, are allowed some play in the process, the fact remains that the primary consideration in a democracy must be equality. Giving any particular group or area additional weight is essentially an anti-democratic move. Adopting any suggested change to the proposals

because of history or because they do not seem “popular” must be resisted.

The US Supreme Court in the 1960s led the way in stressing the importance of voter equality in *Reynolds v. Sims* (1964), 12 L.Ed. (2d) 506. Its words bear mention:

But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. *Citizens, not history or economic interests, cast votes.* Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. *Again, people, not land or trees or pastures, vote.* Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960s, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.

“People, not land or trees or pastures, vote.” To hold otherwise, would be a retrograde step. And if the notion is advanced that it is not the land or trees or pastures in rural areas that need additional weight or representation, but rather the people in rural areas, that notion is one that does not withstand scrutiny. People are people. They do not gain an additional status in a democracy allowing for greater say in how democratic institutions ought to be run due simply to where they live. To argue otherwise confounds things.

The notion that such considerations should be allowed to distort the equality that is at the heart of democratic government may reflect a desire to adhere to the trust-like theory. It may reflect a willingness to accord greater voting power to those rural voters who live closer to the lands, trees, pastures and other resources, on the premise that they may be counted upon as more likely to vote in accordance with the interests of such things. But the flaw is that such voters are (like voters everywhere) more likely to vote according to their own self-interest, not the national interest. In any event, allowing for social engineering based upon such notions represents a clear divergence from *Charter* requirements.

Similarly, the notion that rural areas deserve more representation because they are harder for an elected representative to serve is without merit. Several reasons may be offered for that.

First, there are other ways of addressing such concerns without detracting from the equality principle. Rural elected representatives can be (and are) given additional

travel allowances, allowances for multiple constituency offices, staffing and so on.

Second, the notion that the ombudsperson role of elected officials is more onerous on rural representatives does not bear scrutiny. Elected officials in urban and suburban ridings who face multiple linguistic and ethnic communities, disparate income groups, disparate claimants on government assistance programs, all face significant challenges to their ability to serve their constituents as well. Adding to their burden a disproportionately large population to serve would only compound the difficulties. It would also discriminate against those who lived in urban areas in terms of the service their elected officials can provide.

The BCCLA's History of Involvement with Electoral Districting Legal Challenges—the *Dixon v. AGBC* Litigation

The BC Civil Liberties Association has a long history of defending the principle of voter equality, commonly referred to by the phrase "rep by pop." In the 1980s after the *Charter of Rights and Freedoms* came into force, the BCCLA reviewed the situation then existing with provincial electoral districts in British Columbia. Those boundaries displayed no proper regard for the principle of voter equality.

The BCCLA, through its then-President John Dixon, commenced legal proceedings by way of a petition filed with the Supreme Court of British Columbia, contesting the constitutional validity of the provincial laws that prescribed such electoral districts for provincial elections. I had the privilege of serving as legal counsel throughout.

Chief Justice MacEachern was then the Chief Justice of the Supreme Court of BC. He case managed the proceedings until his appointment to the position of Chief Justice of British Columbia on his elevation to the Court of Appeal. Prior to that, he addressed a preliminary legal question brought by the provincial government and delivered written reasons dismissing the government's challenge to the case: *Dixon v. AGBC (No. 1)* (1986) 7 BCLR (2d) 174 (S.C.). That question he addressed was whether the function of drawing electoral district lines was immune from *Charter* review.

The provincial government contended that since electoral districts were defined in the *Constitution Act* of BC and since there was some reference to the "constitutions" of each of the provinces in the *Constitution Act, 1867* and the *Constitution Act, 1982*, the electoral districts drawn by the province must be part of the constitution of Canada. If so, then the courts had no role to play in reviewing such laws. One could not have one part of the constitution (e.g., the *Charter's* right to vote) overrule another part (e.g., the electoral district descriptions). In essence, the argument was that *Charter* principles did not apply to how electoral district boundaries were set, or indeed to how the process of voting was set.

I should add that the argument was not without some basis in constitutional law precedent. The Supreme Court of Canada had, around that time, dealt with whether the religious school provisions of the Canadian constitution were undercut by other provisions of the constitution, including the *Charter*. The answer was no. One could not have a general right provided for in the *Charter* overrule a specific provision carving out a special place in constitutional law for religious schools. One expects a similar approach would be taken to a challenge to the age limits on how long Governors-General, Lieutenants-Governor, Senators and superior court judges may serve. It

would be difficult marshaling an argument that the provision in the constitution mandating retirement at age 75 amounted to unconstitutional age discrimination. The "discrimination," if that is what it amounts to, was embedded in the constitution itself.

It is important at this stage to recall that this argument was presented just a few years after the *Charter* had been made law. The BC government had accepted a constitutionally entrenched guarantee of rights and freedoms. It had not made it known at that time that it rejected the notion that the *Charter* applied to how voting rules and electoral districts were set. There is a curiosity to the argument advanced by the government in that it appeared to revert to pre-*Charter* thinking. Yet the BC government was represented in the litigation by R. E. ("Bob") Edwards, QC, (later a judge of the BC Supreme Court). One can expect that his instructions were to contest the challenge to provincial electoral districting laws on any and all grounds. Within the bounds of professionalism and the law, he did exactly that.

On the other hand, one can search the records of debates and proceedings among those who framed the *Constitution Act, 1982* and, in particular, the *Charter of Rights and Freedoms*, and not find any express anticipation that enacting the *Charter* would lead to a finding that any electoral district laws were unconstitutional or, indeed, that the process of drawing such electoral district boundaries was subject to *Charter* principles.

Arguments about the application of the *Charter* to electoral districting laws were novel. The *Charter* was new. The case the BCCLA was bringing was novel. The issues were ones of first impression. It was therefore perfectly proper for the government lawyer to bring arguments before the court that contrasted clearly and distinctly from those of the party challenging the law. No disrespect or dishonor to the government or its counsel arises, therefore, from having taken up the challenge and argued the case as fully and ably as it did.

Indeed, I recall a case management conference in the Chief Justice's chambers at which the battle lines were discussed and agreed. Bob Edwards, QC, set out that the government's argument would be that even if the BCCLA were successful, it wouldn't really make much of a difference. He referenced a study, never produced in evidence, that an election based upon purely equi-populous electoral districts would have resulted in the same party composition of the legislature at the last elections. I didn't know what to say in response to that, if anything. But Chief Justice MacEachern, whose legal acumen and sensitivity to where the law reasonably ought to go was unrivalled, said it best. He responded to Bob Edwards, QC, that such arguments were quite beside the point. First, he said, the composition of individual members of the legislature might be different.

The Charter was new.

That could have any number of effects on legislation and policy. Second, he noted that the variables on which any survey or study that the province relied ignored the most fundamental aspect of the issue. That was whether the public could have confidence that principles like equality among voters were being respected. Symbols were important and equality was an important symbol.

Now, one could have expected that such comments, made in chambers in a relatively private exchange among such experienced legal minds, would have led one or another to question whether the arguments being advanced for the province or what the decision about them was likely to be, were as they should be. For the province, it appeared unlikely that their arguments would succeed. For the court, it appeared likely that the first objection made to the case the BCCLA was advancing was unlikely to gain traction. Yet the hearing proceeded. The government's arguments were deftly presented. The court treated them with an open and impartial mind.

The arguments of the provincial government about the right to set electoral districts being essentially a political thing that the courts ought to butt out of were presented. The arguments about the need for court involvement were as well. For someone who studied recently at the graduate level in law at Yale University, there was an immediacy of the controversy that was quite stark. While there, I had studied under professors who referenced in almost reverential terms the name of Professor Alexander Bickel. He had died a few years before I attended there. But his standing among his peers cast a long shadow. Here, in the litigation that I was prosecuting, the defence relied upon writings of Yale's Professor Bickel arguing that having the courts enter the political arena regarding electoral districting laws was not just suspect, it was wrong. He had written at length with regret about the US Supreme Court's decision to enter the "political thicket" involved with redistricting cases. Having not just Bob Edwards, QC, but Professor Bickel and Felix Frankfurter, a Justice of the US Supreme Court who disagreed with extending constitutional law into electoral redistricting decisions, arrayed against the position the BCCLA was advancing made things more formidable.

Also, having a challenge based upon theories that not only argued their own strengths, but that were unafraid of exposing the perceived weaknesses of their opposition, raised the stakes of the litigation. It made the need for arguing effectively the rationale for holding BC's laws invalid all the stronger.

The argument proceeded in court. Each side presented their arguments as best they could. Chief Justice MacEachern had extracted agreement from all sides that

whatever the decision was there would be no appeal until the case was all over. He did that because he did not want to see the proceedings caught up in interminable appeals. Each ruling could result in the trial process being stymied while years passed until appellate courts decided whether the case could proceed. By treating the decision on this first objection from the province as a "ruling in the process" and something on which no formal order of the court would be drafted or entered, such appeals were avoided. If there were to be appeals, they would have to take place after the whole case had been decided. Knowing that, the parties focused on putting everything before the trial court for its decision.

Chief Justice MacEachern reserved his judgment for a time. When his Reasons for Judgement were released, they showed that he rejected the province's arguments. He commenced his Reasons by noting what the petition was about:

[4] This petition questions the allocation of seats in the legislature of British Columbia on the basis of uneven electoral representation. In short, the petitioner says the legislature has created electoral districts and there are as many as 15 or 16 times more electors in some districts than others. The petitioner, whose standing was not questioned on this application, says "one person one equal vote" is guaranteed by various sections of the *Charter*, particularly ss. 2(b)—freedom of expression, 3—voting, 6—mobility, 7—liberty, and 15—equality. The petitioner, of course, relies upon s. 52(1) of the *Constitution of Canada* which provides that any law that is inconsistent with the provisions of the *Constitution* is, to the extent of the inconsistency, of no force or effect. Thus the petitioner says unequal electoral distribution is inconsistent with various *Charter* rights and therefore invalid.

He set out what the provincial government's response to that was:

[9] The response of the Attorney General to this petition is simply that the *Constitution Act of British Columbia*, including s. 19 and Sched. 1, is a part of the *Constitution of Canada* which is the supreme law of Canada and that the provisions of the *Charter* do not govern other provisions of that supreme law.

After reviewing the legislative history of constitutional enactments and electoral districting laws, he noted that "technical" arguments detracting from the application of the *Charter* were to be avoided:

[39] Further, I think technical arguments should not lightly be permitted to authorize escape from the scrutiny of the *Charter*. It is the latter and not the definition of the *Constitution* that should be given a generous construction. I agree with Howland CJO and Robins JA (both dissenting) in *Re Education Act*, supra, at p. 40, where they say:

If any doubt exists as to whether an exception to the guaranteed fundamental rights and freedoms is authorized by the *Charter*, the doubt must be resolved in favour of the application of the *Charter* and not the extension of the exception. Much was said during the hearing about the *Charter* being a "living tree" whose growth ought not to be stunted by narrow technical interpretations. In our opinion, the consequences that flow from the construction the proponents of Bill 30 would have the Court place on the words "or under" run contrary to the spirit of that concept. To accept that in this post-*Charter* era of our constitutional development Bill 30 can escape scrutiny under the *Charter* on that narrow technical basis, in our view, is to give the clock's hands a backward turn.

Finally, he concluded thus:

[52] But it also seems to me that the exercise of a legislative jurisdiction given by the *Constitution* to a legislature, particularly when it results in a law such as the present *Constitution Act of British Columbia*, is subject to the *Charter*, inter alia, because of *Charter* s. 32(1)(b) and by *Charter* s. 52(1) (unless excluded by the non obstante clause—s.33).

[53] Applying the foregoing to this case, I conclude that the authority of the legislature to enact or amend the *Constitution Act of British Columbia*, particularly s. 19 and Sched. 1, is "constitutional" in the sense that no other body may interfere with such jurisdiction and no body can change that arrangement without a constitutional amendment. How the legislature exercises this authority, and the validity of such provisions in the sense of conforming to the *Charter*, is quite a different matter. It is the court's reluctant responsibility to examine the result of the exercise of such authority to ensure that it conforms with the *Charter*. Thus, although the constitutional tree may be immune from *Charter* scrutiny, the fruit of the constitutional tree is not. If the fruit of the constitutional tree does not conform to the *Charter*, including s. 1, then it must to such extent be struck down.

The case then proceeded, as agreed, to a full hearing on the merits.

By the time it came on for hearing, Chief Justice MacEachern was on the Court of Appeal. The case was heard by then Chief Justice McLachlin, who had been appointed to serve as Chief Justice of the Supreme Court of British Columbia.

Again, the arguments were starkly different. The province had, clearly for reasons of a pragmatic nature, put in place a commission of inquiry headed by County Court Judge Tom Fisher. The Fisher Commission heard from parties across the province. They even invited, specifically, the BCCLA to make a submission. At the time I reflected on whether participating was something that could rebound against the interests of the ongoing litigation. But a decision was taken that we should make our presentation to the commission, just as we were planning on making to the court, and see what the response was. At the commission of inquiry hearing, things did not proceed in as promising a manner as one could have hoped. On behalf of the BCCLA, I pressed for a strict adherence to the equality standard. I noted the arguments about how oddly shaped some electoral districts might be were usually misplaced.

For example, I noted that at the federal level in the 1960s a riding known as Burnaby-Seymour had been created. Burnaby and North Vancouver were separated by the Burrary Inlet and a bridge. They had a mix of working class, middle class and upper middle class voters. Yet they were not so disparate as to make a riding composed of some of one municipality and some from another impossible to represent. Ray Perrault had been elected over Tommy

Douglas in the riding in 1968. Ed Nelson, for the NDP, defeated Ray Perrault, in 1972. Mark Raines, for the Liberals, defeated Ed Nelson of the NDP and Jim Neilson of the Conservatives in 1974. Voters in the riding had an array of quality candidates from which to choose and made their decisions.

I recall Commissioner Fisher made what I regarded as negative comments after my submissions. He suggested that the Supreme Court of Canada might be about to render decisions that limited the scope of the *Charter*. That turned out to be wrong. Whether he took that as a cue or not, his commission recommended electoral district boundaries that are among the most progressive that BC electoral districting commissions over the past 30 or 40 years have done. He decided upon a maximum 25 per cent divergence in population among electoral districts. That was applied throughout the province, including the north and the Kootenays. The happy thing about his recommendations and report was that they established clearly that things could be done better in BC than the existing electoral districts. Evidence about his recommendations was placed before the court when the hearing of the BCCLA petition was brought.

Now it is true that there is no magic to the plus or minus 25 per cent allowance that Judge Fisher decided upon. The federal government had, in legislation going back decades, provided that for drawing federal electoral district boundaries within each province a quotient was to be derived by dividing the province's population into the number of seats allocated to it and then the work of electoral boundaries readjustment commissions was to keep within a plus or minus 25 per cent allowance. A list of factors, including geography, transportation and communication, community boundaries, history and such were allowed as additional considerations. Judge Fisher adopted the 25 per cent rule likely because it had some precedent in federal law and also because, in the result at least, he found that he could come within that deviation allowance while still respecting all of the other factors he thought appropriate to consider.

I mention that because for at least part of the time the BCCLA was pursuing that case, consideration was given to hiring someone to prepare a report that would draw electoral district boundaries based upon 0 per cent, 5 per cent and 10 per cent allowances. Showing that it was possible to arrive at such district boundaries while avoiding oddly misshapen ridings or ones that would be impractical to travel within or represent was a factor considered in relation to the evidence to be adduced. In the end, we did not do so and used the Fisher Commission report as evidence instead.

That decision was not based upon conceding or adopting a 25 per cent divergence formula as being appropriate for constitutional law standards. It was more practically arrived at than that. The simple fact is that the cost of obtaining such a report and the time involved in getting it would have been great. And the importance of getting a decision of first impression was pressing. That is particularly so given that we expected that whatever decision resulted would be appealed.

I would note, however, that in the USA, the Supreme Court ruled in 1983 in a case known as *Karcher v. Daggett*, 462 US 725 (1983) that a deviation of 0.6984 per cent of the average district was unacceptable. They did that notwithstanding the fact that the census figures on which that deviation was calculated were conceded to be likely to have a margin of error by undercounting of at least 1-2 per cent. The court majority noted that the standard by which electoral reapportionment schemes were to be assessed for congressional districts was one that required equality be adhered to as

much as possible. This plan did not do so.

How did the court know that the plan did not adhere to equality as much as it could? Because the evidence put before it had competing plans that showed that a better job could be done. Courts are to decide cases based upon evidence and the evidence there showed that the plan approved by the state legislature was defective. Now, some might focus on the fact that the plan was a highly partisan one, drawn by the Democratic Party majority in the New Jersey legislature at that time and favoring its interests with gerrymandered districts that were neither compact territorially, nor respectful of communities of interest, community boundaries, historical representation or transportation or communication links. But the court did not dwell on any of those. The standard of equality provided a bright line rule that was more readily applied than would a consideration of whether all of those other factors had been appropriately weighed and considered.

I mention that case because it assists in understanding several matters. First, it shows that strict adherence to equality is possible. Arguments about not doing so can be made on a number of grounds, but impossibility is not one of them. Second, it shows the importance of having an alternative plan if one wants to set about criticizing what is in place or is being proposed by someone else. Absent such a way of showing how things could be done better, it is often going to be difficult establishing on the evidence that the status quo or a proposed change meets constitutional requirements. Third, it shows that in relation to reviews of constitutional challenges to such laws, courts are likely better off having a bright line standard to apply than having to balance a variety of factors. The former allows for a ready standard for evaluation of what the political branches of government come up with. Without such a standard, the courts leave people guessing how far afield one may go before triggering a constitutional legal standard.

Of course, courts could adopt an approach that paralleled that of judicial review in administrative law cases. There, courts have come to a standard whereby legal issues are generally determined on whether the decision is legally correct, while factual and discretionary issues are reviewed on whether the decision is one to which a reasonable tribunal could come. Allowing that kind of an approach to prevail in constitutional litigation over electoral district boundaries would be problematic, however. That is because it is the court's responsibility to ensure adherence to constitutional guarantees. Hiving off functions to a government, legislature or a commission that they put in place cannot provide a "pass" for courts to avoid reviewing the output of such processes to see if they meet constitutional requirements.

I am perhaps getting ahead of myself in elaborating

on things to this extent. Once again, it is important to remember that the focus of attention in the *Dixon v. AGBC* litigation was on establishing a principle. How that got worked out in the future was for later cases and later efforts to address.

During the course of the hearing before McLachlin, CJSC, the learned judge asked a question of Bob Edwards, QC. The question drew upon an argument presented on behalf of the BCCLA. At the time, it must be remembered, the province was a mix of single and multi-member electoral districts. Now multi-member electoral districts are not a bad thing per se. For example, if every electoral district was a dual member district and was required to elect one male and one female representative, it is clear that efforts to advance the cause of eliminating the disproportionate representation of males in elected positions would be advanced. Everyone would have two votes, one for each representative. Voting power would be equal, at least if one assumed that the electoral districts were equal. Similarly, if having dual member ridings was done so as to ensure communities of interest were not divided and not to submerge voting blocs that otherwise would elect a member representing their own, divergent, interests, then nothing amiss would arise.

But at the time of argument in the *Dixon v. AGBC* case, there was a public perception that dual member ridings suffered from problems of gerrymandering. The notoriety of what came to be called "Gracie's Finger," an addition to the Vancouver-Little Mountain dual member riding, at the last redistricting was great. That had included just enough voters from a reliably Social Credit voting neighborhood in Vancouver to ensure the re-election of the Social Credit candidates, including the Hon. Grace McCarthy, a prominent cabinet minister. The addition of voters from a well-to-do neighborhood to a riding of less well-to-do voters appeared designed not to reflect voters' interests so much as submerge them. The fact that on a map it looked like a finger extended out from the riding to take in that neighborhood made it a cartoonist's dream.

In any event, during submissions to the court for the BCCLA, I argued that if the province were right about electoral districting laws being exempt from the *Charter*, then the province could theoretically draw electoral districts so that everyone was in one riding electing one member and the premier's household was designated a multi-member riding electing all the rest of the members of the legislature.

When Bob Edwards, QC, was arguing the province's case, McLachlin, CJSC, asked him about the point I had raised. He demurred. She pressed the point. He finally answered by saying that the courts were always there to address egregious cases where politics had triumphed

over reason. McLachlin, CJSC, pounced on that and said, “so, you agree it’s just a matter of degree, then?” Bob Edwards, QC, conceded the point. If the province went too far afield, then the court had jurisdiction to rein it in. McLachlin, CJSC, properly enough, took that as a concession that the court had to decide how much was too much.

She reserved judgment and, shortly before she was appointed to the Supreme Court of Canada, delivered her Reasons for Judgment: *Dixon v. AGBC* (No. 2) (1989) 35 BCLR (2d) 273 (S.C.). She found the challenged laws to be unconstitutional. They failed to meet the requirements of the *Charter*.

McLachlin, CJSC, found the variation in numbers of voters among the provincial ridings to be extreme:

The result of the Commission’s application of these standards is summarized in Appendix A to these Reasons. It supports the petitioner’s contention that there are wide deviations from the norm (the average population per elected representative).

At the extremes, the electoral district of Atlin is 86.8 per cent below the equal population norm, while the district of Surrey-Newton is 63.2 per cent above the norm, for a total variance of 149.7 per cent. This is an extreme but not atypical example. Nine ridings are more than 25 per cent below the norm, while 10 are more than 25 per cent above the norm; 20 ridings are more than 10 per cent below the norm, while 25 are more than 10 per cent above (p. 6).

She further noted that, “The effect of the disparities in British Columbia is to enhance the power of the rural voter. Votes in urban areas tend to be worth considerably less than votes in rural areas outside the lower mainland” (p. 9).

The concerns about according one group in society (e.g., rural voters) more political weight than their numbers merit was obviously something that ran counter to *Charter* principles of equality and democratic governance. McLachlin, CJSC, set out this comment in that regard:

Viewed in its textual context, the right to vote and participate in the democratic election of one’s government is one of the most fundamental of the *Charter* rights. For without the right to vote in free and fair elections all other rights would be in jeopardy. The *Charter* reflects this. Section 3 cannot be overridden under s. 33(1); it is, in this sense, a preferred right: *Hoogbruin v. A.G.BC* 1985 CanLII 335 (BC CA), (1986), 24 D.L.R. (4th) 718 (BCCA).

The provincial government argued that the right to vote set out in section 3 of the *Charter* was a limited concept. A pre-*Charter* text was referenced to suggest that historically the right to vote in Canada meant no more than these:

The Attorney General, relying on Boyer, *Political Rights: The Legal Framework of Elections in Canada* (1981), conceded that the following core values or rights form part of the s. 3 guarantee of the right to vote.

- + The right not to be denied the franchise on the grounds of race, sex, educational qualification or other unjustifiable criteria;
- + The right to be presented with a choice of candidates or parties;
- + The right to a secret ballot;
- + The right to have one’s vote counted;

- + The right to have one's vote count for the same as other valid votes cast in a district;
- + The right to sufficient information about public policies to permit an informed decision;
- + The right to be represented by a candidate with at least a plurality of votes in a district;
- + The right to vote in periodic elections; and
- + The right to cast one's vote in an electoral system which has not been "gerrymandered"—that is, deliberately engineered so as to favour one political party over another (pp. 81 et seq).

All of those were important points, but McLachlin, CJSC, rejected the government's contention that they exhausted the definition of the right to vote. She was emphatic that the concept of equality was a necessary component, indeed a component that held priority in the definition and understanding of the right to vote:

I would add to this list a tenth precept. It cannot be denied that equality of voting power is fundamental to the Canadian concept of democracy. The claim of our forefathers to representation by populations—"rep by pop"—preceded Confederation and was confirmed by it.

As I have earlier noted, the purpose of the s. 3 guarantee of the right to vote must be to preserve to citizens their full rights as democratic citizens. The concept of representation by population is one of the most fundamental democratic guarantees. And the notion of equality of voting power is fundamental to representation by population. The essence of democracy is that the people rule. Anything less than direct, representative democracy risks attenuating the expression of the popular will and hence risks thwarting the purpose of democracy (pp. 16-17).

Of course, finding that fundamental aspect of the meaning to be given to the right to vote was not unusual. Lord Durham's *Report on British North America* in the early 1800s had called for recognition and respect of the principles of representation in accordance with population. The *Constitution Act, 1867*, itself provided for the allocation of seats in the House of Commons to meet standards of proportionate representation. Throughout Canadian history, instances of political gerrymandering, whether by efforts to aggregate voters in odd-shaped ridings so as to achieve a political end or to give more voting weight to voters supportive of the government by crafty drawing of electoral district boundary lines, have been met with scandal and public opprobrium.

Chief Justice McLachlin's conclusion that "the notion of equality is inherent in the Canadian concept of voting rights" is thus unassailable.

In the argument before her, the BCCLA had urged a rule of strict voter equality and had referenced certain US cases in support of that. McLachlin, CJSC, found that absolute or strict equality was not required. But it is important to note that in making that allowance she nonetheless held that: "relative equality of voting power is fundamental to the right to vote enshrined in s. 3 of the *Charter*. In fact, it may be seen as the dominant principle underlying our system of representational democracy."

Those words bear careful consideration. While some modest deviation from absolute or strict voter equality may be tolerated as a practical matter, the

fact remains that the fundamental concern must be one of ensuring equality of voting power. Otherwise, pragmatism becomes a tool for justifying ever-increasing inequality and erosion of fundamental principles. Eventually, what started off as a mere “pragmatic” response to the situation “on the ground,” would become a principle that reverted to the deprivation of *Charter* guarantees and the loss of confidence by the public in basic democratic institutions and values.

She noted as well the evolutionary nature of our history, remarking that “Parliament, born as a privileged body representing a select few, evolved gradually over the centuries to a body representing the citizenry as a whole” (p. 18). She added that we had a “tradition of evolutionary democracy, of increasing widening of representation through the centuries” (p.22). Increasingly, the burden becomes heavier on anyone seeking to justify diverging from equality as a norm in electoral matters.

McLachlin, CJSC, noted as well that some of the arguments proffered as justifying disproportionate representation for rural areas ignored that they were counter-balanced by similar concerns affecting urban areas. For example, the notion that an MP or MLA could not effectively serve his or her constituents in a rural area due to large geographical areas to cover were offset by concerns that urban MPs or MLAs faced when dealing with large populations including higher concentrations of the poor or marginalized groups, or significant concentrations of ethnic minorities and linguistic groups. She wrote:

Relative electoral parity is similarly essential to the elected representative’s “ombudsman” function which requires the representative and his or her staff to deal with individual problems and complaints of constituents. It is not consistent with good government that one member be grossly overburdened with constituents, as compared with another member.

In the end, McLachlin, CJSC, held that the federal model allowing for deviations of up to 25 per cent were as much as the *Charter* reasonably would allow and she noted, with apparent approval, that the province had just received a report from a Commission headed by then County Court Judge Fisher that had recommended new boundaries for BC provincial elections that met those criteria.

The upshot of that litigation was thus that Canada had formal recognition given to the fact that the *Charter* guaranteed that each voter was entitled to an effective vote and that meant that there must be relative voter parity in how electoral district boundaries were drawn.

Lessons From The Saskatchewan Electoral Boundaries Reference—the Importance of Evidence

In the 1990s a similar challenge arose concerning electoral district boundaries in Saskatchewan. In *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 SCR 158, McLachlin, J., on the Supreme Court of Canada, upheld electoral district boundaries drawn by the government of then Premier Grant Devine. The background to the case is notable. The Devine government waited until late in its term to put in place new electoral district boundaries. It derived its strongest support from rural areas.

The previous legislation in place had allowed for a 15 per cent deviation from the provincial average in terms of numbers of voters permitted in each riding. The lines drawn in 1981 using that approach were now outdated given urban

growth and rural depopulation. Drawing from the federal example and, perhaps, from the BC litigation, the Devine government put in place boundaries that allowed for up to 25 per cent, with the possibility of further exceptions in extraordinary circumstances. The lines drawn favored rural areas.

The Devine government met with opposition to its proposals. There were public concerns expressed as to their validity and propriety. The upshot was that it referred the validity of the boundaries to the Saskatchewan Court of Appeal. That court held the boundary legislation unconstitutional in a decision rendered March 6, 1991.

The timing of all this was awkward all round. The Saskatchewan government was now in its fifth year since the previous election. There was no realistic prospect of getting new boundaries drawn so as to allow an election to be held on those. Without electoral district lines, the ability of the province to have an election before the time limited by the *Constitution Act, 1982* for legislatures to sit was running out. Also, and perhaps most pertinent for a proper understanding of the case and its significance overall, was the fact that the only “plan” in evidence before the courts on the reference to the Court of Appeal and on appeal to the Supreme Court of Canada, was the one that the Devine government’s commission had come up with. There was thus no evidence of any better way to draw the boundaries.

The Supreme Court of Canada held its hearing on the matter on April 29-30, 1991 on an expedited basis. The Deputy Attorney General of Saskatchewan argued the appeal. He was supported by interventions as of right from most of the other provinces, the federal government and the territories. Roger Carter, QC, an eminent labour lawyer from Saskatchewan, had been appointed amicus curiae in the Saskatchewan Court of Appeal proceedings and was the respondent on the appeal to the Supreme Court of Canada. The BCCLA applied to intervene and was allowed to do so by Laforest, J. He allowed several other intervenors to participate as well.

At the hearing, Bob Edwards, QC, appeared for the BC government as intervenor. In his submissions to the court, he remarked on the participation by the BCCLA. He questioned how the association could appear and argue given how the *Dixon v. AGBC* case had been decided. In his view, that case had been a contest between strict equality or “effective representation” of voters and the BC government had prevailed on that. While no doubt sincere in his views, the submission did not ring true. The BC government had resisted the BCCLA’s challenge to electoral districting laws on every available ground.

When I had my chance to speak I noted his question, “why was the BCCLA here, given the outcome of the *Dixon v. AGBC* case?” I gave the answer: “We won. And we want to preserve and protect the constitutional guarantee the *Charter* established.” That drew some smiles from the bench.

A question about the application of the *Charter* was raised at the hearing, but not by the immediate parties to the reference and appeal. The government of Saskatchewan and Roger Carter, QC, had proceeded on the basis that the *Charter* applied. The *Dixon v. AGBC* case said that. But *Dixon v. AGBC* was just a trial court decision in British Columbia. It was not a pronouncement by the highest court in the land. The issue of the *Charter’s* application was raised in an intervenor’s factum, by the government of the Northwest Territories. None of the other factums dealt with it directly. The BCCLA factum touched on it as part of reciting the history of the *Dixon v. AGBC* litigation. The decisions of the BC courts in that litigation were, of course, before the Supreme Court of Canada and available for consideration.

I recall a conversation with counsel for one of the other governments that intervened. He advised that he had thought of doing what the Northwest Territories counsel had done, but refrained from doing so because he thought it preferable to leave it for another day. If the court came up with too stringent a standard, the issue of the application of the *Charter* overall could be revisited.

I was skeptical then, as now, about that strategy. Even though it meant eating into the short time that I had for the BCCLA’s submissions, given that the Northwest Territories’ counsel had raised the point, I felt it important to address it. I did so and was asked by certain justices for references to the cases argued on the point when it was dealt with by the courts in BC.

The Supreme Court’s decision came on June 6, 1991, again driven by the expedited nature of the proceedings and the need for a quick decision. The majority judgment written by McLachlin, J. upheld what McLachlin, CJSC, had written in the *Dixon* case with BC electoral districting laws were subject to *Charter* scrutiny. She wrote this:

A preliminary question arises of whether the definition of provincial voting constituencies is subject to the *Charter*.

The Minister of Justice of the Northwest Territories submits that the *Charter* does not apply since the legislation whereby constituencies are created is part of the constitution of Canada and hence not subject to the *Charter*. He submits that the provinces have had the right to establish electoral boundaries since joining Confederation. In his view, the place of voter equality in this determination is a matter of constitutional convention

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which is impervious to judicial review. The right of the provinces to create electoral boundaries as they see fit "must be taken as being an inherent limitation on the right to vote in s. 3."

I cannot accept this submission. Although legislative jurisdiction to amend the provincial constitution cannot be removed from the province without a constitutional amendment and is in this sense above *Charter* scrutiny, the provincial exercise of its legislative authority is subject to the *Charter*; as McEachern CJ observed, "[i]f the fruit of the constitutional tree does not conform to the *Charter*... then it must to such extent be struck down": *Dixon v. BC (AG)* 1986 CanLII 770 (BC SC), (1986), 7 BCLR (2d) 174, at p. 188. The convention for which the Minister contends goes no further than to empower the province to establish its electoral boundaries. The particular exercise of that power is subject to s. 3 of the *Charter*, which binds Saskatchewan as it does every province and territory of Canada.

That appeared to have dealt with the strategy of waiting and trying on for size an argument about the *Charter's* application later on. The highest court had ruled that the *Charter* applied to such laws.

As for voter parity, once again McLachlin, J., held that absolute or strict parity was not a requirement, but that equality was still the primary concern:

What are the conditions of effective representation? The first is relative parity of voting power. A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. The legislative power of the citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative. The result will be uneven and unfair representation.

It is important to note this additional point. McLachlin, J. (as she then was), highlights it at the end of her judgment:

In summary, the evidence supplied by the province is sufficient to justify the existing electoral boundaries. In general, the discrepancies between urban and rural ridings is small, no more than one might expect given the greater difficulties associated with representing rural ridings. And discrepancies between particular ridings appear to be justified on the basis of factors such as geography, community interests and population growth patterns. It was not seriously suggested that the northern boundaries are inappropriate, given the sparse population and the difficulty of communication in the area. I conclude that a violation of s. 3 of the *Charter* has not been established.

Obviously, had there been evidence before the court of

an alternative —of a competing plan for how to draw electoral district boundary lines—that resulted in a closer approximation of relative voter parity, the court majority’s finding could not have been the same.

Cory, J., (with Lamer, CJC and L’Heureux-Dube, J.), in dissent, would have upheld the Saskatchewan Court of Appeal’s finding on unconstitutionality. He had to grapple with the fact that there was no competing plan as well. But he brought his focus on the process of drawing the boundaries, instead of just on the result. He noted this:

In Saskatchewan, the basic requirement of reasonable equality was met when the 1981 constituency map was drawn. No reason has been provided as to why it was no longer possible to achieve the degree of equality reflected in that distribution. Moreover, no explanation has been given as to why the balancing of the relevant factors could not, as it was previously, be left to the Commission rather than being mandated by the legislature. The province has failed to justify the need to shackle the Commission with the mandatory rural-urban allocation and the confinement of urban boundaries to municipal limits. The effect of these mandatory conditions was to force the Commission to recommend a distribution which departs from the higher degree of equality achieved in 1981. In the absence of a reasonable explanation as to why this was necessary, the distribution in question is suspect and there is no basis upon which to conclude that the legislature’s objective in imposing the mandatory conditions was pressing and substantial.

It is clear enough that had an alternative plan been provided to the court that kept closer to voter parity, the result would likely have been to find that the Devine government’s plan was unconstitutional. One could not argue that the evidence in the case demonstrated that the primary consideration—voter parity—was being given due weight if the government-sponsored plan was more unequal and a clear basis for demonstrating a justification for such a divergence was not provided.

Alberta Revisits the Disparity Problem

In the 1990s, the Alberta government sought to entrench a disparity in favor of rural voters in its provincial electoral districting laws. Again, the courts there decided that in the absence of evidence of a better plan they would not invalidate the law, but at the same time made it clear that there was no constitutional imprimatur of acceptability for such discrimination.

In an early phase of litigation over the legislation, the courts refused to enjoin it being proclaimed into law. The government tried to argue that amounted to approval of what it had done. When the matter came on for a full hearing, the court clarified that was not correct. In *Reference re: Order in Council 215/93 Respecting the Electoral Divisions Statutes Amendment Act, 1994* ABCA 342 the Alberta Court of Appeal said this:

[45] It is one thing to say that the effective representation of a specific community requires an electoral division of a below-average population. That approach invites specific reasons, and specific facts. The constitution of Canada is sufficiently flexible to permit disparity to serve geographical and demographic reality.

[46] It is quite another to say that any electoral division, for no specific reason, may be smaller than average. In the 1991 Reference, we affirmed the first, not the second. We affirm again that there is no permissible variation if there is no justification. And the onus to establish justification lies with those who suggest the variation.

The court complained that the Reference was proceeding without clear reasons and evidence from the government why the boundaries were being drawn as they were. It did note its strong suspicion that improper factors had come into play:

[59] While we hesitate to make a firm statement in the absence of detailed reasons, we fear there may well have been regard for an irrelevant consideration. This serious concern proceeds from this basic idea: we do not think it a correct approach to the *Charter* to exclude unpopular alternatives simply because they are unpopular.

[60] It is one thing to say that, on the facts and for a given community, a deviation becomes a practical necessity; it is quite another to say that existing deviations must remain because significant numbers of voters otherwise will be unhappy. The only fit response to that, in general, should be to remind voters, with Burke, that "the people never give up their liberties but under some delusion."

[61] While some deviations in Alberta are no doubt inevitable, we see evidence that the practical necessities raised by the principle of effective representation did not, alone, guide the hand of the legislators. On the contrary, what seems to have motivated this scheme at least in part was the acknowledgment that, whether or not some disparities were warranted, change would be made slowly so as not to offend unduly the political sensibilities of some electors.

Obviously, the fact that a given area has "always" had an MP or MLA all to itself is hardly a justification for continuing that if its number of voters has fallen in relation to the rest of the province. Indeed, when one goes back to the *Dixon* litigation, part of the rationale for the Atlin and Columbia River constituencies in the northwest and southeast corners of BC continuing to exist was that they had long been in existence. That proposition simply did not withstand examination, given that Atlin was only one fifteenth the size in terms of voters as the largest riding and Columbia River, although a bit more populous, likewise had only a fraction of the number that existed in urban ridings.

The Alberta Court of Appeal added:

[65] ...One reason [Mr. Bogle, a government representative] gives in his affidavit for this decision was that a further reduction "would have meant a sudden and substantial reduction in the level of representation." That is, we observe, exactly the concern of some electors. The concern, we feel constrained to add, of other electors, those in Metropolitan Alberta, was that their existing inadequate level of representation would remain reduced.

[66] With respect, this very natural concern of an elected official for the "comfort zone" of a vocal portion of the electorate is not a valid *Charter* consideration. The essence of a constitutionally-entrenched right is that it permits an individual to stand against even a majority of the people. Put another way, Canadians entrenched certain traditional rights for minorities in the Constitution because they do not trust themselves, in all times and circumstances, to respect those rights. The fact, then, that a significant number of Albertans do not like the results of an equal distribution of electoral divisions is no reason to flinch from insisting that they take the burden as well as the benefit of democracy as we know it.

The court noted that in its 1991 decision it had refused to overturn the electoral districts provided for as they represented a significant improvement towards the equality principle. The government argued that was as far as it had to go. The court's response was to reject that. They may have had in mind something similar to what Lord Thankerton observed about precedent:

“the decisions of this House in progressively construing a statute must often be stepping-stones rather than halting places”: *Birch Bros., Ltd. v. Brown* [1931] AC 605.

The Alberta Court of Appeal reiterated the progressive and evolutionary nature of movement towards closer approximation of equality:

[67] It may be thought that we took a different view in the 1991 Reference about the disaffection of non-urban electors. The Court there refused to make a declaration of invalidity because:

The political prudence that encourages gradual but steady change from larger to smaller deviation should not be castigated. Indeed, even if the court were inclined to hold that the automatic deviation built into the 43/40 split offended the *Charter*, we no doubt would temper any relief granted in a way not unlike what this committee recommended.

[68] We accepted that reasoning, but only as a reason for judicial restraint in the face of error, not as a valid consideration for a boundary-writer. We saw “gradual but steady” movement towards a *Charter*-supported approach. (Whether we thus invoked section 1 or the power to withhold a remedy is an issue we stepped past for that case, and will again for this.) We saw, in the 1989 scheme, a considerable closing of the gap. In coming to that conclusion, we relied on the power of an electoral commission to use the hybrid division. On that basis, we saw evidence of enough progress to warrant a refusal to act. But this was consideration of appropriate judicial restraint, not approval of regard for irrelevant considerations.

At paragraph 70 of its decision, the court emphasized the importance of the point:

As we have said, the origin of the problem before the Legislature is the historic imbalance in the level of representation between agrarian and non-agrarian populations in Alberta. Each year this problem worsens, because each year urban populations increase and non-urban populations decrease. We call this a problem because it impacts significantly on the right to vote of urban Albertans. This cannot be permitted to continue if Alberta wishes to call itself a democracy.

The court advised the government, in response to the Reference questions, that it meant what it said about “gradual and steady” progress towards equality and that any divergence therefrom required clear, reasoned and compelling justification.

The court’s words are apposite here. The work of this Commission must be to continue the progress towards equality among voters. It ought not be deterred in that effort by calls from some that suggest that following

the requirements of the *Charter* is “unpopular” in some quarters. The Alberta Court of Appeal reasoned that such “unpopularity” was simply not a factor that properly could be considered when dealing with *Charter* rights, particularly when they touched upon the fundamental concerns of preserving democratic institutions and the confidence that the public overall ought to have in their integrity.

The Burden of Demonstrating that Changes to Proposed Electoral Districts Should Satisfy Constitutional Guarantees and Legal Standards is on the Person Suggesting Such Changes

The reason that I have gone through the foregoing history of these legal challenges in such detail is that they underscore a point of importance in relation to any suggestions made for changes to the proposed boundaries that would result in significant deviations from the voter parity rule. The proposition is this: the Rubicon has been crossed.

Where proposals put forward are a reasonable basis for drawing the electoral districts and demonstrate “how it can be done” so as to comport with the requirements of the federal redistricting legislation and with the *Charter* equality and effective voting guarantees, then the burden of showing that another way of doing things is available rests on those making such an assertion.

In the US, after each decennial census, and sometimes more often, challenges are made, or may be made, at each state concerning the electoral districting that is to prevail.

That is not to say that changes here and there that result in either substantially the same voter parity or perhaps even a closer approximation of voter parity among the ridings ought not be considered. But it does emphasize that the burden is on anyone proposing a change to show (a) why such a change is reasonably required, (b) what important purposes would be served by making it and (c) how such changes achieve the primary goal of ensuring voter parity at least as well as the proposed boundaries do.

Indeed, during argument at the Supreme Court of Canada on the Saskatchewan Electoral Boundaries reference, I recall saying to the court that if we were going to have court review of such laws, then evidence as to what was proposed and how it complied with the equality principle was essential. At the time, I thought it afforded the court an “out.” There was no such additional evidence showing that a method of drawing electoral district lines was available that would avoid the problems inherent in the Devine government gerrymandering. The court was

thus faced, at a time when the Saskatchewan government's term of office was about to end, with a choice between a bad set of boundaries and nothing else. It is thus not all that surprising it chose the one put forward. The opposition to them had not proffered anything concrete in evidence to counter what the government propounded.

The court did not spend as much time as it could upon evidentiary issues. That much is a pity. From my perspective, it would have been preferable for it to stress that each case is decided upon the evidence and the legal arguments presented. In the absence of evidence setting forth, on a thorough-going basis, how things could be done better, the court had just one set of boundaries. In contrast with the BC litigation, where the Fisher commission had supplied a set of boundaries that were available for use and that met a plus or minus 25 per cent standard, in the Saskatchewan case, the court was presented with the Devine government's gerrymander and nothing else.

From a legal perspective, it is not surprising the court ruled as it did. In each case, the court acts as an impartial and independent arbiter. It does not serve as a helper for either side, but relies on them to present evidence to their best advantage.

One should not, therefore, read into the Supreme Court's decision in the *Saskatchewan Electoral Boundaries* case more than is appropriate. While some later courts and electoral commissions have taken it to water down some of the *Dixon v. AGBC* reasoning, I have never thought so. It is more a matter of what evidentiary record is presented.

In the US, parties spend millions of dollars on lawyers and experts who assemble information and evidence that gets presented to courts on contests about the validity of electoral districting laws. While not necessarily commending the extent of expenditures, nonetheless, one can see that having evidence is the ultimate test of reasonableness. Where a government, whether directly or by a commission of inquiry, comes up with new electoral boundary lines that we may regard as being sub-standard or corrupt, the obligation on challengers is one of presenting in evidence a better way of doing things. Otherwise, there is not much to argue about.

Nothing to Fear, Nothing to Hide: The Right to Privacy as a Civil Liberty

by David Copp

09

Securing our privacy against intrusion by powerful institutions is crucial to our well-being and it is crucial to the security of our democracy. The right to privacy is a core civil liberty. Unfortunately, however, as is widely understood, a new triple-threat to privacy has arisen over the past 10 to 20 years and it is going to be difficult for civil libertarians to resist this threat. One source of the threat is the new information technologies that enable both governments and non-governmental institutions to monitor the lives of ordinary citizens as never before. The second is the heightened motivation to make aggressive use of these technologies in order to accumulate information about ordinary citizens. Governments are motivated by the security concerns that have come to the forefront since the terrorist attacks of September 11, 2001. Corporations and other institutions see a variety of ways to profit from accumulating data about ordinary people. The third element in the threat is the fact that ordinary citizens greatly enjoy and benefit from the new technologies and often fail to see any serious reason for concern. The information technologies are liberating as well as covertly constraining.

Many of us are happy, even anxious, to share personal details with others on so-called "social media" internet sites. Many of us search the internet with great frequency, many times a day, without caring that we are thereby creating an online profile of our concerns and interests.

We use computers and smart phones to send electronic messages or to map our positions using GPS technology, without realizing or being concerned that mobile phone technology can be used to track our movements. We shop and bank online. These technologies are becoming deeply enmeshed in our everyday lives, and they are welcomed in many ways, perhaps by most of us. Moreover, public areas are increasingly being monitored by closed circuit television, and we are becoming used to this. These technologies enable our lives to be closely monitored in ways that few of us fully understand. Yet it is common to take the view that the potential of the technology to monitor us is not a major cost when everything is taken into account, including the benefits that the technology affords us.

There is, then, in these technologies, a joining of means and motives with seductive benefits, and taken all together, this constitutes an acute threat to privacy. The technology is surely not going to disappear, not until it is replaced by some future information technology we cannot foresee, or unless our civilization disappears. The security threats are also unlikely to disappear in the near future. Disaffected groups likely will continue to use whatever means they can to further their interests, and this will stand behind and justify security agencies in their use of information technologies to compile information about us. Corporations will continue to

These technologies enable our lives to be closely monitored in ways that few of us fully understand.

try to profit from the new technologies. There is fortunately room for hope that ordinary people will begin to understand the threat posed by the technology. Such understanding will depend on two things. The first thing, ironically, is information. There needs to be a broad understanding of exactly how much information and what kinds of information can now be brought together about each of us, and how this information can be used. The second thing is philosophical and political insight. In order to defend a right to privacy, we need to have a solid understanding of the nature of privacy, its value, and its importance to civil liberties. And this understanding needs to be widely shared among all political parties and tendencies. Civil libertarians need to busy themselves on this second front.

First, in my view, a right to privacy is concerned with our control over the access that other people have to information about our lives. Control over information about ourselves is different in subtle ways from privacy as we ordinarily understand it, but I will not attempt to analyze or explain the ordinary notion of privacy.¹ Instead, when I speak of privacy I will mean to refer to the kind of control over information that, if I am correct, a right to privacy would defend. We can say if we like that a person has privacy to the degree that she has control over the relevant kind of information. I mean here to include as "information" not only the information contained in data and documents, but also the information contained in visual images and auditory recordings of a person and her activities. Some of this information could not easily be captured in a text. For instance, recordings of noises and sounds made by a person contain information about the person even if what they record is not speech. I also include as "information" what one can learn about a person in observing her directly.² A person loses privacy when photographs of her are shared without her having control over them, when she is liable to be observed and lacks control over whether she is observed, and when she lacks control over data concerning her life. A legal right to privacy would be concerned with our control over information of these kinds.

Second, we need to understand the value of privacy in the sense I have explained. There are excellent discussions in the philosophical literature of the value of privacy.³ James Rachels argues plausibly that, in addition to the various ways that privacy might be important to people in special circumstances, privacy is important because it enables us to create and maintain different sorts of relationships with different people. Some relationships are intimate, and some are not, for example.⁴ We value intimate relationships and, if Rachels is correct, privacy is critical to our ability to have such relationships. One might argue as well that a degree of privacy is a precondition of autonomy since a person's ability to govern her own life will be weakened if others can have unrestricted access to what she is thinking and intend-

ing. Beate Roessler contends that “we value privacy for the sake of our autonomy.”⁵ Given the attitudes many people have, and that we have no reason to expect will disappear, a measure of privacy is also crucial to our ability to live spontaneously and without being subject to worries about being embarrassed or shamed for engaging in innocent activities of a kind that all human beings engage in. Worries about being under surveillance can constrain us from expressing our personality openly and without inhibition. It is not that we need to hide our personality, or to hide the fact that we engage in activities that are completely innocent. Yet a surveillance and tracking and recording of our activities would potentially restrain us by creating a risk of embarrassment and it would in this way remove a kind of spontaneity from our lives that we value greatly. For all of these reasons, privacy is crucial to our well-being.

Given this, it is arguable that there is a right to privacy, or a right to a significant degree of control over the access that other people have to information about one’s life. One might aim to ground such a right in the importance of privacy to our well-being. Some would argue, however, that such a right, if there is one, is merely a corollary of property rights.⁶ It is true that property rights can help to secure privacy. Improper searches of our homes are intrusions into our privacy at the same time as they are invasions of property. Yet privacy is of greater significance than this, as we can see if we think about ways our privacy can be compromised without harming property rights except perhaps trivially. For example, private citizens can purchase GPS devices and, by placing such a device on someone’s car, keep track of where the person goes and what she does. This abridges a property right since the owner of a car has a right to determine what is attached to it. Yet it is a minor abridgement of a property right by comparison with the consequences for privacy when anyone could in principle keep track of one’s movements. For a second example, there are microphones that enable private citizens and police to keep track of what is said and of what noises are made behind closed doors, and without any obvious intrusion on property. So it seems that the importance of privacy cannot be explained merely by reference to property rights.

Third, we need to be clear why a right to privacy is a civil liberty and what this means. Many things are important to our well-being without being protected by a civil liberty. Parks and libraries are examples. To be sure, if a law discriminates against members of a minority by prohibiting them from using public parks or libraries, this surely is an abridgement of the civil liberties of the minority. If there is censorship of libraries, this too is an abridgement of a civil liberty. Nevertheless, I do not believe there is a civil liberty that ensures a right to be supplied with a public library or a right to there being public parks. A decent and well-functioning society provides these things to its citizens, but not everything

of this nature is protected by a civil liberty. A decent and well-functioning society also ensures that its citizens have a sphere of privacy that is protected from invasion, and this is important. Yet I believe that a right to privacy is also a civil liberty and I believe that this is an important political fact about privacy. When we claim that there is a right to privacy and that it has the status of a civil liberty, we are claiming more than merely that a decent and well-functioning society guarantees its citizens a sphere of privacy. We are making a claim about what the law ought to say. The key point in my view is that privacy is crucial to democracy. This is why privacy is a civil liberty.

In saying this, I am relying on the concept of a civil liberty as well as on a normative view about what justifies the civil liberties. Although I worked with the BC Civil Liberties Association for several years that were formative for me, during the 1970s and 1980s, I confess that I did not have a clear idea of what marked the boundaries of the civil liberties. Indeed, I recall debates among Board members at the time about this very matter.

Here is my proposal. First, civil liberties are legal rights that people *ought* to have in order to protect them against a certain class of actions by governments, institutions, and private individuals. Second, the actions in question are those of a kind that threaten either democracy itself or the equal status of citizens as political actors in a democracy. This means that a civil liberty must have a political rationale that connects a proposed legal right to a concern with democracy. For example, if free speech is a civil liberty, then there *ought* to be a *legal* right to free speech *because* the legal protection of free speech is crucial to democracy or to the equal status of citizens as political actors. This is the proposal. I need to explain and illustrate it before I can return to privacy.

I should stress, to begin, that my proposal is not meant to rule out other arguments for a right to privacy.⁷ First, there are other views about what justifies the civil liberties, and they might support somewhat different ideas about the civil liberty of privacy. Most important is the Millian idea that governments can only rightly interfere with a person’s freedom to prevent harm to others.⁸ Second, there are accounts that might support a moral right to privacy that goes beyond the civil liberty of privacy. If I eavesdrop I may abridge your right to privacy without abridging your civil liberties. My central goal in this paper is to propose an account of what the civil liberties are, and to argue that a right to privacy is a civil liberty. This is not the whole story about privacy.

Let me also stress that my proposal does not mean that there are no civil liberties in *undemocratic* societies. There are civil liberties wherever there is law, such that there are rights the law ought to guarantee. Even though Iraq was a dictatorship in 1995, it is nevertheless

true that there ought to have been a legal right to free speech. There ought to have been such a right because the legal protection of free speech is crucial to democracy and to the equal status of citizens as political actors.⁹ This is why free speech is a civil liberty, as I will explain more fully below. The point is that, on my proposal, civil libertarians are partisans of democracy. If we live under a dictatorship we might be even more clear why the civil liberties are important.

A central example of a civil liberty is the equal right to vote. On my proposal, this right is a civil liberty because actions that threaten equal voting rights threaten democracy by undermining the equality of fundamental political authority among the citizens that is the hallmark of democracy. Civil libertarians therefore would be right to protest gerrymandered parliamentary constituencies and to protest poll taxes and policies regarding voter identification that create unequal burdens among different classes of voters. It is interesting in this context to consider what civil libertarians should say about policies governing the financing of election campaigns. Policies that permit wealthy individuals to exercise exceptional influence in elections do not directly undermine equality of fundamental political authority but they can nevertheless threaten the equal status of citizens as political actors. The relationship between power and authority needs to be clarified, of course, but I believe that significantly unequal power undermines democracy by

undermining its point, and by undermining the value of equal authority. This is an issue that can be a matter of debate among civil libertarians. My proposal can explain why there is this controversy.

A second example of a civil liberty is the right to a fair trial, *habeas corpus*, and, more generally, the right to due process as a condition of criminal punishment. Here the idea is not that abridgements of due process directly threaten democracy by undermining citizens' equality of fundamental political authority. It might be said that even a person who is unjustly imprisoned has the same political authority as every other citizen. The problem is, however, that the threat of imprisonment without due process undermines democracy in an indirect way by undermining the security of citizens who might disagree with political decisions. The right to due process offers some protection from the power of governments to imprison citizens for political reasons. A regime of political prisoners obviously threatens the equal status of citizens as political actors. We can argue on this ground that due process is a civil liberty. No doubt due process is also important for other reasons, but the issue is why due process is a civil liberty. My proposal can explain why it is.

A third example is the right of free speech and the right to freedom of expression. It is clear on my proposal why a right to freedom of *political* expression is a civil

*Civil libertarians
are partisans
of democracy.*

liberty; this is a right that ought to be protected in law because of the importance of political expression to the well-functioning of democracy. If my proposal is correct, however, it might seem to follow that the right to produce and display works of art does not qualify as a civil liberty, for works of art do not argue political positions. But they can. A famous example is the photography of Robert Mapplethorpe, which was controversial and subjected to attempts at censorship precisely because its homo-erotic nature was viewed as advocating a way of life of which the wider society tended to disapprove. As Alexander Meiklejohn famously argued, any speech, and any kind of expression, can in principle be political in nature given that virtually any issue can become the object of legislation in a democracy in the absence of civil liberties or constitutional protections that take certain topics off the legislative agenda.¹⁰ Freedom of artistic expression is no doubt important for many reasons, and it is important to articulate these reasons. But our concern is with freedom of expression as a civil liberty. My claim is that my proposal can explain why it is a civil liberty.

Freedom of religion can be grounded in a similar way. Contemporary politics around the world shows the way in which religion can be politically significant. Religious belief grounds the political views of many people. The right to the free practice of religion is, on my proposal, a corollary of the right to freedom of political expression.

Turn now to the right to privacy. I believe that the standing of the right to privacy as a civil liberty is analogous to the standing of freedom of expression. My proposal can explain, of course, why a right to privacy in *political matters* is a civil liberty, for this is a right of importance to the well-functioning of democracy. If the police can be legally authorized to spy on oppositional political parties by monitoring their meetings or by putting together membership lists, it is obvious how this could put a chill on political activity. Think of how the secret police in Communist countries in eastern Europe were able to prevent the development of an effective political opposition for 40 years or so. Invasions of political privacy and of the right of free political expression were crucial. Similarly, if the police or security agencies can have legal authority to spy on oppositional political communications or on those who are reading controversial books and the like, it is obvious how this could inhibit political activity. Think of the way that the *USA Patriot Act* permits police in the United States to access lists of the books one borrows from libraries. It might seem, however, that if my proposal is correct, any right we have to privacy that goes beyond *political* privacy is not a civil liberty. Arguably, privacy in the bedroom or in personal communication is of no political significance. But such an argument would be mistaken. The fundamental problem is that virtually any kind of action can have political significance in the right context. It is obvious that political privacy includes much more than merely actions

that communicate political content since it also includes organizing political parties and the like. But if virtually any kind of action can have political significance, then virtually any kind of action can potentially be brought under the umbrella of a civil liberties protection even if the justification of the right is political.

First, on my proposal, the civil liberty of privacy includes a right to privacy in political activities, including the communication of political matters. That is, there ought to be a legal right to such activities or a legally protected sphere of activity. But to provide effective protection for political activities, privacy must be construed more broadly than this. This is because, again, virtually any kind of action can have political significance, including setting up a tent in a public square and burning a flag. Symbolic actions that otherwise might be trivial can have political significance. Given this, it would be difficult to define a right in an operationally clear way that restricts the right of privacy to privacy in political activities. A legal right needs to be specified in a way that defines a clear line between protected actions and unprotected actions, and the line between political activities and non-political activities is not clear in the requisite way. Citizens need to know whether an activity will fall into the protected area of privacy, such that they can rely on its not being legally liable to being interfered with or spied upon. Moreover, state authorities and authorities in other relevant institutions must be able to tell ahead of time, before deciding to spy on an activity, whether or not it is likely to fall in the legally protected sphere of privacy. The idea of a right to privacy in *political activities* is not operationally clear in the requisite way because authorities cannot generally tell ahead of time which activities are likely to be political and which are not. Because of this, the law can provide effective privacy protection for political activities only if it defines a right to privacy that is more expansive than this. For example, it might provide protection for activities that are clearly political and for activities of political parties and organizations with political goals such as churches, trade unions, environmental groups, and so on. But this would not be enough.

Second and more important, democracy is threatened when governments and institutions interfere with our development of political views. And we develop our political views in the course of a great many activities including reading and reflection, conversation and debate, religious discussion, and so on. Our political views can be affected by sensitivities that we develop in quiet moments with family and loved ones. Our moral sensibility can be powerfully affected by our religion, by art that we see and by novels that we read, as well as by contact in formative periods of our lives with important role models. Consider again the example of Mapplethorpe. If he were not free to work on his photography with the confidence that his privacy would not be invaded, he might have been inhibited from doing so. Indeed if

there were no zone of legally protected privacy, Mapplethorpe could have been known to be taking homo-erotic photographs and he might have been prohibited from doing so. This would have interfered with his developing a political message in his art. The example illustrates the political significance of privacy since attempts to develop political messages and positions can be controversial and subjected to attempts at restriction. Our having a zone of privacy that is legally protected can assure us that political thought and expression developed in this zone will not be monitored and spied upon, even if it is oppositional or controversial. Therefore, even if I am correct that the rationale for a civil liberty must be restricted to showing how the proposed legal right would protect citizens against actions of a kind that threaten democracy or the equal status of citizens as political actors, we can still justify an expansive right to privacy.

Third, I believe my proposal can go some way to explaining why the right to privacy extends to activities in the bedroom and the bathroom, in the living room and the office. The right to confidentiality about one's sexual orientation can be given a grounding here. We live in a culture that leads people to have negative attitudes of various kinds toward homosexuality, but homosexuality is just one example. Shame and embarrassment are powerful motivators as shown by political blackmailers and political scandals, such as the 1966 Gerda Munsinger affair. If my actions in what I consider to be private moments are liable to be observed by government agents or by agents of powerful institutions, using powerful microphones or cameras, internet monitoring, or GPS tracking devices, then I will be careful to avoid what might embarrass me, no matter how innocent. This can inhibit me from activities that would otherwise be open to me without fear of embarrassment. And such monitoring or tracking or recording could be used to manipulate or threaten political actors. So a concern to protect democracy and to assure the equal status of citizens as political actors can warrant a legal protection against such monitoring or tracking or surveillance.

Many European countries give citizens significant rights against the accumulation of information about them by internet companies. We can illustrate what is at stake with the dramatic example of an Austrian man who was able to see his Facebook file due to a provision in the law of Ireland.¹¹ His file contained 1,222 pages of entries including emails he had deleted and a list of websites he had visited. If police have access to such records, it is clear how they could be used to manipulate people. We have only to recall the ways in which the FBI under J. Edgar Hoover was able to influence and manipulate people who knew only that the FBI had a file on them. The political power this gave Hoover was enormous.

Privacy is important for many reasons that I have not discussed, and a right to privacy can be grounded in ways I have not discussed. It is important to set all of this out clearly and in detail. But the concern of the BCCLA is with the civil liberties. I believe that my proposal can explain why the right to privacy is a civil liberty.

"Nothing to hide, nothing to fear." This annoying and shallow political slogan reveals a complete misunderstanding of why it is important that there be a legal right to privacy. We favor legal protections of privacy partly because we understand the importance of privacy to our well-being. Privacy contributes to our ability to have valuable relationships, supports our autonomy and our ability to live spontaneously, free of threats of embarrassment and shame for innocent activities. It is not that we value privacy because there are things that all of us need to hide. We have no need to hide our personality, or to hide the fact that we engage in completely innocent activities. Yet we value

spontaneity in our lives, and intimate relationships, and a loss of privacy can restrain and inhibit us. Beyond this, I have argued that there ought to be an expansive legal right to privacy because privacy is important to democracy and to our equal status as political agents. Without a protected sphere of privacy we would have reason to be cautious in investigating political matters and in developing and discussing ideas and positions that are in opposition to established powers or that are unconventional. We would have reason to be wary of politically motivated interference with our freedom. All of this would undermine democracy. What we fear in part is powerful institutions that could undermine democracy if there were not a protected sphere of privacy.

The “Nothing to hide” slogan is used as a quick way to dismiss concerns about privacy. It is persistent and it sounds credible, yet it gives no insight into how civil libertarians should think about privacy. Instead it poses a challenge. What exactly is the value of privacy such that there ought to be a high legal and moral barrier constraining governments and other institutions from interfering with our privacy? This is the question I have been pursuing in this essay. Privacy cannot be secured unless there is a widely shared clear and solid understanding of why privacy is valuable and of why it is crucial to democracy. I maintain that a concern to protect democracy undergirds all the civil liberties. If so, the key to understanding why privacy is a civil liberty is to understand how a legal right to privacy can enhance and protect democracy.

There remains the triple-threat against privacy. There is the new information technology. There are the security concerns and the profit to be made. And there is the lack of concern about privacy among those who see only or mainly the benefits of the technology. My argument might help counter this lack of concern by providing a theoretical underpinning for a legal right to privacy. The threat remains, however, and to deal with it effectively we need to devise a regime of privacy law that will allow us to retain the benefits of the new technology without putting at risk our basic interest in privacy and our interest in protecting democracy. It is far from obvious how this can be done.¹²

1 Anita Allen has argued that the information-control account of privacy is inadequate as an account of our ordinary notion of privacy. She points out that a person lacks privacy if she is observed 24 hours a day even if she retains control in that she is only observed due to her having requested this. Conversely, a person may be able to find privacy in secluded places even if she has no control over whether others observe her in those places. Steven Davis points out (in personal correspondence) that if the police have a warrant allowing them to wiretap my phone, I have lost control over information about me even if the warrant is never used by the police, so that my privacy is not actually abridged. I agree that the information-control account does not capture our ordinary concept. Allen also argues, however, that the account is inadequate to capture a plausible goal of public policy. I am not convinced. "Something very different and more complex than data control is the realistic aim of privacy policies" for the internet, she says. I am not clear what Allen thinks the aim of privacy policies ought to be. I therefore set aside her worries. See: Anita Allen, "Privacy," in Hugh LaFollette, ed., *The Oxford Handbook of Practical Ethics*, (Oxford University Press, 2003), at pp. 485-513, at 502.

2 In this way, I want to include what Anita Allen calls "physical privacy and aspects of what she calls "proprietary privacy" under the umbrella of what she calls "informational privacy." See Anita Allen, "Privacy," p. 485. I set aside Allen's category of "decisional privacy," or freedom from interference with personal decisions, despite its importance in US constitutional law, because it seems more properly to be a matter of liberty rather than privacy.

3 See: Allen, "Privacy," pp. 490-492 for a useful overview of the various suggestions that have been made in the philosophical literature. See also: Beate Roessler, *The Value of Privacy* (Cambridge: Polity Press, 2005).

4 James Rachels, "Why Privacy is Important," (1975) 4:4 *Philosophy and Public Affairs* pp. 323-333, especially at 326.

5 Roessler, *The Value of Privacy*, p. 1, also pp. 17-18, 43-77. See also: Gerald Dworkin, *The Theory and Practice of Autonomy*, (Cambridge: Cambridge University Press, 1988).

6 Such a view was relied on by the majority in the 2012 US Supreme Court decision in: *United States v Jones*, 132 S Ct 945 (2012), USSC online: www.supremecourt.gov/opinions/11pdf/10-1259.pdf. According to James Rachels, Judith Jarvis Thomson views the right to privacy as consisting in a bundle of rights including the right over one's body and person and rights to property. Rachels argues that this view is inadequate to explain the value of privacy. See Rachels, "Why Privacy is Important," pp. 331-333. Rachels is discussing Judith Jarvis Thomson, "The Right to Privacy," (1975) 4:4 *Philosophy and Public Affairs*, at. 295-314.

7 For discussion, see: Steven Davis, "Is There a Right to Privacy," (2009) 90:4 *Pacific Philosophical Quarterly*, at 450-475.

8 The question whether the Millean theory is plausible as a theory of the moral limits of law should be separated, I think, from the issue whether it is plausible as a theory of the civil liberties. The Millean theory might imply, for example, that the law ought not to require motorcycle riders to wear a helmet, but it is not clear that there is a civil liberty to ride a motorcycle without wearing a helmet.

9 See: David Copp, "Capitalism versus Democracy: The Marketing of Votes and the Marketing of Political Power," in John D. Bishop, ed., *Ethics and Capitalism* (Toronto: University of Toronto Press, 2000) pp. 81-101. See also: Harry Brighouse, "Political Equality and the Funding of Political Speech," (1995) 21:3 *Social Theory and Practice*, at 473-500.

10 Alexander Meiklejohn, *Free Speech and Its Relation to Self Government* (New York: Harper Brothers Publishers, 1948).

11 See: Kevin J. O'Brien, "Austrian Law Student Faces Down Facebook," *The New York Times*, (February 5, 2012).

12 I am grateful to Steven Davis, Jerry Dworkin, Johnnie Pedersen and Beate Roessler for helpful suggestions and comments.

“Thinking Shall Replace Killing”: Some Thoughts on Civilization and Human Rights

by Brendan Myers

10

01

When the idea of human rights first started gaining traction in Western civilization, the idea was often expressed in the language of mythology. Back in 1791 the philosopher Thomas Paine wrote that the French Revolution itself was “generated in the rational contemplation of the rights of man.”¹ In the pages that follow this statement, Paine describes the drama of the storming of the Bastille, in July of 1789, and the people’s march upon Versaille in October of the same year. With that story he attributed not just to the people involved, but also to the idea of human rights itself, “an enthusiasm of heroism, such only as the highest animation of liberty could inspire...”² But it was not just in dramatic victories of people-power over state-power that the idea of human rights became mythology. Paine also asserted that the contemplation of rights eventually leads us to “the divine origin of the rights of man at the creation. Here our inquiries find a resting-place, and our reason finds a home.”³ Paine is referring to the Biblical claim that we are “made in the image of God” (Genesis 1:27 and 9:6). Indeed in his text he invoked that very line from Genesis to support his case.⁴ And Paine could reasonably assume that by uttering that statement, his contemporaries would know exactly what he was talking about, and would probably agree.

Further, since religion had been invoked in the service of human rights, Paine could state that therefore human rights are universal:

Every history of the creation, and every tradictionary account, whether from the lettered or the unlettered world, however they may vary... all agree in establishing one point, *the unity of man*; by which I mean, that all men are of *one degree*, and consequently that all men are born equal, and with equal natural right, in the same manner as if posterity had been continued by *creation* instead of *generation*...⁵

Again, Paine was not the only writer of his time who sought to expand the idea of human rights to cover our whole species. People seemed to feel that the idea of universal human rights was not an invention, but a discovery, revealed to them from the highest order of value they could conceive: the order of the Godhead.

The history of human rights has been told often enough, and there is much more to it than what I have rendered here. But let this little account serve to remind readers of the parts of that history which are pertinent to the argument I am about to lay before you.

Our time is more than 200 years after the time of Thomas Paine and all his Enlightenment revolutionary friends. Since then, the idea has spread around the globe. We have the *Universal Declaration of Human Rights*, adopted in 1948 by the United Nations General Assembly with no dissenters, although eight countries abstained. We have universities around the world dedicating special research units and whole departments to the study, criticism, and promotion of human rights. In the name of human rights people demand remedies for their grievances, and in the name of human rights they demand social or political change. In the name of human rights governments criticize or punish other governments, using trade sanctions, propaganda, and military adventures. And now hundreds of countries have lists of rights enshrined in their constitutions for the protection of their citizens against the depredations of other citizens, big businesses, and their own governments. Now a right granted by legislation is a civic or political right, and not a natural or human right, if we must be a stickler for details. But as Paine wrote, "every civil right grows out of a natural right," and so a civic right is but "a natural right exchanged."⁶ This notion of exchanging natural rights for civil ones also appears in Thomas Hobbes and Jean-Jacques Rousseau. But the point is that the idea of human rights is alive and well in the 20th century. Thomas Paine and his rationally contemplative Bastille Day revolutionaries seem to have won.

While the idea of human rights is alive and well, the religious rock upon which the idea was founded does not have the same weight that it once had. Modern people have lost confidence in the great mythologies, like religion, which writers like Thomas Paine could assume his readers shared with him. We now live in what the fashionable scholars call the "postmodern" age. What does this word mean? Following the work of the philosopher Jean-Francois Lyotard, postmodernism means "incredulity toward meta-narratives."⁷ A metanarrative, to be simple about it, is a language used to describe or express a world view. And a world view, if we follow the work of Albert Schweitzer, who invented the term, can be defined as: "...the content of the thoughts of society and the individuals which compose it about the nature and object of the world in which they live, and the position and the destiny of mankind and of individual men within it."⁸ Following Schweitzer, a metanarrative is the sum of a set of related answers to the most important questions in life. So when Lyotard says that we're living in a postmodern world, characterised by incredulity toward metanarratives, he's saying something like this: Lots of people no longer trust their grand world views like they once used to do. There simply isn't the same level of confidence shared by everyone, or nearly everyone, in the same answers to the big questions. As Lyotard says, "the old poles of attraction represented by nation-states, parties, professions, institutions, and historical traditions are losing their attraction. And it does not look as though they will be replaced, at least not on their former scale."⁹ The result is that we live in a society with not one grand world view, but two, or 10, or 50. And none of them really stand above the rest, at least not for long. My point is not to say that postmodern skepticism is right or wrong. The point is to say that it's here, and that it makes it very much easier to cast doubt on ideas once held to be universal. And as noted, one result of this situation is that the conceptual foundation of human rights has lost the footing it once had in Abrahamic religion. Indeed some conservative religious thinkers now regard the idea of universal human rights as a threat to the integrity of their religion. For example: Douglas Farrow, professor of Christian thought at McGill University, wrote that human rights is a "battering ram" in a "concerted attempt to demolish" the Judeo-Christian moral order.¹⁰

Here are two recent definitions of human rights which are now considered more or less standard.

1. A legal or moral protection to which people are entitled simply by virtue of being human.
2. An interest of sufficient importance that the rights-holder can place others under a duty to have that interest fulfilled.

The first one is descended from the original understanding of human rights developed by Paine. But it doesn't include the Biblical proposition that we are entitled to rights because we are "made in the image of God." It asserts that there's something special about being human, but doesn't say anything about exactly *what* that special thing is. Taken at face value, it merely asserts; it does not explain or justify. The second definition here is a little bit more robust. For it is obvious that people have an interest in things like freedom, safety, food, water, shelter, and a number of other similar things that help make people's lives go well. But what's not obvious is exactly how those interests translate into rights. In a passage from *After Virtue*, philosopher Alasdair MacIntyre observed that statements concerning one's interests *are not the same* as statements concerning what one has a right to possess. There's no obvious logical inference leading from the former to the latter. Yet these two kinds of statements, he observed, tend to be conflated. Next MacIntyre observed that the objects of people's interests, and hence the rights that they claim, are always profoundly caught up in historical situations. Rights "presuppose the existence of a socially established set of rules," and these rules "only come into existence at particular historical periods under particular social circumstances."¹¹ It follows, so MacIntyre leaves us to infer, that human rights are not universal, and certainly not natural. Rather, they are highly contingent, highly accidental. Indeed he concluded that there are no such things as natural or inalienable rights because "every attempt to give good reasons for believing that there *are* such rights has failed."¹² MacIntyre is no champion of postmodernism, but this denial of the universality of human rights is the very soul of incredulity toward metanarratives.

Here's a second kind of criticism. Look again at the second definition of human rights given earlier: "an interest of sufficient importance that the rights holder can place others under a duty to have that right fulfilled." This definition complicates the question of who "possesses" a right. For if this is what I mean when I claim my rights, then it's the next person who has to do something about it. It's not a claim about who or what I am; it's a claim about what the next person should do, or not do. And as such, it leaves open the question of who shall decide what "an interest of sufficient importance" is.

From this situation, it may follow that if I claim something as my right, but other people say that my interest in that thing is not important enough, then my claim

is quite pointless and empty. I could claim that they're wrong to evaluate my interest so lowly, but unless I'm very persuasive my claim would fall on deaf ears. And while it would be a very poor moral statement if it didn't describe obligations people owe each other, still it doesn't say much about *why* that next person should feel obliged. The best known examples of the emptiness of human rights claims when no one is willing to stand up for them are the various accounts of refugees wandering Europe after the end of the Second World War. With no government willing to acknowledge them as their citizens, and hence no government willing to protect their rights, the refugees had effectively no rights at all. In short, under this definition of rights, it makes no sense to say that you have a right to something when no one *else* is willing to stand up for you. And what reason could be given for why they should stand up for you? Perhaps there's an assumption of moral reciprocity involved, in which I respect other people's rights and interests in the hope that others will respect mine. But then we are no longer talking about the intrinsic importance of being human, or the intrinsic importance of certain interests people may have. Instead we are talking about something like a social contract, or perhaps one of David Hume's "conventions."¹³ And then the whole point of having a right to something is lost.

MacIntyre's *After Virtue* was first published in 1981. Around 15 years later, Michael Ignatieff published a simple and straightforward argument for supporting human rights anyway, whether they have a metanarrative foundation, or not. According to Ignatieff, human rights are good things because upholding them tends to reduce oppression in the world. In his words, they are "necessary to protect individuals from violence and abuse, and if it is asked *why*, the only possible answer is historical. Human rights is the language through which individuals have created a defense of their autonomy against oppression of religion, family, state, and group."¹⁴ This is a very utilitarian argument. There's no invocation of anything metaphysical about the divinely ordained dignity of humanity. But it's an effective argument nonetheless. For surely no one would say that a government is right to torture someone convicted of a crime no worse than petty thievery. Surely no one would say that it's acceptable to abduct and enslave someone, just because he is poor. Ignatieff's argument has its critics, but it goes straight to the heart of the matter: the reduction and perhaps someday the elimination of unnecessary human suffering.

03

In the absence of a widely accepted singular world view for our culture, such as that which Thomas Paine could presuppose he shared with his listeners, but in the clear presence of a lot of human suffering that really must be stopped, might the notion of human rights be grounded in something else? Is there any way to restore the

universality of the idea of human rights, without creating yet another metanarrative that postmodern incredulity will reject? What idea could accommodate (if not entirely answer) the criticisms described here, and at the same time preserve the aim of the reduction of human suffering? Friends, I've a suggestion. And to explain my suggestion, let's go back in time again: to Athens, Greece, in the 6th century BCE, and the era generally agreed to be the birthplace of Western civilization.

Obviously there is not one single dramatic moment which definitively initiated Western civilization. It was a sequence of related yet distinct events in which one Greek community, Athens, transformed itself from an independent city-state, into the leader of a "league" of allied city states. Then it transformed itself again into the head of an international empire. Somewhere in this process, Athens also discovered its artistic and intellectual genius. Through the leadership and diplomacy of Pericles, various Greek cities entered into contracts with Athens, in which Athens would protect all of them from Persian attack. In return, Athens would receive a money tribute from all of the cities under its protection. But Pericles diverted some of the money away from the war effort and into architecture, sculpture, theatre, music and the arts. As noted a generation later by Plutarch, one of his biographers,

Pericles was also anxious that the unskilled masses, who had no military training, should not be debarred from benefiting from the national income, and yet should not be paid for sitting about and doing nothing. So he boldly laid before the people proposals for immense public works and plans for buildings, which would involve many different arts and industries and require long periods to complete, his object being that those who stayed at home, no less than those serving in the fleet or the army or on garrison duty, should be enabled to enjoy a share of the national wealth.¹⁵

Pericles also established competitive music and theatre festivals, and created for Athens a great reputation as a centre of the arts, which it held for many centuries. It is worth adding that, in Plutarch's account, Pericles transformed Athenian society this way not primarily by force of arms, but also by force of *words*. Even his opponents acknowledged his mastery of oratory and rhetoric. Reading between the lines of his biography one gets the impression he was a master psychological manipulator as well. Athens was a democracy, and Pericles had to be elected every year. But as Plutarch says, Pericles was re-elected for 40 consecutive years. He preserved his position by creating a reputation as an honourable and selfless person, concerned with the glory of Athens as a whole and not just his own personal glory. This point was also noted by Thucydides in his account of Pericles' famous Funeral Oration. Plutarch also emphasized that Pericles was unmoved by bribery

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and never enriched himself personally from the public treasury.¹⁶

Plutarch's portrait of the man veritably drips with worshipful adoration. It's almost embarrassing to read it. But I think there is an important observation here. Athens, in the time of Pericles, became a society which held artistic and intellectual activity to be at least as culturally important as military victory. Thinking was beginning to replace killing as a social force. It's this shift in emphasis, this movement, that I want to address.

And it is not only in Greece that this movement emerges. It is, I suspect, an elemental idea, which anyone can discover, at any time and place. The phrase "thinking shall replace killing," as I have used it here, comes not from the speeches of Pericles but from the story of Deganawidah, the Great Peacemaker who established the Iroquois Confederacy. The birth of Deganawidah was prophesied to his mother by a messenger from the Great Spirit; and he was born to her while she was still a virgin.¹⁷ He was surrounded by miraculous signs, such as a canoe made of solid stone which floated perfectly. But let's look at his meeting with the first person who accepted his message of peace: a woman who pressed him to describe how his peace message would be translated from theory to practice. He answered by saying that the Great Peace

will take the form of a longhouse...in which there are many fires, one for each family, yet all live as one household under one chief mother. Hereabouts are five nations, each with its own council fire, yet they shall live together as one household in peace. They shall be the Kanonsiönni, the Longhouse. They shall have one mind and live under one law. Thinking shall replace killing, and there shall be one commonwealth.¹⁸

One of Deganawidah's followers asked him what people who accept the Great Peace will be like. The Peacemaker answered:

Reason brings Righteousness, and Reason is a power that works among all minds alike. When once Reason is established, all the minds of all mankind will be in a state of Health and Peace. It will be as if there were but a single person.¹⁹

There are many more instances of this elementary idea appearing in other places in the world. Consider this statement made by Njal Thorgeirson, the leading figure of a 10th century Icelandic saga that bears his name: "With law our land shall rise, but it will perish with lawlessness."²⁰ Later in the story, the *Althing* or annual public assembly of Iceland gathered. However,

...many said that this was hardly worth it, for even cases brought to the Thing were getting nowhere,

"and we would rather," they said, "press our claims with point and blade."²¹

"That you must not do," said Njal, "for it will not do to be without law in the land."

Njal's preoccupation with law is an instance of the same movement we found in Pericles and in Deganawidah: that it is better to work out our problems with rationality, than with violence. We find this idea again in a fragment from the *Book of Mencius*, composed during China's Warring States period, in which education stands in the place of reason and rationality: "According to the way of man, if they are well fed, warmly clothed, and comfortably lodged but without education, they will become almost like animals"²² (*Book of Mencius*, 3A:4). The earliest example of this movement that I can think of appears in the *Code of Hammurabi*, circa 1700 BCE. There we find, in the preamble, the assertion that the whole point of the *Code* is: "to bring about the rule of righteousness in the land, to destroy the wicked and the evil-doers; so that the strong should not harm the weak...," and also "to give the protection of right to the land," and bring about "the well-being of the oppressed."²³

Yet some of you may be wondering: what does all this have to do with human rights? It's this: we might restore the universality of the idea of human rights by situating the idea in the context of this movement by which a society shifts its priorities, from violence to intelligence, from conquest to culture. I've chosen examples from societies that had no contact with each other at the time when these statements were first uttered, in order to show that the movement from killing to thinking may very well be a universal idea. It is universal, not in the sense that it has always existed as a matter of historical fact, but rather in the sense that the potential for discovering it is available to anyone, anywhere, at any time. In this transformation, a society does not entirely give up its capacity for warfare. But I think it also gives to itself new, additional priorities, such as art, music, justice, education, and peace. It is that movement towards new priorities which we call civilization; and as I shall argue, it's that movement called civilization where the idea of human rights might find its proper home.

04

Civilization! Have I not just invoked an old metanarrative, and having done so, also invoked everyone's postmodern incredulity? Yet what I have in mind is not a particular metanarrative. Rather, what I have in mind is a perpetually unfolding activity in human life by which any number of metanarratives come into being, sustain themselves, and perhaps also fade away. This is a well established proposition, generally agreed by many philosophers who study the idea of civilization. For instance, here's Albert Schweitzer, in *The Decay*

and Restoration of Civilization:

For a quite general definition we may say that civilization is progress, material and spiritual progress, on the part of individuals and of the mass. In what does it consist? First of all in a lessening of the strain imposed on individuals and on the mass by the struggle for existence. The establishment of as favourable conditions of living as possible for all is a demand which must be made partly for its own sake, *partly with a view to the spiritual and moral perfecting of individuals*, which is the ultimate object of civilization.²⁴

Look closely at the last sentence, in which Schweitzer asserts that the "ultimate object of civilization" is "the spiritual and moral perfecting of individuals." This means, as he explains, that "both individuals and the mass let their willing be determined by the material and spiritual good of the whole and the individuals that compose it; that is to say, their actions are ethical. Ethical progress is, then, that which is truly of the essence of civilization..."²⁵ And this ethical progress, Schweitzer claims, is the whole point of the idea of civilization.

As another example, here's philosopher Jay Newman, who, in an argument concerning religious tolerance, observed that "Like all words that end in the suffix '-zation,' it [civilization] refers to a certain kind of process. We speak of a particular civilization or of certain civilizations, but we should not forget that the term 'civilization' primarily signifies a process that something is undergoing or has undergone."²⁶ The process that Newman refers to is the same one I've just illustrated: it is the process by which a society and its individual members give greater and greater prominence to reason and rationality over violence. For as Newman says, civilization is "...the process of approximating or realizing, primarily by the use of reason, the greatest possible number of trans-cultural or universal human aspirations, both for oneself and for the greatest possible number of others."²⁷ Newman also identifies three qualities (not values) which "gradually appear as a society develops and often recede as it deteriorates: rationality, respect for the rights of "outsiders," and complexity of the value-system."²⁸

In this way of thinking about civilization, we can reply to some of the criticisms of human rights raised earlier. We may propose a relationship between the idea of human rights and the idea of civilization as a perpetually unfolding process. For surely one of the universal human aspirations of civilization, to use Newman's language, is the aspiration to eliminate fear, hate, oppression, criminal violence, and the like, as far as possible, for everyone. The idea of human rights shares that aspiration. To use Schweitzer's language, the idea of human rights is an historically recent step in humankind's ethical progress toward a better condition of life for everyone. The idea of human rights can share in the universality of the progress and aspiration of civilization, as once it

shared in the universal claims of Enlightenment reason and Abrahamic religion, themselves metanarratives that emerged from the same process. Human rights are products of the unfolding process of civilization by which human beings learn to prefer thinking more than killing.

Of course the word "civilization" has other meanings. Samuel Huntington, the political scientist, defined it as "the highest cultural grouping of people and the broadest level of cultural identity people have short of that which distinguishes humans from other species."²⁹ But his definition is incomplete. It defines particular social groups that can be called "civilizations;" it does not define the idea of "civilization" as such. Let us avoid the fallacy of equivocation.

Now a postmodern critic might say that I have merely substituted one highly questionable metanarrative for another. But such a criticism misses the point: for the word "civilization" names a process and not a particular world view. Civilization is the perpetually unfolding story of how we mere human beings are experimenting with different ways to lift ourselves up and create a better world. Schweitzer, who wrote of the necessity for civilization to have a sound and solid world view, made no statement about particular religions or particular political ideologies being more civilized than others. He wrote only that an acceptable world view, whatever it was, had to be rational, ethical, and optimistic.³⁰ To claim that rationality and ethical progress are just two metanarratives among others is perhaps to not take them seriously enough. As Schweitzer said, "All real progress in the world is in the last analysis produced by rationalism."³¹ And as Newman says: "If we cannot reason with people, and if they cannot reason with each other, then it is hard to regard them as civilized...I am not making a value judgment here: I am describing an observable phenomenon."³² Rationality, as a guiding concept of civilization, is less like a metanarrative and more like a Darwinian selection criteria.

05

The second criticism concerned the disappearance of one's rights when no one else is willing to stand up for them. Understanding civilization as an ethical process, we may propose that part of the aim of that process is the production of what one might call "the civilized person." This civilized person is not simply the one who knows which of her interests is important enough that she can claim them as her rights. Rather, this civilized person is the one who acknowledges the interests of others as well as her own. She is the one who sees the other who is different from herself, and yet she does not hate or fear; she is the one who is in a position to harm or oppress the other who is weaker than herself, and yet she stays her hand. The idea of human rights is an instrument that we can use to help produce such

a person. Now this may be to treat human rights as instrumental rather than intrinsic goods, which may not satisfy all supporters of the idea. But I think this is not so bad. For the whole point is to reduce human suffering and edify human life, not to enforce human rights laws for their own sake. Ignatieff raises a point very much like this when he wrote that "To be a rights-bearer is not to hold some sacred inviolability but to commit oneself to live in a community where rights conflicts are adjudicated through persuasion, rather than violence. With the idea of rights goes a commitment to respect the reasoned commitments of others and to submit disputes to adjudication."³³ (Notice how Ignatieff, probably unintentionally, reaffirmed the ancient wisdom that thinking should replace killing.) Now it takes a certain kind of moral character to have such commitments. It takes a certain moral character to see others who are weakened, vulnerable, or merely different, and yet not hate or fear them. Thus to understand rights correctly, and promote them effectively, we must speak of more than people's interests. We must speak of the character-virtues that make a human being into a civilized human being. Rationality is certainly one of those virtues, but there may be more: the heroic virtues of courage, generosity, and friendship; the classical virtues of justice, prudence, and temperance, as examples. There may perhaps be more, as each culture, climate, and historical circumstance requires.

It is here, I think, in Schweitzer's notion of ethical progress, that I think we can see most clearly how the ideas of civilization and of human rights are relevant to each other. For if I'm right, it follows that we can't promote human rights by doing nothing more than writing new laws for our police to enforce. We also have to involve ourselves in a much more comprehensive project. Legislation remains important, obviously. But we also support the idea of human rights by *doing things which help create a cultural and social environment in which reason, respect, and compassion are stronger than hate and fear*. We must do that which teaches, supports, and rewards the character-virtues of the civilized person. This can mean something formal and institutional, such as a national health care service, or a progressive court diversion program for offenders with special circumstances. Education may have a special place here, as education influences so profoundly an individual person's character, during his or her most formative years. The education system in which I serve as professor, the CEGEP system of Quebec, includes humanist and philosophical education for the explicit purpose of teaching moral and cultural values. As noted in a report for CEGEP Vanier College on history and purposes of its Humanities program: "The Core programs are designed to help each student develop to a higher level in his basic skills of reading, thinking, writing, and speaking; to initiate critical reflection on his—and his society's—intellectual, artistic, moral, social, and political values; to promote a deep insight into the human

condition both past and present."³⁴ Similarly the *Parent Report* (1964) which effectively created the CEGEP system, stressed the importance of philosophy for young people's intellectual and moral development so that students "may be aware of the major problems confronting mankind and encouraged to develop their reasoning ability. Time spent thinking is not wasted; it liberates man spiritually, gives him the intellectual courage to withstand undue pressures and to outdo himself..."³⁵ Obviously education is not the only way to promote a more civilized social environment, and to promote the formation of civilized human beings. It can also involve informal or smaller scale activities, such as a community theatre, a musical concert, a youth sports league, a public library, a farmer's market. These social and cultural means of advancing the great work of civilization, taken together, may be a thousand times more important and powerful than any act of a parliament. For these things help create the kind of social and cultural environment in which fear and hate have less purchase on people's minds, and in which the civilized person may appear and thrive.

- 1** Thomas Paine, *Rights of Man*, (New York: Dover Publications, 1999), at 15.
- 2** Thomas Paine, *Rights of Man*, (New York: Dover Publications, 1999), at 21.
- 3** Thomas Paine, *Rights of Man*, (New York: Dover Publications, 1999), at 29.
- 4** Thomas Paine, *Rights of Man*, (New York: Dover Publications, 1999), at 28-9.
- 5** Thomas Paine, *Rights of Man*, (New York: Dover Publications, 1999), at 29. Emphasis his.
- 6** Thomas Paine, *Rights of Man*, (New York: Dover Publications, 1999), at 31.
- 7** Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge*, (Minneapolis: University of Minneapolis Press, 1984) at xxiv.
- 8** Albert Schweitzer, *The Decay and Restoration of Civilization*, (London: Adam & Charles Black, 1923) at 80-1.
- 9** Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge*, (Minneapolis: University of Minneapolis Press, 1984) at 14.
- 10** Douglas Farrow, "The New Moral Order," *Catholic Insight*, (November 20, 2008).
- 11** Alasdair Mac Inytyre, *After Virtue*, 2nd ed, (London: Duckworth, 2000) at 67.
- 12** Alasdair Mac Inytyre, *After Virtue*, 2nd ed, (London: Duckworth, 2000) at 69. Emphasis his.
- 13** David Hume, *A Treatise of Human Nature*, ed. Norton & Norton (OED, 2000) 3.2.2(§10), at 314-15.
- 14** Michael Ignatieff, *Human Rights as Politics and Idolatry*, (New Jersey: Princeton University Press, 2001) at 149.
- 15** Plutarch, "Pericles," *The Rise and Fall of Athens: Nine Greek Lives*, (London: Penguin, 1960) at 178.
- 16** Plutarch, "Pericles," *The Rise and Fall of Athens: Nine Greek Lives*, (London: Penguin, 1960) at 172, 182-3.
- 17** Paul A. W. Wallace, *The White Roots of Peace*, (New Mexico: Clear Light Publishers, 1994) at 11.
- 18** Paul A. W. Wallace, *The White Roots of Peace*, (New Mexico: Clear Light Publishers, 1994) at 14.
- 19** Paul A. W. Wallace, *The White Roots of Peace*, (New Mexico: Clear Light Publishers, 1994) at 41.
- 20** *Njal's Saga*, (London: Penguin, 2001) at §70, at 117.
- 21** *Njal's Saga*, (London: Penguin, 2001) at §97, at 165.
- 22** Wing-Tsit Chan, *A Source Book in Chinese Philosophy*, (New Jersey: Princeton University Press, 1963) at 69. See citation from *Book of Mencius* 3A:4.
- 23** *The Code of Hammurabi*, (Montana: Kessinger Publishing, 2004) at 1. Emphasis added.
- 24** Albert Schweitzer, *The Decay and Restoration of Civilization*, (London: Adam & Charles Black, 1923) at 37-8.
- 25** Albert Schweitzer, *The Decay and Restoration of Civilization*, (London: Adam & Charles Black, 1923) at 36. Emphasis added.
- 26** Jay Newman, *Foundations of Religious Tolerance*, (Ontario: University of Toronto Press, 1982) at 70.
- 27** Jay Newman, *Foundations of Religious Tolerance*, (Ontario: University of Toronto Press, 1982) at 65.
- 28** Jay Newman, *Foundations of Religious Tolerance*, (Ontario: University of Toronto Press, 1982) at 70.
- 29** Samuel P. Huntington, "A Clash of Civilizations?," *Foreign Affairs*, (Summer, 1993).
- 30** Albert Schweitzer, *The Decay and Restoration of Civilization*, (London: Adam & Charles Black, 1923) at 86-90, 93-97.
- 31** Albert Schweitzer, *The Decay and Restoration of Civilization*, (London: Adam & Charles Black, 1923) at 89.
- 32** Jay Newman, *Foundations of Religious Tolerance*, (Ontario: University of Toronto Press, 1982) at 70-1.
- 33** Ignatieff, *Human Rights as Politics and Idolatry*, at 84.
- 34** "Humanities and General Education" Vanier College Report, 1974.
- 35** Alphonse-Marie Parent, *Report of the Royal Commission of Enquiry on Education* ("The Parent Report"), (Ottawa: The Commission, 1964) at vol. III, ch. xxiv.

Prejudicial Consequences of a “Non-Conviction” in Canada

by John W Conroy *QC*

11

Introduction

Twenty-six years ago, a majority of the Supreme Court of Canada held in *Gridic v. The Queen*¹ as follows:

There are not different kinds of acquittals and, on that point, I share the view that “as a matter of fundamental policy in the administration of the criminal law it must be accepted by the Crown in a subsequent criminal proceeding that an acquittal is the equivalent to a finding of innocence” (see Friedland, *Double Jeopardy* (1969), at p.129; also *Chitty i*, 648; *R. v. Plummer*, [1902] 2 K.B. 339 at p.349). To reach behind the acquittal, to qualify it, is in effect to introduce the verdict of “not proven,” which is not, has never been, and should not be part of our law.

The topic for discussion here is not about the consequences of an acquittal, although corrections officials and some members of the Parole Board of Canada have on occasion attempted to go behind such. Rather, the concern is with the consequences to an individual after a charge has been laid in accordance with Crown counsel policy (a substantial likelihood or at least a reasonable prospect of conviction) and is then terminated by the Crown before any adjudication by a court on the merits has taken place. This occurs often without explanation, at least on the record, of the reason for the termination,

and carries subsequent consequences arising by virtue of the records kept in relation to those proceedings, either by a prospective employer, at a foreign border, or if one is incarcerated.

We are all familiar with the sentencing options and usual consequences post-conviction, as well as the collateral consequences such as the resulting criminal record that ensues upon conviction for an offence pursuant to a federal statute, such as the *Criminal Code* or the *Controlled Drugs and Substances Act*. This chapter attempts to address the problems and consequences arising when a charge has been approved but is then terminated or dropped, either by way of a stay of proceedings, withdrawal or a consent dismissal, and the record kept of such a disposition by the Canadian Police Information Centre (CPIC) and perhaps other computer databases.

There is yet another method of discontinuing proceedings: namely, a decision by the Crown to “proceed with a new information.” When this is done, a member of the public can access JUSTIN, British Columbia’s criminal justice information database and see what the original charge was. This is not possible for a stay of proceedings (SOP) or at least when entered, it will not disclose the original charge in the online database. Clearly, some thought needs to be given to regulate public access to such things or, at a minimum, what can be made of

them by the public, prospective employers, border guards, police and corrections officials, to prevent prejudice to persons affected in the absence of a conviction.

The primary concern here is the impact of the entry of an SOP by the Crown pursuant to s. 579 of the *Criminal Code of Canada*² as the means of terminating a proceeding, as opposed to withdrawing the “information” or “indictment” or consenting to the dismissal of the charges, when a final disposition of the matter is intended. The Crown can enter a stay of proceedings in relation to charges at any time during the proceedings and can withdraw the charge prior to the accused being placed in jeopardy. Only the court, however, can dismiss (or give permission to withdraw) the charges once the accused has been placed in jeopardy. Consequently, a “consent dismissal order” involves the Crown calling no evidence and inviting the court to dismiss. In practice, while the Crown can withdraw the matter at any time, consent of the court is required if the Crown intends to do so after an arraignment hearing has taken place pursuant to the Provincial Court Criminal Case Flow Management Rules. Regional Crown counsel advises that this is the practice and that therefore the stay of proceedings option, which does not require the court’s approval, is the preferred method of termination.³

While there is no specific statutory provision with respect to the withdrawal of charges, that appears to be the method chosen to terminate proceedings in a number of provinces, not including British Columbia. If the withdrawal is to take place after the accused has been placed in jeopardy, presumably leave of the court to withdraw is required as in the case of a consent dismissal.

The stay of proceedings, which is the chosen method in BC, is governed by section 579 of the *Criminal Code*, which provides as follows:

Attorney General may direct stay

579. (1) The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.

Recommencement of proceedings

(2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced. R.S., 1985, c. C-46, s. 579; R.S., 1985, c. 27 (1st Supp.), s. 117.

While subsection (2) provides for the re-initiation of the proceedings within one year, given the absence of any statute of limitations in relation to indictable offences in Canada, there is of course nothing to prevent the Crown from initiating separate or additional proceedings for the same matter, in the absence of a dismissal of the charges, which would render the matter “res judicata”—already judged and no longer subject to appeal. Significantly, subsection (2), provides that if the proceedings are not re-initiated within one year, “the proceedings shall be deemed never to have been commenced.”

If that is so, the question arises as to why any publicly accessible record is kept of the existence of the charge once the year has expired and the charges not reinitiated.

According to the BC Court of Appeal in *R v. Smith*,⁴ once a stay has been entered a judge is “functus” and without jurisdiction to proceed. Further, the discretion that the Attorney General has is beyond direction or control of that judge. According to the New Brunswick Court of Appeal in *R v. Carr*,⁵ the prosecution has a right of withdrawal that is separate and distinct from the right to stay proceedings and the matter can be withdrawn after a plea of not guilty. The Ontario Court of Appeal found in *Campbell v. Ontario (AG)*⁶ that the exercise of this discretion is not subject to review by a court, except possibly where there is a flagrant impropriety on the part of the Attorney General. In the absence of proof of abuse of process the prosecutor has an untrammelled discretion in this regard. See also *R v. (D.)*.⁷ However, the case of *Chartrand v. Quebec (Min. of Justice)*⁸ is authority that the entry of the stay is subject to judicial review under the *Charter* and cannot be used to override the rights guaranteed by the *Charter* although no such violation was found on facts relating to section 15.

According to the annotations in relation to section 579 in the latest *Tremee-ar's Criminal Code*⁹, the power that the prosecutor has under this section has no impact on the prosecutor's other authority to withdraw charges prior to arraignment and plea, nor the authority of the court to stay proceedings for an abuse of process or *Charter* infringement. The *Criminal Code* makes no provision for the withdrawal of an information by the prosecution.

A record of a stay of proceedings can have prejudicial consequences to an individual in seeking employment, at the United States and perhaps other borders, and if imprisoned, when questioned about the underlying circumstances by corrections officials in their assessment of risk for security and placement purposes and conditional release and by the Parole Board of Canada.

The practice of entering stays of proceedings as the accepted method of terminating proceedings in BC both by federal and provincial Crown counsel has existed since 1950 and has been the subject of previous comment and concern by the BC Civil Liberties Association. In a paper dated June 1975, the BCCLA noted that in 1971, a total of 2,863 indictable offence charges were stayed in Canada; in BC, 1,836 charges were stayed out of a total of 19,455 charges, whereas in Ontario only 70 charges were stayed out of a total of 49,790 charges. By 1973, 3,646 stays were entered in BC and by 1974, 3,753 charges were stayed, a significant increase from 1971. The BCCLA identified four areas of concern in the use of such stays of proceedings:

First, when a stay is entered the accused person is denied his or her “day in court” and, indeed, will likely never have a public determination of his or her guilt or innocence. At the same time, the judge is denied the right to hear a case which lower level judicial officers, for example justices of the peace, have legally determined should be brought before the courts. Both the accused and society are, therefore, denied the traditional benefits of the adversary system of justice.

Second, legal authorities support the proposition that the entry of a stay impairs the rights of the accused person to his or her civil remedies if he or she feels that they were wrongly brought before the courts.

Third, substantial comment has come from a number of provincial court judges to the effect that stays are used to frustrate the proper exercise of judicial discretion. For example, it is the acknowledged practice of

prosecutors in Vancouver to use a stay when they have been denied an adjournment. From the point of view of both the accused person and the system of justice as a whole, this is of vital significance since the decision of a provincial court judge is always subject to the review of a higher court while the discretion to stay proceedings, exercised by the prosecutor, cannot be reviewed or appealed.

Finally, the extensive use of stays is dangerous because there is no requirement that reasons for the termination of proceedings appear on the court record. In fact, stays are often entered out of court. The procedure, being both clandestine and arbitrary, fosters secrecy and suspicion about the nature of the judicial system. The stay is uniquely suited to disguise favouritism and discrimination in the criminal law system in that the true reasons for suppressing particular proceedings are virtually unascertainable by the courts, or anyone outside of the prosecution.¹⁰

The *Criminal Records Act*, RSC 1985 c C-47

The *Criminal Records Act* deals primarily with the authority of the Parole Board of Canada Clemency Division to grant pardons after certain waiting periods in relation to both indictable and summary offences, and governs the custody of the records in relation thereto, including provisions relating to non-disclosure of a record in an employment application and the provision for the process for revocation of pardons. The *Act* also deals with the circumstances when an absolute or conditional discharge pursuant to section 736 of the *Criminal Code* is imposed as a sentence. Importantly, when one receives such a discharge the court, notwithstanding the guilty plea or finding of guilt, instead of convicting the accused, directs that the accused be discharged absolutely or on conditions. Subsection (3) expressly provides that an offender so discharged "...shall be deemed not to have been convicted of the offence..." In relation to these types of dispositions the *Criminal Records Act* provides as follows, including a specific purging section:

Discharges

6.1 (1) No record of a discharge under section 730 of the *Criminal Code* that is in the custody of the Commissioner or of any department or agency of the Government of Canada shall be disclosed to any person, nor shall the existence of the record or the fact of the discharge be disclosed to any person, without the prior approval of the Minister, if (a) more than one year has elapsed since the offender was discharged absolutely; or (b) more than three years have elapsed since the offender was discharged on the conditions prescribed in a probation order.

Purging CPIC

(2) The Commissioner shall remove all references to a discharge under section 730 of the *Criminal Code* from the automated criminal conviction records retrieval system maintained by the Royal Canadian Mounted Police on the expiration of the relevant period referred to in subsection (1). 1992, c. 22, s. 6; 1995, c. 22, s. 17(E).

Disclosure to Police Forces

6.2 Notwithstanding sections 6 and 6.1, the name, date of birth and last known address of a person who has received a pardon or a discharge referred to in section 6.1 may be disclosed to a police force if a fingerprint, identified as that of the person, is found (a) at the scene of a crime during an investigation of the crime; or (b) during an attempt to identify a deceased person or a person suffering from amnesia. 1992, c. 22, s. 6.

Customs officers at the US border will treat an absolute discharge as tantamount to an acquittal and certainly better than a stay of proceedings but they still have concerns about conditional discharges. Further, the *National Parole Board* takes the position that it is not a "...department or agency of the

Government of Canada...” so that they can refer to such dispositions in assessing risk to reoffend and are not bound by the non-disclosure provisions.

Significantly, there is no provision in this *Act* governing the records kept of stays of proceedings, nor any provision for their expungement. Consequently, in some cases one may be better off to plead guilty and get an absolute discharge than to obtain a stay of proceedings! Further, this *Act* does not address the many other databases that now exist besides CPIC, such as PRIME and others that are shared with the US, nor of the problem that may exist if the record is shared with the foreign country during the waiting periods and what should occur thereafter in the absence of any way to practically expunge the record in the foreign country in such circumstances.

Federal and Provincial Crown Policy

The general federal Crown policy (the *Federal Prosecution Service DESKBOOK—Public Prosecution Service of Canada*)¹¹ refers to stays of proceedings but does not address when to agree to withdraw, stay or consent dismiss. Federal Crown advises that it is their policy to enter stays of proceedings before trial as opposed to withdrawals and to consent to a dismissal if at trial.

It is perhaps relevant to note the Crown policy in relation to a decision to prosecute as requiring not only sufficient evidence to justify the institution or continuation of proceedings but also that the public interest requires a prosecution to be pursued. The evidence must demonstrate that there is “a reasonable prospect of conviction.”¹²

The general Provincial Crown policy (the *Crown Counsel Policy Manual—Criminal Justice Branch, Ministry of Attorney General British Columbia*)¹³ similarly does not expressly address the question of when or whether a withdrawal or stay of proceedings should be entered, nor when it is appropriate to agree to a consent dismissal. There is a section entitled “Resolution Discussions and Stays of Proceedings,” which simply indicates that a stay of certain charges may take place as part of resolution discussions and decisions. Regional Crown advises that the stay of proceedings is the preferred route to terminate proceedings as it does not require any involvement by the court.

The Apparent Consequences and Potential Remedies or Solutions

In Crossing the Border or Otherwise United States Homeland Security border officials have a broad discretion to deny entry to anyone whether they have a criminal record or not. These officials appear to have difficulty with the term stay of proceedings because it

clearly indicates that the proceedings can be reinitiated, in contrast with a dismissal or withdrawal. The same is true with respect to a conditional discharge because it is conditional, as opposed to an absolute discharge. The concern appears to be with the lack of finality of the proceedings. However, while the US does not have a stay of proceedings power so named, the procedure followed there is to either dismiss the case without prejudice to the government to re-initiate, which seems to be the equivalent of a stay, or to dismiss the case with prejudice to the government, which would be equivalent to our consent dismissal order.

In the long-term a solution has to be made in Canada and will hopefully include limits to the Crown’s power to stay proceedings or at least to the disclosure of that information as part of a criminal record or other databases. Educating American border guards as to our terminology is only the beginning.

In *La v. Canada (Minister of Citizenship and Immigration)*,¹⁴ a citizen of Vietnam with permanent resident status in Canada as a Convention Refugee was ordered deported because he had been convicted in 1997 of possessing cocaine for the purpose of trafficking and sentenced to a three month conditional sentence order. The deportation order was subsequently stayed. An opinion was then expressed that he had breached the terms of the stay of the deportation order and that he constituted a danger to the public. This would have enabled his removal to Vietnam, the country he fled because of his fear of persecution. The opinion of the Minister’s delegate relied upon the applicant’s criminality and likelihood of recidivism. He had a 1995 conviction for possession of cocaine, for which he received one year of probation, as well as the 1997 conviction, and a 2001 conviction for production of marijuana, for which he received a six-month term in prison. The material before the Minister’s delegate also referred to two outstanding charges in Ontario, one for production of marijuana and one for possession of marijuana for the purpose of trafficking. He denied involvement in the Ontario matters, which involved a house he owned that was rented to others. He submitted that charges for which he had not been convicted were an irrelevant consideration.

Lemieux J. quashed the decision and noted that by its very nature an outstanding charge cannot be evidence of recidivism—a likelihood of reoffending. He held that to do so would equate a charge to a conviction without trial (paragraph 21). He referred to *Dokmajian v. Canada (Minister of Citizenship and Immigration)*,¹⁵ *Hinds v. Canada (Minister of Citizenship and Immigration)*,¹⁶ and *Kumar v. Canada (Minister of Employment and Immigration)*¹⁷ among other decisions to support this proposition.

These decisions are hard to reconcile with the decisions of the court in relation to *National Parole Board* deci-

sions considering recidivism, referred to below.

In Seeking Employment I recently received a referral of a case where a man was convicted at trial of a sexual assault and then on appeal, a new trial was ordered. The Crown then determined that it was not in the public interest to proceed and entered a stay of proceedings. The individual was working in a practicum situation and at the conclusion of that period sought full employment with the organization as the employers had expressed great pleasure with his performance up to that time. Unfortunately, the job required a criminal record check, which revealed the stay of proceedings. Although he maintained his innocence, the employer advised that he could not be hired because he had been charged and refused to provide confirmation to that effect in writing. This individual has now experienced this same consequence on several occasions in relation to job applications. The information in the provincial JUSTIN database caused him serious problems, which ultimately he was able to rectify. Even after he persuaded the RCMP to remove the stay entry from CPIC database, he continued to run into the same problem. This is because RCMP policy requires that when a criminal record check is conducted, "Box 4" has to be checked to indicate that a police file does exist and was opened. This of course leads prospective employers to inquire as to the nature of the file and the circumstances, and usually results in the employer declining to employ the individual.

It appears that even if one persuaded the Crown to re-initiate such a proceeding and consent to a dismissal thereby removing the stay and substituting a dismissal on the criminal record, "Box 4" will still be checked indicating a file was opened by the RCMP or a police force and similar prejudice can still occur. The mere existence of a stay of proceedings is indicative that at some earlier point in time a charge was approved by the Crown and a file opened. Clearly, this can have prejudicial consequences, whether the matter has proceeded to trial or not. Arguably, this would still occur in the event of a dismissal due to the RCMP policy and therefore requires modification.

The solution may come through a legislative amendment either to the *Criminal Records Act*¹⁸ or the *Privacy Act*¹⁹ to prevent prospective employers from being able to access anything on a record that is short of an actual conviction. If a person is "deemed never to have been charged," why should a record of such a charge be available to persons outside the police force or corrections branch?

In the Federal Prison System When an individual is imprisoned federally, the Correctional Service of Canada (CSC) representatives responsible for the reception and classification of prisoners is required to obtain information from various sources. Obviously, the criminal record

of the individual is of considerable importance.²⁰ They receive such information, including references to any stays of proceedings, whether as part of a plea arrangement or otherwise. The CSC will often obtain the actual police reports underlying the matters set out in the person's record, often accepting that information to be accurate and true despite the Crown's decision to enter a stay, without any reasons for the stay being given, and will treat the individual as having been convicted of the matter. They then take this into account in reception, placement and security decisions.

Section 24(2) of the *Corrections and Conditional Release Act* enables an offender to correct any errors or omissions in the information gathered by the correctional service. With the process, it is imperative to ensure that correction, or at least the notation of the effort to have something corrected, is not only in the prisoner's paper file but also on the Offender Management System (OMS), which is the digital database that most corrections officials and parole boards use.

In *Tehrahkari v. CSC*,²¹ Lemieux J. of the Federal Court Trial Division granted a judicial review quashing a decision of the Commissioner of Corrections refusing to alter certain information on a prisoner's file. The prisoner had complained about information on his file alleging that he had assaulted another inmate, as well as allegations of attempted escape. He had denied the assault and was found not guilty when the prison guards didn't show up for the hearing. It was therefore not accurate to assert as a fact that he had assaulted the other inmate. The information referring to an escape related to an escape from a prison in Iran and was misleading because it was incomplete and didn't specify that he escaped because he was tortured. It was therefore not accurate to assert, as the files did, that he had attempted to escape from a particular Canadian institution. The prisoner satisfied the court on the balance of probabilities that the material complained of in his files did not meet the standards required by section 24 the *Act* and found a number of reviewable errors by the Commissioner in exercising his discretion not to correct the information.

In *Russell v. AG Canada*,²² von Finklestein J. allowed an application for judicial review in part ordering the Correctional Service of Canada (CSC) to amend its Offender Management System (OMS) to note that the applicant had not been convicted of charges of sexual assault and sexual assault weapon against one JS. These charges were withdrawn by the Crown after Mr. Russell pled guilty to second-degree murder of JW and the forcible confinement of JS. Von Finklestein J. further ordered that the CSC assessment for decision was to be amended to read that "according to the police report" the applicant had forced sexual intercourse on the victim. The CSC had refused to remove these references from his file and a psychological report stated that he had committed the sexual acts as a matter of fact rather than as an allegation. The Court held that the decision to refuse to correct the information failed to take into account the fact that police reports could lead to false conclusions and had actually done so in the case of the psychological assessment, which mixed up allegations and facts. This finding is important because the Parole Board of Canada will question prospective parolees in relation to such matters and will take them into account in assessing the risk to reoffend, as if the matters were proved to be true.

In 1991, the Federal Court Trial Division had occasion to consider this question in *Prasad v. Canada (National Parole Board)*.²³ The prisoner applied for prohibition to prevent the Board from considering material containing reports of criminal activities unsupported by a conviction at an upcoming detention hearing. He asserted that it would be a breach of the duty to act

fairly to consider such material as well as a breach of ss 7, 9 and 11 of the *Charter*. The applicant was 32 years old and was serving a seven-year sentence for sexual assault with a weapon and robbery of an 86-year-old woman. He had been released on mandatory supervision (now called statutory release) but a few months later, was charged with assault and robbery of two prostitutes. Those charges were dropped. The robbery charge was withdrawn because the alleged victim did not show up for trial. The assault charge was withdrawn because the victim did not wish to give evidence.

The applicant posted a \$500 peace bond with undertakings not to have any contact with the complainant. His mandatory supervision had been suspended and at a post-suspension hearing, was revoked with no re-credit of remission. That decision was affirmed by the Appeal Division. When his new mandatory date was reached, he was referred for a detention review. He objected to the inclusion of certain documents referring to crimes and activities of which he was never convicted—in particular, the charges that were dropped. He conceded that previous convictions constituted reliable information but argued that information with regards to offences for which a conviction was never entered did not. The court dismissed the application. The court distinguished *Okeynan v. Warden of Prince Albert Penitentiary*²⁴ as the information in the Progress Summary report in that case was not admissible because it was not specific and would not have given the applicant there sufficient information so that he could adequately prepare himself. It was not suggested that the information was unreliable. Here, the information was specific enough to enable the applicant to prepare his case and to allow its use would not put the fairness of the process into question.

The Board is not determining guilt or innocence at a detention hearing. The issue is whether or not there are grounds upon which the Board can determine whether the applicant, if released prior to the expiry of his sentence, would pose an undue risk to the public. The court held that information with respect to the charges was relevant insofar as it was indicative of the applicant's lifestyle and associations. The Board also distinguished *Cardinal v. Canada (National Parole Board)*,²⁵ holding that it was satisfied that the applicant was aware of the Board's concerns when he was given a chance to make submissions at the post-suspension hearing and, therefore, his section 7 *Charter* rights had not been violated.

A few years later, in *Mooring v. Canada (National Parole Board)*,²⁶ the Supreme Court of Canada held as follows in describing the functions of the *National Parole Board*:

25 The Parole Board acts in neither a judicial nor a quasi-judicial manner: *Mitchell v. The Queen*, [1976] 2 S.C.R. 570, at p. 593. The elements of a parole hearing are described by David Cole and Allan Manson in *Release from Imprisonment* (1990). The authors point out that several elements of the hearing distinguish Parole Board proceedings from those which take place before a traditional court. For example, counsel appearing before the Parole Board serve an extremely limited function.

According to Cole and Manson (at p. 428):

Although counsel is present as an advocate, since the hearing is inquisitorial there is no one against whom counsel can act as an adversary. Indeed, counsel should recall throughout that as far as the Board is concerned, the only occasion on which he may speak, as outlined in the Regulation, is at the end of the hearing when he is given an opportunity to address the Board on behalf of the client.

In addition, the traditional rules of proof and evidence do not apply in

post-suspension proceedings before the Board. As Cole and Manson point out (at p. 431):

While the Board will consider legal defences or mitigating circumstances where a new charge has been laid, in the post-suspension hearing context Board members do not regard themselves as constrained by the formal rules of the criminal law respecting the admissibility of evidence, the presumption of innocence, or the necessity for proof beyond a reasonable doubt.

Other differences between parole hearings and more traditional court proceedings include (1) the Board lacks the power to issue subpoenas, (2) "evidence" is not presented under oath, and (3) the panel presiding over the hearing may have no legal training.

26 In the decision currently under review, the Appeal Division of the Board described its function in the following terms:

The function of the Board at a post-suspension review is quite distinct from that of the courts. The Board must decide whether the risk to society of [the respondent's] continued conditional release is undue. In making that determination, the Board will review all information available to it, including any information indicating a return to criminal activity in the community. This applies whether or not the charges in court have been withdrawn, stayed or dismissed.

Clearly then, the Parole Board does not hear and assess evidence, but instead acts on information. The Parole Board acts in an inquisitorial capacity without contending parties—the state's interests are not represented by counsel, and the parolee is not faced with a formal "case to meet." From a practical perspective, neither the Board itself nor the proceedings in which it engages have been designed to engage in the balancing of factors that s. 24(2) demands.

27 In the risk assessment function of the Board, the factors which predominate are those which concern the protection of society. The protection of the accused to ensure a fair trial and maintain the repute of the administration of justice which weighs so heavily in the application of s. 24(2) is overborne by the overriding societal interest. In assessing the risk to society, the emphasis is on ensuring that all reliable information is considered provided it has not been obtained improperly.

As stated by Dickson J., as he then was, in *R. v. Gardiner*, [1982] 2 S.C.R. 368, at p. 414, in relation to sentencing proceedings:

One of the hardest tasks confronting a trial judge is sentencing. The stakes are high for

society and for the individual. Sentencing is the critical stage of the criminal justice system, and it is manifest that the judge should not be denied an opportunity to obtain relevant information by the imposition of all the restrictive evidential rules common to a trial. Yet the obtaining and weighing of such evidence should be fair. A substantial liberty interest of the offender is involved and the information obtained should be accurate and reliable.

28 These principles apply *a fortiori* to proceedings before the Parole Board in which the subject has already been tried, convicted and sentenced...

In *Canada (Atty. Gen.) v. Coscia*,²⁷ the Federal Court of Appeal upheld a decision of Phelan J. setting aside a decision of the *National Parole Board* on the basis of a breach of the duty of procedural fairness. This was because the Board asked questions that had a double meaning (being a member of or participating in activities of organized crime) without appreciating the difficult position this presented for the prisoner. While the Board was not concerned with establishing that the prisoner was a member of organized crime and participating in a criminal organization to expose the prisoner to the Criminal Code charge or conviction or to being found to be a member of a criminal organization pursuant to the Correctional Service of Canada Directive 568-3 that deems such membership to be a significant risk factor, the Board had no power to grant immunity but found the prisoner was evasive in responding, believing that an affirmative response could be used against him by others.

The Board found his evasiveness to indicate a failure to assume responsibility. The court was of the view that while it was open to the Board to make such inquiries it should avoid the use of terms which, if acknowledged, can give rise to an admission that a criminal offence has been committed with respect to which no conviction has been obtained or at least be mindful of the difficulty which its choice of words poses. There was nothing to prevent the Board from exploring all aspects of the prisoner's previous convictions and ongoing relations without using ambiguous terms. The Board's insistence on using the terms shows they did not hear the prisoner's response to that line of questioning and this was fundamentally unfair.

Most recently, in *Fernandez v. The Attorney General of Canada*,²⁸ Mosley J. held that it was open to the *National Parole Board* to question an offender about past conduct that could have, in theory at least, supported the prosecution for a criminal organization offence for which he was not charged, in the circumstances of the particular case. Mr. Fernandez was a Spanish citizen who came to Canada as a child and had a lengthy history of conflicts with the law, beginning in his adolescence and continuing in adulthood. He had a previous

conviction for manslaughter and spent much of his life in prison, where he had an extensive institutional record. The government's view was that he had long been considered by the police and correctional authorities to be affiliated with organized crime. He had been deported twice and had re-entered illegally.

In 1995, while serving a sentence for manslaughter, he was convicted of possession of narcotics for the purpose of trafficking and was detained until warrant expiry by the *National Parole Board*. In 1998, he was convicted of conspiring, while in custody, with another inmate to import narcotics. In 2004, he pled guilty to a variety of offences, including counselling to commit an indictable offence (murder), conspiring to import cocaine, possession of a forged passport and a stolen credit card, fraud over \$5000, and illegal entry into Canada. He was sentenced to 12 years which, after a pre-sentence custody credit, resulted in a sentence of approximately eight years. The year before his statutory release, he was referred once again to the Board for detention on the grounds that they believed he would commit a serious drug offence before warrant expiry. The applicant was seeking full parole by way of deportation to Spain. The detention was recommended by the CSC on the ground that there was no viable plan for supervision and that he could not be supervised if deported to Spain. He was detained by the Board and parole was denied, so he appealed to the *National Parole Board Appeal Division*, which affirmed the decision.

He then filed for judicial review. The main ground was that the Board erred in failing to observe natural justice by repeatedly questioning the applicant about his involvement in criminal organizations and further erred in relying on inaccurate information provided by CSC regarding the likelihood that he would commit a serious drug offence after warrant expiry. After reviewing the legislation, and specifically the detention powers of the Board, the court referred to *Mooring, supra* and pointed out that the Board may take into account all available and relevant information, provided it has not been obtained improperly. The court also stated that the Board must act fairly and ensure that the information upon which it acts is reliable and persuasive. It is up to the offender to challenge any inaccuracy in the CSC information via the grievance procedure (citing *Latham*) or to challenge it before the Board. The Board may choose not to rely on information contained in the CSC files if it considers it to be inaccurate or unreliable. The court noted the decision of the Federal Court of Appeal in *Zarzour v. Canada*²⁹ to the effect that confronting the person affected by allegations enabled them to comment and rebut them is a significant method of verification (paragraph 38).

The court expressly said:

[26] The information the Board relies upon may

include information about criminal charges that have not resulted in convictions: *Mooring*, above, at paragraph 26; *Prasad v. Canada (National Parole Board)* (1991), 51 F.T.R. 300, 5 Admin. L.R. (2d) 251; *Yussuf v. Canada (Attorney General)*, 2004 FC 907; *Lepage v. Canada (Attorney General)*, 2007 QCCA 567; *R. v. Antoine*, 2008 SKCA 25, 310 Sask. R. 246; *Normand v. Canada (National Parole Board)* (1996), 124 F.T.R. 114, 34 W.C.B. (2d) 173, citing at paragraph 24 several decisions denying *habeas corpus* applications on this ground, approved by the Supreme Court of Canada in *Martin v. Beaudry*, [1996] 1 S.C.R. 898.

Fernandez complained about being questioned with respect to conduct that did not result in criminal charges, arguing *Coscia*, *supra*, that he was questioned about actions that could support a charge of participating in the activities of a criminal organization. He denied being part of any criminal organization but acknowledged having sold drugs to such and having associated with such. He also admitted that his offence of counselling to commit murder involved collecting funds for organized crime figures. The court also referred to extensive references by the trial and sentencing judge to Mr. Fernandez deriving income through his participation in organized crime and admitting to being involved with organized activity of a high level and dealt with criminal organizations. Consequently, in the circumstances it was not unreasonable for the Board to make these inquiries in this case.

Apparently, Mr. Fernandez was on remand for a long time after sentencing to deal with an outstanding obstruction charge but that charge was ultimately withdrawn. The Crown Attorney advised that that was done because he had already been sentenced to a significant period of time and would likely have only received a concurrent additional term in prison. In this regard, the court held as follows:

[43] As these charges had been withdrawn prior to the hearing, the applicant was no longer in jeopardy of prosecution for the alleged offences when he was asked about them. Nor could the Crown have reinstated the charges without facing an abuse of process argument. In any event...any information given by the applicant to the Board about these matters could not have been used against him as evidence in any subsequent trial for these or other offences. But the information that such charges had been laid against the applicant, and the circumstances in which they arose, was relevant to the Board's mandate to protect the public interest. In my view, there was no breach of fairness in asking him about them.

With respect to the questions about being in a criminal organization and the argument based on *Coscia*, *supra*, the court again noted that Mr. Fernandez had long been identified as an associate of members of criminal orga-

nizations and concluded that he could not have been in any jeopardy from any determination by the Board as such a determination had been made many years before. The court also noted that protections against self-incrimination were not referred to by the Court of Appeal in *Coscia* and concluded as follows:

[53] It does not appear from the reasons for judgment in *Coscia* that the protections afforded against self-incrimination by the *Canadian Charter of Rights and Freedoms*,³⁰ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c.11 (the "*Charter*") were cited by either party in their submissions to the Court of Appeal. They were in this case. These protections are set out in sections 11 (c) and 13 of the *Charter*.

[54] Section 11 (c) provides that any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence. Its application is limited to persons charged with public offences involving punitive sanctions, that is, criminal, quasi-criminal and regulatory offences: *Martineau v. Canada (Minister of National Revenue)*, 2004 SCC 81, [2004] 3 SCR 737 at paragraphs 19 and 67. Proceedings of an administrative nature, such as those before the Board, are not penal in nature: *Martineau*, at paragraphs 22–23. In this case, the applicant could not have claimed the protection of section 11 (c) and refused to answer questions about his criminal activity which were not supported by a conviction: *Prasad*, above; *Giroux v. Canada (National Parole Board)* (1994), 89 F.T.R. 307, 51 A.C.W.S. (3d) 1057; *R. v. Davis* [1996] BCJ No. 2119 (BCSC) (QL). This is because, as Justice Donna McGillis discussed at paragraph 20 of *Giroux*, the applicant was not in any jeopardy with respect to potential criminal charges in the detention review before the Board.

[55] These proceedings are administrative in nature and, in conducting the review, the Board is required to consider any factor relevant to the determination of the likelihood of the commission of a serious drug offence. As in *Giroux*, the information respecting criminal offences alleged to have been committed by the applicant was a highly relevant factor to be considered by the Board regardless of whether he had been convicted of those offences: see also *Mooring*, *Prasad*, *Yussuf*, *Lepage*, *Antoine* and *Normand* cited above.

[56] To the extent that an offender requires protection against the use of any potentially incriminating evidence he may provide during a Board hearing in subsequent criminal proceedings that protection is afforded by section 13 of the *Charter*. Section 13 compels the testimony of all witnesses, generally, except an accused charged before a criminal court. It provides the witness with "subsequent use immunity" at other proceedings. It states:

A witness who testifies in any proceedings has the right not to have any incriminating

evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

[57] It is well-settled that section 13 of the *Charter* prevents the use of any testimony obtained at an administrative hearing or other civil proceeding as evidence in subsequent penal proceedings against offenders, except for perjury or for giving contradictory evidence: *R. v. Carlson* (1984), 47 CR (3d) 46 (BCSC); *R. v. Tyhurst*, [1993] BCJ No. 2615 (BCSC) (QL); *R. v. Sicurella* (1997), 120 CCC (3d) 403, 47 CRR (2d) 317 at paragraphs 47-49 (OCJ); *Donald v. Law Society of British Columbia* (1984), 48 BCLR 210, 2 DLR (4th) 385 (BCCA); *Gillis v. Eagleson* (1995), 23 OR (3d) 164 at p. 167, 37 CPC (3d) 252 (Gen. Div.); *Royal Trust Corp. of Canada v. Fisherman* (2000), 49 OR (3d) 187 (SCJ). The applicant could not be prosecuted for perjury or for giving contradictory evidence as the information he provided was not under oath before a court.

[58] In addition to the express protection afforded by s. 13, section 7 of the *Charter* has been held to provide witnesses with "derivative use immunity." Derivative use immunity protects against the use of any evidence obtained as a result of compelled testimony. This is part of the right against self-incrimination: *R v. S* (RJ), [1995] 1 SCR 451; *British Columbia (Securities Commission) v. Branch*, [1995] 2 SCR 3 at p. 14, 123 DLR (4th) 462. While the applicant was not under oath at the hearing and was not before a court, the circumstances under which the hearing was conducted effectively compelled him to answer the Board's questions. The information he provided was not volunteered and, in my view, could not be used by the authorities to uncover other inculpatory evidence to be used against him in a subsequent criminal proceeding.

[59] In other words, any admission that the applicant may have made in these proceedings about his involvement in criminal organizations could not have been used against him as evidence in any prosecution for the offence of participation in a criminal organization or any other substantive offence of which he may be suspected.

[60] The decision whether or not to charge the applicant with the offence of participation in a criminal organization rested with the police and Crown Attorneys. They had that opportunity when the applicant was arrested in 2003 and chose not to exercise it for reasons that are unknown to this Court and are not, in any case, material. The enforcement authorities could not now revisit that decision on the basis of anything learned from the offender during his detention review hearing. As discussed above, they could not re-open the plea arrangements that were entered into between the Crown and the applicant, and approved by the Ontario Superior Court, that led to the withdrawal of charges at the time of his plea. No unfairness relating to possible jeopardy resulted from asking

the offender about these matters in 2009.

[61] In reaching this conclusion, I am mindful that the principle of stare decisis dictates that a court is normally bound to follow any case decided by a court above it in the hierarchy. This is to ensure certainty, predictability and consistency in the law: *Segnitz v. Royal & Sun Alliance Co. of Canada* (2005), 76 OR (3d) 161, 255 DLR (4th) 633 (OCA). However, stare decisis is no longer as rigid as it formerly was: *Lefebvre c. Québec (Commission des Affaires Sociales)* [1991] RJQ 1864, 39 QAC 206 (QCA). Inferior courts are not bound by propositions of law incorporated into the *ratio decidendi* of a higher court's decision which had merely been assumed to be correct without argument. This also applies to expressions of opinion that do not form part of the ratio: *Baker v. The Queen*, [1975] AC 774, [1975] 3 All ER 55; *R. v. Henry*, 2005 SCC 76, [2005] 3 SCR 609 at paragraph 57.

[62] In my view, the comments of the majority of the Federal Court of Appeal at paragraphs 34-36 of *Coscia* were not intended to set down a binding proposition of law but were rather offered as words of guidance to the Board to assist it to avoid entering into confusing ambiguity that would deny an applicant the right to a fair hearing. Those remarks were intended to be helpful but do not form part of the *ratio decidendi* of the decision. The *ratio* in *Coscia* turned on the particular facts of that case.

[63] The offender in *Coscia* was attempting to regain conditional release. In doing so, he denied the implication that he was in some way associated with traditional organized crime. The Board, in attempting to elicit answers from him about his criminal behaviour, did not allow him to explain the distinction he wished to make. At paragraph 35, the Court of Appeal notes that counsel attempted to draw the Board's attention to this without success. In the result, the majority found that the respondent was denied a fair hearing. In the instant case, the applicant was given several opportunities to deny any association with organized crime and explain his criminal history.

[64] There appears to have been no submissions to the Federal Court of Appeal in *Coscia* similar to those which have been presented to this Court with respect to the application of the protections against self-incrimination or discussion of the principles respecting plea negotiations and abuse of process that would prevent an offender being placed in jeopardy by reason of the Board's questions. Accordingly, I do not consider the views expressed in paragraphs 34-36 of *Coscia* to be dispositive of this case.

[65] I note that in *Allaire v. Canada (Attorney General)* 2010 FC 132, my colleague Justice Michel Shore observed that *Coscia* placed the Board in a very difficult position with respect to the nature and scope of questioning available to it. Nonetheless, he considered himself bound by the cited pas-

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sages. Having read my colleague's reasons closely, it does not appear that the considerations I have discussed above were argued before him. For that reason, judicial comity does not compel me to reach a similar conclusion. I agree, however, with his observations about the difficulties that would flow from a too rigid interpretation of *Coscia*. In this case, for example, it might have prevented the Board from inquiring into matters that go directly to the heart of the offender's criminal history and the risk he presents to society. That cannot have been the Court of Appeal's intention.

The court referred to the argument of the Crown Respondent as to the role illicit drugs played in Mr. Fernandez' history, including acquittals and withdrawals, and concluded, on the evidence as a whole and taking into account the factors in the governing legislation, that the Board did not make an unreasonable finding in the circumstances.

Conclusions

Section 7 of the *Canadian Charter of Rights and Freedoms*, forming part of the *Constitution of Canada*, provides that one has the right to life, liberty and the security of one's person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The records kept of these "non-convictions" can often lead to prejudice to a person's liberty and the security of one's person. As they are "non-convictions," where liberty or the security of the person is affected, they are not convictions obtained in accordance with the principles of fundamental justice. If the actions of the government in maintaining these records results in an impact upon liberty or the security of the person, does this not amount to a violation of section 7 in that the impact is not in accordance with principles of fundamental justice?

As indicated above, I am not sure that there is much that can be done with respect to the consequences of these non-convictions at foreign borders, in employment prospects or during the course of the sentence, in the absence of amendments to the *Criminal Records Act* and the *Privacy Acts* both federal and provincial, to preclude access by the general public at least and limit the use that can be made of them by police, as well as corrections and parole authorities.

Obviously, when a prospective employer questions you about a criminal record and you don't have one because the charge was dismissed or stayed but nevertheless a file was opened and there is a note of the non-conviction, the inquiries by the employer are an effort to determine whether or not the event or events took place. It is an attempt to go behind the notation. This would also seem to be the case at a border when questioned to

determine admissibility. Also any attempt by corrections officials or parole board members to inquire into the matter to determine its reliability and to then rely upon it in assessing one's risk to reoffend involves a trying of the issues resulting in an opinion as to whether one should have been convicted or not or at least was involved in the conduct under consideration. This is problematic because it can prejudice a prisoner's placement or chances for conditional release. At a minimum, the position expressed by Lemieux J. in *La, supra*, in relation to outstanding charges, should apply equally to any entries in any databases that do not amount to convictions. Namely they ought not to be able to be used as evidence of conviction for purposes of assessing risk for recidivism, nor to prejudice employment prospects or entry into a foreign country.

Finally, if the use of such information results in a *Charter* violation then the individual whose rights were violated is entitled to an appropriate and just remedy under section 24 (1) of the *Charter*. I am unaware of any such actions for a personal remedy to date.

It is my opinion, based on section 7 of the *Charter*, that any record of anything short of a conviction should not be accessible by the general public so as to be used in a decision that may impact upon the life, liberty or security of the person and that access by others, such as the police and corrections officials, should be limited to intelligence purposes only and not in relation to decisions that impact on section 7 or other *Charter* rights.

- 1** *Gridic v. The Queen*, [1985] 1 SCR 810.
- 2** *Criminal Code*, RSC 1985, c C-46.
- 3** Those rules can be found online at: www.provincialcourt.bc.ca/aboutthecourt/criminalandyoungmatters/criminalcaseflowmanagementrules/index.html.
- 4** *R v. Smith* (1992), 79 CCC (3d) 70 (BCCA).
- 5** *R v. Carr* (1984), 58 NBR (2d) 99 (NBCA).
- 6** *Campbell v. Ontario (Attorney General of)* (1987), 35 CCC (3d) 480 (ONCA).
- 7** *R v. (D.)* (2004), 188 CCC (3d) 89 (NLCA).
- 8** *Chartrand v. Quebec (Minister of Justice)* (1987), 40 CCC (3d) 270 (QCA).
- 9** The Honourable Mr. Justice David Watt & Madam Justice Michelle K. Fuerst, *Tremear's Criminal Code*, (Toronto: Carswell, 2012).
- 10** The complete article can be found at: www.bccla.org/positions/dueprocess/75stays.html. Kudos to Rita Sidhu of the TLABC Criminal Defence litigation group for bringing this to our attention on the TLABC Criminal Law list and who in so doing noted how little has changed in the last 36 years!
- 11** Found at www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/index.html.
- 12** See *Part V Proceedings at Trial and on Appeal*, Chapter 15.
- 13** Found at: www.ag.gov.bc.ca/prosecution-service/policy-man/index.htm.
- 14** *La v. Canada (Minister of Citizenship and Immigration)*, 2003 FCCT 476.
- 15** *Dokmajian v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 85.
- 16** *Hinds v. Canada (Minister of Citizenship and Immigration)*, [1996] FCJ 1544.
- 17** *Kumar Canada (Minister of Employment and Immigration)*, [1984] FCJ 1046 (FCA).
- 18** *Criminal Records Act*, RSC 1985, c C-47.
- 19** *Privacy Act*, RSC 1985, c P-21.
- 20** See s. 23-26 of the *Corrections and Conditional Release Act*, SC 1992, c 20.
- 21** *Tehrahkari v. CSC* (2000), 188 FTR 206.
- 22** *Russell v. AG Canada* (2006), 301 FTR 95.
- 23** *Prasad v. Canada (National Parole Board)* (1991), 51 FTR 300.
- 24** *Okeynan v. Warden of Prince Albert Penitentiary* (1988), 20 FTA 270 (FCTD).
- 25** *Cardinal v. Canada (National Parole Board)* (1990), 46 Admin LA 45; 61 CCC 185.
- 26** *Mooring v. Canada (National Parole Board)*, [1996] 1 SCR 75.
- 27** *Canada (Attorney General) v. Coscia*, 2005 FCA 132.
- 28** *Fernandez v. The Attorney General of Canada*, 2011 FC 275.
- 29** *Zarzour v. Canada* (2000), 196 FTR 320.
- 30** Canadian *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c-11.

Indigenous, Civil and Human Rights: Indigenous Warrior Spirit Fight for Justice

by Preston Guno

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The topic of Indigenous, civil and human rights has been an ongoing discussion with many different perspectives and understandings.

From an Indigenous standpoint, there appears to be a blanket assumption from a majority of non-Indigenous people that everyone in Canada has basic civil and human rights—especially in a country that is, from an international perspective, considered very liberal. Another frequent, but mistaken, assumption is that Indigenous people enjoy "special" or added rights that non-Indigenous people don't have.

The reality is that not all citizens in this country can state, without hesitation, that their civil and human rights are respected. From an Indigenous standpoint personally, and in my experience working with and for Indigenous people, I can state without hesitation that the rights of Indigenous People in Canada are often trampled on by society and various legal systems (education, child welfare and justice) with no consequence, and no available remedy for those whose rights are violated.

In order to begin the work of reforming our systems and society to ensure that assumptions of equality and basic rights for all are actually realized, non-Indigenous people must first understand how the rights of

Indigenous People are routinely denied or discarded. Equally, non-Indigenous people must understand how inaction and silence in response to the denying or discarding of Indigenous rights contribute to that injustice.

The relationship between Indigenous People and the government of Canada is historically grounded in a calculated and systemic attack by the government on the human and civil rights of Indigenous People. Reforming today's systems depends on understanding this history, grounded in policies such as the racist *Gradual Civilization Act*, a bill passed by the 5th Parliament of the Province of Canada in 1857. The government's assimilation policies continued with the introduction of forced and often violent indoctrination and separation from culture and language in Residential Schools, and continue today in the recent stripping the rights of Indigenous women to their cultural identity under Bill C-31 which amended the *Indian Act*.

Indigenous people only received the unconditional right to vote in Canada in 1960. Even today, First Nations children on reserves don't receive government resources per student equal to the funding that children off reserve receive. Instead of fixing that funding problem, the federal government is fighting the right of these children to equal educational opportunities by arguing in federal

court that First Nations children on reserve do not have a right to equal educational funding.

Indigenous People have continuously been subjected to these direct and sometimes subtle attacks on our civil and human rights, but we have not allowed direct action against our People to break our spirit. We have fought on the front lines, as in the Gustafson Lake Stand-Off in 1995; in the international realm, as we did before the United Nations around the implications of Bill C-31 and in relation to the United Nations *Declaration on the Rights of Indigenous Peoples*; in Canada's courts through endless litigation against discrimination and to defend treaty and sovereignty rights; in our communities on and off reserve; and in our families, by teaching Indigenous youth about their rights, our history and our future.

Indigenous People, in our quest for basic human and civil rights, have developed strong allies to challenge the system, and even society, in order to respect the basic rights of our People. One ally to our People, the BC Civil Liberties Association, has respectfully engaged our People. The BCCLA is an important ally, helping to even out the playing field and assisting our People in reclaiming our rights.

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Standing on our Rights: How “Who Can Sue?” has Become the Most Important Question of All

by Craig E. Jones *oc*

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Canadian citizens increasingly find themselves tasked with the responsibility of enforcing the rule of law against society’s most powerful institutions. Individuals and groups are able to perform this function to the extent that courts or legislatures will permit them “standing”—the ability to be heard and to pursue a remedy. The progressive broadening of citizens’ rights—the “rights revolution” in the popular imagination (although my argument goes beyond constitutional rights to embrace legal rights generally)—has historically been framed very clearly within an expansion of courts’ and legislatures’ view of who should be heard in legal proceedings. It follows that the future of progressive rights, and indeed of the rule of law itself, will depend on the continued evolution of these standing rules. I offer these observations with a word of caution: this shift in the burden of law enforcement and social design, if I can put it that way, away from government and on to the citizenry necessarily carries with it some implications for the development of the democratic state, and these should give us some pause.

The idea that a right or legal entitlement might exist without a mechanism for its enforcement seems ludicrous, simply because rights and remedies are intertwined in our legal philosophy. Indeed this is often the way we notionally distinguish “real” rights from others with some lesser status: Certain defined minor-

ity groups have rights, we know, because members of those groups can apply to courts or tribunals when they have been denied equal treatment. On the other end of the spectrum of legitimacy, we feel fairly comfortable in saying that “animal rights” are not “real” rights at all. This is not because we do not generally agree that (at least some) animals should be free from torture, for instance, or arbitrary execution. There is probably a high degree of consensus—moral, philosophical, and political—on a core of such beliefs. We do not consider these recognized interests to be “real” rights because our courts do not presently recognize the standing of even a very sentient nonhuman animal facing even the most egregious violation, and regulation of the interests of animals is left to government, quasi-governmental organizations or industry participants. Even some rather obviously genuine “human” rights—I’m thinking here of the legal rights of persons who are yet unborn to be free from the consequences of tortious environmental harm, for example—are non-justiciable before the courts. Not because future victims do not have a legal interest (they do, or at least, they will), but instead because until they are born and suffer harm they cannot be represented before the courts.

In this light, it is not surprising that when Amnesty International and the BC Civil Liberties Association took the federal government to court over the Canadian

Canadian citizens increasingly find themselves tasked with the responsibility of enforcing the rule of law against society's most powerful institutions.

Forces' treatment of Afghan detainees, they were met by a concentric defence that first questioned the standing of the petitioners, then the justiciability of the matter, then the applicability of the *Charter* itself. With these defences, which are all variations on objections to standing,¹ it was hoped that the merit of the question (whether detainees' right to be free from torture had been violated) would never be reached. And it never was.²

I'm not here making a case for judicial recognition of animal rights or intergenerational environmental tort litigation, nor am I seeking to revisit the brilliant but doomed full-frontal attack on the federal citadel in the detainee case. I just use these as illustrations of how closely entwined are rights and remedies, and how remedies depend on the ability to pursue them in court. My greater point, then, is that the rights revolution, at least as it has played out in the courtrooms and legislatures of Canada, has been a revolution in the law of standing, and we would benefit to be cognizant of the central role played by these rules when we are considering how rights are recognized—that is to say, how they are *allocated*—as we move into a world where more and more social decisionmaking is occurring in the courts, and less and less in the traditional democratic fora.

In retrospect, it's perhaps easiest to see the phenomenon I describe in the negative: that is, to view episodes of rights *deprivation* through the lens of legal standing. There are plenty of examples that spring immediately to mind: In the pre-Emancipation United States, slaves and, in many cases, freed blacks, were kept in check by restrictions on accessing the courts. The famous *Amistad* case³ turned largely on the question whether the African prisoners of that infamous ship were human beings (in which case they could assert rights before the courts), or "property" (in which case they could not). Dred Scott's 1857 suit to be freed failed when the Supreme Court held 7-2 that African-Americans could not be citizens capable of achieving standing under the "diversity of citizenship" jurisdiction of Article III federal courts.⁴

To give an example closer to home, we now recognize extensive rights possessed by aboriginal Canadians. These rights, we understand, were not *created* with the amendment of the *Indian Act* in 1951. But although they had always existed, they were virtually meaningless before that date because members of First Nations were both legally and practically deprived of an audience before the courts. The new *Indian Act* permitted them to sue, with rather breathtaking consequences. Recent court decisions, such as those providing for advance or interim costs awards,⁵ have made that right more accessible still.

Gender equality also has been regulated through rules on women's standing (and its effective corollary, "capacity").⁶ Can we be surprised by the recency of the

meaningful development of women's legal rights, when for centuries wives were prevented from suing as an individual distinct from their fathers or husbands (and don't we consider the fact that females are still legally incapacitated in, for instance, Saudi Arabia, to be at least one reliable indicium of the relative state of women's rights there)? The rights of children tend to ebb and flow with the degree of recognition of litigation guardians with standing to vindicate them. Even today, the question of who does and who doesn't get rights under the *Charter* is delineated in that document in terms of standing.

I could go on and on: Corporate "personhood" would be meaningless if corporations did not have standing to pursue their shareholders' collective interest before the courts, and the limits of that interest (for instance under section 7 of the *Charter*) are generally described in terms of capacity and standing. Unions, for many years recognized by the courts only for matters related to their collective bargaining function, have seen that standing vastly expanded as such associations (particularly public sector unions) have become important social and political players.⁷

Historically, as I hinted earlier with the aboriginal example, there have also been indirect impediments to standing that have effectively prevented the exercise of rights. The equality of gay men could hardly be litigated while homosexuality was a criminal offence, because no one could assert his rights in court, under oath, without exposing himself to prosecution. It is a little-remembered fact that the "Roe" in *Roe v. Wade*⁸ was not a pseudonym imposed as part of a publication ban, but rather the result of the court granting standing for Roe to sue (and provide evidence) *anonymously*, because in describing her efforts to procure an abortion she was confessing to criminal behaviour. It might have been possible that the constitutional questions surrounding abortion could have come before the US courts in another way, but not as soon and not in as clean and orderly a fashion. So one might legitimately question where abortion rights would be in the United States today without this single innovation of the law. And aside from these legal "Catch 22" barriers, there is the enormous economic cost to participants in the legal system, to which I'll return shortly.

Let me take a quick detour to defend litigation as a democratic activity. It is often argued by professional wringers-of-hands that we should be chastised, as a populace, for lack of democratic interest. This lecture is usually preceded by the simple observation that voting rates have declined in recent years, especially (cue the weary wisdom) among "the young." I would agree that voting as a singular institution has diminished lately, but not necessarily the individual's democratic power to participate in the shaping of society. Indeed, if voting has become less frequent, it might be because the act of casting a ballot every three, four or five years has lost

its historically central place in democratic government (and whether it was ever a terribly effective form of democratic participation is in my view questionable). In any event, voting is far less important to democratic government than it once was, and other forms of participation have come to dominate. In the modern age, citizens exercise self-governance through a myriad of relatively modern innovations—opinion polls, for instance, make one's voice between elections a powerful influence on governmental action—not because you have voted, not even because you will, but because you *might*. The input we once enjoyed a single day every several years has now been spread throughout the election cycle—the transient, almost momentary power of the voter has been replaced with the far more formidable and constant influence of the *potential* voter. And as we settle more comfortably into the new Facebook / Twitter / Google Information Age, our economic decisions are increasingly fluid and collectively powerful (and incidentally, therefore, the object of increasingly desperate and insidious efforts at manipulation), as is our ability to rally support around law reform issues.⁹ Democracy—by this I mean collective self-government—on this view is not dead, it is evolving and, if I dare say so, *advancing*, even if not along an even front and even if not as quickly as many might hope.

And litigation over laws, policies and government actions has become an important means of democratic input in government. Since Western society began to embrace the notion, expressed by many enlightenment philosophers and early constitutionalists as "a government of law and not of men," the courts have been an increasingly important forum not simply for the enforcement of laws and the vindication of rights, but for their very design. And so the development of a more generous access to the courts, either as a further advance in the democratization of the West (as I would optimistically say) or as a compensatory mechanism for a population withdrawing, voluntarily or otherwise, from traditional democratic institutions (as others might have it), is an important component of the shift in our governance paradigm.

Historically in Canada, as in England, the "public interest" was considered to be concurrent with the Crown's interest, and so it was considered appropriate that it should be the Attorney General who enjoyed exclusive standing to litigate in the public interest before the Crown's courts. But by the first *Charter* cases, a decade of open-season litigation against the government brought on by the advent of universal Crown liability in civil matters had diminished the Attorney's "Chief Law Officer" role in favour of one as simply the government's lawyer or worse, nothing more than a member of cabinet, a descent from cop to *consigliere* that has been widely observed but not often commented upon.¹⁰

The rule of law requires that someone must step into the

breach and ensure that the institutions that profoundly affect our lives behave lawfully and are reasonably restrained, so “public interest standing” was developed by the courts in the era of the *Charter* to permit the vindication of rights that might otherwise not be pursued.¹¹ It disposed of the requirement that, in order to challenge a law or government action, a person must be somehow directly and personally affected by it. This was replaced by a discretion in the court to grant standing to a public interest litigant where three criteria were satisfied.

First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?¹²

This special type of standing was initially created to facilitate constitutional challenges, but finally, in *Finlay v. Canada*, the Supreme Court of Canada appeared to throw up its hands, and extended public interest standing to challenge government even in non-constitutional cases.¹³ The citizen was now, at least in theory, a free-standing government watchdog at common law.

In the years since *Finlay*, the courts have, from time to time, recognized and even actively encouraged the Attorneys General to regain their traditional high ground.

For instance in *British Columbia v. Canfor*, the Supreme Court of Canada recognized the right of the AG to sue on behalf of the Crown in *parens patriae* (as “parent of the nation”) to recover damages for environmental degradation.¹⁴ Since the decision, governments have not taken up the invitation, which could revolutionize efforts at environmental preservation (particularly if a provincial attorney general were to “licence” a private watchdog to pursue damages in relator actions). The inaction is not all that surprising, as politicians might have little interest in aggressive pursuit of claims against powerful industries that may form cornerstones of their economies.

Public interest standing is only one of the innovations developed to serve a legally-empowered citizenry increasingly called upon to regulate government and other potentially-abusive institutions of modern society. Crown proceeding legislation dispensed of the quaint notion that the Crown could only be sued with its own consent, thus permitting the law of tort, including that of negligence, to increasingly guide government behaviour. Judicial review has been inexorably broadened over the decades permitting persons affected by government decision-making to seek recourse before the courts. The class action lawsuit has been adopted in every Canadian jurisdiction (and even before adopted by legislatures, it was imposed by the courts)¹⁵ as a way of permitting citizens to band together to protect themselves from everything from usurious bank charges to

Litigation over laws, policies and government actions has become an important means of democratic input in government.

toxic products. It is at its root a citizen-initiated regulatory regime. But it, too, must be recognized as a development of the law of standing, because like public interest standing, the class action permits one person, a representative plaintiff, to stand in the place of the many, and provides suitable economic incentives through an economy of scale.

Nevertheless, we are still reluctant to push the boundaries. The British Columbia *Class Proceeding Act* permits “ideological plaintiffs”—that is, representative plaintiffs who are not themselves members of a class, to bring actions in the name of a class where the interests of justice demand it. Yet to call this provision underutilized is to overstate the matter by a large margin.

And what of “public interest standing” itself? In 2012, the Supreme Court of Canada revisited the test in a case brought on behalf of sex workers in British Columbia, where persons not directly affected by the prostitution laws argued for their abolition or modification.¹⁶ The BC Civil Liberties Association and West Coast LEAF both intervened in the case. The court, in a unanimous decision, took a more relaxed and purposive approach to the test, rejecting the main argument in public interest standing cases: that the impugned criminal laws could easily be challenged by a defendant or prisoner directly subject to them, and so the third branch of the public interest standing test—the requirement that there be no other way for the matter to come before the courts—is not met. But this had always been an unsatisfying answer, even if it were in substance true: why should the development of the law on such a crucial social issue be thrust onto the shoulders of a (likely) impecunious criminal defendant, or other vulnerable victim of the majority whim?¹⁷ When you think about it, if a group is prepared to bring a complete challenge, with first-class counsel and a full evidentiary foundation including extensive expert evidence, should a court reject those efforts in favour of a notional challenge that might be brought by a penniless criminal defendant and her legal-aid lawyer (if she is lucky enough to have one)? And doesn’t this give an unfair advantage to the state, which can sidestep a challenge by withdrawing charges or otherwise “settling” an individual case that looks like it might succeed?

The “no other reasonable way” branch of the public interest standing test was meant to keep disputes *inter partes* to the extent possible, to avoid the adjudication of theoretical claims at the instance of “officious intermediaries,” and to promote *Charter* adjudication within a full factual matrix. But it does seem like an unrealistic bar to cases where it might be *legally* possible for individuals affected by the law to either sue or raise the constitutional question as a defence, but practically speaking this will never happen, or if it does happen it will be poor litigation. And, when a law is challenged by an individual, why should the complex public policy and rights-

balancing exercise be constrained by the facts of one individual case? After the *Sex Workers* decision, the third branch of the test now simply asks whether the action is, in all the circumstances and in the context, *one* reasonable and effective means of bringing the case before a court.

Such suggestions, of course, are all premised on the idea that the shift I have tried to identify in favour of a dominant role for private litigants in rights distribution efforts is a good thing. I would argue, broadly speaking, that it is, but I do not wish to pretend that any of the recent developments in standing rules that I have discussed—public interest standing, broader judicial review, crown liability and *Charter* damages, class actions—are in any way a complete solution to the challenge of distributing “access to justice” in the age of policy-by-litigation.

The difficulties arise because there are also inherent dangers in relying on courts (and, to the extent that judges make their decisions within the constraints of the arguments presented to them, on the litigants themselves) to shape policy and the distribution of rights and entitlements in society. I am not one of those who believe that rights adjudication is a zero-sum game—in other words, that in granting a right or freedom to one person or group another must *necessarily* make some sacrifice—but nevertheless governments act, at least ostensibly, to defend vulnerable individuals or groups, and so challenges to laws or government decisions by one group can come at a cost to another. We rely on courts to balance the competing interests at the section 1 stage under the *Charter*, but how effectively they accomplish this depends on who is before them advancing the disparate interests. So it is a problem that litigation is still often a rich man’s game—played by corporations, governments, large unions, wealthy individuals, and (sometimes) NGOs, each of whom we might legitimately be wary of empowering with even more social policy influence than they already enjoy. We know that economics will largely determine access to the fruits of standing—until advance costs awards in favour of divorcing wives in matrimonial disputes, for instance, women were routinely deprived of a just and equal distribution of family assets precisely and ironically because the financial assets were unjustly and unequally distributed. And the courts show an inconsistent appetite for making public interest advocacy less expensive (that a court might impose a costs award against a party who has met all the criteria for public interest standing—as did the Federal Court of Appeal in the Afghan detainee case—seems to me little short of perverse, and if the federal government sought that ruling it should be ashamed). So this is an ongoing challenge.

Courts have recognized the danger of relying on too narrow perspectives and have adopted innovations such as the acceptance of intervenors and the occasional appointment of an *amicus curiae* to present unrepresented

views. But these efforts also carry some democratic difficulties, because the "price of admission" for intervenors, while not as steep as for litigants, may still be prohibitive for many if not most citizens and groups. In British Columbia, one can only admire the remarkable advocacy before the courts of many intervenor organizations, but the groups that have been able to afford the price of admission (including the BCCLA) can always be criticized as unrepresentative of the full spectrum of relevant interests, and intervenors' perspectives, individually or together, are often quite distant from the most vulnerable voices in any given debate. And an *amicus*, however well-versed in the issues and no matter how broad his or her mandate, is in the end a single person with no deeper perspective or experience than any other participant.

The other democratic difficulty is that it is not only a limitation on *participants* that might lead to distorted results, but also a certain selectivity of *issues*. That is to say, if we rely on courts to be a primary forum for the distribution of rights and entitlements (legal and, at least indirectly, economic), and if we rely on advocacy groups to select which matters to take to court, then we can worry that reform will concentrate around issues that give those groups the most public profile, or the best return rate on fundraising letters, and so on. Moreover, judges are human, and they have a lot of control over which cases are heard, for how long, and how expensively. They would prefer to sit on stimulating matters rather than the dull and dry, especially cases where they can make decisions that are clear and heroic. As a result of these fairly subtle factors, there is a risk that judicial resources will be allocated disproportionately to matters that are of most interest to the system participants, at the expense of other matters that are most impactful upon the public (of course, a similar argument could be made about politicians, who are far from immune to the siren call of the sexy issue).

Let me conclude this way: Whatever the future of standing rules may be—and I cannot pretend to know in any comprehensive way what they *should* be—I would suggest that history and present experience both demonstrate that the decisions we make regarding *who* can appear before the court and make arguments, what arguments they can make when they get there, and how much it will cost them to do so, will be among the most important determinants of how rights are recognized and distributed in society in the future. So on the happy occasion of celebrating 50 years of the BC Civil Liberties Association, which has probably been (I will go out on a limb here) Canada's single most consistently influential public interest advocate (and not only before the courts), we might take a moment to reflect on the evolution of the rules that have allowed it to succeed, and consider who we need to have before the courts and when, in furtherance of our shared goal of a more just society.

1 A “standing” defence implies that *someone* can vindicate a right, just not the particular applicant. I say these other defences are related to standing because, if a matter is non-justiciable or a set of rights inapplicable, then no one will have standing to seek their vindication, despite their ostensible recognition.

2 *Amnesty International Canada v. Canada (Minister of National Defence)* (2007), 287 DLR (4th) 35 (FC) (standing, justiciability); *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, 2008 FC 336, [2008] 4 FCR 546; aff’d *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, 2008 FCA 401, [2009] 4 FCR 149 (applicability of the *Charter*).

3 *United States v. Libellants and Claimants of the Schooner Amistad* (1841), 40 US 518.

4 *Dred Scott v. Sandford* (1857), 60 US 393.

5 *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371.

6 “Capacity” is the determination of whether a person is, by definition, an entity capable of achieving standing in any particular case. For the purposes of this discussion it is not necessary to distinguish between the two concepts. A denial of capacity has precisely the same effect as a denial of standing.

7 As Kelleher J. noted in *British Columbia Nurses’ Union v. British Columbia (Attorney General)*, 2008 BCSC 321.

8 *Roe v. Wade* (1973), 410 US 113.

9 Groundswell opposition, organized largely through online social media, which have recently been credited with the defeat of a number of pieces of legislation, including Ontario’s strict young driver reforms, and federal attempts to reshape copyright law and permit warrantless access to personal information online.

10 Australian High Court Justices Gaudron, Gummow and Kirby JJ dryly observed, “it may be ‘somewhat visionary’ for citizens of [Australia] to suppose that they may rely upon the grant of the Attorney General’s fiat for protection against ultra vires action of statutory bodies for the administration of which a ministerial colleague is responsible.” See: *Bateman’s Bay Local Aboriginal Land Council v. The Aboriginal Community Benefit Fund Pty Limited*, [1998] HCA 49 at 38.

For some discussion of the evolution of the Attorney General’s role see: The Hon. Ian Scott, “Law, Policy and the Role of the Attorney General: Constancy and Change in the 1980s,” (1989) 39 U. Toronto L.J. 109 at 122; Kent Roach, “Not the Government’s Lawyer: The Attorney General as Defender of the Rule of Law,” (2006) 31 Queen’s L.J. 598 at 611, and John L.L. J. Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984) at 190.

11 *Thorson v. Attorney General of Canada*, [1975] 1 SCR 138, *Nova Scotia Board of Censors v. McNeil*, [1976] 2 SCR 265, and *Minister of Justice of Canada v. Borowski*, [1981] 2 SCR 575.

12 *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236.

13 *Finlay v. Canada (Minister of Finance)*, [1986] 2 SCR 607.

14 *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 SCR 74.

15 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 SCR 534.

16 *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45, upholding *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2010 BCCA 439.

17 The Afghan detainee litigation provides an interesting example. There, the federal government argued that the BCCLA and Amnesty should be denied standing because it was theoretically possible for an Afghan detainee himself to appear in a Canadian court and assert his rights. To her credit, Madam Justice Mactavish made short work of this submission, noting that detainees “are on the other side of the world, in a desperately poor country...whose infrastructure is in tatters,” and face “logistical educational, linguistic, cultural or economic” barriers, and indeed “may well still be in detention...denied access to legal counsel.” That Canada could argue with a straight face that the existence of such “alternative” petitioners should defeat the claim is perhaps the clearest justification for reform of the third prong of the public interest standing test. See: *Amnesty International Canada v. Canadian Forces*, 2007 FC 1147 at 49-50.

On Rules and Moral Beauty

14

by Jan Zwicky

For obvious reasons, juntas, dictatorships, and liberal democracies figure frequently in discussions of civil liberties. Bureaucracies show up less often. This is so partly because the harms bureaucracies inflict are not usually life threatening. People are sometimes unjustly fined, taxed, or even imprisoned by bureaucracies, but they are rarely executed or subjected to physical torture. Apart from fines and penalties, the injustices inflicted by bureaucracies tend to be spiritual rather than material. Neither the United Nations *Declaration of Human Rights* nor the Canadian *Charter of Rights and Freedoms* enshrines a right to freedom from mindless hassle. And in bureaucracies *per se*, unlike dictatorships, there is no obvious person or group of people who might benefit if liberties are abused. As Kafka understood, what is horrific about large bureaucracies is precisely their facelessness. There is no one to hold to account, no animus to confront or overthrow, and often no court of appeal. As Dickens, some 60 years earlier, had pointed out, a bureaucracy is sometimes all that is left of a court of appeal.

But there is a deeper reason that bureaucracies don't figure in discussions of civil liberties, and it has to do with the relationship between rules and our ability to uphold those freedoms. Bureaucracies are, often enough, outgrowths of liberal democracies or other institutions with interests in equality: regulations, and

the apparatus that maintains them, are among the means that democracies use to ensure fair access and fair distribution. Rules, in the form of laws, are above all the foundation of due process. As the BC Civil Liberties Association itself has said, the law is the "defender and enhancer" of democratic freedoms. It *protects liberty*.¹ I agree, and would not myself want to live in a rule-less society. I am deeply grateful for rules of many sorts; from those governing the flow of traffic on city streets to those that insist I should be paid no less than my male colleagues for work of equal value, rules have made and continue to make my life better. Where the rules are well made, and the principles they uphold are sound, rule-following is emblematic of the conception of justice as fairness.

And yet I believe there remains a question about the relation of rules to the good life. I have in mind not only nightmarish scenarios in which people are genuinely oppressed by unintelligible bureaucratic requirements or made miserable by pressure to conform to some cultural variant of the straight and narrow. The question I want to ask can be provoked by much less insidious circumstances. Indeed, it was provoked in my own life by a sequence of very minor events. But it was, in a way, the insignificance of the episode that brought home to me the significance of the issue. For the effect was profound, and I have continued to puzzle over it.

The encounter took place in that most innocuous of locations, the circulation desk of one of our major university libraries. I had a book in hand and was hoping to be able to take it home to Quadra Island for a week. But it was not my own university library and I had forgotten my COPPOL card—a small piece of grey paper that confirms my registration in the Council of Prairie and Pacific University Libraries Reciprocal Loan Program. The book was an old book on an obscure subject. I had my bar-coded photo-graced University of Victoria faculty library card with me; I was hoping for, but not expecting, a break. Sure enough, I didn't get one. Although other librarians in other situations had scarcely glanced at my COPPOL card, asking immediately for my UVic card as though demanding the real goods, the rule is: you gotta have a COPPOL card before they can ask for your library card, and I didn't have mine with me. I was in the process of putting my UVic card back in my wallet when a voice said, "I'll take it out for you." I looked up. The voice belonged to a woman who'd come up to the desk from the direction of the reserve room during my exchange with the librarian. She was around 30, with a worn jacket, worn backpack, and round, pleasant features. The librarian visibly stiffened. "We strongly discourage patrons from doing that." "That's okay," the woman said. She looked directly at me. "Do you need the book?" "Well, yes," I stumbled, "um, it would help a lot." "Well, then," she smiled at the librarian, "that's easy." She took out her card and put it on the book, which she pushed toward the librarian. The librarian was both flummoxed and annoyed. "Really. We recommend strongly against this." "I'd like the book," the woman said. After a short silence, the librarian swiped her card, scanned the book's bar code, and handed her the book. She, in turn, handed it to me. I thanked her, profusely, in some astonishment, and asked if I could give her my email address, or if she'd like my phone number. "No," she said, having reshoouldered her backpack, already heading toward the main doors, "it's fine."

And she was right. It *was* fine. Her gesture had made it so. This was partly because of the apparent absence of an ulterior motive: she wasn't getting off on confronting the librarian, she wasn't trying to make friends with me, there were no signs of self-congratulatory halo-polishing. What had happened was this: A stranger had looked me in the eye, trusted that I needed the book and trusted that I would return it. I felt, both in the instant and on reflection, liberated.

Why?

I had not supposed I had a "right" to the book. I would not have suffered grievous harm if, as I'd expected, I'd been denied the privilege of taking it home. The reason COPPOL cards are required—when apparently it's one's library card that really matters—eludes me, but I can imagine that such a reason might exist. (Perhaps the COPPOL card confirms that you don't have an atrocious record of not returning books to your home library.) My sense of release, of joy, had its root, I think, in the fact that I had assumed and had myself accepted that I would be reduced to the description "does not have her COPPOL card." It was liberating to be seen for what I was: a polite, if somewhat shabbily dressed, middle-aged woman with a UVic faculty card—likely a scholar and as a good risk as any to return a library book.

But no, there's something else: even more crucial was my benefactor's willingness to make herself vulnerable to my potential untrustworthiness. Her willingness to take that risk opened a space in which it was possible for me to act honourably. It made it possible for me to *be* honourable, to be the trustworthy person which, in fact, I am. This trustworthy person—who respects and loves the institution of the public lending library—this person, her honour and her love, *cannot be countenanced* by the system of rules that

safeguards all of us against the greed, competitiveness, absent-mindedness and laziness of a few. I'm very glad the collection is there when I want to use it; I support the rules that keep it functional; and yet those very rules mean that it is impossible to express, in my actions, the love and honour I actually feel. In trusting me, my benefactor made it possible for me to respond to the claim of moral beauty, and my response was alacritous.

And then there was my admiration for her courage. Experiencing courage in others tends to inspire our own. So, again, there was what we might describe as a liberation of the potential for virtue, an unfettering of my capacity to love the good. In what, precisely, did her courage consist? Since she was not actually breaking any rule, the system was not going to come after her. It consisted partly in her standing up to the disapproval of the librarian. But the librarian's nominal authority derived from the fact that she was the representative of the rules—and the larger part of my benefactor's courage lay in her standing up to the fact of the rules themselves.

For often what humans want to do is not the right thing, nor what is obviously practical, nor even what will satisfy our own interest. We're social animals. Often what we want to do is to hang with the group: we want to do what everyone else does. This compulsion to comply, which we share with many other mammals, is one source of the power of bureaucracies. It can create real anxiety around the image of resistance. It can even disguise from us the fact that certain rules, or certain rules in certain circumstances, have no point: we obey anyway, without thinking, and our obedience alone seems to be sufficient justification for the rule.

However, as I've tried to underline, not all rules are pointless. And in some cases, our respect for them is itself ennobling. (The most famous example might be Socrates' decision to abjure escape and to drink the hemlock.) What, then, is the lesson here? Perhaps this: that trust makes possible a particular kind of community, a community of our best selves—selves that we sense are deeply authentic. It is as though trust is the endo-skeleton that allows community to stand up and really *be* community, whereas a system of rules is an exoskeleton that straightlaces a morass of reprobates into the *shape* of a community.

But this, surely, is too simplistic. We are a species many of whose members are not, in fact, entirely trustworthy—but our communities are not thereby rendered less than real, or less worthy. A tendency to mislay library books is, as often as not, a reflection of something else we treasure deeply: creativity, or generosity, or flexibility, a carefree liveliness. So perhaps the lesson is more like this: We need rules, and our upholding of them can be

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a source of moral beauty. But we need also to perceive when trust is warranted, and when it should trump obedience.

The problem is therefore difficult. Rules for when we should obey other rules are not the answer—not only because there’s a theoretical regress. A correct judgement that trust is warranted, that a given rule should in a given situation be bent or circumvented, is wholly and deeply context-dependent. The capacity for such judgment—like expertise in medical diagnosis or musical phrasing—can be learned; but it cannot be captured by rules—for, to be a rule, a prescription must reduce individual situations to types. What the liberation made possible by trust requires, then, is not only courage. It requires the case-by-case exercise of discernment—a capacity for non-criterialized insight into a field of circumstances, a sensitivity to the larger weather of an event.

Big bureaucracies, history suggests, are outgrowths of empire. Indeed, bureaucracy appears to be the form of government into which empires most frequently evolve as they disintegrate. It is also one of the means by which we continue the domestication of ourselves as a species. And as we populate our way over the brink of the planet’s carrying capacity, we should expect regulations to proliferate. Management by rules is one of the surest ways to avoid having to respond, case by case, to the impossibly large numbers of individuals that now make up cohorts of students, ranks of employees, and the citizenry. But my unknown benefactor has set me an example. She has inspired me to hope that I will learn to distinguish wisely between situations in which the rules do need to be upheld and those in which trust, exceeding the rules, might allow us to be claimed by a situation-specific moral beauty. I hope too that, should I find myself in circumstances of the latter sort, I will, like my benefactor, have the courage to act.

My sincere thanks to Robert Bringham and Colin Macleod for their comments on an earlier draft.

¹ Advertisement for “The Law Protecting Liberty: What You Need to Know,” a course offered by BCCLA Continuing Professional Development on June 2, 2012.

Afterword

by Lindsay Lyster

As the President of the BC Civil Liberties Association, it falls to me to write the epilogue to this Festschrift. As my predecessor, Robert Holmes, QC, has explained in his elegant Foreword, the Festschrift was envisioned as part of the celebration of the 50th Anniversary of the Association. What Rob failed to mention is that this Festschrift, like so much of our 50th Anniversary celebrations, was his brainchild.

On behalf of the BCCLA, I take this opportunity to thank Rob for his years of work with the Association, as a Board and Executive member, President, pro bono counsel and, for our 50th Anniversary celebrations, emcee extraordinaire, and now, with his Foreword, poet laureate.

And what a 50th Anniversary it was. With Rob at the helm, we celebrated the Association, its activists, its history, and its ongoing work. The centrepiece of the celebrations took place in June 2012, with a weekend of events that started with our *50 Years of Freedom Speakers Symposium*. Our speakers, including Dr. Michael Geist, Dr. Cindy Blackstock, Kim Pate, Maureen Webb and Alex Neve, spoke to a standing room-only crowd of members of the public, and served as an inspiring introduction to the Association and the rights and liberties at the core of our mandate.

The weekend continued with our legal conference,

The Law Protecting Liberty. We were gratified by the host of leading jurists and lawyers who spoke at the conference, headed by the Chief Justice of the British Columbia, the Honourable Lance Finch, and the Chief Justice of the British Columbia Supreme Court, the Honourable Robert Bauman. Our keynote speakers, the Right Honourable Kim Campbell and the Honourable Stephen Owen, were a highlight as they shared their thoughts and reflections on the protection of rights and liberties in their unparalleled careers in the service of Canada and Canadians.

Finally, we wrapped up the weekend in style at our fabulous *Golden Anniversary Gala*. Nearly 300 members and friends packed the ballroom at the Coast Coal Harbour Hotel. There, amid the revelry, we recognized the recipients of our annual Reg Robson Award, Robyn Gervais and Cameron Ward, for their dauntless work advocating for the missing and murdered women, their families and Aboriginal communities at the Oppal Commission of Inquiry.

We also presented our inaugural Liberty Awards. The winners of those awards, like Cameron Ward and Robyn Gervais, are each notable examples of commitment to rights and freedoms in their own right, who also, by their accomplishments, serve to illustrate the breadth of the BCCLA's work.

Jamie Haller, a young First Nations woman from Williams Lake, won the Liberty Award for Youth Activism in recognition of her courageous efforts to hold accountable the police officer who punched her in the face while she was hand-cuffed in the back of a police cruiser—this after she called 911 to seek the help of the police. Susan Musgrave, the noted poet, children’s writer and novelist, won the Liberty Award for Arts, reminding us with her body of work why we must continue to be uncompromising in our defence of freedom of expression. Joseph Arvay, QC, who has acted for the BCCLA in some of the most important constitutional cases of the *Charter* era, including *Little Sisters* and our continuing challenge to the *Criminal Code* provisions criminalizing assisted suicide, won the Liberty Award for Legal Advocacy. Last, but not least, Dr. John Dixon, our former President and longtime member of our Board and Executive, was awarded the Lifetime Achievement Liberty Award in recognition of his ever-vigilant work on behalf of civil liberties. Acclaimed human rights lawyer Clayton Ruby and *Toronto Star* publisher John Cruickshank capped off a most memorable evening with their keynote speeches.

Together with the essays in this Festschrift, our anniversary celebrations underscore the work the Association has done for the last 50 years. When our founders gathered 50 years ago to create the BCCLA, they could hardly have predicted what the next half-century would bring, in challenges and accomplishments, and the tools by which to bring them about.

The legal landscape in 1962 was a far cry from what we see today. In 1962, there was no *Charter of Rights and Freedoms*. The *Canadian Bill of Rights* was still in its infancy. There was no modern human rights legislation. The legal tools our founders had in embarking on the task of protecting and expanding rights and liberties were few indeed. They had their principles, the examples of others, especially the *American Bill of Rights* and the American Civil Liberties Union, the United Nations *Universal Declaration of Human Rights*, the common law, and their own determination to make a difference.

Nor did they have modern technology—in 1962 there were no personal computers, no internet, no mobile phones. Revolutions in technology and communication have enabled the BCCLA to reach more people more quickly than our founders could have imagined through our website, e-mail updates, blogs, media releases and Twitter feeds. Yet the same technology that enables us to freely communicate our messages to the world have also given government, and powerful private actors, unheralded opportunities to spy on us, amass vast stores of data about us, and thereby put the very concept of privacy to the test.

Fifty years ago the world was locked in the Cold War. McCarthyism was a very recent memory; “Better Dead than Red” an all too current motto. Détente, Glasnost and the fall of the Berlin Wall brought that war to an end, only to be replaced by the seemingly never-ending Wars on Terror and on Drugs. These postmodern “wars” bring a multitude of threats to human rights and civil liberties that the Association continues to fight, both through legislative reform and in the courts.

On the national security front, we have challenged the Canadian government to uphold the right of those abroad to be free from arbitrary arrest, detention and torture, from detainees at risk of torture being turned over to the Afghan forces by Canadian soldiers; to the Canadian child soldier, Omar Khadr, languishing behind bars in Guantanamo; to Maher Arar, the Canadian victim of extraordinary rendition from the United States to Syria. Closer to home, we have advocated for the rights of those detained here in Canada, whether by

way of so-called “preventative detention” or on immigration security certificates, to due process of law.

On the drug front, we have advocated for an evidence-based approach that would see the end of punitive sanctions for drug use and an emphasis on harm reduction that focuses on the medical needs of addicted persons. That approach has consistently guided our positions, whether making submissions to parliamentary committees on drug policy reform, advocating for fair and liberal access to medical marijuana, or decrying invasive and discriminatory grow-op laws.

Fifty years has seen an increased emphasis by the Association on the rights of the most marginalized among us. This has seen us argue for constitutional protection for Insite, which is a safe place for injection drug users. It has seen us stand with First Nations people and sex workers to call the police and the justice system to account for the epidemic of violence against Aboriginal women and sex workers in the Downtown Eastside and across this country. We have advocated for queer rights, joining Little Sisters in their fight against Canada Customs’ discriminatory refusal to allow them to import books and magazines, and with James Chamberlain in ensuring that the public school system is inclusive of all families, including those with same sex parents. We have advocated, alongside the valiant Gloria Taylor, for the right of the terminally ill to a death with dignity.

Just as our founders 50 years ago could not have foreseen the world we live in today, or the shape of the threats to our civil liberties that we face in 2014, so too we cannot hope to predict the challenges our successors will face in 2062 or beyond. What we can commit to doing is nurturing and passing on to them the same commitment to human rights and fundamental freedoms that have been the foundation of this Association for the last 50 years.

When our founders gathered 50 years ago to create the BCCLA, they could hardly have predicted what the next half-century would bring.

