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Canada has an official multiculturalism policy and a *Multiculturalism Act* to implement it.

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Viewpoint

Richelle Wiseman

Name honour killings to stop the violence

The death of 16-yearold Aqsa Parvez in 2007 was neither the first nor last honour killing in Canada. But details of her murder are better known than most. The statement of facts agreed to by the Crown and defence in the prosecution of Aqsa's killers make it clear her father and brother strangled her because they thought she had brought shame to the family. To re-establish family "honour," Aqsa had to die.

With increased numbers of new Canadians coming from honour-and-shame cultures – predominantly found in South Asia, the Middle East and North Africa – the phenomenon of honour killing must be directly addressed.

Some people claim there is nothing special about honour crimes and say they are just instances of the much broader plague of domestic violence.

Their worry is that if we give this kind of violence a special name, we risk smearing whole ethnic communities with a women-hating stereotype they don't deserve.

This is a mistake. There are distinctive features of an honour killing: a background obsession with female purity/chastity, pre-planning, family approval or complicity, and often broader community approval for forcing an errant woman to "toe the line" according to culturally sanctioned norms.

We have to single out cultural practices which violate women's right to equality, without condemning entire cultural groups.

Rooted in a complex matrix of cultural values

Honour killings are rooted in a complex matrix of cultural values premised on women's inferiority. In some cultures, the birth of a baby boy is celebrated, while a baby girl is hardly acknowledged. Some cultures practise infanticide of baby girls, or selective gender-based abortion of female fetuses.

Girls in these cultures are raised to fulfil one purpose – to be married as a virgin to a husband of their family's choosing, and then to bear children. Any departure from purely chaste behaviour or complete acquiescence to the patriarchal family structure can be construed as dishonourable. At bottom is an obsession with female purity and compliance with male authority.

Preventing this oppression of women and girls requires that we fully understand what we are dealing with. How are social workers, police, school officials and other front-line service providers to address a phenomenon if they can't talk openly about it?

Canada is obliged to address "honour killings"

Globally it is estimated there are at least 5,000 honour killings annually. The number is probably much higher: these crimes are often misreported as suicides, or accidents, or simply ignored. A number of UN initiatives address violence against women. The *International Convention on the Elimination of Discrimination Against Women (CEDAW)* – which Canada has ratified – requires regular reporting on measures taken to eliminate violence and discrimination

toward women. CEDAW recognizes honour killings as a distinct form of violence against women, and identifies the countries and cultures where these killings most often occur.

The new Citizenship Guide

In 2009, the federal government released a new Citizenship Guide for all new Canadian citizens. Discover Canada: The Rights and Responsibilities of Citizenship states: "In Canada, men and women are equal under the law. Canada's openness and generosity do not extend to barbaric cultural practices that tolerate spousal abuse, 'honour killings,' female genital mutilation, or other gender-based violence. Those guilty of these crimes are severely punished under Canada's criminal laws."

This is the first time the Canadian Citizenship Guide has spelled out that the practice of honour killing is not allowed in Canada and is punishable under the *Criminal Code*. Honour killing is murder and will be prosecuted and punished as such.

Reluctance to focus on cultural practices

The reticence to acknowledge that Aqsa Parvez's death was an honour killing is widespread among Muslim Canadians who fear increased Islamophobia. Imam Ala al Sayed, a Muslim leader in Toronto, was quick to say that the problem in the Parvez home was not Aqsa's refusal to wear the hijab. It was simply ordinary teen rebellion that many Canadian families face.

But the issue of honour killing is not about Islam, or any other religion, as it has been known to occur in Muslim, Sikh and Hindu contexts and in communities which are not especially religious but nevertheless trapped in traditional honour-and-shame ways of thinking.

Honour killing is about a set of patriarchal cultural values that must be named, condemned and confronted.

There is no denying it: not all cultures embrace gender equality. It is not racist to name those practices which deny women's dignity in the name of honour. Entire cultures are not being condemned, just the aspects of them incompatible with women's humanity.

Richelle Wiseman is executive director of the Centre for Faith and the Media in Calgary, Alberta.

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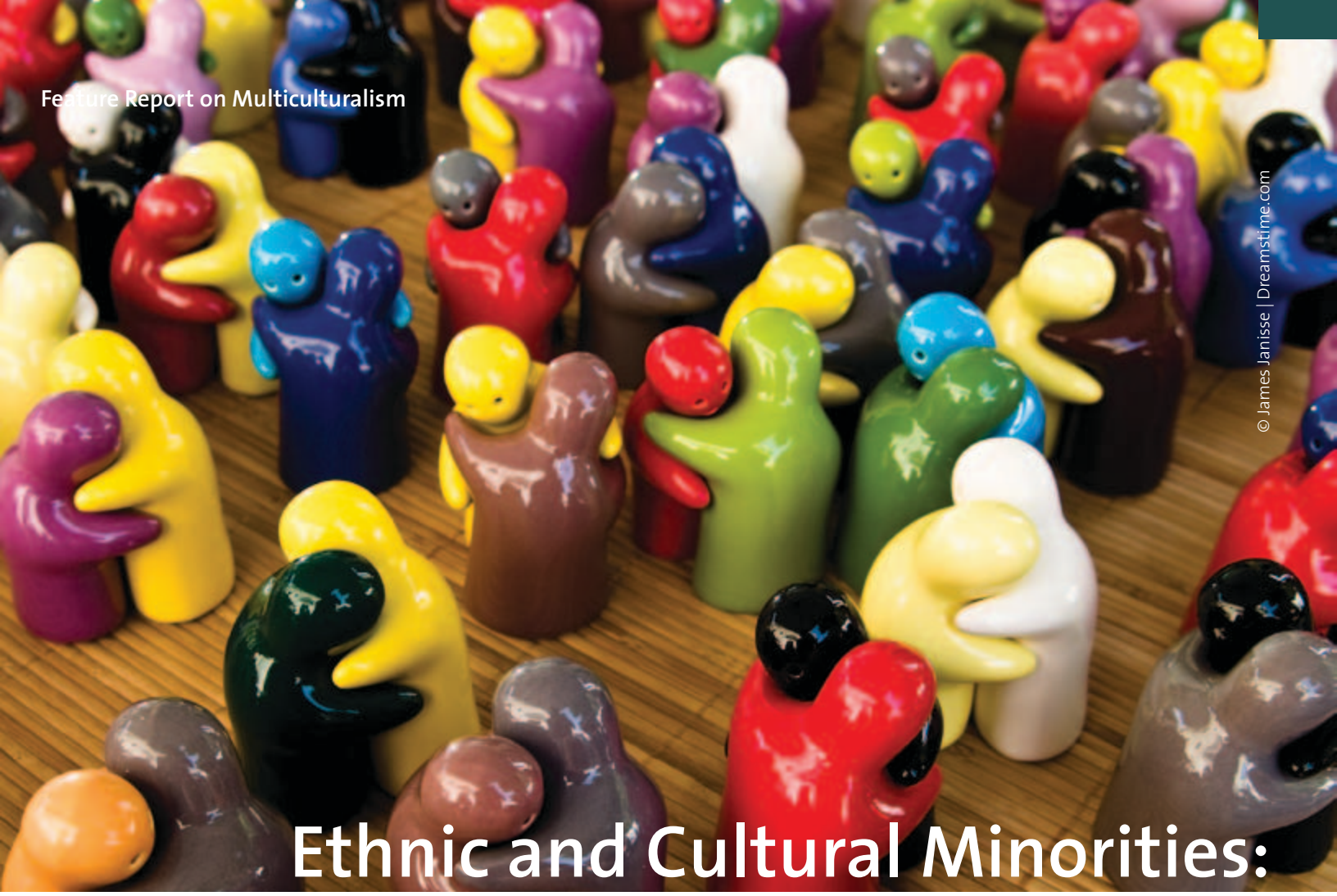

Ethnic and Cultural Minorities: Canadian Policy

From discrimination to equity and multiculturalism

Beginning in the mid-1900s, Canadian policy towards new immigrant ethnic groups began to change significantly. This was due in part to shifting views about the treatment of ethnic minorities and concerns about equality. Moreover, the increase in the number of people of other ethnic origins meant that government policy on the issue could not be as easily ignored as before.

In 1963, the Royal Commission on Bilingualism and Biculturalism was created. Initially, the Commission's mandate was limited to making recommendations on federal policy towards the English and French languages and cultures. Due to pressure from other ethnic groups, and in particular the concerns of Ukrainian Canadians, the Commission's focus was expanded to make recommendations concerning groups outside the English or French cultures. Subsequently, the Commission's key recommendations included greater recognition of the contributions of other ethnic groups, and the need for greater government funding in certain areas.

Also during this period, many of the legal barriers faced by other ethnic groups were removed. In the 1960s, for example, the federal government significantly reformed the *Immigration Act*, removing the preference for a white, skilled labour from Europe and the United States. As a result, immigrants from other parts of the world were granted a much better chance of immigrating to Canada.

Introduction of Federal Multiculturalism Policy

One of the most important shifts in federal policy to other ethnic groups was the introduction of official multiculturalism in the early 1970s. Central to this policy was the official recognition of the diverse cultures in a plural society (albeit one characterized by two founding cultures – English and French). Not only were these other ethnic and cultural groups to

be assured some measure of equity, they were also to be encouraged to retain their linguistic heritages and ethnic cultures instead of being assimilated into mainstream society.

While the notion of multiculturalism theoretically includes Aboriginal peoples, the emphasis of multiculturalism has predominantly related to new immigrant groups. In the latter part of the twentieth century, federal and provincial policy towards Aboriginal peoples pursued a much different trajectory; of particular importance was the shift in viewing Aboriginal peoples as nations, with some entitlements to self-government.

In support of official multiculturalism, the federal government established a number of new programs, providing public monies for cultural activities, projects, and advocacy groups. Also, the federal government created a position at the cabinet table for a minister responsible for multiculturalism, in addition to creating a multiculturalism directorate within the Department of the Secretary of State and a Canadian Consultative Council on Multiculturalism (later renamed the Canadian Ethnocultural Council).

In the years that followed, the Government of Canada introduced other key initiatives to support its official multiculturalism policy. In 1978, the Canadian Human Rights Commission was created to address complaints of discrimination in the private sector, and to spearhead anti-discriminatory educational campaigns – mirroring similar bodies already established by many of the provinces. In 1982, the *Canadian Charter of Rights and Freedoms* was introduced as part of a larger constitutional reform. This constitutional document provides a number of key rights and freedoms critical to multicultural policy.

In 1988, the federal government passed the *Canadian Multiculturalism Act*, which gave official multiculturalism a stronger legal basis by consolidating existing government policies and practices into legislation. In addition, the Act provided a more detailed policy statement on multiculturalism and established agencies in support of the policy, such as the Canadian Multicultural Advisory Committee.

While the focus here is on multiculturalism at the federal level, this is not to suggest that significant developments in this area have not occurred or been pursued at the provincial level. Many provinces have introduced legislation and established programs and agencies in support of their policy multiculturalism objectives.

For a summary of provincial multiculturalism policies, see Parliament of Canada: Canadian Multiculturalism (**www.parl.gc.ca/information/library/PRBpubs/936-e.htm**).

Ethnic groups are not dependent upon the goodwill of governments, or their employers, or their community to respect their cultural heritage and practices. Instead, they may apply to the courts to force these entities to follow key multiculturalism tenets, such as non-discrimination and the freedom to practice one's culture.

Structure of Canadian Federal Multiculturalism

Values and legislative and judicial institutions of federal multiculturalism

Values of Canadian Multiculturalism

In understanding official multiculturalism in a broader context, it is necessary to first examine its basic values, and namely: what sort of society is multiculturalism attempting to promote? In this context, it's useful to examine key clauses of the *Canadian Multiculturalism Act*; and in particular the official statement on multiculturalism policy found in section 3.

First, the Act asserts that all Canadians are entitled to "preserve, enhance, and share their cultural heritage." Central to this notion is the rejection of other common approaches to ethnic and cultural policies. On the one hand, this tenet rejects earlier Canadian policies of assimilation, where the goal was to encourage minorities to discard their cultural heritage and adopt mainstream Canadian values and practices. Under the official policy of multiculturalism, however, citizens are encouraged to retain their cultural heritage while being recognized as part of Canadian society. Not only does this policy of multiculturalism reject early practices of assimilation, it also distinguishes itself from the "melting pot" approach typically found in the United States. Central to this strategy is the idea that the cultural values and practices of immigrants is best combined with those of mainstream society to form a new and single national culture. Under multiculturalism, however, ethnic groups in Canadian society are encouraged to maintain their ethnic distinctiveness, rather than assimilated into an ever-changing national culture.

Second, the Act asserts that individuals and communities are to be assured full and equitable participation in all aspects of Canadian society and that any barriers to that participation will be eliminated. Central here is the idea of inclusion within the broader Canadian society. It should not be the case that an ethnic group is excluded from participating in

Also critical to understanding Canadian multiculturalism policy is its institutional structure. To begin, multiculturalism is a legislative institution in Canadian politics. In other words, it is not simply a statement of ideals, but actually has force and effect on federal laws and programs.

key social, political, and economic institutions simply because they have chosen to maintain their traditional cultural customs and practices.

Third, the Act commits the Government of Canada to "promote the understanding and creativity that arise from the interaction between individuals and communities of different origins." The idea here is that while different ethnic groups are able to preserve and enhance their cultural identities, they are nevertheless to be encouraged to interact with one another. In other words, Canada's population should evolve into a series of cultural islands, but should have mechanisms of interaction to promote mutual understanding and creativity.

Finally, the Act places multiculturalism within the context of Canada's dominant and traditional ethnic divide, between the English and French traditions. For example, the Act states that the Government of Canada is to "advance multiculturalism throughout Canada in harmony with the national commitment to the official languages of Canada." This proviso is significant in that multiculturalism is not meant to replace bilingualism and the special recognition of the French language.

Multiculturalism as a Legislative Institution

Also critical to understanding Canadian multiculturalism policy is its institutional structure. To begin, multiculturalism is a legislative institution in Canadian politics. In other words, it is not simply a statement of ideals, but actually has force and effect on federal laws and programs. This legislative influence stems from a number of sources, first of which is the *Canadian Multiculturalism Act* itself. Canada was the first country in the world to pass a multiculturalism law; under the Act, multiculturalism is recognized as a fundamental characteristic of Canadian society, and is recognized for playing a key role in the decision-making process of the federal government.

Another key source of influence stems from federal (and provincial) human rights and employment equity legislation. The federal *Canadian Human Rights Act*, for example, prohibits discrimination in areas of federal jurisdiction, including both public and private institu-

tions at the federal level. Moreover, the Act extends to discriminatory practices based on race, national or ethnic origin, colour, or religion.

A third key source of legislative influence is the *Canadian Charter of Rights and Freedoms*. As discussed in the previous section, the *Charter* provides constitutional protection of a number of key rights and freedoms relevant to multiculturalism policy. Section 15 of the *Charter* provides constitutional protection against discrimination by any level of Canadian government, while Section 2 provides for a number of key freedoms, such as freedom of religion, assembly, and conscience. In addition, a section was added to the *Charter* which required it to be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians. All laws passed by any level of government are required to be consistent with the *Charter*'s rights and freedoms.

Multiculturalism as a Judicial Institution

Not only does multiculturalism in Canada have a legislative component, it also has judicial institutions that govern it. While there is no "multiculturalism court" per se, key legislative institutions of multiculturalism do have judicial structures. The *Canadian Human Rights Act*, for example, is enforced by the federal Human Rights Commission and Tribunal. This bodies have the authority to arbitrate and mediate claims of discrimination covered by the Act. In addition, the rights to equality and freedom under the *Charter* are interpreted and enforced by the Canadian judiciary – in particular, the Supreme Court of Canada. Under the *Charter*, the courts may strike down or change government laws and practices if they find them to be contrary to citizens' constitutional rights.

This judicial element is significant in that it allows for individual citizens and groups to make claims against private and public institutions and other individuals in support of their multicultural interests. Ethnic groups are not dependent upon the goodwill of governments, or their employers, or their community to respect their cultural heritage and practices. Instead, they may apply to the courts to force these entities to follow key multiculturalism tenets, such as non-discrimination and the freedom to practice one's culture.

Multicultural Policy Debates in Canada

Multiculturalism, national identity, biculturalism, and federalism

Multiculturalism and the Issue of Divisiveness

An immediate debate on multiculturalism centres on its very basic values. Multiculturalism, at its base, holds that ethnic groups are entitled to retain and enhance their cultural heritage. Some critics of multiculturalism, however, argue that this approach is divisive. Central here is the assumption that a stable society requires a common identity and points of intergroup attachments. Citizens need to view themselves as simply Canadian and, in so doing, find common bonds and attitudes among one another. Multiculturalism, however, creates divisiveness insofar as it allows citizens to remain within their traditional cultural communities. As such, citizens will view themselves not as Canadians, but as French, English, Ukrainian, Chinese, or East Indian.

Supporters of multiculturalism often argue that the multiculturalism approach has stabilizing rather than divisive effects. Central here is the assumption that granting equal respect to all ethnic groups will lead to lower levels of racial and ethnic tension. Further to this, there's the notion that the very idea and practice of multiculturalism itself will enhance national identity and attachments to the Canadian nation-state. The Canadian national identity is rooted in the idea that citizens are able to retain their cultural heritage rather than be assimilated or combined into a single culture. Further to this is the notion that all ethnic groups will value their membership in the Canadian nation-state precisely because of this fact.

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Photo courtesy of Brian Seaman

Big Ideas in the Land of Boz

Brian Seaman

Democracy is a form of government that allows us to work out our disagreements without resorting to violence and war. That terse phrase resonates profound truth for me. I heard it during my stay in Bolzano/Bozen (capital of the northern Italian province of Bolzano) this past summer but, truth be told, I heard it outside of the classroom. I will return to the source of this comment in a bit.

I had learned much over my two weeks at an international summer school about minority rights and cultural diversity issues in the European Union. From June 21 to July 2, 2010, other people and I, ranging in age from mid-20s to early-50s and coming from 14 different countries, had gathered for an intensive workshop to hear presentations about – and discuss in break-out, case study sessions – the most pressing social and political issues facing the European Union. These issues were not unlike those occupying the political and academic spheres in Canada; issues such as:

- what constitutes citizenship in the modern, liberal state?
- what are the reasonable and defensible limits to the accommodation of religious and cultural practices?
- what rights can and should accrue to members of minority groups within the modern liberal state?
- how, if at all, should individual rights be reconciled with group rights?
- should individual rights, indeed, be reconciled with the rights of a group at all?

The session was hosted by the European Academy (EURAC) which is a private, multi-disciplinary research centre located just outside the historical district of Bolzano/Bozen with stunning views of the beautiful Dolomite Mountains all around. Located in the northern Italian autonomous region of Trento-South Tyrol, Bolzano/Bozen (Boz is my affectionate pet name for it) is the capital of the province called South Tyrol. South Tyrol is majority German speaking; the other province in the region, Trento, is majority Italian speaking. Trento-South Tyrol provides a successful model for linguistic and national minority group accommodation in a part of Europe that has been anything but a model for co-operation and accommodation throughout its bloody history. Indeed, as recently as the 1960s and 1970s, German-speaking secessionists in South Tyrol were bombing buildings and killing police officers in a campaign aimed at separating the majority German-speaking province of the region. That should sound familiar to Canadians or students of Canadian history.

In fact, in a lot of ways, you could say that Boz (a small city of only slightly more than 100,000 souls) was really a microcosm for the hatred, nationalism, and tribalism that characterized Europe throughout much

of the period of history when the nation-state (based on the notion of one common language and one *Volk*) dominated the political discourse. Indeed, that discourse persisted until the fledgling, early attempts at European union in the aftermath of the Second World War – the bloodiest and most destructive war in history. Early talks and treaties during the 1950s and 1960s laid the framework for the extensive political and economic reality that is the modern reality of the European Union: a network of 27 nation-states that some visionaries dare imagine to be the forerunner for a United States of Europe. Unfortunately, as those more recent, bloodily savage wars in the Balkan peninsula of the 1990s showed us, historical enmities and tribalism still exist.

Democracy is a form of government that allows us to work out our disagreements without resorting to violence and war. I think that statement rather nicely captures the harder edges of what political freedom means: those harder edges where one finds the awkward and difficult issues that concern identity, culture, and political/legal equality. These issues concern us all, and thus, can provide an opportunity to find common ground. However, they are the issues that can also divide us and allow things to spiral out of control if we are not mindful of the need to engage in principled, honest dialogue.

Democracy is a form of government that allows us to work out our disagreements without resorting to violence and war. That phrase also applies to those other harder edges – the boundaries of civilization as set by rule of law and principles of governance – which must be set, must be defended no matter the cost, in order to engage in the kinds of difficult discussions, deal-making, and power-brokering that keep those darker areas of political and social discourse in check. I refer here, of course, to regionalism, nationalism, and tribalism.

As I had alluded above, that description of the hard tasks facing a democracy did not originate in one of the dozens of sessions or discussions that I had participated in while attending the EURAC summer school about minority rights. Rather, that phrase about democracy as a means for resolving disagreement without resorting to violence originated with an energetic young German student. We were talking about cultural identity within a democratic context as we downed red wine and ate grilled beef at a party up in the Dolomite Mountains following the end of the EURAC summer school. Stefan said he could not claim credit for being the originator of the description of what democracy is all about. Be that as it may, though, I must give credit to him then for pulling the phrase out of his memory.

In reflecting on what I learned from my EURAC experience, the following dominant themes emerged for me:

1. this tenuous, fragile experiment in economic and political integration known as the European Union must endure and, indeed, should expand in scope;
2. there is a growing body of jurisprudence at the level of the European Court of Human Rights that has profound relevance for the growing concept of the universality of human rights within the democratic European context. Indeed, these European Court decisions are superseding the decisions of courts at the level of the individual nation-state members and are, as well, taking priority over the national policies of member states; and
3. the political and constitutional arrangements in South Tyrol provide a tangible example of a possible model for the eventual peaceful and just resolution of sources of sectarian strife such as that which exists in Northern Ireland or sources of ethnic nationalism such as exists in the Basque region of Spain.

The way ahead on difficult issues of cultural and ethnic identity within the New Europe will not be easy. However, as I contemplate the new friendships which I have made with the students and academics who are citizens of this New Europe – all of whom speak at least three languages and who increasingly see identity as a fluid and ever-evolving quality – I cannot help but feel optimistic for the future. I have to. I recall chatting with a Bosnian academic named Dzemal Sokolovic at an international buffet night that we had on the second Monday of our summer school. This man shared with me that dozens of his relatives had been killed during the Bosnian-Serb conflict of the 1990s. What I could have expected to hear was cynicism and despair from this man. Instead, he expressed profound hope that the young generation of New Europeans, with their multi-national and multi-linguistic identities to guide the way, will provide leadership not only to the New Europe but, indeed, provide an example to the world.

Brian Seaman, LLB is a Research Associate with the Alberta Civil Liberties Research Centre in Calgary, Alberta.

Brian Seaman, wearing the Canada hat, with Dr. Dzemal Sokolovic, back row centre, and participants in EURAC's summer 2010 session about minority rights. This was taken on EURAC's rooftop patio during international buffet night, June 28, 2010.

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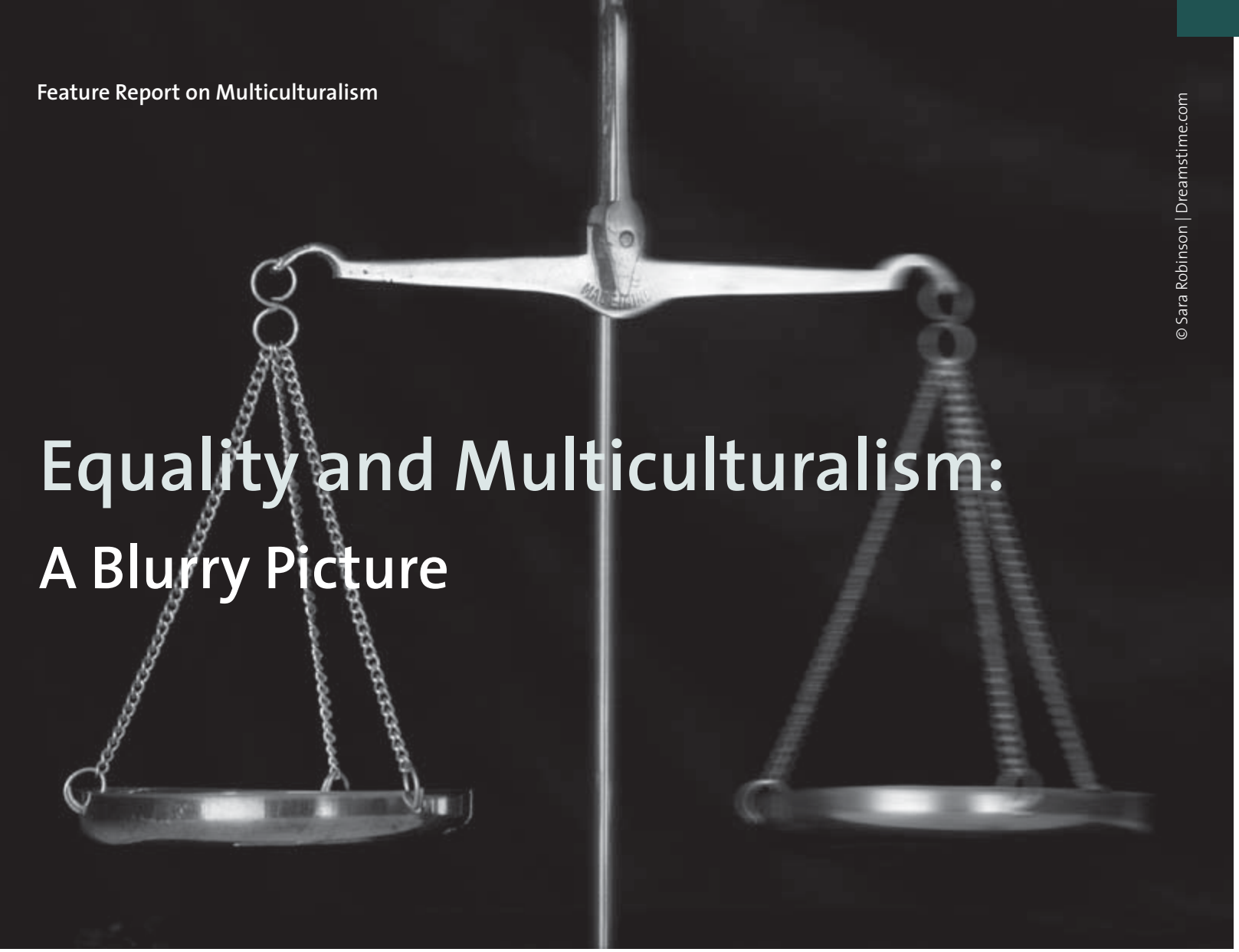

Equality and Multiculturalism: A Blurry Picture

Barbara Billingsley

"It's not fair!" This is a familiar phrase in Canada (particularly to anyone who has children of speaking age!). The idea of fairness, or equality, is a fundamental part of our society. As a nation, we have an intrinsic understanding that all people are deserving of the same fundamental level of treatment in society. This notion of equality dovetails with another fundamental Canadian value: the idea that all people are entitled to a basic level of respect, without regard to their ethnic or cultural heritage or their religious beliefs. In short, we recognize that Canada is a multicultural nation, and that all people should be treated equally. Where Canadian laws must draw distinctions between people, those distinctions should be based on an individual's actions rather than on association or affiliation with a particular ethnic or religious group.

The importance of the principles of equality and multi-culturalism in our society is recognized by many Canadian laws, including, most fundamentally, the Constitution of Canada, the supreme law of the land, with which all other laws must be consistent. In particular, section 15(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") states 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.

This constitutional guarantee of equality, which took effect on April 17, 1985, means that all laws passed in Canada (regardless of whether they are passed by the federal Parliament, by the provincial or territorial legislatures or by municipal governments)

must not unreasonably discriminate against individuals on the basis of personal characteristics, including ethnic origin, colour or religion. (The other sections of the Charter came into effect on April 17, 1982. The implementation of Section 15 was intentionally delayed by three years in order to provide legislators with a grace period for revising any legislation which did not comply with the equality guarantee.)

Soon after Section 15(1) of the *Charter* took effect, the Supreme Court of Canada made clear, in the case of *Andrews v. Law Society of British Columbia* (1989), that this provision protects equality in a substantive, rather than a formal, sense. That is, the equality guarantee is not automatically violated by legislation which creates a distinction between different groups of people. (After all, most laws do create some form of distinction). Conversely, the equality guarantee is not automatically complied with by a law which does not draw an express distinction between groups of people or which, on its face, appears to treat similar groups of people alike. The focus of the equality right is not on the form of a law, but on its content or effect. The problem, however, lies in designing a legal test which courts can use to predictably identify the parameters of this notion of substantive equality.

Over the past twenty-five years, the Supreme Court has struggled to articulate a legal test which gives meaning to the notion of substantive equality without unduly expanding or restricting the scope of the equality guarantee. For a time, the Court endorsed the notion that a law violates the section 15 right only if the law negatively impacts on an individual's human dignity *(Law v. Canada*, 1999). In 2008, however, the Supreme Court abandoned this characterization and restated the applicable legal test as follows: a law will run afoul of the equality guarantee where the law (1) creates a distinction based on a personal characteristic listed in section 15(1) of the *Charter* or on a similar characteristic AND (2) the distinction results in a disadvantage which perpetuates a stereotype or prejudice against the disadvantaged group (*R. v. Kapp*, 2008).

But what does this test mean in practical terms? What does equality under Section 15 *look* like under this test? What, if anything, can we say about the *types* of laws which the courts are finding comply with, or violate, the *Charter*'s equality guarantee, particularly in the context of multi-cultural issues? The purpose of this article is to examine this question by briefly reviewing five Section 15 cases which have been decided by Canadian courts. The five cases have been randomly selected; they bear no special relationship to one another beyond sharing a few fundamental features. Each case involves a challenge to legislation brought under Section 15; each case was decided after the Supreme Court of Canada's restatement of the equality test in 2008; and each case raises the question of equality in the context of an alleged unfairness relating to an issue of multiculturalism (broadly defined, as above, to include ethnic, cultural and religious matters). Together, the cases offer a 'snapshot' of what equality under the *Charter* currently looks in the context of issues relating to multiculturalism.

Over the past twenty-five years, the Supreme Court has struggled to articulate a legal test which gives meaning to the notion of substantive equality without unduly expanding or restricting the scope of the equality guarantee.

The Cases

Trang v. Alberta (Alberta Court of Queen's Bench 2010)

This case was brought before the Alberta Court of Queen's Bench by members of an Asian gang who had been held in jail while awaiting trial for charges of conspiracy to traffic in drugs. The gang members complained to the court that the treatment they received during their incarceration infringed their *Charter* rights. In particular, the inmates argued that their equality rights had been violated because they had been subjected to racist jokes and taunts and other racially discriminatory treatment by the remand center guards.

The Alberta court found that some of the remand centre guards did subject the inmates to racist taunts, jokes and comments. This finding then focused the Court on the legal question of whether the guards' behavior constituted a violation of the complainants' equality rights under the *Charter*. The Court held that, while acting in the course of their employment as correctional officers, the remand centre guards were 'government actors' and therefore their actions were properly subject to scrutiny under the *Charter*. The Court further concluded that the racial slurs and derogatory comments created a distinction based on race and that, in the circumstances, this distinction substantively discriminated against the complainants by perpetuating prejudice and stereotyping. According to the court, "[t]he context includes the fact that the complainants are inmates subject to the coercive and compulsory control by the COs who have made the racist comments or jokes, or … created a separate set of rules of the Asian inmates." Finally, although

the Court was not referred to any previous court decisions on the point, the Court found it to be "self-evident that racial taunts are discriminatory contrary to s.15" and relied on several court cases involving complaints brought under provincial human rights legislation to bolster this conclusion. The fact that the impugned behavior took place in a prison was pivotal to the Court's finding: "… in this case, the prison context must be kept in mind. Prisoners are subject to the psychological and physical control of the state. All actions of the state's representatives are augmented by this fact of compulsion … a prisoner has no choice regarding their environment."

Galganov v. Russell
(Ontario Superior Court of Justice 2010)

This case concerned a by-law passed in the Township of Russell, Ontario. The by-law, which required all new exterior commercial signs in the township to be in both English and French, was challenged by two businessmen. One of the complainants wanted to post a business sign in English only; the other complainant wanted to post a business sign in French only. One of the arguments made by the businessmen was that the by-law unjustifiably violated the *Charter*'s guarantee of equality.

The Ontario Court of Justice dismissed the businessmen's equality complaint for two reasons. First, the Court pointed out that section 15 of the *Charter* does not list language as a protected ground of discrimination. Second, the Court found that laws which promote the equal status of the English and French languages are expressly authorized by Canada's Constitution. Accordingly, such laws cannot be found to violate the *Charter*'s guarantee of equality.

In this case, the Court relied heavily on sections 16(3) and 15(2) of the *Charter*. Section 16(3) states that:

> Nothing in this *Charter* limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

Section 15(2) states that:

> Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Court concluded that, since the purpose of the by-law was "to advance linguistic equality in Russell where a linguistically vulnerable Francophone population resides," the law was protected by s. 16(3) and by s. 15(2) of the *Charter*. In short, the Court concluded that a law which forces equal use of the French and English languages for the purpose of protecting a minority interest does not violate the *Charter*'s equality guarantee.

Cockerill v. Fort McMurray First Nation #468
(Ontario Superior Court of Justice 2010)

This case concerned the voting procedures used by the Fort McMurray First Nation. The Customary Election Regulations used by the band prevented band members who were not living on the reserve from voting for the chief and council members. Two members of the band, who lived off-reserve, argued that the voting restriction was a violation of the Charter's equality guarantee. In 2010 the Trial Division of the Federal Court concluded that the restriction did discriminate against band members living off-reserve and thereby contravened Section 15(1) of the Charter. However, the Court went on to find that the discrimination was justified under section 1 of the Charter because the restriction fulfilled an important purpose of making sure that the local band government served the residents of the reserve. Section 1 of the Charter provides that the rights and freedoms listed in the Charter are subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This provision permits legislators to enact laws which restrict Charter rights provided that the restriction is reasonable in the context of Canadian values. Accordingly, while the restriction violated section 15(1), it was still a valid law because it was a reasonable limitation on the Charter's equality guarantee.

The Trang case is probably the simplest case to understand because the facts provide an obvious example of mistreatment on the basis of ethnicity. The Court's decision likewise makes a point which should also be obvious: The Charter protects Canadians from government actions which treat individuals poorly or abusively because of their ethnic or cultural background.

Alberta v. Hutterian Brethren of Wilson Colony
(Supreme Court of Canada 2009)

In 2003, the government of the province of Alberta adopted a regulation which required all driver's licenses to include a photo of the license holder. Members of the Wilson Colony of Alberta adhered to a religious doctrine which prohibited them from having their photographs taken. Accordingly, they challenged the licensing regulation on the grounds that the licensing regulation violated their *Charter* rights, including the right to equality. A majority of

the Supreme Court of Canada held that the challenged regulation did not violate section 15(1) of the *Charter*. The equality argument was a secondary argument in the case. The primary argument of the complainants was that the legislation violated their freedom of religion, as protected by section 2(a) of the *Charter*. The Court found that, even though the regulation might be viewed as drawing a distinction on the grounds of religion (which is a prohibited ground under Section 15(1)), this distinction was not discriminatory because it did not arise from a demeaning stereotype directed at religious beliefs, but instead was developed as part of a neutral and rationally defensible policy choice; namely, the government's decision to require licensing photos in order to protect the security and integrity of the licensing system.

Ermineskin v. Canada (Supreme Court of Canada 2009)

This case involved a lawsuit brought by the Ermineskin Nation and the Samson Nation bands against the government of Canada. The bands argued that the government had breached its obligations to the bands with regard to investment of oil and gas royalties. As part of this lawsuit, the bands argued that, if provisions of the federal *Indian Act* prohibited the Crown from investing royalties for native bands, these provisions violated section 15(1) of the *Charter* by depriving people who are categorized as Indians under the *Indian Act* of the rights that are available to non-Indians whose property is held in trust by the Crown. The Supreme Court of Canada held that the distinction created by the *Indian Act* did not necessarily disadvantage Indians and, in any event, was not discriminatory within the meaning of Section 15(1) of the *Charter*. The Court found that the money management provisions of the legislation, which were based on the distinction between Indians and non-Indians, did not "preclude investment" but rather permitted the bands to invest funds on their own after following particular procedures, thereby giving "greater control and decision making [to] . . . the bands themselves." Further, under the statutory scheme "[a]ny expenditure of the funds for investment is required to be in the best interests of the bands." Accordingly, the Court concluded that the legislation did not draw a distinction that "perpetuates disadvantage through prejudice or stereotyping."

The Big Picture

What do these five cases tell us about the relationship between the *Charter*'s equality guarantee and multiculturalism in Canada? Each of the cases involve some aspect of multi-culturalism: ethnic origin (including Indian status, and within that classification, on-reserve versus non-reserve Indians), language, or religion. The *Trang* case is probably the simplest case to understand because the facts provide an obvious example of mistreatment on the basis of ethnicity. The Court's decision likewise makes a point which should also be obvious: the *Charter* protects Canadians from government actions which treat individuals poorly or abusively *because of* their ethnic or cultural background. This is, as the Court noted, "self-evident". We would expect no less. In the other four cases, however, the potentially negative impact of government action on particular ethnic or religious groups is much more subtle. These cases deal with legislation which may have the *effect* of adversely impacting multi-cultural interests even though the legislation is not intended to do so. These cases demonstrate that some level of legislative distinction on one of the grounds listed in section 15(1) of the *Charter* will be tolerated in Canada provided that the distinction is not based upon or related to a cultural stereotype and supports a valid government objective which is itself consistent with *Charter* principles.

This picture is at once reassuring and troubling. It is reassuring to know that the *Charter*'s equality provision can be used to protect us against overt government attacks on multiculturalism. In our democratic society, however, such attacks are rare. It is more often the case that legislative distinctions which touch on aspects of ethnicity or cultural heritage do so indirectly or for the purpose of promoting multicultural values (as in the *Galganov* case). For this type of legislation, the dividing line between unconstitutional laws and constitutional laws currently seems to be unpredictable. In short, after twenty-five years of court decisions regarding section 15 of the *Charter*, it is still difficult to say when a court will find that a distinction which has the effect of touching on multi-cultural considerations will offend the principle of equality.

In short, after twenty-five years of court decisions regarding section 15 of the Charter, it is still difficult to say when a court will find that a distinction which has the effect of touching on multi-cultural considerations will offend the principle of equality.

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Multiculturalism and Criminal Law

Charles Davison

Canada has always been a multicultural entity, but it is only in the last few decades that we have seriously begun to grapple with the challenges of adapting our criminal laws to best fit or apply to the myriad of religious and social values held – and the practices observed – by the different ethnic, religious, and racial groups which make up our society. Over the last 30 to 40 years, the ethnic composition of our communities has changed, as more and more newcomers from different parts of the world have immigrated to Canada. The enactment of the *Canadian Charter of Rights and Freedoms* in 1982 gave minorities the means by which they could seek greater recognition and accommodation of their beliefs and practices.

Any discussion of the impact of multiculturalism upon Canadian criminal law must include an appreciation of the differences between *substantive* and *procedural* criminal law. In general, we have usually not been prepared to change our substantive criminal laws in major ways to accommodate cultural differences. At the same time, we have been somewhat more open to procedural changes in order to preserve and respect as many different ethnic and religious practices and values as possible.

Substantive criminal law arises from and defines the basic values by which members of society are able to live together with mutual respect. These are the rules by which citizens determine what is right and wrong, what conduct is tolerated and what behaviour is condemned by the larger community. There is not a great deal of variation when it comes to the most essential rules which define criminal offences. This is probably because across all of humanity, there seems to be a fairly consistent understanding and agreement of what conduct is wrong in and of itself (known by the old Latin expression *mala in se*). Thus, regardless of geographical origin, most cultures and religions have relatively consistent rules against such acts as arbitrary

attacks upon – or the killing of – other members of the same community. Many cultures also have similar rules against the unjustified taking or destruction of another's property.

Canadian society is largely governed by the concept of equality among its members. Regardless of gender, ethnic or cultural background, social status, or religion, the goal of our substantive criminal law is to protect and preserve the personal safety and security of all individual members of the community. Thus, we may live together in peace and strive to fulfill our greatest personal potential. For this reason, significant changes to our substantive criminal laws – our definitions of what is right and wrong – are probably neither necessary nor appropriate as we welcome new Canadians into our society. Newcomers to Canada are expected to abide by our criminal laws as they adapt to life in this country. The criminal law applies to everyone, even regardless of the actual knowledge of that law, as ignorance of the criminal law is not considered an excuse for anyone – new arrival or Canadian-born – charged with having committed an offence.

One example of a change to the substantive criminal law in order to address a possible gap in the protection available to a segment of society is the 1997 criminalization of female genital mutilation (sometimes referred to as "female circumcision"). This is a practice which is followed in some societies and cultures in Asia, Africa, and the Middle East, and involves removing or injuring parts of the female genitalia (usually that of underage girls). There is no medical or health reason for this practice, and there is no benefit to the female involved; in fact, after the initial mutilation takes place, the girl or woman often suffers long-term and permanent medical problems.

In 1997, the World Health Organization and other United Nations bodies condemned this practice, and the same year the Canadian Parliament amended the *Criminal Code* to ensure that this practice would be included within the scope of the crime of "aggravated assault." Aggravated assault is defined as being an assault which results in, among other things, the wounding or maiming of the victim. Parliament added to this legislative provision to ensure that the concepts of "wounds" and "maims" would include the mutilation of a female's genitals.

Another example of a change in substantive Canadian criminal law, which reflects the multicultural nature of our society, took place shortly after the enactment of the *Canadian Charter of Rights and Freedoms* in 1982. Unlike the previous example, however, this change in our law involved removing an offence, and was made by the courts instead of Parliament.

It had been against the law to conduct business on a Sunday since before Confederation in 1867. This prohibition was primarily based upon the belief that Canada was a Christian nation. In 1982, however, a Calgary drug store challenged the validity of *The Lord's Day Act* on the basis that, in light of the constitutional guarantee of freedom of religion for all persons, legislation which favoured the Christian religion – by protecting the sanctity of that religion's holy day – could no longer be considered valid and lawful. In 1985, the Supreme Court of Canada agreed and struck down the legislation on the basis that it infringed upon the freedom of religion of adherents and observers of other faiths and practices.

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These two examples demonstrate ways our substantive criminal laws have been "fine-tuned" in order to address changes in our society brought about by multiculturalism. In the first situation, a social value or practice which causes serious harm has been outlawed in order to ensure that potential victims – girls and young women – are protected equally as would be any other member of Canadian society. In the second example, a legal impediment to full and equal participation in all aspects of our society by minority religious and cultural groups was struck down in order to ensure that as many individuals and groups as possible can equally share in the benefits offered by enshrinement of freedom of religion in our Constitution.

In contrast to the situation concerning substantive criminal law, our rules of criminal procedure may be adapted somewhat more readily to meet the values and practices of many different cultures and ethnic groups. Criminal procedural law is the set of guidelines and requirements we follow as decisions are made concerning those who are alleged to have broken the substantive law. Criminal procedure includes everything from how allegations of criminal conduct are to be made and brought before the courts to the process followed in trials and other courtroom proceedings. It is possible, and quite appropriate, that criminal procedural laws be modified where necessary to accommodate the values and practices of religious and ethnic minorities. Otherwise, these groups might be denied the full protection of the substantive laws if forced to choose between their own beliefs and trad-

A very early example of changes made to accommodate the beliefs and practices of minority groups is found in the legal requirement that evidence given in court be under oath.

itions and sometimes outdated and rigid legal habits.

A very early example of changes made to accommodate the beliefs and practices of minority groups is found in the legal requirement that evidence given in court be under oath. The two basic requirements of an oath were a belief in a supreme being and a system of reward and punishment in an afterlife. Long ago, the common law of England and Canada recognized that administering a Christian- and Bible-based oath to witnesses who did not believe in that religion would not be effective in binding such persons to tell only the truth as they gave their evidence. Therefore, courts began to permit witnesses to swear upon the holy books of their own religions and to engage in such other practices as would, according to the individual's own beliefs and values, represent a solemn undertaking to tell only the truth as he testified. A 1904 British Columbia case, for example, discussed an oath taken according to a Chinese practice of writing one's name on a piece of paper which was then burned to symbolize the burning of the soul of the witness if he then failed to tell the truth.

Another example of such a change to our laws of criminal procedure came with the explicit enshrinement in the *Charter of Rights* of the right of any party or witness in legal proceedings to have an interpreter. In light of Canada's officially bilingual character, criminal proceedings may be conducted in either English or French. However, members of First Nations communities, ethnic and religious minorities, and visitors from foreign countries who understand and speak neither of our official languages may also become involved in criminal proceedings. In order to ensure that they are able to understand what is taking place, and to participate fully, it is essential that the proceedings be translated and interpreted into a language they comprehend. A failure in proper and adequate interpretation can lead to an order for a new trial if an accused person has been convicted in the absence of required translation.

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The most recent example of an effort to accommodate the practices and values of a minority may be the case of an Ontario sexual assault complainant who sought to testify wearing a niqab. A niqab is a face covering or veil which permits other persons to see only the eyes of the woman wearing it. In this case, the complainant testified her religious beliefs required that she not expose her face to any man except those who were part of her direct family. She was called to testify against an uncle and cousin who she said had committed sexual assaults against her a number of years before.

One of the accused objected to the witness being allowed to wear the naqib in court as she testified, citing the traditional principle that accused persons are entitled to challenge their accusers face to face. In October 2010, the Court of Appeal of Ontario held that a judge faced with such a situation must begin by assessing the religious nature of the values in question and the sincerity with which they are being asserted. Upon being satisfied that the beliefs are sincerely held, the judge must then determine the extent to which honouring those values or practices in the courtroom might infringe upon the fair trial rights of an accused person. Ultimately, the judge must attempt to balance and reconcile these two rights. The witness herself may have input into possible methods of achieving the most workable and fair balance of the competing interests. But in some cases, it may simply not be possible to achieve such a balance, in which case the fair trial rights of the accused must be preserved and given priority.

The Ontario Court of Appeal decision perhaps best represents the ongoing challenge faced by Canadian courts as we continue to attempt to accommodate the widely varied beliefs and practices of so many members of our modern, multicultural country. Rarely will there be a single, easy answer when rights and freedoms conflict. Yet it is necessary to find the proper balance if we are to ensure that all members of our ethnically, religiously, and racially diverse society have equal protection of our laws including equal access to the courts. If we truly value the multicultural makeup of present day Canada, we must ensure, to paraphrase the Court in the Ontario case, that participation in the justice system does not come at the cost of compromising one's religious or cultural practices and beliefs any further than is absolutely necessary in the circumstances.

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Religious Accommodation in the Workplace

Peter Bowal and Maxim Goloubev

Religious tolerance is a very important value of Canadian society …

– Supreme Court of Canada, in *Multani* (2006)

Introduction

Private sector employers are not required to meet *Charter* obligations. Apart from minimum regulated standards for pay and working conditions, the only human right that employees in private companies enjoy is equality.

This extension of equality rights to the private employment sector facilitates social inclusiveness. A job created by private capital serves the common good. Because it supplies the means of livelihood and self-esteem for most people, a job is a life essential. In our multicultural society, jobs cannot be offered or withheld on the basis of permanent, visible, personal attributes that have nothing to do with performance. It is unimaginable, for example, that all people over age 45 would be denied jobs solely because of their age.

These equality rights in the private sector are not purely constitutional; they are also found in regular provincial and federal human rights legislation. As ordinary legislation, these rights can be amended by simple legislative majority. Nevertheless, in our current rights-sensitive era, no one would propose to weaken these legislative equality rights.

General Legal Principles

Section 7(1)(b) of the *Alberta Human Rights Act* serves as a representative example of legislated workplace equality rights in the private sector: "No employer shall discriminate against any person with regard to employment or any term of condition of employment … because of the race, ***religious beliefs***, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of that person or of any other person." [emphasis added]

This article examines religious equality. What does accommodation of religion look like in the workplace?

Personal moral, ethical, or political beliefs are not protected, nor are beliefs that promote violence or hate towards others, or that are unlawful. When religious discrimination at work is alleged, human rights commissions consider the beliefs claimed on a case-by-case basis.

Who is an "Employer"?

Due to his religious beliefs, electrician Devinder Wadhwa did not shave his face. Syncrude contracted with a subsidiary company, Casca Ltd., for the supply of clean-shaven union electricians, pursuant to Syncrude's safety handbook, to Syncrude's site on a cost-plus basis. All electricians technically remained employees of Casca Ltd. although Syncrude controlled their work on the site. Was Syncrude an "employer" for purposes of the *Alberta Human Rights Act*?

The Alberta Human Rights Tribunal said "employ" should be given broad interpretation, akin to "utilize," to advance the purposes of human rights legislation. Since these electricians provided services vital to Syncrude's operations, Syncrude was held to be an "employer" within the jurisdiction of the Act.

What Constitutes Protected Religious Beliefs?

Legal protection, and corresponding duty of accommodation, covers "religious beliefs" which presumably are broader than "religion." The term "religious beliefs" is undefined in most legislation perhaps so as not to limit it.

Religion refers to an identifiable system of belief, worship, and conduct, including Native spirituality. According to the Supreme Court of Canada in *Amselem* (2004), religion is "about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to his or her self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith."

Personal moral, ethical, or political beliefs are not protected, nor are beliefs that promote violence or hate towards others, or that are unlawful. When religious discrimination at work is alleged, human rights commissions consider the beliefs claimed on a case-by-case basis. Religious beliefs have been the subject of numerous court and human rights commission cases.

Unless certain religious beliefs are a bona fide occupational requirement, they cannot be part of the job announcement, application form, or interview. Employers cannot ask questions to elicit the applicant's religious affiliation, places of worship, or customs observed.

"*Bona Fide* Occupational Requirement" Exemption

An employer must not intrude upon any employee's religious beliefs or practices at work unless it can demonstrate that a "*bona fide* occupation requirement" of the job necessitates such discrimination. For example, a religious denominational school may legitimately reject non-adherent teachers when hiring. In the 1982 case of *The Canadian Human Rights Commission v. Etobicoke*, the Supreme Court of Canada that the employer must show that the term or condition of employment that is discriminatory was made in good faith and is integral to carrying out the functions of a specific position.

In the case of *Bhinder v. CN* three years later, company policy required the employee to wear a hard hat on the job. Bhinder was a Sikh whose religion called for a turban at all times. The employer tried to accommodate Bhinder by offering him other work for which hard hats were not mandatory. He refused and was dismissed. The Supreme Court of Canada said the hard hat rule, for employee safety purposes, was a *bona fide* occupational requirement made in good faith.

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Religious Practice and the Workplace

An employee's religion may call for prayer at specific times during the day or worship and assembly on a certain day of the week. Work and break schedules may be shifted to accord with prayer, assembly, holy days, or religious fasting. A quiet place may be set aside on site.

Another common scenario is flexibility toward a uniform dress code. Employers may relax requirements relating to head coverings and facial hair, and may permit religious dress that departs from corporate dress policies.

Some religious beliefs may conflict with the performance of some job duties. For example, a Christian

physician or pharmacist may object to counselling or facilitating abortions. Some pastors might want to decline presiding over same-sex marriages. Muslims and Jews may object to handling pork. Some people object to consumption of alcohol on religious grounds. Accommodation can be as simple as implementing a conscience clause at work to allow the religious objector to opt out and be excused. It is not yet clear whether conscience clauses are an employee's legal right.

Religious employers, however, will have a harder time extending their religious beliefs and practices to their employees. Christian Horizons, a faith-based charity with a Christian mission asked employees to sign a "Lifestyle and Morality Statement" barring, among other things, "extra-marital sexual relationships (adultery), pre-marital sexual relationships (fornication), reading or viewing pornographic material [and] homosexual relationships…" Earlier this year, an Ontario court found the religious employer to have transgressed a gay employee's equality right based on sexual orientation. *Bona fide* occupational qualification only exceptionally attaches to the employer claiming religious belief on proof of the job's needs, whereas equality for religious beliefs remains the norm for all employees. Religious employers may not be able to demand employees adhere to their faith beliefs when they provide secular services.

Reasonable Accommodation

Discrimination does not have to be intentional. Workplace religious discrimination occurs whenever employer policies or actions inhibit essential religious activity, even if the policies were in place before the employee was hired. The discriminatory effect of the behaviour is important: one does not have to be singled out for harm. The employer must reasonably accommodate the religious practices of the employee.

Theresa O'Malley was a Seventh-day Adventist employed by Simpsons-Sears. Her religion forbade her working from sundown Friday to sundown Saturday. As no full-time shifts were available that did not require work on Friday or Saturday, O'Malley was dismissed. Simpsons-Sears claimed this was a neutral rule imposed on all employees. In 1985, the Supreme Court ruled that the discriminatory intent of the employer is irrelevant in determining unlawful discrimination. Rules imposed upon employees for good economic or business reasons can still be unlawfully discriminatory. The Court said that employers have a duty to accommodate religious employees to the point of undue hardship on cost, health, safety, or other impacts.

Discrimination does not have to be intentional. Workplace religious discrimination occurs whenever employer policies or actions inhibit essential religious activity, even if the policies were in place before the employee was hired. The discriminatory effect of the behaviour is important: one does not have to be singled out for harm. The employer must reasonably accommodate the religious practices of the employee.

Larry Renaud was a school custodian and a Seventh-day Adventist in British Columbia in 1992. His work schedule, by collective agreement, had him working Friday shifts from 3 p.m. to 11 p.m. He was dismissed, after he and his employer failed to reach a compromise. The employer blamed the collective agreement, which set out terms for all employees. The Supreme Court sided with Renaud, ruling that one cannot contract out of human rights law, so this could not be a *bona fide* occupational requirement. Both the union and the employer have the duty to accommodate. Unions may approve exemptions from the collective agreement for religious employees. Allowing Mr. Renaud to work Sunday to Thursday instead of Monday to Friday would not have caused the employer undue hardship.

In 1990, Jim Christie was an Alberta dairy employee who joined the Worldwide Church of God, which expected him to take certain days off work. His employer refused his request to take Easter Monday off for religious observance. Christie took the day off work and was replaced the next day. In this *Central Alberta Dairy Pool* case, the Supreme Court of Canada found for Christie but refused to precisely define "undue hardship", preferring that it be decided on a case by case basis. Relevant factors will include the employer's size, workforce safety, restructuring flexibility, and disruption to business operations.

Canadian protection of religion in the workplace goes much farther than comparable U.S.

In 1985, the Supreme Court ruled that the discriminatory intent of the employer is irrelevant in determining unlawful discrimination. Rules imposed upon employees for good economic or business reasons can still be unlawfully discriminatory.

Overall, employers will find religious accommodation to be one of the least complicated and burdensome equality obligations. More claims arise from the other enumerated prohibited grounds of discrimination.

law. In a virtually identical case to *Renaud*, an American employee was dismissed for not working a shift on his Sabbath. In *Trans World Airlines, Inc. v. Hardison*, the Supreme Court of the United States approved the dismissal on the ground that accommodating the religious employee's request would punish the other employees asked to take his shift. In the U.S., employer accommodation is expected, but not to anything approaching undue hardship.

Does the employee have to be paid for holy days off work? Two Christian holidays (Christmas Day and Good Friday) are also statutory holidays in Canada. Some employers argued that because these paid "secularized" holidays are statutory, the employer has no obligation to accommodate employees by paying for other religious holidays. In the 1994 case of *Commission Scholaire regionale de Chambly v. Bergevin* the Supreme Court of Canada disagreed. In that case, three Jewish teachers employed by a Catholic school board were denied paid leave to observe Yom Kippur, although they could have taken the day off without pay. The Court said the employer's offer of unpaid leave to the Jewish teachers was insufficient accommodation. Paid leave would not cause undue hardship to the school board.

Gurbaj Multani, a 12-year-old Sikh student in Montreal, was forbidden to wear his ceremonial kirpan dagger to school due to a "no weapons" policy. The school board feared the kirpan presented safety issues, but Multani's family said that banning the kirpan violated his religious rights. In 2006, the Supreme Court of Canada unanimously ruled that his religious rights had been infringed. Ontario had decided in the 1990 case of *Pandori v. Peel Bd. of Education* that the kirpan was allowed as long as it was a reasonable size, worn under clothing, and secured with a stitched flap so it could not be removed from its sheath. The fact that there were no incidents of misuse of a kirpan in Ontario schools persuaded the Supreme Court. If kirpans are permitted in schools, they will likely be permitted at work.

Jennifer Burgess, a pregnant Mormon dental assistant, was dismissed after receiving four reprimand letters. She had failed to sterilize instruments, was absent from work without notice or explanation, and failed to attend scheduled meetings with her employer and other staff. Claiming her absence was due to her pregnancy and church attendance, she argued that her employer failed to properly accommodate her. The Alberta Human Rights Tribunal in 2009 found that the employer did not know of her pregnancy or of her religious beliefs. Her complaint was dismissed. Employees must inform employers of accommodation needs where they are not obvious.

Conclusion

Overall, employers will find religious accommodation to be one of the least complicated and burdensome equality obligations. More claims arise from the other enumerated prohibited grounds of discrimination. Religious belief and practice is generally clear and understood. Accommodation responses, where necessary, are often readily apparent. In any case, employees should provide information about their religious beliefs and requested accommodations so that employers can assess and respond.

Canadians do not have to choose between getting and keeping our employment of choice on the one hand, and subscribing to our religious beliefs and practising them on the other hand. We do not have to choose between job and religion. We can have both.

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Ethics and Cultural Difference:

Accommodation Must Have Its Limits

Janet Keeping

Canadians should be open to accommodation of difference that enhances life in Canada, or at least makes sense. And most are – most of the time. But there must be limits to Canadian embrace of diversity and accommodation of difference, because not everything different (or diverse) is different in a good way. Some of what is being brought to Canada from elsewhere is different, but not desirable.

For example, some people come to Canada to escape religious persecution and enjoy freedom of religion as is guaranteed by the Canadian Constitution. We should offer them sanctuary – it is the right thing to do. But the same people may have little idea of what it is to live in a society where women are entitled to the same freedoms as men. If they assume that gender or inter-generational relations can continue in Canada as they have known them in their

To use another example, not related to gender, many people immigrating to Canada come from highly corrupt countries where police and judges are routinely bought off. Importing profound, pervasive corruption to Canada would make our law enforcement and judicial systems more "diverse," for sure, but in an entirely bad way.

One controversy in Quebec over the niqab – which leaves only the eyes uncovered – provides a good opportunity to explore how reasonable limits to embrace of diversity and accommodation of difference might be set.

countries of origin, serious trouble may ensue. Aqsa Parvez's father, who earlier this year pleaded guilty to murdering her in what was clearly an "honour killing," came to Canada as a refugee.

To use another example, not related to gender, many people immigrating to Canada come from highly corrupt countries where police and judges are routinely bought off.[1] Importing profound, pervasive corruption to Canada would make our law enforcement and judicial systems more "diverse," for sure, but in an entirely bad way. Indeed, it is to escape lousy governance – such as rampant corruption and its cruel consequences – that many seek a better life in Canada.

Yes, of course: many new Canadians arrive with a well-informed and passionate commitment to Canada's public values and way of life, often stronger than that of many long-time Canadians who take what we have for granted.

But this is not true of all new Canadians and, faced with problematic attitudes and practices on the part of some newcomers, many well-intentioned Canadians are unsure how to react. They are conflicted – torn between their inclinations to embrace increased diversity and accommodate difference (praiseworthy inclinations for sure) and their instincts to reject change which seems to threaten human rights or other elements of our democracy, or which seems just absurd or unjustifiably demanding.

Quite a few of these conflicts have focused on cultural or religious dress codes for Muslim women, especially the face coverings that some Muslim women wear (both the burka and the niqab).

One controversy in Quebec over the niqab – which leaves only the eyes uncovered – provides a good opportunity to explore how reasonable limits to embrace of diversity and accommodation of difference might be set. The controversy concerned a woman in Montreal who insisted on wearing a niqab to French language class. Expelled from class, the woman claimed the province of Quebec discriminated against her. Instructors say her refusal to uncover her face hindered learning; her pronunciation could not be corrected because they could not see her mouth.

Reports also suggest that she refused to deal with male students and instructors. The issue prompted the province to formulate "new rules on religious displays for those seeking to use public services."
However this specific case unfolds as it winds its way through the Quebec Human Rights Commission, it provides an opportunity to consider an immensely important question: how far, ethically, do institutions have to go before they can justifiably say "enough is enough"?

Let's start with the obvious: there must be a point beyond which accommodation demanded by individuals would do more harm than good. The problem is determining when that limit has been reached and defending it with sound reasons.

Many people are impatient with anyone, but especially immigrants, seeking any relaxation of rules or other special treatment. But equality is not achieved by treating everyone alike. For example, most people want and need full-time work but some have special needs, such as enough hours away from work every day or week to take care of young children or elderly relatives. Their needs should be accommodated wherever possible with part-time employment opportunities.

As another example, stairs serve the able-bodied well, but people confined to wheelchairs need elevators. Canada is a better, fairer country for its willingness to accommodate those with obvious special needs, such as the disabled. But logic and past experience prove that we cannot stop there. We must extend the same consideration to others who, legitimately, request special treatment.

The thorny question remains: how far is too far? First, we know we have reached the limit when any further accommodation would put unreasonable strain on the organization involved. Human rights law requires employers and providers of public services to accommodate, but only up to the point of "undue hardship," and on the face of it, this makes good sense. However, that raises the question of what constitutes undue hardship.

Let's start with the obvious: there must be a point beyond which accommodation demanded by individuals would do more harm than good. The problem is determining when that limit has been reached and defending it with sound reasons.

The case of the niqab-wearing woman in Montreal gives us some idea of how to answer that question. Apparently, the woman insisted on having a female instructor in her French course. But administratively, such a guarantee would be difficult, if not impossible – sometimes the available teachers are female, sometimes male. And devoting scarce resources to trying to satisfy her demand that she would always be taught by a female could jeopardize other programs and activities.

Second, common sense tells us that the accommodation limit has been reached when to go further would undermine the very activity in question. The language school's position was that the student's face covering made the learning of French difficult, perhaps impossible. I think it is entirely plausible that baring the face is necessary for correction of pronunciation and, if so, then wearing a niqab renders participation in a conversation class futile. If seeing the face is necessary for language learning, then it is ridiculous to allow someone who refuses to bare her face to stay in class, and it would be wrong to insist that our institutions behave in a ridiculous manner. But this "functional" approach to accommodation of difference, some might say, ignores the obvious, overarching issue: in a modern liberal democracy such as Canada, where women are involved in every aspect of society, isn't it fundamentally unreasonable to demand that face covering be accommodated?

I sympathize with the view that it is preposterous to expect accommodation of face covering in Canada. Like many others, I also view the niqab and burka (but not the hijab which covers only the hair) as "ambulatory prisons" – embodiments of women's oppression.

Nevertheless, we have to be very careful about the attitude and tone which we bring to these discussions. We must be respectful of those with ideas very different from our own. That doesn't mean we have to agree with them, but we cannot, for example, assume that every woman who wears this kind of garb is coerced into doing so.

And because Canadians correctly put great importance on freedom of conscience – the right to live our lives according to the principles we consider most important – we cannot blithely conclude that such dress should be banned from public institutions as a general rule.

It is perfectly justifiable, I think, to maintain that women (and men) taking publicly-supported language courses should bare their faces, because seeing the mouth is necessary for the correction of pronunciation. But even if correct, such a conclusion does not justify a general ban on burkas or niqabs in connection with access to public services such as libraries.

… in a modern liberal democracy such as Canada, where women are involved in every aspect of society, isn't it fundamentally unreasonable to demand that face covering be accommodated?

Why not? Because even if the uncovered face is necessary for language learning, it is not necessary for using public libraries unless they are offering language classes, in which case the same considerations apply.

Canada is a better place than many in the world because we think it is important to treat everyone fairly and we know that "fairly" does not mean "the same". But there is growing impatience with what some see as the incessant demands of some minorities for accommodation of their different cultural practices such as wearing the niqab or burka. In order to protect our openness to diversity and difference and be ready to deal with the next controversy, confident we are doing the right thing as a society, we have to engage with each other and the issues. As Charles Taylor wrote in the *Globe and Mail* recently, "Our [democratic] societies will hold together only if we talk to each other with openness and frankness, and, in doing so, recreate a certain sense of solidarity from all our different roots."[2]

Janet Keeping is a lawyer and President of the Sheldon Chumir Foundation for Ethics in Leadership which is based in Calgary.

Notes

1. For the last few years, three of the countries from which the most immigrants to Canada have come are China, India, and the Philippines. While Canada ranked 8th on Transparency International's 2009 Corruption Perceptions Index of 180 countries – and the lower the ranking, the less the corruption – China ranked 79th, India 84th, and the Philippines 139th. Another major source country for Canadian immigration is Pakistan, which also ranked 139th.
2. Charles Taylor "All for one, and one for all", *The Globe and Mail*, Thursday, September 30, 2010.

Cross-Border Mediation – Family Context

Max Blitt

Canadian, American, and Commonwealth practitioners are familiar with the western model of mediation – a neutral third party assists the parties in reaching their own agreement.

What happens when we are dealing with families that have a different religious or cultural value system? In some cultures, the mediator is chosen because he or she knows the parties and is able to influence them in reaching an agreement or accepting a ruling that brings harmony, not only to the parties, but to their communities as well.

Historically, mediations have been common in Christian and Islamic alternate dispute resolution, Jewish, and ancient Hindu tradition and can lead us to conclude that there was success in settling disputes. Why not continue such traditions that are deeply rooted in so many religious faiths? How can mediators educate themselves about the various faiths and cultures?

Mediators can access the Internet to obtain information about the legal system of a foreign country. Similarly, information about a specific country's history, culture, and current affairs are also available on the Internet. Mediators and legal counsel can access the tools to enable them to successfully understand the background of the parties.

In order to achieve resolution in cross-border mediations, it is important for legal counsel and mediators to have a working knowledge of the parties' cultural nuances and behaviours. For example, the German model involves two mediators of different sexes to enable the parents to feel understood during the mediation. A further prerequisite of the mediation team is different professions such as legal counsel and a psychologist. Both mediators must also reflect each parent's cultural background and language. I was privileged to have had an opportunity to discuss

the German model in greater detail in discussions with Mr. Christoph C. Paul in Berlin in July 2009.

At the 2010 International Bar Association in Vancouver, B.C., I, along with Margeurite C. Smith of Seattle, Washington, demonstrated the co-mediation model in the context of a *Hague Convention* case using as an example an abduction from Canada to the U.K. followed by a custody/relocation application in Canada after the children were ordered returned from the U.K. In the demonstration, the mediators were both male and female.

Regarding qualifications, mediators in cross-border disputes should have:

- prior experience with international family disputes;
- an understanding of the principles of the 1980 *Hague Convention* on the civil aspects of international child abduction;
- access to a relevant network of contacts, both domestic and international; and
- some knowledge of various legal systems and how mediation agreements can be incorporated into legal orders or agreements in competing jurisdictions.

As an example, I was retained on a custody matter involving an Egyptian Muslim father and a Lebanese Christian mother. The mother and the children were in Lebanon. Lebanon has communities of *Sunni* and *Shia* Muslims, as well as eighteen official Christian denominations, a small Jewish population, and a significant *Druze* community. Personal status matters are governed by the religious authorities of each community (**www.reunite.org/pages/islamic_information_resource.asp**). I was able, with experienced counsel located in Lebanon, to reach a settlement.

In the context of cross-border family disputes, mediation can work parallel to the *Hague Convention* (**www.hcch.net**) where the countries involved are signatories. Due to the *Hague Convention's* stress on timeliness to resolve cases of wrongful removal or wrongful retention, mediation must be engaged very early in the process. Mediation in such a case could:

- avoid the stress of litigation in two countries;
- avoid the children being moved from the requesting state to their home state only to be returned later after a disputed custody proceeding that allows relocation;
- avoid significant delay caused by litigation in two countries;
- avoid the costs of each party retaining two counsel, one in the requesting state and the other in the home state; and
- empower the parents to make the decisions for their own children as opposed to the courts.

Finally, any mediation, and certainly any international mediation, should be premised upon the following principles: informed consent, voluntary participation by the parties, the best interests of the child test, neutrality of the mediator(s), fairness, and confidentiality. In other words, until the mediation is reduced to a memorandum of understanding which is producible, discussions that take place during the mediation are privileged and not subject to disclosure.

As the demographics of countries such as Canada continue to change, where parties to marriage and marriage-like relationships bring different cultural and religious views to their relationships and where separations and divorce result, cross-border mediation can provide a useful alternate dispute resolution mechanism.

In order to achieve resolution in cross border mediations, it is important for legal counsel and mediators to have a working knowledge of the parties' cultural nuances and behaviours. For example, the German model involves two mediators of different sexes to enable the parents to feel understood during the mediation.

Max Blitt is a lawyer with the firm of Spier Harben in Calgary, Alberta. He has extensive experience dealing with the Hague Convention on the Civil Aspects of International Child Abductions, and has assisted clients in the United States, Poland, France, Germany, Mexico, Brazil, Sweden, Italy, South Africa, Lebanon, and the United Kingdom.

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Columns

Not-for-Profit Law

Peter Broder

Regulatory Bias

It is now commonplace that the traditional distinctions between the private, public, and voluntary sectors are becoming blurred. There is, undoubtedly, an element of truth to that given the rise of "triple bottom lines", public-private partnerships, and interest in social enterprise in the voluntary sector. But two recent federal regulatory initiatives show that voluntary sector organizations remain much more prone to strict oversight than their for-profit counterparts. This means that if there is indeed an increasing overlap between the sectors, charities and not-for-profit organizations face a marked disadvantage in how they operate.

Over the summer, Industry Canada released its proposed Regulations for the new *Canada Not-for-Profit Corporations Act* (*CNCA)*. The Regulations establish the thresholds and parameters that will apply when the department begins to administer the new law.

The *CNCA* drew controversy when it was being developed because, although it replaces a statute that is nearly a hundred years old and modernizes the framework under which federal not-for-profit corporations will be constituted and operate, it features an approach under which voluntary sector organizations are regulated in a manner akin to the way for-profit entities are under the *Canada Corporations Act (CCA).* This entails, in most instances, treating members as equivalent to shareholders and giving them similar rights and remedies.

The importance of moving to an approach where stakeholders become primarily responsible for minding the governance and operations of federal not-for-profit corporations, and away from the activist government regulation of the old legislation, should not be gainsaid. However, the shift to shareholder-style democracy is a difficult cultural change for some types of not-for-profit organizations – such as faith-based groups.

Disputing whether it is appropriate to equate members and shareholders can distract from another crucial element of the new regulatory scheme. Although a greater emphasis on the role of members was one aspect of the new Act, it also imposed an onerous accountability regime based on the source and amount of the revenues received by the corporation. If a not-for-profit corporation derives more than $10,000 from the public or government during a fiscal year, that triggers a set of enhanced accounting and disclosure requirements.

This accountability regime betrays an attitude to regulating not-for-profit corporations more in line with the historical approach of government of the sector rather than the modernized take that is supposed to inform the new statute.

Differential accountability is not unprecedented. Under the *CCA*, corporations making public share offerings have different accountability requirements than private companies. However, imposing enhanced obligations on the relatively few publicly-traded companies in the for-profit sector is not the same as requiring increased accountability of the huge percentage of not-for-profit corporations getting revenue from government or the public.

What's evident here is the very different regulatory mindset that seems to apply to voluntary sector groups. Under the *CNCA,* the threshold for the enhanced requirements kicking in is $10,000 – at which point, the organization becomes what is known as a "soliciting corporation." Any soliciting corporation with $50,000 in annual revenue must (subject to certain exceptions) hire a public accountant and undergo a more rigorous review of its books than an equivalent size group that isn't a soliciting corporation. It may also have enhanced filing and/or disclosure obligations.

If the same criteria applied to for-profit entities, massive numbers of companies would be caught by the provisions. Federal, provincial, and municipal governments routinely fund for-profit concerns through measures like salary subsidies, economic development grants, and support programs for product development and marketing (see **www.grantcanada.com**). In Alberta, for example, the provincial government supplements the wages of workers in accredited for-profit child care facilities in amounts that would see any organization with more than a handful of employees easily surpassing the $10,000 threshold. And where this type of direct funding isn't available, indirect support is often available in the form of preferential tax treatment and other measures.

The double standard applied to the voluntary sector is even more apparent in a private members Bill being considered by Parliament. That legislation, Bill C-470, proposes a $250,000 cap on compensation for employees or contract staff of registered charities. Charities not complying with the cap would be subject to deregistration. A key rationale behind the measure is the fact that registered charities can issue receipts to their donors – which means that the government foregoes the tax revenue associated with these donations.

Supporters of the Bill suggest that, even though the contribution made by the government through its preferential tax treatment often represents only a small portion of the overall revenues of the registered charity, this contribution should allow the government to dictate decisions made by the governance body of the organization on how to staff and operate the charity.

The foregone revenues on the Research and Development Tax Credit – let alone other preferential tax treatment available to for-profit businesses – exceeds the tax expenditure on credits and deductions for personal and corporate charitable donations. Yet there is no suggestion that the measure be extended to the for-profit firms that typically benefit from the Research and Development Tax Credit.

Perhaps it is time to level the playing field and either apply these measures to everyone or to no one.

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A Famous Case Revisited

Peter Bowal and Kimberly Bowal

Whatever Happened To ... Feeney?

People are famous for different reasons. Some buy fame and immortality by forking over millions of dollars for naming rights to professional schools and arenas. If something bears your name in criminal law, however, it comes free. Some singular legal significance of your case carries long-term notoriety. By way of example, murderer Michael Feeney has a warrant named after him.

Early on the morning of Saturday, June 8, 1991, the body of 85-year-old Frank Boyle was found in his ransacked home in remote Likely, British Columbia, population 250. He was brutally bludgeoned to death by five blows to the head with a crowbar, each strike having enough force to kill him.

The RCMP needed more than two hours to drive to Likely from the nearest detachment in Williams Lake. Several terrified residents, including a relative, identified Feeney who they had seen earlier that morning abandoning Boyle's truck which he had crashed near Boyle's residence. A police officer went to Feeney's dwelling, a windowless equipment trailer. When there was no response to his knocks on the door, he identified himself as police. Finally, he tried the door, found it unlocked and entered without permission. He went to Feeney's bed, shook his leg and said, "I want to talk to you." He asked Feeney to get out of bed and, in better light, he noticed blood spattered all over Feeney's T-shirt and shoes — blood that was later matched to Boyle.

The police officer read Feeney his rights to consult any lawyer without delay and to remain silent. When asked whether he understood his rights, Feeney snapped, "Of course, do you think I am illiterate?" He was arrested. He voluntarily answered a few police questions, and gave statements and fingerprints. Another day passed before a lawyer would help him. He admitted to striking Boyle, and stealing Sportsman cigarettes, beer, and cash from Boyle's residence. His T-shirt and shoes were seized as evidence. A search warrant was granted to obtain other items from his trailer.

Feeney was convicted of second degree murder by a jury trial in the Supreme Court of British Columbia in 1992. The British Columbia Court of Appeal unanimously dismissed his appeal.

He appealed to the Supreme Court of Canada on the constitutional grounds that the police had violated sections 8 (unreasonable search and seizure) and 10(b) (right to a lawyer) of the *Charter of Rights and Freedoms*. Feeney asked that the evidence gathered as a result of these violations be excluded under s. 24(2) of the *Charter*. He might get away with the murder.The Supreme Court of Canada, in a five to four decision, agreed with Feeney. His murder conviction was reversed.

Police need a warrant to enter a dwelling to arrest someone. *Charter* privacy rights (section 8) call for police to obtain prior judicial authorization to enter, unless in exceptional circumstances such as hot pursuit, destruction of evidence, or endangerment of life, none of which were present here. The minimum four hour return drive to the nearest detachment and judge to obtain a warrant and the terror which gripped this hamlet did not sway the five judge majority.

An accused must also be informed of the 10(b) right to counsel at the start of detention or arrest which is when the police assume control over one's movement by a demand or direction. In this case, detention began when the officer touched Feeney's leg and ordered him to get out of bed. He was not cautioned at that time and was not given adequate opportunity to obtain a lawyer; accordingly, his 10(b) right was violated.

Since police collected the cash, cigarettes, T-shirt, shoes, admissions, and fingerprints from these "very serious"and "bad faith"sections 8 and 10(*b*) violations of the *Charter*, all this evidence was tossed out by the top Court and a new trial was permitted.

A few weeks later, a man shot and killed three young men at a campground at Kitimat, B.C.. The RCMP, bound by the *Feeney* decision, could not enter the murderer's dwelling. While they went to obtain a warrant to enter from a judge, he escaped under the cover of darkness. He still has not been located and brought to justice.

Canadians were furious at how a mere five unelected and unaccountable judges could overrule eight other judges and quash the *Feeney* conviction. If the police had done something wrong, couldn't they be punished? Should obvious factually guilty murderers be released? Will police have any powers left to investigate serious crimes? The *Charter of Rights* was now considered a murderer's best friend, and respect for it plummeted.

The Canadian government amended the *Criminal Code* to create the "Feeney warrant." Soon police across Canada could call Justices of the Peace in larger centres from the scene on any day, around the clock. With valid reasons for entering the dwelling, the warrant, digitally recorded by the JP, can be immediately authorized and later faxed to the police car or detachment.

Whatever happened to Michael Feeney? All the evidence used to convict him was obtained in violation of his *Charter* rights. Once the Supreme Court of Canada excluded all that evidence, there was nothing left upon which to convict Feeney, so his conviction was overturned. The Court granted prosecutors an opportunity to obtain new evidence and re-try Feeney.

When the second trial took place in 1999, this time in Vancouver, DNA forensics were well-known and reliable techniques. New DNA evidence confirmed that Feeney had murdered Frank Boyle eight years earlier. Saliva on a cigarette collected from Boyle's yard matched Feeney's DNA. His fingerprints were on a beer can in Boyle's vehicle and on the refrigerator in Boyle's house. They were compared to Feeney's fingerprints held by the Calgary Police Service, as

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Aboriginal Law

John B. H. Edmond

Whither Aboriginal Languages – Are They Withering?

Language is central to identity. As the 2005 federal Task Force on Aboriginal Languages and Culture put it, "Language and culture are the foundations of the nationhood of First Nation, Inuit and Métis people." One might add, language is the foundation of culture.

Canada's cultural wealth is found not merely in its official bilingualism or its multicultural tapestry; Aboriginal languages are a part of our mosaic. As Task Force member Frank Parnell of the Haida Nation said, "Each time an Aboriginal language dies, a piece of Canada dies."

A number have died, though, and more are at risk. Is this simply the price of progress, or should something be done? While 29% of First Nations people can converse in their language, only a few of these are flourishing: Cree, with about 85, 000 speakers; Ojibway, with 30,000; Anishininimowin (Oji-Cree, a language derived from Ojibway and Cree), 12,500, and Montagnais-Naskapi, 11,000. Most Inuit can speak one of the dialects of Inuktitut, but Statistics Canada reports a decreasing number using it as the main language at home. Michif, the traditional Métis language of Plains Cree structure and French nouns, is in the worst shape; only 4% of Métis can converse in it.

English is displacing languages around the world, as Robert Crum explains in *Globish*: *How the English Language Became the World's Language*. In Canada, the residential school system, mobility, and more recently, television and the Internet, are responsible for much of the loss. Yet Canada is doing better than the trend. Professor John Price of York University wrote some years ago, "pessimistic views should be balanced in Canada by an awareness that Indian languages have survived more fully in Canada than [in] many other regions of the New World and that long term future viability is secure for at least ten Native languages. By contrast, all of the Caribbean languages are extinct [as are] well over half of the indigenous Central and South American languages." This may not be much comfort, though, to the last ten Nitinat (Ditidaht) or Comox speakers on Vancouver Island, or the less than 100 Seneca, Cayuga or Onondaga speakers of the nearly 4,000 members in south-western Ontario.

British Columbia is home to six of Canada's eleven Aboriginal language families. Its geography gave rise to more First Nation languages than all the rest of country; 32 of about 59. It now has more languages in decline; B.C. accounts for only 7% of people with an Aboriginal mother tongue. According to the Task Force, those of B.C.'s languages that are not "viable small" are "endangered," with most in the latter group. B.C.'s First Peoples' Heritage, Language and Culture Council, a B.C. Crown corporation with the mandate to support First Nations' efforts to revitalize their languages, arts, cultures and heritage, released a report last April. According to its Chair, Dr. Lorna Williams, "all First Nations languages in B.C. are in a critical state." Only 5,600 of 110,000 B.C. First Nation people are fluent, and they are mostly over 65. These are mainly elders whose mother tongue is Aboriginal; the language has been lost to the middle generations, and new generations learn it as a second language if at all.

There is a renaissance. Schools in First Nation communities now typically teach their language to students, who reportedly often go home and teach their nearly-lost language to their parents. The Department of Canadian Heritage, under its Aboriginal Languages Initiative, provides about $5 million a year to Aboriginal communities across Canada to support community-based language projects. Cultural Education Centres produce dictionaries, CD-ROMS, software, audiovisual tools, cultural awareness kits, and second-language acquisition programs. Technology, in some ways the enemy, can be a friend: Manitoba's Louis Riel Institute, for example, offers Michif audio lessons online. The Yinka Déné Language Institute of Vanderhoof, B.C. produces sophisticated materials and programs. The now self-governing Nisga'a of B.C.'s Nass Valley have a robust language program for schools and adults. This is to mention only a few examples. Even Michif may revive, if the new book written and illustrated by Métis artist Julie Flett, *Lii Yiiboo Nayaapiwak Lii Swer: L'Alfabet di Michif* (*Owls See Clearly at Night: A Michif Alphabet*) captures the attention of Métis children.

Territorial legislatures recognize, in varying degrees, Aboriginal languages. In Nunavut, the Inuit Language (Inuktitut and Inuinnaqtun) and English and French are Official Languages, used in the legislature, committees, caucus and executive, with Hansard representing the Inuit language in both Roman and syllabic orthography. The Northwest Territories recognizes as official for use in the legislature six First Nation languages and three versions of the Inuit language, in addition to English and French. Similarly, in Yukon, a Yukon aboriginal language may be used in debates or proceedings of the legislature. Also, in 2008, the Senate of Canada explored the use of Inuktitut in its deliberations. A committee visit to Iqaluit led it to recommend a pilot project of Inuktitut use in the Senate, to be followed by possible use of other Aboriginal languages. This was accepted in May 2008, and Inuktitut has since been used in the Senate ten times.

The revival of interest in language and tradition is reflected in the widespread adoption of First Nation names for what used to be called bands. The "Abitibi-Ontario" is now the Wahgoshig. The Rivière Desert Band, north of Ottawa, is now the Kitigan Zibi Anishinabeg. The former Columbia Lake Band in south-eastern B.C. is renamed the Akisq'nuk First Nation. Cape Breton Island's Middle River Band has been Wagmatcook First Nation since the 1970s. These names bring pride

and a restored sense of identity to the community.

The B.C. Council's view of why language is worth preserving is worth repeating:

> The loss of a language means the loss of thousands of years worth of cultural nuances, rituals and practices. It is through language that a culture is transmitted. Each language holds unique ideas, philosophy, points of view, and intricate details of a culture including everything about a way of life such as family and community relations, systems of politics and power, food and health, art, songs and dance, spirituality and values, history, biology, biodiversity, natural and physical sciences, and interconnectedness with the environment. Every culture has adapted to unique environmental, social and political circumstances, and the language holds an accumulation of the experiences and circumstances of the people.

For those of us who see intrinsic value in language, the preservation or revival of Canada's Aboriginal languages is good news. But the revival must be real; the long-term survival of Aboriginal languages requires their use in the home and in everyday discourse. For a language to be more that a curiosity or museum piece, a critical mass of users is needed. For all the good efforts of agencies, preservation is finally up to the home and the community. Yet it is to be hoped that the restorative value to a community of reviving its language does not isolate it. It must be balanced with engagement with the larger community. As the late Chief Justice Lamer wrote, seeking reconciliation within diversity, "We are all here to stay."

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A famous case revisited, continued from page 30

Feeney had been fingerprinted there a year earlier in connection with another serious crime. Blood on the crowbar was traced to Boyle. The jury in the second trial in 1999 found Feeney guilty of second degree murder beyond a reasonable doubt. A vigorous appeal to the British Columbia Court of Appeal on seven different legal grounds was dismissed a decade after the crime.

The *Feeney* case forever changed police searches and seizures for suspected criminals and evidence. They must now obtain a warrant before entering a home. Even murderers can be freed if their *Charter* rights are not observed. In law, the means are as important as the ends. With Feeney, perhaps law enforcement got lucky.

With the dubious fame of a warrant bearing his name, Feeney will be released from prison shortly.

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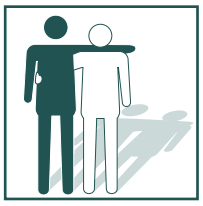

Human Rights Law

Linda McKay-Panos

Freedom of Peaceful Assembly: Why is this an Important Human Right?

Disturbing incidents involving public protests that took place at major public events held in Canada in 2010 (the Winter Olympics and the G20 Summit) have raised the issue of why freedom of assembly is a significant human right in Canada. According to Jeremy McBride in *The Essentials of Human Rights* (Series), (Hodder Arnold, London, 2005) at 18-20, freedom of assembly is the right to express, promote and pursue a common interest collectively. Freedom of assembly is often asserted in the context of the right to protest. In Canada, the *Charter of Rights and Freedoms* guarantees freedom of peaceful assembly. Also, freedom of assembly is enshrined in a number of international human rights instruments, such as the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. Also, a number of regional human rights treaties protect freedom of assembly.

It is clear that the right of peaceful assembly is important. Why? The ability to organize and protest provides citizens with the means to let the government know about their position(s) on any issues of importance to them. Voting is another opportunity people have to voice opinions. However, in between elections, individuals need a method in which their political opinions can be voiced. Letter writing, protests and demonstrations are all ways in which people can express their viewpoints. According to the National Council for Liberty (see: "Your Right to Peaceful Protest" **www.yourrights.org.uk/yourrights/the-right-of-peaceful-protest/index.html**): "When people have nothing else to fight with, it is often their solidarity with each other – to stand together and be counted across communities and even across continents – which proves to be their most powerful weapon." This same author notes that "there have been countless times in the past – even in the recent past – when public demonstrations of support for a cause, or opposition to a policy or government, have changed the course of history." In short, peaceful protest (assembly) is one cornerstone of a healthy democracy.

However, there are limitations to this right. In the international sphere, the right to peaceful assembly must not be denied except in situations of national security or public safety. Moreover, international standards indicate that law enforcement officials should use force only as a last resort; that the force must be proportional to the threat posed; and that force should be used in a way that will minimize damage or injury. *The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (1990) emphasizes that the police must not interfere with lawful and peaceful assemblies, and prescribes limits on the ways in which force may be used in violent assemblies.

Against the backdrop of strong international support for the right of freedom of peaceful assembly, we have the world climate that seems to emphasize security at the expense of freedom of peaceful assembly.

Against the backdrop of strong international support for the right of freedom of peaceful assembly, we have the world climate that seems to emphasize security at the expense of freedom of peaceful assembly. In the wake of large public events in Canada (such as the Winter Olympics and the G20 Summit), federal, provincial and local governments have passed new laws and re-purposed old laws, in an effort to extent the powers of police to prevent the movement of protestors and other members of the public, and limit peaceful political protest. Often these new laws grant the police wide discretionary powers that may be exercised in an unaccountable and discriminatory way.

For example, during the G20 Summit, a number of *Charter* rights were suspended: freedom of expression, the right to peaceful assembly, the right to be free from arbitrary detention and the right to be free from unreasonable search and seizure. The Canadian Civil Liberties Association ("CCLA") said that the conduct of the police during the G20 Summit was at times, "disproportionate, arbitrary and excessive" (CCLA, Breach of the Peace: A Preliminary Report of Observations During the 2010 G20 Summit June 29, 2010, at 4 ("Breach of the Peace")). The problems started even before the event, when the Ontario government passed a regulation under the *Public Works Protection Act*, 1939. This regulation was passed and published (online) in June, 2010, and it designated the streets and sidewalks inside a police-established security perimeter as a "public work" between June 21 and June 28, 2010 (Breach of the Peace, at 9). Police were given expanded powers in the area in and around the security fence and the authority to require individuals approaching the fence to show identification and to subject them to searches. The public was not notified that these police powers were going to be expanded until after the regulation came into effect. At least one person was detained, arrested and charged under the legislation because he did not identify himself while walking outside of the unsecured fence prior to the summit (Breach of the Peace, at 9). The CCLA was concerned that people who lived and worked in the vicinity of the security perimeter had the right to know

that they no longer had the right to refuse to disclose their identity to the police (Breach of the Peace, at 9).

During the G20 Summit, on June 26, 2010, there was significant property damage committed by a group of vandals in downtown Toronto. In response to this criminal activity, the police arrested as many as 1,000 people, including members of the media, human rights monitors, protestors and passers-by. The CCLA indicates that detained people were not permitted to speak to a lawyer or to their families. Arbitrary searches were also performed, some several kilometres from the G20 Summit site. The CCLA also notes that peaceful protests were violently dispersed and force was used. The CCLA concludes that "in an effort to locate and disable 100-150 vandals, the police disregarded the constitutional rights of thousands" (Breach of the Peace, at 4).

Because of the *Charter* right to freedom of assembly (and other *Charter* rights), it is the duty of government to maintain public structures so that citizens can exercise their right to public protest. While at times, it may be difficult to balance security with the right of peaceful protest, it is nevertheless possible and necessary.

In 2002, Calgary hosted the G8. This occurred when the events of September 11, 2001 were very fresh in everyone's minds. At the same time, police and concerned members of non-government organizations in Calgary were also thinking about the events that occurred when APEC leaders met in Vancouver at the 1997 People's Summit. Then, police response to protests resulted in allegations of the excessive use of force (pepper spray, dog handling and use of physical force), and the subsequent recommendations for police provided by the *Commission for Public Complaints against the RCMP* (August 2001). While there were some concerns expressed about isolated incidents in Calgary, the policies and behaviour of the police seemed to be supportive of peaceful assembly, yet also indicated an awareness of security issues.

I was involved with a non-government organization that planned the G6B Conference during the G8 in Calgary. The police met with us and other organizations in advance and were present at protests. They were supportive of the protests, and any police with riot gear were nearby but not visible. While City of Calgary Parks By-law 36/76 (s. 14) provided that "no person shall in a park…make a public address, demonstrate, do anything likely to cause a public gathering; or take part in any process, drill, performance or public gathering", and Bylaw 26M96 required parade protestors to obtain and pay for permits, several of the G8 demonstrations occurred without permits in violation of these bylaws. Yet, the police did not enforce these by-laws.

Perhaps this is a model of government response that should be developed in the future for large public events. Freedom of expression and the right to peaceful assembly are so significant to our democracy that they deserve to be preserved and supported. While this may be challenging, all efforts must be made to learn from both positive and negative examples.

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Employment Law

Peter Bowal and Thomas D. Brierton

Who Owns the Tips?

Many Canadians in the hospitality or service industry, and those with control over the ubiquitous tip jar, will want to know how the law treats tips and gratuities. In particular, do tips added to the bill or extra cash left behind belong to the employer or to the employee? Is an employee required by law to report tips to the employer?

In theory, there are arguments on both sides of the "whose tips?" question. On one hand, customers have a legal and contractual relationship with the business entity only, and employees are mere agents performing services and receiving payments for the employer. Under the control principle, the business hires, trains, and accepts risks for the employee. Customers only have a legal obligation to pay the employer. Tips may be considered as rewards to the business. If employees please customers, why should the employer not reap the benefits, including gratuities, for successful business service?

On the other hand, we know that customers are often personal in their tipping. They prefer tips to go to the employee. Tips might be individual employee "gifts," since they are given voluntarily by customers to the frontline service staff. Since customers are not required to leave tips and they determine the amounts, employers are distanced from this gratuity.

There is little legislation or common law to clarify ownership. Tips and gratuities "intended for an employee" in Prince Edward Island are the property of the employee. If they are taken by the employer, they must be returned within 60 days. Likewise, Quebec law states: "Any gratuity or tip paid directly or indirectly by a patron to an employee who provided the service belongs to the employee of right and must not be mingled with the wages that are otherwise due to the employee."

Specific Intention Expressed by Tipper

Ideally, one would obtain the intention of each tipper at the time they tip, but that is not feasible. The intention of the tipper, if manifested, will always be paramount. Often tips are left at the point of sale without further communication. No intention is expressed, and the tip seems offered to the business like any other feedback. If the tipper says to the employee something like "here, take this and buy yourself something nice," it is a personal gift, even though it was given and received in the context of employment. Words to the effect that, "you've given us great service, so please keep the change" suggest that the tipper was giving the money directly to the tippee and not to the employer.

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Legislation Does Not Count Tips as Wages

Provincial legislation across Canada is clear that customers' tips cannot count as part of employees' wages. Employers must ensure that they pay at least minimum wage to employees. The Alberta *Employment Standards Code* is typical (or "tip-ical?"). It defines "wages" as "salary, pay … commission or remuneration for work, however calculated, but does not include … tips or other gratuities." This falls short of deciding the ownership issue, although it recognizes employee receipt of tips.

Application of Specific Employer Policy

Collective Agreements, employment manuals, and contracts may contain gratuities policies binding on employees. These provisions may stipulate that tips are pooled and distributed according to a formula, on the basis that more than one staffer makes the service complete. The tip issue may be addressed in the employment contract, oral or written. In *Wiskerke v. Theroux* (2001 ABPC 213), a taxi driver was awarded tips as part of his compensation. His employment contract allowed him to collect tips as compensation.

Canada Revenue Agency (CRA) Treatment

At an administrative level, the federal income tax department has a policy on workplace tips: those earned and collected by employees must be reported as income. However, whether tip income forms part of an employee's pensionable (CPP) and insurable (EI) earnings depends on whether they are considered to have been paid by the employer (controlled tips) or whether they are considered to have been paid by the client (direct tips).

According to CRA Interpretation Bulletin CPP-1, controlled tips are considered to have been paid by the employer to the employee. Examples of controlled tips include a mandatory service charge or a percentage added to a client's bill, distribution through the employer's tip-sharing formula, and tips that an employer collects and later pays out to employees as wages. Controlled tips are part of the employee's total remuneration upon which CPP contributions and EI premiums

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are deducted at source. If the employer handles the tips before redistributing them, they are taxed as employer wages (*Lake City Casinos Ltd. v. Canada* (2007 FCA 100)).

Direct tips are paid directly by the client to the employee without employer control. They include money left on the table at the end of the meal, a direct payment to a bellhop or porter, and tips pooled and shared among employees themselves. These direct tips do not attract CPP or EI contributions.

Provincial legislation prohibits employers from making payroll deductions unless they are legally authorized or agreed to. Therefore, an employer must follow the CRA rules with respect to pensionable and insurable earnings and may not be able to deduct the amount of tips from wages unless the employee consents. It cannot bring employees below minimum wage in any event.

It is important to remember that this CRA Interpretation Bulletin is only an administrative statement of policy, not a legally-binding document. While the "controlled" versus "direct" categories are interesting distinctions, this Bulletin only deals with a very minor issue: whether there must be pensionable and insurable source-deductions on those tips. It does not deal with the broader question of who is entitled to the tips in the absence of an agreement or policy.

Reasonable Expectations and Trade Custom

The hospitality and food service industries have the most minimum wage earners at 26.5%. These employers pay minimum wage because they expect tips to supplement this. In *Riverspot Restaurants Ltd. v. National Automobile* [2003 CanLII 62568 (B.C. L.R.B.)], it was agreed that while tips are not technically "wages," in the hospitality industry tips are regarded as employees' regular earnings, not as "gifts" or "additions."

Likewise, in a Manitoba case, *Nychka v. Red Lobster* (2008 MBQB 47), tips were viewed as regular income. When Dawn Nychka was dismissed, she claimed that she expected tips as part of her compensation, and her opportunity to earn tips was lost. Tips were so expected that both sides could accurately estimate tips based on gross sales each night. The Court awarded Nychka compensation for the tips she could have earned during her employment.

Conclusion

There is no obvious answer to the question of who – employer or employee – can legally collect tips given by customers. Provincial legislation only says that employers cannot count tips as part of their obligation to pay minimum wage. The *Income Tax Act* includes tips under the definition of "income" so they must be declared on income tax returns. They are taxed like wages. The Canada Revenue Agency further distinguishes "controlled" from direct" tips in determining whether one pays CPP and EI contributions at source.

This uncertainty has not led to disputes about whether tips are employee income or employer profit. Workplaces have policies on how tips are to be handled and distributed. Most employees start with a clear understanding about who gets the tips. Employers know that tips are an employee performance incentive; they take advantage of this by paying lower fixed wages. This gives rise to an implied understanding, recognized by courts as a custom of the hospitality trade, that tips contribute to total employment compensation. Notwithstanding this, it is wise to include this issue in the employment contract. The contract should specifically outline who the tips and gratuities belong to and how they will be handled.

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Family Law

Rosemarie Boll

Better than Judge Judy!

While the divorce rate in Canada has fallen since the 1990s, about 40% of Canadian marriages end in divorce. Assuming the rate of relationship breakdown is about the same in common-law families, that's a lot of people who will be looking for reliable legal advice. If you don't have a lawyer, where do you go for legal information?

Most people don't read judgments or law statutes, but they do listen to the news, watch TV, and surf the Net. We live in an information age, and the volume of information increases with every new website and blogpost. Google the word "divorce" and you'll get over fifty million hits. Thousands of websites clamour for our attention and it's hard to know where to start – or quit. Yet, despite this avalanche of information, family court judges tell us that litigants still arrive at the courtroom doors without any firm idea about their rights and obligations, procedural requirements, rules of evidence, or even the types of orders a court can and cannot make.

This problem arises for a lot of reasons. Family law varies greatly from jurisdiction to jurisdiction. Every family is unique, and even though one case may seem to be the same as another, they are never identical. Procedures vary enormously even between cities in the same province. And some information out there is just plain wrong. Take, for example, these quotations from bloggers addressing that vexing question – when are kids old enough to decide where they want to live?

"Twelve in Manitoba why don't know but kids by that age know which is the crazy parent"

"It's 12 when they can decide which parent they want to live with"

Lawyers call this "the myth of 12". In reality, a child never gets to decide where she will live, not even at age 16.

Information is only as good as its source. The three top sources for legal information are judges, lawyers, and academics. Many lawyers and academics have an online presence, but we rarely hear from the ones at the top – the judges. Family court judges see thousands of cases, and they are undeniably the best qualified to comment on the realities of family law. Traditionally, judges have shied away from the media and public appearances. They do not speak about their decisions; they let their judgments speak for themselves. But one Canadian judge has taken advantage of his unique position and has moved off the bench and into the media spotlight – meet Mr. Justice Harvey Brownstone. A sitting Family Court judge since 1995, Justice Brownstone has released a bestselling book: *Tug of War: a Judge's Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court*, Toronto: EWS Press 2009). Written for the general public, the book informs parents about the realities of family court, and it isn't pretty: "What we judges see in family court is beyond belief and certainly more dramatic and gut-wrenching than any television show or movie." Justice Brownstone tells you why you don't want to appear in front of him (or any other judge) and recommends alternatives to litigation. He outlines how and why to pick a lawyer, explains concepts such as "the best interests of the child" and "joint custody", and summarizes the tricky rules of evidence. He gives pointers on conducting successful litigation, and the book ends with "Ten Tips for Success in Resolving Parenting Disputes."

In 2010, Justice Brownstone launched an online TV show about family law issues – *Family Matters* (Familymatterstv.com). He interviews guests from the legal community on topics such as child support, collaborative law, mediation, and child protection. Justice Brownstone also answers questions from the public using social media such as YouTube, Skype, email, and AdviceScene.com's Q&A. His talk show has branched out into a discussion on the way the justice system affects relationships: Internet dating, addictions, prenuptial agreements, mental health, adoption, surrogate parenting, same-sex and multi-cultural relationships, parenting after separation and divorce, mediation, child neglect and abuse, and child and spousal support. You can follow him on Facebook and Twitter. He hopes to expand into mainstream TV with documentaries, reality shows, and even live dispute resolution.

Better than Judge Judy!

The top three sources for legal information are judges, lawyers and academics. Many lawyers and academics have an online presence, but we rarely hear from the ones at the top – the judges.

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Law and Literature

Robert Normey

Savage Passions

"There is no document of civilization which is not at the same time a document of barbarism."
–Walter Benjamin, "Theses on the Philosophy of History"

In Barry Unsworth's very fine novel *After Hannibal* (1996) we witness the fate of several couples on a neighborhood road – a *strada vicinali* – outside Perugia, Umbria as they try to fulfill their dreams of retiring to a home in the seemingly enchanted countryside of one of Italy's most magnificent regions. At the center of the novel is the cunning lawyer Mancini, the only man who is prepared to tell the various couples how the games of home renovation, fraud and partnership struggles operate in the dark heart of this sunny Mediterranean land.

Although not as lauded as some of his other work, this is in fact an excellent addition to the Unsworth canon. It shares some of the major themes and concerns of his other great novels – man's inhumanity to man, the ever-present potential of greed and betrayal to upset the happiness and equanimity of the vulnerable in society, the fact that historical currents continue to run deep in contemporary society and the inability to perceive what is in one's best interests until it may be too late.

This is a darkly comic novel and is set in the region of Italy where Unsworth himself now lives, courtesy no doubt of the great commercial and critical success of his masterwork *Sacred Hunger*, co-winner of the Man-Booker Prize.

In an author's note at the outset of *After Hannibal* we are told that the *strade vicinali* give access to scattered houses in the rural parts of Italy. Dusty in summer, muddy in winter, there are thousands of miles of these roads stretching across the country. Their upkeep falls to those who depend upon them, a fact that often leads to quarrels. On one such stretch live various couples in the novel – one British, one American, two Italian. All consider that they are going to live peacefully and contentedly for the rest of their lives in this seemingly idyllic location. Life and various unscrupulous operators have other plans in mind. The novel commences with a visit to the British couple, the Chapmans, from an Italian family that lives down the road. The Checchetti come to their door with a carefully rehearsed complaint. The Italians claim that their garden wall has fallen down as a result of the passage of lorries along the road, hired by the Chapmans for home renovation work. They seek financial compensation. This provokes a harsh, skeptical reaction on the part of Harold and, ultimately, a visit to the mysterious, apparently all-knowing lawyer Mancini.

The tone throughout the novel is playful although the events described often have a bitter quality. This is not a work of realism but indeed a high-spirited comedy where, for instance, the lawyer acts as a wizard capable of conjuring up solutions to the problems that unfold in a manner worthy of Shakespeare's Prospero. That being said, *After Hannibal* has much to say about greed, betrayal and how a legal system – in this case Italy's – does or does not deal with those perennial problems.

Three other couples also encounter shocks to their systems. The Greens need considerable help to get themselves out of a fix with an Italian firm that has extracted considerable money without doing serious work. They contact Stan Blemish, who advertises his expert advice to the many foreigners who have bought houses in Umbria and want them renovated to make habitable. Blemish offers to mediate between different cultures and help the foreigners understand the Italian temperament and approach to this kind of work.

In fact Blemish's plan all along is to assess just how desperate his clients are, to determine what is in their bank accounts and then to quickly drain the accounts through the provision of bogus and fraudulent restoration work done by a dubious Italian contractor. Eventually the Greens also find themselves in the plush offices of Signor Mancini.

Another couple soon to be in distess are the two gay men, Fabio and Arturo. Fabio is a former race car driver who has taken his young street kid from Naples away to his home. Because Fabio was living on a pension, it made great tax sense to transfer the house to Arturo's name, albeit this involved an element of illegality. Unfortunately for Fabio, once concluded, Arturo resolves to separate from his lover and then have his lawyer seek a court order that Fabio vacate the premises. Once again, Mancini is pressed into service.

A number of chapters also feature the history professor, Monti. We learn that his wife has left him to join a new lover. To counteract his sorrow, he devotes himself with ever-greater zeal to his specialty, the history of the Central Italian states. An important theme is introduced in an early chapter on Monti's depressed life. He drives, "as always," by way of Lake Trasimeno, scene of perhaps the most crushing defeat ever suffered by the Roman army. It was there 22 centuries ago that Hannibal and his Carthaginians lay in wait for the Roman legions to enter his trap. The army under the command of Consul Gaius Flaminius

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blundered too close to the marshy verge of the lake, where the footing was soft. Taken by surprise by a lightning flank attack, the Romans were quickly slaughtered and their ghosts continue to haunt the lake. The theme of these dark historical events hanging like a cloud over present-day Umbria is captured in a variety of ways. For instance, place names link the region to the terrible calamity: Sepoltalgia , burial ground; Sanguineto, where the blood ran, and others.

This historical theme is elaborated on at great length in subsequent chapters. Monti presents animated lectures to his class on the rise of the brutal Baglioni family to total power in Perugia in the 15th and 16th centuries. Ultimately the Baglioni are themselves overthrown by a savage assault, conducted on behalf of the pope of the day, no less! Monti at novel's end meditates on the utter destruction of the many towers and palaces built by the Baglioni. He reflects that it is the destiny of all habitations to be razed to the ground and that all we can hope for is temporary shelter. He makes his observations while gazing on the remains of the monstrous fortress, the Rocca Paolina, built in the midst of the Baglioni district as a sign of the new dominance of the Pope.

It is the dream of a permanent home in a setting of beauty, near the great works of Renaissance art that so many of the characters yearn to assimilate into their lives, that leads to danger and near-calamity for the various clients of the formidable advocate. He offers a number of sage comments on the many pitfalls that await any foreigner or local unlucky enough to have to confront the snares of the Italian legal system. When one character exclaims that surely Italy is a country subject to the rule of law we are meant to apprehend the mordant irony.

Mancini explains to his clients the complex nature of the judicial system, which mirrors the country's complexity. Nothing is what it seems and legal processes unfold slowly, with many delays. Later, he observes that Italians have no belief that the law or the police or public administration exist to serve them and so they develop *furbizia*, cunning, and this is admired more than honesty.

When talking to the Greens about their contract with Blemish, Mancini outlines how this cunning might be employed in the drafting of contracts to ensnare customers. A term is inserted allowing the advisor to charge extra for the *imprevisti*, anything unforeseen that might come up in the course of the work. The wily lawyer explains that sharks like Blemish will use such a clause to milk his customers, because anything at all can end up being *imprevisti*.

Mancini himself is ready to deploy any number of tactics and recommends that his clients do and say what it takes to counter the unscrupulous and fraudulent efforts of their antagonists. His advice to Fabio to purchase an ultraviolet light to "age" his signature in ink is priceless. We must remember that this is a dark comedy but a comedy nonetheless. It is with high spirits and a sense of mischievous fun that the writer describes this cynical lawyer who possesses such a deft array of maneuvers for using the legal system to advantage, in ways no Rules of Court Committee imagined.

Just as Unsworth depicts the evils of slavery and press-ganging in the navy in the 18th century in a way that resonates in contemporary times in *Sacred Hunger*, so too in *After Hannibal* he reveals the ways that individuals seeking the perfect home in Umbria are enmeshed in the savage passions from the mists of time that seem to rise up from Lake Trasimeno and the surrounding countryside.

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