



Constitutional

CONSTITUTIONAL, CIVIL LIBERTIES AND HUMAN RIGHTS SECTION
SECTION DU DROIT CONSTITUTIONNEL, LIBERTÉS CIVILES ET DROITS DE LA PERSONNE

Volume 11, No. 2
May/Mai 2008

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High Courts at Odds over Workplace Drug Testing

Graeme Norton*

The Alberta Court of Appeal’s recent decision in *Alberta (Human Rights and Citizenship Commission) v. Kellogg Root & Brown (Canada) Co.* [2007] A.J. No. 1460 (hereinafter “*Chaisson*”) threatens to broaden the range of situations in which employers can permissibly conduct mandatory drug testing. This decision stands in contrast to earlier jurisprudence, such as *Entrop v. Imperial Oil Ltd.*, [2000] O.J. No. 2689 (hereinafter “*Entrop*”) and *Toronto Dominion Bank v. Canadian Human Rights Commission et al.* 163 D.L.R. (4th) 193 (hereinafter “*T.D. Bank*”), both of which placed greater limitations on workplace drug tests. If followed by other adjudicators, *Chaisson* will likely lead to workplace drug testing being used more frequently. As a result, persons suffering from substance abuse related disabilities may be more vulnerable to discrimination and the private lives of off-duty employees subject to greater employer controls.

Chaisson originated as a human rights complaint about a construction company’s policy of requiring all new employees in non-unionized positions to pass a “post-offer/pre-employment” drug test. While the employer asserted that such measures were necessary for the promotion of workplace safety, it does not appear that the policy drew any distinction between employees in safety sensitive positions and those who were not. The complainant had agreed to take the test and had started working as a receiving inspector while the results of his test were pending. After nine days of work, the drug test came back positive and his employment was terminated. The complainant admitted that he had smoked marijuana five days before taking the test; however, there was no evidence that he was drug addicted or had ever been impaired on the job.

The jurisprudential backdrop against which *Chaisson* was decided was largely characterized by the *Entrop* and *T.D. Bank* cases. Like *Chaisson*, the Ontario Court of Appeal’s *Entrop* decision also involved a drug testing policy justified on the basis of safety concerns, though the testing occurred during, rather than pre-employment. The decision addressed a discrimination-based human rights complaint filed by a long-term employee who, in spite of over seven years of abstinence, was transferred out of a safety sensitive position when his employer learned that he was a recovering alcoholic. He was later permitted to return to his home position only if he agreed to submit to random drug and alcohol tests. The Federal Court of Appeal’s decision in *T.D. Bank* is even more factually similar to *Chaisson*. This case involved a human rights challenge filed by the Canadian Civil Liberties Association to a bank policy requiring all



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new employees to submit to mandatory pre-employment drug testing. Though it made no distinction between safety sensitive and other positions, the bank asserted that the policy was a necessary part of its “commitment to maintain a safe, healthy and productive workplace.”

Chaisson, *Entrop* and *T.D. Bank* all involved discrimination complaints filed under the relevant human rights legislation. The human rights analyses of the three cases address similar issues; however, the conclusions reached are divergent. Notably, *Chaisson* differs with *Entrop* in its treatment of evidence of impairment. Significant aspects of *Entrop*'s analysis rest on the assumption that sanction is only appropriate where there is clear evidence of impairment. The Court drew a crucial distinction between alcohol testing and drug testing because alcohol tests could indicate *current* impairment levels, while drug tests could not. As a result, random employee alcohol testing was found not to be discriminatory because it was sufficiently connected to the legitimate objective of promoting workplace safety. Drug testing, in contrast, was found to be overly intrusive and discriminatory because it could not give the employer any information that would help it improve workplace safety by removing impaired employees.

Chaisson approached impairment evidence more liberally and relied heavily on information that the effects of marijuana can linger for several days after use. In the result, the Court found that there was a clear connection between the policy, as it applies to recreational drug users, and the promotion of workplace safety. This led the Court to conclude that the policy was “directed at actual effects suffered by recreational cannabis users, not perceived effects suffered by cannabis addicts”. In reaching this conclusion, the Alberta Court of Appeal essentially found permissible, what the Ontario Court of Appeal found discriminatory. Aware of this potential inconsistency with *Entrop*, the Court stated that to the extent that the two decisions are incompatible, “we decline to follow that decision.”

Chaisson's treatment of drug testing evidence is cause for concern. This approach grants employers sufficiently more leeway to probe and punish off duty conduct without adequately demonstrating the employment rationale for doing so. While the effects of drug use may persist for several days, it's not clear these longer-term effects have any significant bearing on work performance. Someone who smoked marijuana five days ago, for example, could be better prepared for work than a drug-free co-worker who got a bad sleep last night. In recent years, marijuana testing appears to have improved to the point where it can now detect actual impairment in the four to eight hour period after use. Such developments, however, were not the basis for *Chaisson*'s divergence from *Entrop*. Instead, the Alberta Court of Appeal indicates that impairment need not be proven at all to justify not hiring a person. Simply demonstrating that they have recently used drugs may now be sufficient.

Contrasts between the findings of *Chaisson* and *T.D. Bank* are even starker because of the factually similar nature of the policies dealt with in each case. Where *T.D. Bank* found that mandatory pre-employment drug testing was discriminatory, *Chaisson* found that it need not even trigger protections of the relevant human rights legislation. The discrimination, which the court found present in *T.D. Bank*, resulted from the finding that, “an employer policy aimed at achieving a drug-free work environment should not be deemed neutral when by design it is directed at all those who use illegal drugs and, by necessity, those who are drug dependent”. Thus, in the Court's opinion, mandatory drug testing is, by definition, discriminatory as it tends to deprive drug dependent persons of employment opportunities. *Chaisson* found no such discrimination, even though the policy in question was very similar to *T.D. Bank*'s. For the Alberta Court of Appeal, the fact that the complainant was neither a real nor perceived substance abuser obviated any basis for his assertions of discrimination. While such a finding may be arguably applicable to the specific complainant, it ignores the broader realities addressed by *T.D. Bank*. Just because a specific individual isn't directly discriminated against, doesn't mean that a policy is not discriminatory.

The aforementioned jurisprudence's focus on the discriminatory aspects of drug testing has resulted in other issues, relating to such policies, being somewhat ignored. Privacy issues, for example, are clearly engaged by workplace drug testing, though they have not factored largely in the leading jurisprudence. Arbitrator Michel Picher provides a helpful discussion of such issues in *Imperial Oil Ltd. and C.E.P., Local 900*, [2006] O.L.A.A. No. 721 (M. Picher). This arbitration award considers a broader range of issues, as it deals with the permissibility of mandatory drug testing for safety sensitive positions under a collective agreement, not human rights legislation. Picher's analysis focuses broadly on whether an employer can randomly drug test employees without reason to suspect that they are impaired. He emphasizes the importance of personal dignity and privacy in reaching his

conclusion that drug testing is, generally, unacceptable unless the employer can demonstrate a reasonable suspicion of impairment *before* administering the test. As such thresholds are almost always absent in mandatory drug testing policies, Picher finds that they are not permissible tools for the promotion of workplace safety under all but the most exceptional circumstances.

Clearly, workplace drug testing matters are capable of triggering an array of different legal issues. Until recently, the leading jurisprudence on this subject had provided a satisfactory and relatively consistent framework for this difficult area of law. Affected employees were, generally, afforded sufficient protection against unwarranted discrimination and privacy intrusions. Off-duty conduct was delineated from workplace misconduct, resulting in a balancing of employee and employer interests. *Chaisson* threatens to erode these protections and increase the type of workplace discrimination identified in *T.D. Bank*. Leave to appeal to the Supreme Court of Canada has been sought in *Chaisson* - reason to hope that our highest Court will restore an appropriate balance between employer and employee rights.

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Message from the Chair

*David A. Wright**



This is a time of great change for those practicing human rights law in Ontario. On June 30, 2008, Bill 107 will take effect, making significant changes to the enforcement of the *Human Rights Code*. Courts will have new powers to apply the *Code*, and applications may be filed directly with the Human Rights Tribunal of Ontario. The Ontario Human Rights Commission will have a new mandate, and a new Legal Support Centre will assist applicants. On June 11, 2008, together with the Labour and Employment and Administrative Law Sections and the Law Society of Upper Canada, our Section is presenting a half-day continuing legal education program on practice under the new system. There will be many prominent speakers including Attorney General Chris Bentley. The day will focus on practical problems, including an advice panel that will explain how they would deal with hypothetical fact patterns under the new system. Detailed program information and registration are available at www.oba.org.

The Section has also been busy with other activities. We presented, together with Justice for Children and Youth, a program on the Charter for high school students, as part of the OBA's Law Day activities. The day, organized by Vice-Chair Cheryl Milne, included games, a debate, and presentations by several individuals whose lives were affected by Charter litigation as young people. We held a dinner program on electoral rights, organized by Secretary Joe Cheng. We were part of the OBA's support for the proposed Apology Act. Member-At-Large Alexi Wood is participating in the OBA's response to the Law Society's report on women in the profession.

It has been a privilege and pleasure to serve as Chair of the Section over the past two years. I have learned greatly from the discussions at CLE programs, in the newsletter, and at Executive meetings. I would like to thank all the members of the Executive, OBA Staff Liaison Peter Guennel, News Editor Vickie Rose, Advocacy and Government Relations Liaison Jonathan Clancy, and Law Day Staff Coordinator Filippo Conte for their hard work, pleasant company, and good humour. I am grateful to everyone who has participated in the Section through membership, writing for the newsletter, or attending programs.

I think that the interest, wide participation and variety of topics covered in our Section's programming shows that constitutional, civil liberties and human rights law has a significant part in the practices of Ontario lawyers practicing in diverse fields. I know that in the years ahead, this Section will continue to make a significant contribution to education, advocacy and discussion in these constantly changing areas.

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'The *Long(ley)* and the Short of it' — Enduring Charter Litigation Served up with a Laugh

Catherine Thompson and Stephen McCammon*

University of Toronto mathematics professor Peter Rosenthal and self-admitted “electoral *Charter* geek” Gail Sinclair have represented opposing sides of Canada’s landmark right to vote cases. However, they spoke from the same page and were full of good humour when talking about their passion for s. 3 of the *Charter* during a recent dinner panel hosted by the Constitutional, Civil Liberties and Human Rights Section. The dinner event – styled as *The Long(ley) and the Short of it: Electoral Rights and Justification in the Democratic Process* – was held on January 31, 2008. Professor Sossin, who teaches constitutional law, and is a former law clerk to the Chief Justice of the Supreme Court of Canada, rounded out the panel discussion with insights on broader themes raised by the *Longley* decision.

A core value of s. 3 includes the right to meaningful participation in the electoral process. Rosenthal represented Marijuana Party Leader Blair Longley, among others, and Sinclair represented the Government of Canada at the Ontario Court of Appeal (OCA) in *Longley v. Canada (Attorney General)*.¹ The case examined the threshold limiting access to the \$1.75 per vote financing under the *Canada Elections Act*. Only parties that obtain at least two per cent of votes nationally or five per cent in ridings in which the party endorsed a candidate are eligible for these funds. The OCA held that s. 3 was violated, but saved by s. 1, whereas the Superior Court of Justice (SCJ) had earlier found the section was not saved by s. 1. The OCA also found that ss. 2 and 15 were not violated.

Leave to appeal has been filed with the Supreme Court of Canada (SCC) – in fact, Rosenthal served Sinclair with a draft of the leave application at the end of his speech with an invitation for her comments. Sinclair responded with the wisdom that, as in politics, “it’s never over” in *Charter* litigation. Sinclair went on to share why she is passionate about s. 3, noting, for example that electoral rights anchor and give other *Charter* rights. She cautioned that s. 3 may seem deceptively simple, but is as multi-varied as a robust *Shiraz*.

Rosenthal shared with dinner guests his wry sense of humour when he suggested that when he was first approached on the per vote financing threshold, he thought that if he just wrote a few letters to the Department of Justice referencing the SCC’s *Figueroa v. Canada (Attorney General)* decision,² the Government would see the light and simply amend the *Canada Elections Act*. *Figueroa* involved a challenge to sections of the *Canada Elections Act* requiring that political parties nominate candidates in at least 50 electoral districts to obtain and retain registered party status. Party status allows parties to receive benefits, including the ability to issue tax receipts. In *Figueroa*, the SCC declared that the 50 candidate rule was unconstitutional.

Things haven’t quite turned out that way.

Not only has the Government defended its legislation vigorously, but it did so successfully before the OCA, where the OCA distinguished *Figueroa*. In particular, in its minimal impairment analysis in *Longley*, the Court of Appeal held that the financing thresholds do not impede the right of political parties to be registered and thereby become entitled to other public funding and informational benefits, including the right to issue tax receipts. In the decision below, the Superior Court of Justice had suggested an audit regime as a less intrusive and equally effective alternative to the financing threshold approach. An audit scheme would help ensure that parties were devoting their resources to their own participation in the political process. However, the OCA said an audit scheme, among other concerns, creates the potential for unwarranted interference in the internal affairs and policies of a political party. The OCA found that the financial threshold approach falls within a range of reasonable alternatives, even though another reasonable alternative not invoking such thresholds might be conceivable.

According to the OCA’s decision in *Longley*, the per vote financing threshold was introduced partly in response to the activities of the Natural Law Party which has promoted the benefits of transcendental meditation (also called ‘yogic flying’). In 1993 – prior to the enactment of the threshold – \$717,000 in public funds was provided

to the Natural Law Party following a national election in which the party obtained 0.6 per cent of the national vote (approximately 85,000 votes). The OCA stated that: “The perception was that the Natural Law Party had not participated in the election for the purpose of engaging in political discourse and enhancing the political process; rather, its purpose was to advertise its contemplative lifestyle, promote its fee-based meditation courses and enhance its commercial aims. It hired people to “run” on its behalf.”

In his opening remarks, Professor Sossin wryly noted that having been invited to “clean up” after the first two speakers, he’d been left with little to do. Sossin went on, however, to broaden the discussion. He questioned whether parliament is the best vehicle for handling election law, as established parties have an inherent interest in rules that maintain their power - pointing to the chief electoral office as a more neutral alternative. Sossin argued that thresholds should be tailored to address the mischief to be remedied, instead of the size or popularity of a ‘rogue’ party. In addition, he suggested that the policy intent underlying the income tax system – that it is a mechanism for the redistribution of wealth - could support the idea that those parties with the least amount of votes should not be excluded from receiving any benefits on the basis of receiving a small number of votes. Finally, bearing in mind the mixed private/public nature of political parties and the employment of an audit scheme, Sossin noted that the more public in nature the entity and the more it is supported by the public purse, a concomitant oversight on the spending of public funds should be explored.

Editor’s Note: At press time, the Supreme Court of Canada had not yet issued its decision on the leave application in *Longley*. On April 24, 2008, the Court announced that the leave application had been dismissed. So ends the saga.

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¹ 2007 ONCA 852

² 2003 SCC 37

Constitutional Law Cases at the Court of Appeal for Ontario

*Benissa Yau, Evan van Dyk, David De Groot**

Current to February 29, 2008.

Recent Decisions

Marchand v. Ontario, 2007 ONCA 787

Marchand, who was adopted in 1956, believed that she had been prevented from accessing information about her birth father by the *Child and Family Services Act* (CFSA), R.S.O. 1990, c. C.11, and the *Vital Statistics Act* (VSA), R.S.O. 1990, c. V.4. The VSA empowers Ontario’s Registrar General to seal an adopted child’s original birth certificate and substitute a birth certificate containing the facts in an adoption order. The CFSA provides for an Adoption Disclosure Registry that allows adopted children and their birth parents to contact one another, but only if both parties consent. The CFSA only otherwise allows for disclosure when required for the health, safety, or welfare of an individual –that is, emergencies. As Marchand’s father did not consent to participate in the registry, she was unable to access his identifying information.

Consequently, Marchand challenged the VSA and CFSA as violating her rights under section 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The applications judge held that Marchand did not have standing to challenge the VSA, as her original birth certificate was never sealed.

The applications judge dismissed the section 7 challenge against the CFSA on the basis that the restrictions it imposed on Marchand's ability to access the information she desired did not reach her core individual liberty and dignity interests. The legislature was furthermore entitled to consider the privacy interests of parents who give up their children for adoption and to balance them against the adopted children's right to information. The application judge further held that even if Marchand's rights were infringed, the applicant had not identified any principle of fundamental justice implicated by the impugned provisions. The applications judge also rejected Marchand's section 15 challenge against the CFSA on the basis that the statute does not deny benefits to, or place an unequal burden on, adopted children, nor does it promote stereotypes or demeaning messages about adopted persons.

The Court of Appeal dismissed Marchand's appeal. The application judge's analysis and conclusion with respect to Marchand's standing to challenge the VSA is upheld. On the section 7 issue, it is unnecessary to pass judgment on the "liberty" and "security of the person" aspects of the application judge's reasons, because the court agrees with the application judge's analysis and conclusion on the "principles of fundamental justice" component of the analysis. The unconditional disclosure of identifying personal information of third parties, even if they are of birth parents of the claimant, without regard to the privacy and confidentiality interests of the persons identified and without regard to any serious harm that might result from disclosure, is not a fundamental principle of justice. Instead, it is a proposition of public policy that continues to be vigorously debated. The court also held that the applications judge's section 15 analysis is sound, and the evidentiary record supports her analysis.

***Club Pro Adult Entertainment Inc. v. Ontario (Attorney General)*, 2008 ONCA 158**

Club Pro Adult Entertainment ("Club Pro") comprises adult entertainment club owners who installed "designated smoking rooms" in their clubs, pursuant to then-existing municipal by-laws. Club Pro sued to invalidate and to claim damages arising from the passage of the *Smoke-Free Ontario Act*, which prohibits smoking in indoor and public spaces, thereby rendering the designated smoking rooms useless. While Club Pro's statement of claim includes numerous private law causes of action, its claim also seeks to invalidate the legislation on a number of constitutional matters. Namely, Club Pro argues that the Act's is *ultra vires* the province, violates sections 2(d), 7, and 15 of the *Canadian Charter of Rights and Freedoms*, as well as the unwritten constitutional principle of the rule of law.

The motion judge granted Club Pro leave to amend the breach of contract claim and the *ultra vires* claim. She struck out all of the other pleadings without leave to amend. The motion judge held it was plain and obvious that the section 2(d) claim failed because smoking in groups is not a constitutionally protected associational activity; that the section 7 claim failed because a prohibition on smoking in indoor and public places did not violate protected rights to life, liberty, or security of the person and the prohibition was not unconstitutionally vague; and that the section 15 claim failed because the prohibition could not be tenably viewed as discriminating on the basis of race or disability, and the differential treatment of smokers does not implicate interests of self-worth or dignity. The motions judge recognized the existence of an unwritten constitutional rule of law principle in Canadian jurisprudence, but held that it was too unsettled to serve as an independent ground for invalidating legislation. Finally, the motions judge determined that although Club Pro did not appear to have a strong claim that the Act was in pith and substance a criminal law, the factual matrix before her sufficiently suggested that the Act was a prohibition that imposed penalties for a public purpose, and might tenably constitute *ultra vires* criminal legislation. Club Pro appealed the motion judge's decision on the dismissed claims, and the province cross-appealed the motion judge's decision to grant leave to amend the *ultra vires* claim.

In a brief endorsement, the Court of Appeal held that the motion judge made no errors in dismissing the claims that she did. The Court then held that the motion judge's decision to allow Club Pro to amend the *ultra vires*

claim was incorrect. According to the Court of Appeal, while the Act may have had prohibitions for socially undesirable conduct, Club Pro failed to demonstrate that the Act was repugnant to the federal government's jurisdiction over criminal law. Rather, it was clear that the pith and substance of the Act was within the province's jurisdiction over health.

Belende v. Patel et al., 2008 ONCA 148

The appellant appeals an order granting summary judgment to the respondents, Farzana Nabizada and Seena Nasrati, and dismissing the appellant's action. One issue raised on appeal is whether the motion judge had the jurisdiction to deny the appellant the right to a bilingual proceeding.

These were bilingual proceedings conducted under s. 126 of the *Courts of Justice Act*. Before the hearing, the appellant was notified that a bilingual judge would not be available to hear the motions. On the hearing date, the appellant's agent appeared and requested that the hearing of the motions be adjourned to a later date when a bilingual judge would be available. The motion judge, who was not bilingual, denied the appellant's motion for an adjournment and proceeded to hear the three scheduled motions, including the motion in question. In various court proceedings, the appellant had previously objected to the presence of more than 16 judges as not being qualified to preside due to inadequacy in the French language. In the motion judge's view, the appellant was manipulating the bilingual obligation to delay proceedings. Some of the materials were translated "to the extent required" and an interpreter was available in the courtroom.

The court of appeal allowed the appeal. The motion judge should have adjourned the motions to a date when a bilingual judge was available. English and French are the official languages of the courts in Ontario, and the court has a responsibility to ensure compliance with language rights. A proper interpretation of s. 126 is one which is consistent with the preservation and development of official language communities in Canada and with respect and preservation of their cultures. Violation of these language rights, which are quasi-constitutional in nature, constitutes material prejudice to the linguistic community. A court would be undermining the importance of these rights if, even in circumstances where the decision rendered on the merits was correct, the breach of the right to a bilingual proceeding was tolerated and the breach was not remedied.

R. v. Harrison, 2008 ONCA 85, dismissing an appeal from the conviction entered by Justice Norman M. Karam of the Superior Court of Justice.

The appellant was stopped despite having committed no traffic violation. He was found to be driving under suspension and arrested. A subsequent warrantless search of the vehicle, unrelated to the arrest and admitted by the officer to be without reasonable and probable grounds to suspect an offence had been committed, revealed 35 kg. of cocaine in the vehicle. The trial judge held that the search was unconstitutional, described the *Charter* breaches as "extremely serious", but declined to exclude the evidence.

The appeal was dismissed. In deciding to admit the evidence, the trial judge considered the appropriate factors under s. 24(2) of the *Charter*. He recognized that, while serious, the breaches did not fall into the most egregious category. They did not have a particularly serious effect on the accused's *Charter* rights. The judge concluded that the seriousness of the offence warranted admission of the evidence despite the breaches. His decision was not unreasonable, reflects no error in principle, and deserves deference on appeal.

Justice Cronk dissented. On the trial judge's findings of fact, the *Charter* breaches were extremely serious, flagrant, brazen and deliberate. The trial judge, however, stated that the evidence must be admitted because the breaches "paled in comparison to the seriousness of the offence." In doing so, he misstated the test for exclusion of evidence, which is whether condoning the constitutional misconduct by admitting the evidence would do more harm to the integrity of the justice system than would excluding the evidence. The trial judge did not advert to the negative

impact that admitting evidence gained by serious and deliberate *Charter* breaches would have on the repute of the administration of justice. While it is always distasteful to exclude evidence of a serious crime, the courts must dissociate themselves from misconduct of this nature.

***R. v. Colson*, 2008 ONCA 21**

The appellant, after convictions in Quebec, agreed to take part in a post-release supervisory program for high risk offenders in Toronto. He entered into a recognizance to facilitate the supervisory program. A tenant, in the apartment building where the appellant worked, later complained that he had sexually assaulted her. Although he was never formally charged, the police videotaped an interview with him, during which he gave the police a saliva sample. After DNA samples taken from the body of a murder victim were found to be similar to the sample, provided by the appellant, he was arrested for first degree murder. A further blood sample provided through a warrant executed while he was in custody resulted in a match as well. His conviction rested largely on the basis of the DNA evidence.

At trial, the judge held the appellant's saliva sample was given voluntarily. He also found that the appellant knowingly gave the sample in the sense that he was aware of what he was doing, of the significance of his act, and of the use to which the police would be able to make of the sample. He applied a balance of probability standard to all of these findings. Colson argued on appeal that the common law requires that the Crown establish a waiver beyond a reasonable doubt rather than a balance of probabilities.

The appeal was dismissed. The standards for establishing waiver are the same under the common law and the *Charter*: whether the Crown has established on a balance of probabilities that the accused voluntarily consented to the giving of the sample. One of the reasons that the common law requires a higher standard to show the voluntariness of *confessions* is that courts are concerned about reliability. Bodily samples need not be treated in the same way because there are no concerns about reliability. There is no need to create a new common law right by equating bodily samples and statements in this regard.

***R. v. Morrissey*, 2007 ONCA 770**

The appellant, who fatally shot his ex-girlfriend, attempted to kill himself with a gunshot to the head. He survived, but suffered from severe brain damage, resulting in amnesia over the murder. He requested that the trial judge tell the fitness jury that testimonial competence was a precondition to fitness to stand trial. The trial judge rejected the request.

After the jury found him fit to stand trial, he elected to be tried by judge alone. At the outset of trial, he brought an application to stay proceedings on the basis that his amnesia precluded his ability to make full answer and defence, rendering his prosecution unconstitutional. The trial judge reserved decision on the application until the end of trial; at the end of trial, she held that the s. 7 right to make full answer and defence was not violated.

After the close of the Crown's case, the appellant brought a further application, challenging his own testimonial competence under the *Canada Evidence Act*, claiming that his amnesia rendered him incompetent to testify as a witness. He sought to lay the foundation for an argument that his testimonial incompetence (rather than simply his amnesia) precluded his ability to make full answer and defence. The trial judge held that the appellant was required to testify on a competency *voir dire* before she could determine his competency to stand trial. The appellant refused to testify and the application was dismissed.

The appeal was dismissed. Justice Blair held that testimonial competence is not a condition precedent to fitness to stand trial. Although they may have overlapping characteristics, the two concepts, and the nature of the inquiries concerning them, are quite different. Therefore, the trial judge was correct in refusing to charge the fitness jury to the effect that testimonial competence was a condition precedent to fitness to stand trial. Even if,

in a given case, testimonial incompetence through incapacity to recall could be a factor in a finding of unfitness, the evidence in this case provides no basis for a finding of testimonial incompetence or unfitness to stand trial.

Moreover, in relation to the Incompetency Application, the trial judge was correct to hold that the appellant could not meet his burden on the application without testifying on a competency *voir dire*. Given the appellant's refusal to testify on the application, the trial judge was correct to dismiss it.

Finally, while it is likely that the appellant's brain injury and ensuing retrograde amnesia had some impact on the manner in which he was able to conduct his defence, they have not so interfered with his ability to defend himself that it can be said that he was denied his constitutional right to make full answer and defence. The appellant was able to cross-examine Crown witnesses, to call defence witnesses and even to adduce evidence to support the theory that the shooting was unintentional.

***R. v. Puyenbroek*, 2007 ONCA 824**

While intoxicated, the appellant struck two pedestrians walking on the highway's shoulder. He left the scene and drove the short distance to his home. The OPP arrived 47 minutes later and spent 20–25 minutes investigating the scene before heading to the appellant's residence. After observing a damaged truck parked in the driveway and learning from the appellant's wife that he had recently returned, the officers entered the home and arrested him for impaired driving. While in the appellant's bedroom, the officers also noticed and seized improperly secured (though legally owned) guns and ammunition.

At trial, the appellant applied to exclude the evidence resulting from the warrantless search. The trial judge held that the police entered the appellant's residence lawfully on the basis of the common law hot pursuit exception and the consent of the appellant's wife. The accused was convicted of impaired driving and firearms offences and received a sentence of three years, six months for the driving offences, plus 60 days for the firearms offence.

On appeal, the appellant sought only to exclude the evidence of the firearms. His appeal was granted. Justice Feldman held that the trial judge erred in applying the common law hot pursuit exception. Officers who enter a residence without a warrant under this exception must have reasonable and probable grounds, both objectively and subjectively, for arresting a suspect within the residence. Nothing in the officers' evidence suggests that they intended to enter the house to make an arrest. Rather, they intended to speak to the appellant.

In addition, the trial judge extended the hot pursuit exception to a situation long after the offence was completed and the perpetrator had left. There seems to be no reason for extending the hot pursuit exception beyond the "classic" situation of hot pursuit, in which the officer is at the heels of a suspect at the moment the suspect enters a residence. Once an officer has reasonable and probable grounds to arrest a person in a residence, the officer can obtain a warrant. There was no justification for failing to obtain a warrant here.

The trial judge also erred in ruling that the consent of the appellant's wife justified the officers' warrantless entry, as the officers did not inform her of her right to refuse consent. Since the search was unconstitutional, and the careless storage offence relatively less severe, the evidence of the firearms should be excluded under s. 24(2) of the *Charter*. The sentence appeal was also granted.

***Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada*, 2007 ONCA 814**

The appellant operates the Great Blue Heron Casino (the "Casino") on its reserve, employing 1,000 employees – less than one percent of whom are members of the First Nation. After the Ontario Labour Relations Board certified the union as the employees' bargaining agent, the Band Council enacted its own Labour Relations Code.

Though closely modeled on the *Canada Labour Code*, it had certain differences, which had the effect of making it difficult for a union to represent the workers. The appellant asserted a right to enact the Code and displace the LRA under its aboriginal and treaty rights, as recognized and affirmed by s. 35 of the *Charter*. The OLRB rejected those claims. The Divisional Court dismissed the appellant's application for judicial review.

The appeal was dismissed. Although the appellants suggested they are claiming the right to regulate work activities and to control access to aboriginal lands, it is more properly characterized as a claim of a right to enact a labour relations code. It is apparent that its subject is labour relations, not the regulation of work activities or controlling access to aboriginal lands. In particular, the provisions of the *LRA* with which the claim conflicts have nothing to do with access to the reserve or with the regulation of work activities. The appellant is unable to identify any ancestral practice, custom or tradition that bears any relationship to a modern labour relations code.

Even if the appellant did have a right as an aboriginal practice to regulate work activities and access to aboriginal lands, such a practice could not be said to be integral to the distinctive culture of the appellant. The appellants have also failed to establish reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim. The appellant's claim is cast at a level of such generality that it amounts to an assertion that First Nations should be accorded a virtually unconstrained right of self-government in relation to any activity that takes place on aboriginal lands. That submission is at odds with the governing jurisprudence.

Finally, the Divisional Court did not err in not finding that the OLRB had failed to consider the Crown's duty to consult and to accommodate regarding the aboriginal and treaty rights claimed by the First Nation. The appellants did not prove the criteria required by the Supreme Court of Canada in *Haida Nation*.

***Longley v. Canada (Attorney General)*, 2007 ONCA 852**

Section 435.01(1) of the *Canada Elections Act* sets a minimum number of votes that political parties must receive in an election before they qualify for public funding. The threshold requires a party to receive 2% of the national vote, or 5% of the vote in constituencies in which it ran candidates. A number of individuals and political parties successfully applied for a declaration that the section was inconsistent with ss. 3 and 15(1) of the *Charter*. They also challenged it under ss. 2(b) and 2(d) of the *Charter*. The government challenged the standing of the political parties, claiming that s. 504 of the Act, which grants parties legal personhood for judicial proceedings, only applies to proceedings under the Act.

The appeal was allowed. Justice Blair held that the threshold violates s. 3 of the *Charter* by exacerbating a pre-existing disparity in the capacity of political parties to communicate their message, and interfering with the respondents' right to meaningfully participate in the electoral process. However, the section does not violate s. 15(1) of the *Charter*, as it does not distinguish, on the basis of a personal characteristic, between the members/supporters of the parties that do not meet the threshold as compared to members/supporters of parties that do. Instead, the threshold distinguishes between these two groups on the basis of the voter support received by the applicable parties. Moreover, the human dignity of the individual respondents would not be violated, even if there was a distinction made. The threshold also does not violate ss. 2(b) or 2(d) of the *Charter*. The respondents would have to show that their exclusion from the statutory benefits regime substantially interferes with their s. 2 rights. The evidence on the record falls short of meeting this requirement.

Despite the s. 3 violation, the thresholds are saved by s. 1 of the *Charter*. The objective of the threshold – to protect the integrity of the electoral process and its financing regime, and to prevent the misuse of public funds by “parties” with commercial or satirical motives – is pressing and substantial. Moreover, the threshold is rationally connected to this objective because it has the effect of ensuring that only parties that actually receive a measure of electoral support get the funding, and such parties are less likely to have commercial or satirical motives.

The thresholds are also minimally impairing because they are tailored to the objective and fall within a range of reasonable options available to Parliament. Finally, the salutary effects of the thresholds outweigh the deleterious effects since protecting the integrity of the electoral process is more important than absolute party equality.

Section 504 of the Act only grants personhood status to political parties for the purposes of proceedings under the Act, not all proceedings. This follows from the scheme of the Act, and the fact that the provision is found in the part of the Act dealing with enforcement (as opposed to party status). The political parties do not have the capacity to bring a free-standing *Charter* challenge in their own name.

Decisions on Reserve

Flora v. General Manager, Ontario Health Insurance Plan, on appeal from [2007] O.J. No. 91 (Div. Ct.).
Heard on January 21, 2008.

In 1999, Mr. Flora was diagnosed with liver cancer. After consulting several Ontario doctors, he was told that he was not a suitable candidate for a liver transplant and was given six months to live. Mr. Flora explored his options in other countries. His research led him to Cromwell Hospital in London, England, where he underwent chemoembolization and living-related liver transplant (“LRLT”) from his donor brother. Mr. Flora sought reimbursement through the Ontario Health Insurance Plan (“OHIP”). OHIP denied his request. He therefore sought a review of the decision by the Health Services Appeal and Review Board. A majority of the Board confirmed OHIP’s decision on the basis that the treatment was not generally accepted in Ontario as appropriate for a person in the same medical circumstances as Mr. Flora and so the treatment was not an insured service.

The Divisional Court dismissed Mr. Flora’s appeal. The Board’s decision was reasonable. The Board carefully examined the medical evidence and accepted the evidence of the Ontario specialists that LRLT was not appropriate for a person in Mr. Flora’s medical circumstance. The court did not agree that appropriateness of a treatment should be determined based only on potential benefit to a patient. Medical decision-making also requires consideration of resource allocation, a naturally limited supply of donor organs, survival outcomes and ethical considerations. The test of whether a given treatment is “appropriate” is a factual one depending on the evidence. The court rejected Mr. Flora’s s. 7 *Charter* argument that the regulation under the *Health Insurance Act* which imposes a limit on funding for medical treatment obtained outside of the country is inconsistent with the *Charter*. Mr. Flora’s s. 7 rights were not engaged because the regulation did not create an impediment to individuals in securing out-of-country treatment. Section 7 does not create a positive obligation on the part of the government. Further, the Supreme Court of Canada has explicitly stated that there is no constitutional right to state-funded health care.

Mr. Flora appeals the decision, arguing that the correct standard of review that should have been applied by the Divisional Court is one of correctness, not reasonableness, and that in any case, the Board’s decision was unreasonable. He also pursues his argument that the regulation in question is inconsistent with the *Charter*.

Appeals Scheduled for Hearing

None.

* *Evan van Dyk*, Law Clerk, Court of Appeal for Ontario, (416) 327-9228.

Benissa Yau, Law Clerk, Court of Appeal for Ontario, (416) 327-5107.

David De Groot, Law Clerk, Court of Appeal for Ontario, (416) 327-5127.

Constitutional, Civil Liberties and Human Rights Cases at the Supreme Court of Canada

Sebastian Spano*

This list is current as of March 28, 2008.

Recent Decisions

Bruker v. Marcovitz, 2007 SCC 54

Divorce proceedings were commenced by the Appellant, Bruker, in 1980. A decree absolute was granted in 1981. The parties negotiated agreements on various matters including child custody, child support and spousal support. In addition, the parties agreed to appear before a rabbinical court where the Respondent would consent to granting the Appellant a *get*, a Jewish divorce. Despite the Appellant's repeated requests to proceed with the *get*, the Respondent refused to comply. The Appellant initiated proceedings for damages for breach of the agreement, seeking damages for her inability to marry as a Jew and for being prevented from having children considered "legitimate" under Jewish law. The trial judge held that the civil agreement to appear before a rabbinical court moved into the realm of the civil courts and was binding notwithstanding its purpose of compelling a religious obligation. Damages of \$47,500 were awarded. The Québec Court of Appeal reversed the trial judge's decision, noting that the obligation was in substance religious in nature and that to compel Marcovitz to grant the *get* would interfere with his exercise of religious freedom.

The majority of the Court allowed the appeal, with reasons by Abella J. (McLachlin C.J. and Bastarache, Binnie, LeBel, Fish and Rothstein JJ. concurring) and with dissenting reasons by Deschamps J. (Charron J. concurring). The issues raised by the appeal were justiciable. The agreement to obtain the *get* constituted a valid and binding obligation under Québec law. On the religious freedom issue, the majority held that under Québec's *Charter of Human Rights and Freedoms* any infringement of religious freedom experienced by the Respondent must be weighed against the "democratic values, public order and general well-being of the citizens of Québec," in accordance with s. 9.1 of the *Charter*.

620 Connaught Ltd. v. Canada (Attorney General), 2008 SCC 7

Is the annual licence fee for the right to sell alcoholic beverages imposed on hotels, restaurants and bars in Jasper National Park a regulatory charge or a tax? The fee is imposed under the authority of s. 24 of the *Parks Canada Agency Act* by the Minister of Canadian Heritage. If the fee is a tax, it is contrary to s. 53 of the *Constitution Act, 1867*, under which only Parliament may impose a tax, and therefore *ultra vires* and beyond the jurisdiction of the Minister. The Federal Court and the Federal Court of Appeal found the fee to be a regulatory charge, and therefore validly imposed.

The Appeal was dismissed by a unanimous Court with reasons by Rothstein J. In pith and substance, the fee is a regulatory charge. In determining whether a levy is a tax or a regulatory charge, an examination of its regulatory features will be required. While most business licence fees have the attributes of a tax, it is necessary to determine whether there is a relevant regulatory scheme and whether the fees are connected to that scheme. Consistent with the analysis by Gonthier J. in *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, the fee is part of a "complete, complex and detailed code of regulation". The regulatory scheme is aimed at affecting individuals' behaviour. There is a proper estimation of the costs. And, there is a relationship between the regulation and the person being regulated, such that the person causes the need for the regulation or benefits from it.

***Juman v. Doucette*, 2008 SCC 8**

The parents of a 16-month old child brought an action in negligence and breach of contract against the operators of a day care centre, alleging that the child suffered a brain injury as a result of the negligent care of the child. Shortly after the child's injury, the Vancouver Police conducted a criminal investigation into the injuries and interviewed the defendant and Appellant McKenzie (Juman). The civil claim was settled and the Appellant's discovery evidence was never entered into evidence at a trial nor disclosed in court. The Attorney General of British Columbia brought a motion for disclosure of the discovery transcript of the Appellant, seeking to vary the implied undertaking of confidentiality to allow the transcript to be disclosed to the Vancouver Police. Does s. 7 of the *Charter of Rights and Freedoms* operate to prevent the police from obtaining discovery evidence produced in the civil litigation process? The British Columbia Court of Appeal answered the question in the negative, holding that the implied undertaking rule does not extend to disclosure of *bona fide* criminal conduct.

In a unanimous decision, the appeal was allowed with reasons by Binnie J. The implied undertaking rule is based on the need to protect the privacy and the right against self-incrimination of participants in litigation, who are compelled to disclose personal information in the pre-trial discovery process. Participants in the process receive some assurance that the documents and answers provided in discovery will not be used for a collateral or ulterior purpose, which in turn encourages a more complete and candid discovery. Absent a court order or a compelling public interest, no exemptions or variations to the undertaking should be granted. Compelling public interest includes situations of immediate and serious danger to the public and contradictory testimony by an examinee. Where an exemption is sought for discovery relating to criminal conduct which does not amount to serious and immediate danger, the appropriate route is to obtain a subpoena or a search warrant.

Decisions on Reserve

***Société des acadiens et acadiennes du Nouveau-Brunswick Inc. c. Sa Majesté la Reine* - and - *Marie-Claire Paulin c. Sa Majesté la Reine*, File 31583, appeal from 2006 FCA 196 (Appeal heard 17 October 2007)**

Is the RCMP obligated to provide services in both official languages in accordance with sections 16(1), 16.1 and 20(2) of the *Canadian Charter of Rights and Freedoms* when it is acting as a provincial police service? The Federal Court of Canada answered the question in the affirmative. The decision was reversed on appeal on the basis that the obligation for enforcing the language obligations of the *Charter* for services provided by the province of New Brunswick fall on the province. The RCMP was the wrong party as it was merely acting as an agent for the province. The Federal Court was also held to be the wrong forum for deciding the dispute over the language obligations of the province of New Brunswick. The New Brunswick Court of Queen's Bench was held to be the appropriate forum.

***Ville de Montréal (aux droits de la communauté urbaine de Montréal) c. Commission des droits de la personne et des droits de la jeunesse et autre*, File 31551, appeal from 2006 QCCA 612 (Appeal heard 5 December 2007)**

An individual's application for a policing position with the Montreal police force (SPCUM) was rejected on the grounds that the good character requirements had not been met, given that she had pleaded guilty to theft some years before the application. She informed the SPCUM that her criminal record had been effectively erased as a result of having been granted a conditional discharge. After the SPCUM confirmed its decision, a complaint was brought before the Commission des droits de la personne et des droits de la jeunesse, which ruled in favour of the complainant and awarded damages of \$5,000. The Quebec Court of Appeal affirmed the decision, holding that the SPCUM had breached s. 18.2 of the Quebec *Charter of Human Rights and Freedoms*, which forbids discrimination in employment on the basis of a prior criminal act not connected to the employment or for which a pardon was received.

Talib Steven Lake v. United States of America, et al., 31631, appeal from 2006 CanLII 29924 (ON C.A.) (Appeal heard 6 December 2007)

The appellant delivered 90 grams of cocaine to an undercover OPP officer in Detroit, Michigan. When extradition proceedings were begun by the United States of America, the appellant was a Canadian citizen living in Ontario. He was committed for extradition and the Minister of Justice ordered his surrender. On judicial review of the order, the appellant argued that his right to remain in Canada under s. 6 of the *Charter of Rights and Freedoms* was violated. The application for judicial review was denied. The Ontario Court of Appeal dismissed the appeal, ruling that the Minister's reasons, while brief, were adequate; they allowed the court to determine whether: the Minister conducted a proper "Cotroni assessment" or committed a reviewable error in that assessment. The Court also ruled that a mandatory minimum sentence of 10 years for distributing nearly 100 grams of crack cocaine did not offend s. 7 of the *Charter* or s. 44(1)(a) of the *Extradition Act*.

Hydro-Québec c. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ), File 31395, appeal from 2006 QCCA 150 (Appeal heard 22 January 2008)

A long-term employee was dismissed from her employment due to a high rate of innocent absenteeism over a period of several years caused by various physical and psychiatric problems. The employer was concerned about the employee's current and future ability to provide the required level of performance and regular attendance. An arbitrator denied a grievance of the dismissal. That decision was upheld on judicial review. On appeal, the Quebec Court of Appeal held that despite the employer's efforts in the past to accommodate the employee's illnesses, it could not be said that it had discharged its duty to accommodate her *currently*, in light of the expert evidence indicating that various accommodations could be made to the employee's work situation to enable her to work with her disability, including a progressive return to work schedule and part-time work.

Adil Charkaoui c. Ministre de la Citoyenneté et de l'Immigration et Solliciteur général du Canada, File 31597, appeal from 2006 FCA 206 (Appeal heard 31 January 2008)

After the fourth review of the appellant's detention under an immigration security certificate, the appellant filed a motion for a stay of proceedings alleging various infringements of procedural rights guaranteed under s. 7 of the *Canadian Charter of Rights and Freedoms*, including: the destruction of notes and recordings of his interviews with CSIS; the belated disclosure of certain information; and the receipt by the reviewing judge of new information of which the Minister had no knowledge when the certificate was issued. Although the reviewing judge ended the appellant's detention, the main proceedings for deportation were still pending.

New Brunswick Human Rights Commission v. The Potash Corporation of Saskatchewan Inc., File 31652, appeal from 2006 NBCA 74 (Appeal heard 19 February 2008)

New Brunswick's *Human Rights Code* provides an exemption to the general prohibition against age discrimination in employment where a discriminatory practice or policy is a term or condition of a *bona fide* retirement or pension plan. The effect of the provision is that a retirement age of 65 may be imposed if it is part of a term or condition of a *bona fide* pension plan. This raises the question of the interpretation of the provision, and others like it, in light of the Supreme Court of Canada's judgments in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (*Meiorin*), and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868. To what extent should the *Meiorin* test be incorporated in the determination of a *bona fide* pension plan? Is the approach set out in *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, a judgment dealing with discrimination in the insurance context, appropriate in determining the meaning of *bona fide* pension plan? What is the standard of review of the decision of the Human Rights Board of Inquiry?

Privacy Commissioner of Canada v. Blood Tribe Department of Health, File 31755, appeal from 2006 FCA 334 (Appeal heard 21 February 2008)

An employee of the respondent was dismissed from her employment. Her employment file contained correspondence between the employer and its solicitors. Following the dismissal the employee requested access to the information in her employment file. The contents of the file were eventually disclosed to her except for the correspondence between the employer and its solicitors, the employer citing privilege. The Privacy Commissioner ordered production of the documents over which privilege was claimed pursuant to paragraphs 12(1)(a) and (c) of the *Personal Information Protection and Electronic Documents Act (PIPEDA)*. The Federal Court of Appeal held the Commissioner's decision to a standard of review of correctness. It concluded that the lower court had erred in adopting a purposive and liberal interpretation of paragraphs 12(1)(a) and (c) of *PIPEDA* and in adopting *Access to Information Act* principles in a *PIPEDA* review. The Court reversed the lower court's decision and the Commissioner's order for production of the documents was vacated.

Honda Canada Inc. operating as Honda of Canada Mfg. v. Kevin Keays - and - Ontario Human Rights Commission, File 31739, appeal from 2006 CanLII 33191 (ON C.A.) (Appeal heard 20 February 2008)

A long-term employee was wrongfully dismissed from his employment following an absence from work due to medical reasons including chronic fatigue syndrome. He returned to work after his long-term disability benefits were terminated, although he continued to experience difficulties performing his work and missed work intermittently. The employment was terminated following a series of failed attempts to reach a work accommodation, the culminating event being the employee's request for clarification of the purpose and methodology of an examination by a doctor proposed by the employer. In addition to damages for wrongful dismissal, including an extended notice period for bad faith in the manner of dismissal, the employee was awarded punitive damages as a result of discriminatory conduct contrary to the Ontario *Human Rights Code*. The damages were awarded on the basis that conduct contravening a right protected in the *Human Rights Code* meets the requirement for an independently actionable wrong. The trial judge's decision was upheld on appeal, except the quantum of punitive damages, which the majority ruled was excessive. Should discrimination and harassment be treated as separate causes of action? Should human rights statutes be incorporated in individual employment contracts?

British Columbia Transit v. Canadian Federation of Students - British Columbia Component, et al. - and between - Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component, et al., File 31845, appeal from 2006 BCCA 529 (Appeal heard 25 March 2008)

The respondent challenged the advertising policies of TransLink, a corporation created by the *Greater Vancouver Transportation Authority Act*, and Transit, a corporation continued pursuant to the *British Columbia Transit Act*, on the basis that the policies infringed its right to freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The policies permit commercial advertising on the outside of transit vehicles, but prohibit political advertising or advertising "likely to cause offence to any person or group of persons or create controversy". An application for declaratory judgment was dismissed by the trial judge, although he did hold that the corporate transit bodies constitute "government" within the meaning of s. 32 of the *Charter*. The British Columbia Court of Appeal allowed the appeal.

Minister of Justice, et al. v. Omar Ahmed Khadr, File 32147, appeal from 2007 FCA 182 (Appeal heard 26 March 2008)

The respondent, a Canadian citizen, was apprehended by American forces in Afghanistan in 2002. He was 15 years of age at the time. He has been detained in Guantanamo Bay, Cuba, at a U.S. naval facility. In 2005, he was charged with murder and attempted murder by an unprivileged belligerent; conspiracy to commit offences triable by Military Commission; and aiding the enemy. As of February 2007, the charges against him are: murder and attempted murder in violation of the law of war; conspiracy; providing material support to the enemy; and

spying. Before the charges were laid, officials from the Canadian Security Intelligence Service and the Department of Foreign Affairs and International Trade, Canada, interviewed the respondent without the presence of his counsel. The visits were allegedly not consular or welfare visits, but purely for gathering information for intelligence or law enforcement purposes. Through *Access to Information Act* (AIA) requests and through disclosure and production in the course of two Federal Court proceedings, one seeking remedies for alleged violations of the respondent's right to counsel and right to silence by Canadian officials in the course of the interview in Guantanamo Bay, the other seeking an order to compel the government to extend consular and diplomatic services to him, the respondent received redacted copies of some documents in the Crown's possession. Redactions and deletions were made on the grounds of international relations, national defence and national security, pursuant to statutory exemptions in the AIA, and on the basis of "specific public interest immunity" under s. 38 of the *Canada Evidence Act*. The respondent brought an application for judicial review seeking a mandamus order to compel the full disclosure of all documents in the possession of the Crown that might be relevant to the charges against him, arguing that this was required by s. 7 of the *Charter* and consistent with the principles in *R. v. Stinchcombe*. The applications judge dismissed the application, holding that the *Charter* did not have extraterritorial application. The Federal Court of Appeal allowed the appeal, holding that a justiciable *Charter* issue is raised given that Canadian authorities took part in gathering evidence against the respondent at the pre-charge stage and transmitted summaries of the evidence to U.S. authorities. This participation assisted U.S. authorities in preparing their case against the respondent, increasing the likelihood that charges would be laid and his life, liberty and security of the person deprived. A sufficient causal connection existed between the Canadian government's investigation and the potential deprivation of life, liberty and security of the person.

Cases Scheduled to be Heard

Confédération des syndicats nationaux c. Procureur général du Canada - et - Procureur général du Québec, File 31809, appeal from 2006 QCCA 1454 (Leave granted 24 May 2007); ***Syndicat national des employés de l'aluminium d'Arvida Inc., et autres c. Procureur général du Canada - et - Procureur général du Québec***, File 31810, appeal from 2006 QCCA 1453 (Scheduled to be heard 13 May 2008)

The appellants sought a declaration that various provisions of the *Employment Insurance Act* (EIA) violate the *Constitution Act, 1867*, particularly: s. 91(2A), the federal power over unemployment insurance; s. 91(3), the federal taxation power; s. 92(13), property and civil rights in the province; s. 93, provincial authority to legislate in respect of education; and, s. 125, exemption of federal and provincial public lands or property from taxation. The employment insurance program has undergone significant changes since 1986, including: the incorporation of the Employment Insurance Commission's budget into the Consolidated Revenue Fund and, with it, the significant accumulated surplus of \$50 billion. The appellants challenge, among other things, whether the Constitution gives the federal government the authority to use monies raised from employment insurance premiums as a general source of federal revenue and for purposes other than employment insurance. A related issue is whether the provisions of the EIA that are under challenge are a valid exercise of the federal taxation power.

Raymond Desrochers et autre c. Ministère de l'Industrie du Canada et autre, File 31815, appeal from 2006 FCA 374 (Scheduled to be heard 20 May 2008)

The federal Department of Industry has established a Community Futures Development Program with the aim of helping communities diversify themselves economically. This is achieved in Ontario through Community Futures Development Corporations (CFDC), autonomous organizations of the federal government constituted as non-profit organizations under provincial law. The appellants brought a complaint under the *Official Languages Act* (OLA) against what they considered unequal access to French language services by the North Simcoe CFDC. The Commissioner of Official Languages concluded, following an investigation under Parts IV and VII of the OLA, that French-language services provided by the North Simcoe CFDC and the Department of Industry were not equal in quality to those provided in English. An application under s. 77(1) of the OLA was brought seeking a declaration that the respondents had not complied with Parts IV and VII of the OLA and damages. The application was denied in light of the finding by the trial judge that remedial measures had been taken by

the Department at the time of the filing of the application, although he did find that s. 25 of the OLA requires third parties, such as the North Simcoe CFDC, to provide services to the public in either official language when acting on behalf of a federal institution. The Federal Court of Appeal agreed with the trial judge on all but the issue of costs to the appellants.

Chief John Ermineskin, et al. v. Her Majesty the Queen in Right of Canada, et al. File 31875, appeal from 2006 FCA 415 and ***Chief Victor Buffalo acting on his own behalf and on behalf of all the other members of the Samson Indian Nation and Band, et al. v. Her Majesty the Queen in Right of Canada, et al.***, File 31869, appeal from 2006 FCA 415 (Scheduled to be heard 22 May 2008)

Under the terms of Treaty 6 (1876) and the *Indian Act*, and surrender instruments executed in 1946, the appellant bands surrendered the oil and gas resources found beneath the surface of their reserve lands. Pursuant to the *Indian Oil and Gas Act*, royalty monies received by the Crown from the exploitation of those resources are to be held in trust for the bands. The Crown treated the moneys as “public money” within the meaning of s. 2 of the *Financial Administration Act*, and therefore to be deposited in the Consolidated Revenue Fund. Royalties are also treated as “Indian moneys” and “capital moneys” under the *Indian Act*. As capital moneys, certain rules are set for the expenditure of those moneys. The appellants maintained that the Crown, as trustee of their capital moneys has and always had a common law duty to invest the money prudently. The Crown maintained that it had no authority to invest the money given the language of the *Indian Act*, and instead periodically invited proposals from Indian bands for an investment plan for the use of the moneys, in accordance with ss. 61 and 64 of the *Indian Act*. No proposals were received by the appellants until 2005, when the Samson First Nation and Band submitted a proposal. The appellants claimed damages or equitable disgorgement of hundreds of millions of dollars derived from their royalties. The claims were dismissed by the Federal Court. An appeal from that decision was dismissed by the Federal Court of Appeal. The appellants also asserted a claim of discrimination under s. 15 of the *Charter of Rights and Freedoms* on the ground that ss. 61 to 68 of the *Indian Act* deny them, as Indians, a right that is available to non-Indians whose property is held in trust. This claim was also rejected by the Federal Court and the appeal was dismissed by the Federal Court of Appeal, which held that a remedy under s. 15 of the *Charter* is only available where a personal right has been infringed. Here, the claim is for a collective right, since the royalties and other properties are communal property held by the bands.

C.A., et al. v. Director of Child and Family Services, File 31955, appeal from 2004 MBCA 59 (Scheduled to be heard 20 May 2008)

The appellant, a 14 year-old (at the time of the hearing in the Manitoba Court of Appeal) Jehovah’s Witness suffered from Crohn’s Disease. In the course of a hospital admission necessitated by lower gastrointestinal bleeding, her hemoglobin count had reached a level that, in the opinion of medical staff, created an imminent and serious risk to her life or health. A blood transfusion was deemed necessary, but the parents and the child would not consent on the basis that it was forbidden by their religion. The Director of Child and Family Services was informed of the refusal and the Director apprehended the child as being in need of protection, relying on ss. 25(8) and (9) of the *Child and Family Services Act*. The applications judge granted a treatment order sought by the Director to enable hospital staff to perform the transfusion. The issues raised on appeal were: whether the common law principle of the mature minor is replaced by s. 25 of the CFSA as it relates to potentially life-threatening medical situations; and, if so, whether the legislation violates s. 2(a), s. 7 and s. 15(1) of the *Charter of Rights and Freedoms*. The Manitoba Court of Appeal answered the first question in the affirmative, holding that the legislation forms a complete code for dealing with refusals of medical treatment. The Court also held that the legislation while violating s. 2(a) was a justifiable infringement under s. 1 of the *Charter*. No violation of s. 7 and s.15 was found.

Cases Where Leave Recently Granted

Ministry of Public Safety and Security (Formerly Solicitor General) v. Criminal Lawyers' Association - and - Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner of Ontario, File 32172, appeal from 2007 ONCA 392 (Leave granted 29 November 2007)

Does s. 2(b) of the *Canadian Charter of Rights and Freedoms* encompass a right of access to government information? Does Ontario's *Freedom of Information and Protection of Privacy Act* (FIPPA) unjustifiably limit the right to freedom of expression in s. 2(b) of the *Charter*? The Criminal Lawyers Association (CLA) sought disclosure of records concerning an internal OPP investigation. The investigation arose after a Superior Court judge stayed murder charges in *R. v. Court and Monaghan* because he found that the police and Crown attorneys had engaged in serious violations of the defendants' rights under the *Charter*. The Superior Court's detailed description of *Charter* violations was in stark contrast to the OPP's terse press release stating it had found no evidence of attempts to obstruct justice.

The request for disclosure was denied on the basis of exemptions contained in FIPPA sections 14 (law enforcement records), 19 (solicitor-client privilege), and 21 (personal privacy). The Assistant Commissioner of the Office of Information and Privacy, on a review of the denial, held that although the CLA's claim fulfilled the public interest override in FIPPA s. 23, the override provision's plain text makes it applicable to the personal privacy exemption, but not the law enforcement or solicitor-client privilege exemptions. The Assistant Commissioner also rejected the claim that the inapplicability of FIPPA's override provision to the latter exemptions violates the CLA's rights under section 2(b) of the *Charter*. The Divisional Court dismissed the CLA's application for judicial review. The majority at the Court of Appeal allowed the appeal, holding that expressive content was at issue and that the requested information fell under the protection of section 2(b) of the *Charter*.

Her Majesty the Queen in Right of the Province of Alberta v. Hutterian Brethren of Wilson Colony, et al, File 32186, appeal from 2007 ABCA 160 (Leave granted 29 November 2007)

Alberta requires that all drivers' licences have a photograph of the possessor of the licence. A challenge was brought by the Respondents under section 2(a) of the *Charter*, which protects freedom of religion. The Respondents are a Christian sect that strictly adheres to the second commandment which forbids making for oneself "an idol, or any likeness of what is in heaven above or on the earth." The Respondents maintain that they are forbidden from voluntarily allowing themselves to be photographed. Although Alberta has required the driver's photograph on the driver's licence since 1974, it permitted individuals with religious objections to be exempted from the photo requirement. In 2003, however, Alberta passed new regulations making the photograph mandatory, effectively removing the religious exemption. The justification for the new regulations was to combat identify theft. The Alberta Court of Appeal, in a majority judgment, upheld the lower court's decision that the new regulations eliminating the religious exemption were contrary to the *Charter*.

Robin Chatterjee v. Attorney General of Ontario, File 32204, appeal from 2007 ONCA 406 (Leave granted 20 December 2007)

The Respondent seized \$29,020 in Canadian currency and various items commonly used in the production of marijuana following the arrest of the Appellant and a search of his vehicle as an incident to the arrest. An application *in rem* for the forfeiture of the items was brought under Ontario's *Civil Remedies Act* (CRA). In response, the Applicant challenged the legislation as *ultra vires* the province and contrary to sections 7, 8, 9 and 11 (d) of the *Charter*. The forfeiture application was granted. An appeal of the trial judge's order was dismissed by the Ontario Court of Appeal. It held the legislation to be in pith and substance a matter of property and civil rights in the province in accordance with s. 92(13) of the *Constitution Act, 1867*. The forfeiture scheme under the CRA, like other forfeiture schemes, was held to be a civil mechanism, and not penal in nature.

Laura Ravndahl v. Her Majesty the Queen in the Right of the Province of Saskatchewan as represented by the Government of Saskatchewan, et al., File 32225, appeal from 2007 SKCA 66 (Leave granted 7 February 2008)

Saskatchewan's *Workers' Compensation Act* provided that the surviving spouse of a deceased worker, who died as a result of his or her injuries, would cease to receive a monthly pension if the surviving spouse remarried. Only a lump sum equivalent to two years of monthly payments would be paid on remarriage. Following the Applicant's remarriage in 1984, the Act was amended so that the monthly compensation continued whether or not the surviving spouse remarried. The new legislative provision applied only to spouses who remarried after April 17, 1985. The Applicant could not benefit from this amendment. In 1999, legislation was passed to provide for a one-time payment for spouses who remarried prior to April 1985. The Applicant did not apply for this lump sum benefit, choosing instead to bring an action in 2000 to declare parts of the Act as contrary to s. 52 of the *Canadian Charter of Rights and Freedoms*. Specifically, she challenged the constitutionality of the provision that permitted remarried surviving spouses to continue receiving compensation if they remarried after April 17, 1985. She also challenged the legislation which provided the lump sum award to surviving spouses who remarried before April 17, 1985. The Applicant sought an order that these legislative provisions are contrary to s. 15 of the *Charter*, an order reinstating her spousal pension, damages and pre-judgment interest and costs. The chambers judge treated the claims as claims for damages under s. 24(1) of the *Charter* and presumed that the cause of action arose on April 17, 1985, the date that s. 15 of the *Charter* came into effect. She struck out the claims for damages and for declarations of invalidity as being barred by the *Limitation of Actions Act*. A majority of the Court of Appeal upheld the decision to strike out the damage claims, but reversed the chambers judge on her decision to strike out the claims for the declarations of invalidity of the legislation. The dissenting judge would have allowed the appeal on all grounds. Is the Applicant precluded from advancing a personal claim for damages as a result of the *Limitation of Actions Act*? Does the Act also preclude a challenge to the constitutionality of the impugned statutes?

Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters, Consolidated Fastfrate Transport Employees' Association of Calgary and the Alberta Labour Relations Board, File 32290, appeal from 2007 ABCA 198 (Leave granted 6 March 2008)

The Applicant, Fastfrate, is a national freight-forwarding business that arranges for local pick-up of customer shipments, consolidates the shipments into one truckload, arranges for inter-provincial shipments, and de-consolidates and delivers or arranges local delivery of those shipments. This is done using third party carriers. No Fastfrate employees or equipment cross provincial boundaries. In April 2004, the Canada Industrial Relations Board (CIRB) certified the Respondent Teamsters as bargaining agent for all Fastfrate employees in Alberta, Saskatchewan and Manitoba, except for sales staff and dispatchers. Included in the certification order was a bargaining unit in Calgary already represented by the second Respondent, the Consolidated Fastfrate Employees' Association of Calgary. The Association obtained a stay of the CIRB order pending a determination by the Alberta Labour Relations Board (ALRB) as to whether the Association is the proper bargaining agent. In dismissing the Association's application, the ALRB held that the Calgary operation fell within federal jurisdiction and was therefore subject to the *Canada Labour Code*. It ruled that Fastfrate's Calgary operation is "part of a single, indivisible inter-provincial undertaking" notwithstanding its use of third party carriers, and therefore a work or undertaking "connecting the Province" with other provinces within the meaning of s. 92(10)(a) of the *Constitution Act, 1867*. The trial judge quashed the ALRB decision. The Alberta Court of Appeal, in a majority judgment, reversed that decision. It held the ALRB's decision to a standard of correctness because a direct constitutional question was required to be addressed. Is a physical connection to the inter-provincial activity a pre-condition to finding a federal work or undertaking? How significant is the functional nature of the operation connecting the provinces as a factor?

Ministre de l'Éducation, du Loisir et du Sport et autre c. Hong Ha Nguyen et autres, File 32229, appeal from 2007 QCCA 1111 (Leave granted 6 March 2008) and *Ministre de l'Éducation, du Loisir et du Sport et autre c. Talwinder Bindra*, File 32319, appeal from 2007 QCCA 1112 (Leave granted 6 March 2008)

Section 23(2) of the *Canadian Charter of Rights and Freedoms* provides that Canadian citizens any of whose children receive primary or secondary school instruction in English or French have the right to have all their children educated in the official language in which the other children received or are receiving their education. Québec's *Charter of the French Language* was amended in 2002 rendering irrelevant the fact that a child of Canadian citizens has received an English language education at the primary level in an unsubsidized private school, in a request by a parent to have that child or any other child receive a public English-language education (s. 73, part 5, paragraph 2). Similarly, the fact of a child having received a special authorization from the Minister, on humanitarian or health grounds, to receive a public English-language education is irrelevant in a request to have a sibling to receive such education (s. 73, part 5, paragraph 3). The Tribunal Administratif du Québec dismissed a challenge by a group of parents that these amendments to the legislation violated s. 23(2) of the *Canadian Charter*. A judicial review application of the Tribunal's decision was denied. The Québec Court of Appeal granted the appeal. The Tribunal's decision was held to a standard of correctness given that the proceedings raised constitutional questions, the answer to which would have precedential value.

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