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REVIEW OF CURRENT LAW AND LAW REFORM

TRENDS AND DEVELOPMENTS

FEATURE ARTICLES

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The review is dedicated to publishing the original work of current and recently graduated law students, articling students, and students pursuing undergraduate or graduate studies both in law and in other disciplines. *Appeal* endeavours to publish articles that are timely, relevant, and which address possibilities for Canadian law reform.

The editors welcome and encourage the submission of articles, opinion pieces, case commentaries and critiques, as well as criticisms and suggestions for the inclusion of timely issues. For submissions information, contributors should refer to page 4 of this volume and/or the journal website as listed above.

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Trends & Developments

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Editorial

Welcome to the 2001 issue of *Appeal: Review of Current Law and Law Reform*. Now in its seventh year, the journal continues to provide a forum for student scholarship on current legal issues. Our goal is to publish timely and relevant works that examine Canadian law reform on issues of interest to the legal profession, as well as the general public.

Our *Trends and Developments* section begins with Richard Weiland's analysis of the *Uniform Electronic Commerce Act*, Canada's approach to the growing area of e-commerce. Aviva Farbstein discusses the success of the current review process, legislation and regulations for mergers in the quickly evolving Canadian communications industry. The unintended consequences of legislation is the focus of Sara Smyth's article on "anti-loan sharking" provisions in the *Criminal Code*. Alisia Adams' article reviews the recent trend in the judiciary to find provincial statutes of limitations inapplicable to First Nations' legal claims.

In the *Feature Articles* section, Robert Stack takes an in-depth look at the education rights of special needs students in British Columbia. The recent application of the *Charter* and human rights acts to special education regimes is examined by reviewing policy, statutes and recent case law. The winner of the 2001 Cassels Brock & Blackwell Paper Prize, Shauna Labman, examines the dilemma posed in the law for transsexuals, and how their physical transition leaves them in a state of legal limbo. Finally, the question of whether there is a right to welfare in Canada is the topic of Amber Elliot's article.

The Editorial Board would like to thank our numerous volunteers – students, professors, and lawyers in the community – for their help, as well as law firms who provided financial support. This assistance enables *Appeal* to continue its tradition of publishing high quality student scholarship year after year. We hope you enjoy this volume of *Appeal*.

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The *Uniform Electronic Commerce Act*:

Removing Barriers to Expanding E-Commerce

Richard Weiland is completing his third year of law school at the University of Victoria. Upon graduation, Richard will article with the Vancouver firm Clark, Wilson.

Introduction

The total value of global e-commerce is expected to increase to $3.9 trillion by 2004, a twenty-fold increase from 1999.[1] This phenomenal growth has raised two significant concerns about the certainty of conducting business over the Internet. The first is whether agreements made over the Internet will be legally enforceable.[2] The second is the problem of authenticating electronic documents and records. The technological means to authenticate electronic records continue to develop, but many legal questions remain unanswered: what will the law recognize as valid authentication, and what benefits will this status confer?

Recent provincial legislative initiatives attempt to answer these questions. Ontario, Manitoba, Saskatchewan, Nova Scotia and the Yukon have already enacted electronic commerce legislation,[3] and British Columbia, Quebec and New Brunswick are in the process of developing similar laws.[4] Aside from minor variations, these provincial initiatives implement a model statute developed by the Uniform Law Conference of Canada (ULCC) in 1998 and 1999.[5] Titled the *Uniform Electronic Commerce Act* (*UECA*),[6] this model statute is influenced by the United Nations model e-commerce legislation, which set an internationally acceptable standard in 1996.[7] The Canadian situation mirrors a growing international trend toward introducing legislation to facilitate the development of e-commerce.[8]

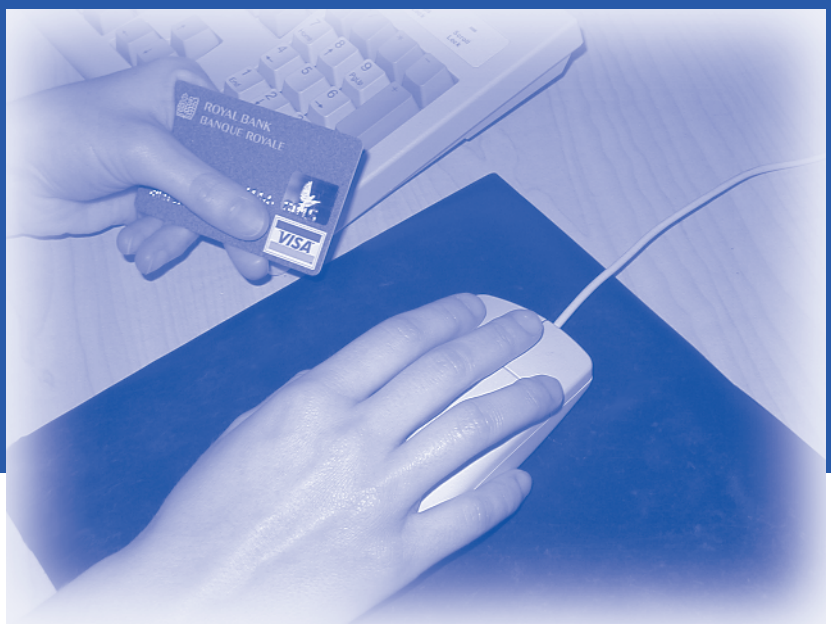
Legislative responses around the world take a variety of approaches to the problems raised by electronic transactions. A recent international study noted three general categories of e-commerce legislative approaches.[9] First, several older initiatives adopted a 'prescriptive' approach, enacting stringent guidelines pertaining to the use of specific technologies. Second, other legislation utilizes a 'two-tiered' approach, granting basic legal benefits to all electronic authentication techniques, and conferring additional legal benefits or presumptions upon documents authenticated by approved methods. Third, the 'minimalist' or 'enabling' approach makes no effort to enact specific standards for authentication techniques, focusing instead on

1 Source: International Data Corporation, (Nov 2000), online: <http://www.idc.ca>; cited in Industry Canada, "Canadian Internet Commerce Statistics Summary Sheet" (date accessed: 07 Nov 2000).

2 See *e.g.* T. Smedinghoff & R. Hill Bro, "E-Commerce in Illinois: is it legal?" (Apr 2000), 14 CBA Record 26 at 28.

3 *The Electronic Commerce Act 2000*, S.O. 2000 c.17 (in force October 16, 2000); *Electronic Commerce and Information Act*, C.C.S.M. c.E55 (Parts 1, 2, 4, 5, 7 in force October 23, 2000); *The Electronic Documents and Information Act*, S.S. c.E-7.22 (in force November 1, 2000); *The Electronic Commerce Act*, S.N.S.2000 c.26 (in force December 1, 2000); *Electronic Commerce Act*, S.Y. 2000, c.10.

4 Bill 32, *Electronic Transactions Act*, 4th Sess., 36th Parl., B.C., 2000 (1st reading 5 July 2000); Bill 161, *An Act to establish a legal framework for information technology*, 1st Sess., 36th Leg., Que., 2000. The Government of New Brunswick has released a consultation paper: "Public input requested on proposed electronic transactions law" (2000), online: Communications New Brunswick <http://www.gov.nb.ca/newsjus/2000e1071ju.htm> (date accessed: 15 Dec 2000) .



the legal effect of electronic documents.

Canada's model legislation, the *UECA*, follows the minimalist approach. It does not set out specific criteria to which all documents must comply to be considered authentic. Rather, it begins with the governing principle that all electronic information is legally valid, and then removes existing legal barriers that are in conflict with that rule. These barriers are found both in the common law of contracts and in statutory 'writing' requirements.

The Governing Principle

The governing principle of the *UECA*, as stated in section 5, is that "Information shall not be denied legal effect or enforceability solely by reason that it is in electronic form."[10] Understanding the double negative structure of this provision is key to understanding the *UECA*. The *UECA* does not confer any special benefits on information in electronic form, regardless of its reliability. Instead, it seeks to eliminate prejudice against any electronic form of communication. While information in an electronic form, like information on paper, may have no legal effect for many reasons, this provision prevents a party from claiming that the document is invalid by the mere fact that it was conveyed electronically. In other words, electronic transactions are to be treated the same as their non-electronic equivalents. The remainder of the *UECA* deconstructs the legal barriers that would otherwise impede electronic transactions and e-commerce.

Removing Contract Law Barriers

Contract law has been successful at adapting to new communications technologies as they have developed. Thus, communication

5 The Quebec legislation, not based on the *UECA*, is the single exception.

6 *Uniform Electronic Commerce Act* (1999), online: Uniform Law Conference of Canada <http://www.law.ualberta.ca/alri/ulc/current/eueca*fin*.htm> (last modified: August 1999).

7 "UNCITRAL Model Law on Electronic Commerce with Guide to Enactment" (1996), online: United Nations Commission on International Trade Law, <http://www.un.or.at/uncitral/english/texts/electcom/ml-ec.htm> (date accessed: 9 October 2000).

8 See e.g. legislation based on the UNCITRAL Model Law has been adopted in Australia, Bermuda, Colombia, France, Hong Kong, Mexico, Ireland, Republic of Korea, Singapore, Slovenia, the Philippines, and the state of Illinois: "Status of Conventions and Model Laws" , online: UNCITRAL <http://www.uncitral.org/english/status/Status.pdf> (date accessed: 2 Nov 2000). Similar model legislation prepared by the U.S. National Conference of Commissioners on Uniform State Law has been adopted as law in 23 American states: "Legislative Fact Sheet on the Uniform Electronic Transactions Act", online: NCCUSL <http://www.nccusl.org/uniformact_factsheets/uniformacts-fs-ueta.htm> (last modified: Jan. 2001).

9 See "Survey of International Electronic and Digital Signature Initiatives" (1999), online: Internet Law & Policy Forum <http://www.ilpf.org/digsig/survey.htm> (date accessed: 9 October 2000) [hereinafter 'ILPF Survey'].

10 *Supra* note 6.

of offer and acceptance are valid when sent through the mail[11] or transmitted by facsimile machine.[12] The adoption of paperless electronic communications, however, has raised new problems that the common law had not previously addressed. These include the use of non-traditional means to express offer and acceptance, the use of computers as intermediaries and the use of electronic authentication techniques.

At common law, evidence of offer and acceptance could be oral, written, or communicated by the action of one of the parties. Some electronic communication methods, however, do not fit neatly into these categories. Clicking on an icon on a web site, for example, is an action that immediately results in the user sending an electronic message to the computer system of the host. The legal effect of this message-producing action has no directly analogous common law precedent. Section 20 of the *UECA* clarifies the common law by specifically permitting an offer, acceptance, or other matter material to the contract to be expressed in any of three ways.[13] First, the communication may be made by means of an electronic document – an e-mail message, for example. Second, a party to the contract can use an "action in electronic form", which includes clicking on an icon on a computer screen. Third, the *UECA* creates a broad category of "otherwise communicating electronically in a manner that is intended to express the offer, acceptance or other matter." This residual category allows for a broad range of current and future technologies to be used, including touching a number on a touch-tone phone, pressing a button on a handheld wireless device or giving a verbal command to a speech recognition device. The wording of this provision ensures that the expressed intent of the parties, rather than the particular communication medium, is relevant in determining whether a contract has been formed. The focus on the intent rather than the medium is true to the neutral, barrier-dismantling approach of the *UECA*.

Consumer groups in the United States have expressed concern that similarly worded U.S. legislation creates legal obligations where none existed before.[14] This concern is probably unfounded, since courts have enforced such contracts on common law principles alone. In *Rudder v. Microsoft,*[15] the Ontario Superior Court upheld the validity of a software licensing agreement that a consumer agreed to by clicking an icon labeled "I agree" while the contractual terms were displayed on the screen. Rejecting the plaintiff's attempt to escape certain terms of the contract on the grounds that he did not assent to them, the judge concluded, "on the present facts, the Membership Agreement must be afforded the sanctity that must be given to any agreement in writing."[16] In light of this case, the provisions of the *UECA* appear not to create new legal obligations. Courts had already been willing to adapt the common law of contracts, where necessary, to enforce reasonable electronic contracts. The *UECA* simply creates greater certainty by ensuring consistent

11 *Adams v. Lindsell* (1818), 1 B. & Ald. 681.

12 *Trans-Pacific Trading v. Rayonier Canada Ltd.* (1998), 48 B.C.L.R. (3d) 296 at par. 40.

13 *UECA*, *supra* note 6, s. 20(1).

14 See N. Morehead, "The Age of E-Sigs is Here", online: WiredNews <http://www.wired.com/news/politics/0,1283,37342,00.html> (date accessed: 9 October 2000).

15 [1999] O.J. No. 3778, online: QL (OJ).

16 *Ibid.* at para. 17.

treatment for all present and future technologies through which contracts are formed.

A conceptually more difficult problem to fit into the common law of contracts occurs where one or both parties to the contract use a computer as an intermediary. When selling goods through a web site, for example, a vendor will program its server to offer to sell a particular item to a prospective purchaser who expresses interest in the item. Similarly, a trader in securities may set a computer to monitor a share price and sell a given number of shares as soon as the price reaches a determined level. In both of these situations, when the other contracting party communicates the offer or acceptance, the first party may not be aware that the transaction has been completed. The issue becomes whether there was a meeting of minds sufficient to form a contract despite the lack of a temporal nexus.

The *UECA* solves this problem by introducing the concept of the "electronic agent", meaning any electronic means to initiate or respond to an action without human review.[17] Quite simply, the *UECA* allows a contract to be formed by the interaction of a person and an electronic agent, or by the interaction of two or more electronic agents.[18] In effect, the intention of the person using the electronic agent is expressed in the instructions the person gives the agent, and remains valid until those instructions are changed.

The *UECA* also contains special provisions to deal with a "material error" made by persons dealing with an electronic agent.[19] If the electronic agent does not allow the person to review and correct the transaction before it is made final, the person may escape the agreement by notifying the other person of the mistake and returning any consideration. If a company is purchasing computer systems from a vendor's website, for example, and mistakenly orders 55 rather than 5, the web site should provide at least one chance for the purchaser to correct the transaction before it is made final. If it does not, and the company receives 55 computers before the mistake is noticed, the purchaser may notify the vendor and return the computers, and will not be obligated to pay for them. This consumer protection provision will increase, rather than decrease, certainty in contracting by encouraging all parties using electronic agents to include adequate review mechanisms into their programs.

Although web-based e-commerce sites are the most obvious current example of the use of electronic agents, the *UECA* definition is broad enough to cover any technologies that initiate communication or respond to another person's communication without human intervention. This technology neutral approach will allow emerging and yet undiscovered technologies to be given immediate legal recognition as they gain acceptance.

One of the most frequently discussed aspects surrounding the

17 *Supra* note 6, ss. 19, 21.

18 *Ibid.*, s. 21.

19 *Ibid.*, s. 22.

emerging e-commerce framework has been legal recognition of authentication techniques. The *UECA* approach to authentication techniques in commercial relations is relatively straightforward compared to legislative approaches in other jurisdictions.[20] Aside from situations in which a signature is specifically required by law,[21] the *UECA* does not mention authentication. In the case of a private contract to which no statutory requirements apply, the use of authentication technologies is covered by the governing principle of the *UECA*,[22] and by the general contracting provision which states that any matter "material to the formation or operation of a contract" may be expressed electronically.[23] In other words, where no statutory requirements are involved, parties are free to use any authentication mechanism they agree upon, and feel comfortable with, in the context of the transaction.

Removing Statutory Barriers

In addition to the challenges faced in adapting contract law to accommodate electronic communication, the *UECA* addresses provincial statutory requirements that may conflict with the general provision, giving legal validity to electronic communication. Many business transactions are subject to statutory requirements which, interpreted literally, could prevent their translation into electronic media. Numerous provincial statutes require documents to be "in writing", to be "signed" by one party, or in other ways suggest paper-based communication.[24] In most of these cases, however, the intent of the statute is not necessarily to have the document on paper, but to take advantage of one or more of the benefits that particular requirement provides. The *UECA* removes these statutory barriers to electronic communication by allowing electronic media that fulfill the purposes intended by each paper-based requirement. This approach is known as the "functional-equivalent" approach.[25]

Basic writing requirements translate fairly easily to their electronic equivalents. Where a statute simply requires something "in writing", for example, an electronic record must simply be "accessible for future reference" to comply.[26] Where one party must "provide" another with a document in writing, the *UECA* adds the further requirement that the electronic information must be "capable of being retained".[27] Information posted on a corporate web site, for example, would usually meet a requirement that the information be in writing, but would not meet a requirement to provide the information in writing to another party unless it was in a form in which that party could transfer it to his or her own computer for storage.

Other statutory requirements apply to electronic information with somewhat greater difficulty, due to inherent characteristics of electronic

[20] See ILPF Survey, *supra* note 8.

[21] Discussed *infra* note 30 and accompanying text.

[22] *UECA*, *supra* note 6, s. 5.

[23] *Ibid.*, s. 20.

[24] E.g. a corporation may "in writing" authorize an agent to use its corporate seal: *Company Act*, R.S.B.C. 1996, c.62, s. 35(2).

[25] See the *Guide to Enactment* of the *UNCITRAL Model Law on Electronic Commerce*, *supra* note 7, para. 15-17.

[26] *UECA*, *supra* note 6, s. 7.

[27] *Ibid.*, s. 8(1).

communication. For example, where a law requires an "original" document, a literal interpretation would exclude almost all forms of electronic information. Even the most securely encrypted electronic document, when transmitted from one device to another, is sent as a copy of the original document. The *UECA* recognizes that the purpose of requiring an original document is to verify that the information contained therein is the same as it was at the time of its creation. Thus, it deems an electronic document to be original "if there exists a reliable assurance as to the integrity of the information contained in the electronic document from the time the document to be presented or retained was first made in its final form".[28] In a similar vein, where a law requires more than one copy of a document to be provided, the recipient of the document can easily reproduce it and may not wish to receive multiple electronic copies of the document. Providing a single electronic document, therefore, fulfills such a requirement under the *UECA*.[29]

Where the law requires a document to be signed, the *UECA* contemplates the use of electronic signatures. Rather than setting stringent reliability standards, however, the *UECA* simply allows electronic signatures where they achieve the same purposes as their pen-and-ink counterparts. Since the basic function of a signature is simply to link a person with a document,[30] an electronic signature is defined as information "created or adopted in order to sign a document" that is associated in some way with the person signing the document.[31] The combination of the intent of the signer and the *UECA* of affixation or association sufficiently achieve the functions of a written signature in most situations.

In some cases, however, the public interest may demand a higher standard of reliability for certain classes of documents. In such cases, the *UECA* as drafted allows the provincial government to make a regulation that an electronic signature relating to a document of that particular class must meet a reliability standard.[32] The requirement is twofold: the electronic signature must reliably identify the person signing the document, and it must be reliably associated with the document. This higher standard is not a departure from the functional equivalence approach, but rather recognition that in certain circumstances the statutory signature requirement intends to create a lasting positive identification of the signer. One class of documents where such a regulation may be enacted is contracts relating to the disposition of land, which in most provinces are not enforceable unless in writing and signed by the person charged.[33] Because of the importance of maintaining a high standard of reliability in real property contracts, provincial governments that have adopted the *UECA* will likely enact regulations stating that an electronic signature pertaining to such a contract must meet the reliability requirements.

[28] *Ibid.*, s. 11(1)(a).

[29] *Ibid.*, s. 14.

[30] See D. Farrend, "Policy Considerations Behind Legislation Recognizing Electronic Signatures" (Jul 1998), online: Uniform Law Conference of Canada <http://www.law.ualberta.ca/alri/ulc/current/efarrend.htm> (date accessed: 9 October 2000).

[31] *UECA*, *supra* note 6, s. 1(b).

[32] *Ibid.*, s. 10(2).

[33] See *e.g. Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 59(3).

Conclusion

Rather than setting up a new legal framework for electronic commerce, the *UECA* takes a minimalist approach. It does not grant special benefits to certain classes of electronic information, but rather sets out the simple rule that information in electronic form should not be prejudiced. To achieve this result with greater certainty, the *UECA* addresses specific concepts in contract law, easing their translation into the electronic realm. In addition, the *UECA* specifically allows electronic information to satisfy statutory writing requirements that were never intended to exclude electronic information. This enabling, barrier-removing approach achieves greater certainty in the e-commerce realm while allowing parties the freedom to use whatever channels of communication they find most desirable. The provinces' adoption of the *UECA* model should facilitate the continued growth of e-commerce in Canada.

A look at Merger Review in Light of Corporate Consolidations in Communications

Aviva Farbstein has a BA in Broadcast Journalism from Concordia University and an MA in Communications Studies from the University of Calgary. She is currently in her second year of law school at the University of Victoria, where she will graduate in 2002.

Introduction

The communications industry has undergone enormous change in recent years, due in part to new technologies, shifts in regulatory philosophy and consumption patterns, and greater international competition. These changes have coincided with a trend of mergers and takeovers in the industry. All of these factors together blur the lines that have been drawn around specific communications sectors, and bring into question the sufficiency of the legislation, regulation, and regulators now in place to deal with a quickly converging and evolving industry.

This paper looks at the merger review system in Canada, using as an example the recently announced deal between CanWest Global Communications Corp. ("CanWest") and Hollinger Inc. ("Hollinger"). It examines the interplay between sectoral regulation and general competition law. In it, I will examine the historical reasons for the state of the law in Canada, with some reference to the experiences of other countries, since this is an area where there is a great deal of international consultation.

The Deal

On July 31, 2000, Hollinger and CanWest announced that CanWest would purchase most of Hollinger's Canadian assets for approximately $3.5 billion in cash and shares.[1] Hollinger possessed the Southam group of newspapers, which publishes daily newspapers in most major Canadian cities, and the nation-wide *National Post*. Hollinger also owned a large number of community papers throughout the country, trade publications, and Internet properties including canada.com. CanWest bought most of the community newspapers, trade publications, all the metropolitan dailies, and 50 per cent of the *National Post*, as well as the Internet assets, and the Southam Magazine and Information Group.

CanWest owns television stations, cable channels, and radio stations in Canada, and production, program distribution, and media assets.[2]

1 " Hollinger Inc., Hollinger International Inc., and its Affiliates Announce the Sale of CDN $3.5 Billion of Canadian Assets to CanWest Global Communications Corp." (31 July 2000) online: Hollinger International, News Release <http://www.hollinger.com/press/2000/Press_073100.htm> (date accessed: 6 October 2000) [hereinafter "Hollinger"].

2 T. Cole, "A Mogul in the Making" *The Globe and Mail* (29 September 2000) B1.

Hollinger will acquire a 15 per cent interest in CanWest.[3] All is subject to review.

Examining the Deal

The transaction is interesting as it highlights the trend towards amalgamation in the communications industry that has raised questions about corporate concentration and its effects on the public.[4] This deal involves newspapers, a broadcaster with different types of operations, a television production company, the international distribution rights to a large collection of programming, and new, or non-traditional, media. Both companies also have extensive holdings outside of Canada, and have been on acquisition sprees in recent years. As the technologies themselves converge, the corporate structures in the industry are following a parallel course.[5]

The deal also illustrates some of the challenges regulators and competition authorities are faced with, raising the following questions: should the sector-specific Canadian Radio-television and Telecommunications Commission ("CRTC") decide the fate of the agreement, or should the Commissioner of the Competition Bureau exercise the merger review power under general competition legislation? On the basis of what legal and policy considerations should the decision be made?

Sectoral Regulation or General Competition Authority

Competition Authority

The *Competition Act*[6] is the primary statutory source of competition law in Canada. It aims at ensuring that markets are working competitively. Some of the ways in which the *Act* does this include prohibiting any

[3] Hollinger, *supra* note 1.

[4] B. Marotte, "CRTC concerned by news media mergers" *The Globe and Mail* (6 October 2000) B2. Other deals cited were the proposed takeover of CTV by BCE, a deal between BCE and Thomson Corp., and the proposed takeover of Groupe Videotron Ltée and TVA by Quebecor.

[5] For a discussion of this phenomenon, see A. Gates, "Convergence and Competition: Technological Change, Industry Concentration and Competition Policy in the Telecommunications Sector" (2000) 58 *U. of T. Faculty of Law Rev.* 83. [Hereinafter "Convergence and Competition"] The author explores the implications of technological convergence on the communications industry and its regulation.

[6] S.C. 2000, c-34.

grouping of companies formed to create a position of dominance (by combining for anti-competitive ends) (s. 45(1)); any company or group of companies from taking advantage of a position of dominance, for example by stifling competition or inflating prices (s. 78); and deceptive advertising (Part VII.1).[7] Although many countries are only now implementing competition legislation[8] Canada has had provisions prohibiting restraint of trade since the *Criminal Code* was first enacted in 1892.[9] Competition laws are couched in general terms, giving the relevant authority the power to oversee the workings of the economy as a whole. Competition agencies tend to react to specific behaviors of industry players, often as a result of a complaint. In the area of merger review, there are pre-merger notification rules and guidelines, and the Competition Tribunal has the power to review mergers, either before or after they occur (s.92(1)).[10] They also have a focused mandate to protect and promote competition, and generally, the policy goals, which must be balanced, do not conflict as much as the policy goals of sectoral regulators.[11] According to the Canadian *Competition Act*, its purpose is:

> …to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.[12]

Competition law also tends to be more penal than sectoral regulation, with authorities able to fine companies or order them to stop certain arrangements or agreements. Canadian competition law includes both civil and criminal sanctions.[13]

Sectoral Regulation

Sectoral regulation is by definition concerned with a particular segment of the economy, and tends to be more concerned with the overall workings of that sector with the aim of ensuring fairness, rather than with the investigation and prohibition of specific behaviours defined as anti-competitive. Sectoral regulators tend to take a more regulatory, preventative approach, often through licensing schemes.[14]

This more holistic approach is often reflected in the regulator's mandate to promote a number of policy goals, with competition among them. The CRTC, for example, must promote the policy goals stated in the *Broadcasting Act*[15] and the *Telecommunications Act*[16] when regulating those industries.[17] Certain objectives of these Acts are often in conflict with other objectives listed in the same Act.[18]

7 *Competition Act*, *supra* note 6.

8 It is estimated that in the 1990s, approximately 35 countries have adopted for the first time or strengthened their existing competition laws: World Bank *Competition Policy in a Global Economy* (Washington: The World Bank, 1998) at 2.

9 Statutes of Canada, 1892, c.29. Title VI, Part XXXIX deals with "Offences connected with Trade and Breaches of Contract"; ss. 516-519 prohibited conspiracies in restraint of trade, and s. 520 prohibited combinations in restraint of trade.

10 Competition Act, *supra* note 6.

11 OECD, Directorate for Financial, Fiscal and Enterprise Affairs, Committee on Competition Law and Policy, *Relationship Between Regulators and Competition Authorities*, Doc. No. DAFFE/CLP(99)8 (1999) [hereinafter "Regulators and Competition Authorities"] at 8-9.

12 Competition Act, *supra* note 6, s. 1.1.

13 Regulators and Competition Authorities, *supra* note 11 at 116.

14 Regulators and Competition Authorities, *supra* note 11 at 8-9.

15 *Broadcasting Act, 1991*, S.C. c. B-9.01.

16 S.C. c. 38.

17 *Canadian Radio-television and Telecommunications Commission Act*, S.C. c. C-22, s.12. The specific goals will be discussed further in the following section.

The differences in the mandates of the sectoral as opposed to competition authorities can be traced to the different functions each was meant to fulfil. Generally, sectoral regulation arose in the context of managing industries where there was some form of government intervention in market mechanisms. Telecommunications is a good example, as the telephone industry was regulated as a natural monopoly from roughly the turn of the century until recently.[19] Broadcasting is another example, where governments stepped in to deal with issues of scarcity.[20] One theory posits that as these industries move towards full deregulation and liberalization, sectoral regulation becomes less important, and general competition law should be applied.[21] Deregulation and liberalization affect telecommunications more than broadcasting, because of continued content regulation in broadcasting. There are, however, some aspects of the broadcasting industry subject to the same pressures as telecommunications. The two will be discussed in greater detail later in this paper.

Interaction Between the Two

The existence of sectoral regulators and competition authorities within the same country means that the two must cooperate. In the United Kingdom (U.K.), this interaction has been worked out into a written set of rules,[22] and written into the U.K. *Competition Act, 1998*,[23] with the aim of ensuring consistency. In Canada, the relationship between the Competition Bureau and sectoral regulators is set out to some degree in the *Competition Act*,[24] but is also governed by specific agreements and common law principles.[25]In the past, there has been some friction between the Competition Bureau and the CRTC, particularly as the telecommunications market was becoming more competitive.[26] More recently, the Competition Bureau has demonstrated a willingness to allow the CRTC to carry out its functions in relation to telecommunications and broadcasting.[27] In 1999, the two bodies described the way they would interact in different situations. Neither the CRTC or the Competition Bureau will interfere in areas where the other has exclusive authority. Where the CRTC has authority, but does not exercise its regulatory power (by forbearance or exemption),[28] the *Competition Act* applies to the activities that are not being addressed by the CRTC.[29]

Where there is concurrent authority between the two (primarily in the area of merger review), the bodies have accepted that there is parallel jurisdiction, and that the transaction must comply with both the industry-specific legislation and the *Competition Act*. There is also some concurrency with regard to marketing practices, and the Competition Bureau will deal with marketing practices specifically mentioned in the *Act*, such as false advertising, and exclusive or tied selling.[30]

18 See e.g. P.D. Swanson "Encouraging competition in Canadian Telecommunications: changing perceptions of regulation and the understudy role of Competition Law" (1997) Communications L.J. 2(2) 57 [Hereinafter "Encouraging competition"] at 59, where some of the conflicting policy goals in the *Telecommunications Act* are discussed.

19 R. Babe, *Telecommunications in Canada* (Toronto: University of Toronto Press, 1990) at 137; Encouraging Competition, *supra* note 18.

20 Canada, Department of Communications, *Evolution of the Canadian Broadcast System: Objectives and Realities 1928-1968* by D. Ellis (Ottawa: Department of Communications, 1979) at 75, discussing the report of the 1929 Royal Commission on Radio Broadcasting.

21 Regulators and Competition Authorities, *supra* note 11 at 7.

22 Regulators and Competition Authorities, *supra* note 11, summarized at 244-247.

23 (U.K.), 1998, c. 41. The *Act* replaces a number of prior legislative instruments, and amends even more Acts still in place, many of them dealing with the seven sectoral regulators in the U.K.

24 *Supra* note 6.

25 See e.g. the "Regulated Conduct Defense" which applies in certain situations to exempt some regulated industries from compliance with the *Competition Act*. See Regulators and Competition Authorities, *supra* note 11 at 115-116.

The Commissioner of the Competition Bureau ("Competition Commissioner") is responsible for reviewing mergers and conducting investigations into potentially anti-competitive practices. Under the *Competition Act*, the Competition Commissioner can appear before all federal boards, commissions, or tribunals at their request, at the request of the Minister of Industry (who oversees the Competition Bureau), or on the initiation of the Competition Commissioner.[31] The Competition Commissioner may make representations before provincial regulatory bodies, at their request, or with their leave.[32] According to the Competition Bureau's annual report, the Competition Commissioner ("as the statutory champion of competition") intervened in seven CRTC hearings in 1999, and six hearings conducted by other sectoral or trade regulators.[33] Representations by the Competition Commissioner to the CRTC have had some influence in the past.[34]

The *Competition Act* contains a clause that allows exemptions for mergers that would result in efficiency gains that offset the anti-competitive effects of the merger.[35] In addition, the Competition Bureau, in urging sectoral regulators to encourage competition within their industries, is careful to say that competition should be encouraged as a means of achieving some or all of their other policy goals.[36]

Sectors Within the Communications Industry

This section will examine the relevant sectors of the communications industry, and describe the traditional form of regulation applied to them, as well as the rationale for that regulation, and some of the major policy goals. The media sectors typically implicated in convergence are newspapers, broadcasting, telecommunications, and new media.

Newspapers

Newspapers in Canada are exempt from sectoral regulations or regulators. This reflects the importance placed on the ideal of freedom of expression, and more specifically of the press. The newspaper industry is, however, subject to general laws, such as the *Competition Act*, the law of libel and slander, and other laws that may apply.

The last attempt to regulate the press in Canada inspired the following statement:

> The [*British North America Act*] contemplates a Parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs… the practice of this right of free public discussion of affairs is … the breath of life for parliamentary institutions.[37]

26 Encouraging competition, *supra* note 18 at 61-62.

27 Regulators and Competition Authorities, *supra* note 11, at 113-114; Convergence and Competition, *supra* note 5, at 101; OECD, Directorate for Financial, Fiscal and Enterprise Affairs, Committee on Competition Law and Policy, *Regulation and Competition Issues in Broadcasting in the Light of Convergence* Doc. No. DAFFE/CLP(99)1 (1999) [hereinafter "Regulation and Competition Issues"] at 179.

28 The *Broadcasting Act*, *supra* note 15, s. 9 (4), allows the CRTC to exempt licensees from some requirements if it feels enforcing the requirements will not contribute to the policy goals. The *Telecommunications Act, supra* note 16, allows forbearance in some cases (s. 34 (1)) and allows some classes of carriers to be exempted from the application of the *Act* (s. 9 (1)) if the CRTC determines that these actions are consistent with policy goals.

29 CRTC & Competition Bureau, *Backgrounder: CRTC/Competition Bureau Interface* (Ottawa: Industry Canada, 1999) online: <http://strategis.ic.gc.ca/SSG/ct01544e.html> (date accessed: 17 October 2000) [Hereinafter "CRTC/Competition Bureau Interface"].

30 CRTC/Competition Bureau Interface, *supra* note 29.

31 *Supra* note 6, s.125 (1).

32 *Supra* note 6, s.126 (1).

33 Industry Canada, Competition Bureau *Annual Report 1999-2000* (Ottawa: Industry Canada, 2000).

Since then, the *Canadian Bill of Rights* guaranteed freedom of speech and of the press[38] and the *Charter of Rights and Freedoms* guarantees "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[39]

However, there is an important distinction between regulating the press for content and regulating the press for other reasons. In the 1980s, there was some support for regulating the corporate relationships in the newspaper industry. The rationale for this regulation was summarized as follows:

> Freedom of the press is not a property right of owners. It is the right of the people. It is part of their right to free expression, inseparable from their right to inform themselves. The Commission believes that the key problem posed by its terms of reference is the limitation of those rights by undue concentration of ownership and control of the Canadian daily newspaper industry.[40]

The UK regulates the newspaper industry on issues other than content, but stops short of having a dedicated newspaper regulator.[41] In Canada, the newspaper industry falls under the *Competition Act*, and there have been cases brought against newspaper owners under that *Act*.[42]

Broadcasting

Broadcasting in Canada is regulated by the CRTC under the *Broadcasting Act*, which defines broadcasting as "any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus."[43]

The primary rationale for regulating broadcasting was to allocate the scarce resource of radio (then television) frequencies. In Canada, the advent of both radio and television broadcasting raised nationalistic concerns about the harm from exposure to primarily American programming, available free over the airwaves to most Canadians, leading to rules about Canadian content and ownership. These concerns also gave rise to rules designed to safeguard Canadian advertising dollars and requiring cable television providers to include a certain percentage of Canadian channels in their packages.[44]

Broadcasting is regulated by a multi-class licensing system.[45] Any changes to the terms of a licence, change in ownership, or transfer of shares of a licensee, requires prior approval from the CRTC.[46] In making such decisions, the CRTC is required to take into account the policy goals contained in section 3 of the *Broadcasting Act*. Broadly, these relate to the rationales discussed above.

34 See e.g. the discussion on the Pacific Place Cable hearings *supra* note 18 at 60.

35 *Supra* note 6, s. 96 (1) (a).

36 A. Lafond (Deputy Commissioner of Competition), "The Roles and Responsibilities of the Industry Regulator versus the Competition Bureau as Regulated Industries Become Competitive" (Address to the Conference Board Regulatory Reform Program Meeting, 19 February, 1999).

37 *Re Alberta Legislation* [1938] 2 D.L.R. 81 (S.C.C.) at 107.

38 S.C. 1960, c. 44, reprinted in W.S. Tarnopolsky, *The Canadian Bill of Rights*, 2nd ed. (Ottawa: Carleton Library, 1975), s. 1 (c) and (f).

39 *Canadian Charter of Rights and Freedoms*, s. 2 (b), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c.11.

40 Royal Commission on Newspapers (1981) *Report* (Hull: Minister of Supply and Services), at 1.

41 See: "Guidance on DTI procedures for handling Newspaper Mergers", online: U.K. Department of Trade and Industry <http://www.dti.gov.uk/CACP/cp/nmerger.htm> (date accessed: 6 October 2000). There are considerations within competition law that are specific to mergers and other practices within the newspaper industry, recognizing that industry's importance in a democracy.

42 Notably, *Canada (Director of Investigation and Research) v. Southam Inc.* [1997] 1 S.C.R. 748 [Hereinafter *Southam*]. The Supreme Court upheld

Telecommunications

Telecommunications, also regulated by the CRTC, is defined in the *Telecommunications Act* as "the emission, transmission or reception of intelligence by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system."[47] Regulation in this context was based on the need to oversee the monopolist telephone companies, and now rests primarily on the need to ensure a smooth transition to full competition and deregulation. There are additional concerns about promoting universal service, protecting consumers, ensuring fair interconnection, and fostering national unity through telecommunications.[48] The CRTC has a mandate to promote the policy goals in the *Telecommunications Act*.

The traditional expertise of the telecommunications regulator is managing the effects of monopolies or companies with a high degree of market dominance. The market for telecommunications services is opening up, and is populated by incumbents (former telephone monopolists) and their competitors. The competition between the two in the formerly monopolistic markets is highly regulated, and issues of market concentration tend to focus on companies moving out of their geographic areas or out of their traditional market sectors through mergers (for example, the merger between Telus and BC Tel, and BCE's purchase of CTV television network). Interconnection is watched carefully by a group with specific technical expertise,[49] and national unity concerns are reflected in ownership restrictions that have survived at least three international trade agreements.[50]

New Media

Some examples of new media are Internet applications, and interactive forms of traditional media. New media that may conceivably fall under the CRTC's purview have been specifically exempted from regulation.[51] The content of new media must comply with general libel and slander, obscenity, and other laws. One of the problems related to enforcing these laws where new media are concerned relates to liability; often, it is unclear who the originator of the content is, and who is legally responsible for it.[52]

New media also have implications for traditional media. In regard to regulation, high-speed digital networks have far greater capacity than over-air or even cable transmission systems, eliminating the need for regulation to ensure fair allocation of a scarce resource; increased availability of international content (via satellite or over the Internet) makes enforcement of Canadian content rules difficult; and in some cases, the medium itself will defy the attempts of regulators to characterize it. In regard to patterns of use, new media in some cases can be a substitute for, or even threaten to displace, traditional media.[53]

the Competition Tribunal's finding that the effects of Southam owning both daily newspapers in Vancouver and two community newspapers in the area was seen to substantially lessen competition in the real estate advertising market.

43 *Supra* note 15, s. 2 (1).

44 For a more complete discussion, see D. Ellis, *Fast Forward: Home Entertainment and the New Technologies* (Toronto: Friends of Canadian Broadcasting, 1992) at 149-152.

45 The classes include public and private broadcasters, public and private networks, cable distributors, and cable specialty channels.

46 CRTC/Competition Bureau Interface, *supra* note 29.

47 *Supra* note 16, s. 2 (1).

48 Some argue that the national unity concern was introduced to ensure federal jurisdiction over telecommunications: W.T. Stanbury "Telecommunications Regulation and the Constitution: The Main Themes" In J. Buchan et al, eds., *Telecommunications and the Constitution* (Montreal: Institute for Research on Public Policy, 1982) 1 at 6.

49 CRTC/Competition Bureau Interface, *supra* note 29.

50 Canada-US Free Trade Agreement, North American Free Trade Agreement, and the General Agreement on Trade in Services round on telecom-munications.

Cross–Sector Operations

Increasingly, cross-sector operations are resulting, and the CRTC is not always in the best position to deal with these issues. The CRTC may not have the mandate to deal with cross-ownership, given that it regulates telecommunications and broadcasting under separate regimes. In practice, the CRTC issues most decisions under either its telecommunications or broadcasting authority, which have dedicated staffs. Since there are different government departments, and to some extent mutually exclusive Acts,[54] governing the two sectors, it is unclear whether the CRTC can consider the two in combination.[55] There may be some leeway where new media are concerned, given that they have been considered by the CRTC as an issue concerning both telecommunications and broadcasting.[56]

In the case of newspaper/broadcasting arrangements, the CRTC did at one time restrict ownership of newspapers and broadcasting licences, but under questionable legislative authority.[57] As a result, the Competition Bureau seems best placed to deal with corporate arrangements that escape the boundaries of telecommunications or broadcasting, and exclusively competent to consider arrangements that escape the boundaries of both sectors.

Market Definition

With cross-sector mergers, the crucial issue becomes how to define the affected market. The *Competition Act* is framed in terms of fostering competition in "respect of any article" (s. 31), "article or commodity" (s. 32 (1)), "products" (s. 50 (1)), or "defined market" (s. 77 (1) (b)). It is this last term that offers the Competition Bureau the ability to define the market at which it is looking. According to the Competition Bureau, "In merger analysis, relevant markets are defined by reference to actual an potential sources of competition that constrain the exercise of market power," and overlap of products and geographical markets will not be enough to put them in the same relevant market.[58]

An important consideration will be the availability of the same market products, but the authorities will also take into account the availability of substitutions; other products that may not be identical, but that demonstrate elasticity of demand. This is not an easy task at the best of times, and when the market relates to convergent communications, it is even more complex. The point has been made that while convergence has increased the available substitutes for traditional media offerings, it has done so for a small (though growing) portion of the population.[59]

Questions will undoubtedly revolve around when the potential for competition from one product is real enough to counteract concentration in

51 CRTC, *Exemption Order Respecting Experimental Video-on-Demand Programming Undertakings*, Broadcasting Public Notice 1994-118, 16 September 1994.

52 Regulation and Competition Issues, *supra* note 27 at 297.

53 Some of these implications are discussed at greater length in Convergence and Competition, *supra* note 5 at 106-107.

54 The *Telecommunications Act*, *supra* note 16, does not apply to broadcasting by broadcasting undertakings (s.4), and the *Broadcasting Act*, *supra* note 15, does not apply to a telecommunications common carrier acting solely in that capacity (s. 4 (4)).

55 One exception to this rule is s. 9 (1) (f) of the *Broadcasting Act*, *supra* note 15, which requires a broadcaster to seek CRTC approval before entering a distribution agreement with a telecommunications carrier.

56 CRTC, *New Media*, Broadcasting Public Notice 1999-84 / Telecom Public Notice 99-14.

57 D. Townsend, "Regulation of Newspaper / Broadcasting, Media Cross-Ownership in Canada" (1984) Autumn *U.N.B.L.J.* 261, at 262, where the author notes that nothing in the relevant legislation gave the CRTC jurisdiction over the newspaper industry.

58 Director of Investigation and Research, Competition Act: *Merger Enforcement Guidelines* (Information Bulletin No. 5) (Ottawa: Consumer and Corporate Affairs Canada, 1991) at 7.

59 Convergence and Competition, *supra* note 5 at 108-109.

the sale of another product. It is interesting that in recent cases where the *Competition Act* has been applied against communications companies, markets were defined in terms of uses of advertising.[60]

Application to the CanWest–Hollinger Deal

The relevant authorities have decided that the CRTC will be the body to review the deal, presumably because of concerns related to the communications sector. While the CRTC has a mandate to promote diversity in the broadcasting system, the effects of this deal on broadcasting will be limited. Hollinger will take a 15 per cent interest in CanWest, a figure which is well under even foreign ownership allotments. The CRTC does not have the mandate to review the effects of the deal on the newspaper industry. Even if the CRTC could look at the effects of the newspaper industry, it is arguable that the most significant effects of the deal will be on the overall communications market.

This leads us to the ability of the Competition Bureau to try to define affected markets, and have greater latitude in what it considers.[61] The competition authorities' recent experience in communications has shown an industry-driven definition of affected markets, focussing on the effects of amalgamations on companies doing business with newspapers. While mergers in the communications industry affect advertisers, producers and other companies, focussing on these markets ignores other markets which may be affected by anti-competitive practices. While advertisers form an important market, so too does the audience for the content.

Alternate Views

It might be helpful to examine some alternate views of the communications industry. The EU Directorate General of Information, Communications, Culture and Audiovisual Media ("DG X") notes that there are theoretical reasons to continue treating communications as a separate regime, in spite of the developments discussed above. They include the need to promote pluralism, provide quality content, respect linguistic and cultural diversity, and protect of minors.[62] These goals coincide with the goals of Canadian communications policy, and with the theme that freedom of expression is tied to access to information, and participation in the political process.

DG X suggests a useful distinction between public and private communications.[63] This allows the communications market to be broken down so that policy issues with regard to the public sphere are considered, while deregulation is allowed to proceed in areas that do not merit separate treatment. This view is reflected in the special newspaper provisions in the UK, in European discussions of the audiovisual sector[64] and, generally, in a

60 See *Southam*, *supra* note 42 and Regulation and Competition Issues, *supra* note 27 at 180-183.

61 The fact that the Competition Bureau defines a market is not enough; the definition of the market will be at issue in any proceedings before the Competition Tribunal, and in any subsequent appeals or judicial reviews.

62 In Regulation and Competition Issues, *supra* note 27 at 298.

63 Regulation and Competition Issues, *supra* note 27 at 304.

64 EC, *Television Without Frontiers Directive* (89/552/EEC as modified by 97/36/EC).

recognition of the right to information and its relation to public participation in a society.

Conclusion

Recognizing the importance of communications and the desirability of a diverse array of views in public communication should be fundamental to the review of media mergers. The merger review system in Canada does not adequately take these factors into account due to the overly narrow mandate of the CRTC and the purely economic mandate of the Competition Bureau. The Hollinger-CanWest example demonstrates the possibility that a major consolidation of market power in the dissemination of public communication may not be captured by existing legislation and regulation.

In applying public policy, it is important to keep in mind the intricacies of the communications sector. First, we must look to the services offered by a communications company. Regardless of the medium, these may be broken down roughly into distribution channel, content, and advertising. Specific public policy considerations about access to diverse sources of information should concentrate on content, and on the others only insofar as they might affect availability of content.

The public/private communications distinction suggested by DG X is a technology-neutral way of looking at the function of a mode of communication that may serve to filter those aspects of the industry that require a special regime. It is not perfect, and there will be technologies that do not easily fit into either of the categories, but it is a good starting point.

What is needed is a new way for the relevant agencies to work together, one that combines the broad mandate of the Competition Bureau (which includes ensuring consumers have access to competitive prices and product choices) with the sectoral expertise of the CRTC. Within the existing framework, the simplest way to accomplish this might be to allow the Competition Bureau to conduct the review, calling on submissions from the CRTC about sector-specific concerns. This sort of arrangement could be duplicated with other sectoral regulators, for hearings that affect a regulated sector but overflow the regulator's mandate.

Postscript:

As Appeal was going to press, the Federal Government announced it would appoint a panel to study issues of media concentration in Canada.

Criminalizing Usury: The Evolution and Application of S. 347 of the *Criminal Code*

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Introduction

The *Criminal Code of Canada* contains an anti- loan sharking provision which makes it a criminal offence to charge interest rates in excess of sixty per cent per annum. Section 347 has been used to regulate a wide variety of consumer and commercial transactions, regardless of their form or the amount at issue. This paper will begin by providing a brief review of the history of s. 347 before examining recent developments in the related case law. It will be argued that while the section could ultimately serve a useful purpose, it is currently being interpreted and applied so broadly by the courts that it is not fulfilling its prosecutorial mandate.

Historical Background

Canadian lawmakers have long grappled with controlling the problem of loan sharking in which a lender, commonly referred to as a "loan shark," lends money at an extortionate rate of interest. Parliament first responded to this threat by regulating interest rates on small consumer loans through the creation of the *Money-Lender's Act*.[1] The Act limited the rates of interest on loans under $500 made by money lenders to 12 per cent per annum. Such legislation quickly proved ineffective, however, as lenders disguised their usurious interest charges as "legitimate" lending fees required as a pre-condition for the granting of a loan.[2]

Parliament then introduced the *Small Loans Act*,[3] which placed a limit on the amount of interest that could be charged on loans up to $1,500.[4] The small loans legislation was created during a highly restrictive consumer credit market, when there were only a small handful of lenders available to grant small loans to ordinary consumers. The legislation reflected the need to protect vulnerable consumers who were often driven into the hands of street-level loan sharks.[5]

The *Small Loans Act* was not free from criticism, however.[6] The $1,500 ceiling became unworkable given the dramatic increase in the cost of

[1] S.C. 1906, c. 32.

[2] M. A. Waldron, *The Law of Interest In Canada*, (Scarborough: Carswell, 1992) at 12.

[3] S.C. 1939, c. 23.

[4] See J.S. Zeigel, "The Usury Provisions in the *Criminal Code*: The Chickens Come Home to Roost" (1986) 11 Can. Bus. L.J. 233 at 234.

[5] See J.S. Ziegel, "Comment: Bill C-44: Repeal of the Small Loans Act and Enactment of a New Usury Law" (1981) 59 Can. Bar Rev. 188 at 192.

[6] *Ibid.* at 189.

money. The amount was also relatively low and therefore easy for lenders to circumvent. These concerns led Parliament to repeal the *Small Loans Act* in 1980 and introduce a new section into the *Criminal Code*.[7]

The rationale behind s. 347 was a request by the police to provide them with a workable definition of loan sharking that would not require proof of threats, violence or fraud.[8] Unlike the *Small Loans Act*, which appears to have been more directly targeted at street-level loans, s. 347 is not limited to consumer transactions. The current provision is extremely broad. It extends far beyond the reach of the *Small Loans Act*, by criminalizing a fixed rate of interest for the first time, and by imposing a ceiling on all types of credit arrangements without regard to the sophistication of the parties or the actual sum involved.[9]

Review of the Section

Section 347 provides that everyone who enters into an agreement or arrangement to receive "interest" at a "criminal rate" or receives payment or partial payment of "interest" at a "criminal rate" is guilty of an offence and is liable to a $25,000 fine, or a maximum of five years imprisonment, or both. A "criminal rate" of interest is defined as, "an effective annual rate of interest calculated in accordance with generally accepted actuarial practice and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement." The annual rate of interest is calculated on the "credit advanced" to the borrower, not what the lender would realize on his investment.[10]

Implicit in the definition of "criminal rate" is the assumption that virtually any rate of interest exceeding sixty per cent annually is extortionate

[7] S. 305.1 was added to the *Criminal Code* by Bill C-44 in December 1980 and came into effect April 1, 1981. Such section was later renumbered as 347 – for the sake of convenience, I will refer to the section as such throughout this paper.

[8] See M.A. Waldron, *supra* note 2 at 60.

[9] See Major J.'s discussion in *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 at 128 [hereinafter *Garland*].

[10] *BCORP Financial Inc. v. Baseline Resort Developments Inc.*, [1990] 5 W.W.R. 275 (B.C.S.C.) [hereinafter *BCORP*].

and criminal in nature. Such an assumption is quite unsound when the borrower acted as a free agent and was not coerced, threatened or intimidated by the lender.[11] Assume for example that an employee requests a $1.00 loan from his co-worker, and promises to repay him $1.10 at the end of the day. This loan, with a 10 per cent per day rate of interest, would result in an "effective annual rate of interest" of 3,650 per cent. If the same loan were granted at a rate of 10 per cent on a weekly basis, the annual rate of interest would amount to 520 per cent per annum. Although in both cases there was actually a very small sum of interest charged to the borrower (few would argue that a ten cent charge of interest on a one dollar loan is excessive), the rate of interest in both cases was grossly criminal.

The expansive definition of "interest" includes all charges paid or payable for the advancing of credit, whether in the form of a fine, fee, penalty, commission or other similar charge. While such inclusive wording was designed to ensure that usurious lenders are unable to conceal criminal interest rates in the form of other less apparent charges, the language of the statute indicates that s. 347 was intended to have a far wider reach than to simply assist with the prosecution of loan sharks.[12] "Interest" has been found to include a wide range of charges, such as lawyer's and broker's fees required to be paid by the borrower,[13] bonus fees,[14] and commitment fees.[15] The section has been applied to a great number of commercial transactions which bear little resemblance to true loan sharking agreements.

The results are frequently not criminal prosecutions but civil actions in which the borrower has asserted the common-law doctrine of illegality in an attempt to avoid an interest payment, or to render an otherwise legitimate agreement void.[16] The provision has therefore attracted widespread criticism from commercial lawyers and academics, many of whom have called for the section's amendment or repeal.[17] It is therefore curious that the courts have not attempted to narrow the scope of the application of this section to commercial loan agreements.

While there is a need to protect consumers from those who lend money at an excessive rate of interest, there is also a need to encourage commercial lending for risky yet potentially beneficial transactions. Compensation for the cost of delayed recovery is the hallmark of credit arrangements.[18] Typically, the rational investor will invest only if the expected returns are sufficient given the risks – the riskier the investment, the higher the anticipated return will be because the savvy investor will demand additional compensation for that risk.

If the legislation circumvents the relationship of risk and return by restricting the lender's recovery, it inhibits the potential for sound investment decision-making. This could hardly have been the intent of Parliament when it set out to regulate the impact of loan sharking upon the average consumer.

11 See Ziegel, *supra* note 5 at 193.

12 *Garland*, *supra* note 9 at 130.

13 *Creswell v. Raven Bay Holdings Ltd.* (1984), 53 B.C.L.R. 183 (S.C.) [hereinafter *Creswell*].

14 *Castle Rentals Inc. (Re)* (1984), 60 B.C.L.R. 40 (S.C.).

15 *BCORP*, *supra* note 10.

16 See M.A. Waldron, "White Collar Usury: Another Look at the Conventional Wisdom" (1994) 73 Can. Bar Rev. 1 at 2.

17 See S. Antle, "A Practical Guide to Section 347 of the *Criminal Code* – Criminal Rates of Interest" (1994) 23 Can. Bus. L.J. 323 at 325.

18 *Garland, supra* note 9, at 142.

However, the courts have developed a body of case law that links s. 347 with the commercial loan, assuming that Parliament intended to make the charging or receiving of interest at a criminal rate illegal, whatever the parties' motives, financial position or access to legal advice.[19]

Review of the Case Law

Until recently, courts tended to abide by the notion that parties who entered into an agreement which did not expressly require the borrower to pay a criminal rate of interest were not guilty of an offence under the *Code*.[20] In *Nelson,*[21] the Court held that s. 347 was not breached as a result of the borrower voluntarily repaying a mortgage loan before the expiry of the term. In that case, if the interest rate was calculated over the short period that the mortgage was outstanding, the interest rate exceeded 60 per cent. If calculated over the actual term of the mortgage, however, the annual rate of interest was less than 60 per cent.

The majority of the Court held that a criminal rate of interest must always be calculated with regard to the contractual terms of the loan, and not to an earlier repayment date selected by the mortgagor. Therefore, in calculating the annual rate of interest, one must ask what the payments would have amounted to had they been spread out over the entire period of the loan, and thus arrive at a lower rate of interest than would technically have resulted from the borrower's decision to pre-pay early.

The judicial thinking behind the decision was simply that there is no definitive reason why the same loan agreement should be treated as either criminal – as a result of the borrower's decision to pre-pay at an early date – or not, merely as a result of the borrower's decision to make payments to the lender over the entire course of the loan. The result would be that parties to virtually any loan transaction would face unlimited uncertainty as to whether s. 347 would ultimately be breached. Such concern was well expressed by the trial judge in the *Nelson* case, who stated that:

> By applying a repayment date which is solely in the discretion of the borrower, there is no certainty as to what the rate will be. It will never be known and could never be ascertained and a prospective lender could be in an anomalous position in a perfectly innocuous interest rate of 6 per cent being repaid the following day that could amount to a rate in excess of 60 per cent.[22]

Similar reasoning was expressed by Anderson J.A. at pp. 225-227, who found that any other interpretation would lead to an "absurd result" which Parliament could not have intended:

> Parliament cannot have intended that the words "criminal rate" have two different meanings within the same section or that an innocent mortgagee who has entered into a perfectly lawful agreement should as

[19] Waldron, *supra* note 15 at 3.

[20] *Nelson v. C.T.C. Mortgage Corp.* (1984), 59 B.C.L.R. 221 [hereinafter *Nelson*].

[21] *Ibid.*

[22] *Ibid.* at 223.

> the result of a voluntary act of the mortgagor in prepaying the mortgage become guilty of an offence under [s. 347(1)(b)].
>
> The purpose of [s. 347] was to make unlawful in agreements or arrangements which require the borrower to pay interest at a criminal rate. The mortgage here does not require payments of interest at an unlawful rate. The exercise of an option by the borrower does not therefore fall within [s. 347(1)(a) or (b)].

This approach was called into question, however, with the simultaneous release of two cases concerning the scope of s. 347.[23] In *Degelder*, for example, the Court denied that "a criminal rate of interest must always be calculated by reference to the contractual terms of the loan,"[24] and instead held that "...subs. (1)(a) and (1)(b) are separate and independent provisions: the first targets transactions that are inherently illegal, and the second catches transactions that are illegal in their operation."[25] While the Court in *Garland* expressly indicated that it was not overruling *Nelson*, it broadened the reach of s. 347 in a manner which is difficult to reconcile with previous judicial thought. A voluntary act on the part of a borrower might now, along with a certain amount of encouragement by the lender, be sufficient to bring an otherwise legitimate loan agreement within the confines of s. 347. In so deciding, the Court adopted the "wait and see" approach to lender liability: the receipt of interest at a criminal rate may now occur at any stage in the agreement between the parties, whether or not expressly contemplated in the contract itself.

An unfortunate illustration of the application of the court's new approach is found in *Garland*. In that case, the respondent, Consumers' Gas Company Limited ("Consumers' Gas"), was a regulated utility which provided gas to consumers in Ontario. Consumers' Gas billed its customers on a monthly basis and each bill specified a "due date" by which outstanding accounts were requested to be repaid. Customers who did not pay by the specified date incurred a "late payment penalty" which amounted to 5 per cent of the charges owing that month. Such penalty was simply a one-time charge and did not increase or compound over time.

A brochure offered by Consumers' Gas to its customers, entitled "Getting to Know Us," explained the reasoning behind the late payment penalty. It explained to customers that:

> You should pay your gas bill on or before the due date shown on the bill, in order to avoid late payment charges. These charges are designed to encourage late paying customers to pay their accounts promptly, thus minimizing the cost of carrying outstanding accounts.[26]

The appellant, Gordon Garland, had been a Consumers' Gas customer since 1983. He had paid roughly $75 worth of late payment

[23] *Garland, supra* note 9, and *Degelder Construction Co. v. Dancorp Developments Ltd.*, [1998] 3 S.C.R. 90 [hereinafter *Degelder*].

[24] *Ibid.* at 104.

[25] *Ibid.* at 106.

[26] *Garland, supra* note 9 at 121.

penalty charges in the period between 1983 and 1995. Garland commenced a class action law suit on behalf of over 500,000 Consumers' Gas customers on the basis that the late payment penalty charges were "interest" in excess of 60 per cent per annum and therefore that the gas utility had violated s. 347 of the *Criminal Code*. The Supreme Court of Canada agreed.

The first obstacle that the Supreme Court faced, however, was that s. 347 typically arises in transactions which involve an advance of money in the form of either a loan, a mortgage or financing agreement. The gas utility contended that it was not advancing credit and that the late payment penalty did not amount to "interest" within the meaning of the *Code*. Clearly, in this case, the gas utility was not lending money to its customers.

The court nonetheless found that the provision of goods and services to customers under contract, for which payment may be deferred, constitutes "credit advanced," within the meaning of s. 347. The Court noted that such payments were nothing more than charges for the purpose of compensating the gas company for having to maintain overdue accounts. The gas utility therefore had an agreement or arrangement with its customers by which it would advance credit (provide gas) in return for a payment which included a 5 per cent charge of interest. The late payment penalty was therefore a "charge...in the form of a...penalty...payable for the advancing of credit under an agreement or arrangement."[27] The Court noted, at p.143:

> The conclusions reached in this appeal may not follow intuitively from those concepts of "credit" and "interest" as those terms are employed at common law and in every day life. The result here is mandated by the extemely broad compass given to those terms by Parliament under s. 347.

The next challenge was for the court to get around *Nelson*, in which the British Columbia Court of Appeal held that a criminal rate of interest would not arise where it was the result of a voluntary act of the borrower seeking, for example, to pay off an overdue account early. The gas utility argued that it did not actually *require* its customers to pay interest at a criminal rate as customers could avoid the late payment penalty altogether by simply paying their bills on time, or by deferring payment to a later date.

Garland argued that if the customer elected to pay his or her bill almost immediately after the due date, the customer would still be required to pay the flat 5 per cent late payment penalty. Converting the one-day interest rate into an annual rate, as required by s. 347 (multiplying the 5 per cent "daily rate" by 365) yields an interest figure in excess of 1800 per cent. The actuarial evidence submitted by Garland further revealed that customers who paid the late payment penalty 38 days after incurring it would not be paying interest at 60 per cent per annum.

The Court rejected the arguments advanced by Consumers' Gas and

[27] *Ibid.* at 143.

found that while "strictly speaking," customers may have delayed their payment beyond the 38 day period, there was clearly no "invitation" to do so and, in fact, most customers did not regard themselves as having the flexibility to wait that long.[28] Statistical evidence submitted by Garland revealed that 81 per cent of customers elected to pay their overdue accounts within ten days of receiving the late payment penalty.

While the Court ultimately found that "Consumers' Gas neither encourages late payments nor seeks to profit from them,"[29] they nonetheless concluded that it is the substance and not the form of the transaction which is at issue. The Court found that there was clearly no violation of s. 347(1)(a) in this case: the agreement, on its face, did not expressly require customers to pay interest at a criminal rate. However, the gas utility was found liable for the fact that the penalty gave rise, in some instances, to the actual receipt of interest in excess of 60 per cent as prohibited by s. 347(1)(b).

The conclusion reached by Major J. reflects the broad interpretation now given to the wording of s. 347. *Garland* reveals that this section may be used to target a large number of otherwise ordinary and acceptable transactions, regardless of their actual form or the amount involved, if their net result is to encourage a borrower to repay a loan during a period in which the annual rate of interest would amount to 60 per cent or greater. It is important to keep in mind that in writing for the majority in *Garland,* Major J. did not ultimately conclude that s. 347 would be breached as a result of the borrower voluntarily electing to pre-pay at an earlier date. In that case, while the court acknowledged that customers did have the option to pay their gas bills at a later date, they did not actually perceive themselves as having the option to do so.

The court's finding indicates that in order for s. 347 to be found to have been breached, there still must be some indication that the lender has compelled the borrower to pre-pay early. A strictly voluntary decision on the borrower's part may not be sufficient to offend s. 347. The Court's reasoning is consistent with earlier findings that interest must amount to:

> ...a fee which is not ordinarily payable by a borrower and which directly or indirectly results in a benefit to the lender personally or to someone whom he designates. Further, *it must be a condition of the agreement, imposed by the lender, that he will lend only if the borrower agrees to pay that fee*...[30]

If a lender were to "disguise" usurious interest charges in the form of an incentive plan, such as the reduction of interest charges, or the withholding of the imposition of a penalty, in order to encourage the borrower to pre-pay at an earlier date, such may be sufficient for the court to find that s. 347 had been breached.

[28] *Ibid.* at 150.

[29] *Ibid.* at 142.

[30] *Creswell, supra* note 13 at 192 [emphasis added].

The uncertainty which arises from the "wait and see" approach raises the question of whether s. 347 is in need of legislative reform, as suggested by Major J.:

> It should be noted however that s. 347 is extremely problematic law. Some of its terms are more comfortably understood in the narrow context if street-level loan sharking, while others compel a much broader application. The two facets of the statute do not comfortably co-exist. The Court is aware that the present decision may have the effect of increasing the importance of s. 347 in some consumer and commercial transactions.
>
> Given the interpretive difficulties inherent in the provision and the volume of civil litigation which it has already spawned, it is with some reluctance that we are legally driven to this conclusion. However, the plain terms of s. 347 must govern its application. If the section is to be given a more directed focus, it lies with Parliament, not the courts to take the required remedial action.[31]

Such reasoning indicates that at least one member of the Supreme Court of Canada would appreciate an attempt by Parliament to narrow s. 347 and develop a bright-line test. The court could have taken a more purposive approach and concluded that a late payment penalty is not actually a fee for the advancing of credit, or that penalties do not expressly fall within s. 347. However, they were constrained by the broad definition of "interest" included by Parliament to ensure that individuals would be prevented from disguising usurious charges as other items.

The problem with adopting such a plain reading of the section is that there is no definitive reason why a company such as Consumers' Gas should be prohibited from both catering to the needs of its customers and recovering their losses. If the true intention of s. 347 is to circumvent loan sharking, Parliament should not be regulating all transactions with interest rates of 60 per cent or greater, whether they are in fact truly usurious loan transactions or not, but rather should be seeking to identify what exactly loan sharking arrangements encompass.

Conclusion

Perhaps Parliament should raise the bar and criminalize transactions with an "effective annual rate" of interest far higher than 60 per cent. Parliament might also specify that there should be some element of violence, threat or intimidation involved before the section will apply. Parliament could also more tightly word the section so as to exclude its application to lending transactions which involve willing participants with the benefit of legal advice. Clearly, as the section presently stands, it is not fulfilling its ultimate, or even intended, prosecutorial mandate.

31 *Garland, supra* note 9 at 143.

Unforgiven Trespasses:

Provincial Statutes of Limitations and Historical Interference with

Indian Lands

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Introduction

Since Europeans first arrived in North America, both governments and private individuals have interfered with aboriginal Canadians' right to use and enjoy their traditional territories. Canadian history is rife with examples of the alienation and damage of Indian lands in circumstances that were not only morally reprehensible, but also often contrary to the laws of the day.[1]

Aboriginal peoples have historically faced significant obstacles to seeking remedies in Canadian courts for these injustices. A legacy of paternalism effectively discouraged many aboriginal groups from pursuing claims for interference with their lands until the latter decades of the twentieth century.[2] However, Indian bands are gaining familiarity with and confidence in, the judicial system and are turning to the courts to remedy the historical injustices perpetrated against them.

Canadian courts must now decide whether aboriginal claimants have waited too long before commencing their actions, and whether defendants in these historical claims can use statutes of limitations to insulate themselves from liability. Although a preliminary matter, statutory limitations have the potential to extinguish even the substantively strongest of claims. Presumptions about their application inform bargaining positions in negotiations for settlement.[3]

This paper will explore the application of provincial statutes of limitations to claims made by Indian bands. This article will examine the principles of limitations and consider how these principles have been inconsistently applied to actions commenced by Indian bands in the past. Lastly, this article will examine recent legal developments that suggest Canadian courts are moving towards a constitutional approach to the issue, which if followed, would effectively insulate claims respecting Indian lands from the application of provincial statutes of limitations in provincial courts.

[1] See e.g. the facts of *Chippewas of Sarnia Band v. Canada* (1999) O. J. No. 1406 (Ont. Sup. Ct.), online: QL (OJ), in which unsurrendered Indian lands were sold to settlers in 1839, contrary to the *Royal Proclamation, 1763*.

[2] William B. Henderson, "Litigating Native Claims" (1985), 19 L. Soc. Gaz. 174.

[3] Catherine E. Bell, "Limitations, Legislation and Domestic Repatriation," (1995) 29 U.B.C. L. Rev. 149.

Statutes of Limitations Generally

Pursuant to their jurisdiction over the administration of justice and property and civil rights,[4] each Canadian province has enacted legislation that limits the time in which plaintiffs can commence actions. Under many of these statutes of limitations,[5] a cause of action is expressly extinguished at the conclusion of the limitation period, although provisions are made for extending the limitation period in specific circumstances.[6] The discoverability principle, articulated by the Supreme Court of Canada in *Central Trust Co.* v. *Rafuse*,[7] enables the court to postpone the commencement of limitation periods until the plaintiff discovers, or should discover with the exercise of reasonable diligence, that the cause of action exists.

In *M.(K.)* v. *M.(H.)*,[8] the Supreme Court of Canada held that fairness should be the central consideration in applying the discoverability principle for determining limitation periods. Writing for the majority of the Court, LaForest J. recognized that statutes of limitations are created to protect the interests of potential defendants by allowing them repose, foreclosing claims based on stale evidence, and encouraging plaintiffs to diligently pursue their claims. These considerations must be balanced with the interests of plaintiffs and the public, particularly when the social context in which the claim arose contributed to the plaintiffs' failure to commence proceedings in a timely manner. In *M.(K.)* v. *M.(H.),* the Supreme Court also held that public policy requires that the start of the limitation period for victims of childhood incest, as particularly vulnerable plaintiffs, be postponed until the plaintiffs participate in the therapy necessary to understand the true scope and consequences of the wrong perpetrated against them. *M.(K.)* v. *M.(H.)* seems to have heralded a policy-based approach to interpreting and applying statutes of limitations.

[4] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(24) reprinted in R.S.C. 1985, App. II, No. 5., s. 92(13) and 92(14).

[5] See e.g. s. 9(1) *Limitations Act*, R.S.B.C. 1996, c. 266.

[6] See e.g. *ibid.*, ss. 5, 6 and 7.

[7] [1986] 2 S.C.R.147 at 224.

[8] (1992), 96 D.L.R. 289.

Policy Considerations

Indian land claims arise in very different legal and political contexts than most civil actions. As a result, a broader range of policy considerations must be addressed by the courts in applying statutes of limitations. The origins of aboriginal title, the nature of the relationship between the Crown and Indians, and the historical obstacles to seeking redress for interference with Indian land should all inform notions of fairness in the context of such claims.

Most claims for interference with Indian lands are based on the claimants' aboriginal title in the affected territory. In *Delgamuukw* v. *British Columbia*, the Supreme Court of Canada recognized that aboriginal title is derived from Indians' "…historic occupation and possession of their tribal lands…" arising before the assertion of British sovereignty and from "the relationship between common law and pre-existing systems of aboriginal law."[9] Protected by s. 35(1) of the *Constitution Act, 1982,*[10] aboriginal title "encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes… and second, that those protected uses must not be irreconcilable with the nature of the [claimants'] attachment to that land."[11] This interest is *sui generis*, held communally by all members of an aboriginal nation, and is inalienable except to the Crown.[12]

This limit on the capacity of aboriginal groups to freely alienate their lands was articulated in the *Royal Proclamation, 1763,*[13] and is an important aspect of the unique relationship between the Crown and Aboriginal Canadians. The *Royal Proclamation, 1763,* constituted a unilateral undertaking by the Crown to act on behalf of Indians in their dealings with third parties[14] in an effort to consolidate its authority in North America, and protect its aboriginal allies. This undertaking, like the more specific obligations undertaken in treaties between the Crown and First Nations, is grounded in the honour of the Crown and its recognition of the rights of aboriginal groups to their traditional territories.

Pursuant to its jurisdiction under s. 91(24) of the *Constitution Act, 1867,*[15] the federal government is primarily responsible for meeting the Crown's obligations with respect to Indians and their lands. Section 18(1) of the *Indian Act* describes the Crown's role with respect to reserve land as follows:

> Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.[16]

[9] *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) 193 (S.C.C.) at para. 114.

[10] *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c. 11.

[11] *Supra* note 9 at para. 117.

[12] *Ibid.* at para. 113 and 115.

[13] R.S.C. 1985, App. II, No. 1.

[14] *Guerin v. The Queen* (1985), 13 D.L.R. (4th) 321 at 340 (SCC).

[15] *Supra* note 4.

[16] *Indian Act*, R.S.C. 1985, c. I-5.

This provision recognizes the Crown's obligation to act in the best interests of Indian bands and confers the discretion to determine what their best interests are. As a result of the Crown's discretionary control over aboriginal lands, the relationship between the Crown and Indians has fiduciary characteristics.[17]

In order to meet its obligations to protect Indians' interests, the federal Crown was granted the capacity to pursue actions on behalf of Indian bands for unlawful occupation of, or trespass on, reserve lands.[18] However, where the Crown failed to pursue such claims, or was itself a potential defendant, aboriginal groups were often incapable of enforcing their rights in a timely manner. In many cases the Crown failed to disclose potential causes of action.[19] Unfamiliar with Anglo-Canadian legal concepts and institutions, and with limited economic resources, most Indian bands had no realistic opportunity to commence actions with respect to their land, and indeed, between 1927 and 1952, Indians were expressly prohibited from raising money to do so.[20] In applying statutory limitations, systemic barriers to pursuing legal claims are important factors to be considered, as are the unique content and source of aboriginal title and the honour of the Crown in fulfilling its fiduciary responsibilities.

In the United States, similar contextual factors have led to an express policy that state limitation periods are inapplicable to Indian land claims.[21] In *Oneida* v. *Oneida Indian Nation*, the Supreme Court of the United States cited "Congress' concern that the United States had failed to live up to its responsibilities as trustee for the Indians" by refusing to statute-bar a claim based on the unlawful alienation of lands subject to aboriginal title in 1795.[22] Such a policy has not yet been adopted in Canada, and statutory limitation periods have instead been interpreted and applied on a case-by-case basis.

Applications of Statutes of Limitations to Indian Claims

Canadian courts have applied provincial statutes of limitations inconsistently to claims respecting Indian lands.[23] In some cases, courts have strictly interpreted provincial statutes of limitations and found historical claims by Indian bands to be statute-barred.[24] However, many judges have sought to decide such claims on their substantive merits by extending or postponing limitation periods based on concepts of continuing trespass, equitable fraud, and policy-driven interpretations of the discoverability principle.

In *Johnson* v. *BC Hydro,*[25] the British Columbia Supreme Court held that the misappropriation and on-going use of Indian lands constituted a continuing trespass, for which a new cause of action accrued each day. However, courts have been hesitant to apply this reasoning, particularly

[17] *Supra* note 14 at 341. For a thorough discussion of the scope of the Crown's fiduciary responsibilities, see Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown Native Relationship in Canada*, (Toronto: University of Toronto Press, 1996).

[18] *Supra* note 15; *The Queen v. Smith* (1980), 113 D.L.R. (3d) 522 (F.C.A.) [hereinafter *Smith*].

[19] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 [hereinafter *Blueberry v. Canada*).

[20] *Indian Act*, 1927 R.S.B.C., c.98, s.141.

[21] *Oneida County v. Oneida Indian Nation* (1985), 470 U.S.226 at 240-245.

[22] *Ibid*.

[23] *Supra* note 3 at 191-192.

[24] *Attorney General (Ontario) v. Bear Island Foundation* (1984), [1985] 1 C.L.N.R. (OS.C.); *Lower Kootenay Indian Band v. Canada*, [1992] 2 C.N.L.R. 54.

[25] [1981] 3 C.N.L.R. 63.

where an initial breach of duty or alienation of land can be pinpointed at a specific point in time.[26]

The Supreme Court of Canada adopted a preferable approach in *Guerin v. the Queen,*[27] a case in which the federal government leased surrendered reserve lands for less than its market value. In writing for the majority of the Court, Dickson J. held that the government's delay in disclosing material facts to the band may constitute equitable fraud sufficient to postpone the running of the limitation period.[28] This approach, in which the limitation period does not begin to run so long as the Crown conceals information relevant to a potential action against it, has been applied in subsequent claims against the federal Crown,[29] but would have no application in the absence of a fiduciary relationship between the Indian band and defendant. Such a fiduciary relationship would arise only "where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power."[30] It would generally be limited to claims against the federal government with respect to claims arising from the surrender of Indian lands.[31]

More recently, the Supreme Court of Canada has applied the policy-driven approach articulated in *M.(K.)* v. *M.(H.)* to allow for the extension of a limitation period for an Indian band's claim against the federal Crown. In postponing the commencement of the limitation period in *Blueberry v. Canada*,[32] the Supreme Court of Canada recognized the obstacles that aboriginal groups historically faced in pursuing claims against the Crown for interference with their lands.

While these approaches to extending or postponing limitation periods have allowed some Indian bands to be compensated for historical interference's with their territories, they have been inconsistently applied and have not prevented the claims of some bands from being barred by the conclusion of limitation periods.[33] Questions as to whether a given claim is statute-barred continue to be litigated, thereby diverting resources from the resolution of substantive issues.

By grounding decisions on principles developed in the general context, the courts have failed to consider the unique position of aboriginal peoples and their lands in the Canadian legal system. As Gonthier J. articulated in *Blueberry* v. *Canada:*

> When determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the *sui generis* nature of aboriginal title requires courts to go beyond the usual restrictions imposed by common law, in order to give the true purpose of the dealings.[34]

[26] *Supra* note 3; *Semiahmoo v. Canada* (1997), 148 D.L.R. (4th) 523 (F.C.A.) [hereinafter *Samiahoo*]; *Fairford First Nation v. Canada (Attorney General)* (1999), 2 C.N.L.R. 60 (F.C.(T.D.)).

[27] *Supra* note 14.

[28] *Ibid.*

[29] *Semiahmoo, supra* note 26.

[30] *Supra* note 26 at 341.

[31] *Supra* note 19.

[32] *Ibid.*

[33] See e.g. *supra* note 9.

[34] *Supra* note 19 at para. 7.

Until recently, courts have avoided considerations of the constitutionality of statutes of limitations. However, recent case law indicates that Canadian judges are becoming increasingly willing to examine the constitutional context in which these laws are applied. Superior court justices in British Columbia and Ontario have found provincial statutes of limitations to be *ultra vires* with respect to Indian lands, and questions continue to be raised about the validity of such statutory schemes in light of s. 35(1) of the *Constitution Act, 1982*.

A New Approach?

Two recent provincial superior court cases have found provincial statutes of limitations to be unconstitutional with respect to claims over Indian lands. The approach adopted by the Courts in *Stoney Creek Indian Band* v. *British Columbia*[35] and *Chippewas of Sarnia Band* v. *Canada (Attorney General)*[36] represents a principled consideration of constitutional issues involved, and establishes a fair and predictable standard upon which potential parties to such actions can negotiate.

In the *Stoney Creek* case, Lysyk J. of the British Columbia Supreme Court considered an application by Alcan Aluminum Ltd. for summary judgment pursuant to Rule 18A of the Supreme Court rules.[37] Although his decision has subsequently been set aside by the British Columbia Court of Appeal for lacking an established factual basis and being beyond the ambit of summary proceedings,[38] the appellate court did not refute its reasoning. Thus the judgment of Lysyk J. remains a persuasive examination of the applicability of statutes of limitations to claims of Indian bands in provincial superior courts.

Lysyk J. held that the Stoney Creek Indian band's claim against Alcan for the unauthorized construction of a road across the band's reserve between 1948 and 1951 cannot be statute-barred by the *British Columbia Limitation Act*.[39] Jurisdiction to legislate with respect to "Indians, and lands reserved for the Indians"[40] is conferred on the federal government by s. 91(24) of the *Constitution Act, 1867*. The scope of this head of power was explained by Lamer C.J.C. in *Delgamuukw* v. *British Columbia (Attorney General):*

> The core of Indianness encompasses the whole range of aboriginal rights that are protected by section 35(1) [of the Constitution Act, 1982]... Provincial governments are prevented from legislating in relation to ... aboriginal rights.

Section 91(24) protects a core of federal jurisdiction even from provincial laws of

> general application through the doctrine of inter-jurisdictional immunity.

[35] [1999] 1 C.N.L.R. 192 (B.C.S.C.) [hereinafter *Stoney Creek*].

[36] [1999] O. J. No. 1406, online: QL (OJ).

[37] *Supra* note 2.

[38] *Stoney Creek Indian Band v. Alcan Aluminum Ltd.* (unreported), [1999] B.C.J. No. 2196, online: QL (BCJ).

[39] *Supra* note 26.

[40] *Supra* note 4.

> That core has been described as matters touching on "Indianness" or the "core of Indianness.[41]

To the extent that statutory limitations affect the right to possess Indian land, which is at the core of this federal jurisdiction,[42] they are *ultra vires*, and of no force and effect. Lysyk J. recognized that in order to be meaningful, aboriginal rights must include the ability to legally enforce those rights:

> The right to claim damages for interference with Indian reserve land not only rests upon the right to possession of those lands, but is sufficiently integral to such possession as to share the same characterization for constitutional purposes.[43]

By purporting to extinguish the right to sue for damages for interference with Indian lands,[44] the *Limitation Act* effects the core of federal jurisdiction. Such statutory provisions are not invigorated by s. 88 of the *Indian Act*,[45] which referentially incorporates provincial laws of general application to apply to Indians, but not to Indian lands.[46] As a result, the *ultra vires* provincial statute of limitation "must be read down and given the limited meaning which will confine it within the limits of provincial jurisdiction."[47]

Stoney Creek was followed and expanded upon by Campbell J. of the Ontario Superior Court in *Chippewas of Sarnia Band*.[48] In this proceeding, the Court considered a motion to statute-bar a band's claim for possession of lands that were illegally alienated in 1839. Campbell J. relied on to the reasons of the Federal Court of Appeal in *The Queen* v. *Smith*, a case in which a provincial statute of limitation was found to be inapplicable to actions by the federal government on behalf of Indian bands:

> If provincial law respecting the limitation of actions could apply so as to have the effect of extinguishing the Indian title or the right of the federal Crown to recover possession of land for the protection of the Indian interest,... it would have the effect of destroying or eliminating a part of the very subject-matter of federal jurisdiction.[49]

In *Chippewas of Sarnia*, the court held that the Canadian provinces have never had the jurisdiction to statute-bar claims respecting Indian lands. However, colonial statutes adopted prior to Confederation may be applicable in cases of the historical alienation of aboriginal lands. In this case, the right to possession of lands now owned by private persons was barred by the 60-year equitable limitation period, established by colonial statutes. The band's property rights crystallized into an adequate alternative remedy in damages against the Crown for any wrongful dispossession.[50] Campbell J. balanced the rights of the band against the interests of the current owners (who were *bona fides* purchasers for value without notice), while acknowledging that a remedy must be available for the injustices perpetrated against the

[41] *Supra* note 9 at 270-271.

[42] *Smith, supra* note 18.

[43] *Supra* note 26 at 218.

[44] *Supra* note 35.

[45] R.S.C., 1985 c. I-5.

[46] *Supra* note 26 at 205.

[47] *Derrickson v. Derrickson* (1986), 26 D.L.R. (4th) 175 (S.C.C.) at 184.

[48] *Supra* note 35.

[49] *Supra* note 9 at 572.

[50] *Ibid.* at 545.

Chippewas of Sarnia.

In both *Stoney Creek* and *Chippewas of Sarnia*, provincial statutes of limitations were found to be *ultra vires* as the result of the operation of inter-jurisdictional immunity. However, in *Chippewas of Sarnia*, Campbell J. made reference to the potential for statutes of limitations to violate the aboriginal and treaty rights of aboriginal peoples that are recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. Campbell J. observed that "the application of the provincial limitation statutes to these lands would extinguish aboriginal title, a result that cannot be achieved without clear and plain Parliamentary intention, conspicuously lacking" in such statutes.[51] The Supreme Court of Canada held in *R.* v. *Sparrow*[52] that "the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right,"[53] which following its reasoning in *Delgamuukw*, would include "the right to occupy lands and engage in activities which are integral to the distinctive aboriginal culture of the group claiming the right."[54] As Lysyk J. recognized, such aboriginal rights would effectively be extinguished if a statute of limitation prevented an aboriginal group from enforcing their rights and remedying breaches of those rights.

The s. 35(1) approach would provide more expansive protection to rights of Aboriginal Canadians.[55] The division of powers argument expressly adopted in *Chippewas of Sarnia* and *Stoney Creek* is less compelling in federal courts, where s. 39(1) of the *Federal Court Act* referentially incorporates provincial statutes of limitations.[56] Both of the provincial superior courts, which have found the limitations provisions to be unconstitutional, acknowledge that a different result would have been likely in the federal court system.[57] However, in *Roberts* v. *Canada*, the Federal Court recently left the door open for a consideration of the constitutional validity of s. 39(1) of the *Federal Court Act*[58] in light of s. 35(1) of the *Constitution Act, 1982*, where an Indian band is able to establish aboriginal title to the subject of the litigation.[59] No court has expressly held that provincial statutes of limitations violate s. 35(1) aboriginal or treaty rights. Given the recent expansion of the scope of rights protected, and the trend towards a closer examination of the constitutionality of such provisions, it could be expected that both provincial and federal courts would deem statutes of limitations *prima facie* inapplicable to claims respecting aboriginal lands.

Conclusion

These recent developments in the application of statutory limitation periods bring Canada closer to the American model, under which claims by Indians are not subject to statutes of limitations in the absence of clear legislative intent.[60] In the United States, public policy requires aboriginal peoples to have an adequate opportunity to apply to court for remedies for

[51] *Supra* note 35 at para. 502.

[52] (1990), 70 D.L.R. (4th) 385.

[53] *Ibid.* at 401.

[54] *Supra* note 9 at 271.

[55] *Supra* note 4.

[56] R.S.C. 1970, c. 10.

[57] *Supra* notes 26 and 35.

[58] R.S.C. 1985, c. F-7.

[59] *Roberts v. Canada*, [2000] 3 C.N.L.R. 303.

[60] *Supra* note 21.

historic wrongs. Canadian courts seem to be moving towards a greater acceptance of a similar policy. Canadian people are increasingly recognizing that, in order to address the historical, constitutional, and political realities of aboriginal claims, these cases must be adjudicated on their merits, rather than avoiding the substantive issues by refusing the claims on the basis of statutes of limitations.

Progress and Uncertainty:

The Educational Rights of Special Needs Children in British Columbia

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Introduction

The following essay is a study of the legal rights of children with "learning disabilities" ("LD") and other special needs in the education system of British Columbia. In this brief introduction, I will make a few comments about the scope, structure and argument of the paper. The exact subject of the paper is not easy to define. In terms of the kinds of disability under study, there is some stress on "learning disabilities"; but categories such as "LD" are, in both pedagogy and pathology, loose and dynamic, and LD children often have other related conditions, such as Attention Deficit Disorder ("ADD"). The paper is primarily about the rights of those with special educational needs. However, issues related to purely "physical" disabilities – such as access to buildings and transportation – will receive little attention in this paper. In terms of its jurisdictional-geographic boundary, the field of the paper is again inexact. The paper focuses on the statutory and administrative regime of British Colombia, but case law from other provinces is relevant because special education involves questions of civil and human rights.

Indeed, the most interesting and significant issue in special education law is the degree to which judicial interpretation of equality provisions in provincial human rights statutes and the *Canadian Charter of Rights and Freedoms*[1] ("*Charter*") will overwrite education legislation. A conclusion of this paper is that courts have only begun the work of submitting special education regimes to the scrutiny of the *Charter* and human rights acts. The results are likely to be progressive and may result in some thoroughgoing alterations of educational practice, but there are many issues to settle and the future course of jurisprudence is not likely to be smooth. The problem of special education rights raises a host of difficult questions and has already tested and taxed the principles of equality jurisprudence.

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11.

The paper is divided into three sections: first, introductory comments on the history and policy concerns of special education law; second, an inspection of relevant statute provisions on special needs education in British Columbia; and third, a study of recent case law on special needs as an issue of human and civil rights. In this last section, I will not only examine questions that have been the subject of litigation – such as the right to integration – but also anticipate issues that parents may bring to court in the future. These concerns include the crucial question of whether school boards have a constitutional obligation to assess children for learning disabilities or ensure that staff members have a level of special needs training.

A "New Minority": Special Needs and Equal Rights

The practical question that this paper seeks to answer is the following: what rights do children with learning disabilities and special needs have in the education system of British Columbia? A court considering this question has to deal with four areas of controversy in the recent history of educational policy and human rights: the status of children in law and traditional concepts of the role of the state and judiciary in protecting vulnerable members of society; recognition in international human rights law of both children's rights and educational rights, and the impact of international standards on domestic law; the tension between the legislature, as the source of legal policy and legitimacy, and the courts, as guarantors of justice; finally, evolving professional and social thought on the theory and practice of special education and the nature of disability.

Special education law involves, first of all, the rights of children. Common and civil law traditions have always recognized what we might call the doctrine of "child vulnerability". Children, according to this view, have a

weaker sense of their rights than do adults, and less ability to protect their interests. Courts must keep in mind, then, the great imbalance of power between educator and pupil. Their ancient role the in the exercise of *parens patriae* – the ability of the state to take parental responsibility for those unable to exert their own rights – might still have some relevance for the very modern question of what resources and rights special needs children can obtain from education bureaucracies.

But special education law concerns also new sources of protection for the young. The second aspect to note about Canadian education rights law is its relationship to a wider historical trend: the decades since World War Two have witnessed an elaboration of the natural rights of children. The young represent a minority of sorts, a discrete subgenus of humanity, with its own special experiences and necessities. In particular, children need education. Both the *Universal Declaration of Human Rights* and the *United Nations Convention on the Rights of the Child* recognize a "civil" right to education and some "welfare" or "entitlement" right to a free education.[2]

Canada is a signatory to these documents, but our domestic human rights law is not as explicit. No provision of the *Charter* expressly recognizes a "civil" right to education, though such basic liberties presumably come under the shelter of the s. 2 fundamental freedoms, such as thought and assembly. The "welfare" right of a child to *a free education* finds neither explicit nor implicit acknowledgment in the *Charter*. Similarly, only the human rights codes of Saskatchewan, Manitoba and Quebec even mention a right to education, and these provisions probably do not amount to a direct entitlement to free education, but simply designate education as a service that providers have to offer without discriminating on a prohibited ground.[3] An *a priori* right of children to free public education is not part of rights law in Canada. Educational rights depend on the positive law of each jurisdiction. This fact means, for our purposes, that special needs groups can only use the equality principle of the *Charter* and human rights codes to ensure that provincial legislatures offer them the same rights as other children.

The third point about special education law is that it involves schools and education, which have a distinctive status in the Canadian constitutional and public administration scheme, one indeed that has recently forced the courts to consider the justice of educational statutes. Under the original *British North America Act* (*1867*), now the *Constitution Act (1867)*,[4] education is a provincial competence. Provincial governments have made full use of this authority. The various education acts regulate instruction and are the source of any entitlement to public education. Most Canadian schools are part of large, publicly funded systems. The managers of these systems are school boards that have a quasi-autonomous status; but

[2] The *Universal Declaration of Human Rights* GA Res. 217 (III) UN GAOR, 3rd Sess., Supp. No. 13, UN Doc A/810 (1948). Article 26(1) calls for free public education "at least at the elementary and fundamental stages." In the United Nations *Convention on the Rights of the Child* (1990), Article 28 stipulates that primary education should be "available free to all", while states must make various forms of secondary education "available and accessible to every child."

[3] *Saskatchewan Human Rights Code*, R.S.S. 1978, c. S-24.1, ss. 12-13; *Human Rights Code* (Manitoba), S.M. 1987-88, c. 45; *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12 [Hereinafter "Quebec *Charter*"], s. 40.

[4] *The Constitution Act 1867*, 30 & 31 Victoria, c. 3 (U.K.) s. 93.

there is no doubt that the state is deeply involved in Canadian education.

Indeed, the presence of a "state actor" transforms the social issue of special education into a subject of equality and civil rights. For instance, although the American racial desegregation controversy stands 30 years back in the past of another country, the shadow of this towering debate colours current Canadian jurisprudence and scholarship on the law of special education. But, while courts have a *Charter* obligation to police government for violations of civil rights, they retain some traditional reluctance to determine government policy.

Thus, special education law is marked by a tension between parliamentary supremacy and judicial review. Special education litigation, as we shall see, presses on courts both policy matters of a highly technical nature, as well as issues of resource allocation and entitlement, the problems of "distributive justice" that have historically been the prerogative of the legislature and executive. Problems of special education involve pedagogic theory and medical-psychological opinion; for this reason, courts have an incentive to stress the constitutional principle of the supremacy of parliament and leave much to the discretion of the legislature and educational bureaucracy. However, counterbalancing this policy of deference are two other social facts, the vulnerability of children and the relative weakness of parents in relation to government bureaucracy. Education, like health care, is one of those matters of "local or private" concern (to use the language of the *BNA Act*) that provincial governments have transformed into large, bureaucratic and very "public" operations. Faced with a public monopoly, parents have few options if they feel that their school board is not providing an adequate or fair education. The nature of modern schooling as a public utility is a strong policy reason for courts to stress the constitutional principle of judicial review. Parents often have no other redress.

The final fundamental aspect of the question "what rights do the learning disabled or special needs students have" centres on the word "disabled." Like the rights of the child, the rights of the disabled have occupied considerable space on the public policy agenda since the Second World War. Indeed, the prerogatives of the disabled are better entrenched in Canadian domestic law than those of children: mental and physical disability is a prohibited ground of discrimination under both the *Charter* and the provincial human rights acts.[5]

However, the novelty and progressive character of these rights makes them difficult to define. Some of the uncertainty in the law of special education arises from the protean character of our philosophies of disability and equal rights as well as the changeability of educational theory and practice. If judges and legislators have not exactly been weathervanes, turned around by every new gust of pedagogic opinion, the wider social and

[5] W.J. Smith and W.F. Foster, "Educational Opportunities for Students with Disabilities in Canada: A Platform of Rights to Build on" (1993-1994) 5 Education & L.J. 193 at 202; W.J. Smith and W.F. Foster, "Educational Opportunities for Students with Disabilities in Canada: How Far Have We Progressed" (1996) 8 Education & L.J. 183 at 189.

academic conversation about disability and rights has certainly swayed their judgment. Many authorities remark on a basic "paradigm-shift" in the theory, practice and legal regulation of special education. An older model portrayed the disabled as victims of an incapacitating affliction, unfortunates who require charity, consideration and treatment. The new model conceives of the disabled, including special needs students, as a minority group that needs most of all to stand for its own legitimate privileges, particularly the right of inclusion in society.[6] Canadian law, as we shall see, has neither fully accepted the minority conception nor completely abandoned the older view, especially its pragmatic emphasis on treatment and special accommodation.

Unsurprisingly, the minority-rights vision of disability originates from the United States, with its deep-rooted traditions of judicial review and civil rights litigation. No doubt the link between civil rights and disability gave a vigorous and far-reaching character to the renovation of American special education policy in the 1970s. During the early years of that decade, several high profile cases, such as *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*[7] and *Mills v. Board of Education of the District of Columbia*,[8] established the principle that laws denying equal education to the disabled are unconstitutional under the 14th Amendment.[9] These decisions, together with the general social concern with disability, prompted a broad federal intervention in special education.[10] In 1975 the United States Congress approved the *Education for All Handicapped Children Act* (*EAHC*), which is now the *Individuals with Disabilities Act* (*IDEA*).[11] At a stroke, this statute put into force a vision of special needs education that Canadian law has been incrementally moving towards for 20 years.

Under the *EAHC-IDEA*, states can access federal funds for special education if they accept several principles and pedagogic devices. First, states and local educational agencies have a duty to seek out and identify handicapped children (as defined in law) and provide them with a free education and related services. Second, this schooling has to be "appropriate" rather than arbitrary or discriminatory. Appropriate education means that the needs of the specific child are paramount in the design of an academic strategy. Thus educators have to draw up an "individualized educational program" for every handicapped child. Third, instruction should occur in the "least restrictive environment", which is a term of art for the integration of special needs students into regular courses and classes. Fourth, the *EAHC-IDEA* guarantees parents (and at some point children) rights of "due process" – what Canadians call natural justice or administrative fairness – in decision-making processes under the *IDEA*.[12]

The *IDEA* scheme has its detractors.[13] For instance, the Act is detailed and, therefore, the special needs regime is perhaps inflexible and litigious. However, many in Canada see the *IDEA* model as something of the

6 Smith and Foster, 1996, *supra* note 5, at 184; W.J. Smith, "Affirmative Action for Students with Disabilities? Not Yet Says the Court of Appeal" (1994) 6 Education & L.J. 89.

7 343 F. Supp. (1972).

8 348 F. Supp. 866.

9 U.S. Const. amend. XIV.

10 See discussion in T.A. Sussel, *Canada's Legal Revolution: Public Education, The Charter and Human Rights*. (Toronto: E. Montgomery Publications, 1995).

11 20 U.S.C. § 1401.

12 D. Poirer, L. Goguen & P. Leslie, *Education Rights of Exceptional Children in Canada: A National Study of Multi-Level Commitments* (Toronto: Carswell, 1988) at 29; A. Brown & M.A. Zucker, *Education Law and Legislation in Canada* (Toronto: Carswell Publishers, 1998) at 219.

13 For a discussion of problems with the scheme in its early years see Sussel, *supra* note 10 at 53.

holy grail of special education litigation and lobbying crusades. In its comprehensiveness, the *EAHC-IDEA* does provide much that is absent in Canadian law. First, it represents an all-encompassing effort to reform American special education according to both the minority's right model and specific pedagogic ideas. Second, the *IDEA* has a quasi-constitutional authority, because it limits the power of state legislatures and the discretion of local governments. Finally, the provisions of the Act flow from a national recognition of the right of special needs children to a meaningful education. In this sense, the federal Canadian legislation that the *IDEA* most resembles is the *Canada Health Act*.[14] It is probably true that Canadian special needs students do not have a right to appropriate education in the same way that Canadians have a quasi-constitutional right to health care. In the recent history of special education law in Canada, litigants have attempted to win rights like those in *IDEA* by means of the anti-discrimination provisions of the *Charter* and the provincial human rights acts.

The Sovereign's Will Has the Force of Law: Common Law, Courts and the British Columbia *School Act*

Provincial legislatures make school law in Canada. Enforceable rights in this area derive from statute. Positive laws dominate this important area of social regulation because, in part, the common law has little specific to say about education. Historically, matters of school law simply came under the private law fields of contract, tort or trust. The influence of private law has probably diminished because, for most of the national history of Canada, governments have exercised their powers of taxation to pay for a public system of education. Thus politics and public administration, not contractual bargains or private duties of care, shape much of the relationship between schools and their clientele. A dissatisfied electorate has the remedy of the ballot box, but children do not vote and individual parents, especially if their children have idiosyncratic needs or possibilities, have few remedies other than to negotiate with the school system. Thus special needs children, as a minority, are somewhat vulnerable to the will of the legislature and the electorate. Like any other minority, they may find democracy at times to be unresponsive, even menacing.

Courts have had neither the means nor the inclination to redress this imbalance. Traditionally, they have limited their jurisdiction to the enforcement of statutory educational rights, with considerable deference to the judgment of school officials in matters such as the placement of children who are somehow "different". Indeed, common law principles of statutory enforcement and administrative review have perhaps not changed very much since the Supreme Court of Canada discussed judicial examination of educational decisions in *Bouchard c. Saint-Mathieu-de-Dixville (Municipalité) Commissaire d'écoles*.[15] At dispute in that case was the expulsion of two

[14] *Canada Health Act*, R.S.C. 1985, c. C-6.

[15] [1950] S.C.R.479 [hereinafter *Bouchard*].

children whom the Court found to be "backward mentally." School authorities had ejected the boys for being unable to keep up with classes, and concomitant insubordination and misbehaviour. Rinfret, C.J.C., accepted the testimony of a doctor that it would be better for all involved if the children were placed in a special institution.[16] The school trustees had, Rinfret C.J. noted, both a statutory duty to admit children and a statutory power to exclude them. In applying these provisions to particular a case, courts should, the Chief Justice held, defer to the judgement of the administrative decision-maker. Thus the Court validated the expulsions.

Similarly, in *Carriere v. County of Lamont No. 30*,[17] the Alberta Court of Queen's Bench held that it could examine issues of procedural fairness but not substance; it had no authority to determine the placement of a special needs student, since this was a matter of school board discretion. In *Yarmoloy v. Banff School District No. 102*,[18] the same court declined to examine the merits of a refusal to re-register a developmentally delayed child who, in the opinion of the Banff School Board, would be better served by a special program in Calgary.

The fullest expression of the Canadian common law on the review of special education decisions is still the judgment of the British Columbia Supreme Court in *Bales v. Board of School Trustees (Central Okanagan)*.[19] The case merits considerable attention because it may represent more of the current law than people recognize. The facts of the case were as follows. When Aaron Bales was eight, school officials removed him from his regular school and placed him in a segregated school. Aaron's mental capacity was that of a child of about half his years. His parents opposed the segregated placement. Before the Court, they argued that the decision denied their child an ordinary education and that the school board had no authority to create segregated institutions.[20]

The Court did not accept these arguments. The reasons of Taylor J. are long, perhaps because the Court felt it necessary to justify old rules to a new *zeitgeist*. When the case took place, the *Charter* was law and social inclusion for the disabled had been a visible objective of progressive social policy for more than a decade. However, the *Bales* decision preceded both the coming into force of the s. 15 equality provisions of the *Charter* and the 1989 revision of British Columbia's school law. Thus, although Taylor J. recognized the potential benefits of integration, he decided the case simply by recognizing the authority of the school board to make placement decisions. Under the former BC *School Act*,[21] school boards had to provide all students in their districts with "sufficient school accommodation and tuition, free of charge" (s. 155(1)(a)). The duty was enforceable, and in order to ensure that the right had some meaning, a court could, according to Taylor J., review decisions about education on *substantive grounds*. Boards

16 *Ibid.* 480.

17 August 15, 1978 (Alta.Q.B.) [unreported].

18 [1985] Alta.J. No. 562 (Alta.Q.B.), online: QL (AJ).

19 (1985), 54 B.C.L.R. 203 (S.C.) [hereinafter *Bales*].

20 *Ibid.* at 205.

21 R.S.B.C. 1979, c. 375.

have to exercise their discretion reasonably.[22]

However, a reasonableness standard of review, in administrative law, means considerable deference to the original decision-maker, and Taylor, J. noted strong reasons why the school board could expect consideration. First, the body had to deal with "politics" in the sense of policy, that is it had to establish an official position on matters of educational philosophy – such as integration – in which courts presumably have limited competence to meddle.[23] Second, the board, which was an elected body, also had to dispose of questions of "politics" in the sense of cutting the pie of public goods into individual portions. Even if integration were clearly beneficial, the Court stated, political decision-makers can withhold potential benefits, particularly since the statute did not oblige the School Board to do any more than provide a sufficient education. Similarly, Taylor J. noted that the private duty of care, according to the law of negligence, is limited to the avoidance of foreseeable harm, not the conferral of all possible benefits.[24] Thus, the Court dismissed the parent's case with an evident sense of reluctance but a stronger commitment to parliamentary sovereignty.

Were *Bales* pleaded today, the outcome might be the same, but the arguments would be different, and the parents would have better ones. The first important change was that the constitutional ground for attacking segregation became much more solid. In *Bales*, the parents made a civil rights argument based on s. 7 of the *Charter*, which states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The Court was not attracted to the idea that the segregation of special needs children represented a breach of s.7,[25] a provision designed to protect citizens from excessive state power, particularly in the justice system. However, s. 15 came into force three years after the rest of the *Charter*. Its purpose was clearly to protect against state discrimination:

> 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 language, combined with the recent history of desegregation in the United States, stimulated litigation on the issue of whether special need or disability could justify practices of separate (and perhaps equal) education.

An early example was *Elwood v. Halifax County Bedford District School Board*.[26] Luke Elwood had difficulty speaking and understanding when spoken to. Citing his developmental disability, the Halifax school board

[22] Some commentators miss Taylor J.'s statements about reasonableness and assume that he simply validated a decision that was procedurally correct. See Sussel, *supra* note 10 at 57.

[23] *Bales*, *supra* note 19 at 215, 219 & 224.

[24] *Ibid.* at 225.

[25] *Ibid.* at 221.

[26] Consent order, unreported, June 1, 1987 [hereinafter *Elwood*]. See Sussel, *supra* note 10 at 58.

sought to place Luke in a class for special needs children at another school. Luke's parents challenged the decision as a breach of s. 15 equality rights. American language from the *EAHC*, such as "least restrictive environment", even made its way into the pleadings. The Nova Scotia Supreme Court saw enough merit in the claim to enjoin the school from carrying out the placement before judgement, and the s. 15 argument sufficiently impressed the school board that it consented to the parents' essential demands. The Court did no more than approve a negotiated settlement, but the case raised expectations of a constitutional prerogative to integrated education.[27] These hopes swelled when a similar case, *Rowett v. Board of Education*,[28] also resulted in a settlement favourable to the parents' view.

Rowett and *Elwood* suggested that provincial governments may have to modernize their education laws in order to meet the requirements of s. 15, and thus the second post-*Bales* change was progressive law reform. Concern for the welfare and rights of the disabled had already led Ontario to overhaul its special needs regime in the *Education Act*[29] (the "Ontario Act") of 1980. The new Ontario model mirrored the *EAHC* both in philosophy and structure; the statutory and regulatory provisions were detailed and specific.[30] Some of the particulars merit comment here because they are an interesting contrast to the BC system. Under s. 8(3) and s. 170(1) of the Ontario Act, the Minister and school boards have a duty to provide appropriate special education, but they are also responsible for "early and ongoing identification of the learning abilities and needs of the pupils." Decisions about identification and placement proceed within a fairly elaborate architecture of committees and appeal boards, so that the process has a quasi-judicial air and seems less a matter of political or bureaucratic discretion.[31]

Law reform in British Columbia was comparatively belated and circumscribed. Preparation of legislation for the rigours of judicial review was a reason Parliament postponed the effective date of s. 15. However, the BC government did not act until pressured by the early s. 15 cases and the lobbying efforts of increasingly rights-conscious parents.[32] Two documents record the shift in public policy. In 1988, the Royal Commission on Education counselled the government and Ministry of Education (the "Ministry") to tailor education programs to the needs of particular students; its report stressed the need to recognize the rights of all students in the system.[33] Likewise, the Ministry of Education's *Mandate for the School System* (1989) spoke of the education of students according to their particular abilities.[34]

This language of "appropriate education" was not hollow. Like most other education laws in Canada,[35] the BC *School Act*[36] ("BC Act") establishes a general right to education without qualifications as to disability.

27 See Sussel, *supra* note 10 at 59.

28 (1989), 69 O.R. (2d) 543 (Dist. Ct.).

29 R.S.O. 1990, c. E.2.

30 On the influence of the *EAHC* see: M.E. Manely-Casimir, "Equality in the Education of Special Needs Students: A Canadian Perspective" (1997) 9 Education & L.J. 276 at 277. For an overview of the law, see Brown & Zucker, *supra* note 12 at 213-218.

31 Manely-Casimir, *supra* note 30.

32 See Sussel, *supra* note 10 at 60.

33 British Columbia Royal Commission on Education, *The Report of the Royal Commission on Education: A legacy for learners* (Victoria: Royal Commission on Education, 1988)

34 The *Mandate for the School System* was approved at OIC 1280/89.

35 Smith & Foster, *supra* note 6 at (1993-1994) 220 & (1996) 193.

36 *British Columbia School Act*, R.S.B.C. 1989, c. 61. I will use the section numbers from the revised *British Columbia School Act*, R.S.B.C. 1996, c. 412.

S. 2 provides,

> 2 A person is entitled to enroll in an educational program provided by the board of a school district if the person
>
> (a) is of school age, and
>
> (b) is resident in that school district.

Similarly, s. 75 states,

> 75 (1) Subject to the other provisions of this Act and the regulations and to any orders of the Minister under this Act, a board must make available an educational program to all persons of school age resident in its district who enroll in schools in the district.

In defining a "school program", as Terri Sussell notes,[37] the new legislation drops the term "sufficient", which had influenced the court in *Bales*, and adopts the vocabulary of appropriate education. Under s. 1 an "educational program" is one "designed to enable learners to develop their individual potential." As well, the power of ejection, which had allowed the school board in *Bouchard* to keep out two handicapped children, is quite limited under the current BC statute. Unlike most of the other provincial legislation, the BC Act has no "expulsion" exception to the general duty of boards to register students and the obligation of students to enrol.[38] Even suspension for misconduct requires the furnishing of an alternative education program.[39] As far as this writer is aware, the other ground for exclusion – "a communicable disease or other physical, mental or emotional condition that would endanger the health or welfare of the other students" – has not become an excuse to suspend special needs children.[40]

These provisions are significant, but the new special needs regime actually came into being because of a revolution that took place in subordinate legislation. Lobbying by parents convinced the government to supplement the BC Act with the Special Needs Students Order, Ministerial Order 150/89.[41] The order represents an adoption of the idea of "least restrictive environment":

> 2 (2) A board must provide a student with special needs with an educational program in a classroom where that student is integrated with other students who do not have special needs, unless the educational needs of the student with special needs or other students indicate that the educational program for the student with special needs should be provided otherwise.

Special needs is defined quite broadly:

> 1 In this order "student with special needs" means a student who has a disability of an intellectual, physical, sensory, emotional or behavioural nature, has a learning disability or has exceptional gifts or talents.

[37] See Sussel, *supra* note 10 at 60.

[38] On the duty of students, see s. 3 of the BC Act, *supra* note 36. On expulsion in other jurisdictions, see Smith & Foster, *supra* note 6 at (1993-1994) 219 & (1996) 196.

[39] See BC Act, s. 85 (2) (c) and (d), *supra* note 36.

[40] *Ibid.*, s. 91(5). The duty of alternative education applies here as well. However, some parents would argue that misconduct suspensions often result from an inability of schools to cope with social and behavioural issues related to LD and ADHD.

[41] Sussel, *supra* note 10 at 63. Note that in the original order, the only criterion for rebutting the presumption was the interest of the handicapped child, not his peers.

Thus the Government of British Columbia accepted the idea that special needs children have a right to an education amongst their peers, and it did so despite the fact that no court had yet said that an integration right is implied in s. 15 of the *Charter*.

Another aspect of the *EAHC* model also came to be enforceable in subordinate legislation. According to The Individual Education Plan Order, Ministerial Order 638/95, special needs students are entitled to an Individual Education Plan ("IEP"):

> 2 (1) A board must ensure that an IEP is designed for a student with special needs, as soon as practical after the student is so identified by the board.

The order excludes students whose disability will have little effect on the goals or manner of their education.[42] Individualized plans have to include specific targets for the student, as well as a list of services and materials required to attain the anticipated outcome.[43] Boards are obliged to have the IEPs reviewed at least once a year and, finally, schools have to follow through on the IEP:

> 5. Where a board is required to provide an IEP for a student under this order, the board must offer each student learning activities in accordance with the IEP designed for that student.

Thus, Ministerial Order 638/95 made manifest and substantial the rhetoric of appropriate education in the 1989 BC Act.

Parents also have more say under the new regime, though the administrative system is not as elaborate or deferential to parents as the Ontario scheme. Officials have to consult with parents when making determinations under either the Individual Education Plan Order or the Special Needs Students Order.[44] S. 11 of the BC Act entitles parents and students to appeal any decision or non-decision by an employee of the board if it "significantly affects the education, health or safety of a student." However, the BC Act leaves the appeal process in the hands of the involved school board; the legislation has little to say on the crucial matter of appeal procedure and makes no provision for a second appeal to the Ministry or a third party.

This loose administrative framework may be sufficient for some disputes, but, given the importance of matters such as placement (which touches on rights protected by the *Charter*), a school board may have to go far beyond the requirements of the statute in order to assure an adequate level of procedural fairness. It is worth noting, as well, that a second appeal, of sorts, does exist. The BC Supreme Court can review these school board reassessments, but since the BC Act describes the decision as "final,"[45] a

[42] Ministerial Order 638/95 s.2.

[43] *Ibid.*, s. 1.

[44] Ministerial Order 150/89 s. 2(1); Ministerial Order 638/95, s. 4. The Individual Education Plan Order also envisions consultations with the student where appropriate. In the Act itself, see also s. 7, under which a parent can compel consultation on a child's education program.

[45] BC Act, s. 11(6), *supra* note 36.

court would presumably, under principles of administrative law, only scrutinize the decision for errors of law, unreasonableness or even patently unreasonableness in reaching a conclusion. The school board is further insulated by the s. 1 "educational program" definition, where an appropriate education is one that "*in the opinion of the board*" is designed to develop the potential of individual students. Thus, according to the BC Act, it is the board, and not parents or a court, which should decide the contents of an appropriate education.

Under the new statutory scheme, school boards and school officials continue to control education. Broad bureaucratic discretion is no doubt necessary, and some of the new limitations on that discretion are considerable. The statutory presumption in favour of integration, in particular, is a very substantial reform. But one would not describe the reformation of 1989 as comprehensive. Almost nothing is said, for instance, about identification and assessment. A school board could thus avoid its obligations under the ministerial orders simply by discounting or not seeking out evidence of special need. Through this gap in the law fall LD and ADHD students, whose disabilities teachers may be slow to suspect or may misperceive as simple intellectual or social problems. Even a board intent on identification has no incentive for timely assessment. Thus a common complaint of special needs parents in BC is that waiting lists for assessments have stretched to two years. According to the detailed research of Smith and Foster, the lack of statutory identification requirements is a pan-Canadian problem.[46]

In general, the BC Act is short on the administrative details of special education. The duty to implement educational programs is cast in general terms, as is the right to resources.[47] No provisions address vital matters such as special education training requirements for teachers and teacher aids or the integration of school programs with other social services for special needs children. The Ministry does publish *A Manual of Policies, Procedures and Guidelines*.[48] This large guidebook has the comprehensive character of the *EAHC-IDEA*; but it does not have the force of law, as *Bales* recognized.[49] Thus, for instance, the *Manual* recognizes the importance of "early identification", and makes suggestions about how to ensure that appeal procedures conform to natural justice;[50] however, these statements are binding only in so far as they stay within the four corners of the ministerial orders on special education. Thus, the enforceable special needs regime of British Columbia amounts to a handful of provisions in subordinate legislation.

Besides legal authority, the Ministry does have another means of compulsion: supplemental funding grants for special needs students. As far as this writer has been able to determine, however, the Ministry only uses

46 W.J. Smith and W.F. Foster, "Educational Opportunities for Students with Disabilities in Canada: Beyond the School House Door" (1993-1994) 5 Education & L.J. 305 at 333.

47 According to s. 85(1)(c) of the BC Act, *supra* note 36, boards must provide "educational resource materials necessary to participate in the educational program."

48 British Columbia Minister of Education, *Manual of Policies, Procedures and Guidelines* (Victoria: Special Education Services) [hereinafter *Manual*].

49 The policy manual at that time did offer some argument for the plaintiffs that the Ministry supported integration, though the Court found the document to express only general policy and not binding law. *Bales*, *supra* note 19 at 212-216.

50 See A-5, *supra* note 48, and the Information Circular #439.

this power over the purse to enforce its categorization scheme for identifying learning disabilities. Naturally, the Ministry wishes to control its own budget and needs a mechanism to ensure that school boards do not use identification criterion to inflate their transfers. For example, the Ministry includes in the test for severe learning disability a requirement that, essentially, the student be two years behind his peers.[51] Funding depends on adherence to this standard.

Not all parents are pleased with this criterion. Likewise dissatisfaction about delays in assessment, the use and consequences of identifications, the allocation of resources, the efficacy of education programs, the impartiality of appeal committees – all lead us back to the question of whether the *Charter* and human rights legislation provide special needs children with rights other than those enumerated in the BC Act.

General Human Rights, Minority Needs, Specific Public Duties

As noted above, counsel would argue *Bales* differently today because of the progressive law reform and because of the coming into force of the equity provisions of the *Charter*. As well, the BC *Human Rights Code* (the "Code")[52] provides as follows:

> 8 (1) A person must not, without a bona fide and reasonable justification,
>
> (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
>
> (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public
>
> because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex or sexual orientation of that person or class of persons.

Thus, for the past decade Canadian courts have had to decide whether school acts such as those of Ontario and BC are compatible with s. 15 of the *Charter* and provincial human rights legislation. We will now look at those judgments.

Two introductory points should be made about the case law. The first point relates to its quantity and relevance for British Columbia. Fewer cases are on the books than one might suspect because of a tendency, which we have seen in *Elwood* and *Rowett*, to settle before appeals are exhausted.[53] As well, many of the cases are on the issue of integration. In BC, mainstreaming is, by ministerial order, the presumed placement method. However, the "integration" cases suggest that a BC school board can easily justify a determination that circumstances had rebutted the presumption of integration, leaving it free to exercise its right (under Ministerial Order

[51] *Ibid*. E-12

[52] R.S.B.C. 1996, c. 210

[53] W.A. MacKay, "Human Rights and Education: Problems and Prospects" (1996) 8 Education & L.J. 69 at 74.

150/89) to place a child in a segregated environment.

The second point is that the currents of jurisprudence flow around certain basic, perhaps irresolvable tensions in the case law. One way of looking at the jurisprudence is as a contest between formal and substantive notions of equity. No doubt Brown and Zucker are correct when they point out that some parents are employing s. 15 of the *Charter* to prevent schools from distinguishing their children from their peers, while other parents use the same provisions to seek more special treatment.[54] But it is probably true that those parents are not so much interested in equality, however defined, as acquiring an appropriate education for their children; and the general notion of substantive equality, as the accommodation of difference, is fairly well established in law. The great policy dilemma, rather, is that special education litigation draws the courts into territory that they rarely entered before the era of civil rights judicial review. As noted earlier, special education involves issues – from abstract pedagogy to concrete choices on placement and resources – in which the courts may be ill equipped or unwilling to pry. As LaForest, J., said in *Law Society of British Columbia v. Andrews*,

> Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions.[55]

At the same time, however, courts have to give meaning to specific statutory provisions, as *Bales* noted, and they have plain obligations under both the *Charter* and human rights codes to review positive legislation – even broad, public policy legislation – for conformity to the principle of equality. Judicial review also follows the canon that remedial legislation and constitutional documents should receive a generous and liberal interpretation. In addition, beyond this clear and sanctioned task to defend and advance civil equity, courts may simply also have inclinations to facilitate appropriate education and give some support to parents whose educational choices are limited to the public education system.

With these comments in mind, we can pick up again the thread of constitutional law as it was developing after *Bales*. A point fairly well settled since that case is the general application of the *Charter* to schools and special education. This was the *ratio* of the appeal in *Rowett*,[56] and the general relevance of the *Charter* is assumed in most recent case law, though courts have struggled somewhat with the relationship between the *Charter* and bureaucratic discretion. Similarly, although the *Code* does not mention education specifically, it would seem to fall under a "service or facility customarily available to the public." That has been, at least, the presupposition in several special education cases under the *Code*.[57]

[54] Brown & Zucker, *supra* note 12 at 213-218.

[55] [1989] 1 S.C.R. 143 at 94.

[56] See Sussel, *supra* note 10 at 59.

[57] *Adamer v. British Columbia (Council of Human Rights)*, [1999] B.C.J. No. 1804, online: QL (BCJ); *Deptford and Board of School Trustees of School District No. 63 (Saanich)*, February 27, 1992, unreported letter decision, BC Human Rights Council.

Most of the rights cases have been on the question of integration, which is both one of the most basic issues in special education law and probably also the rights claim best suited to civil rights arguments. Two lines of authority have split the case law, but the Supreme Court of Canada recently gave a fairly exhaustive treatment of the matter in *Eaton v. Brant County Board of Education*.[58] However, before we come to that decision, it is important to note that the broad viewpoints that have resulted in two lines of authority. The first line of authority is reluctant to view the problem of integration simply as a matter of minority rights. It tends to be sensitive to the practical pedagogic needs of the child and conscious of the limits of jural efficacy and judicial competence. This stream of thought is evident in two significant judgements from the Quebec Court of Appeal, *Régionale Chauveau* (*Commission Scolaire*) c. *Québec* (*Commission des droits de la Personne*)[59] and *Saint-Jean-sur-Richelieu* (*Commission Scolaire*) c. *Québec* (*Commission des droits de la Personne*).[60] In both cases, the Court of Appeal rejected arguments that separate placement of special needs children amounts to discrimination under the Quebec *Charter of Human Rights and Freedoms*.[61]

Chauveau involved a secondary student with William's syndrome. He had followed the mainstream curriculum in elementary school, but a placement committee decided that he should go into a segregated class after grade 6. There is at least some indication that their reasons were based upon a formal notion of equality (which would not permit special status for a person in a regular class), a general rigidity in school standards, and an inability to provide services.[62] The Human Rights Tribunal accepted the parents' position and held that the combined application of the *Quebec Charter* and the Quebec *Education Act*[63] (the "Quebec Act") results in a strong (though rebuttable) presumption in favour of integration.[64] Such a holding would have given special needs students in Quebec the same rights to integration as those in BC, despite the fact that the Quebec government had never put into force anything like Ministerial Order 150/89.

The Court of Appeal rejected the idea of an "integration presumption". Its decision was in several ways realistic. First, it was in agreement with *Saint-Jean* that children in Quebec only have a right to the education set out in the positive law of Quebec. The primacy of positive law persists despite s. 40 of the *Quebec Charter* – which states that every person has a right to a free education – because the provision limits this right "to the extent and according to the standards provided by law." Second, the Quebec Act does not include a right to integration. Third, the effect of s. 40 and s. 10 – the equality provision – is that boards have to accommodate children and integration is merely one way of doing so.

Rousseau-Houle, J.A., did not defend her position on the basis of formal equality, as had school officials. Quite the reverse, she argued that the

[58] (1995) 123 D.L.R. (4th) 43 (Ont. CA), rev'ed [1997] 1 S.C.R. 241.

[59] (1994), 21 C.H.R.R. D/189 [hereinafter *Chauveau*].

[60] (1994), 21 C.H.R.R. D/173[hereinafter *Saint-Jean*].

[61] R.S.Q. c. C-12, *supra* note 3.

[62] See Smith, *supra* note 6 at 90.

[63] R.S.Q. c.I-13.3, ss. 4, 239.

[64] Smith, *supra* note 6 at 99. Rivet J. did not go so far as to say that any segregated placement was a *prima facie* breach. Thus a school board would not necessarily have a burden to justify every special placement.

insistence on integration as a right is formalistic, while a flexible approach to the adaptation of services recognizes that the accommodation of difference is the real meaning of equality.[65] But if flexibility means substantive equality, why would parents oppose it? One reason is that an inflexible right is a right upon which a person can rely; the alternative to integration is somewhat foggy. As Rousseau-Houle J.A. noted, the combination of s. 10 and s. 40 of the *Quebec Charter*, together with the Quebec Act itself, means that special needs children have a right to an education, a right that includes the prerogative of accommodation. But how can a court assess whether school boards respect this right? What resources or services are necessary to satisfy it? Rousseau-Houle J.A. wrote:

> One of the natural consequences of the recognition of a right must be the undertaking of the obligation to take reasonable measure to protect it (*Ontario Commission of Human Rights & O'Malley* v. *Simpsons-Sears Ltd.*, p. 554). Thus the issue to determine is, in essence, if the C.S.R.C. has taken reasonable measures to ensure that D.R. can exercise, in complete equality, his right to educational services adapted to his needs….[66]

This test of "reasonable measures taken" leads back to *Bales*.

It is important to understand why the law has not advanced much past *Bales*. All that constitutional or quasi-constitutional equality guarantees is that special needs students receive the same educational benefits as other students. Neither s. 40 of the *Quebec Charter* nor s. 15 of the *Canadian Charter* establishes a right to an education, but only an equal right to any education that a province offers. When a court recognizes the special needs of an individual child, it cannot simply check to see if all children have the same education program. How can a court, then, decide if a province is complying with a statutory duty to offer education to children? The test is whether the ministry or school board has taken reasonable steps to do so. Anything more severe would amount to magisterial meddling in bureaucratic discretion and a court-made constitutional right to an education. Thus, fairness principles, even when they have a status above positive law, may not take us much farther than court enforcement of a statute that promises – as in *Bales* – to educate all children.

Chauveau did not just reject the holding of the Human Rights Tribunal, but its philosophy as well. We will examine the "minority rights" view of integration by looking at how it influenced the Ontario Court of Appeal in *Eaton* v. *Brant Board of Education*.[67] The subject of the case was Emily Eaton, a 12 year old with cerebral palsy. She had very limited abilities to communicate, difficulties with vision, and was dependant on a wheelchair. After several years in mainstream programs, Emily's "Identification, Placement and Review Committee" decided that a special needs program, involving a partially segregated environment, would better suit Emily's needs

65 *Chauveau*, *supra* note 59 at para. 50.

66 *Ibid.* at para. 51. Translation is that of the author.

67 Ont. C.A., *supra* note 58.

and abilities. A "Special Education Tribunal" approved the decision, and the parents took the matter to Divisional Court; it deferred to the opinion of the previous decision-makers on what was best for Emily.[68]

The Court of Appeal overturned this decision. Arbour J.A. (as she was then) held that s. 15 of the *Charter*[69] creates a presumption in favour of integration of special needs students into regular classes. As a result, schools that intend to segregate children have the burden to justify the placement. She said that the Special Education Tribunal had not considered this presumption in its deliberations and ordered it to rehear the matter. Arbour noted the lower court's deferential, respectful approach to education decision-makers; the issue involved, after all, such a degree of expertise and difficulty that pedagogues could not reach a consensus on it. But Arbour responded that more than the mechanics of instruction were at stake. The disabled are not patients needing special care,[70] but a minority defined by its marginalization. S. 15 has as its purpose, she argued, the prevention and amelioration of circumstances that lead to the domestic exile of minorities. Arbour made her strongest points by looking back and reviving some of the rhetoric of the 1970's and 1980's "inclusion movement":

> The history of discrimination against disabled persons…is a history of exclusion…Deinstitutionalization was the first step towards full community integration, which has been the primary objective of the disability movement.[71]

Integration derives directly from this inclusion imperative and thus "represents more than the endorsement of a pedagogical theory."[72] Segregation has an inherently discriminatory character and, therefore, s. 15 requires, in Arbour's view, strict justification for any separate placement.

Both in terms of history and principle, Arbour has a point. "Segregation" is a word we instinctively suspect, and "inclusion" is a principle that compels some immediate respect as an inherently preferable social norm. But one can question whether the right under construction is not too abstract. Is education (and educational theory), as Arbour suggests, about mere instruction, divorced from wider social and human concerns? Does, on the other hand, the right to physical inclusion really stand separate from and above other values in the hierarchy of goods? Certainly inclusion is preferable, if at all, for concrete or at least identifiable reasons, and the language of pragmatic learning even slips into Arbour's justification for integration:

> Inclusion into the main school population is a benefit to Emily because without it, she would have fewer opportunities to learn how other children work and how they live. And they will not learn that she can live with them, and they with her.[73]

68 For a discussion of the Tribunal and Divisional Court judgements, see Manely-Casimir, *supra* note 30 at 280.

69 The appellants argued that provincial human rights legislation also applied, but Arbour J.A. considered the *Charter* alone, given both the similarity of the documents and the *Charter's* superiority. See *Ontario Human Rights Code*, R.S.O. 1990, c. H.19, ss 1 & 14.

70 Indeed, Arbour J.A. notes as an important moment in the history of disabled emancipation the transfer of responsibility for the disabled in Ontario from the Ministry of Health to the Ministry of Community and Social Services. *Eaton* (CA) at 57.

71 *Ibid.*

72 *Ibid.*

73 *Ibid.* at 58.

Thus inclusion would seem to serve practical purposes, such as mutual edification.

In any case, Arbour concluded that the Ontario Act was unconstitutional because it allowed school boards to exercise discretion on placement without the presumption in favour of inclusion. Oddly, however, she held that a segregated placement would not violate the *Charter* if parents consented to it. This notion, as well as the holdings on presumption and burden, came under scrutiny on appeal to the Supreme Court of Canada.

The Supreme Court disappointed many in the special education field. Arbour's decision had won accolades from commentators and lobbying groups attracted to the idea that the disabled could have such a definite constitutional right in education;[74] but the decision of the Supreme Court turned in large part on a rejection of the presumption of integration. Still, the reasons in *Eaton* are probably the most comprehensive treatment of special needs education law, and much of what the Court said was progressive.

Sopinka J. wrote the decision for the Supreme Court of Canada. Before coming to the specific question of the presumption, he laid out the test for discrimination under s. 15.[75] A plaintiff has to show that the act under review makes a distinction on a prohibited ground and that this discrimination either imposes a burden on the plaintiff or denies her an advantage. Some implications of the first requirement – a distinction – are worth noting. Sopinka J. repeated the established law that not all distinctions are discriminatory. Perhaps the most meaningful indication of discrimination is separate treatment grounded on presumed rather than actual characteristics. The obligation to assess the actual person prohibits not just rank prejudice but also excessive use of a "label":

> Avoidance of discrimination on this ground will frequently require distinctions to be made taking into account the actual personal characteristics of disabled persons.[76]

This statement does suggest that *when* a school board provides an educational program different from the ordinary scheme, it has to be appropriate to the actual child and not a mere template. Further, the prohibition against the indiscriminate application of distinctions might also mean that schools cannot distinguish among students on scant or half-knowledge; and it could, therefore, furnish material for an argument that s. 15 demands a certain level of special education training for people making such distinctions in the education system. "Labeling" and training levels are important concerns for parents, but the danger in challenging identifications is that schools will simply make fewer of them. This hazard is particularly perilous for LD or ADD children, whose special needs are not immediately

[74] Bertha Greenstein, *Exceptional Child's Right to Inclusion* (1995) 7 Education & L.J. 77; Manely-Casimir, *supra* note 30 at 283; MacKay, *supra* note 53 at 77.

[75] For the origins of test, see: *Andrews*, *supra* note 55. Sopinka reviews certain unresolved problems in the case law: *Eaton* (SCC), *supra* note 58 at 270.

[76] *Eaton* (SCC), *supra* note 58 at 272.

obvious.

The second requirement for a finding of discrimination is that the distinction be burdensome; it must result in the denial of a benefit or the imposition of hardship. Here Sopinka J. parted ways with Arbour J.A. It was not that he had a mean view of what society must do to accommodate special needs; indeed, Sopinka J. in *Eaton* recognizes the paramountcy of substantive equality, particularly in regard to the disabled, stating that people with special needs look at society from the outside not so much because of exclusionary bigotry but because of "indirect discrimination":

> Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access…it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.[77]

Since prejudice is not the problem, the separation of people with special needs from the rest of society will not disappear as a result of formal inclusion. Indeed, real accommodation requires not formality but flexibility. Students with special needs differ from other social groups in that they are a minority more by virtue of their difference from the norm, and less by way of what they share with each other:

> It follows that disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these grounds. However, with respect to disability, this ground means vastly different things depending upon the individual and the context. This produces, among other things, the "difference dilemma" referred to by the intervenors whereby segregation can be both protective of equality and violative of equality depending upon the person and the state of disability.[78]

Sopinka J. concluded that integration is an educational norm, but not a legal presumption, for while it benefits most special needs children, it can potentially burden others.

Sopinka J. held that the Special Education Tribunal asked the right question: which placement is in the best interests of the child? I have suggested that parents may prefer an inflexible right to integration over a general right of accommodation because the latter is vague and because the former may give them a base from which to negotiate. Sopinka J. did realize that the clientele of schools are in a weak position, but, rather than finding a presumption, he held that,

> We cannot forget, however, that for a child who is young or unable to

[77] *Ibid.* at 272.

[78] *Ibid.* at 273-274.

> communicate his or her needs or wishes, equality rights are being exercised on his or her behalf, usually by the child's parents…For this reason, the decision-making body must further ensure that its determination of the appropriate accommodation for an exceptional child be from a subjective, child-centred perspective, one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life.[79]

Here is a recognition, then, of the doctrine of child weakness. The child-centred imperative may prove difficult to enforce, but it should give parents a pry bar to shift the weight of administrative inertia and crack open the walls of bureaucratic self-protection. Yet Sopinka J. was also likely correct to warn against the dangers of parents determining placement from their perspective. Arbour J.A.'s stress on parental consent was, according to Sopinka J., inconsistent with previous case law, and he affirmed that parents' views of best interest are not legally definitive.[80] *Pokonzie v. Sudbury District Roman Catholic Separate School Board*[81] applied this principle to deny the wish of parents who very much wanted their child in the mainstream.

Pokonzie raises a question that we might briefly consider before assessing the wider meaning of *Eaton*. An issue in *Pokonize* was the degree of deference that the Ontario Divisional Court should give to the Special Education Tribunal. The Court was inconclusive:

> If the test on this Judicial Review be whether the Tribunal's decision is patently unreasonable, then our answer is: "No, it is not patently unreasonable." If the test be the higher test of: "Was the Tribunal correct," in our view: "yes, the Tribunal was correct."[82]

The judgements in *Eaton* proceeded from Arbour J.A.'s conclusion that in constitutional matters courts can review subordinate or administrative agencies for correctness in their decisions, and the same is true if the jurisdiction of the body is in question.[83] But *Eaton* did not determine the issue of the appropriate standard of review to apply to educational decision-makers in academic matters. While the Supreme Court displayed some deference to the Special Education Tribunal, the standard of review will likely vary – depending on the nature of the administrative body and the issues being decided – from reasonableness to patent unreasonableness. However, the front line of future litigation may be in the "no-man's land" where constitutional and pedagogic questions are hard to distinguish. School boards will call for deference while parents will argue that a correctness standard should apply in such grave matters as placement.

Standard of review is not the only weighty issue that will continue to burden courts after *Eaton*. The dispute in *Eaton* inspired well-reasoned judgements, and certainly the issues were emotional and significant; but the case avoided some difficult, outstanding questions in special education law.

79 *Ibid.* at 277.

80 *Ibid.* at 278-279.

81 [1997] O.J. No. 4698 (Ont. Ct. J. Gen. Div.) [hereinafter *Pokonzie*].

82 *Ibid.* at para. 30.

83 *Halifax Regional School Board v. Nova Scotia (Department of Education and Culture)*, [1998] N.S.J. No. 412 (N.S.S.C.) at 5, online: QL (NSJ).

It is important to recognize the limits of its *ratio*. First, the Court applied the "best interests of the child" test among existing educational options, and it certainly did not mean that the state had an obligation to provide a special needs child with the best of all possible educations. But what remedy could a court offer, for instance, if a statute did not mention integration and a school board did not offer it at all? Could a court use s. 15 to force a board to have an integration option, and if so, would that not be, in certain situations, the establishment of a welfare right to a better education?

Similarly, the Court ruled that schools have a duty to provide appropriate education – that is education based on actual and individual characteristics – when they distinguish special needs children from their peers. But what if the school chooses not to make distinctions at all? Sopinka J. concluded the first part of the discrimination test as follows:

> It is quite clear that a distinction is being made under the Act between "exceptional" children and others. Other children are placed in the integrated classes. Exceptional children, in some cases, face an inquiry into their placement in the integrated or special classes. It is clear that the distinction between "exceptional" and other children is based on the disability of the individual child.[84]

The *special needs program* itself was, thus, *the* distinction; and, potentially, a court might not have a justification for constitutional review where positive special needs programs are absent. Substantive equality makes it possible to argue that schools have to treat differently students with disabilities where necessary, and they cannot therefore be wilfully blind to the presence of special needs. But does a school board have to look for these special needs? Can a duty to do so derive from the principle of equality in s.15 or is it, again, a welfare right that the legislature must decide to recognize or not? What level of benefit is required to achieve equality? Such questions remain outstanding despite *Eaton*.

Some have argued that the law has already passed *Eaton*.[85] Equality's orbit and extent was at issue in two recent and controversial Supreme Court of Canada judgments, *Eldridge v. British Columbia (Attorney General)*[86] and *Vriend v. Alberta*.[87] *Vriend* read "sexual preference" into the list of prohibited grounds of discrimination in the Alberta human rights legislation.[88] The justification for this aggressive judicial re-writing of positive legislation was the logic of inclusion and group membership that Arbour had illustrated in *Eaton*. Donna Greschner argues that the "full membership" principle would have affected the decision in *Eaton* had the Court considered it.[89] One should not underestimate, however, the degree to which Sopinka J. understood and rejected Arbour J.A.'s application of the minority rights argument to the facts in *Eaton*. *Vriend* fits neatly into his analysis. Prejudgment – not the natural economy of building social spaces

84 *Eaton* (SCC), *supra* note 58 at 274-275.

85 Manely-Casimir, *supra* note 30 at 287.

86 [1997] 3 S.C.R. 624 [hereinafter *Eldridge*].

87 [1988] 1 S.C.R. 493 [hereinafter *Vriend*].

88 *Individual Rights Protection Act*, RAS 1980, c.1-2.

89 D. Greschner, "The right to belong: the promise of *Vriend*" (1998) 9:3 N.J.C.L. 417.

according to the needs of the majority – bars greater participation by homosexuals in society. Gay people experience "separateness" because of two relatively homogenous things – their sexual preference and attitudes towards it – not because of a diverse mélange of mental and physical conditions that clash in innumerable ways with the ordered habits of mainstream social and economic endeavour. A court dealing with *Vriend*-like facts need not, therefore, balance the necessity for inclusion with the requirement for flexibility in the delivery of a public service or the protection of a human right.

Eldridge may have a greater impact, particularly given the gloss it received from *Concerned Parents for Children With Learning Disabilities Inc.* v. *Saskatchewan (Minister of Education)*.[90] *Eldridge* held that BC hospitals and the Medical Services Commission had violated s. 15 of the *Charter* by exercising their general discretion under BC health legislation not to have translation services for deaf patients. The denial of this benefit resulted in unequal treatment and was therefore indirect or adverse discrimination. Smith, J. of the Saskatchewan Court of Queen's Bench, flagged the emphasis on "discretion" and "benefits" when he read *Eldridge* in light of the facts of *Concerned Parents*.

Concerned Parents is an important case, because it involves not a demand for integration – which fits fairly easily into equal treatment arguments – but a rejection of integration in the name of appropriate education. The facts of the case are as follows. Concerned Parents for Children with Learning Disabilities Inc. ("Concerned Parents"), a Prince Albert non-profit group, sought to force the local school board to segregate six LD children in a comprehensive special education course, the "Carlton Connection". This was a novel education program, but the board had already experimented with it on a trial basis. The Government of Saskatchewan and the school board applied to have the Court strike the statement of claim as disclosing no reasonable cause of action. Smith J. expressed considerable scepticism about most of Concerned Parents' case, and he reiterated typical concerns about busybody courts encroaching on political autonomy and impeding bureaucratic discretion. The issue in the case was, he stated,

> the ability of parents to seek the assistance of the courts to obtain the quality of public education to which they believe their children are entitled.[91]

Put in these terms, the parents were in effect asking the court to enforce welfare rights not positively expressed in law. However, Smith J. thought that *Eldridge* might provide Concerned Parents with an argument, and therefore the claim should proceed to trial. Both cases, he noted, involved minorities seeking access on an equal footing to public services. Thus, the six children could expect the school board to use its discretion to

[90] [1998] S.J. No. 566 (Q.B.), online: QL (SJ) (hereinafter "Concerned Parents").

[91] *Ibid.* 1.

provide them with a benefit that would allow them equal access. *Eldridge* might lead to a constitutional entitlement to "appropriate education":

> While the defendants in the case at bar do not deny the plaintiffs' statutory right to appropriate educational service, the effect of *Eldridge* is to elevate this statutory right to a constitutional entitlement.[92]

It is not clear exactly what Smith J. meant by appropriate education, nor why *Eldridge* principles were necessary to enforce a statutory right to appropriate education.

Whether the abstract right derives from statute or the constitution, the question remains how to measure its implementation. The difference between *Eldridge* and *Concerned Parents* was that the Prince Albert school board was offering special education to the children in order to facilitate equality and the dispute was simply about the efficacy of the program. Presumably, the program in place would have been sufficient to meet the traditional test for the implementation of statutory right. As we saw in *Bales* and *Chauveau*, this test was reasonable efforts to make the right meaningful. However, Smith J. seemed to think that appropriate education might require a "correctness analysis" under administrative law and the recognition of a welfare right to effective education under constitutional law,

> …if the plaintiffs are able to establish, at trial, on the basis of expert evidence, that special educational services provided in the classroom with the additional assistance of resource teachers are significantly ineffective, in comparison to the Carlton Connection model, for education of children such as the infant plaintiffs.[93]

From the standpoint of administrative law, one can criticize this argument for not allowing due deference to decision-makers; but the more fundamental question is constitutional: where does s. 15 require the government to provide effective education? S. 15 is about equality, not the quantity or quality of public benefits in themselves.

Some Conclusions: Rights – Natural, Consitutional and Positive

This critique of *Concerned Parents* demonstrates the limits of the equality principle as a means to achieve wider educational rights for the learning disabled. The ultimate right to education in Canada derives from provincial statute. It depends on the will of the legislature and thus the electorate. In British Columbia, special needs students have a right to integration, subject to considerations of practicality, and to education tailored to their individual needs. Rights to assessment, parental input and appeal, program implementation, teacher-training levels – all are vague or non-existent.

Most Canadians would, I imagine, accept a natural right to

92 *Ibid.* 59.

93 *Ibid.* 60.

appropriate education, but Canadian constitutional and human rights law does not recognize this privilege. Thus minorities are able to use the *Charter* and human rights legislation only to insist on equal access to public benefits. Equality does not provide a fundamental right to education but one relative to other children. Theoretically, if regular students received a generally poor education, the disabled would not have a constitutional argument to ask for anything more effective. Practically, the relative right does not offer a standard for judging whether a special needs student is receiving an equal education, since her needs may be so different from other students as to make comparison an illusive measurement.

Does the absence of a constitutional or quasi-constitutional (as in the United States) right to appropriate education matter? The experience in British Columbia indicates that it does. If special needs children have a natural right to education, and were it recognized in constitutional law, then parents would be able to insist, for instance, that schools both identify children with special needs and do so without excessive delay. The existence of a duty to educate properly, balanced with a need for deference and political choice, would allow parents to press for improvements without having to make what are at times essentially empty arguments about inequality between students. In general, special education would not be at the whim of a legislature composed mostly of parents who do not have special needs children. The complexities of special education law suggest that, in order to avoid the tempest of welfare rights, we may have turned into the rocks of absolute legislative discretion, with its potential dangers for minorities, and the shoals of equal opportunity rights litigation, where the language of equality seems unable to deal with a problem of social policy.

Left in Legal Limbo:

Transsexual Identity

and the Law

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Introduction

Can a transsexual male who has begun hormone treatments and developed female breasts be sent to a male prison? What if he is raped while imprisoned?[1] At what point is an individual's sex "changed"? With the removal of the original genitalia or with the construction of the new genitalia?[2] Can one possess latent transsexual tendencies?[3]

Transsexuals pose a dilemma in the law both in their pre-operative and post-operative states. Even in the terminology of their label, they fail to belong entirely in either sex and are consequently left in a state of limbo, not yet accepted as a member of their new sex but no longer truly belonging to their original sex. Remedying this situation requires far-reaching changes in social perceptions and understandings. The law has the ability to both mirror and construct social norms. By reflecting the vision of a transsexual as an anomaly, requiring special analysis in differing circumstances, the law perpetuates the social exclusion of these individuals.

The courts and the legislature must acknowledge their powers to either cement the transsexual's marginalized standing between either sex or develop a new process of sexual identification that would remove the transsexual from the current state of legal limbo. However, simply re-assigning a sex identity poses its own set of problems regarding how sexual identity should be seen in the law and begs the question of whether sexual identity should hold any legal relevance. The purposes of this paper are three-fold: to explore the various ways in which the courts have attempted to determine the 'sex' of transsexuals and the accompanying difficulties with these approaches; to present alternative approaches and analyze the ambiguities that remain; and finally, to suggest a new means of perceiving sexual identity. This paper emphasizes the significant role of the law in the

[1] See *Farmer* v. *Brennan* 511 U.S. 825 at 837 (1994), where a pre-operative transsexual was sent to prison where he was raped.

[2] See *B.* v. *A.* (1990), 29 R.F.L. (3rd) 258 (Ont. S.C. T.D.) [hereinafter *B.* v. *A.*]; C(L) v. C(C) (1992), 10 O.R. (3d) 254 [1992] O.J. No.1830 [hereinafter C(L) v. C(C)] in each case a woman received both a mastectomy and hysterectomy but had not yet received a constructed penis.

[3] See *M.* v. *M.(A.)*. (1984), 42 R.F.L. (2d) 55 (P.E.I. S.C.) where a husband received a decree of nullity on his marriage because his wife determined herself to be a transsexual and initiated hormone treatments after the marriage had dissolved. The judge found that her latent transsexualism had prevented her from being capable of marriage.

construction of social perceptions of sexual identity and suggests that the law must move away from a binary view of gender as either male or female. Opposite this prevailing view, I propose to move sexual identity towards a "gender spectrum" where identity is not sexually classified.[4]

Defining Sexual Identity

Medical professionals have achieved a degree of consensus in considering transsexualism as a psychological disorder in which the subject believes he or she was born into the body of the wrong sex.[5] Transsexuals therefore differ from transvestites, that is, individuals who choose to dress in the clothing of the opposite sex; hermaphrodites, who biologically possess reproductive organs of both sexes; and homosexuals, who are attracted to members of the same sex.[6] The recognized "treatment" for transsexuals is sex-reassignment surgery, a process lasting several months and resulting in the outward appearance of the reassigned sex through a combination of hormone treatment and surgically constructed genitalia. Sexual intercourse is possible but the reassigned transsexual is incapable of having children.

The most common legal issue surrounding transsexuals to come before the courts concerns the validity of marriages.[7] Here, as a reflection of general legal ambiguity surrounding sexual identity issues, the law has taken two different approaches to determining sexual identity; significantly, the implications of these approaches extended beyond the intended scope of marriage cases. The traditional "biological" approach examines the genetic characteristics of the transsexual, and argues that the inalterability of chromosomes prevents the possibility of a complete "sex-change." The opposite view is a "psychological" approach focusing on the cumulative socio-psychological factors involved in the construction of a sexual identity.

[4] Although this paper limits its scope to the issue of transsexualism, it should be noted that the following considerations and assertions can apply to analogous sexual identity issues.

[5] Lori Johnson "The Legal Status of Post-operative Transsexuals" (1994) 2 Alta. Health L.J. 159 at 159.

[6] While pre-operative transsexuals often engage in relations with the same sex, it is not the same as a homosexual relationship as the transsexual sees himself/herself as a member of the opposite sex.

[7] In Canada there is no federal legislation preventing same-sex marriages; however, under the *Civil Code* in Quebec and the common law in the rest of Canada, courts have long ruled that marriage is restricted to between a man and a woman. Most recently, on January 14, 2001 Elaine and Anne Vautour and Kevin Bourassa and Joe Varnell were married in two same-sex wedding ceremonies in Toronto's Metropolitan Community Church under the authority of a section of Ontario's Marriage Act permitting any adult to obtain a licence and be married after "publication of banns". They are now pursuing a case against the Government of Ontario claiming that the refusal to recognize and register these marriages is a violation of their *Charter* rights.

This approach accepts that surgery and hormone treatments transform the post-operative transsexual into a member of their reassigned sex.

The Biological Approach

The leading English law and one of the first major cases in the area is *Corbett* v. *Corbett*, where a man married a male to female post-operative transsexual.[8] Ormond J. held that biologically, as shown through a chromosome test, sexual identity is fixed at birth and cannot be altered. Thus, the transsexual was still legally male and the marriage was a nullity. While Ormond J. did state "I am not concerned to determine the 'legal sex' of the respondent at large," adding that he was only determining the sex for the purposes of marriage, it seems both problematic – in a legal and moral sense – that there should be different methods of sex determination for various legal purposes.[9]

Indeed, *Corbett's* influence did extend beyond the scope of marriage. In *R.* v. *Tan*, the English Court of Appeal upheld the conviction of a male to female post-operative transsexual for being a male living off the earnings of prostitution despite the fact that the accused was now female.[10] The Court found that "common sense and the desirability of certainty and consistency demand that the decision in *Corbett* should apply for the purpose not only of marriage but also for a charge under s. 30 of the Sexual Offences Act."[11] While this reference to "certainty and consistency" illustrates the court's recognition of the need for a stable definition, it is also a re-enforcement of the court's strict denial of an altered sexual identity and therefore offers no promise for the transsexual.

The Psychological Approach

While still the law in England,[12] both American and Australian courts have moved away from *Corbett*'s preoccupation with biological identity. In *M.T.* v. *J.T.* the New Jersey court stressed that psychological factors must play a role in sexual identity:

> a person's sex or sexuality embraces an individual's gender, that is, one's self-image, the deep psychological or emotional sense of sexual identity and character. Indeed, it has been observed that the "psychological sex of an individual," while not serviceable for all purposes, is "practical, realistic and humane."[13]

Likewise, in *R.* v. *Cogley*, the Australian Court of Appeal affirmed the statement from the trial judge that: "[T]he law should regard as a woman a male to female transsexual where core identity is established [i.e. the psychological personality or character of the person concerned] and where sexual reassignment surgery has taken place."[14] Such an approach exhibits sensitivity to the individual transsexual, as opposed to the biological

[8] [1970] 2 All. E.R. 33 (P.B.D.) [hereinafter *Corbett*].

[9] *Ibid.* at 48.

[10] [1983] Q.B. 1053 (C.A.) [hereinafter *Tan*]. Although beyond the scope of this paper, the question arises in this case as to whether it is appropriate to have laws that apply differently to men and women.

[11] *Tan*, *ibid.* at 1064.

[12] See *R.* v. *Registrar General of Births, Deaths and Marriages for England and Wales*, [1996] 2 F.L.R. 90 (Q.B.D.).

[13] 355 A. 2d 204 (N.J. Sup. App. Div. 1976) at 209.

[14] [1989] 41 A Crim R 198 (Vic. Ct. of Cr. App.) at 201-202.

approach that uses science to deny the transsexual identity. While a definite improvement, the psychological approach appears to require a ruling on the "psychological sex" and therefore fails to provide the transsexual with any certainty as to their perceived legal identity.

Canadian Inconsistency

Most recently, Canadian cases have tended to produce indeterminate rulings that suggest a confusing fluctuation between the predominant approaches to sexual identity determination. In two Canadian cases, *B.* v. *A.* and *C(L)* v. *C(C)*, the court ruled that an individual who had received both a hysterectomy and a mastectomy but who had not yet received a surgically constructed penis was still to be regarded as a woman.[15] The court reasoned that if the hormone treatments were abandoned the individual would revert to her female self and therefore could not be legally recognized as a man. This was not an espousal of the biological view that sexual reassignment is impossible because of the inalterability of chromosomes, but neither was it a recognition of the psychological aspects of sexual identity. The suggestion appears to be that there must be a degree of irreversibility to a sex change before it will be recognized by the law. The cases therefore ignore the fundamental essence of sex reassignment, namely, the possibility of altering sexual identity. Further, it seems absurd to use a constructed penis as the benchmark of maleness. The individual in both cases no longer had either breasts or a uterus, having made a conscious decision to rid herself of these indications of femaleness, and yet the absence of the male equivalent prevented her from attaining the status of being male. By way of argument, if a man who loses his genitalia through an accident remains legally recognized as male, why then does the requirement of a penis only apply to transsexuals?

In *L.A.C.* v. *C.C.C.*, the court, citing insufficient evidence, refused to render a decision involving an application for a marriage annulment where the husband was a pre-operative transsexual.[16] Had the court been content with the biological test under which sexual identity is unalterable, as established in *Corbett*, it would not have been necessary to require further evidence regarding the individual transsexual as no sex change could ever be recognized. However, under the psychological approach requiring sex reassignment surgery to harmonize the physical and psychological aspects of human sex, the legal determination is equally predictable as the case involves a pre-operative transsexual lacking physical and psychological harmony. Therefore, the individual cannot yet be regarded as a member of the other sex. It is unclear what further evidence the court would require to reach a decision. While this may indicate an even greater sensitivity by the court to the precarious position of the transsexual, it again leaves the situation highly ambiguous as to what constitutes a sex change in the law.

[15] *Supra* note 2.

[16] [1986] B.C.J. No. 2817, online: QL (BCJR)

The British Columbia Supreme Court most recently issued a ruling in June 2000 on whether the prohibition against discrimination on the basis of sex under the *British Columbia Human Rights Code*, R.S.B.C. 1996, c. 210 extends protection from such discrimination to transsexuals.[17] The case involved the refusal to permit a post-operative transsexual, Ms. Nixon, to work as a rape relief counselor because she had not been a woman since birth. Due to the nature of the work, the Vancouver Rape Relief Society had applied under the *British Columbia Human Rights Code*, S.B.C. 1973, c. 119 for approval of a women only hiring policy. At issue was the question of the Human Rights Tribunal's jurisdiction to hear Ms. Nixon's complaint. The particulars of the case involve detailed, and largely irrelevant for the purposes of this paper, issues of administrative law. However, to determine jurisdiction, the court had to rule on whether the allegation of discrimination could be characterized as a complaint of discrimination by any women based upon appearance. This required a ruling on whether to regard Ms. Nixon as a woman.

Davies J. referred to s. 27(1) of the *Vital Statistics Act*, R.S.B.C. 1996, c. 479 which provides:

> If a person in respect of whom trans-sexual surgery has been performed is unmarried on the date the person applies under this section, the director must, on application made to the director in accordance with subsection (2), change the sex designation on the registration of birth of the person in such a manner that the sex designation is consistent with the intended results of the trans-sexual surgery.[18]

This provision was originally enacted in 1973 – the same time that the *Human Rights Code* was enacted. Thus, Davies J. states that the legislative intent was for post-operative transsexuals to possess the same legal status as the members of their reassigned sex. Accordingly, Ms. Nixon's case could be "characterized as an allegation of discrimination against her as a woman."[19] The transsexual is therefore granted legal acceptance into the reassigned sex.

Of further significance is Davies J.'s *obiter dicta* on whether the meaning of "discrimination on the basis of sex" as an enumerated ground under the *Human Rights Act*, S.B.C. 1984 c. 22 [1984 Act] and the present code, includes discrimination based on gender identity, a category encompassing transsexualism.[20] He states that it would too greatly narrow the limit upon the purpose and intent of the 1984 Act and the present *Code* to contain discrimination on the basis of sex to male/female issues. It would be wrong to interpret the prohibition against discrimination on the basis of sex "as not also prohibiting discrimination against an individual merely because that person or group is not readily identifiable as being either male or female."[21] He acknowledges that "sex or gender issues may factually include more than purely male or female possibilities and characteristics."[22]

17 *Vancouver Rape Relief Society* v. *British Columbia (Human Rights Commission)*, [2000] B.C.J. No. 1143, 2000 BCSC 889 Vancouver Registry No. A993201, online: QL (BCJR) [hereinafter *Nixon*].

18 *Ibid.* at para. 40.

19 *Ibid.* at para. 42.

20 The present code was created on January 1, 1997 when the *Human Rights Amendment Act*, S.B.C. 1995, c. 42 came into force [hereinafter present code]. There were no substantive changes to the relevant sections of the code.

21 *Supra* note 17 at paras. 56-57.

22 *Ibid.* at para. 58.

Sexual Identity – Binary or Spectrum?

Examination of the *Nixon* decision shifts the discourse on transsexual identity away from both the biological and psychological approaches towards a new means of not just defining transsexual identity but of perceiving sexual identity more generally. While recognizing transsexual rights with a higher degree of sensitivity to their position than had been seen in past cases, the *Nixon* case suggests two alternative modes of recognition, neither of which seems entirely satisfactory. In the first part of the judgement Davies J. determines Ms. Nixon to be recognized as a woman, but he later goes on to state she may not be readily identifiable as either sex. Ultimately, the case regards sex as both binary male-female categories and as a spectrum along which sexual identity has an infinite number of variations.

The concept of a dichotomy is reinforced in the first part of the case and maintains the male-female binary as central to our perception of social ordering. Thus, the transsexual is required to assume a specific sexual identity in which they can never entirely or properly belong. This is evident in that while jurisdiction has been established, it remains to be seen how the Human Rights Tribunal will decide on Ms. Nixon's complaint.[23] The Rape Relief Society's argument that only those who have been born as women and raised as women possess the requisite understanding of the female identity to properly counsel may still be found to be valid. Ms. Nixon would then be left as a woman who is not as much a woman as other women, but clearly not a male.

The inadequacies of the binary approach are revealed insofar as even the determination of present sex does not end the legal dilemmas. Such an outcome would also fail to consider the possibility of a male-to-female transsexual requiring rape relief counseling and, in effect, leaves the transsexual marginalized. Responding to the concern that the traditional victim will feel uncomfortable with a counselor who is not a "woman" within the victim's perception, the only reply is that if the law begins to better recognize the transsexual's new identity then this recognition will seep into society's consciousness. If the law remains considerate of public impressions and public impressions are guided by the law, no space is left for forward movement.

And yet, the sexual spectrum approach is likewise problematic as dealt with by the court system presently. The foundational premise of transsexualism is the notion that there are two distinct sexes and the individual is trapped in the body of the wrong sex. To use transsexualism as a tool to argue for the eradication of the male-female binaries is therefore somewhat inappropriate. For Davies J. to state that Ms. Nixon "is not readily identifiable as being either male or female"[24] is to deny her recognition of the entire process of sex-reassignment. The implication is that Ms. Nixon's

[23] At the time this article was published, the Tribunal had not yet decided this case.

[24] *Supra* note 17 at para. 57.

comfort with her newly assigned identity is not shared by others with whom she interacts. Identity perception cannot be limited to the individual but must encompass social impressions. Otherwise the transsexual remains in the periphery – having exchanged social belonging in the "wrong" body for exclusion from society in the "right" body.

New Perceptions

Thus, while destruction of the binary is problematic, focus on a strict binary should be deflected. The notion that the male-female dichotomy is crucial to social functioning is the source of antagonism against anything diverging from this divide. Homosexual relationships fail to fit the binary mode any better than the hermaphrodite, the transvestite or the transsexual. One must ask what, if any, benefit arises from a continued legal emphasis on sexual definition. The law's struggle to define the transsexual serves as the ideal illustration of why the male-female focus is no longer appropriate. Rather, this paper proposes a gender identity spectrum where the existence of male and female definitions on alternate ends does not preclude a wide range of other identity options.

Deviation from the binary focus has strong repercussions, all of which this author argues are positive. If sex is a fluid concept, then the ability to differentiate between same-sex and opposite-sex relationships dissolves and simply "relationships" remain. Most of the cases examined focussed on marriage and hinged on the legal refusal to accept same-sex marriages. As sex begins to be seen on a spectrum as opposed to a binary, the notions of "same" and "opposite" become unclear and impossible to uphold. Likewise, laws, such as in *Tan*, where the offence required the accused to be male could no longer be plausible. For equality to be achieved there must be equal recognition by the law and not differentiation based on sex.

Some feminist authors will argue that subsuming the binary into a spectral analysis leaves women in a precarious position in the law. Particularly in the criminal sphere, there is concern that there needs to be a heightened acknowledgement of the differences between men and women and their reactions in certain circumstances. As Christine Boyle notes, traditional criminal law research "embodies a male perspective on the world masquerading as an objective non-gendered perspective."[25] This reveals itself most obviously in criminal law defences that lean toward male reactions and are therefore biased against women. Yet, one must be careful as this neither represents the spectrum nor the binary; rather it is an assertion of a solitary identity. It is not the spectrum that concerns feminists but conversely the failure to recognize any difference in identity.

Furthermore, the feminist counter demand for recognition of the binary raises concerns regarding female stereotyping. In self-defence cases,

25 "Criminal Law and Procedure: Who Needs Tenure?" (1985) 23 Osgoode Hall L.J. 427 at 428.

critics warn that justifying the reasonableness of battered women's action with evidence of "learned helplessness" is problematic as it works against women who do not fit this stereotype of passivity.[26] Again, the spectrum approach offers the most acceptable solution as the admission of a range of identity options leads to the acceptance of a range of reactions recognized by the law.

Conclusion

With regards to the transsexual, to date, the law has only made decisions applicable to specific situations, choosing to remain silent on the more general issue of formulating consistent treatment of transsexual identity. The decisions pertain to how the transsexual is viewed by society and what types of interaction are permitted. The underlying assertion is that a transsexual is too much a deviation from societal norms to find unqualified acceptance. The unfairness of such a conclusion only serves to further the original cause of rejection. Before society is capable of accepting a transsexual's participation in public interaction, in areas such as marriage and volunteering, such participation must be permitted. The law has the power to issue such permission. At the moment, the first step is to acknowledge the inescapable reality of the law's power of construction. Harlon Dalton points out:

> [I]t is worth underscoring that our sensibilities change. Some changes are relatively small. I have nearly gotten to the point where I can eat everything at my local sushi bar without gagging. But the big stuff changes as well – how we approach sex and sexuality, race, gender, God, country, our bodies, our planet – and that is true for societies as well as for individuals, over periods briefer than a human lifetime.[27]

We are in a period of changing perceptions of sexual identity. The spectrum approach offers the best option in its promotion of equality, understanding and acceptance of all people while incorporating the traditional male-female binary. The law can chose to either lead this change or to be the resisting force against it. For most of us, our sexual identity is secure and therefore a non-issue. Yet, think for a moment what you would do if the law threatened to deny you this identity? An individual deserves the respect and freedom to make the personal decision on their sexual identity. The law must grant them this right.

[26] See Isabel Grant "The Syndromization of Women's Experience" in Grant, Boyle, MacCrimmon, and Martison, "A Forum on *Lavallee* v. *R*: Women and Self-Defence" (1991) 25 U.B.C. L. Rev. 23 at 51.

[27] Harlon Dalton, "'Disgust' and Punishment", 96 Yale L.J. 881 at 903, as quoted in Kate Sutherland, "Legal Rites: Abjection and the Criminal Regualtion of Consensual Sex" (2000), 63 Sask. L. Rev. 119-144 at para. 73.

Social Assistance and the *Charter*:

Is there a Right to Welfare in Canada?

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> The idea of entitlement is simply that when individuals have insufficient resources to live under conditions of health and decency, society has obligations to provide support, and the individual is entitled to that support as of right.
>
> Charles Reich[1]

Introduction

Over the past several decades, the question of whether people have a right to welfare has been vigorously debated. After the Great Depression and World War II, a widespread consensus emerged that people had the right, as citizens, to receive assistance when they needed it. Governments accepted the idea that there were economic and structural causes of poverty. If poverty is caused by forces that the individual cannot control, "welfare entitlements are conceived as rights, not favours – a fulfilment of the ideal that each person is entitled to his/her due as citizen."[2] In recent years, however, this "citizenship" perspective has come under attack. The rise of neo-liberalism in the 1980s and 1990s led to the virtual erosion of the Keynesian Welfare State.[3] Poverty became known as an individualized problem and it was not long before the principle of universality was abandoned in favor of the needs test. Today, governments are eager to reduce social expenditures and reluctant to acknowledge that individuals may be entitled to a level of social assistance that is sufficient to meet their basic needs. In the present paper, I examine the issue of whether there is a right to welfare. S. 7 of the *Canadian Charter of Rights and Freedoms*[4] provides the focus for my analysis. I will show that while a strong case can be made that s. 7 protects welfare rights, the arguments in favor of a constitutional right to welfare may be of limited practical value.

Current Trends: Low Rates and Strict Eligibility Requirements

The issue of whether people have a right to a minimum level of social assistance is one of growing concern for poverty law advocates and

[1] C. Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues" (1965) 74 Yale L.J. 1245 at 1256.

[2] I. Johnstone, "Section 7 of the *Charter* and Constitutionally Protected Welfare" (1988) 46 U.T. Fac. L. Rev. 1 at 9.

[3] See J. Brodie, "Restructuring and the New Citizenship" in I. Bakker, ed., *Rethinking Restructuring: Gender and Change in Canada* (Toronto: University of Toronto Press, 1996), 126-140 for an interesting discussion about how the rise of neo-liberalism has disproportionately affected women.

[4] *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11.

their clients. Current provincial welfare rates are so low that it is unrealistic to think that they are adequate to cover an individual's basic expenses.[5] Nevertheless, politicians continue to express the view that poverty is not a significant problem in Canada. When economist Christopher Sarlo argued that relative measures of poverty (e.g. Low Income Cut-off) should be replaced with absolute measures, several Conservative MPs embraced the idea.[6] According to Sarlo, poverty exists when people cannot fulfill needs that are fundamental to survival.[7] He focuses on the actual costs of such things as food and shelter rather than on average Canadian income levels. Sarlo's new analysis suggests that people can get by with much less than previously thought. Although critics have identified flaws in Sarlo's methodology,[8] the approach continues to garner widespread support. Under the strict approach, fewer people will be classified as poor. If there are fewer poor people, reductions in social expenditures can be more easily justified. Unfortunately, it seems that several provinces have taken this line of reasoning to the extreme. Over the past few years, social assistance rates have been reduced to such an extent that, by any measure, recipients live in poverty.[9]

The case of *Finlay v. Canada (Minister of Finance)*[10] shows that in some instances social assistance rates may even be reduced below the level of basic requirements. Finlay was a social assistance recipient from Manitoba. In an attempt to recover overpayments that had previously been made to Finlay, the government reduced his monthly allowance to the point where it was no longer adequate to meet his basic needs. Finlay argued that Manitoba's social welfare legislation,[11] which permitted this kind of reduction, violated the *Canada Assistance Plan*[12] (CAP). Under CAP, the provinces had to comply with certain conditions in order to receive federal transfer payments. One such condition, set out in s. 6(2)(a) of CAP, required a province to provide

[5] In British Columbia, for example, the maximum monthly allowance as of December 1997 for a single employable individual was $500.

[6] G. York, "MPs try to move the poverty line" *The Globe and Mail* (23 February 1993).

[7] See C. Sarlo, *Poverty in Canada* (Vancouver: Fraser Institute, 1992).

[8] See *e.g.* J. Murphy, "Analyzing the poverty of Christopher Sarlo" 17 Perception 19.

[9] M. Young, "Starving in the Shadow of Law: A Comment on *Finlay v. Canada (Minister of Finance)*" (1994) 5 Constitutional Forum 31 at 31.

[10] [1993] 1 S.C.R. 1080 [hereinafter *Finlay*].

[11] *Social Allowances Act*, R.S.M. 1987, c. s160.

[12] R.S.C. 1985, c. C-1.

financial assistance to a person in need "in an amount or manner that takes into account the basic requirements of that person." Nevertheless, a majority in the Supreme Court of Canada held that s. 6(2)(a) of CAP did not require provincial social assistance to fulfill or equal a recipient's basic needs.

Even more problematic than the low levels of assistance are the strict eligibility requirements under provincial welfare legislation. Many needy individuals simply do not qualify for assistance. Under the *B.C. Benefits (Income Assistance) Act*,[13] eligibility for income assistance is determined by an asset test, an income test and a social test. The asset test, even with exemptions, is particularly strict. Consider, for instance, that a single person under the age of 55 with no dependents is ineligible if he has assets in excess of $500.[14] One cannot help but suspect that government statistics showing a drop in the percentage of people on welfare over the past few years are simply a reflection of stricter eligibility requirements.[15]

An individual who does manage to qualify for assistance under provincial welfare legislation still cannot be said to have a right to welfare because the ministry often retains a broad discretion to reduce or terminate assistance. In Ontario, for example, a person who refuses to participate in a workfare program can be cut off welfare for up to six months.[16] Similarly, in British Columbia, the minister can reduce the level of a person's assistance if she fails to search for or accept suitable employment.[17] Furthermore, a person who fails to disclose relevant information to the minister may be rendered ineligible for a period of three months.[18] An outstanding warrant is yet another factor that will render a person ineligible for income assistance under the B.C. legislation.[19] Although it may not be immediately apparent, these seemingly reasonable restrictions often do more harm than good. Disqualifying a person on the basis that a warrant has been issued for that person's arrest may appear justified. However, it is important to keep in mind that the individual may feel compelled to plead guilty because of his need to become eligible for social assistance as soon as possible.

Whether or not we agree with a given requirement, the fact remains that it is difficult to speak in terms of a statutory entitlement to welfare when so many terms and conditions apply to the receipt of assistance. Indeed, the combination of low rates, strict eligibility requirements and ministerial discretion suggests that there is no right to a minimum level of social assistance under provincial welfare legislation. The concept of a statutory right to welfare is likely to become even more illusory now that the *Canada Health and Social Transfer* (CHST) has replaced CAP. In her comment on the *Finlay* decision, Young notes, "[E]ven though the Court did not regard CAP as holding provinces to payments which are exact fits with basic requirements, the Court did make one useful finding. Provincial income assistance rates, to be part of programmes eligible for federal funding, cannot

[13] R.S.B.C. 1996, c. 27 [hereinafter *IA Act*].

[14] *Income Assistance Regulation*, B.C. Reg. 75/97, s. 9 [hereinafter *IA Regulation*].

[15] The B.C. government reports that in January 2000, 6.47 per cent of the B.C. population was on welfare compared to 9.68 per cent in December 1995. Online: Ministry of Social Development and Economic Security Homepage <http://www.sdes.gov.bc.ca/research/keyfacts.htm> (last modified: 14 March 2000).

[16] B. Trumpener, "A Dance with the Devil" *This Magazine* (May/June 1998) 13 at 13.

[17] *IA Act*, *supra* note 13, s. 9.

[18] *IA Regulation*, *supra* note 14, s. 21.

[19] *Ibid.* at s. 12.

be completely freely set."[20] Basically, the court in *Finlay* found that social assistance levels had to be "consistent" with the recipient's basic needs. While "consistency" is a vague standard, it is a standard nonetheless.

Unfortunately, any optimism that might have remained after *Finlay* was dashed when CAP was replaced by the CHST in 1996. Under the CHST, the federal government provides a block grant to the provinces for health care, post-secondary education and social assistance and services.[21] Provinces are basically free to spend the money as they see fit. Although they must continue to adhere to national standards for health care, the same cannot be said about the area of social assistance. In fact, only the no-residency requirement survived the shift from CAP to the CHST. There is no longer any standard that requires social assistance rates to be "consistent" with basic needs.

Section 7 and the Right to Welfare

It has become increasingly apparent that Canadian governments are not committed to ensuring that everyone has an adequate standard of living. The question of whether there is a constitutionally protected right to welfare has therefore taken on special significance for many poverty law advocates. Any answer will depend on the scope of the protection offered by s. 7 of the *Canadian Charter of Rights and Freedoms*. S. 7 provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Since the *Charter* came into force in 1982, courts have grappled with the issue of whether social welfare interests fall within the ambit of s. 7. It is generally agreed that s. 7 does not protect purely economic interests. Many courts have been reluctant to import social welfare interests into s. 7 because they are perceived as economic interests. For example, in *Gosselin v. Quebec (Procureur general)*,[22] the plaintiff argued unsuccessfully that a reduction in the amount of social assistance she received infringed her s. 7 right to security of the person. The Quebec Court of Appeal affirmed the Quebec Supreme Court's finding that s. 7 does not protect a right to social assistance because it does not protect economic rights.

Similarly, in *Masse v. Ontario (Ministry of Community and Social Services)*,[23] the Ontario Divisional Court held that a 21.6 per cent reduction in social assistance benefits did not violate s. 7 of the *Charter*. The court found that s. 7 did not provide a right to a minimum level of social assistance because the *Charter* did not impose positive obligations on government.

Few would dispute that social assistance claims can be easily characterized in economic terms. Upon examination of the facts in *Masse*,

[20] Young, *supra* note 9 at 34.

[21] See A. Moscovitch, "The Canada Health and Social Transfer" in R.B. Blake & J.F. Strain, eds., *The Welfare State in Canada: Past, Present and Future* (Concord: Irwin Publishing, 1997), 105-120 for an overview of some of the implications of the new federal funding scheme.

[22] [1999] R.J.Q. 1033 (C.A.) [hereinafter *Gosselin*].

[23] (1996), 134 D.L.R. (4th) 20 (Ont. Div. Ct.) [hereinafter *Masse*].

Keene observes, "Undoubtedly, a disabled welfare recipient who is left with $3.00 per month for all essentials but rent can be described as being concerned with economics."[24] It is important not to lose sight of the fact that what is at stake in these social assistance claims extends beyond economics. In *Wilson v. British Columbia (Medical Services Commission)*,[25] the British Columbia Court of Appeal considered the scope of the liberty interest in s. 7: "The trial judge has characterized the issue as 'right to work' [a purely economic question], when he should have directed his attention to a more important aspect of liberty, the right to pursue a livelihood or profession [a matter concerning one's dignity and sense of self worth]." The court in *Wilson* acknowledges that work is a fundamental aspect of an individual's life because it provides not only a means of financial support, but because it also serves certain psychological needs. If the right to pursue a profession is protected under s. 7 because employment relates to the individual's identity, dignity, and self-respect, one could argue *a fortiori* that this protection applies to social welfare interests.[26]

Johnstone identifies four characteristics typically associated with welfare recipients.[27] Each characteristic relates directly to the concept of psychological integrity that s. 7 was designed to protect. First, Johnstone points out that poor people are economically and psychologically vulnerable. Second, welfare recipients are often disengaged from mainstream society. Third, poor people often have low self-esteem. Indeed, in today's society, being poor means feeling like a second-class citizen. Finally, Johnstone notes that poor people experience feelings of dependency. These harmful feelings are exacerbated when a person is forced to rely on charity.

In 1991, End Legislated Poverty (ELP) did a study to find out how people felt about using charity.[28] Participants explained that they often had to put up with insulting and humiliating treatment when they went to food banks. They also pointed out that even waiting in line at a soup kitchen could be an intensely degrading experience. Nevertheless, low welfare rates meant that the vast majority of these individuals had no other choice but to rely on charity. As one participant put it, "Most people, if not all, are on welfare. If people had less rent to pay or a bigger cheque, they might not have to line up for a bag of groceries."[29]

Obviously, a Ministry decision to reduce or terminate social assistance has tremendous psychological implications for the individual. While s. 7 may not protect purely economic interests, the Supreme Court of Canada seems to have left open the possibility that it may protect against the stigmatization and stress that so many welfare claimants experience. For example, in *Rodriguez v. British Columbia (Attorney General)*,[30] the Supreme Court of Canada affirmed the notion that security of the person encompasses physical and psychological integrity as well as basic human dignity. In *Irwin*

[24] J. Keene, "Claiming the Protection of the Court: *Charter* Litigation Arising from Government 'Restraint'" (1998) 9 N.J.C.L. 97 at 110.

[25] (1988), 53 D.L.R. (4th) 171 at 187 (B.C.C.A.) [hereinafter *Wilson*].

[26] See I. Morrison, "Security of the Person and the Person in Need: Section Seven of the *Charter* and the Right to Welfare" (1988) 4 J.L. & Social Pol'y 1 at 12 for a brief discussion about how *Wilson* might be applied in the welfare context.

[27] Johnstone, *supra* note 2 at 8.

[28] See K. Hobbs et al., "Waste of a Nation: Poor People Speak Out about Charity" (1993) 31 Can. Rev. of Social Pol'y 94.

[29] *Ibid*. at 102.

[30] [1993] 3 S.C.R. 519 [hereinafter *Rodriguez*].

Toy Ltd. v. Quebec (A.G.), the Court contemplates the possibility that social welfare interests may fall within the ambit of s. 7:

> The intentional exclusion of property from s. 7, and the substitution therefor of 'security of the person'…leads to a general inference that economic rights as generally encompassed by the term 'property' are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within 'security of the person'…We do not, at this moment choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights.[31]

The Supreme Court of Canada's most recent discussion of the scope of protection encompassed in "security of the person" came in *New Brunswick (Minister of Health and Community Services) v. G.(J.) [J.G.]*.[32] The issue in that case was whether the New Brunswick government had a constitutional obligation to provide state-funded counsel in child protection proceedings. The Court found that in the circumstances of the case, s. 7 protected a right to state-funded counsel. Speaking for the Court, Lamer C.J. explained, "For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity."[33] Ordinary stresses are not sufficient to trigger s. 7 protection. Rather, there must be serious state interference with the individual's psychological integrity.

Canada's International Commitments

It is generally agreed that the *Charter* should, as far as possible, be interpreted in light of Canada's international obligations. Jackman advances two main justifications for using international agreements as guides to *Charter* interpretation. First, she points out that Canada, as a member of the United Nations, has participated actively in the human rights movement that has taken place throughout the world since World War II.[34] Much of the language of the *Charter* can be traced to the international agreements that Canada has endorsed over the years. Second, Jackman maintains that there is a presumption that Parliament does not intend to violate Canada's international commitments.[35] It follows that the *Charter* should be read consistently with these obligations.

For the purposes of interpreting s. 7, two major documents are relevant. The first is the *Universal Declaration of Human Rights*.[36] Article 25 reads:

> Every one has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in

[31] [1989] 1 S.C.R. 927 at 1003-4 [hereinafter *Irwin Toy*].

[32] (1999) 177 D.L.R. (4th) 124 (S.C.C.) [hereinafter *New Brunswick*].

[33] *Ibid.* at 147.

[34] M. Jackman, "The Protection of Welfare Rights Under the *Charter*" (1988) 20 Ottawa L. Rev. 257 at 288.

[35] *Ibid.*

[36] *Universal Declaration of Human Rights*, U.N.G.A. Res. 217 (III), 3 U.N. GAOR, Supp. (No. 13) 71, U.N. Doc. A/810 (1948).

> the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control.

The *Declaration* clearly lends support to the notion that people have a right to the basic necessities of life. Johnstone notes that there is a similarity between "security" in Article 25 of the Declaration and "security" in s. 7 of the *Charter*.[37]

The second important international agreement in the area of social welfare is the *International Covenant on Economic, Social and Cultural Rights*.[38] The *Covenant* was ratified by Canada in 1976. Among other things, it speaks of "freedom from want" and, like the *Declaration*, the *Covenant* refers to the individual's right to an adequate standard of living. Thus, it is apparent that the language of both documents supports a generous interpretation of s. 7.[39]

The American Experience

Because the *Charter* reflects many of the ideals contained in the American Bill of Rights, American law serves as a useful guide to the interpretation of s. 7. It is particularly important to examine the landmark case of *Goldberg v. Kelly*,[40] a 1970 decision of the United States Supreme Court. In that case, the Court found that a hearing was required before a person's public assistance benefits could be terminated. The Court characterized welfare as a kind of property right. Since the 14th Amendment explicitly protects the right to property, the recipients' due process claim succeeded. Thus, in *Goldberg v. Kelly*, welfare was afforded some measure of constitutional protection. The decision has implications for welfare in the Canadian context. One fairly obvious inference is that if welfare is merely a property right, it is not protected by s. 7, a provision which, unlike its American counterpart, does not mention property.

While it is important to note that the Court in *Goldberg v. Kelly* found that welfare fell under the heading of property rights, the significance of the classification should not be overstated. According to Morrison, welfare rights were protected in *Goldberg v. Kelly* for reasons that went beyond the fact that they could be characterized as property rights.[41] Indeed, Brennan J., speaking for the Court, emphasized the idea that welfare serves important purposes: "Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the community."[42] Brennan J. accepted the theories of Charles Reich, an influential author who viewed welfare as a right that needed to be more effectively enforced.[43]

The line of reasoning that emerged from *Goldberg v. Kelly* has been used by those who maintain that the *Charter* protects welfare rights. For example, Jackman argues that the right to life, liberty and security of the person is virtually meaningless if an individual cannot fulfill his or her basic

[37] Johnstone, *supra* note 2 at 10.

[38] *International Covenant on Economic, Social and Cultural Rights*, Annex to G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316, (1966).

[39] See also *R. v. Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321 at 360 where the Supreme Court of Canada states that s. 7 should be interpreted generously.

[40] (1970), 397 U.S. § 254.

[41] Morrison, *supra* note 26 at 14-15.

[42] *Goldberg v. Kelly*, *supra* note 40 at 265.

[43] See Reich, *supra* note 1.

needs.[44] Thus, it appears that the reasons for protecting welfare under s. 7 of the *Charter* would be very similar to those that have already been articulated by the U.S. Supreme Court. In other words, the absence of the term "property" in s. 7 does not necessarily undermine the case for welfare rights in the Canadian context. According to Morrison, "It may be argued that the purposes for protection of welfare rights in American law are equally compelling under the *Charter*."[45]

Nevertheless, some of the more fundamental limitations of *Goldberg v. Kelly* must be considered before any proper conclusions can be drawn about the status of welfare rights in the United States and Canada. Hasson notes that a hearing requirement at the termination stage does not protect people who are denied benefits at the outset.[46] This raises the complex issue of whether governments are under any obligation to provide welfare in the first place.[47] In the Canadian context, some commentators have advanced the position that s. 7 does not create a right to welfare that exists independently from state action.[48] Rather, as Morrison explains, "having undertaken to do these things which closely implicate fundamental interests, the state may be constitutionally constrained in how it treats the interests so created."[49] In other words, if the government is going to provide social assistance to people, it must do so in a manner that is consistent with s. 7 of the *Charter*. This implies, among other things, that rates must be adequate to cover basic needs. Unfortunately, this does not provide a complete answer to Hasson's concerns about those individuals who are initially denied welfare. Cases like *Goldberg v. Kelly* involve individuals who are already receiving benefits. Questions remain about whether those who apply for assistance and are rejected can argue that they have a right to welfare.

According to Hasson, another limitation of *Goldberg v. Kelly* is that the level of benefits at stake in that case was so low that it is difficult to imagine how any welfare recipient could have survived on the amounts provided.[50] As mentioned previously, a meaningful right to welfare requires that the level of assistance be adequate to fulfill a person's basic needs.

Administrative Agencies and the *Charter*

Even if convincing arguments can be made to show that s. 7 does protect welfare rights, questions remain about the practical significance of such arguments. A large number of cases in the welfare context are heard and ultimately disposed of by administrative tribunals. A claimant seeking to challenge an initial decision to reduce or terminate assistance will probably never go to court. This is true despite the fact that decisions made by administrative tribunals can always be reviewed in accordance with the principles of administrative law. Even when the statute itself provides for a right of appeal to the courts, only a handful of cases ever make it that far.

[44] M. Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) 19 Queen's L.J. 65 at 79.

[45] Morrison, *supra* note 26 at 15.

[46] R. Hasson, "What's Your Favourite Right? The *Charter* and Income Maintenance Legislation" (1989) 5 J.L. & Social Pol'y 1 at 26. To support his position, Hasson relies on the work of Professor O'Neil. See O'Neil "Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases" [1970] Supreme Court Review 161.

[47] See e.g. Morrison, *supra* note 26 at 15 and Johnstone, *supra* note 2 at 15-18. Both authors address the argument that constitutional protection should not be afforded to something that may be characterized as a mere privilege.

[48] See e.g. Morrison, *supra* note 26.

[49] *Ibid.* at 18.

[50] Hasson, *supra* note 46 at 26-27.

Litigation requires time and money. These are luxuries that social assistance recipients simply do not have. Thus, the administrative tribunal hearing stage is crucially important in the sense that it provides claimants with what will very likely be their final opportunity to challenge an unfavourable decision.

With this background in mind, two questions must be examined. First, do administrative tribunals have the jurisdiction to apply the *Charter*? Second, even if they do have the jurisdiction to apply it, to what extent are they likely to do so? With respect to the first issue, Morrison explains that "[t]here is a growing judicial consensus that most administrative tribunals have a limited jurisdiction to apply the *Charter*."[51] Indeed, the Supreme Court of Canada in *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*[52] confirmed the idea that a tribunal with the power to decide questions of law also has the power to decide whether a law violates the *Charter*. Thus, an administrative body like the B.C. Benefits Appeal Board, which has the authority to review a decision considered to be an error in law, is also capable of deciding *Charter* issues.

Commentators like Morrison predict that if administrative bodies have the jurisdiction to consider *Charter* arguments, poverty law advocates will be encouraged to advance such arguments.[53] However, there is good reason to believe that administrative agencies are even less likely to be persuaded by *Charter* arguments than the courts. Members often have little or no legal training or expertise. Currently, only the vice-chair and four members of the 11 person B.C. Benefits Appeal Board have law degrees.[54] Thus, a decision of the Board will probably not be the product of legal reasoning. Rather, it may be based almost entirely on the facts of a particular case. *Charter* arguments are not going to advance a claimant's cause when the real task is to generate as much sympathy as possible on the facts of the case.

Practical Implications

If we accept the broad proposition that s. 7 protects welfare rights, a number of practical difficulties arise that must be addressed. For example, Johnstone asks, "What kinds, levels, and shares of goods should be available to each person? What level of well-being is fundamental to human dignity?"[55] Johnstone suggests that courts may not be in the best position to deal with these types of issues.[56] Arguably, socio-economic questions should be left to the legislatures. Hasson warns about the difficulties that arise when courts become involved: "[O]ne cannot turn an intensely political question such as the level of welfare benefits into a legal question simply by deeming it so."[57] Commentators like Hasson believe that instead of opting for litigation, poverty law advocates would be wise to spend their time lobbying for political change. Indeed, it is difficult to deny the fact that *Charter* challenges

51 I. Morrison, "Poverty Law and the *Charter*: The Year in Review" (1990) 6 J.L. & Social Pol'y 1 at 13.

52 [1991] 2 S.C.R. 5.

53 Morrison, *supra* note 51 at 16.

54 Online: B.C. Benefits Appeal Board Homepage <http://www.bcbab.gov.bc.ca/history.htm#mems> (last modified: 8 September 1998).

55 Johnstone, *supra* note 2 at 11.

56 *Ibid.* at 12.

57 Hasson, *supra* note 46 at 2.

to income maintenance legislation generally do not succeed. According to Keene, one of the main reasons for the dismal success rate is that lawyers and judges simply cannot identify with welfare claimants.[58] The judiciary is composed of highly educated people who generally come from privileged backgrounds. In contrast, "[t]he claimant in social assistance cases is by definition a member of our most disadvantaged social class, and faces a reality that is light-years away from anything experienced by judges, lawyers, or anyone they are likely to know."[59] Not surprisingly, some have questioned whether courts are competent to determine the substance of welfare rights.

Concerns about legitimacy also arise when courts require governments to take positive action. That is, when courts tell governments how to spend money, they are basically usurping the role of democratically elected legislatures. In response to this line of reasoning, Jackman argues that "[i]t is impossible to seriously maintain that courts do not play a policy-making or legislative, role in Canadian society."[60] But apart from the question of legitimacy is the concern that the imposition of positive obligations on government may produce unintended results. If the government is required to spend more money on social assistance, other social programs may suffer as a result. Johnstone points to *Silano v. British Columbia* [61] as one example of a case that ultimately backfired on welfare recipients.[62] At issue in *Silano* was a $25 discrepancy between the level of social assistance available to those under the age of 26 and to those over the age of 26. When the British Columbia Supreme Court held that this difference infringed s. 15 of the *Charter*, the government proceeded to reduce the older group's benefits.

In theory, the political arena may be the most appropriate forum for the welfare rights debate. In reality, however, provincial governments left to their own devices are unlikely to enforce affirmative welfare rights in a meaningful way. As Jackman observes, "While the poor may not be represented by the courts, neither are they well represented by the legislature."[63] The provinces have already demonstrated a commitment to get tough on welfare and at a time when cutbacks are the norm there is good reason to believe that the situation is only going to get worse for Canadians living in poverty.

Johnstone points out that the international community does not rely on courts to enforce social and economic rights.[64] The threat of negative publicity helps to ensure compliance with international obligations. Again, it is important to consider whether this technique is truly effective. According to a recent report by the National Anti-Poverty Organization (NAPO), Canada has not been living up to its obligations under the *International Covenant on Economic, Social and Cultural Rights*.[65] Specifically, the "loss of the right to income support" is cited as one indication that Canada is not

58 Keene, *supra* note 24 at 99.

59 *Ibid.*

60 Jackman, *supra* note 34 at 336.

61 (1987), 42 D.L.R. (4th) 407 (B.C.S.C.) [hereinafter *Silano*].

62 Johnstone, *supra* note 2 at 12.

63 Jackman, *supra* note 34 at 336.

64 Johnstone, *supra* note 2 at 14.

65 Online: National Anti-Poverty Organization Homepage <http://www.napo-onap.ca/meltdown.htm> (last modified: 9 December 1998).

adequately protecting the rights of its citizens.[66] NAPO Vice-President Jacquie Ackerly notes, "The UN may rank Canada as #1 in the world in overall development, but this report provides clear evidence that the benefits of that development are not shared equally in Canada."[67]

Conclusion

As the preceding discussion illustrates, the question of whether there is a right to welfare is not a straightforward one. It is difficult to speak of entitlement under provincial welfare legislation and there is debate about whether s. 7 of the *Charter* protects the right to a minimum level of social assistance. Although the ambit of "security of the person" seems wide enough to include social welfare interests, it should be kept in mind that this is only the first step in the s. 7 analysis. We must also ask whether the deprivation is in accordance with the principles of fundamental justice. If not, we must inquire as to whether the infringement can be justified as a reasonable limit under s. 1 of the *Charter*. Obviously, a s. 1 analysis and an examination of the principles of fundamental justice are beyond the scope of this paper. Nevertheless, they do represent additional hurdles in what is already an uphill battle for poverty law advocates.

66 *Ibid.*

67 *Ibid.*

Production Notes

Volume 7 of *Appeal* was designed to maintain a consistent look and feel with previous volumes while implementing a number of improvements. Modifications appearing in this volume include increased font size, increased paragraph spacing, addition of upper leader bars, and improved consistency throughout – all designed to improve readability.

For the first time, the 2001 layout and design was completed entirely in-house by a member of the *Appeal* Editorial Board. The layout was set in QuarkXPress™ 4.1 for PC. Post-production printing was contracted to The Fleming Group of Victoria. In another first, electronic copies of Volume 7 are available on *Appeal's* website in portable document format (PDF), having been created with Adobe® Acrobat® Distiller 4.0.

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