MUNICIPAL REGULATION OF PUBLIC SPACES:

*EFFECTS ON SECTION 7 CHARTER RIGHTS**

Kendra Milne

Introduction

On October 26, 2005, the City of Victoria obtained an interlocutory injunction to enforce one of its by-laws[1] and remove an assembly of campers from Cridge Park. The group of campers consisted of homeless municipal residents who could not or would not take refuge in the local shelters. There were also municipal residents protesting the lack of adequate services for the poor, and those that travelled from outside the municipality to support the group. The homeless campers were forced to leave the park because they were breaching a

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* This paper developed from a conversation with Professor Benjamin Berger, University of Victoria, Faculty of Law, and from some of his suggested arguments for the Cridge Park injunction hearing.

[1] City of Victoria, By-law No. 91-19, *Parks Bylaw* (1991), s. 28. The section reads:

(a) No person may conduct himself in a disorderly or offensive manner, or molest or injure any other person, or loiter or take up a temporary abode over night on any portion of the park, or obstruct the free use and enjoyment of any park by any other person, or violate any bylaw, rule, regulation or notice concerning any park.

(b) Any person conducting himself as aforesaid may be removed from the park and is deemed to be guilty of an infraction of this bylaw.

municipal bylaw and the question they asked the city council was simple: Where can we go?

The morning following the injunction decision, the mayor of Victoria made a statement to the press about the case. He stated that "we cannot give up public parks or spaces" and that if the group moved to another city park, the by-law would be immediately enforced.[2] His comment reinforced the campers' point. Public spaces consist of parks and streets, and both have by-laws that regulate their use. If the campers are not able to stay in public places because of these by-laws,[3] if the shelters are full, and if they have no access to private property, then there is nowhere in Victoria where they can legally stay. This situation is not isolated to Victoria. It is common for a municipal by-law regime to regulate the use of public spaces.[4] These by-laws usually prohibit obstruction of the streets and loitering in the parks. Such regulations create a regime in which those who lack permission to be on private property and have no access to shelters are left with no choice but to breach the by-laws if they desire to reside in that municipality.

The examination of this situation raises several questions. For example, from where does the authority to create a municipal regime of this nature flow? Is this type of regime contrary to s. 7 of the *Canadian Charter of Rights and Freedoms*[5] ("*Charter*")? If this type of regulation does breach the *Charter*, what is the impact on municipal governments? The exploration of these questions may at first seem

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[2] See Alan Lowe's interview with CBC BC On the Island (11 November, 2005), online: CBC <http://www.cbc.ca/ontheisland/interviews.html>.

[3] See *supra* note 1; City of Victoria, By-law No. 92-84, *Street & Traffic Bylaw* (1992), s. 75. The section reads in part:

> " … [N]o person shall damage, encumber, obstruct or foul any street or portion of a street or other public place or do anything that is likely to damage, encumber, obstruct or foul any street or public place…"

[4] See *e.g.*, City of Vancouver Board of Parks and Recreation, *Parks Control Bylaw* (2003); City of Vancouver, By-law No. 2849, *Street & Traffic Bylaw* (2005).

[5] *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 [*Charter*].

like a purely academic exercise; however, with approximately 26 percent of the households in Victoria at risk of becoming homeless, [6] the implications of the exercise become rapidly evident.

Constitutionality of the By-law Regime

The regulation of public spaces by municipalities is within their delegated power. The provincial government authorizes such regulations through legislation. In BC, s. 8(3)(b) of the *Community Charter*[7] grants BC municipalities the express authority to regulate with respect to public places. Local governments that choose to enact a by-law regime similar to Victoria's act under that authority, as well as under s. 46(1) and s. 62 of the *Community Charter*. Section 46(1) grants municipalities the authority to establish penalties for people who "cause a nuisance on, obstruct, foul or damage any part of a highway or other public place", and s. 62 authorizes municipalities to regulate "in relation to persons, property, things and activities that are in, on or near public places". There is little question that a regime regulating public spaces is *intra vires* a municipality, but a larger question still remains. Does this type of regime violate the *Charter*?

The first issue to address when examining the constitutional validity of a municipal by-law regime is to determine whether or not the *Charter* applies to municipal government action. Prior to a Supreme Court of Canada (SCC) case addressing the issue, BC lower courts assumed that the *Charter* applies. In 1993, the SCC applied the *Charter* to a municipality.[8] The Court did not specifically address why the *Charter* applies to municipalities; they simply proceeded with a *Charter* analysis. After this case, lower courts continued to assume that since

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[6] In 1996, 26 percent of households in Victoria used more than 50 percent of their income for housing. See British Columbia, Ministry of Municipal Affairs and Ministry of Social Development and Economic Security, *Local Responses to Homelessness: A Planning Guide for B.C. Communities* (2000) at 92.

[7] *Community Charter*, R.S.B.C. 2003, c. 26.

[8] *Ramsden* v. *Peterborough (City),* [1993] 2 S.C.R. 1084.

municipalities derive their power from provinces, they fall under the *Charter*.[9]

The SCC expressed its reasoning in *Godbout* v. *Longueuil (City)*[10] ("*Godbout*") after one of the parties questioned the *Charter*'s application to municipalities in their appeal. Before proceeding with a *Charter* analysis, La Forest J. took the time to expressly state why s. 32[11] of the *Charter* includes municipalities:

> [S]uch entities are, in reality, 'governmental' in nature … they cannot escape *Charter* scrutiny. In other words, the ambit of s. 32 is wide enough to include all entities that are essentially governmental in nature and is not restricted merely to those that are formally part of the structure of the federal or provincial governments.[12]

La Forest J., writing for part of the Court, found that municipalities fall under the *Charter* for three reasons. Municipalities are democratically elected and accountable in a similar manner to Parliament and provincial legislatures; they possess a general taxing power that is indistinguishable from that exercised by the Parliament or the provincial legislatures; and municipalities derive their existence and law-making power from the provincial government.[13] *Godbout* cemented the Court's position, which many had expected: the *Charter* applies to municipal governments.

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[9] Felix Hoehn, *Municipalities and Canadian Law* (Saskatoon: Purich Pub., 1996) at 324.

[10] *Godbout* v. *Longueuil (City)*, [1997] 3 S.C.R. 844 [*Godbout*].

[11] *Charter*, *supra* note 5 at s. 32. The section states:

> (a) to the Parliament and government of Canada in respect of all members within the authority of Parliament including all matters relating to the Yukon and Northwest Territories; and
> (b) to the legislatures and government of each province in respect of all matters within the authority of the legislature of each province.

[12] *Supra* note 10 at para. 47.

[13] *Ibid.* at para. 51.

Development of the Section 7 Analysis

Section 7 states:

> 7. 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 SCC has repeatedly stated the proper approach to interpreting and applying all of the rights protected under the *Charter*. In R. v. *Big M Drug Mart Ltd.,*[14] the SCC expressed that when applying the *Charter*, a purposive and non-legalistic approach should be taken; the Court also noted that even if the state action has a valid purpose, the effects of the action are sufficient to violate *Charter* rights.[15] The Court has also expressed the appropriate approach for interpreting s. 7 specifically. In *Re B.C. Motor Vehicle Act*[16] ("*Re MVA*"), the SCC stated that s. 7 guarantees three separate rights—life, liberty and security of the person—and that only one of the three need be engaged in order to trigger s. 7.[17] These rights are qualified by the second part of the section; s. 7 will not be breached if the right is deprived in accordance with the principles of fundamental justice. There is an argument that s. 7 confers two separate rights:[18] the first is the right to life, liberty and security of the person (a positive right), and the second is the right not to be deprived of those unless the deprivation is in accordance with the principles of fundamental justice (a negative right). In more recent cases, the "two rights theory" of s. 7 has received less mention, although the Court has explicitly left open the possibility.[19] The Court has also repeatedly made it clear that they do

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[14] R. v. *Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295.

[15] *Ibid.* at 344 and 296.

[16] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 [*Re MVA*].

[17] *Ibid.* at para. 23; Hoehn, *Municipalities*, *supra* note 9 at 50.

[18] *Re MVA*, *ibid.* at paras. 23, 104-105; *Gosselin* v. *Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at paras. 83, 336-31[*Gosselin* cited to S.C.R.].

[19] *Gosselin*, *ibid.* at 83.

not feel obligated to determine the scope of s. 7. As case law develops, the Court will decide the appropriate extent of the section.[20]

To summarize, the judicial analysis under s. 7 has two components. First, the claimant must establish that his or her life, liberty or security of the person was deprived by a state action. Second, the claimant must prove that the deprivation was contrary to a principle of fundamental justice.[21] With respect to the first component, the right to life has not really been engaged in jurisprudence,[22] although that may change with future judgments. Most of the successful claims have been based on a deprivation of the claimant's liberty or security of the person.

The SCC has interpreted "liberty" in a broad sense.[23] The right to liberty is always engaged if the threat of imprisonment is present, but La Forest J. recognized in *Godbout* that liberty can extend much further:

> [T]he right to liberty enshrined in s. 7 of the *Charter* protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference.
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> […]
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> [T]he autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.[24]

In that case, an employee was fired for not meeting a municipal residency requirement for employment. La Forest J. felt the right to

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[20] *Re MVA*, *supra* note 16 at paras. 66-67; *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30 at 51 [*Morgantaler*]; *Gosselin*, *ibid.* at para. 79.

[21] *Rodriguez* v. *British Columbia (Attorney General),* [1993] 3 S.C.R. 519 at 584 [*Rodriguez*].

[22] Robert J. Sharpe and Kent Roach, *The Charter of Rights and Freedoms*, 3rd ed. (Toronto: Irwin Law, 2005) at 203.

[23] *Godbout*, *supra* note 10 at para. 66.

[24] *Godbout*, *supra* note 10 at para. 66.

liberty was invoked when choosing where to live. This interpretation of "liberty" has been accepted by the Court in later decisions.[25] In accepting that liberty covers autonomous personal decisions, the SCC was careful to limit the scope of the application. In *R.* v. *Malmo-Levine*[26] ("*Malmo*"), the Court clarified that the s. 7 right to liberty does not protect lifestyle choices since they do not engage the most basic values of human dignity and autonomy that underlie the *Charter*.[27]

The SCC has also carefully analyzed the scope of "security of the person". In *Morgentaler*,[28] the Court recognized that "security of the person" extends beyond physical harm and includes psychological and emotional stress.[29] The Court later confirmed this interpretation in *Rodriguez*:[30]

> There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.[31]

The scope was, again, expanded by the SCC in *New Brunswick (Minister of Health and Community Services)* v. *G. (J.)*[32] ("*New Brunswick*"). The Court stated that "the protection accorded by this right extends beyond the criminal law"[33] and that the psychological harm does not

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[25] *R.* v. *Malmo-Levine; R.* v. *Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 85 [*Malmo* cited to S.C.R.].

[26] *Ibid.*

[27] *Ibid.* at para. 86.

[28] *Morgantaler, supra* note 20.

[29] *Ibid.* at 56.

[30] *Rodriguez*, *supra* note 21.

[31] *Ibid.* at 588.

[32] *New Brunswick (Minister of Health and Community Services)* v. *G. (J.)*, [1999] 3 S.C.R. 46 [*New Brunswick*].

[33] *Ibid.* at para. 58.

need to amount to nervous shock, but that it must be objectively determined to be "greater than ordinary stress or anxiety".[34] Although the Court has left economic rights out of the scope of protection that s. 7 affords,[35] the Court has left open whether economic rights fundamental to human survival are covered under "security of the person".[36]

One must always remember that, even if life, liberty and security of the person are clearly engaged, s. 7 may not be violated. A right must be deprived *and* the deprivation must be contrary to the principles of fundamental justice. The "principles of fundamental justice" requirement qualifies the right to life, liberty and security of the person.[37] The interpretation of "principles of fundamental justice" was uncertain for some time. The first case to tackle the issue was *Re MVA*, and the SCC stated that fundamental justice is more than natural justice[38] or a procedural guarantee.[39] Lamer J. wrote, "the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system".[40]

The SCC has now developed a three-step test for the Court to recognize new principles of fundamental justice.[41] First, the principle must be a legal principle. Second, the principle must be fundamental

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[34] *Ibid.* at para. 60.

[35] *Irwin Toy Ltd.* v. *Quebec (Attorney General),* [1989] 1 S.C.R. 927 at 1003 [*Irwin Toy*].

[36] Don Stuart, *Charter Justice in Canadian Criminal Law*, 3rd ed. (Toronto: Carswell, 2001) at 52; *Irwin Toy*, *ibid.* at 1003; *Gosselin*, *supra* note 18 at para. 81.

[37] *Re MVA*, *supra* note 16 at paras. 24, 62.

[38] *Ibid.* at para. 26.

[39] *Ibid.* at para. 65.

[40] *Ibid.* at para. 64.

[41] *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General),* 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 8 [*CFC* cited to S.C.R.]; *Malmo*, *supra* note 25 at para. 113.

to the societal notion of justice, illustrated by sufficient consensus. Third, the principle must be precise enough to be applied with predictable results. When applying this test to establish a new principle of fundamental justice, the Court may balance individual and societal interests.[42] Principles of fundamental justice recognized by the Court include the requirement of a guilty mind,[43] the requirement for reasonably clear and unarbitrary laws,[44] and the right to a fair trial.[45] Principles of fundamental justice rejected by the Court include the best interests of the child,[46] human dignity and autonomy,[47] and the harm principle.[48]

The Court has suggested the rights in ss. 8-14 of the *Charter* are a subset of those covered under s. 7, and that those rights are examples of deprivations of life, liberty or security of the person that are not in accordance with principles of fundamental justice.[49] If one can fit the proposed s. 7 deprivation under a right protected in ss. 8-14, the persuasive argument that the deprivation is automatically not in accordance with the principles of fundamental justice can be made.

The analysis the SCC has developed when applying s. 7 is set out above. It must be noted that, as with any right guaranteed under the *Charter*, once the violation of the right has been established, the state has the opportunity to justify the violation under s. 1 of the *Charter*. With respect to s. 7 in particular, the SCC has expressed that, because of the onus on the claimant to establish that the deprivation was not in accordance with the principles of fundamental justice, "a violation

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[42] *Malmo*, *ibid.* at para. 98.

[43] R. v. *Ruzic*, , 2001 SCC 24, [2001] 1 S.C.R. 687 at para. 47 [*Ruzic* cited to S.C.R.].

[44] *CFC*, *supra* note 41 at para. 8.

[45] *New Brunswick*, *supra* note 32 at para. 91.

[46] *CFC*, *supra* note 41 at para. 7.

[47] *Rodriguez*, *supra* note 21 at 592.

[48] *Malmo*, *supra* note 25 at para. 111.

[49] *Re MVA*, *supra* note 16 at para. 28; *Morgentaler*, *supra* note 20 at 175.

of s. 7 will normally only be justified under s. 1 in the most exceptional of circumstances, if at all".[50]

Does the Municipal By-law Regime in Question Violate Section 7?

As Jeremy Waldron stated, all homeless people have "so far as freedom is concerned [are] the streets, parks, and public shelters, and the fact that those are collective resources made available openly to all".[51] When these resources are regulated by municipal governments in a way that deprives the homeless of this alleged freedom, is s. 7 of the *Charter* violated?

Municipal by-law regimes that prohibit using public spaces for sleeping and setting up shelters have not been formally challenged under s. 7 in BC. There have been several cases in BC similar to the Victoria Cridge Park case, where municipalities went to court to get an injunction to enforce their by-laws,[52] but no instances where a full s. 7 claim has been made.

As previously mentioned, a common s. 7 claim relating to shelter is based on a notion of positive rights, or a claim that individuals have a right to reasonable access to shelter and the state has a duty to provide it. This argument is not required and will not be pursued here. The following arguments focus on the violation of s. 7 from the perspective of negative rights.

The effects of a by-law regime such as Victoria's on the homeless can be framed in several ways. One view is that the regime prohibits homeless people from fulfilling basic needs required for survival. Another view is the regime leaves homeless people with no choice but to breach the by-laws if they live in the municipality. The final view is that the regime strips homeless persons of their choice of where to reside. Any of these options could be grounds for a s. 7 claim.

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[50] *Godbout*, *supra* note 10 at para. 91; *Re MVA*, *ibid.* at para. 85.

[51] Jeremy Waldron, "Homelessness and the Issue of Freedom" (1991) 39 UCLA L. Rev. 295 at 302.

[52] *Vancouver (City)* v. *Maurice*, 2005 BCCA 37; *Vancouver Board of Parks and Recreation* v. *Sterritt*, 2003 BCSC 1421; *Vancouver Parks Board* v. *Mickelson*, 2003 BCSC 1271 [*Mickelson*].

From a perspective purely based on survival, the by-law regime in Victoria creates a situation where homeless people cannot obtain shelter or rest, necessities for human survival. The Victoria regime makes it an infraction to erect a shelter or to sleep ("loiter" or "obstruct") in public places. On a January day in Victoria, 84 percent of homeless people do not have access to a shelter for that evening.[53] No one disputes that there are not adequate shelter beds in Victoria for those that need them. Homeless people in Victoria are limited to finding or creating shelter in public places since they have no access to private property. Adequate shelter in the winter and sleep are requirements for survival. A by-law regime that prohibits these two activities in public places prohibits homeless people from meeting their required needs lawfully. This prohibition violates s. 7, specifically the right to "security of the person". Physical security is engaged in an evident way. In *Morgentaler,* the SCC acknowledged that a violation of physical security was the most obvious application of "security of the person" and extended the scope from there.[54] This violation is not in accordance with principles of fundamental justice because, as the SCC has recognized, the protection of human life is fundamental to our society.[55] None of the rights protected in the *Charter* can be enjoyed without the right to life. The fact that life is protected under s. 7 and s. 12 illustrates that the protection of human life is already a fundamental principle in our society. This was the very reason the majority of the Court rejected the s. 7 argument in *Rodriguez.*[56] There is no need to argue a new principle.

The second view of the effects of the Victoria by-law regime is that it strips homeless people of very fundamental choices. If a homeless person decides to reside in a municipality with a by-law regime such

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[53] Victoria Cool Aid Society, *Homeless Count – 2005 Victoria, BC* (2005). Also note that shelters often have a limited number of nights per month a person can stay in order to fairly distribute the beds that are available.

[54] *Morgentaler*, *supra* note 20 at 56.

[55] See *Rodriguez*, *supra* note 21.

[56] *Ibid.* at 585. The majority of the Court in this case found that the protection of human life restricted them from finding a violation of s. 7, while McLachlin J.'s dissent used the principle as a basis for finding a violation.

as Victoria's, then she will be involuntarily violating the by-laws whenever she rests or finds shelter. By-laws that regulate the use of public spaces presuppose that residents have access to somewhere other than public space. With no access to private property or shelter, a homeless person has no means of complying with the by-laws. The justice system has a clear distaste for penalizing citizens for actions not morally voluntary.[57] "Liberty" protects choices that are so fundamental and personal that they go to the very meaning of personal autonomy and dignity.[58] The SCC has said that choosing where to reside qualifies under "liberty",[59] so one would assume that losing the fundamental choice of whether to abide by the law or not would also qualify as a deprivation of liberty. The principle of moral voluntariness was also a recognized principle of fundamental justice in *Ruzic*:

> It is a principle of fundamental justice that only voluntary conduct—behaviour that is the product of a free will and controlled body, unhindered by external constraints—should attract the penalty and stigma of criminal liability. Depriving a person of liberty and branding her with the stigma of criminal liability would infringe the principles of fundamental justice if the accused did not have any realistic choice.[60]

Although in *Ruzic* the Court's statement was specific to criminal offences, when applying the three requirements of a principle of fundamental justice from *Malmo-Levine*, one only needs to argue that there is a societal consensus that a person should not be punished for acts or omissions she has no control over. The other two requirements, that the principle be sufficiently precise and that it is an existing legal principle, have already been established since the Court has recognized this principle in criminal matters. Establishing a consensus that it is inappropriate and unfair to penalize citizens for actions that they have no choice but to perform, even if the penalty and stigma are slightly lowered, should not be that difficult.

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[57] See *Ruzic*, *supra* note 43; *Re MVA*, *supra* note 16.

[58] *Supra* note 24.

[59] *Supra* note 25.

[60] *Ruzic*, *supra* note 43 at para. 47.

The last characterization of the effects of the regime is again founded on the deprivation of a fundamental choice. If a homeless person decides she does not want to involuntarily violate the by-law regime, she is forced to leave the municipality. She loses her right to choose where to live. As part of the SCC stated in *Godbout*, depriving people of the right to choose where they will reside violates their liberty. In addition, in a municipality like Victoria, forcing homeless people to leave the city has other costs to their liberty and security of the person. A city like Victoria has services such as psychological, substance abuse and employment counselling, as well as shelter beds (when they are not full), and access to food, health care, money and drugs for those addicted. Forcing people to leave the municipality in order to comply with the law deprives them of these services, since many are not available outside urban centres. This violates their liberty by depriving them of the fundamental choice to try to get out of the economic situation they are in by taking advantage of services available in the city. Outside of the city, a drug addict has less access to substance abuse counselling and someone unemployed and under-educated has less opportunity to develop job skills. Depriving people of their right to choose to live in a municipality also violates their security of the person by harming their physical and psychological well-being and health by limiting access to health care and counselling services.

When using this characterization of an engaged s. 7 interest, the principle of fundamental justice is not as apparent. In *Morgantaler*, the SCC stated,

> [A] legislative scheme which limits the right of a person to deal with her body as she chooses may violate the principles of fundamental justice under s. 7 of the *Charter* if the limit is arbitrary. A particular limit will be arbitrary if it bears no relation to, or is inconsistent with, the objective that lies behind the legislation.[61]

One could argue that the regime at issue violates the liberty and security of the person of homeless people in Victoria in an arbitrary manner. The deprivation of their rights is due to their economic status. That deprivation has no relation to the presumed purpose of by-laws that regulate public spaces, which is to provide an equal opportunity for all residents to use the space in a safe and meaningful

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[61] *Rodriguez*, *supra* note 21 at 619-620.

manner. The effect of a by-law regime of this nature is inconsistent with this purpose since, due to their economic status, a group of residents (the homeless) cannot use the space in a manner that is meaningful to them. The deprivation of their liberty and security of the person is not in accordance with the principles of fundamental justice.

In the above ways, the municipal by-law regime in question likely violates s. 7 of the *Charter*. Only one characterization need be successful. The municipality would then have the onus of justifying the infringement under s. 1 but, as stated above, this would only be successful in exceptional circumstances.

Where Does This Leave Municipalities?

If the by-law regime violates s. 7 and cannot be justified under s. 1, then municipalities must change their regime or cease enforcement. It is not realistic or constructive for people to camp freely in public places; however, a *Charter* challenge may force governments to address the issue in a more efficient and effective manner if that is the only available alternative. The onus to deal with the issue certainly does not fall completely on municipal governments. The causes of homelessness are very broad and include mental heath, addiction, lack of affordable housing and employment opportunity, abuse and many other factors.[62] Some of these issues cannot and should not be dealt with at the municipal level. Municipal governments are in a good position to lobby the higher levels of government about the issue of homelessness if they are forced to do so. Because local government decisions affect people on a day-to-day basis and they are more accessible than other levels of government, municipal governments will always have a role in addressing important social issues like this one.

Municipal governments also have a number of tools they can use to encourage affordable housing and shelters. These include condominium conversion controls, housing reserve funds, density bonuses, comprehensive development zoning, fast tracking development approvals, provision of land, secondary suite policies

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[62] Toronto, Report of the Mayor's Homelessness Action Task Force, *Taking Responsibility for Homelessness: An Action Plan for Toronto* (1999).

and provision of tax breaks.[63] Not only can they lobby higher levels of government, but they can also use such tools to address homelessness at the local level.

Other jurisdictions outside of Canada have dealt with the issue of homelessness very differently. Scotland has enacted a landmark legislative regime that requires local governments to provide housing for the homeless and to produce a homelessness strategy.[64] Models such as this one may provide Canadian governments with direction on how to better address this issue.

Conclusion

The Cridge Park injunction granted to Victoria was a temporary injunction. In all prior BC injunction cases, permanent injunctions were granted.[65] Although Cridge Park was cleared and the campers moved on, in August 2006, the campers and protestors can return. The municipality may be forced to go through the injunction process again unless a solution is found. Perhaps the limit on the injunction granted to Victoria is an indication of the Court's decreasing patience with the situation, and a growing unwillingness to grant a permanent solution (a permanent injunction) to the municipality without forcing them to address the cause of the situation. A full s. 7 challenge of the Victoria by-laws may also take place in the future. It seems as though the Court, as well as the campers, are trying to put some pressure on the municipality to find a solution. Only time will tell if they are successful.

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[63] *Supra* note 6 at 69.

[64] *Homelessness etc. (Scotland) Act*, A.S.P. 2001, c. 10; *Housing (Scotland) Act*, A.S.P. 2003, c. 10.

[65] *Supra* note 52.

A CRITIQUE OF ADVANCE DIRECTIVES AND ADVANCE DIRECTIVES LEGISLATION

Emily Clough

The goal [of an advance directive] is to have open, serious, and intensive conversation between seriously ill people and their families, friends and physicians about the prospects of death and the way that everyone expects to behave as death comes closer. The underlying protection here is not in the specifics or what is said, but in the fact that people are talking.[1]

I. Preface

When I began this paper, I intended to write about the benefits of instructional directives. I believed that instructional directives could help stop the imposition of unwanted life support on patients who would prefer to die. Perhaps instructional directives could also help avoid family conflicts like the battle that happened over the death of Terry Schiavo.[2] I had even counselled people on the value of instructional directives while teaching a course on chronic disease

[1] R.A. Burt, *Death Is That Man Taking Names: Intersections of American Medicine, Law, and Culture* (Berkeley, CA: University of California Press, 2002) at 171.

[2] For more discussion about the Schiavo case, see *infra* note 94.

management.[3] Without a doubt, I was a supporter of instructional directives.

So when I found some medical research that noted problems with instructional directives, I was skeptical. However, the evidence soon became overwhelming. There were numerous medical studies, all from credible journals, noting major practical problems in the actual use of instructional directives in health care settings. Several legal scholars also pointed out theoretical problems with the concept of autonomy and the ability to pre-determine good health care decisions. It quickly became clear to me that instructional directives were not all that I had thought them to be.

Advance directives affect the lives of dying patients and health care practitioners on a daily basis. Although the move towards greater patient autonomy may be worthy in theory, it appears to be falling short in the practice of instructional directives. There is room for more discussion and thought on this subject, in particular regarding better ways to help people make good health care decisions based on their personal values and wishes.

II. Introduction

An advance directive is a planning tool that is intended to give patients the ability to make life and death choices based on their personal values, goals and life plan. Advance directives can contain two parts: an instructional directive (or "living will") and a proxy directive. Both directives come into force when a patient loses the ability to make his or her own decisions (or is deemed mentally incompetent). An instructional directive allows a patient to decide ahead of time what medical treatments she does and does not want to receive in the future.[4] A proxy directive allows a patient to select

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[3] The six-week course is entitled "Chronic Disease Self-Management Program." In BC, it is coordinated by the Centre on Aging at the University of Victoria. Online: The Centre on Aging <http://www.coag.uvic.ca/cdsmp>.

[4] There is some uncertainty as to whether an instructional directive can be used only to refuse treatment or whether it can also be used to positively demand treatment. For example, the rejection of resuscitation is a common use of an instructional directive, a do-not-resuscitate (DNR)

someone else to make health care decisions on her behalf. This paper focuses on instructional directives—their development, their problems, and their regulation. The benefits and problems of proxy directives will not be analyzed in this paper.[5]

Instructional directives developed out of a clash of two factors: the development of life-sustaining medical technology and a societal shift that increasingly recognized the value of autonomy. People feared suffering a prolonged dying process where they were unnaturally kept alive on machines and tubes. Two major cases in the USA developed the law that patients have a right to determine their future health

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order. But could an instructional directive demand that a patient always be resuscitated, no matter what the medical circumstances? In 2003, the Manitoba Law Reform Commission concluded that instructional directives should not be used to demand treatment that would otherwise be withheld. See Manitoba Law Reform Commission ["*LRC*"], *Withholding or Withdrawing Life Sustaining Medical Treatment,* No. 109 (2003). There is one case that is somewhat relevant to this issue. In *Sawatsky* v. *Riverview Health Centre Inc,* [1998] 167 D.L.R. (4th) 359, 6 W.W.R. 298 (Man. Q.B.), a physician had put a DNR order on Mr. Sawatsky's chart despite fierce opposition from his spouse. The Manitoba Court of Queen's Bench allowed an injunction to temporarily remove the DNR order from the patient's chart. The decision clearly emphasized that the Court was allowing an order for an injunction, not ruling on the broader issue of physician capability to apply a DNR order in the face of proxy dissent. Mr. Sawatsky died before the case could be tried on its merits.

[5] For a critique of proxy directives, see A.E. Buchanan et al., *Deciding for Others: The Ethics of Surrogate Decision making* (New York: Cambridge University Press, 1989). See also E.J. Emanuel et al., "Proxy Decision Making for Incompetent Patients. An Ethical and Empirical Analysis" (1992) 267(15) Jama 2067. See also J. Suhl et al., "Myth of Substituted Judgment. Surrogate Decision Making Regarding Life Support Is Unreliable" (1994) 154(1) Arch Intern Med 90. See also D.P. Sulmasy et al., "The Accuracy of Substituted Judgments in Patients with Terminal Diagnoses" (1998) 128(8) Ann Intern Med 621.

care.[6] Two important cases in Canada established that wishes in an instructional directive should be followed, even if following the instructions could lead to a patient's death.[7] The patient's right to self-determination should trump a doctor's wishes.

Starting in the mid-1990s, Canadian jurisdictions began passing legislation on instructional directives. Currently, several statutes in Canada directly regulate instructional directives, giving requirements for how old a person must be in order to make a valid directive and form requirements (i.e., signed, dated, etc.).[8]

Many legal scholars, public institutions and politicians have applauded instructional directives, arguing that they protect patient self-determination and autonomy.[9] In theory, they have a good point, but medical research tells a very different story. Medical research shows that instructional directives may merely be adding a layer of confusion and legality to an already difficult end-of-life situation. In particular, this paper will outline the following problems with instructional directives: (1) people do not make them; (2) the information in instructional directives may not be clinically relevant; (3) the instructional directive may not reflect the current wishes of the patient; (4) patients generally lack the knowledge to make accurate treatment decisions; (5) even if they are made and are relevant, instructional directives may not affect treatment decisions; (6) other values (i.e., a physician's values or organizational values) may usurp

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[6] See *Matter of Quinlan*, 70 N.J. 10, 335 A.2d 647 (1976) [*Quinlan*] and *Cruzan* v. *Director, Missouri Department of Health*, 497 US 261, 110 SCt 2841 (1990) [*Cruzan*].

[7] See *Malette* v. *Shulman,* (1990), 72 O.R. (2d) 417 (C.A.) [*Malette*] and *Fleming* v. *Reid,* (1991) 82 D.L.R. (4th) 298, 4 O.R. (3d) 74 [*Fleming*].

[8] Further discussion of these statutes will be found at Part III. c, below.

[9] See R. Astroff, "Who Lives, Who Dies, Who Decides?: Legal and Ethical Implications of Advance Directives" (1997) 7 W.R.L.S.I. 1. For a summary of current public approval for living wills see A. Fagerlin et al., "Enough: The Failure of the Living Will" (2004) Hastings Center Report 34, No. 2 30. But see also R. Dresser, "Precommitment: A Misguided Strategy for Securing Death with Dignity" (2003) 81(7) Tex Law Rev 1823.

the patient's values; and (7) legislation has confused the standard of when an instructional directive is applicable.

Legislation that regulates instructional directives may be a step in the wrong direction because it focuses on defining the narrow legal boundaries of a directive rather than encouraging its use as an instigator of conversation and thought. Instructional directives should move away from legal formalities and focus more on encouraging people to think about and discuss their goals and wishes for end-of-life care.

III. Development of Instructional Directives

Advance directives were not an issue before the development of life-sustaining treatments like ventilators, dialysis machines, antibiotics and feeding tubes.[10] Before those technologies, if an individual suffered a cardiac arrest or caught pneumonia she was likely to die quickly. There were few treatment decisions to be made.[11]

In the early twentieth century, new life-saving technologies were developed. These medical advances were primarily used to sustain lives, regardless of the patient's actual wishes.[12] As was noted by a physician in the Senate Special Committee's Report, "in this century, [physicians] have come to view our mandate to be to overcome death".[13]

Along with these medical advances came broad changes to the values of society, and individual liberty, personal security and bodily integrity became more important. The physician/patient relationship was changing from an authoritarian or paternalistic interaction to one

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[10] K.L. Kirschner, "When Written Advance Directives Are Not Enough" (2005) 21(1) Clin Geriatr Med 193 at 195.

[11] Law Reform Commission of Canada, Minister of Supply and Services Canada, *Euthanasia, Aiding Suicide and Cessation of Treatment*, No. 28 (1982) at 5.

[12] *Ibid.* at 5.

[13] Senate of Canada, *Of Life and Death: Report of the Special Committee on Euthanasia and Assisted Suicide,* No. 33 (1995).

much more defined by equality and participation.[14] Patients wanted more input into their treatment decisions.[15] There was fear that new medical technologies could be used to unreasonably extend the dying process, leaving people unable to control their medical decisions.[16] People feared "the prospect of dying away from home in impersonal and unfamiliar surroundings and of having to endure prolonged and often needless suffering".[17] As Robert Burt dramatically put it, people feared the "physician's relentless warfare against death and their consequent infliction of terrible suffering on people who were inevitably and uncontrollably dying".[18]

III.a American Developments

From the late 1970s to the early 1980s, the tension between the paternalistic application of life-saving treatment and the principle of personal autonomy entered public awareness. In 1976, the case of Karen Quinlan sparked public debate.[19] Ms. Quinlan went into cardiac arrest when she was 21 and permanently lost consciousness due to brain damage. She was put on a ventilator to keep her alive. Her father sought a court order that would allow him to direct the ventilator to be removed, arguing that this was what Ms. Quinlan would have wanted. The New Jersey Supreme Court granted the order, ruling that patients have the right to decide whether to receive life-sustaining treatment.

After *Quinlan*, state and federal governments became interested in passing legislation that would protect the patient's right to self-determination. The same year as *Quinlan*, California passed the *Natural*

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[14] Manitoba LRC, *Withholding or Withdrawing Life-Sustaining Medical Treatment, supra* note 3 at 6.

[15] Manitoba LRC, *Substitute Consent to Health Care*, No. 110 (2004) at 5.

[16] Manitoba LRC, *Self-Determination in Health Care (Living Wills and Health Care Proxies),* No. 74 (1991) at 3.

[17] G. Dworkin et al., *Euthanasia and Physician-Assisted Suicide* (Cambridge, UK: Cambridge University Press, 1998) at 84.

[18] Burt, *supra* note 1 at 1.

[19] *Quinlan*, *supra* note 6.

Death Act.[20] This was the first statute in North America that dealt with advance directives.

In 1990, the *Cruzan* case spurred on the development of advance directives.[21] This case involved the application to withdraw the feeding tube from Ms. Cruzan, a patient who was in a permanent vegetative state. Similar to *Quinlan,* Ms. Cruzan's parents argued that Ms. Cruzan would have wanted the tube to be removed because she had previously stated that she would not want to "live as a vegetable". The Missouri Supreme Court ruled that Ms. Cruzan's feeding tube should not be removed. The Court ruled that there must be clear and convincing evidence of the patient's wish to have life-sustaining procedures withdrawn in order for treatment to be withdrawn from an incompetent patient. Oral statements must indicate a specific clinical situation and the particular intervention that is to be refused. Ms. Cruzan's prior statements did not meet that standard.

On appeal, the US Supreme Court upheld the Missouri ruling, holding that Missouri's "clear and convincing evidence" standard was constitutional.[22] The Supreme Court indicated that each state is free to set standards for what will constitute evidence of a patient's preferred treatment. Other states, for instance New Jersey in *Quinlan*, are permitted to have a lower standard than Missouri's "clear and convincing evidence".

Few oral statements would meet the rigorous standard required by the Missouri Supreme Court. Hence, public policy promoted the creation of a written advance directive. By drawing up an instructional directive that complies with a legislated standard, a patient could feel confident that her wishes will be upheld.

In 1991, a federal law came into effect in the US that requires all hospitals and nursing homes to inquire at the time of admission as to

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[20] *California Natural Death Act*, Cal. Health and Safety Code §7185-7195 (West 1976) (repealed 2000).

[21] *Cruzan, supra* note 6.

[22] *Cruzan, supra* note 6.

whether the patient has an advance directive.[23] If the patient does not have a directive, the institution is required to ask whether the patient would like one completed. It is left up to the individual states to regulate advance directives as they see fit. Since 1991, most states have revised or enacted laws on advance directives.[24]

III.b Canadian Common Law Development

By the 1990s in Canada, the tension between respecting individual autonomy and preserving life was largely resolved.[25] Competent patients have the right to determine what shall be done with their bodies.[26] This right to self-determination includes the right to reject any treatment, including life-sustaining or life-saving measures.[27]

In *Malette,* the Ontario Court of Appeal held that a competent patient can refuse medical treatment through an instructional directive. In that case, an emergency-room doctor gave a blood transfusion to a severely injured and unconscious woman. The critical factor was that the patient carried a card declaring her unwillingness to undergo a blood transfusion because of her religious convictions. Mrs. Malette survived, but she suffered mentally and emotionally when she found out that she had received a blood transfusion. Mrs. Malette sued Dr. Shulman for damages in battery. Despite the card being neither witnessed nor dated, the Court held that the instructions on the card should have been followed. Robins J.A. noted that "the right to

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[23] *Patient Self-Determination Act*, Omnibus Budget Reconciliation Act of 1990, Pub L No. 101-508.

[24] B. Lo et al., "Resuscitating Advance Directives" (2004) 164(14) Arch Intern Med 1501-6.

[25] M.J. Dykeman, *Canadian Health Law Practice Manual* (Toronto: Butterworths, 2000) at 8.13.

[26] Justice Cardozo's statement in *Schloendorff* v. *New York Hospital,* 211 N.Y.R. 125 (1914) at 129-130 is often quoted in this regard: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body".

[27] See Manitoba LRC, *Self-Determination in Health Care, supra* note 13 at 4. See also P.A. Singer et al., "Elective Use of Life-Sustaining Treatments in Internal Medicine" (1991) 36 Adv Intern Med 57.

determine what shall be done with one's own body is a fundamental right in our society. The concepts inherent in this right are the bedrock upon which the principles of self-determination and individual autonomy are based".[28] A patient's right to self-determination allows her the freedom to make choices that may seem to be against her best interests.

In *Fleming,* the Ontario Court of Appeal confirmed that instructional directives can be used to pre-emptively reject treatment. In *Fleming*, two psychiatric patients, while competent, refused a particular treatment. They intended for their refusal to be binding even if they were to become incompetent. The attending physician brought an application that would require the guardian to make treatment decisions based on the patient's best interests (in this case, receiving treatment) rather than upon their prior wishes (in this case, rejecting treatment). According to Robins J.A., the right of a competent adult to refuse medical treatment is entrenched in common law and in s. 7 of the *Canadian Charter of Rights and Freedoms*.[29] Regarding an instructional directive, Robins J.A. noted that:

> A patient … may specify in advance his or her refusal to consent to the proposed treatment. … This right must be honored, even though the treatment may be beneficial or necessary to preserve the patient's life or health, and regardless of how ill-advised the patient's decision may appear to others.[30]

III.c Canadian Legislation

There is currently no federal law that governs advance directives.[31] In its 1995 report, "Of Life and Death," the Senate Special Committee

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[28] *Malette*, *supra* note 7 at 432.

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

[30] *Fleming*, *supra* note 7 at para. 34.

[31] The federal government likely does not have jurisdiction to regulate in this area. Although "health" is not specifically designated to either provincial or federal jurisdiction, it is generally accepted that the provinces

on Euthanasia and Assisted Suicide recommended that all jurisdictions that did not have advance directive laws adopt such legislation.[32]

Currently, five Canadian provinces have legislation that specifically regulates instructional directives: Alberta,[33] Saskatchewan,[34] Manitoba,[35] Newfoundland and Labrador[36] and PEI.[37] The statutes reflect the intent to make instructional directives formal and binding. The statutes vary in the age minimum required to make a valid directive. In Alberta, a person must be over 18.[38] In Saskatchewan,

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have exclusive jurisdiction over the supply of health goods and services pursuant to ss. 92(7) (hospitals), 92(13) (property and civil rights) and 92(16) (matters of a merely local or private nature) of the *Constitution Act, 1867*. Instructional directives would likely fall into the category of s. 92(13) (property and civil rights) because they are contractual in nature, and thus would be under the jurisdiction of the provinces. See J.G. Downie et al., *Canadian Health Law and Policy* (Toronto: Butterworths, 2002) at 12.

[32] Senate of Canada, s*upra* note 13 at 50.

[33] *Personal Directives Act*, S.A. 1996 c. P-4.03 [*AB Act*].

[34] *The Health Care Directives and Substitute Health Care Decision Makers Act,* S.S. 1997, c. H-.001[*SK Act*].

[35] *Health Care Directives Act*, C.C.S.M. 1992, c. H-27 [*MB Act*].

[36] *Advance Health Care Directives and the Appointment of Substitute Decision Makers Act*, S.N. 1995, c. A-4.1 [*PEI Act*].

[37] *Consent to Treatment and Health Care Directives Act,* S.P.E.I. 1996, c. 10 [*NL Act*].

[38] *AB Act*, *supra* note 33 at s. 5(1).

Manitoba and PEI, a person must be over 16.[39] Newfoundland and Labrador does not have a minimum age requirement.[40]

The statutes also vary in the form that the instructional directive must take (i.e., signed, witnessed and dated). In Alberta[41] and PEI,[42] the directive must be signed by the maker, dated and witnessed by someone other than the spouse of the person. In Saskatchewan[43] and Manitoba,[44] the directive must be in writing, signed by the maker and dated. There is no requirement for witnessing unless the patient cannot sign the document herself. In Newfoundland and Labrador, an instructional directive must be in writing, signed by the maker and witnessed by independent persons;[45] there is no dating requirement.

Most of the other jurisdictions in Canada have some legislation that covers instructional directives by implication. For example, statutes in BC[46] and Ontario[47] require a health care provider to respect

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[39] *SK Act*, *supra* note 34 at s. 2(1)(c); *MB Act, supra* note 35 at s.5.

[40] The statute instead focuses on competency. See *NL Act, supra* note 37 at s. 3(1): "a person who is competent may make an advance health care directive setting out the person's instructions regarding his or her health care treatment or setting out general principles regarding the type of health care the person wants".

[41] *AB Act*, *supra* note 33 at s. 5(1).

[42] *PEI Act, supra* note 36 at s. 21.

[43] *SK Act*, *supra* note 34 at s. 6.

[44] *MB Act, supra* note 35 at s. 8.

[45] *NL Act, supra* note 37 at s. 6(1).

[46] *Health Care (Consent) and Care Facility (Admission) Act,* RSBC 1996, c. 181, s. 12.1 [*BC Act*]: "A health care provider must not provide health care under s. 12 if the health care provider has reasonable grounds to believe that the person, while capable and after attaining 19 years of age, expressed an instruction or wish applicable to the circumstances to refuse consent of the health care".

[47] *Health Care Consent Act,* S.O. 1996, c. 2, s. 5: "A health care provider shall not administer treatment under s. 25 [emergency treatment] if the health care provider has reasonable grounds to believe that the person,

instructional directives in emergency care settings. The health care provider must not provide treatment if there are "reasonable grounds" to believe that a person expressed an "instruction or wish" to refuse specific treatment. The use of the word "wish" indicates that an oral statement may be sufficient. The only express limitation is that the instruction or wish must be made after the person is 19 years old in BC, or 16 years old in Ontario.

BC,[48] Ontario,[49] Quebec[50] and the Yukon[51] have proxy legislation that gives *de facto* protection of instructional directives. The proxy legislation generally requires the proxy to abide by a patient's prior known wishes, but does not require that those wishes be expressed in a specific format. Instructional directives that are in writing, signed and dated would certainly constitute evidence of a prior wish. The broad language of the proxy directive statutes implies that oral statements will suffice as indication of a patient's wishes.

In Nova Scotia, there is no legislation that specifically requires a health care provider or proxy to abide by a patient's prior wishes.[52] There is no legislation regulating proxy or instructional directives in New Brunswick, the Northwest Territories or Nunavut.

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while capable and after attaining 16 years of age, expressed a wish applicable to the circumstances to refuse to consent to the treatment".

[48] *BC Act*, *supra* note 46 at s. 19(2)(a).

[49] *Substitute Decisions Act,* S.O. 1992, c. 30, ss. 66(3).

[50] *Civil Code of Quebec,* S.Q. 1991 c. 64, art. 12.

[51] *Health Act,* R.S.Y. 2002, c. 106, s. 45(5).

[52] There is legislation covering proxy directives, but it does not specifically require the proxy to abide by the patient's prior expressed wishes. See *Medical Consent Act,* R.S.N.S. 1989, c. 279.

There are currently two main templates for advanced directives in Canada: the "Living Will"[53] and a document called "Let Me Decide".[54] Both advance directives, if completed fully and properly, will meet the standards of all Canadian jurisdictions.

IV. Problems With Instructional Directives

1) People do not make them

Advance directives have been endorsed in the US for over 30 years, and since 1991, federal legislation has required that health care organizations inform patients of their right to make a directive. Despite this high profile, relatively few people in the US complete advance directives. A 2005 article noted that medical research has indicated that only 5 to 15 percent of people in the US have advance directives.[55] Studies have found only a small increase in the percentage of the public who have executed an advance directive since the introduction of the federal legislation in 1991.[56] Several surveys have indicated that many people know about advance directives but few actually complete them. [57]

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[53] Created by the Joint Centre for Bioethics at the University of Toronto. The template is available online: Joint Centre for Bioethics <http://www.utoronto.ca/jcb/outreach/living_wills.htm>.

[54] Created by a Canadian doctor, Dr Molloy. See W. Molloy, *Let Me Decide* (Troy, ON: Newgrange Press, Orkney House. 1989). See also W. Molloy, *Let Me Decide: The Health and Personal Care Directive That Speaks for You When You Can't* (Victoria, BC: Vancouver Island Health Authority, 2004). Online: Vancouver Island Health Authority <http://www.viha.ca/healthpoint/let_me_decide/pdf/LMD_AdvanceDirective_New_Form.pdf>.

[55] Kirschner, *supra* note 10 at 196.

[56] E. Larson and T. Eaton, "The Limits of Advance Directives: A History and Assessment of the Patient Self-Determination Act" (1997) 32 Wake Forest Law Review 249.

[57] E.R. Gamble et al., "Knowledge, Attitudes, and Behavior of Elderly Persons Regarding Living Wills" (1991) 151(2) Arch Intern Med 277. See also J.L. Holley et al., "Factors Influencing Dialysis Patients' Completion of Advance Directives" (1997) 30(3) Am J Kidney Dis 356.

There are many factors that could explain why the use of advance directives is so low.[58] The process of creating an advance directive may be time consuming and psychologically difficult. People generally do not like to think about their own death, let alone make detailed plans. Some people procrastinate, while others assume instructional directives are only for the elderly or infirm.

People may not issue instructional directives because they simply do not want to make end-of-life decisions alone. In a study of dialysis patients, approximately one-third of the patients said their directives should be followed strictly, another third said their families and physicians should have some input in the decision, and the remainder said their families and physicians should have "complete leeway" to override their directives.[59] In another study, researchers found that most of their patients did not want to make final resuscitation decisions, but instead preferred to rely on their doctor's choices.[60]

That people do not want to make their own treatment decisions is perhaps one of the most interesting reasons for the low use of instructional directives. If people do not want to make their own choices, then where does this leave theories of self-determination and autonomy? The proponents of self-determination have fought precisely so that people can have their medical choices respected. And yet studies show that people do not necessarily want to make final choices in regard to end-of-life decisions. As Robert Burt recently noted, "applying the autonomy framework in end-of-life decision-making has had little practical effect and much fictitious

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[58] For a more detailed analysis of the reasons why people may not make instructional directives, see Fagerlin et al., *supra* note 8.

[59] A. Sehgal et al., "How Strictly Do Dialysis Patients Want Their Advance Directives Followed?" (1992) 267(1) Jama 59.

[60] C.M. Puchalski et al., "Patients Who Want Their Family and Physician to Make Resuscitation Decisions for Them: Observations from Support and Help. Study to Understand Prognoses and Preferences for Outcomes and Risks of Treatment. Hospitalized Elderly Longitudinal Project" (2000) 48(5 Suppl) J Am Geriatr Soc S84. See also S. Isaacs et al., *To Improve Health and Health Care 1997: The Robert Wood Johnson Foundation Anthology (*1997), online: Robert Wood Johnson Foundation <http://www.rwjf.org/files/publications/books/1997/index.html>.

posturing. Efforts to persuade people to execute advance directives to protect their autonomy if they should become incompetent have essentially failed".[61]

2) Information May Not Be Clinically Relevant

Empirical studies and physician accounts have repeatedly shown that instructional directives do not give physicians a clinically relevant guideline. For example, some directives use vague statements such as "take no heroic measures" or "continue treatment only if the benefits outweigh the burdens".[62] Even instructional directives that focus on specific interventions may fail to guide a physician because not all treatment situations fit neatly into one of the anticipated scenarios.[63]

3) It May Not Reflect Current Wishes

People change their minds frequently. Kirshner notes that "[a]s dynamic, evolving being, we … frequently change our minds about issues as inconsequential as our favorite colors or foods and issues as significant as where we live, whom we marry and how we choose to spend our time".[64] Studies have shown that people also frequently change their minds while in the midst of dealing with a medical problem. In situations where patients are seriously ill, the trend is for people to change their minds in favour of receiving more treatment.[65]

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[61] R.A. Burt, "The End of Autonomy. Improving End of Life Care: Why Has It Been So Difficult?" (2005) 35(6) Hastings Center Special Report 9.

[62] M. Addison, "Living Wills/Advance Directives—a Physician's View" (1991) 1 Health Law Review 9.

[63] A.S. Brett, "Limitations of Listing Specific Medical Interventions in Advance Directives" (1991) 266(6) Jama 825.

[64] Kirshner, *supra* note 10 at 197.

[65] J.S. Weissman et al., "The Stability of Preferences for Life-Sustaining Care among Persons with Aids in the Boston Health Study" (1999) 19(1) Med Decis Making 16. See also K.E. Rosenfeld et al., "Factors Associated with Change in Resuscitation Preference of Seriously Ill Patients. The Support Investigators. Study to Understand Prognoses and Preferences for Outcomes and Risks of Treatments" (1996) 156(14) Arch Intern Med 1558. See also M.A. Lee et al., "Do Patients' Treatment Decisions Match Advance Statements of Their Preferences?" (1998) 9(3) J Clin Ethics 258.

To a healthy and active person, the thought of being confined to a wheelchair may seem a fate worse than death. But when placed in the midst of an illness, what once was unthinkable may become acceptable.[66]

If a directive does not express current wishes, then it may be doing little to support self-determination and autonomy. In fact, the directive may have the opposite effect, binding people to decisions they no longer endorse. The authors of *Canadian Medical Law* conclude that creating an instructional directive "is really tantamount to gazing into a crystal ball, particularly for one who is in general good health when filling out the directive".[67]

4) Patients Lack the Knowledge to Make Good Treatment Decisions

Presentation of the medical scenario can have a huge impact on the decisions of the patient. For example, one study showed that even just changing the language from a "90 percent chance of life" to a "10 percent chance of death" made people change their minds on treatment decisions.[68] In another study, 201 seniors were asked for their treatment decisions given various outcomes. Seventy-seven percent changed their minds at least once when given the same

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[66] For an insightful narrative on this subject, see Nancy Mairs, *Waist High in the World: A Life Among the Nondisabled* (Boston, MA: Beacon Press, 1996). "Everybody well or ill, disabled or not, imagines a boundary of suffering and loss beyond which, she or he is certain, life will no longer be worth living. I know that I do. I also know that my line, far from being scored in stone, has inched across the sands of my life: at various times, I could not possibly do without long walks on the beach or rambles through the woods; use a cane, a brace, a wheelchair; stop teaching; let someone else put on and take off my underwear. One at a time, with the encouragement of others, I have taken each of these (highly figurative) steps… . Meanwhile, I go on being, now more than ever, the woman I once thought I could never bear to be".

[67] B. Sneiderman et al., *Canadian Medical Law: An Introduction for Physicians, Nurses and Other Health Care Professionals* (Scarborough, ON: Carswell, 2003).

[68] Brett, *supra* note 63.

scenario but different valence of presentation.[69] These studies question whether instruction directives really reflect what the patient wants or are simply a reflection of the presentation of information.

A further problem with instructional directives is the patient's potential lack of medical knowledge. One medical researcher, Dr. Brett, points out that "various combinations of preselected interventions … may contradict the patient's goals or suggest unusual patterns of medical practice".[70] The intervention-focused directive runs the risk of promoting the selection or rejection of interventions because of their inherent characteristics rather than as appropriate means to the ends that the patient would have wanted.[71]

5) It May Not Affect Treatment Decisions

Even if an instructional directive has been made, there is no guarantee that it will ever get to the appropriate physician at the appropriate time. Practically, instructional directives may be made years in advance of any health care treatment. The existence, let alone location, of an instructional directive may be unknown to the attending physicians and family members. If admitted to an emergency room, a patient may be too overwhelmed with the circumstances to mention their advance directive.[72] One study found that only 26 percent of patients who had previously executed advance directives had their directives recognized during their hospitalization.[73]

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[69] T.R. Malloy et al., "The Influence of Treatment Descriptions on Advance Medical Directive Decisions" (1992) 40(12) J Am Geriatr Soc 1255.

[70] Brett, *supra* note 63.

[71] A. Moxey et al., "Describing Treatment Effects to Patients" (2003) 18(11) J Gen Intern Med 948.

[72] R.S. Morrison et al., "The Inaccessibility of Advance Directives on Transfer from Ambulatory to Acute Care Settings" (1995) 274(6) Jama 478.

[73] *Ibid.*

The most damning research on instructional directives comes from the SUPPORT study, the largest study to date of dying people in America.[74] The main researchers of the SUPPORT data conclude that

> [advance directives] were ineffectual in shaping care. In fact, the current practice of advance directive use failed at every key juncture. … Our intervention was successful in getting virtually all advance directives recorded. However, they still had no effect upon decision making.[75]

6) Other Values May Usurp a Directive

Even if the instructional directive is on the patient's chart and the doctor has read it, the values of the physician may usurp the values of the patient.[76] One study found that a patient's preferences were respected as long as the physician thought that the patient's choice

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[74] The SUPPORT (Study to Understand Prognoses and Preferences for Outcomes and Risks of Treatment) study involved over 9000 very sick patients in five different hospitals over a period of six years. The study received funding of approximately $29 million from the Robert Wood Johnson Foundation. The study involved two phases: an initial phase that identified problems in the care of dying people, and a second phase that attempted to correct those problems. The second phase was carried out through the intervention of specially trained nurses who spent all their time counselling patients and families about treatment options. A large part of each nurse's job was to communicate the preferences and the prognosis between physicians and patients. Despite this intervention, the study found little improvement in the recognition of patient wishes. See "A Controlled Trial to Improve Care for Seriously Ill Hospitalized Patients. The Study to Understand Prognoses and Preferences for Outcomes and Risks of Treatments (Support). The Support Principal Investigators" (1995) 274(20) Jama 1591.

[75] Isaacs, *supra* note 60.

[76] D. Orentlicher, "The Illusion of Patient Choice in End-of-Life Decisions" (1992) 267(15) Jama 2101.

resulted in the best decision.[77] Another study found that physicians are more inclined to talk with patients who are most like them.[78]

The values and policies of the health care institution may also usurp the patient's advance directive. The Dalhousie End-of-life Project noted that

> [s]ome policies … suggest that the organization can place limits on whether a decision made in the process of advance care planning will be considered valid within that facility. For example, one facility suggests that an advance directive will be respected as long as it does not conflict with the mission of the organization … one policy explicitly states that while a patient can make an advance directive, no guarantees are given as to whether it will be respected.[79]

7) Legislation Confuses the Standard

Some instructional directive statutes have standards that appear to be higher than the common law. For example, as discussed above, the Newfoundland and Labrador statute requires an instructional directive to be in writing, signed and witnessed by two independent persons. The Saskatchewan statute requires a directive to be in writing, signed and dated. Yet the common law appears to have a lower standard. For example, the card in *Malette* was upheld as a valid directive that should have been followed even though it was not dated or witnessed. In *Fleming,* the patient's wishes were not in a legal format, but were discovered through a review of the clinical records.[80]

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[77] M. Danis et al., "A Prospective Study of Advance Directives for Life-Sustaining Care" (1991) 324(13) N Engl J Med 882.

[78] T.R. Malloy et al, *How Interventions Are Described Affects Patients' Decisions About Life-Sustaining Treatment,* in American Geriatric Society/American Federation For Aging Research Annual Scientific Meeting, 1991 Program (Abstract A2).

[79] Health Law Institute, Dalhousie University, "Review of Withholding and Withdrawal of Potentially Life-Sustaining Treatment Policies in Canada" (2004) Online: <http://as01.ucis.dal.ca/dhli/cmp_documents/documents/ACFbodROQ.pdf > at 54.

[80] See *Fleming, supra* note 7.

Case law in the US indicates that some states have a specific standard for allowing when a patient's prior wishes will be considered. For example, in Missouri the standard is that there must be clear and convincing evidence of the patient's prior wish. As happened in the *Cruzan* case, oral expressions of interest would likely not meet the standard. How would oral statements of preference be treated in Canada?

An unreported Alberta case from 1999 gives some direction in this area.[81] In that case, the 47-year-old Constable Durksen was in a comatose state after a major car accident. The Court was asked for advice on whether life-sustaining treatment could be discontinued. The patient had not made an advance directive, but anecdotal evidence from family and friends indicated that he would not want to receive life support.[82] The Court took this anecdotal evidence into consideration, and allowed the removal of life support.

At the time of Constable Durksen's case, Alberta's *Personal Directives Act* was in force.[83] It required that a personal directive be in writing, signed and dated.[84] Clearly Constable Durksen's comments to his family and friends did not meet the standard of a statutory directive. Yet the Court considered his commentary as persuasive evidence. This case indicates that Canadian courts may apply a standard lower than statute when determining whether a patient's prior wishes should be considered.

There are four other sources of evidence indicating that legislation may not be raising the standard for recognizing advance directives: LRC reports, legislative debates, principles of statutory interpretation and *Charter* rights.

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[81] *In the Matter of Robert Kenneth Durksen, Dependent Adult, Surrogate Court of Alberta, Lethbridge/MacLeod* (16 Sept 1999), court file DA06-02070, cited in G. Godlovitch et al., "Discontinuing Life Support in Comatose Patients: An Example from Canadian Case Law" (2005) 172(9) Canadian Medical Association Journal at 1172-3.

[82] Constable Durksen had witnessed many injuries and fatal car accidents in his work, and had discussed his views with friends and family.

[83] *Personal Directives Act*, S.A. 1996, c. P-4.03, now R.S.A. 2000, c. P-6

[84] *Ibid.* at s. 5(1).

Some provinces appear to have dealt specifically with how an instructional directive statute interacts with the common law. For example, in 1991, the Manitoba LRC stated that the "common law presently recognizes some directions given in advance in respect of future medical treatment. The Commissions' proposed scheme would not affect the legality of such directions, nor would it impede the courts from expanding upon them".[85] Indeed, the Manitoba statute now states that "nothing in this Act abrogates or derogates from any rights or responsibilities conferred by statute or common law".[86]

In Saskatchewan, there may be an argument that the statute was not intended to raise the common law standard. In debating the *Saskatchewan Act* in the legislature, the Honourable Mr. Cline said that "health care directives legislation reinforces the personal autonomy of Saskatchewan residents. It recognizes the importance of self-determination, and it also recognizes that individuals want to exercise choice in their medical treatment".[87] These statements can be used to show that instructional directive legislation was passed in order to affirm patient rights, not to derogate from the common law standard.

There may also be an argument that statutory interpretation indicates that statute should not raise the common law standard. Ruth Sullivan notes that "it is presumed that the legislature does not intend to change the existing law. This presumption was used historically to shelter the common law from unwanted statutory intrusions. It is used in modern courts to resist any weakening or exclusion of principles, whether common law or statutory, that are considered important by the courts".[88]

Finally, there is indication that the principles of self-determination and autonomy are entrenched in the *Charter* and cannot be changed

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[85] Manitoba LRC, *Self-Determination in Health Care,* s*upra* note 13 at 4.

[86] *MB Act, supra* note 35 at s. 25.

[87] Saskatchewan, Legislative Assembly, *Hansard*, 1591 (13 May 1997) at 1618 (Hon. Eric Cline).

[88] R. Sullivan, *Statutory Interpretation* (Concord, ON: Irwin Law, 1997) at 182.

by provincial statute. In *A.M.* v. *Benes*,[89] the Court reviewed a decision of a parent to refuse electro-convulsive therapy treatment for her schizophrenic adult daughter. The Board argued that the mother had not complied with s. 21 of the *Ontario Health Care Consent Act* (namely, that she act in the best interests of the daughter). Justice Shulman looked at the interaction between the common law (*Malette* and *Fleming*), statute and the *Charter*:

> I want to stress the constitutional entrenchment because there are in the materials filed on behalf of the Attorney General repeated references to provisions of the Act said to be "codifications" of the related common law. Historically, where there was no *Charter* dimension, statutory codifications have usually supplanted, within the ambit of the statute, the pre-existing substantive common law. … It is in my opinion crucially important to stress that the patient's rights here in issue are fundamental, constitutionally entrenched rights of a high order and that no amount of "codification" will diminish those rights unless the asserted codification meets the tests of the *Charter*.

From Justice Shulman's comments, it could be argued that a directive that does not meet the legislated standard should be upheld on constitutional grounds.[90] In particular, the right to security of the person in s. 7 of the *Charter* guarantees physical and psychological

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[89] *M. (A.)* v. *Benes* (1998), 166 DLR (4th) 658 (Ont. Ct. Gen. Div.), add'l reasons at (1998), 173 DLR (4th) 758 (Ont. Ct. Gen. Div.), rev'd on other grounds (1999), 180 DLR (4th) 72 (O.C.A.).

[90] The right to refuse treatment via advance directives may be protected by several sections of the *Charter*. See s. 2(a) ("Everyone has the following fundamental freedoms: *a*) freedom of conscience and religion") or s. 15 ("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") or s. 7 ("Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"). A claim under s. 2(a) or s. 15 would require a very specific factual basis in order to succeed. Section 7 was successfully argued in *Fleming* and may offer the strongest constitutional grounds.

integrity.[91] In *R* v. *Morgentaler,* the Supreme Court of Canada noted that "the law has long recognized that the human body ought to be protected from interference by others ... with the advance of the *Charter*, security of the person has been elevated to the status of a constitutional norm".[92]

Although persuasive evidence exists that statute was not meant to raise the standard on advance directives, there is some support for the opposite conclusion. Robins J.A. makes the following observation in *Fleming*:

> In my view, no objection can be taken to procedural requirements designed to determine more accurately the intended effect or scope of an incompetent patient's prior competent wishes or instructions. As the Act now stands, the substitute consent-giver's decision must be governed by wishes which may range from an isolated or casual statement of refusal to reliable and informed instructions based on the patient's knowledge of the effect of the drug on him or her. Furthermore, there may be questions as to the clarity or currency of the wishes, their applicability to the patient's present circumstances, and whether they have been revoked or revised by subsequent wishes or a subsequently accepted treatment program. The resolution of questions of this nature is patently a matter for legislative action.[93]

V. Conclusions

There seems to be a strong case that legislation is not imposing a higher standard on when an instructional directive should be followed. If the common law provides a more flexible standard, then what is the purpose of instructional directive legislation? One purpose may be to boost the confidence of members of the public in their ability to determine their own end-of-life care. With the publicity given to the *Quinlan* case in the 1970s, and recently the *Schiavo* case in

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[91] See *R* v. *Morgentaler,* [1998] S.C.R. 30 [*Morgentaler*]. *Rodriguez* v. *British Columbia,* [1993] 3 S.C.R. 519.

[92] *Morgentaler, supra* note 91 at para. 5.

[93] *Fleming*, *supra* note 7 at para. 57.

Florida,[94] people fear what will happen to them if they become incompetent. Legislation may be a convenient way to display support for self-determination and autonomy.

Legislation may put forth a good public face, but it does not resolve many of the issues with instructional directives. As argued above, just because an instructional directive is legally binding, does not mean that it will be used or that it will affect treatment decisions. In fact, legislation may be serving as a hindrance to improving the treatment of dying people because it focuses on form, not content. At best, instructional directive legislation gives a veneer of protecting patient autonomy. At worst, instructional directive legislation confuses standards, gives the maker a false sense of security and does nothing towards protecting patient autonomy.

Perhaps instead of legislation, efforts should be put into more public dialogue and awareness about end-of-life care issues surrounding instructional directives. As Dr. Kirschner concludes in her recent article, "advance directives should be seen as tools that facilitate making difficult decisions in uncertain times, not as static, dogmatically binding documents".[95]

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[94] In 1990, Terri Schiavo's heart stopped. She was resuscitated, but she suffered severe brain damage and was unable to feed herself. Her husband was appointed her guardian, and asked the Court to remove her feeding tube. Ms. Schiavo's parents vehemently objected to removing the tube. The issue became highly publicized and was much debated. Eventually, her husband won a court battle, her feeding tube was removed, and she died. See *Schindler* v. *Schiavo* (2003), 851 So.2d 182 (Fla. App. 2 Dist.). See also R. Dresser, "*Schiavo:* A Hard Case Makes Questionable Law" (2004) Hastings Center Report 8.

[95] Kirschner, *supra* note 10.

IN GOOD FAITH TO WHOM?

AN ANALYSIS OF JUDICIAL DEFERENCE TO MUNICIPAL AUTHORITY AND THE DISPUTE OVER THE ARBUTUS CORRIDOR

Ryan Goldsmith

I recall driving across the Arbutus Corridor daily on my way to school and being stopped by the familiar lights and sounds of a train crossing. Sometimes it would be only for a moment, and other times I might be waiting for what seemed like an hour. I later remember wondering (while really knowing) why the trains never passed by that crossing at 16th Avenue anymore. I also recall wondering how such an odd-shaped piece of land might be developed after it was no longer used for rail—perhaps it would remain undeveloped and be used as bike trails, or perhaps it would be a stretch of very narrow houses and shops. It never occurred to me that these musings might be the subject of consideration by our nation's highest court of appeal, the Supreme Court of Canada.

The legislature of British Columbia has empowered municipalities with broad powers of discretion over land use planning. Since these powers could be seen to conflict with the rights of landowners, these discretionary powers must often be enforced by the courts. While there is a general presumption in favour of the courts deferring to municipal authority, the courts can intervene and review municipal actions where they are outside the authority of the municipal government or where the actions are marked by "patent unreasonableness". Where the courts draw the line between deference and intervention has been debated over many years, but continues to lack the clarity the courts insist it has. Recently, the British Columbia

Court of Appeal overturned a lower court decision that struck out a by-law restricting development on private land owned by Canadian Pacific Railway (CPR), finding the city acted within its powers in enacting this by-law.

The goal of this case comment is to examine the current case before the Supreme Court of Canada (SCC) regarding the Arbutus Corridor, and to consider the likely outcome in light of the specific statutory context and past jurisprudence regarding judicial deference to municipal authority in municipal land use planning. Given these two formative factors, I conclude that the SCC will find against the private property rights of CPR and in favour of the by-laws enacted by the City of Vancouver. I will begin with an overview of municipal authority over land use planning, followed by an examination of case law, setting out the parameters of judicial deference to municipal authority. I will then look at municipal authority in relation to the current dispute between the City of Vancouver and Canadian Pacific Railway over the future use of the Arbutus Corridor.

Municipal Land Use and Planning

Though real property may be privately owned, an owner of land is restricted in what may be done with that land. Section 92 of the *Constitution Act, 1867* gives provinces authority over both "Municipal Institutions in the Province", and "Property and Civil Rights in the Province".[1] The most recent legislation governing municipal institutions is the *Local Government Act*, which confers on regional districts and municipalities authority over land use and planning. Provisions mandating long term strategies begin in Part 25, entitled "Regional Growth Strategies", while more localized planning and specific land use zoning is outlined in Part 26, "Planning and Land Use Management". In addition, more detailed local authority is set forth in the *Community Charter*[2] and the *Vancouver Charter*.[3] It is through

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[1] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[2] S.B.C. 2003, c. 26 (*Community Charter).*

[3] S.B.C. 1953, c. 55 (*Vancouver Charter).* It is useful to note that the *Vancouver Charter* predates both the *Local Government Act* and the *Community Charter.*

these legislative tools that a municipality may define land use restrictions and requirements.

Regional districts are required to create broad 20-year plans for regional growth. The purpose of these plans is to "promote human settlement that is socially, economically and environmentally healthy and that makes efficient use of public facilities and services, land and other resources".[4] As most of the specific land use planning authority is at the municipal level, the *Local Government Act* also sets out the requirement that municipalities (including Vancouver) are to incorporate a regional context statement into their official community plans (or, for Vancouver, official development plans) that outlines how each local government will align its planning with the overall growth strategy of the region.

As land use planning is a delegated authority under provincial legislation, local governments are free to make and change land use by-laws so long as they do so in accordance with the enabling legislation. This legislation prohibits so-called "people zoning", or zoning in a way that has a discriminatory effect on certain people or classes of people, as well as requiring that rezoning be done in good faith and for the promotion of community planning goals. Local governments are also prevented from rezoning private land to strictly public use unless they provide adequate compensation to the landowner.[5] Further, it is not presumed that rezoning will affect already developed property due to the notion of non-conforming use, which allows for the continued use of land for a purpose that was valid prior to rezoning, provided that use is not expanded.[6]

Judicial Deference to Municipal Authority

Canada adheres to a long history of judicial deference to municipal authority that can be traced back to the nineteenth century in

[4] *Local Government Act,* R.S.B.C. 1996, c. 323, s. 849.

[5] *Ibid.* s. 914.

[6] *Ibid.* s. 911.

England. In the case of *Kruse* v. *Johnson*,[7] Lord Russell of Killowen C.J. stated that "in matters which directly and mainly concern the people of the county who have the right to choose those whom they think best fitted to represent them on their local government bodies, such representatives may be trusted to understand their own requirements better than judges".[8] As such, courts have adopted a very narrow approach to determining whether or not to strike down an action of a municipal government. This approach includes incidences where a municipality has acted *ultra vires*, or outside of the authority to govern granted by provincial legislation[9] or, if that action was within municipal authority, then the standard of review is one of "patent unreasonableness".[10]

On the specific issue of land use planning, this pattern of judicial deference continues. In 1995 the BC Court of Appeal heard the case of *MacMillan Bloedel Ltd.* v. *Galiano Island Trust Committee* ("*MacMillan Bloedel*"),[11] in which the Galiano Island Trust Committee (GITC), the equivalent to a municipal council (with respect to land use jurisdiction) under the *Islands Trust Act*,[12] rezoned land belonging to MacMillan Bloedel to increase the minimum lot size and prevent family dwellings, with a view to preventing residential development on the Island. This rezoning was found to be both *intra vires* and not implemented in bad faith:

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[7] *Kruse* v. *Johnson* (1898), [1895-99] All E.R. Rep. 105 (Queen's Bench). This 1898 case was in reference to a by-law against singing in the streets.

[8] *Ibid.* at para. 7.

[9] *Shell Canada Products Ltd.* v. *Vancouver (City)*, [1994] 1 S.C.R. 231 (*Shell Canada*). In *Shell Canada* the City of Vancouver passed a by-law refusing to do business with Shell until it would withdraw from South Africa. This was found to be beyond the scope of municipal powers and therefore *ultra vires*.

[10] *Nanaimo (City)* v. *Rascal Trucking Ltd.*, [2000] 1 S.C.R. 232. Declaring a pile of soil to be a nuisance was found not to be an unreasonable assertion of municipal authority even after permits had been granted for the processing of that soil.

[11] (1995), 28 M.P.L.R. (2d) 157 (B.C.C.A.) (*MacMillan Bloedel*).

[12] R.S.B.C. 1996, c. 239 (*Islands Trust Act*).

> by the combined effect of ss.960 and 972 [now 914[13]], supra at p. 20, and s.963, supra at p. 19, the Legislature of British Columbia authorizes a municipality to "downzone", an exercise of power many persons would consider equivalent to expropriation, and to do so without paying compensation.[14]
>
> Both their expressed motives, and their true motives, were directed towards furtherance of the objects of the Islands Trust Act. … It follows that the finding of bad faith can and should be set aside.[15]

The learned judge held that in his view "courts should be slow to find bad faith in the conduct of democratically elected representatives acting under legislative authority, unless there is no other rational conclusion".[16]

The Court of Appeal's decision in *MacMillan Bloedel* was more recently affirmed and applied outside of the *Islands Trust Act* in *Canada Mortgage and Housing Corporation* v. *North Vancouver (District)*, [*CMHC*][17] in which North Vancouver rezoned land owned by CMHC from zoning permitting residential use, to zoning only for recreational purposes. In language emulating that of Lord Russell, Esson J.A. stated that in interpreting the scope of municipal powers judges "should confine themselves to rectifying clear excesses of authority rather than using the terms such as 'improper purpose' and 'bad faith' to substitute the court's view of what is right for the view of the elected representatives".[18]

The Arbutus Corridor: History

The Arbutus Corridor is a stretch of land running north to south through Vancouver, which is owned by Canadian Pacific Railway (CPR), and has been an active rail line since 1901. It is approximately

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[13] *Local Government Act*, *supra* note 4.

[14] *MacMillan Bloedel, supra* note 11 at para. 94.

[15] *Ibid.* at para. 182.

[16] *Ibid.* at para. 191.

[17] 10 M.P.L.R. (3d) 1 (B.C.C.A.) (*CMHC*).

[18] *Ibid.* at para. 33.

10 kilometres long and comprises 45 acres, varying in width from 50 to 66 feet across. For the past five years, this land has been at the heart of a dispute between the City of Vancouver and CPR over its future use. While CPR has fee simple title to the Arbutus Corridor, this title is subject to conditions set out in the *Canada Transportation Act*.[19] The *Act* governs the use of the land for rail and then outlines requirements to be met in the event CPR wishes to discontinue its use as a rail line. As early as 1986, in anticipation of CPR no longer needing the Arbutus Corridor for freight transportation, by resolution Vancouver City Council stated their desire to preserve it for rapid transit purposes after decommissioning.

In 1995 the City added to this resolution an intention to use the corridor as a greenway as laid out in its *Vancouver Greenways Plan*.[20] This would allow for its use by pedestrians and cyclists, and preserve the land as green space. Within the *Vancouver Greenways Plan*, the City identifies the Arbutus Corridor as "a keystone of the Greenways system", and acknowledges that it is "owned by the Canadian Pacific Railway … [and is] in active rail use. In addition, the right-of-way is informally used as an urban trail by pedestrians and cyclists. … Possibilities exist to share transit and Greenway use when the rail line is redeveloped".[21]

Under the *Canada Transportation Act*, the decommissioning of a rail line is a three-year process designed to allow for the land's continued use as a rail line. Sections 142 to 146 outline the requirements to advertise for sale the lands for continued use as a rail line, followed by a condition obligating CPR to offer the land for sale to the City.[22] In early 1999 CPR indicated its intention to the City to begin the process of decommissioning the Arbutus Corridor and on October 14th, 1999,

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[19] S.C. 1996, c. 10.

[20] Adopted July 18th, 2000, this document is only available in hard copy from the City Planning Office. See also, Urban Structure Policy Report recommending its adoption online: City of Vancouver <http://vancouver.ca/ctyclerk/cclerk/950718/p2.htm>.

[21] *Ibid.* Quotes are taken from Madam Justice Brown's decision in *Canadian Pacific Railway Co.* v. *Vancouver (City)* (2002), 33 M.P.L.R. (3d) 214 (B.C.S.C. in Chambers) (*CPR Chambers*).

[22] *Canada Transportation Act*, *supra* note 19, s. 145.

officially began that process. Around the same time, CPR indicated to the City its own plans for developing the land involving both residential and commercial development, in addition to greenways. By June of 2000 CPR had completed a second round of public consultation on its development plans, with a third round to begin the next month.

Though an option to purchase the Arbutus Corridor was to come up in January of 2001, on July 25th of 2000 the City of Vancouver adopted the Arbutus Corridor Official Development Plan (AC ODP). At the heart of this dispute is the fact that the AC ODP effectively prevents CPR from following through with any of its development plans. Section 2.1 of the AC ODP makes the following restrictions with regard to development of the land:

> This plan designates all of the land in the Arbutus Corridor for use only as a public thoroughfare for the purpose only of:
>
> (a) transportation, including without limitations:
>
> (i) rail;
>
> (ii) transit; and
>
> (iii) cyclist paths
>
> …
>
> (b) greenways, including without limitation:
>
> (i) pedestrian paths, including without limitation urban walks, environmental demonstration trails, heritage walks and nature trail; and
>
> (ii) cyclist paths.

While not specifically a rezoning of the Arbutus Corridor, s. 563 of the *Vancouver Charter* sets out that:

> (2) The Council shall not authorize, permit, or undertake any development contrary to or at variance with the official development plan.
>
> [and that]
>
> (3) It shall be unlawful for any person to commence or undertake any development contrary to or at variance with the official development plan.

As a result, the only use CPR may make of its land going forward is its continued use as a rail line, which CPR clearly has no intention of doing. CPR would have no choice but to take the City to court.

In the Courts

In June of 2002, CPR's case against the City of Vancouver was heard before Madam Justice Brown of the BC Supreme Court. CPR alleged that the City's adoption of the Regional Context Statement Official Development Plan and the Arbutus Corridor Official Development Plan were *ultra vires* the authority of the City and constituted a taking of its property for a public purpose without compensation. The relief sought by CPR was compensation for the alleged expropriation of its property.

The legislation preventing a municipal government from rezoning private land to a strictly public use is found within s. 914 of the *Local Government Act*. This section reads as follows:

> 914 (1) Compensation is not payable to any person for any reduction in the value of that person's interest in land, or for any loss or damages that result from the adoption of an official community plan or a bylaw under this Division or the issue of a permit under Division 9 of this Part.
>
> (2) **Subsection (1) does not apply where the bylaw under this Division restricts the use of land to a public use.** [emphasis added][23]

Since the disclaimer in subsection 2 above only refers to by-laws "under this division" (being division 7—Zoning and Other Development Regulation) and to the issuance of permits under division 9, and the case at bar does not involve rezoning, the exception does not apply. Further, as Justice Brown points out, "Section 569[24] is clear, at least to the extent that any exercise of

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[23] *Local Government Act, supra* note 4, s. 914.

[24] *Vancouver Charter, supra* note 3, s. 569 reads as follows:

Property injuriously affected

> **569.** (1) Where a zoning by-law is or has been passed, amended, or repealed under this Part, or where Council or any inspector or official of the city or any board constituted under this Act exercises any of the powers contained in this Part, any property thereby affected shall be deemed as against the city not to have been taken or injuriously affected by reason of the exercise of any such powers or by reason of

powers by the Council pursuant to Part XXVII of the Vancouver Charter cannot be deemed to be a taking".[25]

The chambers judge did, however, go on to find ambiguity within the *Vancouver Charter* as it applies to the present case. Justice Brown interpreted the creation of greenways outlined in the AC ODP as creating streets, or, in the alternative, parks. It is on this definition that Justice Brown applies s. 289 of the *Vancouver Charter*, which states that "Unless otherwise expressly provided, the real property comprised in every street, park, or public square in the city shall be absolutely vested in fee-simple in the city".[26] A hypothetical situation is introduced which Justice Brown asserts would lead to an absurd result and as such, she takes a reading of the *Vancouver Charter* as a whole to make the finding that "It is this ambiguity which leads me to conclude that passing the AC ODP, without a concomitant acquisition of the property, or other agreement with the owner, is not contemplated by the legislation and is ultra vires".[27] Accordingly, Justice Brown found the AC ODP to be invalid and set it aside.

On appeal to the BC Court of Appeal, the City of Vancouver argued that its actions were within its delegated authority under the *Vancouver Charter*. CPR cross-appealed on the grounds that the chambers judge erred in finding that the AC ODP did not constitute a taking, insisting that the City has effectively prevented CPR from making any use of its land other than public use. CPR also cross-appealed on procedural grounds, which was dismissed with relative ease.[28]

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such zoning and no compensation shall be payable by the city or any inspector or official thereof.

[25] *CPR Chambers supra* note 21 at para. 98.

[26] *Vancouver Charter, supra* note 3, s. 289.

[27] *CPR Chambers, supra* note 21 at para. 85.

[28] *Canadian Pacific Railway Co.* v. *Vancouver (City)* (2004), 237 D.L.R. (4th) 40 (B.C.C.A.) (*CPR Appeal).* CPR argued that the City did not follow proper procedures in enacting the bylaw by providing for an insufficient public hearing and failing to disclose the documents requested by CPR. As this

The majority judgment of Esson J.A. looked first to the City's appeal. Upon a close examination of ss. 561 to 563 of the *Vancouver Charter*,[29] Justice Esson found the by-law to have been validly enacted. The City is empowered to designate lands as public thoroughfares through an official development plan and, once enacted by by-law, must not permit development that conflicts with it, with the result of essentially freezing development on such land.[30] In stating these findings, Justice Esson concedes that "from the point of view of CPR, [this] is unfair and unreasonable" and has "no doubt that many right thinking people, not having CPR's direct interest in the issue, would agree", but goes on to state that "that is not a ground for setting aside the By-law. The Court's jurisdiction to set aside a by-law is a narrow one".[31]

With regard to the chambers judge's finding of ambiguity between s. 289 and ss. 561 to 563, Justice Esson disagreed: "[Section 289(1)] will come into play if and when the property is acquired by the City. It says nothing as to the manner or point in time at which the City must acquire title to the property, or at which it becomes a street".[32] Furthermore, s. 569 states clearly that no by-law enacted to establish a development plan can be deemed to be a taking, and hence compensation is not due. In acknowledging the chambers judge's

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was not a zoning bylaw there was no statutory duty to hold a public hearing, and further, in what appears to be an adaptation of the clean hands doctrine, CPR's request for "every piece of paper in any category of record which CPR, based on its sophisticated grasp of the history from 1886 to 2000 of consideration by the City of possible future uses of the Corridor, thought might be found in the City's files" was "so excessively broad and showed so little regard for the question whether any of the documents were pertinent or relevant or, for that matter, whether they ever existed, that the City was in my view fully justified in rejecting it out of hand".

[29] *Vancouver Charter*, *supra* note 3.

[30] *CPR Appeal*, *supra* note 28 at paras. 19-21.

[31] *CPR Appeal*, *supra* note 28 at para. 22.

[32] *CPR Appeal*, *supra* note 28 at para. 32.

assertion that a legislative interpretation that leads to an absurd result may be rejected, Justice Esson pointed out that absurdity "cannot be established by reference to a hypothetical set of facts far removed from the facts of the case at bar".[33] It is also asserted that finding the by-law invalid on the grounds that it is absurd is akin to a finding of unreasonableness, which is barred both by the case law discussed above with respect to deference, and by s. 148 of the *Vancouver Charter*.[34]

As a result, the majority opinion found that "the chambers judge erred in her interpretation of the provisions of the *Vancouver Charter* and in concluding that Council in enacting the By-law of July 21, 2000 exceeded its powers", and subsequently set aside the finding that the adoption of the AC ODP exceeded the powers of the City. He then dismissed both grounds of CPR's cross-appeal, finding from the legislation that the City's actions neither constituted a taking nor were adopted in a manner exceeding their authority.

In a very brief opinion concurring in the result, Southin J.A. found this to be a case where "in arriving at a conclusion … compelled by law" it was a case where she "was obliged to avert [her] nostrils".[35] Though a legally enacted by-law, Justice Southin found that it "can have no purpose but to enable the inhabitants to use the corridor for walking and cycling, which some do (trespassers all), without paying for that use".[36] Justice Southin goes on to insist that the parties negotiate a bargain for the purchase and sale of the land to the city, or, in the alternative, that the Province should intervene and impose a settlement between them. In her final statement, Justice Southin emphasizes her distaste for the situation by calling the current dispute

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[33] *CPR Appeal*, *supra* note 28 at para. 38.

[34] *Vancouver Charter*, *supra* note 3, s. 148 reads as follows:

148. A by-law or resolution duly passed by the Council in the exercise of its powers, and in good faith, shall not be open to question in any Court, or be quashed, set aside, or declared invalid, either wholly or partly, on account of the unreasonableness or supposed unreasonableness of its provisions or any of them.

[35] *CPR Appeal*, *supra* note 28 at paras. 114-115.

[36] *CPR Appeal*, *supra* note 28 at para. 117.

"an absurdity unworthy of this Province which, on the way to the 2010 Olympic Games, is asserting to all and sundry that it is a marvellous place".[37]

On June 7th of 2004, CPR filed an application to the Supreme Court of Canada for leave to appeal and on December 16th of the same year that application was granted. A panel of seven judges of the Supreme Court heard this appeal on November 9th of 2005 and has reserved judgement. The average lapse in time between a hearing at the Supreme Court and the release of the decision is approximately four months.

Analysis

Stemming from the country's roots as a British colony, Canadian law follows the doctrine of parliamentary supremacy, which states that Parliament[38] can make or unmake any law. It is from this perspective, ultimately, that the BC Court of Appeal has examined and decided on this case. The *Local Government Act* and the *Community Charter* (or the *Vancouver Charter* in the present case) clearly set out what a municipal council may do in the governance of local matters. The wording in this enabling legislation with respect to the case at bar is clear in permitting a municipal council to create development plans designating public thoroughfares, as well as insisting that such development not require compensation to private landowners.

While judges have only a very narrow scope when it comes to reviewing municipal actions, it is still unclear where that line is to be drawn. Nevertheless, the case law does show some patterns. Thus far, land use by-laws that have been struck down have been predominantly, if not entirely, restricted to specific zoning by-laws. They have also predominantly been cases in which a zoning by-law was enacted for the purpose of negatively affecting property value with a view to purchasing it at a reduced cost.[39]

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[37] *CPR Appeal*, *supra* note 28 at para. 120.

[38] This refers both to the Parliament of Canada and to the legislatures of each of Canada's provinces and territories.

[39] *Re North Vancouver (District) Zoning By-law 4277*, (1973) 2 W.W.R. 260 (B.C.S.C.).

In 1974, however, the BC Supreme Court quashed a zoning by-law enacted by the City of Burnaby that rezoned land belonging to Columbia Estate Co. as a parking zone, with the intention that it may be used at some future date as a park-and-ride facility.[40] In light of more recent jurisprudence, however, I find it unlikely that this case would elicit the same response today. In *CMHC*, the District of North Vancouver rezoned lands belonging to CMHC from residential to purely recreational, effectively freezing future development. The District rezoned the land for the purpose of preventing immediate residential development, and since that was found to be a valid policy goal of the District and the rezoning was done within the District's statutory authority, the rezoning was upheld to be valid.

MacMillan Bloedel[41] was a case in which the Galiano Island Trust Committee enacted by-laws rezoning land belonging to MacMillan Bloedel to preclude residential development. While it was alleged that the zoning by-laws were enacted for motives ulterior to those expressed to Macmillan Bloedel, and this was the basis for a finding at trial of bad faith, the Court of Appeal overturned the trial decision, finding that since both the expressed and ulterior motives for the rezoning were valid objectives in land use planning, the by-laws were valid. The Court concluded: "An ulterior purpose that is within the ambit of the delegated power is not an improper purpose. To render the by-law illegal, the purpose of the by-law would have to extend beyond the powers of the delegated authority".[42]

Another common thread to the jurisprudence in land use planning is that land use planning by-laws will generally be upheld where the restriction does not affect current or historical use. It is in this vein that *Yuen* v. *Oak Bay (District)*, [*Yuen*][43] was decided. The owners of a cemetery in Oak Bay wished to subdivide part of their land that had

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[40] *Columbia Estate Co.* v. *Burnaby (District)* (1974), 49 D.L.R. (3d) 123 (B.C.S.C.). Note: contrary to *Re North Vancouver Zoning By-law 4277*, there was no expressed or implied intent to purchase the land at any time in the near future.

[41] *MacMillan Bloedel, supra.* note 11.

[42] *MacMillan Bloedel, supra* note 11 at para. 182.

[43] 90 B.C.L.R. (2d) 313 (C.A.), [*Yuen*].

never been used as a cemetery, for the purpose of developing that part residentially. The District of Oak Bay created a by-law outlining a minimum property size that could contain a cemetery (which, consequently, was a size larger than the plot of land at issue here) and zoned the land in such a way as to prevent residential development. Because the zoning affirmed the land's continued use as a cemetery, the by-laws were upheld.

Conclusions

In applying this jurisprudence to the present case, the following becomes clear. The AC ODP enacted by the City of Vancouver was enacted within the City's authority under the relevant legislation. Though not specifically zoning by-laws, the development plan does prevent any development of this land by CPR for the foreseeable future, and though it is clear CPR has no intention of continuing to operate a rail line along the corridor, a similar objection was rejected in *Yuen*, where the portion of the cemetery land in question was not usable for cemetery purposes.

Insofar as good faith and intention can be considered by the judiciary, there is a great deal of evidence on the part of the City that it long held (since 1986 at least) an intent to negotiate with CPR with a view to the acquisition of its land along this corridor. For example, a January 2000 policy report on urban structure summarized the various policy statements made by the City over the previous 15 years.[44] This document concluded with an acknowledgement of the various zoning by-laws that apply to different portions of the Arbutus Corridor and affirms policy direction towards acquiring this land. Further, on February 1st, 2000, in a regular council meeting, a motion was passed in relation to the Arbutus Corridor, concluding "[t]herefore be it resolved that the City of Vancouver enter into immediate discussions with the CPR with a view to assuming control of the Arbutus Corridor for the purpose of preserving and maintaining the integrity

[44] *City of Vancouver Policy Report on Urban Sructure*, Jan. 18, 2000, online: City of Vancouver <http://vancouver.ca/ctyclerk/cclerk/000118/P3.htm>.

of the corridor for transportation use".[45] As no negotiations have taken place to buy the land from CN, it is unclear where this case stands on the good faith of the City or whether the City's intent in passing the AC ODP has crossed the line into an area of judicial review open to the Supreme Court. As the current use being made of the corridor is principally an illegal one—trespassing by local citizens—and the AC ODP does nothing more than perpetuate that until such time as the City acquires the land from CPR, the Supreme Court may find room to interject and find the City has overstepped its bounds.

As a result of the principles of judicial deference to municipal authority that have been set forth in the cases discussed above, and in many others (which this paper does not have the scope to mention), courts are reluctant to interfere with municipal governance. As evidenced by several cases that have been overturned on appeal, including the present case, it seems a clearer direction is needed from our nation's highest court on that fine line between appropriate and improper purpose when it comes to legislating land uses in relation to private land. I expect this case to be the one to draw that line.

Postscript: Trespassers One and All

On Thursday, February 23rd, 2006, the Supreme Court of Canada delivered its judgement in relation to CPR's appeal of the BC Court of Appeal's decision to allow the by-law to stand.[46] With a noticeable lack of interest with concerns of fairness or attention to the reasons for the enactment of this particular by-law, the Court addressed the issues presented to it in a strictly statutory analysis. Noting twice in

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[45] City of Vancouver Council Meeting, *Motion*, Feb. 01, 2000, online: City of Vancouver <http://vancouver.ca/ctyclerk/cclerk/000201/motionb.htm>.

[46] *Canadian Pacific Railway Co.* v. *Vancouver (City)*, 2006 SCC 5

her decision her feelings of sympathy for CPR, Chief Justice McLachlin found that on the strict wording of the enabling statutes, the City of Vancouver was well within its powers to restrict development on the Arbutus Corridor. Further, it was also within the City's powers to refuse compensation.

Though it does not directly affect the private ownership of the land itself, the impracticality of any measures that might attempt to stop the public from trespassing on this land has effectively, for the foreseeable future, rendered this stretch of land public. In response to the judgement rendered, CPR has noted in a media release on its Web site that "[the ruling] does not change the current status of the property as a rail freight corridor nor does it provide for the corridor to become public lands", and that "[a]ny change from freight rail use will require purchase of the land from CP".[47] In fact, in anticipation of this decision, CPR has set up a Web site, <arbutuslands.com>, with the intention of creating a "[v]ision for the Arbutus Lands [that] will reflect the community's vision for the future of the Lands while considering [several] guiding principles of sustainability".[48]

Time will tell what will ultimately become of this stretch of land. It is abundantly clear, however, that without the potential for economic use, this land, once valued at over CDN$100 million,[49] is now likely available for a song. This substantial devaluation is directly attributable to the decision of the City of Vancouver to designate the land for use only as a public thoroughfare. With its collective hands

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[47] Canadian Pacific Railway Co., "Supreme court rules on Arbutus lands but future use still to be determined" news release (23 February 2006) online: CP Rail

<http://www8.cpr.ca/cms/English/Media/News/General/2006/Arbutus.htm>.

[48] Canadian Pacific Railway Co., online: <http://www.arbutuslands.com/guiding-principles/>

[49] Society Promoting Environmental Conservation (SPEC), "Majority of public wants to keep Arbutus Corridor for transportation" news release (26 January 2000), online: SPEC

<http://www.spec.bc.ca/ArbutusCorridor/public_opinion_poll.html>.

tied by the statutory authority granted by the legislative assembly of British Columbia to the City, the judiciary has had no choice but to allow this to happen.

CONTRACTUAL VALIDITY OF END USER LICENCE AGREEMENTS

Renée Zmurchyk

End User Licence Agreements (EULAs) specify the parameters governing the use of a product and may be found on all software. Originally, EULAs were created simply to limit product liability and a manufacturer's warranty on goods but have since evolved into extremely elaborate contracts, often containing highly restrictive terms. EULAs are typically formed with consumers who have no bargaining power, where negotiation is nonexistent, and true acceptance is frequently not required. The validity and enforceability of EULAs and, more specifically, terms within EULAs, has continued to perplex those in the software world. Even within the courts there has been considerable controversy. An exploration of the various forms in which EULAs may be presented, the terms contained therein, as well as recent case law will provide insight into the current state of these agreements.

Part I: Forms of EULAs

EULAs can take on many forms, some of which are typically known as clickwrap, browsewrap and shrinkwrap agreements. These agreements have in common a lack of negotiation, as the contract is dictated by the producer and acceptance is indicated by some act other than a written signature. This article provides a review of the current state of EULAs and the various ways in which they may be presented to the consumer.

Clickwrap Agreements

Clickwrap agreements require the user to scroll through the agreement and confirm acceptance of the terms and conditions by taking some form of positive action, such as clicking an "I accept" button, prior to use of the program. The installation or use of the software is conditional on the user accepting the agreement and thereby consenting to abide by its terms.

The use of clickwrap agreements is growing. Today, there remains no doubt that legally binding contracts between users and manufacturers may be formed online. The momentous case of *Rudder* v. *Microsoft Corporation,* [*Rudder*][1] established that clickwrap agreements are valid and legally binding contractual agreements. In *Rudder*, Microsoft filed for a permanent stay of proceedings, claiming that the plaintiffs agreed online to the exclusive jurisdiction clause stating that the State of Washington was the governing jurisdiction for any disputes. The plaintiffs argued that the online agreement should not be enforced because they did not receive specific notice of the clause and were therefore unaware of its existence. In rejecting the plaintiffs' claim, the Court noted that the plaintiffs were required to click an "I agree" button twice during the process and that the forum selection clause was no more difficult to read than any other term. The Court compared the online agreement to an agreement in writing, holding that it must be given the same enforcement.[2]

The recent 8th Circuit Court decision in *Davidson & Associates, Inc.* v. *Jung,* [*Davidson*][3] affirmed that clicking on an "I Agree" button at the end of a EULA creates a binding agreement and will be enforceable against the consumer. The Court took into account that the software packaging contained notice on the outside of the box stating that it is subject to a EULA, the defendants assented to the EULA by clicking the "I agree" button, and then proceeded to install the game. Terms of the EULA were disclosed prior to game installation and the

[1] (1999), 2 C.P.R. (4th) 474 (Ont. Sup. Ct.) [*Rudder*].

[2] *Supra* note 1 at para. 19.

[3] 422 F.3d 630 (8th Cir. 2005) [*Davidson*].

defendants expressly consented to those terms. These factors were found to be sufficient notice to create a binding contract.[4]

Few cases have considered the validity of clickwrap licences, however; where their validity has been challenged, the terms of the contract have ultimately been upheld.[5] It appears that future courts will find clickwrap agreements to be valid binding contracts as long as a standard of notice is met. The recent case law indicates this onus may be satisfied where the term being challenged is plainly stated within the EULA and a positive action for assent to the entire EULA is required.

Browsewrap Agreements

Browsewrap agreements set out the terms somewhere within the site but do not require the user to review or agree to the terms prior to use of the program. Uncertainty remains surrounding the enforceability of browsewrap agreements because of the lack of active consent required by the user. There are very few cases that deal directly with browsewrap agreements.

In *Register.com, Inc.* v. *Verio, Inc.*,[6] the New Jersey Superior Court Appellate Division upheld the enforceability of the browsewrap agreement on the basis of implied consent, whereby the end user had agreed to the terms simply through installation or use of the software. The browsewrap agreement was recognized based on the fact that it was designed and presented carefully. The Court noted that the terms of use were clearly posted on the Web site and that the defendant's conduct in using the site constituted agreement of the terms.

However, other courts have held that browsewrap agreements are unenforceable.[7] For example, in *Ticketmaster* v. *Tickets.com*,[8]

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[4] See pg. 66 for further analysis of the *Davidson* case.

[5] See notes 1 and 3.

[6] 126 F. Supp. 2d 238 (S.D.N.Y. 2000).

[7] See *Specht* v. *Netscape Communications Corp* 150 F. Supp. 2d 585 (S.D.N.Y. 2001), for further discussion on browsewrap agreements. In this case the agreement was unenforceable.

[8] 2003 U.S. Dist. LEXIS 6484 (D. Cal. 2003) at 2.

Ticketmaster argued that its browsewrap agreement was analogous to a shrinkwrap agreement, where notice on the exterior packaging states that opening the package constitutes adherence to the licence agreement. Ticketmaster set forth its terms and conditions on its Web site homepage, along with a statement providing that anyone who continued using the site was deemed to have agreed to those terms. The Court was not persuaded by this argument, ruling that terms on a Web site are not necessarily obvious and may be easily missed. In finding that no implied agreement existed, the Court noted that many customers will not bother to read the fine print and therefore, it cannot be said that merely putting the terms on the Web site creates a contract with anyone using that site.

According to a recent study of precedents and scholars, it was suggested that a browsewrap agreement will likely be valid and enforceable where the following four elements are satisfied: (1) the user is given adequate notice that the terms exist; (2) the user has a meaningful opportunity to review those terms; (3) the user is given notice that taking a specified action results in assent to the specified terms; and (4) the user performs that specified action.[9]

Shrinkwrap Agreements

Shrinkwrap agreements have the terms contained on or inside the software box. Originally, shrinkwrap agreements were located on the exterior of the software packaging, allowing consumers to read the terms prior to purchase. The concept was that the licence terms were deemed to be accepted once the user opened the shrinkwrap seal on the software product. This has changed in recent years, possibly to improve the visual appearance of the box, with licences now being placed inside the packaging. Acceptance of shrinkwrap agreements is generally indicated by the use of the software and failure to return it within a specified period of time. Arguably, reading a notice inside a box is not equivalent to the degree of assent that occurs in a clickwrap agreement, where the consumer must take a positive action to agree to the terms, although the validity of shrinkwrap agreements has been upheld.

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[9] Christina L. Kunz et al., "Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements" (Nov. 2003) 59 The Bus. Lawyer 291 (QL).

Step-Saver Data Systems Inc. v. *Wyse Technology*[10] was one of the earliest cases of significance. The 3rd Circuit Court upheld the validity of a shrinkwrap agreement between two businesses. Other courts, however, have refused to enforce shrinkwrap agreements, considering them to be invalid. In *Vault Corp.* v. *Quaid Software,* [*Vault*][11] the 5th Circuit Court refused to enforce the terms of a licence agreement because some terms of the agreement were preempted by federal copyright and patent law. At the district court level, it was stated that the shrinkwrap licence was a contract of adhesion that was only enforceable if the Louisiana statute, explicitly validating the shrinkwrap licence, was valid and not preempted by federal copyright law. The Court concluded the Louisiana statute was not valid, at least to the extent that its provisions were contrary to federal copyright policy on the prohibition of copying for any purpose and prohibition on reverse engineering.

More recently, in *ProCD, Inc.* v. *Zeidenberg,* [*ProCD*][12] it was held that a shrinkwrap licence was binding on the purchaser. In this case, the purchaser had notice of the licence terms as there was a disclaimer on the outside of the box indicating the transaction was subject to a software licence. Under the terms contained inside the box, the purchaser had a right to return the software if the terms were unacceptable. The Court noted that shrinkwrap licences are enforceable as a general matter unless their terms are objectionable on grounds applicable to contract, such as violation of a rule of positive law or unconscionability.

There remains little doubt that EULAs can be enforced by courts subject only to substantive contract law. An agreement may be unenforceable if it breaches the established rules of contract law, such as unconscionability.[13] Clearly, questions remain about the enforceability of properly drafted shrinkwrap, clickwrap and browsewrap agreements, although many jurisdictions have upheld their enforcement. For the time being, browsewrap and shrinkwrap

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[10] 939 F.2d 91 (3rd Cir. 1991).

[11] 847 F.2d 255 (5th Cir. 1988) [*Vault*].

[12] 86 F.3d 1447 (7th Cir. 1996) [*ProCD*].

[13] See pg. 70 for further discussion on unconscionable terms.

agreements should be used cautiously. Historically, shrinkwrap agreements have not been upheld, but since the *ProCD* decision they are more likely to be endorsed by the courts. Future cases will determine whether *ProCD* has set precedence for upholding the contractual validity of shrinkwrap agreements. Since the *ProCD* decision in 1996, a similar case has yet to be tried. Ultimately, clickwrap agreements should be the preferred method wherever possible to ensure the EULA creates a binding online contract.

In the marketplace, clickwrap agreements are currently limited to online software programs. In the near future, it is likely there will be a shift to an increasing use of clickwrap agreements. Based on recent case law and the enforceability of this form of agreement, companies will expand their use. It is foreseeable that technology will be designed for game consoles and software computer games that require users to actively assent to the terms of EULAs. In order to maximize enforceability of EULAs, companies may continue usage of browsewrap and shrinkwrap agreements, but will also require end users to assent to a clickwrap agreement before using their products.

Part 2: How EULAs Are Limiting End User Rights

EULAs often contain extensive terms that attempt to highly limit consumer rights. For example, common EULAs prohibit consumers from criticizing products publicly or from reverse engineering a product. Many EULAs include terms that provide for automatic software updates and installations, while disclaiming any liability for faulty products or products that do not operate as advertised. Manufacturers also commonly reserve the right to change their EULA, without notice to the consumer, deeming that continued use of the product constitutes acceptance of the additional terms. Not only are consumers required to agree to all the onerous terms listed, but also agree to any contractual terms that may be added in the future. These terms directly conflict with many legal rights including freedom of speech, product liability, privacy rights, security rights and intellectual property rights.

There continues to be considerable debate and uncertainty amongst the legal community about what terms will be enforced by the courts. The following review of current law will provide some insight into the validity and enforceability of two specific provisions found within EULAs: unilateral change to the EULA and reverse engineering.

Unilateral Change to the EULA

Many EULAs contain a term providing that the user consents to all future changes in the agreement including any new rules, policies, terms or conditions on use of service. Furthermore, the user's continued use of the product constitutes acceptance of these new terms, regardless of whether he or she has received notice. By agreeing to this provision, users are agreeing to any future terms that may appear in the agreement, which amounts to a unilateral alteration to the contract.

The Ontario Superior Court, in *Kanitz* v. *Rogers Cable Inc.*,[14] affirmed that unilateral changes to the service agreement were valid and binding on the user. The plaintiffs commenced a class action prompted by service difficulties they experienced with their high-speed Internet access. Prior to installation of service, customers were required to sign a user agreement, which included a provision providing that the agreement could be amended at any time and that customers would be notified of changes on the defendant's Web site, through e-mail or by post. Rogers argued that the class action should be dismissed because the user agreement provided for arbitration as the exclusive dispute resolution mechanism. The original online user agreement did not state that disputes must be resolved through arbitration but had been updated to include this clause. The change was posted on the Web site within the EULA, along with a notice that the agreement had been amended. The plaintiffs argued that the amending provision amounted to a unilateral imposition of terms, which the Court should not sanction. They also argued that they did not have sufficient notice of the revised terms because Rogers did not provide notice by e-mail or postal mail and therefore, it should not be binding on the subscribers. The Court concluded that adequate notice was provided and they were bound by the terms when they continued to use the defendant's service.

There will always be exceptions to this finding and each future case will be evaluated on its own merits, although this decision regarding an amending provision places onerous obligations on users to frequently check the Web site for any changes or amendments. Where a user agreement provides that it may be amended at any time, continued use of service after posting the amendment will normally

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[14] (2002), 58.O.R. (3d) 299 (Ont. Sup. Ct.) [*Kanitz*].

constitute deemed acceptance of that amendment, despite absence of an express agreement to the unilateral change.

Reverse Engineering

Reverse engineering is the process of beginning with a finished product and working backwards to figure out how the product was made and how it operates. The fair use doctrine[15] is an aspect of Canadian[16] and American[17] copyright law that provides for the use of copyrighted material in another author's work.[18] Section 107 of the US *Copyright Act* states that "the fair use of a copyrighted work, including such use by reproduction in copies … for purposes such as criticism, comment, new reporting, teaching, scholarship or research, is not an infringement of copyright".[19] Copyright law is aimed at protecting an author's expression. It does not confer unlimited protection and privileges, but is designed to reward individuals for their creation, in order to benefit the public as a whole. Copyright will protect creativity in video games and software but will not extend protection to all

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[15] The fair use doctrine is known as the fair dealings defence in Canada. The Canadian fair dealing defence is substantially similar to the American fair use doctrine. See Robert G. Howell, "Reformulation of Copyright by the Supreme Court of Canada: *Théberge*, *CCH* and *Tariff 22*" (Paper presented at the Intellectual Property Law symposia in Vancouver, BC, June 2004) [unpublished] for further discussion on the similarities between American and Canadian fair use/dealing exceptions.

[16] *Copyright Act*, R.S. 1985, c. C-42, s. 29.

[17] *Copyright Act*, 17 U.S.C. § 107.

[18] The Supreme Court of Canada recently established the application of the fair dealing exception in Canadian copyright law in *CCH Canadian Ltd.* v. *Law Society of Upper Canada,* 2004 SCC 13. The Supreme Court of Canada did not address the scope of the fair dealings defence in relation to reverse engineering. The most recent case law on reverse engineering and copyright protection is from the United States. Therefore, given the similarities between the copyright Acts in Canada and in the United States, this paper will focus on the application of the fair use doctrine in American case law.

[19] *Supra* note 17.

functional aspects of those products. Reverse engineering has been widely accepted as a legal fair use of copyrighted material.[20]

To prove copyright infringement, the plaintiff must show ownership of a valid copyright and that copying of protected expression took place. The fair use defence allows courts to maneuver around the strict application of copyright laws. Fair use has been defined as a "privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent."[21] This defence provides for creativity, which copyright laws are designed to foster. Courts must decide the applicability of the fair use defence on a case-by-case basis in light of the purpose of that doctrine and the *Copyright Act*.

The *Sega* v. *Accolade,* [*Sega*][22] and *Sony* v. *Connectix Corporation,* [*Sony*][23] decisions clearly show that reverse engineering is considered fair use so long as that use is aimed at understanding the technology in order to facilitate further technological advancement. The issue raised in *Sony* was whether the intermediate copying of software during the reverse engineering process should be considered fair use under the *Copyright Act* when the final product contains no infringing code. It was determined that the intermediate copying was necessary. The Court found that Connectix reverse engineered a product that would be compatible with games designed for the Sony PlayStation and that purpose was legitimate under the first statutory factor of the fair use analysis. The Court also concluded that the end product did not contain any code that infringed on Sony's copyright (although it noted that this factor is of little weight). The final factor was the effect on the market for the Sony PlayStation. Connectix's game console was a new platform for PlayStation games. It was likely that Sony would sustain economic losses on the sale of their PlayStation consoles,

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[20] This was affirmed in *Sega* v. *Accolade* U.S. App. LEXIS 78 (9th Cir. 1993) and *Sony* v. *Connectix Corporation* 203 F.3d 596 (9th Cir. 2000).

[21] Derek Prestin, "Where to Draw the Line Between Reverse Engineering and Infringement: Sony Computer Entertainment, Inc v. Connectix Corp." (2002) 3 Minn. Intell. Rep. Rev. 137 (citing H. Ball, *Law of Copyright and Literary Property* 260 (1944)).

[22] 1993 U.S. App. LEXIS 78 (9th Cir. 1993) [*Sega*].

[23] 203 F.3d 596 (9th Cir. 2000) [*Sony*].

although it could actually increase sales for Sony games. This was insufficient to compel a finding that the fair use doctrine should not be applied. In *Sega*, it was determined that where there is a legitimate reason for a developer to study or examine unprotected functional aspects of a copyrighted program and where there are no other means to do so, the disassembly of the program is considered a fair use under the fair use doctrine.

The recent 8th Circuit Court decision in *Davidson*[24] established that EULAs can override protections under federal copyright law, including the fair use doctrine. An in-depth analysis of this decision evidences how far courts are willing to go to protect the sanctity of EULAs. *Davidson* dealt with the right to reverse engineer in order to build an open-source network game emulator. In order to play many popular Blizzard video games over the Internet (such as Diablo and Starcraft), gamers must connect through Blizzard's proprietary Battle.net service. The Battle.net mode of operation allows Blizzard games to be played online, using their servers. Dissatisfied with the occasional difficulties in Battle.net service, a group of independent programmers created a functional alternative to the plaintiff's online gaming service, known as bnetd. In order to design bnetd, the programmers created their own servers and reverse engineered Blizzard games and protocol from Battle.net to figure out how to get Blizzard games to operate on their servers. This information was used to give players access to the bnetd server. Battle.net servers contained a proprietary mechanism, which was not incorporated into the bnetd servers, that prevented pirated copies of Blizzard games from being played online. Yet once users began to play the game, there was no discernible difference from the standpoint of the participants in the online game. Blizzard sued the creators of bnetd for reverse engineering their products, claiming the programmers were in violation of the EULA.

The *Davidson* case differs from *Sega* and *Sony* because of the existence of a EULA. Blizzard's EULA contained a term expressly prohibiting reverse engineering of their products. The defendants in *Davidson* argued that even if the EULA is enforceable under contract law, it should not be enforced because it prohibits the fair use of Blizzard software. Their main argument was that reverse engineering is a fair

[24] *Supra* note 3.

use under copyright law and that copyright law overrides Blizzard's EULA. In *Davidson*, the Court concluded that contractual agreements that waive the right for users to reverse engineer products are valid and, therefore, the defendants waived their statutory rights by assenting to the EULA.

The *Davidson* case found that EULAs can override established intellectual property rights. This is not an astounding revelation. It is nothing new in the world of contracts that two parties can contract out of their legal rights. Parties have long been able to sign a contract that removes a privilege or right they otherwise would have had. For example, free speech can be explicitly contracted away through a gag order, or implicitly by doctors and lawyers. Courts have always been reluctant to set aside a contract created between two competent parties. Where rational, competent parties create a contract prohibiting reverse engineering, courts will not override that provision simply on the basis that it removes rights.

Debatably, this case was really more about issues of contract law rather than copyright law. According to the decisions in *Sega* and *Sony*, if there was no EULA, the programmers likely would not have been liable because the fair use defence would have been upheld. The problem was that the defendants in *Davidson* accepted the explicit agreement of terms, including the prohibition on reverse engineering. Arguably, the Court was essentially bound to uphold the sanctity of the EULA as an enforceable contract despite the defendant's attempts to circumvent it.

In reaching its decision, the Court reviewed the following cases. In *Vault*,[25] the District Court refused to enforce the terms of a licence agreement, ruling that the state *Software Licence Enforcement Act*, which prohibited reverse engineering, was preempted by federal law. In a more recent case, the Federal Circuit held in *Bowers* v. *Baystate Technologies, Inc.*[26] that a broad prohibition on reverse engineering in a shrinkwrap licence was enforceable and not preempted by the federal *Copyright Act*. The Court adopted the analysis of *ProCD*[27] in holding

[25] *Supra* note 11.

[26] 68 Fed. Appx. 966 (Fed. Cir. 2003).

[27] *Supra* note 12.

that parties may contract out of the rights provided in the *Copyright Act*.[28] The Court in *Davidson* distinguished the ruling in *Vault*, finding that it simply stood for the fact that a state law prohibiting all copying is preempted by the *Copyright Act* and therefore does not apply to this situation. The Court found that the issue in this case was not one of conflicting laws, but rather involved contractual agreements.[29]

Many commentators have taken the *Davidson* ruling to stand for the fact that any reverse engineering of software and video games is now illegal. For example, Jason Schultz, a staff attorney for EFF who worked on the case, stated that "[the ruling] essentially shuts down any competitor's add-on innovation that customers could enjoy with their legitimately purchased products".[30] Members of the gaming community have suggested that the Court's decision makes it unlawful in most cases to reverse engineer any commercial software program, thus making it unfeasible to create new programs that interoperate with older ones. Future cases will dictate the accuracy of these opinions, although a close review of the judgment in *Davidson* seems to suggest this criticism may be overstated.

There was much more involved in this situation than simply the creation of an add-on innovation. Most importantly, the defendants reverse engineered protocols after expressly agreeing not to through acceptance of the EULA. They disassembled a Blizzard game to figure out how to implement password protections when creating an account in Battle.net mode, made an unauthorized copy of a Blizzard game to test the interoperability of their creation, redirected protocol, looked into Blizzard client files and performed data dumps. They also used a program to figure out how Blizzard games displayed ad banners so that people running the bnetd emulator could display ads in the same format and they took approximately 50 icons and symbols from the Battle.net site and built them into their server. Not only

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[28] There was a strongly worded dissent in this case, arguing that shrinkwrap licences that override the fair use defence should be preempted by the US *Copyright Act*.

[29] *Supra* note 3 at 14.

[30] "Federal Court Slams Door on Add-On Innovation", September 1, 2005, online: EFF <http://www.eff.org/news/archives/2005_09.php>. (last accessed September 20, 2005).

were the Blizzard games designed to connect to Battle.net servers but once game play began, a user perceives no noticeable difference between Battle.net and bnetd. The programmers attempted to mirror all of the user-visible features of Battle.net, including online discussion forums and access to the programs computer code for others to copy and modify. The end result was that individuals using Blizzard games could play their game over the Internet via bnetd rather than Battle.net.[31] It is also important to note that the defendants were not average gamers. They were sophisticated programmers and, therefore, were not as likely to be subjected to an inequality in bargaining power. All of this may suggest that the average gamer who creates a game modification will not be prosecuted by game companies and, if they were, arguably the court would not reach the same conclusion.

The fact remains that the widespread use of EULAs today may essentially ban the use of reverse engineering to design new and improved products. It is not easily disputed that courts should protect the sanctity of contracts when entered into by two competent parties. Subsequently, if reverse engineering is an important tool, there must be another way to ensure its continued use. For example, legislation could be introduced to prohibit some of the terms found in EULAs, although this should only be done if the value of reverse engineering is greater than the value lost by not upholding private contracting.

A tension exists between the benefits and downfalls of reverse engineering, although it is a broad and important social interest. Technological innovation must be supported, but obviously game creators see value in prohibiting reverse engineering. If reverse engineering were allowed, game creators would spend more resources to protect their technology against use by others. This would increase overall costs, which would be passed on to the consumer. Conversely, reverse engineering has tremendous value and the ban of it results in negative consequences to society. Reverse engineering increases creativity, innovation and competition. Banning reverse engineering hinders technical innovation. Reverse engineering provides new and enhanced products for consumers. It also ensures that competitors

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[31] Hear audio recordings of the oral arguments before the 8th Circuit Court of Appeals, online: EFF <http://www.eff.org/IP/Emulation/Blizzard_v_bnetd> (last accessed November 15, 2005).

are able to enter into the market. The effect of prohibiting all reverse engineering goes well beyond game publishers. It has clear positive outcomes for the economy, but for the meantime, it appears that courts are bound to uphold private contracts unless they are willing to strike down these onerous terms, possibly through a finding of unconscionability. The tension between reverse engineering and contracts must be balanced by the courts and the government. Future cases and potential legislation will determine the outcome.

Unconscionability

The defendants in *Davidson* argued that even if the EULA was a binding contract, it was an unconscionable contract and was therefore unenforceable.[32] One concern arising from the *Davidson* case was a potential inequality of bargaining power between the two parties. It was purported that the EULA was a contract of adhesion because it does not square with the reasonable expectations of the parties, as no member of the public would expect to pay for a game and then be unable to use it simply because they did not agree to the licence terms. No reasonable person would expect to be barred from installing a game unless he or she complied with the EULA.

The basic test applied for unconscionability is "whether, in light of the general background and the needs of a particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract".[33] In the context of standard form contracts, unconscionability is characterized by the "absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them".[34] In order to find the existence of unconscionability, both a procedural and a substantial element must be present. A sliding scale is used in applying these two elements, which allows for a greater degree of one element and a lesser degree of the other to result in a finding of unconscionability.

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[32] This was argued in the District Court but was not at issue at the 8th Circuit level. See *Davidson* v. *Internet Gateway*, 334 F. Supp. 2d 1164 (D. Mo. 2004).

[33] Cal. Code 1670.5 (2004) Legis. Comm. Cmt. (1). Cited at 21 of *Davidson.*

[34] *Fanning* v. *Fritz's Pontiac-Cadillac-Buick*, 322 S.C. 399 (S.C. 1996).

Substantive unconscionability looks to the actual terms of the agreement, while procedural unconscionability focuses on the manner in which the contract was negotiated and the circumstances of the parties at the time of formation. Procedural unconscionability may be shown by either an inequality in bargaining power or unfair surprise. This may be evidenced by terms that are unreasonably favourable to one party, terms hidden in the contract, or where one party has substantially lower education levels. Substantive unconscionability may be shown by an overly harsh allocation of risks or unjustifiable costs or a great price disparity. Where a court finds that a contract or clause is unconscionable at the time it was made, it can refuse to enforce the contract or limit the application of that clause to avoid an unconscionable result.

The Court in *Davidson* ruled that the contract was neither procedurally nor substantially unconscionable. Unfortunately, a finding of unconscionability depends heavily upon the subjective preferences of individual courts. In concluding that the agreement was not procedurally unconscionable, the Court did not clearly explain its reasoning. It found unequal bargaining power between the parties but decided that there was no procedural unconscionability because there was no element of surprise surrounding the contract terms. The defendants were not "unwitting members of the general public", but were computer programmers and administrators familiar with the language used in the contract.[35] The Court affirmed its reasoning by stating that the defendants had the right to agree to the terms and play the game, return the game for a refund, or they could have selected a different game. However, the fact that other products are available on the market does not represent a meaningful choice for the defendants or any consumer, because almost all games contain a EULA with similar terms. If the defendants in this case were unwitting members of the general public, it is easy to conceive of them being surprised by the onerous terms of the EULA and the Court may have found the existence of procedural unconscionability.

The Court further failed to address why the contract was not substantively unconscionable, only stating that the EULA did not impose harsh or oppressive terms. According to the Court's definition of substantive unconscionability, the contract did not impose a one-

[35] *Supra* note 32 at 22.

sided result. It is undisputed that the EULA protects the economic and intellectual investments of the drafter. The creator of the EULA benefits from the agreement while binding the user to a number of strict terms, which are clearly not created for the benefit of that user.

Part III: Future Possibilities

Since the *Davidson* decision, the issue is no longer whether prohibition on reverse engineering can be a term of a contract in a EULA, as it clearly can be, but rather how far courts will go to uphold the rights of publishers in a EULA and where, if ever, they will find the agreement to be unconscionable. Consumers often do not understand how limiting EULAs are on their rights. Undoubtedly, online agreements are valid contractual agreements and parties are free to contract out of legal rights, but at what point will the courts see that consumers have no other option but to agree to the contract? In today's marketplace, if consumers wish to use software, there is no real meaningful choice; they must assent to the terms of the EULA, and in their current state, these agreements are severely limiting consumers' rights.

It should be noted that the *Davidson* Court may have lacked a true understanding of the gaming community. The Court disproved of the fact that bnetd was not created for commercial purposes since the defendants did not attempt to profit financially from their creation.[36] The defendant's goal is common in the gaming world; they created a product to improve the gaming experience. They were simply frustrated with the poor service provided on the Blizzard server. It was not mentioned in the case, but the decision seems to infer that since there was no commercial purpose, the defendants were engaged in a malicious act directed towards Blizzard in an attempt to cut into their market share. That seems to be the only logical explanation as to why the Court would even point out the fact that the server was not created for commercial purposes. This appears to be one example of how out of touch the Court was with the video game world and the purpose of creating modifications. Viewed from another standpoint, this leaves open the possibility that future cases may be decided differently, providing more protection to the end user, as the legal

[36] *Supra* note 3 at 18.

community increases their understanding of modifications and the gaming community as a whole.

The *Davidson* ruling also seems to leave open some possibility that future cases may hold certain terms of a EULA to be unconscionable, particularly where the user is an "unwitting member of the general public".[37] In most situations, the EULA will not affect average consumers or influence their purchasing decisions, nor will it have any lasting effect on their lives. This presents the current problem that publishers can use EULAs to suppress minority rights, such as the right to reverse engineer, and only a limited number of people will be affected. Ideally, as the general public learns more about EULAs and how they are being used to deprive consumers of basic rights they may take for granted, future challenges may well become more common. As one article analogized,

> [m]any people treat EULAs with the same reverence they do the tags on mattresses that say, '*Do not remove this tag under penalty of law.*' They scoff at the idea that anyone could enforce such a bizarre rule. Increasingly, however, we are seeing consumers and software developers threatened with lawsuits for engaging in the digital equivalent of ripping tags off a mattress.[38]

The question remains: How will the seminal outcome in *Davidson* affect the software world?[39] Predictably, we will see an increase in the use of clickwrap agreements to present EULAs, as *Davidson* has authenticated their validity. Perhaps this case will not have a long-term negative impact on the ability of gamers to create new game innovations from existing products. Rather, it may represent the need for more certainty and parameters around the use of EULAs. Reverse

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[37] *Supra* note 32 at 22.

[38] Annalee Newitz, "Dangerous Terms: A User's Guide to EULAs", online: EFF <http://www.eff.org/wp/eula.php> (last accessed October 20, 2005).

[39] For an interesting audio discussion of what the Blizzard decision means for open-source programmers, technologists and consumers, see the following link for a radio recording with University of Pittsburgh law professor Michael Madison and programmer Seth Finkelstein. Online: IT Conversations <http://www.itconversations.com/shows/detail259.html> (last accessed Nov. 15, 2005).

engineering is a vital function. This is clearly recognized by the legislators, as it was found to be an important use and, therefore, was not prohibited by intellectual property laws. It appears the Court in *Davidson* was essentially bound to uphold the entrenched laws of contract. So now it is up to the legislator and end users to respond.

Little doubt remains that EULAs are enforceable in virtually all domains of commercial activity. These agreements form contracts of adhesion; they heavily restrict one party while leaving the other party free. The result is a decrease in end user rights, where the actions a user may take are severely limited. In the meantime, it appears as though publishers have extensive protection on their products and can use EULAs to prohibit any activity related to the software platform that they have not specifically authorized. Future cases and possible legislation will bring further clarity to the scope of EULAs. For now, consumers and programmers should be aware of the importance and possible consequences of consenting to EULAs.

WHY STOP NOW?
THE AVAILABILITY OF BUSINESS METHOD PATENTS IN CANADA

Matthew Synnott

In describing the patent system's role in the industrial revolution, Abraham Lincoln commented that "the patent system added the fuel of interest to the fire of genius".[1]

Introduction

Indeed, the genius of invention was the catalyst for change during the rise of industrialism. Today, it is the information economy that is on the rise. While the genius of invention remains a catalyst for progress in the information economy, the shape of innovation has changed. The patent system ably protected inventors and promoted innovation in the industrial age, when the most important innovation involved physical, discrete technologies. However, in the information economy, a broader definition of innovation must be embraced, one that further values enhancement of process or method rather than enhancement of physical tools. Consequently, a debate has emerged as to the role of the patent system in protecting innovations of methods or processes.

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[1] James Gleik, "Patently Absurd" *New York Times Magazine* (12 Mar 2000) online: New York Times <http://www.nytimes.com/library/magazine/home/20000312mag-patents.html>.

This paper will analyze the availability of business method patents in Canada. Specifically, it will be submitted that while business method patents are already available as a matter of practice, they deserve a wider and more explicit reception into law. Initially, a brief explanation of patents and an attempt to define business method patents will be offered. American and Canadian jurisprudence will then be reviewed in order to assess the availability of business method patents. Finally, this article will discuss various competing arguments over the utility of business method patents, in order to support their efficacy.

2. A Foundation to Business Method Patents

An Introduction to Patents

Patents are the law's primary mechanism for encouraging and rewarding the development of new and better technology. Gleick describes the patent as "enforcing a Faustian bargain: inventors give up their secrets, publishing them for all to see and absorb, and in exchange, they get a 20-year government-sanctioned monopoly on their technology".[2]

Accordingly, the benefits of the patent system target two groups: the public and inventors. Patents serve the public by allowing later innovators to leverage the information disclosed in patents in order to create new and better inventions. Patents serve the inventor (once they become a patent holder) by granting them a 20-year exclusive right to use of their invention. This exclusive right to use allows patent holders to capitalize on their inventions; patent holders can use and sell the output of their technology, license their technology to others for a return, or use their patent as a negotiating tool.

There are several requirements for an invention to be patentable. First, the invention must be captured by the definition of invention in s. 2 of the *Patent Act*[3]: "'invention' means any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter". This definition requires the invention to be classifiable under one of the proscribed taxonomies. Subsection 27(8)

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[2] *Ibid.*

[3] *Patent Act*, R.S.C. 1985, c. P-4, s. 2.

of the *Patent Act* expressly prevents patenting "any mere scientific principle or abstract theorem", even if it may fit into one of the s. 2 taxonomies.[4] The s. 2 definition also requires that the invention be useful. Vaver explains that usefulness simply requires the invention to work as described and produce something or have a technical result but is not dependent on other factors like commercial viability.[5] Assuming the invention fulfills the requirements of the s. 2 definition, it must also meet an additional two requirements for patentability: novelty and non-obviousness. Novelty, or newness, is specifically required by s. 28.2 of the *Patent Act*.[6] An invention will not be novel if it was known to the public more than a year before the patent application. Non-obviousness is mandated by s. 28.3 of the *Patent Act*.[7] The test asks whether a notional person would come up with the invention "directly and without difficulty".[8] This notional person is "skilled in the art or science"[9] of the invention and has been held to have no inventiveness or imagination.[10]

Business Method Patents

Business method patents (which have also been referred to as process patents) are not defined in any primary legal authority in Canada or the United States.[11] In fact, the leading judicial authority on the availability of business patents recommended eliminating the

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[4] *Ibid.* at s. 27(8).

[5] David Vaver, *Intellectual Property Law: Copyright, Patents, Trademarks* (Toronto: Irwin Law, 1997).

[6] *Patent Act*, s*upra* note 3 at s. 28.2.

[7] *Ibid.* at s. 28.3.

[8] Vaver*, supra* note 5.

[9] *Patent Act*, *supra* note 3 at s. 28.3.

[10] *Beloit Canada Ltd.* v. *Valmet Oy*, [1986] F.C.J. No. 87 (Fed C.A.).

[11] Teresa Cheung and Ruth M. Corbin, "Is there a Method to the Madness? The Persisting Controversy of Patenting Business Methods" (2005), 19 I.P.J. 29, at para. 35.

taxonomy.[12] However, it is perhaps disingenuous to suggest there is no difference whatsoever in the context of patentability between two example inventions, one of which is a machine that produces a discrete physical output, versus another invention that offers a more efficient means of organizing and using mutual fund data. A definition is required in order to lend precision and provide context for the analysis in the paper.

Part of the difficulty in formulating a definition for business method patents is a product of the scope given to the phrase. "Business method" is a blanket term and can describe numerous patented inventions in a diverse array of fields including logistics, advertising, marketing and finance. Most commonly, business method patents seem to be associated with e-commerce and other computerized systems for doing business. Given that most modern innovation occurs in an electronic context over an appropriately broad range of fields, this is a logical association. It also is difficult to formulate a definition of business method that will describe all of what should be patentable without also describing things that should definitely not be patentable. Stephen J. Ferance offers a broad definition: "'business method' refers to any method in the field of economic endeavour".[13] This definition includes all electronic commerce methods and many professional skills and purely mental steps.[14] While this definition is undoubtedly encompassing, more precision is necessary to identify the niche of business methods amongst the collective whole of patentable subject matter.

It has been suggested that there is an implicit understanding that a business method patent will describe a "system or method for how information is obtained, managed and used in the course of carrying on a business or similar enterprise".[15] The requirement for interaction

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[12] *Infra*, note 19 at 1375.

[13] Stephen J. Ferance, "Debunking Canada's Business Method Exclusion from Patentability" (2001) 17 C.I.P.R. 493 at 495.

[14] Purely mental steps and professional skills describe methods that have consistently (and correctly) been seen as not patentable. See below at *3.2.1* and *3.2.2*.

[15] Cheung, *supra* note 11 at para. 35.

with information clearly speaks to e-commerce and many other potential business methods. However, not every business method patent will necessarily involve an interaction with information.[16]

For the purposes of this paper, the term "business method" refers to a process in any economic endeavour that will achieve a certain result. Interaction with information will be a common and critical aspect of most business methods.

3. Judicial Treatment of Business Method Patents

American Jurisprudence

The landmark decision with respect to business method patents is that of the United States Court of Appeals (6th Circuit) in *State Street Bank & Trust* v. *Signature Financial Group* ("*State Street*").[17] In *State Street*, the plaintiff State Street Bank & Trust sought a declaration of invalidity for United States patent serial number 5,193,056 for a "Data Processing System for Hub and Spoke Financial Services Configuration" (the "Boes" patent).[18] The Boes patent, assigned to the defendant Signature Financial Group by the inventor R. Todd Boes, facilitated administration of a "hub and spoke" mutual fund scheme. In the hub and spoke scheme, various mutual fund assets (being the spokes) are pooled as partners into an investment portfolio partnership (being the hub). The patent described a computerized system for constant collection and analysis of data related to the mutual funds, allowing for the efficient administration and records keeping of the mutual fund scheme.[19]

Initially, the Boes patent was invalidated by the District Court. The District Court made this ruling by application of two possible exceptions to patentability: the "business method exception" and the

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[16] See *e.g.*, US Patent No. 1,242,872 "Self Serving Store" held by Clarence Saunders (the founder of Piggly Wiggly®) describing the modern grocery store.

[17] *State Street Bank & Trust v. Signature Financial Group*, 149 F.3d 1368, 47 U.S.P.Q 2d 1596 (Fed. Cir. 1998) [*State Street* cited to F.3d].

[18] *Ibid.* at 1368.

[19] *Ibid.* at 1369.

"mathematical algorithm exception".[20] On appeal, Rich J. overturned the District Court's decision. Writing for the court, Rich J. dealt with both exceptions and found neither to be applicable.

The perceived business method exclusion was found to be based on a "general, but no longer applicable legal principle",[21] had only been stated in *obiter dicta*, and had never been used by an American court to deem an invention unpatentable.[22] Rich J. also said of the definition of patentable subject matter in 35 U.S.C. § 101[23] (the American equivalent to s. 2 of the *Canadian Patent Act*):[24]

> The plain and unambiguous meaning of § 101 is that any invention falling within one of the four stated categories of statutory subject matter may be patented, provided it meets the other requirements of patentability. … The repetitive use of the expansive term "any" in § 101 show Congress's intent not to place any restrictions on the subject matter for which a patent may be obtained beyond those specifically recited in § 101.[25]

The Court then quoted from *Diamond* v. *Chakrabarty*,[26] deciding that "it is improper to read limitations into § 101 on the subject matter that may be patented where the legislative history indicates that Congress clearly did not intend such limitations".[27] The Court thus eliminated from American law the notion that business methods were

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[20] *Ibid.* at 1472.

[21] *Ibid.* at 1375.

[22] *Ibid.* at 1375.

[23] 35 U.S.C. § 101 states: "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor [sic], subject to the conditions and requirements of this title".

[24] *Infra* note 76.

[25] *State Street*, *supra* note 17 at 1373.

[26] *Diamond* v. *Chakrabarty*, 206 U.S.P.Q. 193, 447 U.S. 303 (USSC, 1980).

[27] *State Street, supra* note 17 at 1373.

inherently unpatentable subject matter, laying the "ill-conceived notion to rest".[28]

The mathematical algorithm exception was described as follows:

> [C]ertain types of mathematical subject matter, standing alone, represent nothing more than abstract ideas until reduced to some type of practical application. … Unpatentable mathematical algorithms are identifiable by showing that they are merely abstract ideas constituting disembodied concepts or truths that are not "useful." From a practical standpoint, this means that to be patentable an algorithm must be applied in a "useful" way.[29]

The Court used the decision of *In Re Alappat* ("*Alappat*")[30] to determine what constitutes a useful way of applying an algorithm. Incorporating *Alappat*, *State Street* required the output of the algorithm to be "a useful, concrete, and tangible result".[31] The Court found that the Boes patent described a system that did produce such an output, with the numbers representing features of the portfolio system, including price, profit, percentage, cost and loss.[32] Therefore, the mathematical algorithm exception was held inapplicable.

State Street also addressed the conceptualization of business method patents. Rich J. suggested that a machine-process dichotomy was not useful:

> [I]t is of little relevance whether claim 1 is directed to a "machine" or a "process," as long as it falls within at least one of the four enumerated categories of patentable subject matter, "machine" and "process" being such categories.[33]

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[28] *State Street, supra* note 17 at 1375.

[29] *State Street*, *supra* note 17 at 1373.

[30] *In Re Alappat*, 31 U.S.P.Q. 2d 1545 (Fed. Cir. 1994).

[31] *State Street*, *supra* note 17 at 1373.

[32] *State Street*, *supra* note 17 at 1375.

[33] *State Street*, *supra* note 17 at 1373.

Canadian Jurisprudence

Canadian courts have yet to clearly address the patentability of business methods in a manner comparable to *State Street*. In "Debunking Canada's Business Method Exclusion from Patentability", Ferance carefully reviewed and analyzed an ostensibly comprehensive survey of jurisprudence in arriving at his conclusion that business method patents were available under the Canadian patent regime. While some authors continue to perpetuate the notion that there exists an exclusion to patentability for business methods,[34] Ferance's conclusions most accurately reflect the rules to be gleaned from the limited jurisprudence and the realities of the Canadian system.

The limited Canadian jurisprudence cited in relation to business method patents generally addresses four issues. The first of these is the patentability of software and computer-based inventions. Second is the professional skills exception to patentability. This issue speaks to inventions that bring about a computerized implementation of a job previously done by a skilled professional as well as inventions that are purely abstract schemes for doing business. The third issue centres on the definition of "art" as used in s. 2 of the *Patent Act*.[35] This issue is paramount, as most method patents will be captured as an invention by application of this definition.[36] Lastly, the fourth issue considers varying approaches to interpretation of the *Patent Act*.

The Patentability of Software and Computer-Related Implementations of Methods

The first clear judicial consideration of whether software and computer-based inventions were patentable was *Schlumberger Ltd.* v.

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[34] Vaver, *supra* note 5. See also Cheung, *supra* note 11 at para. 28: "Dimock and Eisen '…business methods remain excluded from patentable subject matter'". But see M.B. Eisen, "Arts and Crafts: The Patentability of Business Methods in Canada" (2001) 17 C.I.P.R. 279.

[35] *Patent Act*, *supra* note 3 at s. 2.

[36] Cheung, *supra* note 11 at para. 46.

Commissioner of Patents ("*Schlumberger*").[37] In *Schlumberger,* the Federal Court of Appeal unanimously upheld the Patent Examiner and Patent Appeal Board's rejection[38] of the application. Pratte J., writing for a unanimous Court, described the process used in geological exploration as follows:

> The appellant's application discloses a process whereby the measurements obtained in the boreholes are recorded on magnetic tapes, transmitted to a computer programmed according to the mathematical formulae set out in the specifications and converted by the computer into useful information produced in human readable form.[39]

Schlumberger is relevant for three reasons. First, the Court held that a computer-based implementation should not prejudice the patentability of an invention and computer programs could be an invention under s. 2 of the *Patent Act*.[40] Second, the Court clarified that when assessing the patentability of computer-based inventions, it is the substance of the process—regardless of the fact that it is implemented with a computer—that must be considered.[41] The resultant rule was that if the underlying process is not patentable, the computer implementation of it could not transform it into patentable subject matter. Pratte J. stated that "if those calculations were not to be effected by computers but by men, the subject-matter of the application would clearly be mathematical formulae … as such, in my view, it would not be patentable".[42] The application was accordingly denied on the basis of the exception now found in s. 27(8) of the *Patent Act*.

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[37] *Schlumberger Ltd.* v. *Commissioner of Patents*, [1982] 1 F.C. 845, 56 C.P.R. (2d) 204 (F.C.A.) [*Schlumberger* cited to FC].

[38] *Schlumberger's Application*, (1978), 106 CPOR 1 Aug. 1978 (P.A.B.).

[39] *Schlumberger*, *supra* note 37 at para. 2.

[40] *Schlumberger*, *supra* note 37 at para. 4.

[41] *Schlumberger*, *supra* note 37 at para 5.

[42] *Schlumberger*, *supra* note 37 at para 5.

The bar set in *Schlumberger* has been implicitly challenged by numerous subsequent decisions.[43] In *Re Application for Patent of Mobil Oil Corp.*,[44] a patent was issued for a method of filtering instrumentation reflection from seismological data using mathematical algorithms. The Patent Appeal Board held that the removal of reflections from the data made the process a useful art that did not relate solely to mathematical calculations.[45] The 1998 decision of *Re Motorola Inc. Patent Application No. 2,085,228*[46] saw the Patent Appeal Board retreat from the position of *Schlumberger*. The issued patent was for a device that evaluated exponentials—an example of a hardware implementation of a mathematical process. The claim was allowed on the basis that it was for a specific piece of hardware, and therefore the patent would only prevent others from using the hardware, but not the algorithm, as described.[47]

The Professional Skills Exception

While the case of *Lawson* v. *Commissioner of Patents* ("*Lawson*")[48] has been cited as supporting the exclusion of business methods from patentability,[49] it is more correctly characterized as Canadian law's

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[43] *Re application for Patent of Seiscom Delta Inc.*, (1985), 7 C.P.R. (3d) 506 (P.A.B.), where a patent was issued for an invention using a computer to record, process and display seismic data representing three dimensions on a two-dimensional surface; see also *Mobil Oil, infra* note 44 and *Motorola's*, *infra* note 46.

[44] *Re Application for Patent of Mobil Oil Corp*, (1988), 24 C.P.R. (3d) 571 (P.A.B.) [*Mobil Oil* cited to C.P.R.].

[45] *Ibid.* at 575.

[46] *Re Motorola Inc. Patent Application No. 2,085,228*, (1998), 86 C.P.R. (3d) 71 (P.A.B.) [*Motorola* cited to C.P.R.].

[47] *Ibid.* at para. 15.

[48] *Lawson* v. *Commission of Patents* (1970), 62 C.P.R. 101 (Ex. Ct.) [*Lawson* cited to C.P.R.].

[49] H.G. Fox, *The Canadian Law and Practice Relating to Letters Patent for Inventions*, 4th ed. (Toronto: Carswell, 1969) at 23.

reception of the exclusion of professional skills from patentability.[50] The claims described a method for subdivision of real estate lots in an efficient shape. The Exchequer Court rejected the claims as being a professional skill, stating that it represents "an art which belongs to the professional field and is not a manual art or skill."[51] Cattanach J. described the exception in the following passage:

> [P]rofessional skills are not the subject-matter of a patent. If a surgeon were to devise a method of performing a certain type of operation he cannot obtain an exclusive property or privilege therein. Neither can a barrister who has devised a particular method of cross-examination or advocacy obtain a monopoly thereof so as to require imitators or followers of his methods to obtain a license from him.[52]

Applying the above quote, Cattanach J. held the method of subdividing the land to be a professional skill of a solicitor, conveyancer and surveyor, and accordingly the application was rejected.

The professional skills exception was recently applied *Re Patent Application No. 564,175*.[53] The application being reviewed there was for a computerized financial account management system. The system optimized allocation of funds from a mortgage account into multiple investment accounts. Since the process was previously undertaken by individual financial accountants, the Court used the rule in *Schlumberger* and claimed to analyze whether the process itself was patentable without regard to its computerized implementation.[54] The Board applied *Lawson* and stated:

> [T]he Applicant has substituted a computer which has been programmed in a specific manner to make decisions which were formerly made by a financial advisor. … An operation which is not patentable when carried out by an individual

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[50] *Cheung*, *supra* note 11 at para. 42; see also *Ferance*, *supra* note 13 at 511.

[51] *Lawson*, *supra* note 48 at 111.

[52] *Lawson*, *supra* note 48 at 110.

[53] *Re Patent Application No. 564,175* (1999), 6 C.P.R. (4th) 385 (P.A.B.) [*Re 175* cited to P.A.B.].

[54] *Ibid.* at 386.

> cannot be made patentable merely by having it carried out by a computer.[55]

Defining "Art"

In *Lawson*, the Exchequer Court construed "art" according to the definition in s. 2 of the *Patent Act* as including method patents, stating "that 'art' may include a method or process patent is well settled."[56] Cattanach J. defined "art" as "an act or series of acts performed by some physical agent upon some physical object and producing in such object some change of either character or of condition".[57] *Lawson* imposed a linkage to a material object and required a transformation on that object.

More recently, the Federal Court Trial Division addressed the definition of "art" in *Progressive Games, Inc.* v. *Commissioner of Patents* ("*Progressive*").[58] Denault J. stated:

> The sole issue in this appeal is whether or not the Appellant's changes in the method of playing poker fall within the definition of the terms "art" or "process" as those terms are used in the definition of 'invention' at Section 2 of the Act.[59]

In *Progressive*, the patent sought was for a method of playing a card game. Specifically, the method enabled a casino to play heads-up five-card stud poker against one or more players. The Federal Court rejected the patent, as it did not fully satisfy Denault J.'s definition of "art". While Ferance correctly notes that *Progressive* "did not involve a 'business method,' but rather, involved a method of playing a

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[55] *Ibid.* at 386.

[56] *Lawson*, *supra* note 48 at 103.

[57] *Lawson, supra* note 48 at 103.

[58] *Progressive Games, Inc.* v. *Commissioner of Patents* (1999), 3 C.P.R. (4th) 517 (F.C.T.D.), aff'd (2000) 265 N.R. 392, 192 F.T.R. 160 (F.C.A.) [*Progressive* cited to C.P.R.].

[59] *Ibid.* at 521.

game",[60] the case is still significant for its somewhat problematic construction of "art".

Denault J. began by affirming that "art" includes process.[61] The Court then used the Supreme Court of Canada's decisions in *Shell Oil* v. *Commissioner of Patents*[62] in order to construct a three-part definition of "art". Denault J. stated:

> Accordingly, the definition of the term "art" as provided by the Supreme Court includes a process that:
>
> (i) is not a disembodied idea but has a method of practical application;
>
> (ii) is a new and innovative method of applying skill or knowledge; and
>
> (iii) has a result or effect that is commercially useful.

The poker game met both the first and third criteria of the *Progressive* definition of "art".[63] The application was rejected on the basis of the second, as the Court did not see the poker game as a substantial change or innovation.[64]

Interpreting the Patent Act

The Supreme Court of Canada grappled with the patentability of higher life forms in *Harvard College* v. *Canada (Commissioner of Patents)* ("*Harvard College*").[65] Though the inventive subject matter is not related to business methods, the decision is relevant in two ways. First, the decision is a recent and compelling authority on the interpretive approach to deciding what is captured by "invention". Second, the decision (as well as its treatment in the Federal Court of

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[60] Ferance, *supra* note 13 at 525.

[61] *Progressive*, *supra* note 58 at para. 13.

[62] *Shell Oil* v. *Commissioner of Patents,* [1982] 2 S.C.R. 536, 67 C.P.R. (2d) 1.

[63] *Progressive*, *supra* note 58 at para. 18.

[64] *Progressive, supra* note 58 at para. 20.

[65] *Harvard College* v. *Canada (Commissioner of Patents)*, 2002 SCC 76, [2002] 4 S.C.R 45, [*Harvard College* cited to S.C.R.].

Appeal) provides a basis for questioning the sources of the perceived business method exception in Canadian law.

The majority and minority decisions in *Harvard College* make it clear that "invention", for the purposes of s. 2 of the *Patent Act*, is an expanding concept. Bastarache J., writing for the majority, stated: "Because the Act was designed in part to promote innovation, it is only reasonable to expect the definition of 'invention' to be broad enough to encompass unforeseen and unanticipated technology."[66]

This statement certainly supports the notion that the *Patent Act* should continue to support innovation in the context of new technologies (such as biotechnology and e-commerce). However, the majority did not accept that invention had as expansive a definition as that suggested in *State Street*.[67] The enumerated categories[68] in s. 2 were held to be exhaustive. Additionally, it was held that if an application was captured by one of the enumerated categories in "invention", policy grounds and exclusions not provided for by the *Patent Act* could not operate to prevent the granting of patent.[69] Assuming many business methods can be captured as an "art"[70] within the textual definition of "invention", this ruling necessitates their patentability.[71]

Ferance notes that the first instance in Canadian legal literature of the notion that business methods were excluded from patentable subject matter was in a 1926 text on patent law by Featherstonhaugh and Fox.[72] The statement was supported by *obiter dicta* from the English case of *Cooper's Application*[73] that suggested "a mere scheme or plan"

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[66] *Ibid.* at para. 158.

[67] *Ibid.* at para. 158.

[68] *Patent Act*, supra note 3.

[69] *Harvard College, supra* note 65 at paras. 144 and 152.

[70] See above at 3.2.3.

[71] This of course presumes that the other requirements for patentability, as described above in 2.1, are met.

[72] Ferance, *supra* note 13 at 515.

[73] *Cooper's Application* (1902), 19 R.P.C. 53.

such as "a plan for the efficient conduct of business" was not patentable.[74] In *Harvard College* at the Federal Court of Appeal, Rothstein J.A. cast doubt on the persuasiveness of English law, quoting Pigeon J. in *Tennessee Eastman* v. *Canada*[75]: "I doubt whether decisions dealing with the patentability of inventions under the U.K. Act are entitled to the weight which authors such as Fox … seem to think they should have".[76] Rothstein J.A. added: "it is doubtful that UK decisions are helpful for the specific purpose of construing the definition of 'invention' in the Canadian Patent Act".[77] Given that the Canadian definition of "invention" closely modelled the American definition,[78] American jurisprudence provided "useful guidance".[79]

At the Supreme Court level, the majority decision did not challenge the criticisms of the persuasiveness of U.K. jurisprudence levied by Rothstein J.A. The dissenting opinion, written by Binnie J., accepted the views of Rothstein J.A. and also considered American jurisprudence persuasive.[80] However, *Harvard College* did not fully embrace the American construction of invention. Neither the majority nor the minority opinions accepted the proposition that invention includes "anything under the sun made by man".[81] This distinction is not apposite; such an expansive interpretation is not required for business method to be construed as an invention.

Harvard College cannot be considered without also addressing the more recent decision by the Supreme Court of Canada in *Monsanto Canada*

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[74] *Ibid.* at 54.

[75] *Tennessee Eastman* v. *Canada* (1972), [1974] S.C.R. 111, 8 C.P.R. (2d) 202.

[76] *Harvard College* v. *Canada (Commissioner of Patents)* [2000] 4 F.C. 528, 7 C.P.R. (4th) 1 (F.C.A.) at para. 23, rev'd [2002] 4 S.C.R. 45.

[77] *Ibid.* at para. 57.

[78] *Ibid.* at para. 59.

[79] *Ibid.* at para. 62.

[80] *Harvard College*, *supra* note 65 at paras. 36, 38-40.

[81] *Diamond* v. *Chakrabarty*, *supra* note 26 at 309.

Inc. v. *Schmeiser* ("*Monsanto*").[82] The former found that higher life forms, including the oncomouse (a genetically modified mouse) in issue, were unpatentable subject matter. The latter found genes and modified cells making up a plant to be patentable. While the two decisions may seem difficult to reconcile, *Monsanto* should not necessarily be taken to overrule *Harvard College*; the majority opinion in *Monsanto* addresses how the two decisions can coexist.[83] The difference in results and the changing makeup of the Court may suggest that the Court will adopt a more expansive interpretation of patentable subject matter than the majority decision in *Harvard College*.[84]

Monsanto does not provide further ground for challenging the perceived business method patent exclusion. In *obiter dictae*, Arbour J., writing in dissent, listed "business systems and methods and professional skills" as a judicial exclusion from patentability.[85] However, the support for this proposition was erroneous—it was cited to *State Street*. Further, judicial exceptions from patentability (without textual basis in the *Patent Act*) are themselves doubtful given the rule against such exceptions endorsed in both the majority and minority decision in *Harvard College*.[86] Accordingly, this statement is not persuasive.

In sum, *Harvard College* provides additional bases for challenging the existence of a business method exception to patentability. *Harvard College* held that the only relevant limitations to patentability are those with a textual basis in the *Patent Act*.[87] The judgements of Rothstein J.A. and Binnie J. cast further doubt on the exception insofar as its source is UK law of questionable relevance. The combination of these

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[82] *Monsanto Canada Inc.* v. *Schmeiser* 2004 SCR 32, [2004] 1 S.C.R. 902.

[83] *Ibid.* at paras. 21-24.

[84] The impending appointment of Rothstein J.A. to the Supreme Court of Canada further supports this proposition.

[85] *Monsanto*, *supra* note 82 at para. 133.

[86] *Supra* note 69; and see *Harvard College*, supra note 65 at paras. 40, 144 and 152.

[87] *Ibid.*

holdings undermines the existence of an exception to patentability existing independent of textual basis or Canadian precedent. Further, the argument for increased persuasiveness of American jurisprudence bolsters an interpretation of invention that is inclusive of business methods. Given *Monsanto* and the changing makeup of the Supreme Court of Canada, the potential for the success of this argument is substantial.

Conclusions as to Patentability in the Canadian System

To summarize, the substance of the business method will be assessed in determining its patentability, not its form (*Schlumberger*). The business method must be a new process in order to satisfy the novelty requirement. The process must produce a useful output in order to meet the utility requirement (and satisfy *Progressive*), and the process may need to effect a transformation in a material object in order to be an art under s. 2 of the *Patent Act* (*Lawson*). The process must not be a bare computer implementation of a professional skill (*Lawson, Progressive*). Within this framework, there is a substantial theoretical expanse in which business methods will be patentable subject matter.

The software context provides current examples. In this context, many e-commerce innovations will perform useful functions and produce a tangible output and are wholly distinguishable from their implementation without a computer.[88] The professional skills exception may apply and exclude some inventions that are inherently software versions of a professional. Software or methods accomplishing sufficiently complicated tasks unachievable by a professional will not be excluded.[89] Many inventions will easily satisfy the definition of art articulated in *Lawson* and *Progressive*. It is easy to conceive of business methods, likely implemented primarily through software, that both have methods of practical application, will be new

[88] See, *e.g.*, Canadian Patent Number 2,426,168, Method and Apparatus for Evaluating Fraud Risk in An Electronic Commerce Transaction.

[89] See, *e.g.*, Canadian Patent Number 2,241,767 System for Transforming and Exchanging Data between Distributed Heterogeneous Computer Systems.

and innovate applications of knowledge, and will be commercially useful.[90]

4. Policy Analysis of Business Method Patents

Since *State Street* was issued, a significant portion of literature discussing business method patents has been decidedly critical.[91] These arguments are divisible into two broad groups: intrinsic criticisms and extrinsic criticisms. The intrinsic criticisms argue that business method patents tend to be inherently deficient in some respect, most commonly saying they lack novelty or utility, or are overly broad in scope. The extrinsic criticisms find fault with business method patents on the basis of utility and policy grounds. The common extrinsic criticisms hold that business method patents are harmful to innovation and competition, and are not well suited to assessment. The following review will canvass these arguments and provide a response to each. Additionally, further reasons will be provided in order to support the final conclusion that business methods should be patentable in Canada.

Intrinsic Criticisms

Lack of novelty is a common ground for criticism. Gleick quotes Professor Lessig as saying: "We're talking about people taking ways of doing business and, because they put it into software, they say, 'This is now mine'".[92] An example of this is US Patent Number 5,491,779,

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[90] See *e.g.*, Canadian Patent Numbers 2,367,320 Workflow Management System; 2,404,814 Apparatus, Systems, and Methods for Online, Multi-parcel, Multi-carrier, Multi-Service Parcel Returns Shipping Management.

[91] See *e.g.*, Gleick, *supra* note 1; Leo J. Raskind, "The State Street Bank Decision: The Bad Business of Unlimited Patent Protection for Methods of Doing Business" 10 Fordham Intell. Prop. Media & Ent. L.J. 61; Keith W. Perret, "State Street Bank: Patenting Business Methods" 15 B.F.L.R. 335; Matt Richtel, "Are Patents Good or Bad for Business Online?" New York Times Cyberlaw Journal (28 Aug 1998), online: New York Times <http://www.nytimes.com/library/tech/98/08/cyber/cyberlaw/28law.html>.

[92] Gleick, *supra* note 1.

which is a patent for the pie chart as used on a computer.[93] While the pie chart's invention is credited to Florence Nightingale over 100 years ago, this patent was granted Richard D. Bezjian in 1995. A more common example is the infamous US Patent Number 5,794,207,[94] typically known as the Priceline™ reverse auction patent. Reverse auctions were used well before the patent application was filed in 1996.

Such cases provide at least anecdotal evidence that some business method patents lack novelty. Yet, it is not contended that business method patents should not be subjected to the same standards of novelty as any other patent. If some applications are being granted for less-than-novel innovations, the fault exists in the patent examination process, and no doubt clearer legal rules pertaining to business method patents will be of service to the issue. Additionally, to the extent that the argument is generally built on anecdotal evidence, it certainly cannot be used to support the exclusion of business method patents that are highly novel. This line of reasoning applies with equal force to criticisms rooted in utility deficiencies.

Business method patent claims have also been faulted as being excessively broad in scope. Richtel cites CyberGold's United States Patent Number 5,794,210[95] as an example.[96] However, Swinson notes that there has been a common failure by the media and corporations in differentiating between the perceived scope and the actual legal scope of many contentious patents.[97] As well, if claims are being allowed that are excessively broad, this logically serves as a basis of

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[93] US Patent Number 5,491,779, Three Dimensional Presentation of Multiple Data Sets in Unitary Format Pie Charts.

[94] US Patent Number 5,794,207, Method and Apparatus for a Cryptographically Assisted Commercial Network System Designed to Facilitate Buyer-Driver Conditional Purchase Offers.

[95] United State Patent Number 5,794,210 Attention Brokerage.

[96] See *e.g.*, Richtel, *supra* note 80, as the US Patent Number 5,794,210 was suggested to give it the sole right to pay consumers online incentives.

[97] John Swinson, "Do Internet Process Patents Threaten E-Commerce?" *Australian Legal Information Institute* (06 June 2004).

criticism for the examination and approval process, but not necessarily efficacy of business method patents.

Extrinsic Criticisms

Shortcomings in the patent examination process have also been used to support exclusion. Many, especially in the software industry,[98] have argued that the examination process is ill suited to assess applications properly. Two empirical studies have been conducted on the quality of business method patents.[99] The studies assessed the patents in terms of novelty, obviousness and references to prior art. Both found that business method patents averaged a higher rating than their traditionally accepted counterparts, furthering the notion that perceived issues with novelty and quality may be less a specific indictment of business method patents than suggested. These studies also cast doubt on the arguments against patentability based on perceived issues with novelty.

Ultimately, the most provoking of criticisms are those that question the general utility of patents in the information age. Many commentators have seen business method patents failing a cost-benefit analysis where their predecessors had succeeded. Business method patents are suggested to be without economic efficacy, being harmful to innovation[100] and competition.[101] While neither of these criticisms is wholly without merit (and both are likely broader criticisms of the patent system in general), it must be remembered that the patent system is premised on trade-offs. Additional resources are required by innovators to ensure their technologies do not infringe patented ones, but innovators are provided with a legal mechanism

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[98] Gleick, *supra* note 1; see also Richard Stallman, "The GNU Philosophy" GNU (2004), online: GNU Free Software Foundation <http://www.gnu.org/philosophy/>.

[99] John Allison and Emerson Tiller, "The Business Method Patent Myth" 18 Berk Tech. L.J. 987 at 987; see also Starling David Hunter III, "Have Business Method Patents Gotten A Bum Rap?" MIT Sloan School of Management Paper 182 (2004).

[100] Gleick, *supra* note 1; see also Raskind, *supra* note 91.

[101] Raskind, *supra* note 80; See also Stallman, *supra* note 98; Gleick, *supra* note 1.

for capitalizing on their efforts. In that regard, the system both prevents and fosters innovation. Legally granted monopolies on technology inherently affect competition. However, competitors are challenged to leverage the disclosure in other patents in order to create new and better technologies.[102] Patents are viewed as fostering competition.[103] In the case of small-to-medium-sized enterprises, patent protection can be a critical component in gaining market share from larger, entrenched competitors.

Further Support for Patentability

While the traditional economic justifications for the patent system should still apply in today's economic context, more arguments are available in support of patent protection for business methods.[104] The final one offered here is for the harmonization of law. Cheung states that "with the current ease of mobility of capital and technology, there is impetus for Canada to harmonize the application of its patent legislation with that of other countries".[105] Binnie J. supported this notion in *Harvard College*.[106] The availability of business method patents is desirable from a legal perspective—interpretive harmony and legal certainty should be the ideal—but it will also allow Canadian innovators to compete in an analogous market with comparable rules, and with American competition.

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[102] As an example, in response to the limitation of use of the GIF and JPEG images imposed by software patents, the open source community responded by developing the more efficient PNG image format.

[103] Canadian Intellectual Property Office, "A Guide to Patents" (Ottawa: Industry Canada, 2004), online: Industry Canada <http://strategis.ic.gc.ca/sc_mrksv/cipo/patents/patguide-e.pdf> at 1; see also Competition Bureau, "Intellectual Property Enforcement Guidelines" (Ottawa: Competition Bureau, 2000), online: Competition Bureau <http://strategis.ic.gc.ca/pics/ct/ipege.pdf> at 1, 5.

[104] Statistics Canada, "Determinants of Innovative Activity: The Role of Intellectual Property Rights" (Ottawa: Supply and Services Canada, 2000); see also Cheung, *supra* note 13; Swinson, *supra* note 97.

[105] Cheung, *supra* note 11.

[106] *Harvard College, supra* note 65 at 11.

Conclusion

Business method patents are not explicitly recognized as patentable in the Canadian legal system. However, practice and the existing legal framework dictate that many business method patents have been and will continue to be approved. This unclear position results in a lack of certainty that is not beneficial to either party—those in support or those opposed to their patentability. The law, especially to the extent that it is an economic tool, must provide certainty. Canadian patent law currently allows for the possibility of patentability. While criticisms specifically targeting business method patents are debatable, the patent system continues to provide many benefits. Consequently, it would be inappropriate to further the artificial and potentially baseless exclusion of business methods from patentability. Therefore, it is submitted that the need for certainty and the benefits of patentability necessitate a full reception of business method patents in Canadian law.

DON'T THROW OUT MY BABY!

WHY DALTON MCGUINTY WAS WRONG TO REJECT RELIGIOUS ARBITRATION

Eli Walker

On September 11, 2005, Ontario Premier Dalton McGuinty informed the Canadian Press that his government would act to remove the arbitration of family law disputes from the operation of the province's *Arbitration Act*.[1] McGuinty said religious arbitration could not be part of a cohesive multicultural society and from that point forward there would be "one law for all Ontarians".[2] In so doing, McGuinty sought to end debate on whether Ontario should continue to accept binding arbitration of family law disputes. This debate was sparked by publicity surrounding a new Islamic tribunal in Toronto that proposed to arbitrate Muslim family disputes on faith-based principles.

McGuinty's choice rejected the recommendations made by former Ontario Attorney General Marion Boyd, whom he had commissioned to examine the issue, and did so by relying on either (1) classic liberal conceptions of absolute shared citizenship, or (2) feminist critiques of multiculturalism. The former justification is offensive to some of Canada's founding principles. The latter, while a valid criticism of private arbitration of family disputes, should have led the premier to implement the Boyd Report. Instead, he intends to throw out the baby with the bath water.

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[1] S.O. 1991, c. 17.

[2] "McGuinty rules out use of sharia law in Ontario" *CTV News* (12 September 2005), online: CTV.ca <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1126472943217_26/?hub=TopStories>.

The Baby: Why Arbitration of Family Disputes Is Good

Binding arbitration of family disputes has been available in Ontario since the nineteenth century.[3] It is enabled by government legislation that compels the courts, with some exceptions, to enforce the decisions of private arbitrators on application by the "winning" party. Arbitrators are appointed by the disputing parties in an arbitration agreement, which functions like a private contract. In 1992, Ontario adopted the new *Arbitration Act* to further limit the courts' discretion to refuse or vary awards.[4] A "losing" party has a statutory right to appeal, but it may be waived. A losing party also has a right to seek to invalidate an award on the rules of contract law or on application for judicial review, but the latter option is limited. In family disputes, judicial review will likely only arise because of a breach of procedural fairness,[5] or because the award engages the courts' common law *parens patriae* jurisdiction to interfere for the best interests of children.[6]

There are two justifications for binding arbitration of family disputes: efficiency and freedom of choice. Boyd reports that arbitration and other alternative dispute mechanisms "offer some relief for court backlogs that [are] causing family disputes to drag on over time, thus exacerbating the conflicts".[7] Indeed, as recently as September 2004, current Ontario Attorney General Michael Bryant called arbitration

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[3] Marion Boyd, "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion" (20 December 2004), online: Ontario Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/> at 11.

[4] *Boyd, supra* note 3 at 11.

[5] *Hercus* v. *Hercus,* [2001] OJ No. 534 (S.C.) at paras. 77, 130 and 135.

[6] *Duguay* v. *Thompson-Duguay,* [2000] OJ No. 1541 (S.C.) at paras. 31-32.

[7] *Boyd, supra* note 3 at 34.

"the invaluable way in which we're achieving justice in the province".[8] So binding arbitration provides an alternative venue for speedier resolution of family disputes. This usually means fewer costs for the parties involved and always means less cost for the justice system.

The stronger justification is freedom of choice. Arbitration offers citizens the benefit of resolving disputes away from the formal courtroom environment, with an arbitrator of their choice and, within limits, according to the principles they choose.[9] To a cultural minority, arbitration is of additional utility because they can use it to resolve family disputes according to their own values, which may differ in important respects from those held by the dominant community. So long as these intra-group resolutions do not violate baseline rights guaranteed by individual Canadian citizenship, this flexibility creates what Will Kymlicka envisioned as multicultural citizenship, and may provide a minority community with better resolutions to family disputes than are available to them in a court system that is generally blind to cultural differences.

Kymlicka largely agrees with classic liberalism on the importance of the liberty for each person to pursue their own individual good and the resulting just society.[10] However, he adds, a just society may require that members of minority communities be able to exercise group-specific rights in addition to their individual citizenship rights.[11] This is because (1) one's culture provides context for determining one's good, and its exercise is therefore a basic source of self-actualization and fulfillment;[12] and (2) the laws and policies of the dominant culture, even if applied equally, will often be experienced

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[8] John Jaffey, "AG Promises Family Law Update to Reflect Changing Society" *The Lawyers Weekly* 24: 19 (24 September 2004).

[9] *Supra,* note 1, s. 32(1) of the *Arbitration Act* allows arbitrations to be run according to rules of law designated by the parties.

[10] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, Clarendon Press, 1995) at 80-82.

[11] *Ibid.* at 96-97.

[12] *Ibid.* at 106-107.

negatively by minorities.[13] For instance, intestate succession in Ontario follows rules set out in the *Succession Law Reform Act* that distribute the estate in a hierarchy.[14] Some aspects of this, like favouring independent children over independent parents, are arbitrary choices that reflect the dominant culture's presumption of the nuclear family as the basic social unit. When a minority community does not share this presumption they may experience intestacy as a restriction on their liberty to exercise their culture. Thus Kymlicka's just society might defer to the minority community on certain intestacy laws.

Of course, some of Ontario's intestacy laws are policy-driven choices directed at reducing the feminization of poverty by ensuring that spouses have priority rights to the deceased's estate. Deference that sacrificed these rights at the altar of minority group rights would be undesirable because it would amount to a step backward in ensuring women's equal capacity to pursue their good. It would also therefore be a violation of the primacy of individual rights that underlies Kymlicka's theory of the just society.

So, in my view, arbitration may be beneficial to family law in Ontario because (1) it is more efficient for both citizens and the justice system, (2) it provides citizens with greater freedom of choice in how they resolve family disputes and (3) it may allow minority groups to exercise their cultural values in the resolution of family disputes, so long as they do not violate individual rights.

The Bath Water: Why Arbitration of Family Disputes Causes Problems

Kymlicka's theory does not go unassailed. Its critics argue that the reality of state-sanctioned group rights in a multicultural society is (1) balkanization of ethnicities, cultures and religious groups and (2) the hidden oppression of women within patriarchal minority cultures and religions.[15] The paucity of McGuinty's statements leaves the

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[13] *Ibid.* at 108-109.

[14] R.S.O. 1990, c. S.26, ss. 44-47.

[15] Ayelet Shachar, "Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies" (2005) 50

impression that he has rejected family arbitration out of a fear that recognition of group rights will lead to entrenched legal pluralism and erosion of a cohesive civil society. But Canada's very foundation is legal pluralism. It is a compromise founded on federalism: a regional legal pluralism specifically intended, among other things, to accommodate a cultural and religious minority: French Canadians.[16] Further, although we tend to ignore this, Aboriginal title in Canada is premised on the pre-existing authority of Aboriginal systems of law.[17] Outside of rights ceded through treaty, Aboriginal legal systems continue to operate in concurrence with Canadian law.[18] First Nations are also subject to a distinct legal regime under the *Indian Act*. Finally, religious arbitration of family disputes has carried on in Ontario for some time and the province is not, as a result, a haven of ethnic ghettoes and internecine dispute.[19]

Thus it would be absurd to reject religious arbitration of family disputes in fear of legal pluralism, and I cannot imagine McGuinty did so. It is far more likely that he rejected arbitration on the basis of the feminist critique of multiculturalism. Supporting this inference, on September 8, 2005, three days before McGuinty's announcement, Attorney General Michael Bryant wrote: "there will be no binding

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McGill L.J. 49. Shachar also notes civic-republicanism and ethnoculturalism as other critiques of multiculturalism but these theories have not, I think, played a role in the arbitration debate.

[16] *Reference re: Secession of Quebec,* [1998] 2 S.C.R. 217 at paras. 43-44.

[17] *Delgamuukw* v. *British Columbia,* [1997] 3 S.C.R. 1010 at para. 114.

[18] See *Connolly* v. *Woolrich* (1867), 11 L.C. Jur. 197, 17 R.J.R.Q. 75 (C.S. Que.), where the Court found that a marriage between a white man and Cree woman conducted in accordance with Cree law was binding on the parties under Quebec law.

[19] Boyd, *supra* note 3 at 55-61. Boyd notes in particular the Toronto Jewish community's Beis Din arbitration tribunals, the Ismaili Muslim National Conciliation and Arbitration Board, and the El Noor Mosque in Toronto. All have been arbitrating since before the 1992 enactment of the present *Arbitration Act*.

family arbitration in Ontario that uses a set of rules or laws that discriminate against women".[20]

Ayelet Shachar and Natasha Bakht, employing the feminist critique in separate papers, argue that women in minority communities are the frequently unheard victims of state efforts to accommodate group rights, and of minority group efforts to express their cultural values.[21] This problem frequently plays out in family law because (1) the continuing public/private divide encourages state regulation to keep out of much of what occurs in the family and (2) minority groups, like everybody, feel the shape and management of the family is an important locus of cultural expression.[22] Thus family arbitration, and particularly faith-based arbitration, is a model example of minority cultures seeking to exercise greater control over family law because it is a major venue for expression of their values, while the state is prone to accommodate because the family is still the "private" sphere, albeit to a lesser extent than in the past.

Because minority communities frequently retain more patriarchal values than wider Canadian society, the critique continues, and women in minority communities who resolve family disputes through arbitration will be robbed of the benefits of legal reforms available in the courts, such as mandated divisions of matrimonial property and statutory guarantees of spousal and child support.[23] They may also be denied the benefits of screening for abuse that (ideally) takes place when family disputes enter the legal system.

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[20] Michael Bryant, "Statement by Attorney General on the Arbitration Act, 1991" (8 September 2005), online: Ontario Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/news/2005/20050908-arb1991.asp>.

[21] Shachar, *supra* note 15 at para. 6. See also Natasha Bakht, "Arbitration, Religion and Family Law: Private Justice on the Backs of Women" (March 2005) online: National Association of Women and the Law <http://www.nawl.ca/Documents/Arbitration-Final-0305.doc> at 40.

[22] Bakht, *supra* note 21 at 39.

[23] Shachar, *supra* note 15 at para. 22. Bakht at 40.

These women are unlikely to protest this unequal treatment because (1) they are unable to claim their individual rights due to language, culture and socioeconomic barriers, (2) they fear abuse and alienation from their community, or (3) they are unwilling to claim these rights because they do not wish to undermine their minority culture.[24] Thus the effect of allowing family arbitration is to further marginalize the very women who were meant to enjoy greater fulfillment and self-actualization via enhanced freedom of choice and cultural expression. The freedom of the minority community begets a cultural prison for the minority woman—no doubt a step backward in Canada's efforts to ensure substantive equality.

Bakht also argues that secular women from the dominant community are similarly vulnerable to the disadvantages of private arbitration.[25] Although not subject to faith-based arbitration, these women may find systemic gender discrimination influences arbitration to a greater extent than the courts because arbitration lacks statutory standards and procedures. And while not subject to the same barriers of language, culture and threatened alienation, they may be similarly likely to accept unjust arbitral awards if they are abused or do not have the socioeconomic resources to do otherwise. In this way family arbitration may pose the same threats to women from the dominant community as it does to women from minority communities.

Keep the Baby, Toss Most of the Bath Water: The Boyd Report

Despite these critiques, the Boyd Report concluded that Ontario should attempt to retain the benefits of arbitration. In my view this conclusion reflects a realistic appraisal of Ontario's options and a conviction that there is an acceptable balance to be found between the benefits and dangers of private arbitration.

The key question is whether private resolutions of family disputes should be upheld by the courts and, if so, under what conditions. It is not about whether or not private resolutions to family disputes should take place. Critics acknowledge that even abolishing binding family arbitration will not stop individuals, particularly those in religious

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[24] Bakht, *supra* note 21 at 41, 64-65.

[25] Bakht, *supra* note 21 at 63.

minority communities, from resolving disputes by private contract and faith-based tribunals.[26] A comparative study indicates that Muslims in Britain, polled in 1989, were twice as likely to resolve family disputes in faith-based tribunals even though the decisions held no legal authority in the courts.[27] Granted, ending binding arbitration will almost surely eliminate its use amongst secular Ontarians who will see little incentive to undertake a process the courts will disregard. But for members of a religious community, the decisions of a faith-based tribunal will continue to carry substantial authority on the basis of community, culture and religion. The feminist critique's primary concern in private arbitration is vulnerable women, those who are unable or unwilling to seek judicial remedy of their unjust treatment, and who will continue to abide by the private resolution of family disputes in faith-based tribunals after binding arbitration is gone.

A second point is that the critique relies on the assertion that the benefits of Kymlicka-style accommodation are theoretical while the actual effect of accommodation is the oppression of women. However this has yet to be established. Boyd did not find any evidence to suggest that women are being systematically discriminated against in family arbitration, faith-based or not.[28] Bakht is correct to argue that this conclusion does not mean that discrimination is not happening.[29] It is quite likely that some women are unable or unwilling to appeal arbitral decisions, apply for judicial review or come forward about unjust treatment. It is equally plausible that some women are unaware that this treatment is unjust relative to their individual rights. Nevertheless, in this total absence of evidence it would be rash to

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[26] Bakht, *supra* note 21 at 65. See also Jean-Francois Gaudreault-DesBiens, "The Limits of Private Justice?: The Problems of State Recognition of Arbitral Awards in Family and Personal Status Disputes in Ontario" (2005) 16:1 World Arbitration and Mediation Report 23.

[27] Pascale Fournier, *The Reception of Muslim Family Law in Western Liberal States* (30 September 2004), online: Canadian Council of Muslim Women <http://www.ccmw.com/Position%20Papers/Pascale%20paper.doc> at 25.

[28] Boyd, *supra* note 3 at 133.

[29] Bakht, *supra* note 21 at 57.

eliminate the benefits of arbitration without first trying to quantify and remedy its likely weaknesses.

So the practical result of prohibiting family arbitration in Ontario will be (1) loss of the benefits of efficiency, freedom of choice and multicultural accommodation, (2) continued use of private resolutions of family disputes by at-risk women in minority communities and, (3) the only ostensible benefit, the virtual elimination of arbitration amongst at-risk secular women—all on the basis of a reasonable suspicion of unverifiable injustice.

By contrast, implementing the Boyd Report would allow the existing benefits of binding arbitration to continue while alleviating some of the problems of unregulated private arbitration. Boyd's recommendations propose to do this in three ways: (1) better oversight of family arbitration, (2) more avenues for the courts to interfere with or revoke arbitral awards and (3) more opportunities for women to opt out of arbitration.

First, Boyd recommends making private arbitration of family law a regulated arena. She suggests the formation of a self-regulating industry much like a provincial bar association.[30] She would require that, in every instance, arbitrators certify in writing that they have screened the parties for abuse.[31] All arbitrators would also be required to maintain written records of arbitral awards and to submit summaries, free of identifying information, to a branch of the provincial government or, upon its formation, to the self-regulating professional association.[32] Over time, these records would constitute actual evidence that could be used to conduct real policy research into the incidence of unjust treatment and appropriate responses. Ideally, in the event that evidence shows a particular arbitrator or tribunal is systematically discriminating against women, or they refuse to submit records, the professional association could remove their license to

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[30] Boyd, *supra* note 3 at 135-136. Recommendation 14.

[31] Boyd, *supra* note 3 at 136. Recommendations 18 and 19.

[32] Boyd, *supra* note 3 at 140-141. Recommendations 38, 39 and 41. Additionally, in Recommendation 20, Boyd suggests that a court could set aside an award if the required documents for the arbitration were not maintained; at 137.

practice. This would result in legal sanctions were the impugned tribunal to continue to practice—an option not available against faith-based tribunals if binding arbitration is prohibited altogether.

Second, Boyd recommends increasing the courts' avenues to interfere with arbitral awards. Boyd recommends that arbitral awards be included in the class of domestic contracts the courts may vary under the protections of s. 56(4) of the *Family Law Act*.[33] This recommendation would effectively add three grounds to the existing bases for judicial review: if a party to the arbitration is receiving social assistance, if a party fails to disclose assets or liabilities, or if a party does not understand the nature and consequences of the arbitration.[34] Classifying arbitration awards under s. 56(4) would also make them subject to the courts' right to review the validity and fairness of domestic contracts.[35]

Third, Boyd makes suggestions aimed at improving the prospects that at-risk women would either opt out of arbitration or exercise their rights to appeal and judicial review. Boyd recommends that an arbitration award be invalid without prior signed certificates of independent legal advice or signed waivers of independent legal advice.[36] She also recommends that arbitration agreements that form part of a marriage contract must be reconfirmed in writing at the actual time of the dispute but before arbitration begins.[37]

Conclusion

Of course problems remain. A self-regulating professional association is unlikely to gain powers of coercion over arbitrators for quite some time. Women may continue to experience injustice while the government gathers and analyzes factual evidence. Expanded judicial review does not mean vulnerable women will be any more empowered to exercise the option. Boyd's recommendations continue

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[33] R.S.O. 1990, c. F.3.

[34] Boyd, *supra* note 3 at 133-134. Recommendations 3 and 8.

[35] See *Miglin* v. *Miglin,* [2003] 1 S.C.R. 303 at para. 51.

[36] Boyd, *supra* note 3 at 134 and 137. Recommendations 9(b) and 21 to 24.

[37] Boyd, *supra* note 3 at 134. Recommendation 5.

to allow parties to entirely waive their rights to appeal and independent legal advice. However, some of these shortfalls are Boyd's concessions to the benefits of efficiency in arbitration. Were McGuinty so inclined, he could strengthen the recommendations, at some cost to efficiency, for greater protections against the risk of injustice. He could make independent legal advice mandatory and eliminate the ability to waive appeals on questions of law.

Unfortunately, women made vulnerable by the intersection of disadvantage in gender, class, religion and language will continue to be exposed to the risk that they may be treated unjustly in private arbitration. The Boyd recommendations can only address this peripherally. But the truth is these same women will be exposed to this risk even if arbitration is prohibited, and the injustice is unlikely to register in any public record. By regulating private arbitration of family disputes, faith-based or otherwise, Ontario can gain a better understanding of whether systemic discrimination is occurring and address the problem without a needless sacrifice of the flexibility of arbitration. There is a balance to be found here.

Postscript

On February 14, 2006, several months after I set this argument out, the Ontario legislature passed the *Family Statute Law Amendment Act*[38] to give effect to McGuinty's promise that there would be one law for all Ontarians. Instead of prohibiting family arbitration altogether, the *Act* implements all the safeguards of the Boyd Report I highlighted above, including mandatory certificates of independent legal advice and an unconditional right to appeal.

Despite this invigoration of judicial and policy oversight of family arbitration, the *Act* nonetheless mandates in ss. 1(2) and 5(10) that family arbitration must be conducted exclusively in accordance with the law of Ontario to have any legal effect, thus banning faith-based arbitration. This seems unnecessarily parochial and destined for challenge under the *Canadian Charter of Rights and Freedoms*.[39]

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[38] S.O. 2006, c. 1.

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

As Tarek Fatah of the Muslim Canadian Congress asserted after the amendments were passed, it may be that the nascent Islamic Tribunal that sparked the debate was indeed an attempt by Islamic fundamentalists to make headway via Canadian multiculturalism.[40] And clearly it is not desirable to facilitate hermetic mini-theocracies within Canada. But McGuinty's blunt response of total prohibition ignores the examples of success Boyd found in the Jewish Beis Din, the Ismaili Muslim National Conciliation and Arbitration Board, and the El Noor Mosque in Toronto.[41] It also remains the case that at-risk women in minority communities will continue to feel the authority of faith-based tribunals, whether they are part of the province's arbitration regime or not.

In my view it would still be best to make these bodies subject to the newly enacted powers of judicial and policy oversight. Even if Tarek Fatah is right about the influence of fundamentalist Islam, are not the new powers of judicial oversight a better remedy than no oversight at all? And is this manifestation of Islam so completely insidious that its control demands a total ban on all faith-based arbitration? In the context of the *Charter* it is arguable this blanket prohibition is not a demonstrably justifiable and reasonable limit on freedom of religion under s.1. Although there is a rational connection between the ban on religious arbitration and the protection of at-risk women in minority communities, the prohibition is not a minimal impairment of the religious freedom in question. As such I question whether it is not sure to draw *Charter* challenge from those communities who were arbitrating on faith-based principles prior to the controversy.

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[40] Lee Greenberg, "Ontario Bans Religious Arbitration, Legal Since 91" *CanWest News Service* (15 February 2006), online: Canadian Jewish Congress<http://www.cjc.ca/template.php?action=itn&Story=1645>.

[41] See Shachar, *supra* note 15.