REVIEW OF CURRENT LAW AND LAW REFORM

appeal

VOLUME 3 1997

TRENDS & DEVELOPMENTS

Monitoring Preventive Justice

BC v. The Tobacco Industry

FEATURE ARTICLES

Orders for Open Custody

Contractual Aspects of Voluntary Codes

The Nisga'a Agreement In Principle

Aboriginal Title in the Yukon

BOOK REVIEW

Faculty of Law
University of Victoria

The Appeal Publishing Society wishes to thank our

Patrons

Alexander, Holburn, Beaudin & Lang, Vancouver, B.C.
Anniko, Hunter, Victoria, B.C.
Arvay Finlay, Victoria, B.C.
Blake, Cassels & Graydon, Vancouver, B.C.
Boughton Peterson Yang Anderson, Vancouver, B.C.
Bull, Housser & Tupper, Vancouver, B.C.
Campney & Murphy, Vancouver, B.C.
Connell Lightbody, Vancouver, B.C.
Cox, Taylor, Victoria, B.C.
Davis & Company, Vancouver, B.C.
Douglas, Symes & Brissenden, Vancouver, B.C.
Farris, Vaughan, Wills & Murphy, Vancouver, B.C.
Fraser & Beatty, Toronto, Ont.
Richard P. Gibbons, Whistler, B.C.
Guild, Yule, Sullivan, Yule, Truscott & Slivinski, Vancouver, B.C.
Harper Grey Easton, Vancouver, B.C.
Harrop, Phillips, Powell & Gibbons, Vancouver, B.C.
Hatter, Thompson & Shumka, Victoria, B.C.
Horne Coupar, Victoria, B.C.
Jawl & Bundon, Victoria, B.C.
Lang Michener, Toronto Ont.
Lawson Lundell Lawson & McIntosh, Vancouver, B.C.
MacMinn & Company, Victoria, B.C.
Peck & Tammen, Vancouver, B.C.
Poyner Baxter Blaxland, North Vancouver, B.C.
Richards Buell Sutton, Vancouver, B.C.
Russell & DuMoulin, Vancouver, B.C.
Salloum Doak, Kelowna, B.C.
Smart & Biggar, Vancouver, B.C.
Smith Hutchison, Victoria, B.C.
Sugden, McFee & Roos, Vancouver, B.C.
William J. Sullivan, Vancouver, B.C.
Taylor Jordan Chafetz, Vancouver, B.C.
Tory Tory DesLauriers & Binnington, Toronto, Ont.
University of Victoria, Faculty of Law, Class of '97, Victoria, B.C.

Special Thanks

to the following for their time, energy and commitment to this project:
Professor Diana Belevsky, Professor Michael M'Gonigle, Professor John McLaren, Dean David Cohen and Pat Pitsula.

We would also like to thank the British Columbia Law Foundation, the University of Victoria Law Students' Society, the UBC Law Review Editorial Board, and the Faculty of Law at the University of Victoria for their very generous support.

Thanks and gratitude to our referees.

Production

Appeal Logo Design: David Gruber
Layout and Design: Mark Bawden

APPEAL - review of current law and law reform is published yearly by the Appeal Publishing Society, University of Victoria, Faculty of Law, P.O. Box 2400, Victoria, British Columbia, Canada V8W 3H7 Tel.: (250) 721-8198 Fax: (250) 721-6390 email: appeal@uvic.ca

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

The editors welcome and encourage the submission of articles, opinion pieces, case commentaries and critiques, as well as criticisms and suggestions for the inclusion of timely issues. Letters to the editor are also welcome. Contributors should refer to the submissions information located on page 4 of this volume.

Annual subscriptions to APPEAL are $20.00 for non-students, $10.00 for students and are payable in advance. Advertising rates are available upon request. All correspondence regarding subscriptions and advertising should be sent to the above address. For more information, please refer to page 4 of this volume.

ISSN 1205 - 612X

Contents

Call for Submissions

Are you a Student? Submit Your Papers to APPEAL.

APPEAL – review of current law and law reform is currently accepting submissions. We offer a forum for the excellent work being done by students in Canadian law schools. Your submissions will give readers insight into the views and ideas of Canada's next generation of lawyers.

APPEAL is looking for feature articles of up to 4000 words in length. Shorter articles of up to 2500 words in length (book reviews, case comments, opinions, etc.) are also welcome.

Non-traditional forms of legal writing and analysis (narratives, economic, social and historically contextual articles) are encouraged.

Deadline for submissions is November 1, 1997.

If you are a student and want your work to reach the legal community and beyond, submit your papers to APPEAL.

Send your papers to:
APPEAL
University of Victoria,
Faculty of Law
PO Box 2400
Victoria, B.C.
V8W 3H7
Tel.: (250) 721-8198
email:
appeal@uvic.ca

Editorial

Welcome to this year's issue of Appeal – Review of current law and law reform. The journal was created in 1994 to provide a forum for student writing on legal issues in Canada. Since that time it has developed into a widely-read publication that is of as much interest to the general public as to the legal profession.

This year's journal, unlike previous issues, is not restricted to a single theme. Instead, a variety of topics are addressed, ranging from criminal matters to contractual. The Trends and Developments section comprises two articles that focus on the evolution of Canadian law. Errin Poyner examines electronic monitoring as a means of preventive justice, and Lisa Riddle looks at the potential for provinces to sue tobacco companies for health care costs.

Our feature articles examine aspects of the current state of Canadian law. Richard Fader analyzes the success of the Young Offenders Act in realizing the policy goals that drove its creation. Next, Andrew Morrison provides an overview of the enforceability of voluntary codes in a variety of contexts. Finally, we have grouped two papers together in a separate section dealing with aboriginal issues. With a focus on the Nisga'a Agreement-in-Principle, Sara Baade looks at issues surrounding aboriginal self-government, and Jamie Bliss provides an analysis of the potential for aboriginal title claims in the Yukon Territories.

Our final section, Book Reviews, is new to this issue of Appeal. Janna Promislow reviews the second edition of Canadian International Development Assistance Policies: An Appraisal. We are excited about this new section, and plan to include more book reviews in future editions.

It is with regret that we express our sadness at the passing of F. Murray Fraser, a person very special to Appeal, the Faculty of Law, and the University of Victoria. As a member of our Editorial Advisory Board, Dr. Fraser supported Appeal from its inception. His dedication to legal scholarship inspired us and this journal attempts to embody his spirit and his innovative approach to legal education. He will be truly missed.

The Appeal Editorial Board

Drawing Boundaries
Monitoring Preventive Justice

Errin Poyner is a third year law student at the University of Victoria. Before attending law school, she received an Honours degree in English from the University of British Columbia. Upon graduation, Errin will article at the firm of Farris, Vaughan, Wills and Murphy in Vancouver.

Editor's Note: Just prior to publication, the Standing Committee on Justice and Legal Affairs voted to strike from Bill C-55 the provisions which would allow judges to impose electronic monitoring on potential violent offenders. The high cost of electronic monitoring technology, and not concerns regarding civil liberties, was cited as the reason for the decision.*

The imprisonment of an innocent person for a crime that he or she did not commit is generally regarded as a failure of our legal system to protect the rights of those subject to its sanctions. It undermines our confidence in those who make and enforce the law, and in the inviolability of our personal liberty. Yet on September 17, 1996, Justice Minister Allan Rock introduced a bill to Parliament that would allow the state to electronically monitor persons who have committed no crime, but who simply might do so in the future.[1] This "judicial restraint" proposal is part of a package of amendments aimed at tightening state control over violent and sexual offenders (both actual and potential), while allowing low-risk offenders to serve their sentences in the community. Minister Rock calls the package one of "the most significant initiatives in recent memory in relation to the criminal justice system."[2] However, perhaps more significant is the federal government's desire to identify and electronically tag potential offenders in a manner that may violate their right to liberty, and their right not be deprived thereof except in accordance with the principles of fundamental justice, as guaranteed by section 7 of the Charter.[3]

I. Bill C–55's "Judicial Restraint" Provision

If passed in its present form, the "judicial restraint" provision in Bill C-55 would amend the Criminal Code to include section 810.2. This section would allow provincial Attorneys-General[4] who believe that there are reasonable grounds to fear that a person will commit a serious personal injury offence[5] to lay an information to that effect before a provincial court judge.[6] After a hearing, the judge may require the defendant[7] to enter into a recognizance to keep the peace and be of good behaviour.[8] The judge may also impose additional conditions, most notably the requirement that the defendant comply with a program of electronic monitoring, if

* "Tracking bracelets too costly" *The [Toronto] Globe and Mail* (6 March 1997) A4.

1 Bill C-55, An Act to amend the Criminal Code (high risk offenders), the Corrections and Conditional Release Act, the Criminal Records Act, the Prisons and Reformatories Act and the Department of the Solicitor General Act, 2nd Sess., 35th Parl., 1996.

2 A. McIlroy, "Rock proposes electronic tracking device" *The [Toronto] Globe and Mail* (18 September 1996) A1 & A6

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

4 This role will likely be delegated to Crown attorneys. McIlroy, see note 2 at A6.

5 "Serious personal injury offence" is defined in section 752 of the *Criminal Code*, R.S.C. 1985, c. C-46 as:

> (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
>
> (i) the use or attempted use of violence against another person, or
>
> (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict

BILL C-55

such a program is available where the defendant resides.[9] The period of monitoring may last as long as twelve months;[10] refusal or failure to enter into the recognizance would result in a prison term of the same duration[11] and breach of the terms of the recognizance would be an offence punishable on summary conviction.[12] The defendant need never be charged with, nor convicted of, a criminal offence in order for the section to be invoked.

Despite statistics indicating a recent decline in levels of violent crime,[13] the federal government has identified a growing public perception that Canada's communities are no longer safe places to live.[14] In an attempt to address this fear, the government has pledged to "protect the basic right of all citizens to live in peaceful and safe communities" and to introduce measures to improve community safety and crime prevention.[15] The proposed section 810.2 is such a measure. Minister Rock claims that the goal of judicial restraint is to better ensure public safety by allowing police to monitor the movements of currently sentenced violent and sexual offenders, following their release from prison and expiry of parole.[16] However, the Crown could also invoke the provision against persons suspected of stalking, or criminal harassment, "where there is not enough evidence to lay a charge or get a conviction, but there is reason to fear for someone's safety."[17]

II. Section 7 Analysis

Minister Rock has publicly affirmed the government's confidence in the constitutionality of the electronic monitoring provision.[18] That confidence, however, may be misplaced. The judicial restraint proposal builds on Criminal Code section 810.1, a similarly structured provision that allows

severe psychological damage upon another person,

and for which the offender may be sentenced to imprisonment for ten years or more, or

(b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

6 Bill C-55, see note 1 at s. 810.2(1).

7 The term "defendant" is used throughout this article to refer to an individual who would be subject to electronic monitoring under the judicial restraint provision of Bill C-55. The term "offender" refers to an individual who is subject to electronic monitoring as a penal sentence upon conviction for an offence.

8 Bill C-55, see note 1 at s. 810.2(3).

9 Bill C-55, see note 1 at s. 810.2(6).

10 Bill C-55, see note 1 at s. 810.2(3).

11 Bill C-55, see note 1 at s .810.2(4).

12 Bill C-55, see note 1 at s. 811.

13 After average annual increases of 4% in the rate of violent crime from 1978 to 1992, statistics indicate that the incidence of violent crime is declining. In 1993, violent crime rates dropped less than one percent. In 1994, however, the violent crime rate dropped 3%, the largest drop since 1962. Specifically, the homicide rate dropped 6%, the attempted murder rate dropped 8%, the rate of "serious assaults" dropped 4%, the sexual assault rate dropped 10%, and the rate of "other sexual assaults" dropped 10%. Statistics Canada and Canadian Centre for Justice Statistics, *Canadian Crime Statistics 1994* (Ottawa: Minister of Industry, 1995) at 5, and Statistics Canada and Canadian Centre for Justice Statistics, *Canadian Crime Statistics 1993* (Ottawa: Minister of Industry, 1994) at 8.

14 Canada Department of Justice and Solicitor General Canada, *Towards Safer Communities: A Progress Report on the Safe Homes, Safe Streets Agenda*, at 1. [1996] LNCR No. 68 (QL) at p. 1.

15 "Toward Safer Communities", see note 14 at 1; His Excellency the Right Hon. Romeo LeBlanc, G.-G.(Can.), "The Speech from the Throne" (February 27, 1996). Found at http://www.parl.gc.ca/english/hansards/001_96-02 27/001G01E.html on Feb. 23, 1997.

16 Bill C-55 also creates the category of "Long-Term Offender", which provides for the mandatory supervision of sexual offenders for a period of up to ten years after the completion of their sentence. However, persons sentenced prior to the passing of Bill C-55 cannot be designated " Long-Term Offenders", as the legislation would not have retroactive effect. See note 1 at s. 753.1.

17 McIlroy, see note 2 at A6.

18 McIlroy, see note 2 at A6.

provincial courts to compel persons who might commit sexual offences against children to enter into recognizances prohibiting them from attending places where children are reasonably expected to be present.[19] However, the constitutionality of section 810.1 was recently considered in *R.* v. *Budreo*,[20] a decision of the Ontario General Division (currently on appeal to the Ontario Court of Appeal) that explores the extent to which such preventive recognizances are permissible under section 7 of the Charter.[21] Considered together with the Supreme Court of Canada's recent section 7 jurisprudence, *Budreo* raises issues regarding the limitations placed on such recognizances by the requirements of fundamental justice that may ultimately prove fatal to the judicial restraint provision of Bill C-55.

A. Liberty of the Person

As Justice Then notes in *Budreo*, the imposition of a preventive recognizance unquestionably violates the liberty interest protected by section 7.[22] Prior to the advent of the Charter, the Supreme Court of Canada held in *R.* v. *McKenzie* that to "restrain the liberty of a subject where there has been no crime committed is, beyond question, an interference with a civil right."[23] Similarly, the Supreme Court's post-Charter decision in *R.* v. *Heywood* held that a prohibition against convicted sex offenders "loitering" in school grounds, playgrounds, public parks or bathing areas was also a restriction of liberty that would trigger section 7.[24]

B. Fundamental Justice

a. Preventive justice

However, a restriction of the liberty interest does not constitute a breach of section 7 unless it also fails to accord with the principles of fundamental justice. In *Reference Re: s.94(2) of the Motor Vehicle Act*, Supreme Court Justice Lamer defined those principles as those "found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system."[25] This definition is not, in itself, particularly helpful. However, as S.J. Whitley writes, "history will provide a key to accepted norms."[26] The history of the preventive power of the judiciary is set out in the Supreme Court of Canada's decision in *MacKenzie* v. *Martin*, which indicates that the "immemorial exercise" of the common law power to issue preventive recognizances, or peace bonds, has been the province of lower courts since early Saxon times.[27] The decision in *Budreo* affirms that this long-standing power is "part of the fabric of our law," and its exercise is not inherently contrary to fundamental justice.[28]

b. Overbreadth

The state's imposition of a preventive recognizance is not unconstitutional; however it may be rendered so if some aspect of it violates the principles of fundamental justice. Section 7 of the Charter requires individual rights to life, liberty and

19 R.S.C. 1985, c. C-46. See also McIlroy, note 2 at A6.

20 (1996), 104 Canadian Criminal Cases (3d) 245 (Ontario General Division).

21 *Budreo* also challenged s.810.1 under ss. 9, 11(d), 11(h), and 15 of the *Charter*, and certain of those arguments may also be applicable to the consideration of the judicial restraint provision in Bill C-55. However, for the purposes of this paper, only the section 7 arguments will be analysed.

22 *Budreo*, see note 20 at 265.

23 (1945), 85 Canadian Criminal Cases 233 at 240 (Supreme Court of Canada).

24 [1994] 3 Supreme Court Reports 761 at 789. This case considered the constitutionality of *Criminal Code* s.197(1)(b).

25 [1985] 2 Supreme Court Reports 486 at 512.

26 S. J. Whitley, *Criminal Justice and the Constitution*, (Toronto: Carswell, 1989) at 182.

27 (1954), 108 Canadian Criminal Cases 305 (Supreme Court of Canada) at 316-17. See also R.C. Hunter, Q.C., "Common Law Peace Bonds: the Power of Justices of the Peace to Administer 'Preventive Justice'" (1978), 1 Canadian Reports (3d) 70.

28 *Budreo*, see note 20 at 271. See also *Heywood*, note 24 at 790.

security of the person to be balanced against the state's need to limit those rights under certain circumstances. The means employed to do so must not be overly broad; they may not exceed those strictly necessary to achieve the state's objective. The rationale is explained in *Heywood*: "If the state, in pursuing a legitimate objective, uses means that are broader than necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason."[29] In the operation of the overbreadth analysis, section 7 of the Charter internalises the "minimal impairment" test normally found in a section 1 analysis.[30]

The overbreadth analysis in *Heywood* focused on a blanket restriction against persons previously convicted of sexual offences against children "loitering" in public parks and bathing areas. The Supreme Court of Canada found that this was "a significant limit on freedom of movement" that did not further the objective of protecting children unless children actually frequented the location. The court held that such a limit was overbroad in the absence of a requirement that children be reasonably expected to be present in those places.[31]

The court in *Budreo* followed the *Heywood* approach in considering the aspect of a recognizance imposed under Criminal Code section 810.1 which prohibits attendance at "a public park or swimming area where persons under the age of fourteen years are present or can reasonably be expected to be present, or in a daycare centre, schoolground, playground or community centre." Although the court held that these restrictions met the state's objective of protecting children from sexual offenders, it found the blanket prohibition against attendance at community centres to be overly broad. While community centres do provide programs for children, there may be times when no children are present. Therefore, the court held, without a requirement that children are reasonably expected to be present, the section's object of protecting children was not enhanced by that blanket restriction on the defendant's freedom.[32]

III. Is Electronic Monitoring Overly Broad?

The proposed section 810.2 does not specify the format of the electronic monitoring program contemplated by its drafters, nor the extent of the restrictions such a program might place on the liberties of those ordered to comply with them.[33] A Department of Justice official has stated that judges in individual cases will simply utilize the programs and technology that exist in their jurisdictions.[34] Currently, there are two models of electronic monitoring that might serve the purposes of Bill C-55. Each model has distinct constitutional and practical flaws when employed in the judicial restraint context.

A. The "Curfew Compliance" Model

The electronic monitoring technology presently employed as a penal sanction in British Columbia enforces "curfew compliance."[35] The convicted offender must wear an electronic anklet containing a transmitter that sends a signal to a

29 *Heywood*, see note 24 at 792-3.

30 *R.* v. *Oakes*, [1986] 1 Supreme Court Reports 103 at 139.

31 *Heywood*, see note 24 at 795.

32 *Budreo*, see note 20 at 273.

33 Bill C-55, see note 1. Section 810.2(6) merely states that, "Before making an order under subsection (3), the provincial court judge shall consider whether it is desirable to include as a condition of the recognizance that the defendant...comply with a program of electronic monitoring, if such a program is available in the place in which the defendant resides".

34 Telephone interview with Mr. Troy Demers, Communications and Executive Services Officer, Department of Justice, Ottawa (31 October 1996).

35 K. Unland, "Electronic monitoring has its limits" *The [Toronto] Globe and Mail*, (19 Sept. 1996) at A10.

receiver unit installed in the offender's home. This signal is transmitted through the defendant's telephone line to a central computer, which confirms that the offender is at home during stipulated hours. Random telephone calls and spot checks provide further confirmation of the offender's presence. Except for approved employment, educational and rehabilitative commitments, the offender is confined to his or her home at all times.[36] Additional mandatory conditions of such a sentence require offenders to:

- abstain from the use of drugs and alcohol;
- submit to drug or alcohol testing at any time;
- provide Corrections officials with their residential and employment or school addresses and times when they will be there (making allowance only for travel between those places);
- permit Corrections officials or the RCMP to enter their homes to verify equipment operation and compliance;[37] and
- refrain from operating a motor vehicle.[38]

Overstating the risk that a person poses to the public is an evasion of the overbreadth test: it allows the state to severely restrict the liberty of an individual for no reason other than its inability to predict the harm that such a person might cause.

When the overbreadth test set out in *Heywood*[39] is applied to the "curfew compliance" model of electronic monitoring in the context of judicial restraint, the means employed by the state in achieving its objective appear to be overbroad in both the scope of the geographic restriction imposed, and its intrusive nature. The decisions in *Budreo* and *Heywood* indicate that absolute geographic restrictions will be upheld only where it is found that the probable victim of the feared offence is reasonably expected to be present in the specified location at any time. The judicial restraint provision would allow the Attorney-General to lay the information and does not require that the person or class of persons deemed to be at risk be named;[40] therefore, the "probable victim" is effectively deemed to be every member of the public. Because it is reasonable to expect that some member of the public may be anywhere that the defendant may be, at any time, the confinement of the defendant to his or her home when not at work or school appears justifiable.

It is unrealistic, however, to suppose that a person who has not been convicted of an offence, and who is merely judged to be at risk of doing so, poses a real threat to every member of the public and should be segregated from them when not engaged in a state-approved activity. The evidence that would establish reasonable grounds to fear that such an offence might occur would likely indicate that perhaps only one person, such as a former spouse, or a class of persons, such as children, appear to be at risk, or that the risk of harm is greater under certain circumstances, such as the use of drugs or alcohol. In such cases, the conditions of a recognizance may be narrowly tailored to address the risk presented, as is done by existing Criminal Code sections 810 and 810.1.

In cases where no such person or persons are identified, however, the state cannot rely upon "the protection of the public" to confine legally innocent people to their homes. In *R. v. Parks*,[41] Supreme Court Justice Sopinka expressed "grave doubts as to whether a [preventive judicial] power that can be exercised on the basis of

36 Offenders may be granted permission to attend appointments and run errands if application is made in advance. [Interview with Mr. Tom Larsen, Corrections Officer, Corrections Branch, Ministry of the Attorney-General, Province of B.C. (February 5, 1997) Vancouver Island Regional Correctional Centre].

37 See generally, "British Columbia Corrections Branch Electronic Monitoring Program", and "B.C. Corrections Branch Manual of Operations Adult Institutional Services: Electronic Monitoring Program", K. Schultz, ed., *Electronic Monitoring and Corrections: The Policy, the Operation, The Research* (Vancouver: Simon Fraser University, 1995) at 53 - 78.

38 In addition to the other conditions listed above, this condition is included in the Temporary Absence Authorization Permit issued to offenders enrolled in the Electronic Monitoring Program by the Corrections Branch, Ministry of Attorney General, Province of B.C. The Permit also forbids offenders from entering any premises where the prime commodity for sale is alcohol.

39 *Heywood*, see note 24 at 792-3.

40 Bill C-55, see note 1 at s. 810.2(1).

41 (1992), 75 Canadian Criminal Cases (3d) 287 (Supreme Court of Canada) at 314.

'probable ground[s] to suspect future misbehaviour' without limits to the type of 'misbehaviour' or potential victims, would survive Charter scrutiny." Overstating the risk that a person poses to the public is an evasion of the overbreadth test: it allows the state to severely restrict the liberty of an individual for no reason other than its inability to predict the harm that such a person might cause.

Supporters of the "curfew compliance" model may argue, however, that electronic monitoring is a minimal restriction of liberty that does not outweigh the state's interest in protecting the public. After all, the defendant remains in the community and is able to continue working, going to school, maintaining social and family relationships and enjoying a measure of freedom. Such an argument stems from the public perception that electronic monitoring, as compared to incarceration, is a "soft" or "lenient" sentencing option.[42] Saskatchewan Court of Appeal Justice Vancise disputes this "illusion of liberty" in *R.* v. *McLeod*, where he upholds the trial judge's characterisation of electronic monitoring as "'a very...realistic alternative to jail [which] has all of the elements of punishment, rehabilitation, deterrence, individual and general, built into it.'"[43]

In *Budreo*, Justice Then cautions that where no offence has been committed and only a likelihood of harm proven, the history of preventive justice demands that the restrictions imposed be relatively slight. Acceptable restrictions imposed by the state are "moderate and circumscribed" and "would not prevent a person from leading a reasonably normal life."[44] The "curfew compliance" model of electronic monitoring appears more closely to resemble a "realistic alternative to jail" than a "reasonably normal life." Under the judicial restraint program, the defendant's activities both inside and outside the home would be constantly monitored and severely restricted to those approved by the state, with penalties for any derivation from the strict schedule. The state will also be authorised to enter the defendant's home at any time. While the receiver unit is in operation, the defendant's ability to use the telephone is severely curtailed.[45] This model of electronic monitoring may also prevent the defendant's family members from leading a normal life: research on offenders sentenced to electronic monitoring indicates that persons confined to their homes may direct the resulting anger and frustration at their families, thereby putting their spouses and children at risk.[46]

It may be argued that the electronic monitoring of potential offenders can be made less restrictive than the penal sanction applied to convicted offenders by relaxing some or all of the punitive mandatory conditions outlined above. However, while these conditions are punitive both in purpose and effect, they are also functional; all of the mandatory conditions are necessary to ensure that the electronic monitoring technology serves its purpose, and that geographic restrictions are not casually or unintentionally breached. A curfew must be set in order to define a consistent time when monitoring will begin each night, at which time the defendant must be at home to avoid penalty. Furthermore, because the device cannot tell what

42 *R.* v. *McLeod* (1993), 81 Canadian Criminal Cases (3d) 83 (Saskatchewan Court of Appeal) at 99.

43 *McLeod*, see note 42 at 90.

44 *Budreo*, see note 20 at 275.

45 Larsen, see note 36.

46 S. Mainprize, "Social, Psychological and Familial Impacts of Home Confinement and Electronic Monitoring: Exploratory Research Findings from B.C.'s Pilot Project", see Schultz, note 37, 141-188 at 151-3.

the defendant is doing while away from home during the day, the opportunity to do harm can only be limited by restricting the defendant's activities to those approved by the state. The device cannot tell what the defendant is doing when he or she is at home, whether it be tampering with the monitoring equipment or committing an offence; therefore, spot checks are necessary to ensure compliance with the conditions of the program. The prohibition against consumption of alcohol ensures that the defendant is aware of and responsible for his or her whereabouts at all times. The very limitations of electronic monitoring technology require that the surveillance it imposes be constant and intensive.

Electronic surveillance is not an effective means of controlling the risk to society presented by persons prone to violent behaviour. It is simply a means of punishing those who pose no such risk by restricting their liberty at little cost to the state.

Furthermore, the criteria used by Corrections officials to determine which convicted offenders are appropriate candidates for electronic monitoring indicate that such measures will not be effective in the preventive context. In British Columbia, only those offenders who are voluntarily willing to comply with the conditions of the program, show no pattern of violent behaviour, have no record of sexual offences, and pose no apparent threat to the community are considered eligible for electronic monitoring.[47] Such criteria indicate that electronic surveillance is not an effective means of controlling the risk to society presented by persons prone to violent behaviour. It is simply a means of punishing those who pose no such risk by restricting their liberty at little cost to the state. In addition, because electronic monitoring requires a high degree of self-enforcement,[48] eligible offenders must be willing and motivated to comply with the conditions of the program. As Justice Vancise notes,

> The authorities recommend that a maximum of six months' electronic monitoring be assessed. Any period longer than six months dramatically increases the likelihood of a breach of the condition because of the difficulty of completing such a term.[49]

Where the subject of electronic monitoring has not committed an offence, he or she is unlikely to be willing or motivated to comply with its conditions; the response of such persons is more likely to be a sense of outrage and defiance at the restriction of their liberty. Coupled with the judge's discretion under the judicial restraint provision to assess a period of electronic monitoring six months in excess of the recommended maximum,[50] the chance of a breach resulting in summary conviction is very high. Therefore, the state will do indirectly what it cannot do directly: imprison an innocent person for a crime that he or she has not yet committed.

B. The "JurisMonitor" Model

Another model of electronic monitoring, currently employed in the United States as a penal measure and marketed under the name "JurisMonitor," also requires the convicted offender to wear a wrist or ankle transmitter that allows his or her movements to be monitored. However, rather than enforcing a curfew that confines the offender to his or her home, the police are only alerted when the offender gets too close to places that have been designated as off-limits and equipped with a receiver,

47 "British Columbia Corrections Branch Electronic Monitoring Program", Schultz, see note 37 at 54. Violent offenders may be eligible for electronic monitoring in limited circumstances, ie. to take advantage of rehabilitation programs available only outside of prison (Larsen, see note 36).

48 Unlike an incarcerated offender, an electronically monitored offender must personally ensure that the terms and conditions of his or her sentence are respected. For instance, the offender is personally responsible for being at home at the designated times, and must resist the temptation to engage in activities which have not been approved. The offender must also resist the temptation to consume drugs and alcohol, which may be readily available to him or her in the home. In contrast, prison life relieves the incarcerated offender from these responsibilities.

49 *McLeod*, see note 42 at 104. This is only a recommended maximum; offenders are sentenced to terms of electronic monitoring in excess of six months in limited cases. It is noted, however, that the risk of reoffending increases with the length of the sentence (Larsen, see note 36).

50 Bill C-55, see note 1 at s.810.2(3).

such as a school, or the home of a former spouse whose safety has been threatened.[51]

This model of electronic monitoring does not appear to run afoul of the overbreadth analysis in terms of its geographic restrictions. The device only prevents the defendant from attending places where the specified potential victim(s) of attack is reasonably expected to be present at all times.

Where the "JurisMonitor" model may violate section 7 is in its intrusive nature. Both the "curfew compliance" and the "JurisMonitor" models of electronic monitoring require the attachment of a visible and irremovable symbol of state sanction and control to the defendant's body. The principles that underlie the intentional tort of battery indicate the value that our society places on freedom from such interference with bodily integrity. In *Malette* v. *Schulman*, the Ontario Court of Appeal found a doctor who treated a Jehovah's Witness without her consent and against her wishes liable in battery. Justice Robbins stated,

> The right of a person to control his or her own body is a concept that has long been recognised at common law. The tort of battery has traditionally protected the interest in bodily security from unwanted physical interference. Basically, any intentional non-consensual touching which is harmful or offensive to a person's reasonable sense of dignity is actionable.[52]

It is arguable that the state's interest in public safety justifies a higher threshold of physical interference than the battery standard. However, even in the criminal context, the judicial interim release provisions of the Criminal Code recognise the presumption of non-interference in the accused's physical liberty prior to trial, subject to the Crown's ability to show cause why the accused should be detained.[53] Where no grounds exist even to lay a charge, the threshold of physical non-interference should be even lower.

Furthermore, this ongoing and visible interference with the defendant's bodily integrity does not comply with the requirement in *Budreo* that the conditions of a preventive recognizance be "moderate and circumscribed," allowing the defendant to lead a "relatively normal life."[54] The electronic anklet currently employed as a monitoring device by the B.C. Corrections Branch is approximately three inches long by two inches wide and one inch thick; it is made of thick black plastic and is attached to the offender's ankle by a wide black strap. It resembles an oversized pager, and despite its location on the ankle is hardly inconspicuous. Convicted offenders forced to wear a bracelet or anklet as part of an electronic monitoring sentence report feeling stigmatised by the visible symbol of state sanction and control attached to their bodies.[55] While some defendants under the judicial restraint program may be able to conceal the device beneath clothing, others may not. Consider, for example, the impact of such a device upon the waitress who must wear a skirt and short-sleeved shirt to work. Those unable to conceal the device will suffer the stigma of being perceived as a threat to society despite not having been charged with or convicted of an offence. Those who are able to conceal the device must still live with the knowledge

Those unable to conceal the device will suffer the stigma of being perceived as a threat to society despite not having been charged with or convicted of an offence. Those who are able to conceal the device must still live with the knowledge that the eyes of the state are not merely upon them but affixed to them.

51 Unland, see note 35.

52 (1990), 2 Canadian Cases on the Law of Torts (2d) 1 (Ontario Court of Appeal) at 8-9.

53 R.S.C. 1985, c. C-46, s. 515(1).

54 *Budreo*, see note 44.

55 Mainprize, see note 46 at 160-1.

that the eyes of the state are not merely upon them but affixed to them. As a means of preventive justice, the courts may well find such a physically and psychologically intrusive measure to be overbroad.

The "JurisMonitor" model also presents practical difficulties in the judicial restraint context that call its appropriateness into question. As noted above, the proposed section 810.2(1) would not require that a potential victim be named in the information; indeed, it does not require that a potential victim be named at all.[56] Therefore, where the potential victim cannot be precisely identified by the state, it would be impossible to determine which locations are off limits.

Where the information does identify a potential victim, however, the inability of the "JurisMonitor" model of electronic monitoring to protect that person from harm quickly becomes apparent. While it may be possible to install a receiver in the potential victim's home that would alert the police to the defendant's presence, the potential victim is not at home at all times. What about his or her workplace, school, transportation routes, relatives' homes, or jogging path? The "JurisMonitor" model of electronic monitoring can do nothing to protect the potential victim in these places. Indeed, the potential victim's safety is not guaranteed even at home; a person determined to do harm may not be deterred by the knowledge that their movements are being monitored. It has been observed that a dangerous offender can do a lot of damage before the police arrive.[57]

IV. Section 1

For the reasons outlined above, the judicial restraint provision in Bill C-55 is likely to be found overbroad by the courts if it is ever passed. As such, the restriction of liberty that it imposes will not be in accordance with the principles of fundamental justice, and will constitute a violation of section 7 of the Charter. As noted earlier, the test for overbreadth internalises the "minimal impairment" test normally undertaken in a section 1 analysis; legislation that is overbroad therefore appears incapable of being upheld under section 1.[58] In *Reference Re B.C. Motor Vehicle Act*, Lamer expressed doubt that a violation of the right to life, liberty or security of the person that is not in accordance with the principles of fundamental justice can ever be justified in a democratic society, except in times of war or national emergency.[59] Indeed, a violation of section 7 of the Charter has never been found justified under section 1 by a majority of the Supreme Court of Canada.[60] Therefore, despite the importance of the state's objective of protecting society from the risk of harm posed by potential violent offenders, the judicial restraint provision of Bill C-55 as it is currently drafted will almost certainly be struck down under section 1 of the Charter.

Recent developments indicate, however, that the judicial restraint provision in Bill C-55 will undergo substantial revisions before it is returned to the House of Commons for third reading. Minister Rock's confidence in the constitutionality of his

56 Bill C-55, see note 1 at 810.2(1).

57 Unland, see note 35.

58 *Heywood*, see note 24 at 802-3.

59 *Re B.C. Motor Vehicle Act*, see note 25 at 518; *Heywood*, see note 24 at 802.

60 P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 886.

proposal seems to be faltering as a result of the harsh criticism it has received in both the House[61] and the media.[62] Appearing before the Standing Committee on Justice and Legal Affairs on December 3, 1996, the Justice Minister agreed that significant amendments to the judicial restraint provision are necessary, and suggested three approaches that would narrow the provision's application so that electronic monitoring is available only "where there's a particularly serious threat to public safety." The first approach would impose electronic monitoring only on people who have been convicted of violent crimes. Another approach would impose electronic monitoring only on those with a history of violent behaviour. A third approach requires the creation of a list of factors (including criminal records and histories of violence) that judges would consider before deciding whether to apply the provision. He also asked the Committee to consider whether a less restrictive model of electronic monitoring (referred to above as the "JurisMonitor" model) would be more acceptable than the more conventional "curfew compliance" model of monitoring.[63]

Unfortunately, these suggested amendments fail to address the serious flaws in the Justice Minister's judicial restraint provision. By simply narrowing the groups to which the provision might apply, the amendments do not remedy the above-noted Charter violation that would result from its application. The suggested amendments appear designed to provide a basis under which the provision might be upheld under section 1 as in relation to a "pressing and substantial concern" important enough to justify the violation of a Charter right, as set out in the first test in *R.* v. *Oakes*.[64] However, as noted above, the means chosen by Minister Rock to meet this concern are overbroad, and therefore would not pass the "minimal impairment" element of the *Oakes* proportionality test.[65] The shortcomings of the "JurisMonitor" model of electronic monitoring are several and have been canvassed above. Minister Rock's suggested amendments, therefore, have little substantive merit.

V. Conclusion

Both the perception and the reality of violent crime are serious problems in Canada's communities. However, electronic monitoring of innocent persons does not appear to be the solution. Despite the Justice Minister's confidence in the judicial restraint provision of Bill C-55, the constitutional and practical flaws of electronic monitoring in the preventive context cannot be ignored. Minister Rock's judicial restraint provision is a political response to very pressing public demands for safer communities. However, section 7 of the Charter does not allow public concerns to justify the restriction of an individual's liberty in a manner that violates the principles of fundamental justice. If the judicial restraint provision is passed, the federal government will reap the benefits of tough-on-crime headlines. The Canadian judiciary, however, will be left to repair the damage done to Canadians' Charter rights. In *Heywood* and *Budreo*, the courts have begun to define the strict boundary that section 7 places on preventive justice. It is a boundary that cannot be redrawn by public opinion.

61 House of Commons Debates (3 October 1996) at 5037, (4 October 1996) at 5097, (7 October 1996) at 5174.

62 "Fasten that Collar" *The (Toronto) Globe and Mail* (7 December 1996) D8.

63 Evidence of the Standing Committee on Justice and Legal Affairs, Meeting No.88 (3 December 1996). Found at http://www.parl.gc.ca/committees352/jula/evidence/88_96-12-03/jula88_blk101.html on 5 February, 1997; see also A. McIlroy, "Rock to narrow use of electronic monitor" *The (Toronto) Globe and Mail* (4 December 1996) A4.

64 *Oakes*, see note 30 at 139.

65 *Oakes*, see note 30 at 139.

Finding a smoking Gun

BC v. The Tobacco Industry?

Lisa Riddle completed her first two years of law school at the University of Saskatchewan, College of Law. She is presently a third year visiting student at the University of Victoria, Faculty of Law. Upon graduation, Lisa will clerk with the Ontario Court of Justice (General Division).

The High Cost of Smoking in British Columbia

Tobacco products are the leading cause of preventable death and disease in Canada today. Every year, cigarette smoking causes more deaths than alcohol, car accidents, plane crashes, murder, suicide, illegal drugs and AIDS combined.[1] However, despite the generally accepted link between smoking and health problems, cigarette manufacturers have only once been held liable for the damages their products inflict.[2] The tobacco industry has been aware for many years of both the dangers associated with their products, and ways that they could be made safer.[3] Yet manufacturers continue to deny these dangers[4] and have failed to produce a less harmful product.[5]

On September 26, 1996, B.C. Health Minister Joy MacPhail announced that the province is investigating the possibility of suing tobacco companies to recover the estimated one billion dollars a year[6] spent treating smoking-related illnesses.[7] Recent developments in U.S. tobacco litigation may provide B.C. with the strategy it needs to recoup smoking's huge economic toll. Currently, 22 American states have launched lawsuits against the tobacco industry.[8] Some of the states that have brought these lawsuits have developed legislation providing themselves with a right of subrogation to the claims of individual smokers.[9] Others have developed statutes which create an independent cause of action against companies that cause increases in the cost of health care.[10] The province may wish to consider developing statutes similar to those created in the U.S., and then bring an action based either on a right of subrogation or an independent cause of action. Given the recent advances in medical knowledge about the health risks associated with smoking, and newly-uncovered evidence of the tobacco industry's awareness of those risks, B.C. may have chosen an opportune moment to test the courts' willingness to assign the health care costs of smoking to the tobacco industry.

*J. Beltrame, "First Tobacco Company Says Cigarettes are Addictive" *The Vancouver Sun* (21 March 1997) A1.

1 R. Cunningham, "Tobacco Products Liability in Common Law Canada" (1990) 11 Health Law in Canada 43; R. Doll & R. Peto, "Causes of Cancer, Quantitative Estimates of Avoidable Risks" (1981) 66 Journal of the National Cancer Institute 1191 at 1220.

2 *Carter* v. *Brown & Williamson Tobacco Corp.*, 680 So. 2d 546 (1996); see also G. Clarkin, "B & W Gets Smoked in Court" *CNN Financial Network* (11 July 1996). Found at http://cnnfn.com/hotstories/companies/9608/09/tobacco_pkg/index.htm on 31 October 1996. In the United States, a number of actions have been brought by individuals against cigarette manufacturers, including some class actions. Some examples include: *Cipollone* v. *Liggett Grp. Inc.*, 505 U.S.504 (1992); *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Kotler* v. *American Tobacco Co.*, 926 F.2d 1217 (1st Cir. 1990). See also G. J. Annas, "Tobacco Litigation as Cancer

Editor's note: Just prior to publication, U.S. tobacco manufacturer, the Liggett Group, settled the actions brought by 22 states to recover the health care costs associated with treating smoking-related illness. The Liggett Group made the unprecedented admission that the tobacco industry knew that tobacco was addictive, and causes cancer.*

Putting B.C. into Smokers' Shoes

The province incurs enormous costs in the treatment of smoking-related illness every year. These costs, however, are mere economic losses, for which the courts have long been hesitant to compensate.[11] In contrast, many of B.C.'s smokers have suffered physical illness and disease caused by smoking, the kind of losses for which the courts are far more willing to award damages. Stemming from those health problems are medical expenses incurred to treat smoking-related illnesses. These expenses are nominally charged to the individual smoker, yet are ultimately covered by provincial health insurance. To recover the costs of treating smoking-related illness, the province may wish to step into the shoes of smokers and sue the tobacco industry on their behalf.

A common feature of most insurance contracts is a right of subrogation whereby the insurer, having compensated an individual for a loss, may step into that individual's shoes and sue the party that caused the damage.[12] A number of B.C.

Prevention: Dealing with the Devil" (1997) 336 New England Journal of Medicine 304 at 304. In Canada, only two individuals have brought actions against tobacco companies for negligence. Both have been unsuccessful. See *Perron* v. *R.J.R. MacDonald Inc.*, [1996] B.C.J. No. 2093 (QL) (British Columbia Court of Appeal); *Caputo* v. *Imperial Tobacco Ltd.*, [1996] O.J. No. 1396 (QL) (Ontario Court of Justice (General Division)).

3 S.A. Glantz, D.E. Barnes, L. Bero, P. Hanauer and J. Slade, "Looking Through a Keyhole at the Tobacco Industry, The Brown and Williamson Documents" (1995) 274 Journal of the American Medical Association 219 at 219-223. In this and subsequent articles, the authors have compiled and analysed documents from Brown and Williamson Tobacco Corporation (B&W), the British American Tobacco Company (BAT), and other tobacco interests provided by an anonymous source, obtained from the U.S. Congress, and received from the private papers of a former BAT officer. The complete indexed document set has been deposited in the Archives and Special Collections Department of the University of California, San Francisco, Library and Centre for Knowledge Management. The documents are available on the Internet and may be located at http://www.library.ucsf.edu/tobacco. See also D. Levy, "58 Tobacco Memo Cited Cancer Link" *USA Today* (23 October 1996) B3; and J.J. Curran, Jr., (Address to the American University Law Review Annual Banquet, 20 April 1996) [(1996) 45 American University Law Review 929 at 932].

4 A.D. Frank, "Tobacco Under Fire" *CNN Financial Network* (15 May 1996). Found at http://cnnfn.com/news/9605/15/tobacco_attack.pkg/index.htm on 31 October 1996.

5 Curran, see note 3 at 932.

6 B.C. Ministry of Health and Ministry Responsible for Seniors, "Smoking in B.C.". Found at http://www.hlth.gov.bc.ca:80/cpa/prevcare/smoke.html on 30 October 1996.

7 J. Beatty and T. Barrett, "MacPhail seeks provincial allies in tobacco suit" *The Vancouver Sun* (26 September 1996) B6.

8 "New York Becomes the 20th State to Sue Major Tobacco Companies" *Fox News* (27 January 1997). Found at http://www.foxnews.com/business/wires/f_0127_93.sml on 29 January 1997; State Tobacco Information Centre, "State Suit Summary". Found at http://stic.neu.edu/summary.htm on 13 February 1997; "Memos talk of hiding data" *CNN Financial Network* (18 September 1996). Found at http://cnnfn.com/hotstories/companies/9609/18/tobacco/index.html on 31 October 1996.

statutes governing insurance relationships, such as the Insurance Act and the Insurance (Motor Vehicle) Act provide insurers with a right of subrogation.[13] There are also a number of statutes that provide the provincial and federal governments with a right of subrogation when they have made payments to individuals in fulfillment of a statutory obligation. For instance, the B.C. Workers' Compensation Act and the federal Emergencies Act both provide government bodies with a right of subrogation to the claims of individuals to whom the government has provided compensation.[14]

Some provinces have drafted statutes which provide a right of subrogation for the recovery of the cost of medical services. For example, Alberta's Hospitals Act provides the Crown with a right of subrogation to the claims of injured persons to whom they have provided medical services, thus allowing the province to recover the costs of treatment from the responsible party.[15] In B.C., the Medicare Protection Act allows the Lieutenant Governor in Council to make regulations that provide the Medical Services Commission with a right of subrogation.[16] Under this Act, the B.C. government could pass a regulation which creates a right of subrogation similar to that in the Alberta statute.

A statutory right of subrogation would allow the province to step into the shoes of each individual smoker to pursue recovery of smoking-related health care expenses. However, the cost and time required to bring separate actions on behalf of each smoker would soon prove prohibitive. B.C.'s recently-introduced Class Proceedings Act[17] provides a solution to this problem. Under the Act, a representative member of the class of people who have suffered smoking-related health problems could initiate an action to recover health care costs on behalf of the entire class.[18] Using a statutory right of subrogation, the province could bring a tort action in the name of one smoker on behalf of the class, and would be subrogated to all claims made in that action. Claims against the tobacco industry in such an action might include damages for negligent design of cigarettes, failure to warn consumers of the health hazards associated with smoking, and deceptive trade practices.

Cigarettes: A Defectively Designed Product

All manufacturers, including manufacturers of tobacco products, are subject to a common law duty to "make reasonable efforts to reduce any risk to life and limb that may be inherent in the design" of a product, of which they are aware.[19] In order to determine whether a manufacturer has satisfied this duty an analysis is made of its decision to produce the item. The manufacturer is expected to weigh the potential risk to consumers that its product creates against the utility of using a specific design.[20] Of particular significance will be whether the risks associated with the product could have been diminished easily or inexpensively.[21] Emphasis will be placed on the quality of the manufacturer's decision and whether it conforms to socially accepted standards.[22] However, a manufacturer never has the right to produce a product that is inherently dangerous when it is possible to manufacture the same article without risk of harm.[23]

9 Such actions include *Minnesota* v. *Philip Morris*, No. C1-94-8565 (2d Judicial District, 17 August 1994); *Texas* v. *American Tobacco Company*, No. 5-96CV 91 (Eastern District of Texas, Texarkana Division, 28 March 1996); *Connecticut* v. *Philip Morris* No. C-96-2090 (Northern District of California, 18 July 1996). For a complete listing of U.S. state actions against the tobacco industry, see "State Suit Summary" at note 8.

10 *Commonwealth* of *Massachusetts* v. *Philip Morris Inc.*, No. 95-7378, States, Mega, LEXIS 6859 (Middlesex Superior Court, 19 December 1995); *Agency for Health Care Administration* v. *Associated Industries of Florida, Inc.*, No. 95-1466A0, States, Mega, LEXIS 1057 (15th Judicial Circuit, 21 February 1995).

11 A.M. Linden, *Canadian Tort Law*, 5th ed. (Vancouver: Butterworths, 1993) at 397. However, recent SCC decisions indicate that economic loss may be recoverable where justified by "compelling policy reasons." See *Winnipeg Condominium Corp. No. 36* v. *Bird Construction Co.* (1995), 121 Dominion Law Reports (4th) 193 at 199.

12 G. Brown, J. Menezes, *Insurance Law in Canada* (Toronto: Carswell, 1982) at 313-314.

13 R.S.B.C. 1979, c. 200, s. 224; R.S.B.C. 1979, c. 204, s. 25.

14 R.S.B.C. 1979 c. 437, s. 10(6); R.S.C. 1985, c. 22 (4th Supp.), s. 48(3).

15 *Hospitals Act*, R.S.A. 1980, c. H-11, as am. by S.A. 1994, c. 37. Section 81(1) of the Act provides "If a beneficiary receives health services for personal injuries suffered as a result of a wrongful act or omission of a wrongdoer, the Crown has the right to recover from the wrongdoer the Crown's cost of health services (a) for health services that the beneficiary has received for those personal injuries, and (b) for health services that the beneficiary will likely receive in the future for those personal injuries."

16 *Medicare Protection Act*, S.B.C. 1992, c. 76, s. 45(j), as am. by S.B.C.1995, c. 52.

17 S.B.C. 1995, c. 21.

18 See note 17 at s. 2(1).

19 *Privest Properties Ltd.* v. *Foundation Co. of Canada Ltd.* (1995), 128 Dominion Law Reports (4th) 577 at 641 (British Columbia Supreme Court); *Rentway Canada Ltd.* v. *Laidlaw Transport Ltd.* (1989), 49 Canadian Cases on the Law of Torts 150 at 158 (Ontario High Court of Justice).

20 *Prentis* v. *Yale Manufacturing Co.*, 365 N.W.2d 176 at 183-184 (Mich. 1984) as cited in *Rentway*, see note 19 at 159.

Information recently made available to the public indicates that tobacco companies have been aware for many years of the dangers associated with smoking, as well as possible ways to make tobacco products less dangerous.[24] As early as 1964, the tobacco industry knew that nicotine was addictive,[25] and that cigarette tar caused cancer in animals.[26] It has been confirmed that tobacco companies knowingly add carcinogens and toxins to their products during the manufacturing process.[27] For example, tobacco industry giant Brown & Williamson added the chemical coumarin to their pipe tobaccos, despite their awareness that it is a lung-specific carcinogen more commonly used as a rat poison.[28] The tobacco industry has conducted research into the development of a "safe" cigarette which would contain fewer dangerous ingredients and therefore cause fewer health problems than regular cigarettes.[29] However, this "safe" cigarette has never been marketed, and tobacco manufacturers continue to add known carcinogens to their products.

In light of this evidence, it appears that the tobacco companies have not met their obligation to reduce the known risks associated with the use of their products, and could be held liable for defects in their design. Cigarette manufacturers have been aware of the risks associated with smoking for many years, yet have not made reasonable efforts to remedy them by adding fewer toxic chemicals to their products. Although some may derive pleasure from smoking, this primarily psychological benefit cannot possibly outweigh the risks inherent in the use of tobacco products. Decisions such as that of the Ontario High Court in *Nicholson* v. *John Deere Ltd.* confirm that a manufacturer will be found liable for producing a defective product where the product is inherently dangerous and could have been manufactured in such a way as to remove the risk of harm.[30] While it may not be possible to remove all the risk of harm associated with smoking, this decision clearly indicates that manufacturers are held to a high standard with regard to the safe design of their products.

In addition to establishing that cigarettes are defectively designed, the province would also have to prove that the defects in design caused the damages suffered by individual smokers. In past tort actions against the tobacco industry, causation has been the most difficult element to establish. Cigarette manufacturers have relied on the lack of conclusive proof that smoking causes disease.[31] However, recent medical evidence has conclusively linked smoking with lung cancer and heart disease.[32] The link between smoking and other diseases, however, is less conclusive;[33] the province's ability to establish causation with respect to other diseases will depend on the trier of fact's willingness to accept the overwhelming evidence that smoking is the *most likely* cause of illness.

The Tobacco Companies' Duty to Warn

If cigarettes are not found to be a defectively designed product, the tobacco companies will have to demonstrate that they have met their duty to warn consumers of "dangers inherent in the use of its product of which [they have] knowledge or ought to have knowledge."[34] This duty arises as a result of the disparity

Manufacturers of tobacco products are subject to a common law duty to "make reasonable efforts to reduce any risk to life and limb that may be inherent in the design of their product."

21 *Ford Motor Co.* v. *Nowak*, 638 S.W.2d 582 at 585-586 (Texas Court of Appeal 1982) as cited in *Rentway*, see note 19 at 161.

22 *Prentis*, see note 20.

23 *Nicholson* v. *John Deere Ltd.* (1986), 34 Dominion Law Reports (4th) 542 at 549 (Ontario High Court of Justice); Linden, see note 11 at 567.

24 Glantz, "Looking Through a Keyhole", see note 3 at 219-223.

25 Glantz, "Looking Through a Keyhole" see note 3 at 220; also see generally S.A. Glantz, D.E. Barnes, L. Bero, P. Hanauer, J. Slade, "Nicotine and Addiction: The Brown and Williamson Documents" (1995) 274 Journal of the American Medical Association 225-233.

26 Glantz, "Looking Through a Keyhole" see note 3 at 222.

27 Glantz, "Looking Through a Keyhole" see note 3 at 220-221.

28 A. M. Freedman, "Cigarette Defector Says CEO Lied to Congress About View of Nicotine" *The Wall Street Journal*, Western ed. (26 January 1996) A1 at A12.

29 Glantz, "Looking Through a Keyhole" see note 3 at 221, 223.

30 Nicholson, see note 23 at 549.

31 Annas, see note 2 at 304.

32 M.F. Denissenko, A. Pao, M. Tang, and G.P. Pfeifer, "Preferential Formation of Benzo[a]pyrene Adducts at Lung Cancer Mutational Hotspots in P53" (1996) 274 Science 430 at 432;

33 Doll, see note 1 at 1220.

34 *Hollis* v. *Birch* (1995), 27 Canadian Cases on the Law of Torts (2d) 1 at 19 (Supreme Court of Canada).

in knowledge between consumers and manufacturers.[35] Manufacturers are presumed to know more about the hazardous nature of their products than the consumer and thus they have a duty to inform consumers of these dangers,[36] even if the information is available from sources other than the manufacturer.[37] The duty to warn is continuous, requiring that the manufacturer warn of any dangers known at the time of sale, as well as any dangers that are discovered after the product has been sold.[38]

Cigarettes are very dangerous items; they have been linked to cancers, heart disease and respiratory illnesses.[39] As noted previously, the tobacco industry has been aware of the dangers associated with its products for several years.[40] In many cases, the tobacco industry was aware of the health hazards posed by smoking before the medical community.[41] In light of this evidence, the tobacco industry appears to have had an obligation to warn consumers of the dangers associated with smoking.

In the event that the tobacco industry denies awareness of the health effects of smoking, it may still be held liable on the grounds that it had constructive knowledge of those effects. In *Buchan* v. *Ortho Pharmaceuticals (Canada) Ltd.*, the Ontario Court of Appeal held that manufacturers of prescription drugs are experts in their field, and thus have a duty to keep abreast of scientific research pertaining to their products and to communicate their findings to the doctors who prescribe them.[42] Similarly, tobacco manufacturers could be held to be experts in their respective field, and found liable for failing to warn smokers of health risks of which it ought to have been aware. Furthermore, according to the Supreme Court of Canada in *Hollis* v. *Birch*, manufacturers can be held liable for failing to warn consumers of dangers associated with their products once they become aware of this information.[43] The tobacco industry can therefore be held liable for failing to disclose information obtained from the medical community regarding the health effects of smoking.

The nature and extent of the warning that is required varies according to the potential hazard posed by the product.[44] When the the ordinary use of a product gives rise to significant danger, its manufacturer will be responsible for providing a detailed description of the nature of the risk and the extent of the danger.[45] The manufacturer also must not lessen the impact of the warning through efforts to improve the product's reputation with advertising and promotion.[46] The manufacturer has a duty to be forthright and honest in disclosing to the public all current information regarding its product.[47] This standard is particularly high when the product is intended for human consumption.[48]

Despite the broad scope of the duty to warn and evidence indicating that the tobacco industry has been aware of the dangers associated with smoking for many years, the only warnings that the industry has ever issued have been in response to provincial and federal legislation.[49] The messages placed on cigarette packages do not warn consumers of the nature and full extent of the dangers associated with cigarette smoking, as required by both *Buchan* and *Hollis*.[50] Warnings such as "Cigarette smoking is harmful to you" and "Smoking reduces life expectancy" do not describe all of the potential risks associated with smoking, such as lung cancer, heart disease and

35 *Lambert et al.* v. *Lastoplex Chemicals Co. Ltd. et al.*, [1972] Supreme Court Reports 569 at 574-575.

36 *Hollis*, see note 34 at 19.

37 *Buchan* v. *Ortho Pharmaceutical (Canada) Ltd.* (1986), 54 Ontario Reports 92 at 114 (Ontario Court of Appeal).

38 *Buchan*, see note 37 at 101.

39 Doll, see note 1 at 1220; Denissenko, see note 32 at 432.

40 Glantz, "Looking Through a Keyhole" see note 3 at 223; see also Frank, note 4.

41 Glantz, "Looking Through a Keyhole" see note 3 at 220-221; see also Glantz, "Nicotine and Addiction" see note 25 at 232.

42 *Buchan*, see note 37 at 112.

43 *Hollis*, see note 34 at 19.

44 *Hollis*, see note 34 at 20; *Lambert*, see note 35 at 575.

45 *Buchan*, see note 37 at 101; *Hollis*, see note 34 at 20.

46 *Buchan*, see note 37 at 101.

47 *Buchan*, see note 37 at 113.

48 *Hollis*, see note 34 at 20.

49 Cunningham, see note 1 at 46.

50 *Buchan*, see note 37 at 101; Hollis, see note 34 at 20.

51 Cunningham, see note 1 at 46.

52 *Buchan*, see note 37 at 101.

53 *Hollis*, see note 34 at 20-21.

54 *Hollis*, see note 34 at 34; *Buchan*, see note 37 at 121.

55 Cunningham, see note 1 at 48.

respiratory illnesses, nor do they set out the mortality rate associated with smoking. In addition to the inadequacy of these warnings, the tobacco industry has gone to enormous lengths to reduce their impact. These efforts include limiting the content and appearance of the warnings placed on cigarette packages, denying to both consumers and government the health risks posed by smoking,[51] and portraying smoking positively in advertising campaigns. These practices clearly breach the manufacturer's duty, as described in *Buchan*, not to minimize the effect of any warnings they issue.[52] Finally, tobacco products are intended for human consumption; therefore, the warning issued by their manufacturers should be particularly comprehensive.[53] The tobacco companies have not fulfilled this duty by warning consumers about the full extent of the hazards posed by cigarette smoking.

In addition to proving that cigarette manufacturers have a duty to warn consumers of the dangers associated with smoking, the province must establish a causal link between that failure to warn and smoking-related illnesses. This will require the province to prove that smoking causes illness, and that the tobacco industry's failure to warn affected either individuals' decisions to start smoking, or their failure to quit.[54] In the past, cigarette manufacturers have argued successfully that smokers were aware of the dangers associated with smoking as a result of warnings issued by doctors or family members, and yet they chose to continue smoking. Further warnings, therefore, would have made no difference to their behaviour.[55] However, recent studies indicate that the majority of smokers start smoking before the age of 19.[56] Therefore, despite current restrictions against the sale of tobacco to minors, most of today's smokers became addicted as teenagers, when they were less able to make informed choices about health issues.[57] With the recent revelation that the tobacco industry is aware of the addictive properties of nicotine,[58] it will be difficult for them to argue that smokers could have quit before becoming addicted.

Defences

In previous negligence suits brought against the tobacco industry, manufacturers have successfully defended their actions by alleging that the claimants voluntarily assumed the risks associated with smoking, or were contributorily negligent by continuing to smoke after they became aware of the dangers.[59] However, the defence of voluntary assumption of risk has fallen out of favour with the courts in Canada, and its application has been restricted to situations where the plaintiff has full knowledge and appreciation of the risk and waives the right to a negligence claim.[60] Smokers cannot be said to have made any such waiver, as they do not have access to enough information about the health effects of smoking to make an informed decision and accept the associated risks.

The tobacco industry has employed the defence of contributory negligence with some success.[61] Individuals have a responsibility to use reasonable care to protect themselves,[62] and may be found contributorily negligent where they willingly accept or knowingly expose themselves to risk.[63] The tobacco industry has often asserted that

Tobacco manufacturers have successfully defended their actions in the past by alleging that the claimants voluntarily assumed the risks associated with smoking, or were contributorily negligent.

56 Cunningham, see note 1 at 51.

57 "R.J. Reynolds Saw Future in Young Smokers" *CNN Interactive* (10 July 1996). Found at http://www.cnn.com/HEALTH/9608/23/nfm/tobacco.side/index.html on 28 September 1996; "Clinton, Gore Launch Anti-Smoking Campaign" *CNN Interactive* (23 August 1996). Found at http://www.cnn.com/US/9608/23/clinton.tobacco.update/index.html on 28 September 1996.

58 Glantz, "Looking Through a Keyhole" see note 3 at 220; also see generally Glantz, "Nicotine and Addiction" see note 25 at 225-233.

59 E. Frohlich, "Statutes Aiding States' Recovery of Medicaid Costs from Tobacco Companies: A Better Strategy for Redressing an Identifiable Harm" (1995) 21 American Journal of Law and Medicine 445 at 445.

60 *Miller* v. *Decker*, [1957] Supreme Court Reports 624 at 626; *Crocker* v. *Sundance Northwest Resorts Ltd.* (1988), 44 Canadian Cases on the Law of Torts 225 at 238 (Supreme Court of Canada); Linden, see note 11 at 459.

61 M. Hansen, "Capitol Offensives" (1997), 83 American Bar Association Journal 50 at 50.

62 Linden, see note 11 at 435.

63 *Jeffrey* v. *Commodore Cabaret Ltd.* (1995), 128 Dominion Law Reports (4th) 535 at 542 (British Columbia Supreme Court).

smokers were aware of the hazards associated with cigarettes and should have quit smoking to avoid illness.[64] With our increased knowledge of the addictive nature of nicotine and the resulting difficulty of quitting, this argument might not be as convincing today. In addition, it may be argued that consumers are not fully aware of all of the dangers associated with smoking. The tobacco industry has deflected attention away from the dangers inherent in the use of their product through their advertising and promotion campaigns, as well as their denial of the health hazards posed by smoking.

The B.C. Trade Practice Act

British Columbia might consider bringing a subrogated claim on behalf of smokers under the B.C. Trade Practice Act.[65] This Act allows consumers who have entered into transactions involving a deceptive trade practice by a supplier of goods to sue for resulting damages.[66] The Act defines a deceptive trade practice as "an oral, written, visual, descriptive or other representation, including a failure to disclose" or "any conduct having the capability, tendency or effect of deceiving or misleading a person."[67]

The courts have interpreted the definition of deceptive trade practices very broadly. In *Rushak* v. *Henneken* the British Columbia Court of Appeal held that deceptive practices included "giving an unqualified opinion as to quality when you have factual knowledge indicating the opinion is in some aspect wrong." The court further held that suppliers must refrain from any misleading statements.[68] With the recent disclosure of tobacco industry documents confirming that manufacturers have been aware of the dangers associated with smoking for many years and yet have continued to promote their products as safe, an action against the industry for deceptive trade practices appears to have a strong chance of success.

An Independent Cause of Action

As an alternative to bringing a tort action against tobacco companies based on a right of subrogation to the claims of individual smokers, British Columbia could develop legislation providing itself with an independent cause of action against the tobacco industry. In the United States, both Massachusetts and Florida have passed statutes that allow the state to bring an action against any party that causes an increase in the cost of health care. Under Florida's Medicaid Third Party Liability Act, when the state health department "pays for or becomes liable for, medical care under the Medicaid program" it has a cause of action against a liable third party to recover the full amount of medical assistance provided.[69] Similarly, the Massachusetts legislation provides the state government with a "separate and independent cause of action to recover from any third party, assistance provided to a claimant under [Medicaid]."[70]

While an independent statutory cause of action would establish the existence of a duty on the part of the tobacco industry not to cause an increase in health care costs, B.C. must still establish the other elements of a tort action. As previously noted, it may be difficult to prove a causal link between smoking and an

64 Cunningham, see note 1 at 51.

65 *Trade Practice Act*, R.S.B.C. 1979, c. 406.

66 See note 65 at s. 22.

67 See note 65 at s. 3.

68 (1991), 84 Dominion Law Reports (4th) 87 at 95 (British Columbia Court of Appeal).

69 Florida Statutes, s.409.910(6)(a) (West 1994).

70 Massachusetts Acts, chap. 60 s. 276 (West 1994).

increase in health care costs. The extent of damages suffered by the province, and the liability of each cigarette manufacturer for those damages might also be hard to determine. The Florida Medicaid Third Party Liability Act has addressed these complexities. The Act provides that in any action against a third party for recovery of health care costs, the state evidence code is to be "liberally construed," allowing for the use of statistical analysis to prove issues of causation and aggregate damages. Further, where the third party is liable due to its manufacture or sale of an item, the state may proceed against it under a "market share theory," provided that the products are "substantially interchangeable among brands, and that substantially similar factual and legal issues would be involved in seeking recovery against each liable third party individually."[71] Florida's statute also precludes the use of the affirmative defences of contributory negligence and voluntary assumption of risk.[72] Should the province choose to pursue an independent cause of action against the tobacco industry, it would do well to learn from Florida's example.

While the province stands to benefit greatly from the creation of a statutory duty not to cause an increase in health care costs, the economic and political implications of such a decision cannot be discounted. Other industries which produce goods that might potentially cause health problems may no longer choose to do business in B.C., resulting in the loss of jobs and a negative impact on the economy. For this reason, B.C. may wish to limit the application of such a statutory duty to the tobacco industry alone. However, because the damages recoverable under an action against a manufacturer must justify the expense of bringing the suit, it is likely that the province will only invoke the duty in the most extreme cases.

Tobacco products are the only products on the market that kill when used exactly as the manufacturer intends.

Conclusion

Tobacco products occupy a unique position in the North American marketplace. They are the only products on the market that kill when used exactly as the manufacturer intends.[73] Nonetheless, tobacco manufacturers have only once been held liable for the damages their products inflict. Should B.C. choose to pursue an action against the tobacco industry to recover smoking-related health care costs, it will confront more than legal precedent. It must also battle the tobacco industry's historical foothold in the North American market, and the immense economic power that supports its position.

However, that foothold is slipping. Actions against the tobacco industry to recover health care costs are proliferating in the U.S. With greater economic resources than individual smokers, governments are better able to battle the tobacco industry over liability. In addition, recent advances in medical research linking smoking to disease have overcome the traditional stumbling block of causation in these cases. Although none of the U.S. cases have yet been decided, B.C. should pay attention to the valuable strategic precedent they are setting. However, B.C. should not wait for a U.S. court decision before initiating its own action against the tobacco industry. Its chances of success are better now than ever before.

71 See note 69 at s.409.910(9)(a),(b).

72 Frohlich, see note 59 at 445.

73 Cunningham, see note 1 at 47.

Orders for open Custody

A Rebirth of the Status Offence Under the Young Offenders Act*

Richard Fader completed his B.A. at Saint Mary's University in 1992 and his LL.B. at Dalhousie University in 1996. He is currently working on his LL.M. at Dalhousie University.

The author would like to thank Katherine Hensel for her helpful comments on an earlier draft of this paper.

Introduction

The Young Offenders Act[1] ("Y.O.A.") was proclaimed into force on April 2, 1984, changing the law in the area of youth custody and addressing some of the problems inherent in the Juvenile Delinquents Act[2] ("J.D.A."). The J.D.A., which had been in place since July 20, 1908, reflected the doctrine of parens patriae,[3] a paternalistic approach which gave the courts authority and responsibility to fill the void in the lives of children where there was no family or social support providing control and guidance. An example of the doctrine is the way the J.D.A. defined juvenile delinquent as:

> any child who violates any provision of the Criminal Code or any other federal or provincial statute, or of any by-law or ordinance of any municipality, or who is guilty of sexual immorality or any similar form of vice, or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under any federal or provincial statute.[4]

This Act covered two types of offences: violations of laws that applied to both children and adults, and "status offences," which applied only to children. The term "status offence" included a wide range of non-criminal activities which were seen as violations of parental authority, such as truancy from school and running away.[5] In part, the existence of status offences in the J.D.A. helped lead to the eventual enactment of the Y.O.A.

During the 1950s and 1960s there was a dramatic increase in juvenile delinquency, followed by a growing public pressure to replace the J.D.A. with a statute making young offenders more "accountable" for their actions. In the Y.O.A., the government responded to this pressure for reform, and the Act reflects the public's desire for accountability. The declaration of principle in clause 3(1)(a) is as follows:

> [W]hile young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions.

1 R.S.C. 1985, c. Y-1, as am. S.C. 1995, c.19 [hereinafter Y.O.A.].

2 S.C. 1908, c. 40 [hereinafter J.D.A.].

3 P. Platt, *Young Offenders Law in Canada*, 2d ed. (Markham: Butterworths, 1995) at 1.

4 R.S.C. 1970, c. J-3, s. 2(1).

5 B. Schissel, *Social Dimensions of Canadian Youth Justice* (Toronto: Oxford University Press, 1993), at 67: "[a]s well, the trivial acts of deviance (status offences). . . were covered by the Juvenile Delinquents Act." See J.D.A. s. 3(1) which said that the commission by a child of any of the acts enumerated in the definition "juvenile delinquent" in subsection 2(1) constitutes an offence to be known as a delinquency.

Clearly, a perceived need for punishment was one of the pressures which influenced the legislation.[6] However, a second force behind the legislative reform was a concern with a lack of due process and procedural fairness under the J.D.A. Problems arose when this lack of procedural protection, such as the right to counsel, occurred in conjunction with the non-criminal "status offence." In effect, children were being institutionalized for non-criminal behaviour.

These concerns had an impact on the drafting of the Y.O.A. Subsection 3(1) of the Act emphasizes the fact that children have the same rights as adults under the Canadian Charter of Rights and Freedoms. The Act also established the principle that young offenders are to be subject to the least possible interference from the state. Further, it provides for a wide range of sentencing options, allowing sentences to specify whether open custody (such as group homes) or secure custody is required, depending on the factors in an individual case. It appears that the drafters hoped that open custody would provide the system with the ability to take youths into protection without placing them in "penal" settings.

It is important to note that young offenders fall into an area of shared constitutional jurisdiction. The federal government has the power to legislate in regard to substantive criminal law, but the provincial governments administer justice within their borders. This division is important to understand because although the Y.O.A. is an act of the federal Parliament, orders for custody pursuant to it are carried out in provincially-created institutions. While the federal government provides for a range of correctional disposition options, it is up to the provincial governments to create them. It will be seen later in this paper that despite its goal of uniformity between provinces,[7] the Y.O.A. has seen great disparity in its operation, due to the federal/provincial sharing of power in this area.

While the Y.O.A. may have achieved goals of greater responsibility and punishment, it has not eliminated paternalism and the "status offence" type approach.

6 See W. Wardell, "The Young Offenders Act" (1983) 47 Saskatchewan Law Review 381, at 388.; and T.C. Caputo, "The Young Offenders Act: Children's Rights, Children's Wrongs" (1987) 13 Canadian Public Policy 125, at 138.

7 R.Corrado and A.Markwart, "The Prices of Rights and Responsibilities: An Examination of the Impacts of the Young Offenders Act in British Columbia" (1988) 7 Canadian Journal of Family Law 93, at 94.

Further, where administration of a system of open and secure custody lacks provincial resources, and that shortfall is combined with a growing number of orders of custody, the Y.O.A. is having a harsher effect than intended. As a result, the intentions underlying the Y.O.A. are not being realized. This situation occurs in provinces where insufficient resources are allocated to providing the facilities required to implement the sentencing options of the Y.O.A., and is exemplified by Nova Scotia.[8]

I. Meaning of "Open" and "Secure" Custody

Courts derive their jurisdiction to make orders for custody under section 20 of the Y.O.A. Section 24 qualifies this power by stating that custody is to be used only as a last resort, with emphasis on "the needs and circumstances of the young person" and a consideration of a "pre-disposition report."[9] The principles applied in sentencing adult offenders are tempered in favour of an approach which places greater weight on the needs of the child.

In making a order for custody, the judge must indicate whether it is to be for "open" or "secure" custody,[10] as defined in sub-section 24.1(1). In making this decision, courts must consider whether secure custody is needed to prevent escape or a continuation of illegal behaviour, and must also consider the rehabilitational consequences of the order, and the effect of the order on specific and general deterrence.[11] Further considerations have been introduced by recent amendments to the Act.[12]

It is important to define the terms "open" and "secure" custody. Section 24.1 offers the following definitions:

> "open custody" means custody in
>
> (a) a community residential centre, group home, child care institution, or forest or wilderness camp, or
>
> (b) any other like place or facility designated by the Lieutenant Governor in Council of a province…
>
> "secure custody" means custody in a place or facility designated by the Lieutenant Governor in Council of a province for the secure containment or restraint…

While the Act appears to give broad discretion to the Lieutenant-Governor in Council in designating facilities as "open" or "secure", that discretion is not absolute. As Justice Kroft noted in *C.F.* v. *R.*:

> If it does not meet the description of "open custody" as set forth in the Act then, in my opinion, no regulation or designation can give it a characteristic which it does not possess. The responsibility given to the Lieutenant-Governor in Council must be exercised within the parameters of the law.[13]

This judgment reflects the tension between the federal government's power to make substantive criminal law and the provincial government's duty to administer that law. The more important point, however, is that the "parameters" used in the Act to define open custody are neither clear nor precise. "In spite of the definitions listed

8 The same issues arise in other Canadian jurisdictions. In fact, this problem was recognized early in the life of the Y.O.A. by Lyman Robinson in an article entitled "Open Custody: Some Questions About Definition, Designation and Escape Therefrom," in N. Bala and Chief Judge H. Lilles, *Young Offenders Services* (Toronto: Butterworths, 1984-1997) at 7511. The Manitoba courts struggled with this issue in the case of *C.F.* v. *R.* [1985] 2 Western Weekly Reports 379 (Manitoba Court of Appeal). In *B.(R.)* v. *R.* (1986), 17 W.C.B. 217, the Ontario Provincial Court criminal division held that the absence of open custody for a 16-year-old violated section 15(1) of the Charter. Speaking generally P. Pratt, see note 3 at 459, noted, "[t]he designation of places of custody has been controversial. In some locales, parts of adult prisons have been so designated. As well, from time to time, open custody places are used as well for children in need of protection." For an examination of the specific resources available in individual provinces and territories, see generally Bala and Lilles.

9 "Pre-Disposition Report" is defined in section 14 of the Y.O.A.. After interviews with the accused, and some cases the victim(s), the judge is presented with information such as: the behaviour and attitude of the young person, any plans to change his/her conduct, any history of breaching federal or provincial statutes, willingness to participate in community services, the relationship with parents and their degree of influence and control, and the school attendance record. Certainly the judge has a wider range of material when making a disposition in a case under this Act than in an adult criminal case.

10 Subsection 24.1(2) of the Y.O.A. states: "where the youth court commits a young person to custody. . . it shall specify in the order whether the custody is to be open custody or secure custody."

11 *R.* v. *H.(S.R.)* (1990), 56 Canadian Criminal Cases (3d) 46 (Ontario Court of Appeal).

12 Y.O.A., subsection 24.1(1).

13 [1984] 6 Western Weekly Reports 37 (Manitoba Queen's Bench) at 44. Cited with approval on appeal at [1985] 2 Western Weekly Reports 379 at 383.

in the Act, the facilities named as open custody are not capable of exact scientific definition."[14] Therefore, to achieve a practical and functional understanding of these terms, one must consider in detail the judicial interpretation given to them. From the cases, it is possible to make the following observations:

The distinction between open and secure within a facility

Where a facility is to have both open and secure custody, there must be a distinction between open and secure areas.[15] In *Re D.B.*,[16] Chief Justice Glube of the Nova Scotia Supreme Court (Trial Division) noted,

> an examination of the Queens County facility leads to a conclusion that both open and secure facilities are trying to be maintained within the same relatively small building. This, in my view, defeats the philosophy of the statute. The Order in Council for the facility under review does not make any distinction as to which areas are open and which are secure.

Supervision and physical containment

Secure custody is not limited to traditional notions of restraint, and is satisfied by either physical containment or constant supervision. Open custody is defined in section 24.1 of the Y.O.A. as "(a) a community residential centre, group home, child care institution, or forest or wilderness camp, or (b) any other like place or facility.…" This definition clearly creates a range of options, all of which have a low threshold of containment. Simply because a facility does not have bars does not mean that it is "open custody," but may be secure. This point was recognized by Manitoba Court of Appeal Justice Hall in *R.* v. *David A.B.*:

> Moreover, the lack of bars and locked doors does not mean there are no controls. As I understand it, the control and discipline are exercised by the group of approximately ten inmates that each young offender is assigned when committed to secure custody. The peer pressure of the group exercises control over all inmates.[17]

This quote demonstrates that secure custody facilities do not have to be "jails." Aggressive supervision is inconsistent with open custody as it is defined in the Act. The intent of Parliament was to provide options for the sentencing judge through a sliding scale of lesser forms of incarceration. Justice Hall recognized the fact that secure custody can be mistaken for open custody when supervision replaces bars and locks.

Resources and programs available

The principles stated in section 3 of the Act require that open custody offer facilities providing guidance and assistance. That positive duty on the provinces was recognized in *Re D.B.*:

> ordering a youth to remain in a single room, even though it is fairly large with a television set available, cannot in today's philosophy of providing programmes to assist youths to understand their problems, be considered an appropriate facility and one of open custody.… Parliament has stated that open custody would be something other than the previous traditional form of incarceration.…
>
> [I]t is not the fact that the young person is not free to leave the

14 *Re D.B. and the Queen* (1986), 27 Canadian Criminal Cases (3d) 468, at 471 (Nova Scotia Supreme Court, Trial Division) [hereinafter Re D.B.].

15 *Re L.H.F. and the Queen* (1985), 24 Canadian Criminal Cases (3d) 152, at 157 (Prince Edward Island Supreme Court), [hereinafter Re L.H.F.].

16 See note 14, at 472-73.

17 [1986] Weekly Digest of Family Law, 555 (Manitoba Provincial Court Youth Court), Y.O.S. 86-074.

> facility which offends the definition but rather the lack of facilities and programmes for guidance and assistance....[18]

Therefore, in order to be "like" a community residential centre, group home, child care institution, or forest or wilderness camp, a facility must take positive steps in providing for guidance and assistance. In *Re L.H.F.*, Justice MacDonald made a similar judgment, noting that the court must consider "the number of staff [and] the qualifications of the staff, bearing in mind that one of the primary functions is to teach young offenders how to better achieve in society."[19]

Provinces are able to frustrate the purpose of the Act by neglecting to create the range of resources intended under "open" custody.

Since the Act uses a wide variety of examples within the definition of open custody, it is difficult for the courts to do any more than establish minimum requirements. The unfortunate effect of this limitation is its hamstringing of judicial orders. While the sentencing judge has to make clear whether the order for custody is open or secure,[20] there is no power to specify exactly which type of open custody is to be used. For example, the Y.O.A. does not state that there shall be a wilderness camp facility, but only that creation of such a facility is acceptable, at provincial discretion. Therefore, provinces are able to frustrate the purpose of the Act by neglecting to create the range of resources intended under "open" custody.

II. Increase in Orders for Open Custody Under The Y.O.A.

It is accepted that orders for custody have increased significantly under the Y.O.A,.[21] with the greatest increase in the area of open custody. Judges primarily favour open custody over secure custody because of its perceived softness.[22] In many circumstances, when balancing the delicate interests of the young offender with the interests of society, this middle ground is seen as the most attractive option:

> the new provisions for the court to directly sentence a young offender to "open custody" may have softened the perception of the apparent onerousness of a custodial sentence, reducing inhibitions to employ that sanction and consequently leading to a widening of the custodial net.... [K]nowing this can "only" result in a placement in either a forest camp or a community residential centre, [open custody] does seem less onerous and, indeed, appears to be an attractive option.[23]

It must, again, be noted that this perceived softness does not reflect the true impact of such an order in provinces like Nova Scotia, which do not provide the intended range of open custody.[24] For example, in the Shelburne and Nova Scotia Youth Centres, Nova Scotia's primary youth custodial institutions, there is little difference between open and secure custody. In these provinces, the effect of an order for open custody is practically indistinguishable from the effect of an order for secure custody.

The increase in custodial sentences is well documented and consistent across Canada (see Figure One). In Newfoundland in 1984/85 the proportion of cases receiving custodial sentences was 14.3%, the following year it was up to 19.0%, and by 1988/89 it was up to 21.3%. In British Columbia in 1984/85 the proportion of cases receiving custodial sentences was 11.4%, the following year it was up to 16.1%,

18 See note 14, at 473, 475.

19 See note 15, at 156.

20 See note 10.

21 This point has been conceded by the Department of Justice in its report *Consultation on the Custody and Review Provisions of the Y.O.A.* (Ottawa: Queen's Printer, July 1991), at 1-3. Also see, A. Leschied and P. Gendreau, "Declining Role of Rehabilitation in Canadian Juvenile Justice: Implications of Underlying Theory in the Young Offenders Act," in *Youth Injustice: Canadian Perspectives*, eds. T. O'Reilly-Fleming and B. Clark (Toronto: Canadian Scholars' Press, 1993), at 43-44.

22 *R.* v. *S.A.B.* (1990), 96 Nova Scotia Reports (2d) 374 (Appeal Division).

23 R. Corrado and A. Markwart, see note 7 at 111.

24 V.Samuels-Stewart, *In our Care: Abuse and Young Offenders in Custody: An Audit of the Shelburne Youth Centre and the Nova Scotia Youth Centre, Waterville* (Nova Scotia Department of Justice, 1995).

and by 1988/89 it was up to 21.6%. A Department of Justice study found that six of the eight provinces studied showed a marked increase in the number of orders for custody in the six-year period following implementation of the Y.O.A. For example B.C., Alberta and Manitoba all showed increases in excess of 80%."[25]

Nova Scotia has also seen a larger percentage of dispositions leading to orders for custody. Disturbingly, this growth has come through a dramatic increase in open custody sentences. The problem, as mentioned earlier, is that there is little difference between an order for open and secure custody in Nova Scotia.[26] While an order for open custody is not necessarily a soft middle ground, sentencing judges across the country continue to choose open custody for this very reason. For a comparison of open and secure custody dispositions in Nova Scotia and the rest of Canada in the years following implementation of the Act, see Figure Two.

The Increase in Custodial Sentences

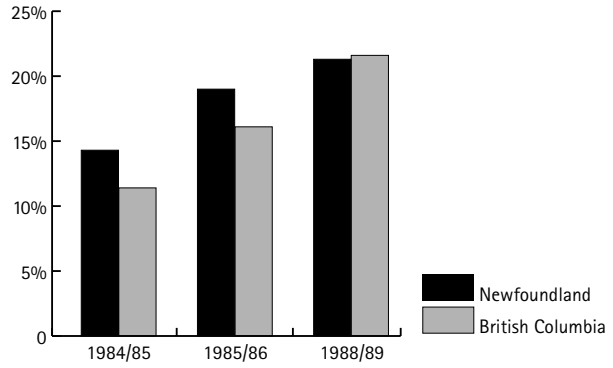

Figure 2[27]

Percentage of Total Dispositions in Favour of Open and Secure Custody

YEAR	NOVA SCOTIA	CANADA
1984/85	Open - 8.5% Secure - 3.0% Total - 11.5%	Open - 8.0% Secure - 6.2% Total - 14.2%
1985/86	Open - 6.7% Secure - 11.2% Total - 17.9%	Open - 7.0% Secure - 9.7% Total - 16.7%
1986/87	Open - 11.8% Secure - 7.9% Total - 19.7%	Open - n/a Secure - n/a Total - n/a
1987/88	Open - 11.1% Secure - 6.7% Total - 17.8%	Open - 9.4% Secure - 10.4% Total - 19.8%
1988/89	Open - 13.8% Secure - 6.8% Total - 20.6%	Open - 9.7% Secure - 10.4% Total - 20.1%
1989/90	Open - 15.3% Secure - 6.7% Total - 22.0%	Open - 9.7% Secure - 11.2% Total - 20.9%
1990/91	Open - 15.2% Secure - 6.2% Total - 21.4%	Open - 9.9% Secure - 10.8% Total - 20.7%
1991/92	Open - 21% Secure - 5% Total - 26%	Open - 17% Secure - 13% Total - 30%
1992/93	Open - 23% Secure - 6% Total - 29%	Open - 17% Secure - 14% Total - 31%
1993/94	Open - 21% Secure - 6% Total - 27%	Open - 19% Secure - 14% Total - 33%

25 Canadian Centre for Justice Statistics, *Recidivists in Youth Court: An Examination of Repeat Young Offenders Convicted in 1988-89* (Ottawa: Statistics Canada, June 1990).

26 This is not a new problem in Nova Scotia, but has existed since the inception of the Act. In the early leading case of *Re D.B.* (see note 14) the court held that the Queens County Jail was not properly designated as a facility for open custody as that term is defined in the Y.O.A.. At page 474 the court noted, "[s]adly, the province, in declining to acknowledge the inevitable as far as the implementation of the Young Offenders Act until the last possible date, has apparently failed in its responsibilities at this point in time."

27 The data for this table is derived from the Canadian Centre for Justice Statistics, *Youth Court Statistics*, 1984-85 through 1993-94. It should be noted that different jurisdictions engage in different pre-court screening procedures. The more aggressive the screening, the higher percentage of serious cases go forward, and there is a correspondingly higher percentage which result in custody. For the purposes of the above analysis the author has made the assumption that screening patterns have not changed substantially from 1984 to 1994.

III. Rebirth of the Status Offence

A disturbing result of the judicial misperception that open custody is a soft middle ground is that some children are being ordered into custody for reasons which resemble the J.D.A.'s status offence. This problem is driven by the sentencing considerations required by the Y.O.A.[28] Under subsection 24(2), "before making an order for committal to custody, the youth court shall consider a pre-disposition report." The requirements of this report are laid out in section 14:

> (2) A pre-disposition report made in respect of a young person shall . . . be in writing and shall include . . .
>
> (v) the availability and appropriateness of community services and facilities for young persons. . .
>
> (vi) the relationship between the young person and the young person's parents and the degree of control and influence of the parents over the young person. . .

The importance placed on the report, and its relationship with the determination of the needs and circumstances of the young offender,[29] was made clear by New Brunswick Court of Appeal Justice Ayles in *R.* v. *R.C.S.*:[30]

> the report did not include information as to the availability of community services and facilities for young persons as required by the statute . . . . [S]uch information . . . would be necessary in determining whether the custody should be open or secure.

Justice Daley of the Nova Scotia Youth Court placed similar emphasis on the pre-disposition report in *R.* v. *C.J.M.*,[31] pointing out that the report is essential where treatment and rehabilitation are the focus of the sentence. It is clear that the pre-disposition report is critical when a sentencing judge is engaged in balancing the protection of society and the best interests of the young offender. As a result of this emphasis on the report, children without supportive families are often sentenced to open custody in order to provide them with a chance at rehabilitation.[32]

The family situation of the young offender becomes the paramount consideration in sentencing when the youth poses little risk to the community. Where an offence is considered "heinous," as in cases like *R.* v. *J.A.C.*,[33] there is less emphasis on a supportive family and more consideration given to general deterrence and specific deterrence.

The majority of young offender cases are not so heinous as to require a strict adherence to principles of deterrence. Yet in the majority of cases, where youths do not have a supportive family, custody becomes the only option for the sentencing judge. The result is a conflict with the general principle that custody should only be used in serious circumstances.[34] Courts justify this outcome on the basis that custody is necessary to provide the structure and guidance needed by the young offender. The Nova Scotia Court of Appeal recently affirmed this proposition in *R.* v. *G.A.L.*:[35]

28 Subsection 24(1) reads, "The youth court shall not commit a young person to custody under paragraph 20(1)(k) unless the court considers a committal to custody to be necessary for the protection of society having regard to the seriousness of the offence and the circumstances in which it was committed and having regard to the needs and circumstances of the young person."

29 P. Riley, "Proportionality as a Guiding Principle in Young Offender Dispositions" (1994) 17 Dalhousie Law Journal 560, at 567:

> "the actual effect of requiring a pre-disposition report is to encourage and support the imposition of custodial dispositions. Often youth courts will impose a custodial disposition in order to remove the young person from a negative home environment which has been brought to the court's attention through the pre-disposition report."

30 (1986), 27 Canadian Criminal Cases (3d) 239, at 244.

31 (1986), 74 Nova Scotia Reports (2d) 388.

32 Also see, *R.* v. *M. (J.J.)* (1993), 81 Canadian Criminal Cases (3d) 487 (Supreme Court of Canada).

33 [1992] N.S.J. No. 483 (QL) (Nova Scotia Supreme Court Appeal Division).

34 *R.* v. *K.L.B.* (1985) 67 Nova Scotia Reports (2d) 232 (Appeal Division); *R.* v. *P.L.M.* (1985), 69 N.S.R. (2d) 99 (Appeal Division); and *R.* v. *C.J.M.* (1986), 77 N.S.R. (2d) 1 (Appeal Division).

35 [1994] N.S.J. No. 517 (QL) (Nova Scotia Court of Appeal) at paragraph 11.

> Each of the appellants are in much need of help and assistance. Each is virtually homeless and lacks family support… How better to accomplish these goals then to place them in a protected environment where there is a real measure of hope for their rehabilitation and reform… (emphasis added).

An opposite result occurred in the case of *R. v. S. (D.C.)*,[36] where the young offender had a supportive family environment. On appeal, the custodial disposition was removed and probation imposed. The court explicitly relied on and quoted significant portions of the pre-disposition report for the successful appeal.

An examination of two cases in particular demonstrates that judges are using custody to replace missing order and structure in the lives of young offenders. In *R. v. T.S.W.*,[37] the court was dealing with a young offender who was convicted of break and enter and sexual assault. The youth court judge described it as one of the most serious cases coming before the court in fifteen years, and ordered five months of secure custody to be followed by sixteen months of probation. In contrast, in *R. v. T.C.M.*[38] the court was faced with a young offender convicted of attempted robbery and upheld the youth court order for two years of secure custody.

Judges have adopted a clear and consistent practice of emphasizing the home life of the Young Offender when determining if an order for custody shouldbe handed down.

In comparing these cases, particular regard must be paid to the reasons for the dispositions. In *T.S.W.* (break and enter and sexual assault) the court was greatly persuaded by the fact the young offender had a very supportive family. The court discussed at length the positive role the youth's mother played in his life, and it appears that the home-situation of the young offender was the determinative factor in sentencing. In *T.C.M.*, the youth did not have a supportive family. The court highlighted the fact that the father was an inmate at a federal maximum security institution, while the mother and grandmother did not play major roles in the youth's life. The court said that custodial dispositions under the Y.O.A. are shorter than available for adult offences because they serve a different purpose: to rehabilitate the young offender rather than to protect the public. Justice Freeman stated for the court:

> a custodial disposition has precisely the same purpose as a noncustodial: each is to be used to further the interests of the young offender.…
>
> A lengthy period of secure custody may be his best (if not his only), hope for the future. There are few positive factors in his life outside an institution which could help him reform himself. This is not a situation where the young offender can be returned to a nurturing family environment, a job, or studies. A lengthy period of custody may permit his involvement in programs to further his education.…[39]

These two cases reflect judges' clear and consistent practice of emphasizing the homelife of the young offender when determining if an order for custody should be handed down. Much of the increase in custodial orders, in these circumstances, is due to the misperceived softness of the order for open custody and the desire to balance rehabilitation with liberty.

Parliament has attempted to address these problems in recent amendments to the Y.O.A. Section 24 was amended by adding the following after subsection (1):

36 [1989] N.S.J. No. 104 (QL) (Nova Scotia Supreme Court Appeal Division).

37 (1991), 100 Nova Scotia Reports (2d) 339 (Appeal Division).

38 (1991), 107 Nova Scotia Reports (2d) 227 (Appeal Division).

39 See above at 230.

> (1.1) In making a determination under subsection (1) [conditions for orders of custody], the youth court shall take the following into account:
>
> (a) that an order of custody shall not be used as a substitute for appropriate child protection, health and other social measures.

This enactment clearly rejects the paternalistic approach taken by the courts. Once again, federal substantive law conflicts with the provincial administration of justice. It is unlikely that this new subsection will change the substance of these types of decisions[40] because judges are still faced with the lack of resources when sentencing. Until the provinces provide a middle ground, the courts will be faced with the stark reality, in some cases, that the only opportunity for structure and control in the life of a young offender is to make an order for custody. Elimination of this paternalistic approach requires changes at the provincial level, not the federal.

IV. Effects of Institutionalization in Young Offender Facilities

With an appreciation of the fact that orders for custody, whether labelled "open" or "secure," are virtually identical in provinces like Nova Scotia, we must look at the practical effects of orders for custody. The negative impact of institutionalizing young offenders is well-documented. For example, youths in "border-line" custody cases are detained with more serious offenders, placing them in a situation where peer pressure is coming from a decidedly negative source.[41] Placement in an institution stigmatizes young offenders, and fosters negative self-perception. Young offenders are separated from their family and their regular circle of friends.[42] They are isolated from the community, and but for contact with guards and counsellors, and occasional excursions outside the institution, society in general.[43] These factors work against the rehabilitational goal of preparing the young offender to re-enter the community following the term of custody.[44] In *R.* v. *A.H.*,[45] British Columbia Court of Appeal Justice McEachern recognized the effect orders for custody within institutions can have on children:

> The report of a psychiatrist who saw the appellant shortly before this appeal states:
>
> I have some concerns that this individual is becoming more and more institutionalized and is beginning to develop peer associations with a largely anti-social group.
>
> … Thus, the choice is to leave him in custody for whatever good that might do, either for the accused personally, or to deter others from committing similar crimes, or release him to the custody of his parents so that he will not risk further "institutionalization", and where he may most likely be rehabilitated.

The court qualified their decision to allow the appeal and release the youth from custody by pointing out that custody was not needed for the protection of society. Speaking of the order of the trial judge, the court said:[46]

> If she had known that he would now be at risk of becoming "institutionalized", or even criminalized. . . I am confident that is what she would have done either by imposing a shorter custodial

40 See generally, *R.* v. *S.C.H.*, [1996] A.J. No. 457 (QL) (Alberta Provincial Court, Youth Court); and *R.* v. *C.M.P.*, [1996] M.J. No. 574 (QL) (Manitoba Court of Appeal), although s.24(1.1) was cited with favour in the later case, the decision turned on consideration of other sentencing factors.

41 "Those who become part of this small population are well on the road to the worst of all possible futures." Report of the National Advisory Committee for Juvenile Justice and Delinquency Prevention, "Serious Juvenile Crime: A Redirected Federal Effort" (March 1984). Also see, R. Kramer, *At A Tender Age - Violent Youth and Juvenile Justice* (New York: Henry Holt and Company, 1988).

42 A.V. McArthur, *Coming Out Cold* (Toronto: Lexington Books, 1974). For a comprehensive discussion on the negative effects of being separated from family and regular friends, see Chapter Four "The Forgotten Family" at 33.

43 See generally, E. McGarrell, *Juvenile Correctional Reform - Two Decades of Policy and Procedural Change* (New York: State University of New York Press, 1988).

44 *R.* v. *G.H.* (1994), 119 Newfoundland & Prince Edward Island Reports 75, at 79 (Newfoundland Court of Appeal).

45 (1991), 65 Canadian Criminal Cases (3d) 116, at 120.

46 See above at 122.

sentence and a term of probation or by some other sentence.

An independent auditor for the Nova Scotia Minister of Justice recently documented these effects.[47] Comments made to the auditor highlight the self-perception problem. Consider the following statements made by young offenders in the Shelburne Youth Centre: "[d]on't get me wrong, I realize this is an institution for young offenders, and we've all done something wrong…"[48] Also, "I'm considered nobody because I'm here. You don't get a chance to be heard… they think you are a criminal so they treat you like one."[49]

Conclusion

Having established that the lack of custodial resources in Nova Scotia has a negative impact on young offenders, it is appropriate to look for some solutions. One of the purposes of replacing the J.D.A. with the Y.O.A. was to remove the possibility of youths being incarcerated for status offences. However, the paternalistic status offence approach has not disappeared and appears to be encouraged by the judiciary's belief that open custody provides a soft middle ground. The courts may be correct in searching for a middle ground when sentencing, but a problem arises in provinces where open custody is indistinguishable from secure and thus a middle ground does not exist. The system of open and secure custody set up by the federal government is not being implemented by some provinces, with the result that the good intentions underlying the Y.O.A. are not being realized.

There are two ways to address this problem. First, sentencing judges could follow the suggestions of the Supreme Court of Canada in *R.* v. *M.(J.J.)*,[50] and make orders pursuant to clause 23(2)(f) of the Y.O.A. This section allows for probation orders which contain residence requirements, and provides judges with the option of placing children, who do not have supportive families, with provincial welfare agencies. It is important to note, however, that the existing resources in Nova Scotia for foster care and welfare agencies are already oversubscribed.[51] The Department of Community Services is having trouble keeping up with orders under the Children and Family Services Act,[52] and would not be able to handle the flow of young offenders if clause 23(2)(f) became a sentencing reality in Nova Scotia.[53] Lower level courts, given this environment, are more likely to follow the message of economic restraint sent by the Supreme Court in *R.* v. *S.(S.)*.[54] There, the court refused to force the Ontario government to create an alternative measures scheme.

The other solution is for provincial governments such as Nova Scotia to create open custody facilities which are consistent with the entire range envisioned in the Y.O.A., from group home to wilderness camp. In so doing, provinces would be on track with harmonizing the competing goals of the Y.O.A. and in the process, better meet the needs of the young offender. Neither of these solutions is possible without more resources being allocated to the youth justice system. However, until that funding materializes, the Y.O.A. will continue to have a far harsher effect than its drafters and proponents intended.

47 Samuels-Stewart, see note 24.

48 See above at 29.

49 See note 47 at 29.

50 See note 32.

51 Telephone interview with S. Drisdale, Department of Community Services (5 March 1996).

52 S.N.S. 1990, c.5.

53 See Department of Community Services, *Annual Report 1993-94* (Halifax: Nova Scotia Department of Community Services, 1994); and *Fostering, A Community Service Strategy for the Year 2000: the Report of the Foster Care Consultation Project* (Halifax: Joint Committee on Foster Care Change, 1995).

54 (1990), 57 Canadian Criminal Cases (3d) 115.

When Voluntary is not really Voluntary

Contractual Aspects of Voluntary Codes*

Andrew Morrison is a second year student in the University of Victoria's LL.B. (Co-op) program.

A native of Unionville, Ontario, Andrew majored in History and Political Science at McGill University. The author researched this paper as a co-op student at the Office of Consumer Affairs, Industry Canada.

*This paper draws substantially on K. Webb and A. Morrison, "Legal Aspects of Voluntary Codes" (Paper presented to the Exploring Voluntary Codes in the Marketplace Symposium, Ottawa, September 1996) [unpublished]. A complete copy of all papers presented at this Symposium is held on permanent reserve at the office of Appeal.

The author would like to thank Kernaghan Webb and Laura Mills for their encouraging and insightful criticisms.

1 D. Cohen, "Voluntary Codes: The Role of the Canadian State in a Privatized Regulatory Environment" (Paper presented to the Exploring Voluntary Codes in the Marketplace Symposium, Ottawa, September 1996) [unpublished]. See also: K. Webb, "Thumbs, Fingers and Pushing on String: Legal Accountability in the use of Federal Financial Incentives" (1993) 31 Alta. L. Rev. 501 at 502.

2 Office of Consumer Affairs, Industry Canada, "Description of Process and Approach" (Foreword to the materials for the Exploring Voluntary Codes in the Marketplace Symposium, Ottawa, September 1996) [unpublished].

Introduction

Virtually every consumer transaction is governed by a voluntary code of some sort. Some of these codes are simple and apply only to one store or company – for example Zellers' promise that the "lowest price is the law." Other codes are complex and can involve multiple firms in a sector. An illustration is the banking industry, where the Canadian Bankers' Association has a code governing the protection of private information. But what happens when a business purporting to adhere to a code fails to honour it? Does the customer have any legal recourse if Zellers refuses to match the price of a competitor? Does the customer have any recourse if her bank neglects to protect her privacy? The law of contract addresses these questions. It appears that a consumer who relied on a voluntary code, whatever his other options, will have an action in contract against the offending party.

Regulation can be viewed as a system of organization which is intended to influence behaviour within a society through mechanisms such as laws, constitutions, social conventions, cultural norms, tax policy and penal sanctions.[1] Although most regulatory instruments are utilized solely by the state, there are some private regulatory instruments. One such private instrument is the voluntary code – a system which is based upon a series of commitments made by one or more private actors to adhere to a set of rules.[2]

Until recently it was commonly thought that offensive behaviour could be defined by law and punished through sanctions. Professor David Cohen theorizes that the relatively small number of offenses enabled everyone to know the law, respect for the law was high and the social stigma of being labelled a transgressor was sufficient to ensure that people generally followed the laws.[3] As society evolved, the state's ability to control private actors through command and control mechanisms diminished. In particular, the proliferation of regulations coupled with an enlarged enforcement bureaucracy made command and control mechanisms increasingly expensive to maintain – a consideration exacerbated by the near universal shift toward fiscal restraint amongst governments of all political stripes. The retrenchment of the state prompted by these factors led to the increasing development of private instruments of regulation, particularly voluntary codes.[4]

As stated earlier, voluntary codes have many variations. Voluntary codes can be used to address virtually any sort of concern including protection of privacy,[5] customer service,[6] safety,[7] and labour standards.[8]

In addition to being less costly to the state, voluntary codes offer two key benefits to firms operating in the current economic climate:

- Efficiency: Unlike regulations, voluntary codes do not need to go through a long and formal development and implementation process. As a result they can be more easily developed, implemented and amended than government regulations. In addition, they can be created and applied with more flexibility than regulations, and can be easily tailored to a specific industry, or to address particular concerns.[9]

3 Cohen, see note 1.

4 Cohen, see note 1.

5 C. Bennett, "Privacy Codes of the Canadian Bankers' Association and the Canadian Standards Association" (Paper presented to the Exploring Voluntary Codes in the Marketplace Symposium, Ottawa, September 1996) [unpublished].

6 A. McChesney, "Voluntary Standards and Dispute Resolution in Canada's Cable Television Industry" (Paper presented to the Exploring Voluntary Codes in the Marketplace Symposium, Ottawa, September 1996) [unpublished].

7 F. Bregha and J. Moffet, "Canadian Chemical Producers' Association Responsible Care Program" (Paper presented to the Exploring Voluntary Codes in the Marketplace Symposium, Ottawa, September 1996) [unpublished].

8 G.T. Rhone, "The Gap Inc. Sourcing Guidelines and Principles" (Paper presented to the Exploring Voluntary Codes in the Marketplace Symposium, Ottawa, September 1996) [unpublished].

...Where a vendor purports to adhere to the terms of a voluntary code, yet subsequently violates this code, a breach of contract occurs.

- Trans-jurisdictional: Unlike regulations, which can only apply within a given territory, voluntary codes recognize no jurisdictional boundaries. In a North American context, this allows a nation-wide industry to adhere to a voluntary code which, if it was in the form of legislation, could trigger constitutional wrangling. Furthermore, voluntary codes provide a mechanism for multi-national industries to develop standards which can apply across territorial boundaries – a critical concern in an increasingly global economy. Finally, in an era of increasing trade liberalization many government standards can be considered non-tariff barriers. Voluntary arrangements allow a domestic industry to set national standards without trade concerns.

However, despite the proliferation of voluntary codes one should not presume that they have no disadvantages. Critics of voluntary codes have commonly mentioned the following drawbacks:

- Free-riders: Voluntary codes by definition cannot be applied to unwilling parties. Therefore, free-riders can emerge and absorb the industry-wide benefits of the code without adhering or contributing to it.
- Sanctions: The limited sanctioning options available in many voluntary codes may prevent adherents or associations from being able to compel transgressing members to comply with the code.
- Window dressing: Some industries will use voluntary codes as "window dressing" to improve their public image, without addressing the true problems within the industry.[10]

One of the most underappreciated aspects of voluntary codes is that despite being voluntary, they have profound legal ramifications for both adherents and non-adherents.[11] Legal issues raised by the existence of voluntary codes can be found in competition law, tort law and administrative law. This paper will focus on the contract law aspects of voluntary codes.

The key difference between regulatory regimes and voluntary regimes is that regulatory regimes are imposed on a population regardless of whether those affected by the regulation want to be bound by it, while voluntary regimes are adopted only with the consent of those affected. Voluntary codes are based in contract. The customer contracts with the vendor and the manufacturer, the vendor with its supplier, and the association with its members.[12] These contracts lead to legal rights and obligations which are ultimately enforceable in court. This paper will explore the contractual relationships which can be derived from voluntary code regimes.

1) Consumers and Vendors

For consumers, a voluntary code is a commitment made by a firm, or group of firms, to comply with certain guidelines on their behaviour, provided that the consumers meet certain conditions. This flows from the line of cases, beginning with *Carlill* v. *Carbolic Smoke Ball Co.*,[13] which deal with offers made to the public. These cases state that where an offer is made to the public and accepted, it must be honoured. If the vendor refuses to honour its offer, the consumer could bring an action for breach of contract, and if successful, obtain damages.

9 It should be noted that some voluntary codes have longer and more complex development processes than laws. For example, the new Sustainable Forest Management code developed by the Canadian Standards Association took nearly three years to develop due to the extensive consultation undertaken by the CSA. G.T. Rhone, "Canadian Standards Association Sustainable Forest Management Certification System" (Paper presented to the Exploring Voluntary Codes in the Marketplace Symposium, Ottawa, September 1996) [unpublished].

10 For more information on the strengths and weaknesses of voluntary codes see: K. Webb and A. Morrison, "Legal Aspects of Voluntary Codes: In the Shadow of the Law" (Paper presented to the Exploring Voluntary Codes in the Marketplace Symposium, Ottawa, September 1996) [unpublished].

11 The existence of a voluntary code can affect those who do not voluntarily agree to comply. For example, in tort law where a voluntary code has been adopted by the majority of an industry the court might use this code to determine the standard of care a non-adherent must exercise.

12 It is important to note that not all "associations" are juristic persons. In some cases an association may be simply be formed by a loose agreement among actors with a similar interest. In this situation the contractual relationship is not between the association and the members, but between each of the signatories to the agreement.

In the context of voluntary codes, where a vendor purports to adhere to the terms of a voluntary code, yet subsequently violates this code, a breach of contract occurs. For instance, many stores promise the consumer that they will match the price of their competitors. This can be viewed as a voluntary code adopted by the store. If the store were to violate this code, an aggrieved customer could sue the store in contract since the offer made to the public – that it would match the price of its competitor – was not honoured.

The consumer's case becomes even stronger where the consumer has essentially bargained for the terms contained in the code by paying a higher price than would be demanded by a competitor who did not follow a similar code. For example, the Gap, an international clothing chain, follows a voluntary code pertaining to the labour standards of its Latin American suppliers.[14] The code includes measures designed to ensure that all of the Gap's clothing is produced in a manner which is humane and not exploitive of the textile workers. If a Gap customer, who paid a higher price for an item of clothing than he would have at a department store where no sourcing code was in effect, were later to discover that the clothing he purchased was in fact manufactured contrary to the Gap's code, then the customer would have a strong action for breach of contract.

Where a vendor intentionally or negligently misleads the customer into believing that it adheres to a voluntary code when in fact it does not, the customer may have legal recourses other than contract-based actions. These would include a private action under a provincial consumer protection act for misleading advertising, as well as a tort action for deceit or negligent misrepresentation.[15] In particular, private actions under a provincial consumer protection act such as the British Columbia Trade Practice Act[16] or the Ontario Business Practices Act[17] might be an effective means for consumers to take action against a company which violates a voluntary code; many of these provincial acts are broadly written and provide for a lower evidentiary burden than in a tort or contract action.[18]

Although the consumer has a contractual action available to her, in many cases it is not practical to actually launch a suit for the violation of a voluntary code. The aggrieved customer in the Gap situation, for example, is unlikely to sue the Gap for the cost of an item of clothing – even in small-claims court the fees and effort required would likely make the necessary action impractical. A potential solution to this problem is the class-action lawsuit, which is statutorily permitted in three Canadian jurisdictions.[19] This type of lawsuit enables a group of aggrieved consumers, customers of the Gap or a bank for example, to join together and create an efficient method of obtaining redress. Another benefit of the class-action suit is that it addresses the problem of the lack of sanctions in voluntary codes. The fear of a large class-action damage award could serve to encourage code adherents to comply with their obligations.[20] Furthermore, a class-action lawyer, motivated by a potentially large contingency fee, would have a substantial incentive to monitor compliance with voluntary codes.

2) Consumers and Manufacturers

Most consumers do not purchase goods directly from the manufacturer, but

13 *Carlill* v. *Carbolic Smoke Ball Co.* [1893] 1 Queen's Bench Division 256 (Court of Appeal).

14 Rhone, see note 8.

15 For more information see: L.N. Klar, *Tort Law* (Toronto: Carswell, 1991) 425-433.

16 *Trade Practice Act* ("T.P.A."), R.S.B.C. 1979, c.406, ss.1, 3, 22.

17 *Business Practices Act*, R.S.O. 1990, c.B-18, ss. 1, 2, 3, 4.

18 See especially: T.P.A., see note 16, s.1 "supplier" which does not require privity of contract between the consumer and the party accused of the breach, and s.3 which broadly defines "deceptive acts or practices" without any requirement of intent to deceive.

19 In Canada these jurisdictions are Quebec (*Act respecting the Class Action*, R.S.Q. 1977, c. R-2.1.), Ontario (*Class Proceedings Act*, S.O. 1992, c. 6.) and British Columbia (*Class Proceedings Act*, S.B.C. 1995, c. 21.). Class-action lawsuits are common in the United States.

instead buy them from a vendor. This means that there is no conventional contractual relationship between the manufacturer and the consumer – the manufacturer has a contract with the vendor, and the consumer has a contract with the vendor, but the manufacturer and the consumer have no such oral or written contract. The doctrine of privity of contract suggests that where there is no contractual relationship between the aggrieved party and a defendant, there can be no action in contract against that defendant.[21] However, where manufacturers make claims about their products which cannot be fulfilled, the courts may find that an implied contract exists between the consumer and the manufacturer – this is known as a "collateral contract"[22] or a "collateral warranty."

It is also important to note that there may be some circumstances in which both the vendor and manufacturer may be involved in voluntary arrangements which attract contractual liability.

This approach is demonstrated in *Murray* v. *Sperry Rand Corporation*[23] where the manufacturer of farm machinery produced a brochure which contained statements about the performance quality of the machine. The brochure was promotional in nature, and was not simply a description of the machine. The court ruled that a potential customer reading the brochure would reasonably conclude that the manufacturer was promising that the described performance quality was also the actual performance quality of the machine. Even though the machine was purchased through a distributor, the court found the manufacturer liable to the consumer since its promises had induced the consumer to purchase the machine.

The potential for the court to find a collateral contract between a manufacturer and a consumer has important ramifications in the context of voluntary codes since it enables consumers to sue a manufacturer in contract where the manufacturer has advertised its adherence to a voluntary code, yet has not lived up to the promise. For example, a manufacturer of bicycle helmets may advertise that its helmets conform to the standards of the Snell Foundation, the Canadian Standards Association or the American National Standards Institute.[24] The consumer may purchase the helmet in reliance on this statement since adherence to a standard would suggest that the helmet is safe. Even if the consumer purchased the helmet at a sporting goods store, rather than directly through the manufacturer, the court could imply a contract between the consumer and the manufacturer so that the consumer could maintain an action in contract.

A consumer's ability to sue the manufacturer in contract is significant for several reasons. First, the manufacturer's awareness of its potential liability encourages adherence to the code. Second, it allows the consumer to obtain compensation where the retailer is not blameworthy. The consumer may not want to sue the local store when the more blameworthy party is a large manufacturer.[25] Third, the consumer may prefer to sue the manufacturer where the vendor does not have sufficient assets to make the action worthwhile. Fourth, in some cases the consumer may wish to sue the manufacturer rather than the vendor where the transaction with the vendor involved an exclusion of liability clause. It is also important to note that there may be some circumstances in which both the vendor and manufacturer may be involved in voluntary arrangements which attract contractual liability.

A consumer who wants to launch an action against a manufacturer also has several non-contract based options. In particular, in situations where it is unlikely the

20 For more information regarding the merits of class-action litigation see: M. Cochrane, *Class Actions: A Guide to the Class Proceedings Act, 1992* (Toronto: Canada Law Book, 1993.)

21 *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* [1915] Appeal Cases 847 (House of Lords) per Viscount Haldane L.C. at 853: "...in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it." See also: G.H.L. Fridman, *The Law of Contract in Canada*, 2d ed. (Toronto: Carswell, 1986) 170-176.

22 Fridman, see note 21 at 477-481. See also: S.M. Waddams, *The Law of Contracts*, 3d ed. (Toronto: Canada Law Book, 1993) at pp424-426.

23 *Murray* v. *Sperry Rand Corporation et al.* (1979) 23 Ontario Reports (2d) 456 (Ontario High Court), see also: *Traders Finance Corp. Ltd.* v. *Haley* (1966), 57 Dominion Law Reports (2d) 15 (Alberta Supreme Court, Appellate Division).

court will find a collateral contract to exist, the consumer might prefer to commence an action under a provincial consumer protection act. Many such acts are broadly written and some specifically eliminate the need for privity of contract. For example, the British Columbia Trade Practice Act defines a "supplier" as anyone who promotes or is involved in a consumer transaction, "whether or not privity of contract exists between that person and the consumer..."[26] This broadly written definition enables a consumer to sue a manufacturer directly for its "deceptive acts"[27] even though the consumer has no contract with the manufacturer.

3) Firms and Suppliers

Firms which adhere to a voluntary code may impose these rules on their suppliers as a term of a contract. For instance, a term of the Gap's code regarding the labour practices of their Latin American suppliers enables the Gap to terminate a contract with the supplier if the code is violated. Requiring a supplier to adhere to a voluntary code adopted by the purchasing firm is not uncommon; what is rare is where a firm requires its customers to adhere to these same terms. An example of this latter requirement is the Canadian Chemical Producers' Association (CCPA) "Responsible Care" code.[28] The Responsible Care program has been in place since the mid-1980's and has successfully increased safety within the chemical industry. It is currently embarking on a stewardship program which would extend the principles of Responsible Care downstream to its customers. Although this facet of Responsible Care has received positive reactions from many CCPA customers, Brian Wastle, President of the CCPA acknowledges that the stewardship issue is an ongoing challenge.[29]

Predictably, there are a number of concerns with the feasibility of imposing a voluntary code on one's customers – how is the customer's compliance monitored and how does one construct incentives which discourage selling to inappropriate customers? The Responsible Care code may be able to overcome these potential problems for two reasons. First, the CCPA's members are primarily large chemical companies which can afford to turn away some inappropriate customers. Second, its customers are mainly established companies which are easier to monitor. In contrast, requiring customers to adhere to a voluntary code would be far more difficult if the firm was not easily able to turn away inappropriate customers, if the firm sold to the public, or if the firm had a large number of customers.

By requiring that suppliers or customers adhere to a voluntary code endorsed by them, firms could potentially work towards attaining public policy goals.[30] For example, the CCPA, by using its market muscle to encourage its customers to abide by the principles of the Responsible Care code, could help improve safety in the manufacturing industry which is regulated at great expense by the state. The imposition of the Gap's labour standards code on its Latin American suppliers is even more interesting since it uses the Gap's market power to impose North American style labour standards on suppliers in Latin American jurisdictions notorious for their abysmal working conditions. Thus the Gap, through the use of market pressures, has achieved something that North American governments have not – the improvement of working conditions in Latin America.[31]

By requiring that suppliers or customers adhere to a voluntary code endorsed by them, firms could potentially work towards attaining public policy goals.

24 These are organizations which develop and administer bicycle helmet standards. See also, J. Buchanan, A. Morrison and K. Webb, "Bicycle Helmet Standards and Hockey Helmet Regulations: Two Approaches to Safety Protection" (Paper presented to the Exploring Voluntary Codes in the Marketplace Symposium, Ottawa, September 1996) [unpublished].

25 Although in practice many lawyers might advise such a consumer to sue the local vendor and allow the vendor to join the manufacturer as a "third party".

26 T.P.A., see note 16, s.1 "supplier".

27 T.P.A., see note 16, s.3.

28 Bregha and Moffet, see note 7.

29 Bregha and Moffet, see note 7.

...Industry associations can only maintain actions for breach of contract against those who have agreed to abide by the association's standards – their members.

It is worth noting that just as imposing the terms of a voluntary code on suppliers and customers can achieve positive public policy goals, this practice could also be used in the self-interest of an industry association. For example, in *R.* v. *British Columbia Fruit Growers' Association et al*[32] the BCFGA was charged with an offence under the Combines Investigation Act when it used its market influence to prevent storage facilities from offering their services to non-members. This action effectively limited non-members to selling their products fresh. The fact that the BCFGA imposed the terms of its voluntary code on its suppliers in order to protect its own interests should be cause for some concern. However, the BCFGA was acquitted at trial since the court found that the non-members were not prevented from selling their fruit.

4) Industry Associations and Member Firms

Perhaps the most obvious contractual relationship created by a voluntary code regime is between industry associations and their members. Generally, when a member firm joins an industry association the member must pay a membership fee and agree to abide by the rules and standards imposed by the association. In exchange the member can advertise their affiliation with the association and gain access to services or benefits provided by the association. The failure by a member to adhere to the association's code can result in harm to the reputation of both the association and its members in good standing. As a result the association will often take legal action against the offending member for breach of contract. Conversely, a member firm could sue the association if it failed to provide the services and benefits bargained for in the contract.

An example of an association taking action against a member is found in the Nova Scotia Court of Appeal case, *Ripley* v. *Investment Dealers' Association*.[33] In this case a member of the Association violated the standards imposed by the Investment Dealers' Association (IDA) and was subsequently disciplined by its Business Conduct Committee. Ripley admitted that he was familiar with the standards set by the IDA and the sanctions which could be imposed for breaching them, but argued that the association should not be able to sanction him since it would violate his s. 7 and 11 rights under the Canadian Charter of Rights and Freedoms. The court disagreed with this argument noting that:

> It may be inferred that members of the securities industry contract to regulate themselves because it is to their advantage to do so. An obvious benefit is the avoidance of the need for government regulation in a field where the need for protection of the public might otherwise attract it. A party to such a contract cannot have it both ways; if he enjoys benefits from a contract which excludes government intervention from his profession, he cannot claim Charter protection when he is accused of breaching the conditions of his contract.[34]

The court's decision in *Ripley* confirms the rights of industry associations to enforce standards, as contractual terms, against offending members. Ultimately, actions of this sort resemble enforcement actions by regulatory agencies against regulated parties. However, there is an important distinction which must be made clear: industry associations can only maintain actions for breach of contract against those who have agreed to abide by the association's standards – their members. Those firms or individuals which choose not to join the association cannot be sued in

30 Provided that these goals are still in the "best interest of the corporation". See: *Dodge* v. *Ford Motor Company* 170 Northwestern Reporter 668 (Supreme Court of Michigan, 1919), and *Parke* v. *Daily News Ltd.* [1962] *1* Chancery Division 927, [1962] 2 All England Law Reports, 929 (Chancery Division).

31 Rhone, see note 8.

32 *R.* v. *British Columbia Fruit Growers' Association et al* (1986) 11 Canadian Patent Reporter (3d) 183 (British Columbia Supreme Court).

33 *Ripley* v. *Investment Dealers Association of Canada et al. (No. 2)*, [1991] 108 Nova Scotia Reports (2d) 38 (Nova Scotia Supreme Court Appeal Division).

contract if they fail to adhere to the association's standards.[35]

One danger which stems from an industry association's ability to set and enforce standards is that the association could set its standards so as to impede competition within the industry. When standards (or regulations) are followed by an entire industry, the level of competition amongst firms in the industry will be reduced simply because no firm can choose to operate below the minimum standards. However, this is not nearly as pressing a concern as when an industry association intentionally erects standards which act to injure competitors. Perhaps the best example of this is found in the American case, *Hydrolevel Corp.* v. *American Society of Mechanical Engineers (ASME)*.[36] In that case, the jury found that influential individual members of ASME, a standards setting body, had acted to protect their companies from competition by falsely suggesting, on behalf of ASME that their competitor's products were unsafe. This sort of situation is quite rare, and it should be noted that the Competition Bureau is aware of the potential anti-competitive effects of voluntary code arrangements. In fact, a recent Competition Bureau paper addresses these issues and notes that where voluntary arrangements are anti-competitive the Competition Bureau will take action to remedy the situation.[37]

Conclusion

Despite their voluntary nature, voluntary codes are not immune to legal actions. At the heart of every voluntary code is a series of contractual relationships, each of which could be subject to an action in contract. The increasing emergence of voluntary codes could serve to empower consumers and public interest litigants by providing an alternative method of obtaining redress. At the same time, one should not overestimate the impact that a greater understanding of the contractual aspects of voluntary codes will have. Although contract law provides another potential avenue for redress, there remain a number of factors which militate against individual consumers bringing actions in contract. Most commonly cited is the imbalance of power between firms and individuals. Firms often have the resources to determine whether a contractual term is being violated and to hire skilled lawyers to fight the individual's action. In contrast, individual consumers may lack the resources to launch an action, may be intimidated by the court processes, and may lack knowledge of the law. Furthermore, damage to the individual consumer from the violation of a voluntary code may simply be too small to merit a legal action – an especially disturbing point since the aggregate damage to consumers as a whole may be significant.

However, in provinces with class proceedings legislation, all of the above factors are mitigated. Consumers may join together to claim their aggregate damages with the assistance of a lawyer motivated by the potentially large contingency fees of a class-action suit. Furthermore, lawyers may have a substantial economic incentive to monitor and help enforce voluntary codes. Overall, there is reason to believe that the contractual relationships derived from voluntary codes will become an increasingly important aspect of the law.

The increasing emergence of voluntary codes could serve to empower consumers and public interest litigants by providing an alternative method of obtaining redress.

34 Ripley, see note 33 at 47.

35 However, it is important to note that although non-members cannot be sued in contract, they could be sued in tort. This risk of liability might prompt non-members to join an industry association or to adhere to the association's standards.

36 *Hydrolevel Corp.* v. *American Society of Mechanical Engineers* 635 Federal Reporter 2d. 118 (United States Court of Appeals, 2d Circuit. 1980).

37 Director of Investigation and Research, *Strategic Alliances Under the Competition Act* (Hull: Ministry of Supply and Services, 1995).

Aboriginal Self-Government in BC

The Nisga'a Agreement-in-Principle

Sara Baade completed her B.A. at the University of Victoria, where she is also finishing her LL.B. She will graduate in 1998.

At 8:27 a.m. our canoe arrived. The journey our forefathers began well over a century ago ended this morning.

Joe Gosnell, President of the Nisga'a Tribal Council, February 12, 1996.

In early 1996, the Nisga'a Tribal Council ("NTC") and the governments of British Columbia and Canada signed an Agreement-in-Principle ("AIP" or "agreement")[1] which, if ratified, will settle Nisga'a claims to land and self-government in British Columbia. The AIP emerges from more than a century of political activism by the Nisga'a, as they sought recognition of their claims to land and self-government in the form of a treaty. It also emerges in a judicial climate which seems likely to recognize self-government as an existing aboriginal right, should this issue be litigated. This paper will focus on the legal basis for self-government and on the self-government provisions of the AIP.

Despite the probable legal basis for self-government, many British Columbians met the announcement of the AIP with criticisms and fears. And apart from the agreement itself, a number of politicians and columnists denied that any

1 *Nisga'a Treaty Negotiations Agreement-in-Principle*, 15 February 1996. Issued jointly by the Government of Canada, the Province of British Columbia and the Nisga'a Tribal Council.

2 Many aboriginal groups across Canada were also critical of the AIP, but this paper, while acknowledging these concerns, seeks instead to address fears of non-aboriginal groups.

form of aboriginal self-government should be accepted.[2] These sentiments may be unrealistic given the legal status of aboriginal rights, and create a negative environment for current negotiations. A constitutional aboriginal right of self-government likely now exists, and the Nisga'a agreement represents a positive approach to the implementation of this right.

What is self–government?

A definition of aboriginal "self-government" is difficult to formulate, as the term has been used to describe a diversity of political arrangements. Fundamentally, self-government arrangements grant aboriginal people some degree of decision-making power in specified areas. Recently, in *Delgamuukw* v. *The Queen* (*"Delgamuukw"*)[3] the Gitksan and Wet'suwet'en people claimed ownership and jurisdiction, including self-government, over a territory in central British Columbia. In dissent, British Columbia Court of Appeal ("BCCA") Justice Lambert articulated the plaintiffs' claim for self-government as a claim for "a right of self-regulation of themselves and their institutions,"[4] and likened it to the self-regulation practised by a forest company, ranching company or Hutterite community.[5] To further understand what is meant by "self-government," it is also useful to look at an example. The Sechelt Indian Band has had a successful form of self-government since 1984, with a band constitution, jurisdiction over land, and various other powers, and this model shares a number of features with the proposed Nisga'a arrangement. In contrast, most aboriginal groups want much more power than either of these models provides. For these groups, self-government is inherent, rather than "contingent" on the will of Parliament,[6] meaning that aboriginal peoples should be recognized as independent sovereigns forming a "third order of government" that is similar in status to provincial governments. The envisioned Nisga'a form of self-government is much more moderate than these proposals.

Self-government is critical to aboriginal culture. The plaintiffs in *Delgamuukw* argued that self-government is necessary "in order to determine their development and safeguard their integrity as aboriginal peoples" and "to preserve and enhance their social, political, cultural, linguistic and spiritual identity."[7] It is understood that "political participation is an essential component of community life [and that] self-government is instrumentally valuable to realize group identity."[8] The spiritual aspect of aboriginal sovereignty is also important: "the right to political self-determination is married to the spiritual right to govern… these two concepts cannot be divorced from one another."[9] In the words of the Nisga'a, self-government means the ability to control their own "lives and destiny."[10] Thus, self-government provides a vehicle for making decisions that affect the cultural identity of an aboriginal people, and likewise increases aboriginal participation in the Canadian political system.

3 *Delgamuukw* v. *The Queen*, [1993] 5 Western Weekly Reports 97 (British Columbia Court of Appeal).

4 See above at 348.

5 See above at 360.

6 M. Asch, "Political Self-Sufficiency" in D. Englestad, and J. Bird, eds., *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Ontario: House of Anansi Press, 1992) 45 at 47.

7 *Delgamuukw*, see note 3 at 149.

8 P. Mackelm, "Normative Dimensions of the Right of Aboriginal Self-Government" *The Report of the Royal Commission on Aboriginal Peoples, Aboriginal Self-Government, Legal and Constitutional Issues* (Ottawa: Canada Communications Group, 1995) 1 at 27.

9 C. Etkin, "The Sechelt Indian Band: an Analysis of a New Form of Native Self Government" (1988) 8 Canadian Journal of Native Studies 73 at 75.

10 Nisga'a Tribal Council, *Nisga'a Government* (Nisga'a Tribal Council, 1993).

A Legal Aboriginal Right of Self-Government

The courts may well establish a right of self-government with a scope far exceeding that envisioned in the AIP.

The Supreme Court of Canada has recently clarified, and in some cases expanded, the scope of constitutionally protected aboriginal rights. While no decision has yet dealt directly with the right of self-government, recent cases suggest that, faced with the issue, the court would decide that there is such a right. For this reason alone, it makes sense to begin negotiating self-government agreements. The courts may well establish a right of self-government with a scope far exceeding that envisioned in the AIP.

The Nisga'a have sought resolution of the issues of aboriginal rights and self-government for over a century. British Columbia's position when it entered Confederation in 1871 was that there was no aboriginal title in the Province. Eventually, after a long history of activism against the Province's position, the Nisga'a brought an action to the Supreme Court of Canada in *Calder* v. *Attorney General of British Columbia ("Calder")*,[11] seeking a declaration that "the aboriginal title, otherwise known as the Indian title, of the Plaintiffs to their ancient tribal territory… has never been lawfully extinguished."[12] Although the claim was dismissed on other grounds, six of the seven judges found that aboriginal title is a legal right pre-existing European contact, and does not need government recognition to exist. The decision immediately enhanced the legal and political credibility of aboriginal claims.[13]

Since 1982, section 35(1) of the Constitution Act, 1982 ("section 35(1)") has further strengthened aboriginal claims, serving as a firm constitutional foundation for aboriginal rights. It reads:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The Supreme Court of Canada first considered the scope of section 35(1) in *R.* v. *Sparrow ("Sparrow")*,[14] in the context of aboriginal fishing rights. The court held that although the government may regulate aboriginal rights, it must justify any regulation that impairs an "existing" aboriginal right. The court emphasized that "s. 35(1) is a solemn commitment that must be given meaningful content,"[15] and set out a four-part test for analyzing aboriginal rights. Supreme Court of Canada Chief Justice Lamer summarized this test in *R.* v. *Gladstone ("Gladstone")*:

> first, the court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right; second, a court must determine whether that right was extinguished prior to the enactment of s. 35(1) of the Constitution Act, 1982; third, a court must determine whether that right has been infringed; finally, a court must determine whether that infringement was justified.[16]

In order to justify infringement, the government must show a valid legislative objective. It must also show that it acted honourably and in the best interests of the aboriginal people; in accordance with its previous decision in *Guerin* v. *The Queen*,[17] the Supreme Court in *Sparrow* added that "the honour of the Crown is at

11 *Calder* v. *Attorney General of British Columbia*, [1973] Supreme Court Reports 313 (Supreme Court of Canada).

12 See above at 313.

13 D. Sanders, "The Nishga Case" (1973) 19 B.C. Studies 3 at 18.

14 *R.* v. *Sparrow*, [1990] 1 Supreme Court Reports 1075 (Supreme Court of Canada).

15 See above at 1108.

16 *R.* v. *Gladstone*, [1996] 137 Dominion Law Reports (4th) 648 (Supreme Court of Canada) at 658.

17 *Guerin* v. *The Queen*, [1984] 2 Supreme Court Reports 335 (Supreme Court of Canada).

stake in dealings with aboriginal peoples."[18] *Sparrow* reveals a broad and liberal treatment of aboriginal rights by the Supreme Court.

A central issue in the *Sparrow* test is whether, if "existing," a right of self-government has been extinguished. When considering the claim for self-government in *Delgamuukw*, the BCCA applied the standard set in *Sparrow*: that "the sovereign's intention must be clear and plain if it is to extinguish aboriginal rights."[19] None of the judges found that aboriginal rights had been extinguished in British Columbia, either implicitly or explicitly; however, the majority rejected the claim to self-government on the basis that the Constitution Act, 1867 had exhaustively distributed jurisdiction, leaving no room for a "third order of government." The validity of this finding is discussed below. The decision in *Delgamuukw* is on appeal to the Supreme Court of Canada, and a look at recent Supreme Court decisions may be helpful in anticipating a possible outcome.

Recent decisions indicate a possible weakening of aboriginal rights under section 35(1).

In 1996, the Supreme Court elaborated on the *Sparrow* framework in several cases dealing with aboriginal rights under section 35(1). In *R.* v. *Jones*; *R.* v. *Gardner*[20] the aboriginal appellants were charged with operating a gaming house contrary to the Criminal Code. They argued that section 35(1) encompasses an aboriginal right of self-government, including the right to regulate gambling. The Supreme Court assumed without deciding that section 35(1) includes self-government claims, and stated that "claims to self-government made under s. 35(1) are no different from other claims to the enjoyment of aboriginal rights and must be measured against the same standard."[21] The standard referred to is that in *R.* v. *Van der Peet ("Van der Peet"),*[22] a contemporaneous case dealing with fishing rights, which held that in order to be an aboriginal right an activity must be an element of a tradition, custom or practice integral to the distinctive culture of the aboriginal group claiming the right.[23] The court in *Van der Peet* added that the activity must have been a "defining feature of the culture in question" prior to European contact.[24]

These statements indicate a modification of the more liberal *Sparrow* approach to aboriginal rights. No longer is the "integral" nature of the activity a factor, but rather a criterion. In addition, in *Sparrow* the relevant time for considering the nature of the right was at the time of sovereignty, whereas *Van der Peet* moved this date back to the time of European contact. Further modifications of *Sparrow* are evident in *Gladstone*, another of the 1996 decisions. For example, *Sparrow* set out a series of questions to determine whether there has been a *prima facie* infringement of section 35(1) rights: is the limitation unreasonable? Does it impose undue hardship? Does it deny to the holders of the right their preferred means of exercising that right?[25] In *Gladstone*, the court modified this approach, saying that the "questions asked by the court in *Sparrow*… only point to factors which will indicate that… infringement has taken place."[26] These recent decisions indicate a possible weakening of aboriginal rights under section 35(1).

However, while the 1996 cases provide a more stringent test for

18 *Sparrow*, see note 14 at 1114.

19 See above at 154.

20 *R.* v. *Gardner*; *R.* v. *Jones*, [1996] 138 Dominion Law Reports (4th) 204 (Supreme Court of Canada).

21 See above at 212.

22 *R.* v. *Van der Peet*, [1996] 137 Dominion Law Reports (4th) 289 (Supreme Court of Canada).

23 See above at 212.

24 See note 22 at 213.

25 *Sparrow*, see note 14 at 1078.

26 *Gladstone*, see note 16 at 669.

determining whether rights will be recognized and affirmed under section 35(1), they do not affect the basic propositions to be derived from *Sparrow* and *Calder*. Aboriginal people will have to establish that self-government was integral to their communities prior to European contact, and that the right was "existing" in 1982. If the right has not been extinguished through clear and plain legislative enactments, it will then fall to the government to justify infringement according to the relatively rigorous standards described above. These legal issues provide a necessary background for discussion of the controversy surrounding self-government, and in particular, the self-government provisions of the AIP.

Historical and legal analysis indicates that constitutional space for aboriginal self-government still exists.

The Agreement-In-Principle

Despite the probable legal basis for self-government, and despite the relatively moderate arrangement envisioned in the Nisga'a AIP, some non-aboriginal British Columbians remain critical of the AIP self-government provisions. They argue that the AIP is constitutionally unworkable, that it gives too much power, that it is racist or divisive, and that it is financially too generous. They also fear implementation of a new political structure that they see as untested and untried. Through an examination of the AIP, it becomes apparent that these arguments may be unfounded, and that the agreement will benefit both aboriginal and non-aboriginal people in the province. Several of the criticisms advanced are discussed in turn below.

"Aboriginal self-government is unworkable within the Canadian constitution."

In *Delgamuukw*, the Province argued successfully before the BCCA that constitutional jurisdiction is now exhaustively distributed between the federal and provincial governments, leaving no constitutional space for aboriginal governments. The majority of the BCCA stated that "a continuing aboriginal legislative power is inconsistent with the division of powers found in the Constitution Act, 1867."[27] In dissent, however, Justice Lambert denied that enactment of the Constitution Act, 1867 constituted a clear legislative intent to extinguish the right of self-government. Is the principle of exhaustion sufficient to show a clear and plain intent to extinguish the right to self-government, under the test for section 35(1)?

Historical and legal analysis indicates that constitutional space for aboriginal self-government still exists. In 1993, the Royal Commission on Aboriginal Peoples noted that a number of enactments before 1867 distributed powers without extinguishing aboriginal powers of government,[28] and that legislation both before and after 1867 assumed that aboriginal governing structures survived past confederation. Moreover, the Constitution allowed for overlapping and concurrent powers; even after 1867, federal and provincial powers were considered to be concurrent with the powers of the English Parliament. Finally, section 129 of the Constitution Act, 1867 stated that laws and powers existing before 1867 presumptively remained in force.[29]

27 *Delgamuukw*, see note 3 at 163.

28 Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa, 1993) at 33.

29 See above at 34.

Following the test in *Sparrow*, then, there was arguably no "clear and plain" intention in the Constitution Act, 1867 to extinguish aboriginal rights.

While many concepts of constitutional law appear incompatible with aboriginal self-government, the recognition of aboriginal rights and the enactment of section 35(1) requires that they be reconsidered. Doctrines such as the principle of exhaustion, which were developed before the enactment of section 35(1), should not be used to prevent the expression of long-standing aboriginal rights.[30] Recognizing jurisdictional powers in a third order of government would complicate judicial decision-making, requiring more than an "either/or" approach to division of powers. However, the need for a new approach should not preclude self-government arrangements which provide for concurrent powers.[31] Constitutionally, then, aboriginal self-government with concurrent or overlapping jurisdiction should not be precluded.

The enumerated powers and jurisdiction set out in the AIP have been the focus of numerous attacks. For example, the AIP provisions have been described as a "a major divestment of power from the Legislature of British Columbia to what is to be in effect the legislature of the Nisga'a central government."[32] In some areas Nisga'a government powers do seem to intrude into provincial jurisdiction. However, many of the powers required for effective self-government are within federal jurisdiction, through section 91(24) of the Constitution Act, 1867 and the Indian Act.[33] In addition, conflicts with provincial jurisdiction already exist because the Indian Act affects areas of provincial authority, such as education, health services, preservation of natural resources, management of fish and game, laws regarding public order and safety, control of intoxicants and taxation.[34] The Province also delegates authority to bands in areas such as child welfare.[35]

Pragmatically, the AIP lists agreed-upon powers and authorities and provides for conflict resolution. Where Nisga'a law is inconsistent with a federal or provincial law, the AIP specifies which shall prevail. Federal or provincial laws are paramount in areas such as public order, peace and safety; traffic and transportation; social services; health services; and intoxicants. In other areas, such as government administration, management and operation, culture and language, and Nisga'a lands and assets, Nisga'a laws are paramount. Nisga'a laws also prevail in key cultural areas such as adoption, child and family services, and pre-school to grade 12 education. The fact that Nisga'a Government will hold powers similar to provincial and federal governments in some areas will not represent a significant divesting of powers from either the Province or Canada, but exemplifies the cooperative nature of the agreement.

The AIP recognizes that sharing of powers is integral in a federal country such as Canada. While the Nisga'a emphasize the need for authority in crucial areas, they agree that "there are many areas of jurisdiction that may best remain with the federal and provincial governments."[36] Because of the large number of relatively small bands in British Columbia, many bands cannot provide a full range of services to their members without cooperation from other levels of government.[37] Fortunately,

Where Nisga'a law is inconsistent with a federal or provincial law, the AIP specifies which shall prevail.

30 P. Hogg & M.E. Turpell, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" in *The Report of the Royal Commission on Aboriginal Peoples, Aboriginal Self-Government, Legal and Constitutional Issues* (Ottawa: Canada Communications Group - Publishing, 1995) 375 at 382, 383.

31 J. Olynyk, "Approaches to Sorting Out Jurisdiction in a Self-Government Context" (1995) 53 Toronto Faculty of Law Review 235 at 241.

32 J. Duncan, Reform Party Canada Indian Affairs critic, quoted in "The new South Africa: B.C.'s Nisga'a settlement is condemned as racist" (1996) 11 *Western Report* 18. Found in Canadian Business and Current Affairs Index, screen 14.

33 R.S.C. 1985 c. I-5; see generally *Olynyk*, see note 31 at 241.

34 J. Taylor & G. Paget, "Federal/Provincial Responsibility and the Sechelt" in Hawkes, D., ed., *Aboriginal Peoples and Government Responsibility, Exploring Federal and Provincial Roles* (Ottawa: Carleton UP, 1987) 297 at 323.

35 See above at 323.

36 Nisga'a Tribal Council, see note 10.

37 Taylor and Paget, see note 34 at 300.

Canadian governments have a history of cooperation; "[i]n many fields of common jurisdiction, formal agreements have been entered into to ensure that both orders of government [i.e. federal and provincial] work together in pursuit of common goals."[38] Aboriginal governments can enter this network of governmental cooperation, using existing techniques for organizing these relationships.[39]

"We're buiding racial walls inside our province." – B.C. Foundation for Individual Rights and Equality

"The AIP gives too much power to Nisga'a Government."

Critics have argued that the AIP is too generous, and that it gives the Nisga'a more power than is rightfully theirs. However, the agreement is moderate, and considerate of the needs of all people in the province. While accommodating the need for self-government, it falls short of more extreme models envisioned by many aboriginal groups. It emphasizes principles of accountability and democracy, and contains a number of checks and balances.

Although it will be constitutionally entrenched through section 35(1), the proposed Nisga'a Government is essentially municipal in nature, rather than being an independent third order of government. The AIP creates a relatively autonomous government, comprising the Nisga'a Central Government and four Village Governments called New Aiyansh, Gitwinksihlkw, Greenville and Kincolith. As mentioned previously, this proposal is similar to the Sechelt model of government, which involves extensive intergovernmental cooperation. The Nisga'a will adopt a constitution similar to those of other local governments; for example, it will provide for establishment of subordinate elected bodies, for the enactment of laws, and for measures of financial accountability.

The Nisga'a political structure will also be democratic and accountable. The constitution comes into force only "upon its approval by at least 70% of those participants 18 years of age and older who vote in a referendum,"[40] and may only be amended with approval of "at least 70% of those Nisga'a citizens who vote in a referendum."[41] In addition, Nisga'a elders are to have a role "in providing guidance and interpretation of the *Ayuuk*[42] to Nisga'a Government."[43] An aspect of the AIP which has particular significance to the Nisga'a is protection of communal land: the constitution must "provide for the prior approval of any disposition of Nisga'a Lands that does, or could result in a change of ownership."[44] Land granted under the agreement is thus protected from loss and managed at the discretion of the Nisga'a Government.

The AIP is also moderate in that it gives rights to non-Nisga'a residing on Nisga'a land. They are to be "consulted about Nisga'a Government decisions which directly and significantly affect them"[45] and are to have "means of participating in subordinate elected bodies whose activities directly and significantly affect them."[46] By contrast, a 1983 federal report, known as the "Penner Report," recommended that in areas of exclusive jurisdiction, aboriginal governments should exercise powers over all people within their territorial limits. That report argued that non-aboriginal people "do not share in the ownership of the assets administered by that government and

38 Hogg and Turpell, see note 30 at 396.

39 See above at 397.

40 *Nisga'a Treaty Negotiations Agreement-in-Principle*, see note 1 at Nisga'a Government, paragraph 11, page 68.

41 See note at paragraph 12, page 68.

42 Ayuuk is defined by the Nisga'a Agreement-in-Principle as "the traditional laws and practices of the Nisga'a Nation." See note 1 at Definitions, paragraph 2, page 1.

43 *Nisga'a Treaty Negotiations Agreement-in-Principle*, see note 1 at Nisga'a Government, paragraph 10(e), page 67.

44 See above at Nisga'a Government, paragraph 10(j), page 67.

45 See above at paragraph 22(a), page 70.

46 See above at paragraph 22(b), page 70.

thus have no right to a voice in such matters."[47] The voting rights given to non-Nisga'a are especially notable because non-aboriginals living in Sechelt do not have these rights. Again, despite fears expressed by critics, the agreement does not represent a significant loss of power to non-Nisga'a British Columbians, even those most directly affected by it.

While satisfying the widespread aboriginal demand that "aboriginal forms of decision-making and accountability must be reflected" in self-governing bodies,[48] the AIP also ensures accountability to the wider provincial community. For example, it establishes mechanisms to "appeal or seek review of administrative decisions of Nisga'a Government institutions which affect their interests."[49] The Supreme Court of British Columbia will also have jurisdiction over Nisga'a Government decisions, but only after "all mechanisms for appeal or review established by Nisga'a Government have been exhausted."[50] Presumably, the Nisga'a government will set up an appeal body to provide for more specialized treatment of issues than is available in the traditional courts. Although this initial process cannot be bypassed, the Supreme Court will remain a safeguard, particularly during the transition period when new mechanisms are first established. The two systems will work together, more effectively including aboriginal people in the existing Canadian system.

"Let us say it loud and clear, so that there can be not misunderstanding: the Nisga'a want to be a part of Canada. We do not want to be an independent state."

-Nisga'a Tribal Council

"The AIP creates special rights for aboriginal people and sets up racial walls within the province."

Some critics argue that the AIP's self-government provisions segregate aboriginal people from other Canadians, thus creating a form of apartheid.[51] Greg Hollingsworth, founder and president of the B.C. Foundation for Individual Rights and Equality, a B.C. group that opposes special rights for natives, claimed that by negotiating self-government agreements "we're building racial walls inside our province."[52] Jack Weisgerber, B.C. Reform leader, called the AIP "totally unacceptable,"[53] and B.C. Liberal leader Gordon Campbell called for "one law for all British Columbians."[54]

However, aboriginal people value self-government in part because it enhances their ability to participate in Canadian society. Far from being divisive in nature, the AIP allows political participation of both Nisga'a and non-Nisga'a living on Nisga'a land. In much the same way as other Canadians participate in decision-making through local municipal governments, the Nisga'a will be able to make a greater political contribution in areas of concern to them. Further, since self-government acts to end relationships of dependency, it works to strengthen rather than weaken or fragment Canada.[55] In the words of the NTC:

> Let us say it loud and clear, so that there can be no misunderstanding: the Nisga'a want to be a part of Canada. We do not want to be an independent state. To [be a part of Canada], it is essential that the federal and provincial governments recognize our right to pass our own laws, to create our own institutions, and to manage and protect our land and resources.[56]

47 Canada, House of Commons. *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Queen's Printer, 1983) at 110.

48 P. Kulchyski, "Aboriginal Peoples and Hegemony in Canada" (1995) Journal of Canadian Studies 60 at 66.

49 *Nisga'a Treaty Negotiations Agreement-in-Principle*, see note 1 at Nisga'a Government, paragraph 19, page 69.

50 See above at paragraph 20, p. 69.

51 See for example "Constitutionally Entrenched Apartheid: A tentative agreement between B.C. and the Nisga'a carves out a sovereign Indian 'homeland'" (1996) 11 *Western Report* 12 at 12.

52 "The new South Africa: B.C's Nisga'a Settlement is condemned as racist" (1996) 11 *Western Report* 18. Found in Canadian Business and Current Affairs Index, screen 9.

53 "Nisga'a Agreement 110 Years in the Making" (1996) 13 *Windspeaker* 3. Found in the Canadian Business and Current Affairs Index.

54 "Backlash Threatens Long-Sought Nisga'a Treaty" (1996) 20 *Catholic New Times*. Found in Canadian Business and Current Affairs Index, screen 29.

55 Canada, House of Commons, see note 47 at 41-42.

56 Nisga'a Tribal Council, see note 10.

Critics of self-government express fears about provisions they call "racist" for creating "different laws and different regulations for different people."[57] The Nisga'a Government will have some powers over Nisga'a citizens beyond its geographical limits, and over non-Nisga'a residing on Nisga'a land. For example, the Nisga'a and Provincial Government are to negotiate agreements for kindergarten to grade 12 education, affecting both "persons other than Nisga'a citizens residing on Nisga'a Lands"[58] and "Nisga'a citizens residing outside of Nisga'a Lands."[59] However, "portable rights" are not conceptually unfamiliar to Canadians; for example, aboriginal people already have portable treaty rights to education off a territorial base. As a result, conflict-of-laws principles already exist to govern such situations.[60] Powers granted in the AIP extend beyond Nisga'a land where necessary to enhance and promote aboriginal culture, such as in education and adoption. Similar arrangements already in place elsewhere in Canada demonstrate that these AIP provisions are reasonable.

Finally, the AIP enables the Nisga'a to participate meaningfully in the Canadian economy. The Nisga'a Nation and the four villages will be separate legal entities, with the capacity, rights, powers and privileges of a natural person, and thus they may enter into contracts and agreements; acquire, hold and dispose of property; raise, expend, invest and borrow money; and sue and be sued. In the past, the Nisga'a were prevented from entering the contractual relationships necessary for economic development, because the common law did not recognize Indian bands as legal entities. This simple provision in the AIP is a significant step towards financial autonomy for the Nisga'a, and thus greater social and economic integration in the province.

Since the implementation of self-government in Sechelt, more young Sechelt people are pursuing higher education, fewer are dropping out of school, and rates of alcohol and drug abuse have declined.

"We're paying too much."

Perhaps the most zealous opposition to the agreement arises from the issue of funding. Under the AIP, Canada and British Columbia agree to make a capital transfer of $190 million to the Nisga'a Central Government, with $175.5 million of this to come from the Federal Government. It goes without saying that self-government, like any public enterprise, cannot succeed without adequate funding. This transfer benefits all British Columbians because a final resolution of the Nisga'a claim means greater economic and political stability. The AIP, if ratified, will "indemnify Canada and British Columbia from liability for claims and actions initiated after the effective date, relating to or arising from the aboriginal claims, rights, titles and interests of the Nisga'a people it warrants that it represents in this Agreement."[61] Thus, ratification of the AIP will benefit the province for reasons of certainty. As ratification cannot be achieved without funding, the capital transfer is essential.

Self-government also has the potential to foster greater aboriginal self-sufficiency and a corresponding decline in the need for social assistance provided by other levels of goverment. Since the implementation of self-government in Sechelt, for example, more young Sechelt people are pursuing higher education, fewer are dropping out of school, and rates of alcohol and drug abuse have declined.[62] These

57 "The new South Africa: B.C.'s Nisga'a settlement is condemned as racist", see note 52 at screen 10.

58 *Nisga'a Treaty Negotiations Agreement-in-Principle*, see note 1 at Nisga'a Government, paragraph 54(a), page 76.

59 See above at paragraph 54(b), page 76.

60 Hogg and Turpell, see note 30 at 394.

61 *Nisga'a Treaty Negotiations Agreement-in-Principle*, see note 1 at General Provisions, paragraph 19, page 7.

benefits of self-government have a positive impact on the province as a whole, both socially and economicially. Locally funded and managed programs are effective and important to the realization of self-government. Commenting on this issue, Sechelt Band Chief Stan Dixon said that

> transfers give better value to these funds by allowing the elected Government of the Sechelt Indian Band to allocate these resources to advance progress in our community where we want to see progress made and not where some Ottawa officials think we should.[63]

For this reason, public funds may be spent more effectively under self-government than they are at present.

Critics of the capital transfer ignore the signficant compromises made by the Nisga'a in return for the benefits conferred by the AIP. First, the specified land base of approximately 1,930 square kilometers represents only a small percentage of traditional territory, and the Nisga'a have agreed to foreit their claim to the rest. Second, the Nisga'a ceded their tax-exempt status, a concession fiercely criticized by other Canadian aboriginal leaders, who emphasize that aboriginal people have already given up land which constitutes their share of the tax base many times over.[64] To some extent, the funding provided under the AIP redresses concerns such as these.

"Aboriginal self-government is untested and untried."

Fears have also been voiced about an "untested and untried form of government" being entrenched in the Constitution of Canada.[65] However, if an aboriginal right of self-government is judicially recognized under section 35(1), it may be futile to deny its existence, and it is important to to recognize that any court-imposed right of self-government would also require innovation. Further, the proposed arrangement is not entirely novel; similar structures are in place municipally, and a similar self-government model has been tested and tried successfully in Sechelt. Importantly, the Nisga'a will not be required to undertake all the responsibilities of government immediately. Transition provisions in the agreement allow for a gradual assumption of powers, duties and obligations. In any case, to the extent that the AIP is novel, this is a necessary result of recognizing rights that have previously been ignored.

Moreover, it is politically astute to negotiate rather than litigate. First, even if a right of self-government is protected by the courts under section 35(1), the details will have to be negotiated, which may be difficult to conduct in good faith in the aftermath of a court battle. Second, negotiation allows all stakeholders have an opportunity to contribute to the discussion, with the result that all parties have a greater sense of ownership of the final outcome. Following the signing of the AIP, "then" British Columbia Premier Michael Harcourt stated, "It's important to have the people of British Columbia understand the document, see the details, give feedback… I think we should let the people of British Columbia be heard now."[66] In

62 Etkin, see note 9 at 80.

63 See above at 83-84.

64 "Nisga'a Agreement 110 Years in the Making", see note 53.

65 "The new South Africa: B.C's Nisga'a settlement is condemned as racist", see note 52 at screen 14.

66 "B.C. government unwilling to sell Nisga'a deal to the public". *Canadian Press Newswire Electronic Text* (15 February 1996). Found in the Canadian Business and Current Affairs Index.

contrast, court-mandated self-government would mean limited opportunity for public participation and imposition of requirements based on narrow legal principles.

A further advantage of negotiation is that it minimizes costs, both financial and human, and reduces government spending on legal fees. Critics are concerned about the expense and potential litigation implicated in self-government as described in the AIP, stating for example that "[n]egotiators have left many of the self-government provisions vague…. All of this presents an eternal feast for lawyers and the possibility of endless litigation."[67] Litigation is always a possibility, but future disputes can also be solved through negotiation in the same way the AIP was reached. The courts have been reluctant to involve themselves in the issue; for example, the majority in *Delgamuukw* held that the matter is "ripe for negotiation and reconciliation."[68] For these reasons, it is preferable that self-government be reached through negotiation between all levels of government.

In summary, self-government agreements must realistically exist within the legal and political reality in Canada. While legal decisions provide useful baselines for any negotiation, it is generally accepted that the complex and specialized issues which arise in the context of self-government may be better addressed through negotiation than by the courts. The Nisga'a AIP clearly represents a positive negotiated outcome, and as such should be ratified.

Conclusions

The Supreme Court of Canada has not yet settled the issue of self-government. However, recent cases indicate that some form of this right would be recognized under section 35(1) of the Constitution Act, 1982. Therefore, the question of whether self-government agreements should be negotiated must now defer to the question of how best to implement aboriginal self-government.

Yet, the self-government provisions of the AIP continue to be widely criticized, despite the relatively moderate nature of the agreement. Through discussion of recent legal decisions and an examination of the provisions of the Nisga'a AIP, this paper has addressed some of the opposition to the proposed Nisga'a Government, which to some extent has clouded support for a positive agreement reached though lengthy negotiation. Negotiation may be preferable to a court-directed approach when dealing with issues of such great political and emotional implications, and the agreement that was reached in this case is moderate and reasonable. To accept self-government under the AIP is not to accept segregation of a portion of the population, but to better include the Nisga'a in British Columbia.

67 "The New South Africa: B.C.'s Nisga'a settlement is condemned as racist", see note 52.

68 *Delgamuukw*, see note 3 at 153.

No Treaty Signed No Battle Fought

The Foundations of Aboriginal Title in the Yukon

Jamie Bliss will graduate from the University of Victoria Faculty of Law in 1997. He plans to clerk for the B.C. Court of Appeal, and will finish his articles at Russell & DuMoulin in Vancouver.

In 1993, an historic step was taken toward resolving comprehensive aboriginal land claims in the Yukon Territory. The signing of the Umbrella Final Agreement ("UFA") between the Council For Yukon Indians, and the governments of Canada and the Yukon, ended twenty years of negotiations and generations of indifference and ignorance toward the claims of Yukon native peoples.[1] Although the creation of the UFA process is a significant step toward the recognition of many aboriginal rights, it is still important to examine the underlying legal basis for the Yukon bands' claims. Should the Crown engage in activities that adversely affect a band's use of land outside the scope of an existing UFA settlement agreement, an examination of the bands' legal rights would prove useful for both sides.

Canadian law with respect to aboriginal title is still developing. There are no cases that authoritatively address the issue of aboriginal title in the Yukon Territory. This paper explores the historical foundations of aboriginal title in the Yukon. The aboriginal peoples of the Yukon might possess unextinguished title to lands based upon historical and constitutional recognition of their rights to the land in the North-Western Territory, and Rupert's Land between 1867 and 1870.[2] Furthermore, an examination of American precedents[3] suggests that a right of compensation may exist in the event that the Crown negatively affects the aboriginal peoples' ability to exercise their traditional rights upon unceded Crown land.

The Doctrine of Aboriginal Title

Aboriginal title at common law is an amorphous doctrine, taking its roots in international law, concepts of English property law, and colonial law and practice.[4] Aboriginal title in Canada is derived from the simple fact that native peoples possessed North American lands when settlers arrived from Europe.[5] As one academic observer described it succinctly:

> The Crown's acquisition of a new colony… may have given it a feudal title blending imperium (the right of government) and dominium (paramount ownership of all land), but the latter was considered "burdened" or qualified at law by the natives' traditional rights in their land. The aboriginal title was proprietary in character and capable of extinguishment only by the Crown through valid legislative process or voluntary agreement with the native owners.[6]

The landmark case *Calder* v *A.G.B.C.*[7] affirmed the existence of aboriginal title at common law. In that case the court split on whether the title of the Nisga'a people was lawfully extinguished by acts of government.[8] However, unextinguished aboriginal title has been found to exist in parts of the Northwest Territories at common law.[9]

Although it is possible that aboriginal title in the Yukon Territory exists at

1 The Umbrella Final Agreement, was signed in Whitehorse on May 29, 1993. It is published under the authority of the Minister of Indian Affairs and Northern Development, by Supply and Services Canada, 1993. The UFA in itself did not create or affect any legal rights. Instead, it provided a framework for the terms and conditions Yukon bands could incorporate into subsequent "Settlement Agreements" with the governments. Section 2.2.1 provides that Settlement Agreements shall be land claims agreements within the meaning of section 35 of the Constitution Act, 1982, R.S.C. 1985, App. II, No. 44. Four final agreements were signed in 1993 by: The Champagne and Aishihik, the First Nation of Na-Cho-Ny'A'K-Dun, the Teslin Tlingit Council, and the Vuntut Gwichin.

2 This is not to imply that aboriginal title depends upon state recognition in all instances, merely that such recognition is significant evidence of its existence.

3 *United States* v. *Alcea Band of Tillamooks et al.*, 341 U.S. 48, (1951) and *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955).

4 The decision of the High Court of Australia in *Mabo* v. *Queensland* (1992), 107 Australian Law Reports 1 (Australian High Court) provides a comprehensive survey of the theoretical development of the doctrine of aboriginal title. For sources of Canadian law of aboriginal title, see J. Woodward, *Native Law*, (1989), at 197-201.

common law, it is still necessary to explore its historical foundations for two reasons. Firstly, the case *Tee-Hit-Ton Indians* v. *United States* stands for the proposition that compensation for lands taken without the consent of the Indians is not possible without a statutory direction to pay.[10] Secondly, an examination of the Yukon's legislative history reveals a unique framework that may constitutionally protect the territory's aboriginal title from extinguishment.

Sources of Aboriginal Title in the Yukon Territory

The Yukon Territory Act created the Yukon Territory from a portion of the Northwest Territories in 1898.[11] By necessary implication, any laws or government action relating to aboriginal title in the Northwest Territories prior to 1898, in turn applied to aboriginal title in the Yukon Territory.[12] This is a significant point, because the terms and conditions of the admission of Rupert's Land and the North-Western Territory into the Dominion of Canada make express reference to settling Indian claims to the land.[13]

The starting point is section 146 of the Constitution Act, 1867.[14] This section provided for the admission of Rupert's Land and the North-Western Territory into Canada on such terms and conditions as might be expressed in an Address from the Houses of Parliament of Canada and approved by the Queen. In addition, the Rupert's Land Act, 1868[15] passed by the British Parliament enabled the Crown to accept a surrender of the lands of the Hudson's Bay Company[16] and to admit Rupert's Land into the Dominion of Canada by order-in-council.[17]

The subsequent terms and conditions for the admission of Rupert's Land contained in the Address of 1867 are included in the following passage:

> And furthermore, that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.[18]

With respect to the admission of the North-Western Territory, the Address of 1869 stipulated that the same terms and conditions of the 1867 Address were to apply.[19] The resulting Rupert's Land and North-Western Territory Order, 1870[20] formally admitted the two territories into the Dominion of Canada on June 23, 1870. Term 14 of the Order is particularly important. It stated:

> Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; …[21]

It is apparent from the terms and conditions and the Order itself, that the existence of an aboriginal title in what would become the Yukon Territory received strong legislative recognition between 1867 and 1870.

There are two implications that may be drawn from the terms and conditions of the admission of the territories. Firstly, it is clear that the Indian interest in their lands was to be recognized by the Crown. Secondly, the use of the term "equitable principles" seems to impose an obligation on the Canadian government

5 Jack Woodward, *Native Law*, see note 4 at 200.

6 Dr. P.G. McHugh, "Legal Status of Maori Fishing Rights in Tidal Waters" [1984] 14 Victoria University of Wellington Law Review 247 at 247, note 1. The apparent duality of interests in land, and the sole right of the Crown to extinguish Indian title is enshrined in the historic decisions of the Marshall Supreme Court in nineteenth century United States in *Johnson* v. *McIntosh*, 21 U.S. 543 at 573-574 (1823). See also *Worcester* v. *State of Georgia*, 31 U.S. 515 (1832). These principles were incorporated into Canadian law in *St. Catharines Milling and Lumber Co* v. *The Queen* (1887), 13 Supreme Court Reports 577, affirmed (1888), 14 Appeal Cases 46 (Privy Council) [Ontario].

7 [1973] Supreme Court Reports 313.

8 The case was dismissed on the technicality that a fiat had not been granted to the appellants. The existence of aboriginal title at common law in Canada has since been affirmed in *Guerin* v. *R.*, [1984] 2 Supreme Court Reports 335 at 376-377. Most of the aboriginal title throughout Canada was voluntarily extinguished with the signing of the numbered treaties. A portion of Treaty 8 encompasses British Columbia, but much of the province is untreated land and therefore is the subject of massive land claims. In the Yukon, the controversial Treaty 11 touches a corner of the territory. See K.Coates , ed. *Aboriginal Land Claims in Canada* (Toronto: Copp Clark Pitman,1992) at 8 and 172-174. But for the agreements signed in 1993, the remainder of the Yukon Territory is potentially open to a claim asserting unextinguished aboriginal title.

9 *Baker Lake* v. *Min. of Indian Affairs & Nor. Dev.*, [1980] 5 Western Weekly Reports 193 at 234, additional reasons [1981] 1 Federal Court 266 (Trial Division).

10 348 U.S. 272 at 279 (1955). Supreme Court Justice Judson quoted the *Tee-Hit-Ton* rule favorably in *Calder* at 343-344.

11 *Yukon Territory Act*, R.S.C. 1985, App. II, No, 19.

12 P.A. Cumming and N.H. Mickenberg, *Native Rights in Canada* (Toronto: Indian - Eskimo Assoc. of Canada in assoc. with General Pub. Co., 1972) at 197-198.

13 For an extensive analysis of these terms and conditions relating to native rights, see K. McNeil *Native Claims in Rupert's Land and the North-Western Territory:*

that the resulting settlements be fair, just and reasonable.[22]

In addition, the reference to the principles that governed the British Crown's prior dealings with natives raises a question of interpretation. Although the Yukon and the Northwest Territories are likely outside the geographical scope of the Royal Proclamation of 1763,[23] the Proclamation nonetheless serves as the earliest definitive statement of British policy regarding its dealings with aboriginal peoples.[24] The essence of the Proclamation is that the Indians' proprietary interest was to be respected.[25] It can be inferred that the same principles were to govern the administration of Canada's two new territories.

The Issue of Extinguishment

The question of extinguishment is perhaps the most crucial issue with respect to evaluating the scope of the rights flowing from aboriginal title in the Yukon Territory. Generally, the sovereign must possess a clear and plain intention to extinguish aboriginal rights.[26] More specifically, the British Columbia Court of Appeal in *Delgamuukw* v. *British Columbia*[27] held that the intent to extinguish aboriginal rights may be inferred from the language of the statute:

> However, the legislative intention to do so will be implied only if the interpretation of the statute permits no other result. Sparrow has made it clear that if the intention is only to limit the exercise of the right it should not be inferred that the right has been extinguished.[28]

In summary, aboriginal title may be extinguished via express language, or where the intention to extinguish is manifested by unavoidable implication.[29]

Territorial legislation exists that may implicitly authorize the extinction of Yukon aboriginal title. Section 4 of the Territorial Lands Act[30] allows the Governor-in-Council or the Minister to authorize the sale, lease, or other disposition of territorial lands. One possible interpretation is that by conferring all powers of disposition on itself, the government has clearly implied that the native title in the land has been extinguished. However, such a reading would be inconsistent with the terms and conditions expressed in the 1870 Order. Furthermore, the *Delgamuukw* case suggests that extinguishment will depend upon an evaluation of each grant under the Act on a case-by-case basis.[31]

The nature of the legislative recognition that aboriginal title in the Yukon received in 1870 also raises a unique constitutional issue.[32] Section 146 of the Constitution Act, 1867 stipulated that the order-in-council admitting Rupert's Land and the North-Western Territory shall have the effect as if they were enacted by the Parliament of Great Britain.[33] Prior to 1931, Imperial Enactments could not be amended or repealed by the Canadian government. The Statute of Westminister, 1931[34] for the most part removed this restriction on Parliament's legislative authority. However, section 7 of that statute reads:

> 7.(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the [Constitution Acts], 1867 to 1930, or any order, rule or regulation made thereunder.[35]

Canada's Constitutional Obligations. (Saskatoon: Native Law Centre, Univ. of Saskatchewan,1982) at 6-26. Also see Cumming and Mickenberg, *Native Rights*, see note 12 at 147-150.

14 R.S.C. 1985, App.II, No. 5.

15 R.S.C. 1985, App.II, No. 6.

16 See above, section 3.

17 See note 15, section 5.

18 *Rupert's Land Order* (Schedule A), R.S.C. 1985, App.II, No.9, at 8.

19 see above (Schedule B), at 14-15.

20 See note 18.

21 See above at 6-7.

22 McNeil, *Native Claims*, see note 13 at 21.

23 R.S.C. 1985, App. II, No. 1.

24 With respect to the issue of the geographical scope of the Royal Proclamation, Supreme Court Justice Hall in Calder at 395 suggested that the Proclamation was a law that "followed the flag". However, in *Baker Lake*, see note 9 at 224 it was held that the Proclamation did not include Rupert's Land.

25 McNeil, *Native Claims*, see note 13 at 22.

26 *R* v. *Sparrow*, [1990] 1 Supreme Court Reports 1075 at 1099.

27 [1993] 5 Western Weekly Reports 97. Leave to appeal to Supreme Court of Canada granted.

28 See above at 157.

29 See note 27 at 156.

30 R.S.C. 1985, c. T-7.

31 [1993] 5 Western Weekly Reports 97 at 157-158. For example, a conveyance of title might unavoidably be considered extinguishment, whereas granting a resource license might be considered a mere impairment of rights, as opposed to extinguishment. At 163-164 Mr. Justice Macfarlane further held that the statutory land settlement scheme of British Columbia's Colonial Instruments 1858-1870 did not preclude the possibility of future treaties or co-existance of Indian and Crown interests.

32 McNeil, *Native Claims*, see note 13 raises this argument at 27-31.

33 R.S.C. 1985, App. II, No. 5.

34 R.S.C. 1985, App. II, No. 27.

35 See above Section 7(1) was repealed insofar as it applies to Canada by section 53(1) of the Constitution Act, 1982. The implications with respect to aboriginal title in the Yukon though are unchanged, as s. 35 of that act recognizes and affirms all existing aboriginal rights.

To the extent that these terms and conditions recognize and protect the Indian interest in territorial lands, it appears that the aboriginal title in the Yukon has a unique constitutional protection from extinguishment.

Because the Rupert's Land Order, 1870 had the effect of being an Imperial enactment, it appears that its terms and conditions were unalterable by Canadian Parliament. Therefore, to the extent that these terms and conditions recognize and protect the Indian interest in territorial lands, it appears that the aboriginal title in the Yukon Territory has a unique constitutional protection from extinguishment.

There are two cases relating to the constitutional status of the terms and conditions of the Rupert's Land Order, 1870. In *Re Paulette et al. and Registrar of Titles (No. 2)*,[36] Mr. Justice Morrow wrote:

> It would seem to me from the above that the assurances made by the Canadian Government to pay compensation and the recognition of Indian claims in respect thereto did by virtue of s. 146 above, become part of the Canadian Constitution and could not be removed or altered except by Imperial statute. To the extent, therefore, that the above assurances represent a recognition of Indian title or aboriginal rights, it may be that the Indians living within that part of Canada covered by the proposed caveat may have a constitutional guarantee that no other Canadian Indians have.[37]

An authority to the contrary appears in *Hamlet of Baker Lake* v. *Minister of Indian Affairs and Northern Development*.[38] Mr. Justice Mahoney recognized that aboriginal title subsisted when Rupert's Land became part of Canada, but declared that the Order did not create rights or obligations, nor did it limit the legislative competence of Parliament.[39] He further held that the Order "merely transferred existing obligations from the [Hudson's Bay] Company to Canada."[40] Although the aboriginal title in the Northwest Territories was not extinguished, competent legislation that diminished the rights comprised in aboriginal title prevailed.[41] Compensation was not sought in the action, and Mahoney did not pass judgment on the issue. Canadian law is unsettled with respect to whether the unique constitutional protection afforded to the aboriginal peoples of the Yukon as espoused in *Re Paulette*, would give rise to compensation for legislation that diminished their rights.

The Issue of Compensation

There is no case law in Canada concerning a claim for compensation for aboriginal title extinguished by legislation. The issue is discussed in the *Calder* decision, citing a wealth of American authorities on the subject.[42] It is a principle of American constitutional law that aboriginal title claims for compensation based upon Fifth Amendment property rights must be founded upon a statutory direction to pay.[43]

In *Calder*, Justice Judson examined the Terms of Union under which British Columbia entered Confederation with the Dominion of Canada. Article 13, the legislative equivalent of the Rupert's Land Order, 1870 reads in part:

> The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.[44]

Applying the American rule in *Tee-Hit-Ton Indians* v. *United States*, Judson held that

36 (1973), 42 Dominion Law Reports (3d) 8 (Northwest Territories Supreme Court) [hereinafter *Re Paulette*].

37 See above at 29. Mr. Justice Morrow's decision was reversed by the Northwest Territories Court of Appeal on other grounds. See (1975), 63 Dominion Law Reports (3d) 1, and (1976), 72 Dominion Law Reports (3d) 161 (Supreme Court of Canada).

38 See note 9.

39 See above at 234.

40 See note 9.

41 see above at 543. The legislation in this case was the *Canada Mining Regulations*, C.R.C. 1978, Vol. XVII, c. 1516. There is some question as to whether legislation passed by the territorial government can unilaterally diminish or extinguish aboriginal rights. In R.G. Pugh, "Are Northern Lands Reserved For the Indians" [1982] 60 Canadian Bar Review 36, the author at 77-79 concludes that if aboriginal lands at common law are lands reserved for the Indians in the context of s. 91(24) of the *Constitution Act, 1867*, territorial governments do not have the jurisdiction to legislate in relation to these traditional lands.

42 See note 7 at 340-345. Hall J. simply held at 416 that the Nisga'a had a right to compensation if and when extinguishment was attempted or should take place. For a more recent analysis, see *Mabo* v. *Queensland* (1992), 107 Australian Law Reports 1 (Australian High Court).

because of the absence of a statutory direction to pay, the Nisga'a had no right of compensation.[45]

The situation of the aboriginal peoples of the Yukon territory can be distinguished from those of British Columbia. The terms and conditions of the Rupert's Land Order, 1870 do contain a clear statutory direction to pay that is enshrined in the Constitution via section 146. Recall that term 14 reads:

> Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government;…

Thus it appears that the native peoples of the Yukon have a right to compensation that may not be available to the majority of aboriginal peoples in Canada.[46]

There remains an issue of interpretation with respect to the phrase, "purposes of settlement." The obvious inference is that the lands would actually have to be taken for inhabitation by incoming residents of the territory. One possibility is that Parliament intended that lands not required for the purpose of settlement would be left in the possession of the native peoples. Nonetheless, it seems likely that the uncompensated expropriation of lands for purposes other than settlement is inconsistent with the spirit of the 1867 Address calling for the use of "equitable principles that uniformly governed the British Crown in its dealings with the aborigines."[47]

It appears that the native peoples of the Yukon have a right to compensation that may not be available to the majority of aboriginal peoples in Canada.

Conclusion

Exploring the legal basis of a claim based on aboriginal title in the Yukon Territory reveals two important points. First, it is unclear whether aboriginal title to the area has been extinguished. Moreover, it appears that the recognition of the Indian interest in the land contained in the terms and conditions of the Rupert's Land Order, 1870 could potentially constitute a legally enforceable obligation to compensate the Yukon native peoples for lands taken for the purposes of settlement.

Although the current climate of political goodwill is favorable towards the resolution of long-standing claims in the Yukon, the historical indifference on the part of Canadian governments should not be forgotten. As Whitehorse Band Chief, Elijah Smith stated in 1968:

> We, the Indians of the Yukon, object to the treatment of being treated like squatters in our own country. We accepted the white man in this country, fed him, looked after him when he was sick, showed him the way of the North, helped him to find the gold; helped him build and respect him in his own rights. For this we have received very little in return. We feel the people of the North owe us a great deal and we would like the Government of Canada to see that we get a fair settlement for the use of the land. There was no treaty signed in this Country and they tell me the land still belongs to the Indians. There were no battles fought between the white and the Indians for this land.[48]

Indeed, should similar concerns resurface, the aboriginal peoples of the Yukon Territory would not be without legal redress. The legal basis of Yukon land claims is an important source of rights that should not be underestimated or forgotten.

43 *United States* v. *Alcea Band of Tillamooks et al.*, and *Tee-Hit-Ton Indians* v. *United States*, see note 3. As a matter of clarification, the Fifth Amendment does not protect aboriginal title. The compensation flows from the statutory direction to pay. In the absence of such direction, the U.S. government is not legally obliged to pay compensation for a claim based upon original Indian title.

44 R.S.C. 1985, App. II, No. 10.

45 *Calder*, at 344. For a critique of Judson's reasoning, see G. Lester, *Inuit Territorial Rights In The Canadian Northwest Territories* (Ottawa: Tungavik Federation of Nunavut, 1984), at 33-37.

46 This notion is reconcilable with the *Baker Lake* decision, as it appears that Term 14 merely clarifies who bears the legally enforceable obligation of compensating the Indians for lands taken, as opposed to creating a new right.

47 See note 18.

48 Department of Indian Affairs and Northern Development, *Report of the Indian Act Consultation Meeting*, (Whitehorse, : Supply and Services Canada, October 21-23, 1968), at p. 48. As cited in Cumming and Mickenberg, see note 12 at 197.

Janna Promislow graduated from the University of Alberta with a Bachelor of Arts in Political Science & Economics in 1993. She is currently a third year L.L.B. student at the University of Victoria.

Canadian International Development Assistance Policies: An Appraisal (Second Edition)

Edited by Cranford Pratt

McGill –Queen's University Press: Montreal-Kingston, 1996. Pp.338

In a political landscape of fiscal cutbacks, deficit reduction and devolution to local governments, discussions of Canadian international development assistance are rare. This political context makes the second edition of *Canadian International Development Assistance Policies: An Appraisal* a refreshing and enjoyable book to read. This collection of essays is written by academics and professionals who are undoubtedly devoted to the field of international development. Although they often project forebodingly on the future of Canadian development assistance, the authors provide a thorough and varied review of Canada's development aid policies which leaves the reader feeling both pride and cynicism with respect to Canada's record in the area.

The volume focuses on the Canadian International Development Agency ("CIDA"), which controls Canadian foreign aid. The first of three sections, Major Components of Canadian Aid provides an overview of the types of development assistance traditionally extended by Canada to developing nations such as multilateral and bilateral aid, food aid, and aid through non-governmental organizations ("NGOs"). Section two, Major Issues of Canadian Aid Policy, is the main substance of the book, delving into the many factors involved in formulating Canadian aid policy. Included in this section are chapters on choosing recipients for bilateral aid, the institutional character of CIDA, export promotion through development assistance, structural

adjustment, human rights in Canadian aid policy, the influence of public interest on Canadian aid to Central America, and Canadian development programs in Asia. The final section compares Canadian aid to that of other developed nations and concludes with a look at "humane internationalism" and the role of such values in shaping Canadian development assistance policies.

In spite of the book's broad coverage of topics in Canadian aid policy, there are some noticeable holes in the collection. The editor acknowledges some of these holes in the Preface, where he apologizes for not having been able to include chapters on the environment and on emergency humanitarian aid. In addition to the gaps identified by the editor, a chapter on CIDA's approach to gender issues is also conspicuously absent. Although an occasional reference to CIDA's approach to Women in Development ("WID") is made in several essays, there is no substantial treatment of the issue. For example, Phillip Rawkin's comments on difficulties involved in translating policy into existing procedures and practices, and notes that the policy priority of maximizing the benefits of CIDA projects for women was built into projects through a "checkoff" mechanism, which is an attachment to project documents explicating how the project benefits women. Rawkin's suggestion is that this mechanism is little more than a rubber stamp to standardize procedures without implementing real change.[1] Elsewhere, Marcia M. Burdette comments on the harmful effects of structural adjustment programs on women.[2] Given the importance of women's roles in the development process these piecemeal comments are insufficient coverage of the topic. The omission of gender as a separate topic may have been excusable in the 1994 first edition of the book given that its publication coincided with increasing attention to gender issues in CIDA programs.[3] However, the editor had ample opportunity before the second edition was published in 1996 to fully address both the topics he recognized as lacking as well as Women in Development. These absences leave an unexplained void in the otherwise thorough and extensive analysis of CIDA policies presented in this collection.

What was perhaps more distracting by its absence was the lack of attention, either in a separate chapter or within existing ones, paid to explaining why aid is important and to justifying the Canadian government's continued support for international aid programs. Traditionally, Canada has supported foreign aid for primarily humanitarian reasons and humanitarian objectives persist as an underlying motivation for much of CIDA's work. However, this book does not present a coherent rationale for the continued pursuit of humanitarian goals overseas. For instance, Cranford Pratt's introductory chapter, Canadian Development Assistance: A Profile presents Canadian aid in terms of acronyms and numbers, which does little to make the case that development assistance is a necessary and productive endeavor. Other essays present a rationale for aid that is based on commercial interests, explaining how Canadian aid programs satisfy domestic government and industry agendas for

1 P. Rawkins, "An Institutional Analysis of CIDA" in C. Pratt (ed.), *Canadian International Development Assistance Policies: An Appraisal* (Montreal-Kingston: McGill-Queen's University Press, 1996. at 166, 167.

2 M. Burdette, "Structural Adjustment and Canadian Aid Policy", see above at 227, 228.

3 Increased prominence for gender issues was in part due to the recommendations contained in Canada's Foreign Policy: Principles and Priorities for the Future, a report released by the House of Commons Special Joint Committee reviewing Canadian Foreign Policy. See C. Pratt, "Humane Internationalism and Canadian Development Assistance Policies" see note 1 at 364.

increased exports and trade ties. For example, the chapters by Mark Charlton (Continuity and Change in Canadian Food Aid), David Gilles (Export Promotion and Canadian Development Assistance), and Cranford Pratt (Humane Internationalism and Canadian Development Assistance Policies) clearly document the rise of commercialization in Canadian foreign aid. While these authors are critical of the commercialization trend, they are also careful to point out that social and political interests still have a role in shaping CIDA policies. With their sometimes cautious, sometimes strong, critiques of the commercial interest basis for foreign aid, these chapters far from satisfy the need for a clear statement of the rationale behind the supposed humanitarian objectives of Canadian development assistance.

The justification for Canadian contributions to foreign aid is addressed in the book, but only in passing comments that must be collected and synthesized as they are found. Cranford Pratt states that "The Canadian public and Parliament have supported aid for over forty years, primarily for humanitarian reasons" and that "There are persuasive long-term Canadian interests in international stability and in the successful management of a wide range of issues that can only be dealt with on an international basis and with the cooperation of the Third World."[4] Jean-Philippe Thèrien states that "Aid can … be viewed as the product of an international culture based on an evolving consensus on how North-South relations are to be organized."[5] and links Canadian aid to national interests and Canada's role as a "middle power" amongst nations on the international stage. T.A. Keenleyside quotes Paul Gèrin-Lajoie, former president of CIDA, who "wrote that the central objective of aid was "the total liberation of man" – liberation, first, from hunger, disease, illiteracy, unemployment, and chronic underemployment, but liberation also from 'the use of force to silence dissenters, systematic recourse to political imprisonment, and the torture of prisoners'."[6] Together, these points begin to create an understanding of why Canada has been and continues to be active in development assistance, but they do not satisfy the need for a justification of aid in an era where 'humanitarian concerns' are easily overlooked in favour of economic ones. Although the authors recognize the vast changes in store for Canadian development assistance policies at the time of writing (1992/93), the idea of development assistance is still 'a given' for them. As development professionals and academics, the authors assume that the importance of international aid is self-evident rather than an issue that needs to be addressed in an appraisal of Canadian aid policies. It seems ironic that the authors frequently allude to the "end of an era"[7] in Canadian development assistance with trepidation and regret yet do not take the opportunity afforded by this book to promote and justify Canada's international development efforts.

From a 1996 perspective, and in light of the drastic cutbacks and realignment that Canadian aid programs have undergone since the first edition of this book was published, it cannot be assumed that the rationale for international development assistance is understood by the Canadian public. Readers need to be brought out of the nationalist introspection that is currently evident in both Canadian

4 C. Pratt, see note 3 at 334 and 371 respectively.

5 J-P. Thèrien, "Canadian Aid: A Comparative Analysis" see note 1 at 316.

6 T.A. Keenleyside, "Aiding Rights: Canada and the Advancement of Human Dignity" see note 1 at 240.

7 C. Pratt, "Canadian Development Assistance: A Profile" see note 1 at 20.

8 M. Charlton, "Continuity and Change in Canadian Food Aid" see note 1 at 80, 81.

9 C. Pratt, "Preface" see note 1 at xi.

and American domestic politics. The authors correctly note this inward focus as an important factor in the shift towards satisfying domestic commercial interests rather than humanitarian ones through Canadian aid strategies. It is not enough to demonstrate that these shifts in CIDA policies reflect similar shifts in most OECD donor countries. Readers need to be reminded of conditions in developing countries and of human tragedies far from home. They also need to be told of pragmatic, even self-interested, reasons for realizing international development separate and apart from domestic commercial interests but which still address "that basic humanitarian instinct… to assist in the 'alleviation of hardships due to circumstances beyond one's control'."[8] National interests in global environmental and economic security as well the stabilization of global population growth are examples of such reasons. Without drawing these connections, the authors succeed only in preaching to the converted. While this need for justification may not have been obvious when the first edition was published, the changes that occurred in the two year period before the second edition came out should have made it clear. Given the objective of "…making a valuable contribution to the continuing public dialogue and debate about Canada's international responsibilities and opportunities vis-à-vis global poverty,"[9] the collection needs to begin with a forceful statement of the case for international development assistance and entice readers to consider what has become a controversial proposition.

Despite this criticism, the appraisal of Canadian development assistance policies provided in this collection of essays is informative and, for anyone interested in Canadian foreign policy in general, well worth reading. The historical overview of the growth of CIDA and of factors that have influenced the direction of aid policy is important for understanding current directions in Canadian development assistance policies. For instance, the review of Canada's food aid program in Continuity and Change in Canadian Food Aid provides insight on why bilateral food aid, as a proportion of total overseas development assistance, has steadily decreased over the past two decades despite strong public support and seemingly simple humanitarian goals. Also of particular interest were the chapters on the institutional character of CIDA and on the role of NGOs in the Canadian development strategy. The institutional analysis provides a unique perspective that is normally inaccessible to those who are not employed or otherwise involved in CIDA. The explanations of the tensions existing between senior managers and project team leaders supports a deeper understanding of CIDA operations and the discussion of CIDA's culture and traditional organization is key to comprehending the difficulty of implementing change in this particular government agency. And finally, I learned a new and useful term to describe inconsistency in government bureaucracy: "adhocracy."[10] The chapter reviewing the relationship between CIDA and NGOs, entitled Paying the Piper: CIDA and Canadian NGOs, demonstrates the radical departure that the contemporary approach has taken from CIDA's approach in previous eras. CIDA's current approach to dealing with NGOs favours "one-stop shopping", which gives greater prominence to large, less "grass-roots" oriented NGOs and curtails the role of NGOs in

10 Rawkins, see note 1 at 164.

11 Pratt, see note 3 at 370.

12 Pratt see above at 369.

formulating aid policy. This approach is significantly different from previous ones which established Canada's reputation in international circles for maintaining a collaborative relationship between CIDA and Canadian NGOs. This collaboration also contributed to the Canadian reputation for commitment to developmental needs as a priority in aid policy; a reputation that is now being threatened.

Although there are holes in this appraisal, some acknowledged and some not, interested readers will find this collection of essays replete with information and valuable insights regarding CIDA and the formulation of aid policies in Canada. It is unfortunate that the authors' sense of foreboding regarding the future of CIDA and Canadian development assistance has been justified by the events of the last few years. The time that has passed since the first edition of this book was written and published emphasizes the changes in Canadian political culture and values which have occurred and which necessitate a justification of continued public funding for Canada's development assistance efforts. Cranford Pratt states that "Humane internationalism, though markedly in retreat, is not yet overwhelmed."[11] As the traces of this value become harder to detect in Canadian foreign aid policies, it is difficult not to read the essays in this collection without a touch of nostalgia for an era in which "The government of Canada… affirmed that its primary objective was to reach and help the poorest countries and people while encouraging Canadians to take pride in the quality and integrity of its development assistance"[12] and in which, at the very least, support for the idea of public development aid could be assumed.

Patrons

The publication of this journal would not have been possible without the generous support of:

Alexander, Holburn, Beaudin & Lang, Vancouver, B.C.
Anniko, Hunter, Victoria, B.C.
Arvay Finlay, Victoria, B.C.
Blake, Cassels & Graydon, Vancouver, B.C.
Boughton Peterson Yang Anderson, Vancouver, B.C.
Bull, Housser & Tupper, Vancouver, B.C.
Campney & Murphy, Vancouver, B.C.
Connell Lightbody, Vancouver, B.C.
Cox, Taylor, Victoria, B.C.
Davis & Company, Vancouver, B.C.
Douglas, Symes & Brissenden, Vancouver, B.C.
Farris, Vaughan, Wills & Murphy, Vancouver, B.C.
Fraser & Beatty, Toronto, Ont.
Richard P. Gibbons, Whistler, B.C.
Guild, Yule, Sullivan, Yule, Truscott & Slivinski, Vancouver, B.C.
Harper Grey Easton, Vancouver, B.C.
Harrop, Phillips, Powell & Gibbons, Vancouver, B.C.
Hatter, Thompson & Shumka, Victoria, B.C.
Horne Coupar, Victoria, B.C.
Jawl & Bundon, Victoria, B.C.
Lang Michener, Toronto Ont.
Lawson Lundell Lawson & McIntosh, Vancouver, B.C.
MacMinn & Company, Victoria, B.C.
Peck & Tammen, Vancouver, B.C.
Poyner Baxter Blaxland, North Vancouver, B.C.
Richards Buell Sutton, Vancouver, B.C.
Russell & DuMoulin, Vancouver, B.C.
Salloum Doak, Kelowna, B.C.
Smart & Biggar, Vancouver, B.C.
Smith Hutchison, Victoria, B.C.
Sugden, McFee & Roos, Vancouver, B.C.
William J. Sullivan, Vancouver, B.C.
Taylor Jordan Chafetz, Vancouver, B.C.
Tory Tory DesLauriers & Binnington, Toronto, Ont.
University of Victoria, Faculty of Law, Class of '97, Victoria, B.C.

PHOTO-READY
PACIFIC COAST SAVINGS
AD

PHOTO-READY
MONTGOMERY AD

DEDICATED
TO
EXCELLENCE

Join a Team Dedicated to Excellence

Be a part of our leading edge legal practice.

Expose yourself to a variety of practice groups.

Experience a high degree of client contact and responsibility in our flexible rotation system.

DAVIES, WARD & BECK

Get Involved with APPEAL

Subscribe to APPEAL

Our broad audience includes law libraries, practitioners, and law students from around the world. Subscribe to APPEAL, and be kept up to date on current issues in Canadian law, and the reforms proposed by tomorrow's lawmakers.

Annual subscriptions are $20.00 for non-students, $10.00 for students, and are payable in advance. To receive your copy of APPEAL, or to order back issues, contact us at the address below.

Advertise in APPEAL

By advertising in APPEAL, you will join the ranks of financial institutions, publishing houses, law firms and others who have already recognized the unique business exposure that APPEAL offers.

The advertising rates for the 1997-98 edition of APPEAL are:

Back cover	$1 000.00
Full page	$ 750.00
Half page	$ 300.00
Quarter page	$ 20000

Support APPEAL

The cost of publishing a law review is substantial, and we rely on the generous donations of our many supporters to defray costs. Your donation to APPEAL is tax-deductible, helps to foster legal scholarship, and is greatly appreciated.

To subscribe, advertise or become a supporter of APPEAL, please contact us at:

APPEAL – review of current law and law reform
University of Victoria, Faculty of Law
PO Box 2400 Victoria, British Columbia
V8W 3H7
tel: (250) 721-8198
fax: (250) 721-6390
email: appeal@uvic.ca