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

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

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Editorial

Now in its fourth year, Appeal has developed a broad, cross-disciplinary readership. Exclusively publishing student legal writing, it attracts articles from across the country and continues to offer topical and engaging pieces that are of interest to both the general public and the legal profession.

The theme of the journal is Current Law and Law Reform, and the contents of the fourth volume represent a diverse range of topics. At the same time, many of the articles complement each other, dealing with converging issues.

The Trends and Developments section features four short articles which examine current issues and make recommendations for future directions in the law. Shera Effler considers the valuation of future earning capacity and its implications for young female plaintiffs in tort claims. Lisa Chamzuk evaluates the effectiveness of the Criminal Code in preventing the inappropriate use of sexual histories in sexual assault trials. Paul Ratanaseangsuang looks at the patentability of higher life forms and directions the law may take when the Federal Court speaks upon the patentability of the genetically engineered "Oncomouse." In a related article, Christopher Cates provides an overview of issues surrounding the need to recognize property in human tissues.

Our Feature Articles also explore issues of emerging importance in Canadian law. Two authors, Barbara von Tigerstrom and Diba Majzub, consider privacy rights, the former in the context of health information and the latter in the context of employment. Lisa Anne Katz Jones looks at copyright law, and argues that copyright must be applied contextually in the area of on-line publishing. Finally, Michelle Lawrence examines the administrative law doctrine of "unreasonableness" and the ways that courts rely on it to reverse local government decisions.

We are very pleased to present in this volume of Appeal some of the very high-quality writing being produced by Canadian law students. We look forward to continuing to provide a unique and exciting forum for outstanding student legal scholarship.

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Future Earning Capacity: Implications for Young Female Plaintiffs

SHERA EFFLER IS A THIRD YEAR LAW STUDENT AT THE UNIVERSITY OF VICTORIA. SHE COMPLETED HER BACHELOR OF COMMERCE DEGREE AT THE UNIVERSITY OF ALBERTA.

Suppose that Billy and Stacy, two-year-old fraternal twins, are seriously injured in a motor vehicle accident. Both are rendered unemployable for the remainder of their lives. As the case proceeds to trial, liability is admitted and the only remaining issues relate to the damages to be awarded. As the trial judge has no evidence as to the probable course that the twins' lives would take (i.e. no school or work history), the loss of future earning capacity is determined using statistical evidence. Stacy is awarded $300 000 on the basis of female earning statistics while Billy receives $800 000 using male statistics. Twins they are no longer. [1]

The valuation of a plaintiff's earning capacity award always involves a degree of speculation. An assessment of the individual's pre-accident ability to work is done and compared with his or her post-accident abilities. A present value must be calculated that properly reflects this economic loss. Generally, the plaintiff's pre-accident working history is analyzed in conjunction with market wage rates to determine earning capacity.[2] Therefore, valuing the earning capacity awards of children (or young adults with no work history) is a much more difficult and speculative task for the courts. Further, in the case of female children, additional concerns are raised due to the traditional stereotypes that exist about women and the corresponding negative bias seen in the labour market. Lord Denning articulated the "children problem" generally, as well as the complicating gender factor, in *Taylor* v. *Bristol Omnibus Co.*:[3]

> At this very young age these [the calculation of earning capacity awards] are speculative in the extreme. Who can say what a baby boy will do with his life? He may be in charge of a business and make much money. He may get into a mediocre groove and just pay his way. Or he may be an utter failure. It is even more speculative with a baby girl. She may marry and bring up a large family, but earn nothing herself. Or, she may be a career woman, earning high wages.

This article focuses on the methods that Canadian courts have used to calculate earning capacity awards for female children and, similarly, young females with no work history. The traditional approach involves determining the level of education or career level that the child likely would have achieved (deduced from factors such as the

1 This result may occur where, although the court is satisfied that both children will reach the same level of education, **gendered** earning statistics are used. It assumes that the court does not "correct" the numerical injustice by supplementing the female plaintiff's award in order to represent the closing of the gendered wage gap, the lost economic benefits of marriage, the trend toward greater full time participation in the labour force by women and the value of "unpaid" work that women do in the home.

It is clear that the sole use of gender-specific statistics (without any corrective upward adjustments) results in a disadvantage for young female plaintiffs.

plaintiff's I.Q. and the occupations of the plaintiff's parents[4]) and then applying corresponding gender-specific actuarial numbers. This article analyzes the negative effect that the **sole** use of this gender-specific data has on female awards and the steps that a few courts have taken to correct the problem.

Specifically, two judicial methods will be analyzed. First, the use of **male** earning statistics for young female plaintiffs in three very recent decisions of the British Columbia Supreme Court (BCSC) will be critically examined.[5] It is suggested, perhaps surprisingly, that this judicial method is not a "radical" step for the Court as it is simply a way to fully "correct" the problems inherent in using gender-specific earning statistics **in certain circumstances**. It is emphasized that this judicial method is used only when there is evidence that the plaintiff would likely have pursued a professional career. Examined next is the judicial method whereby female earning statistics are maintained and then supplemented to account for the closing wage gap and outdated negative gender assumptions. This method has not yet been perfected nor applied consistently by the courts. Therefore, it is arguable that young female plaintiffs subjected to this judicial method (including infants and plaintiffs not likely to attain a professional career) receive worse treatment than those who "qualify" for the male statistics method.

The Problem: Replicating the Inequities of the Past

It is clear that the **sole** use of gender-specific statistics (without any corrective upward adjustments) results in a disadvantage for young female plaintiffs.[6] The underlying

2 See J. Cassels, "Damages for Lost Earning Capacity: Women and Children Last!" (1992) 71 Canadian Bar Review 445. At page 447, it is noted that the valuation of earning capacity is based on one of two conceptual notions. The first, valuing the diminished "earning capacity" of the victim is the one relied upon in the **language** of many judgments. For example, the Supreme Court of Canada in *Andrews* v. *Grand and Toy Alberta Ltd.*, [1978] 2 Supreme Court Reports 229, (1978) 83 Dominion Law Reports (3d) 452 at 469 held that "[i]t is not loss of earnings but, rather, loss of earning capacity for which compensation must be made … A capital asset has been lost: what was its value?" As this approach focuses on human capital, the relevant question is what the victim **could have** earned if the accident had not occurred. However, despite the so-called acceptance of the capacity approach in the jurisprudence, it can be seen that the second conceptual notion, valuing the **probable earnings** of the victim, is the one that is actually applied in most judgments. As a result, existing wages are used almost exclusively as the basis for assessing earning capacity.

3 [1975] 1 Weekly Law Reports 1054 (English Court of Appeal) at 1059.

4 According to evidence adduced in *Houle* v. *The City of Calgary* (1983), 26 Alberta Law Reports (2d) 34 (Alberta Queen's Bench), other relevant factors include: the child's birth order, family income and socio-economic status, parents' and siblings' education, I.Q. and motivation, number of siblings and whether the plaintiff is from a broken home. See also J. A. Sutherland, "Predicting a Child's Future Wage Loss" (1984) 42 The Advocate 169.

problem is that the gender-specific data being used in modern courts was collected in a time when women were not as prominent in the paid labour force and stereotypical assumptions existed about a woman's earning potential.[7] The problems can be broken down as follows. First, reliance on female actuarial tables introduces into court the systemic discrimination that women have faced in the paid labour force, including the immense wage gap endured by women.[8] Second, the reliance on female earning statistics reinforces an implied marriage contingency deduction. More specifically, the large amount of part-time work done by women serves to depress the statistics as these women's other "part-time job" (child rearing/family responsibilities) is not formally valued.[9] Third, there may be explicit marriage contingencies deducted such as earnings lost while the woman is absent from the labour force to bear and raise children.[10]

In *Scarff* v. *Wilson*,[11] the female plaintiff suffered devastating injuries when she was five years of age. Factors such as her economically disadvantaged family and unemployed father were considered when the BCSC held that the plaintiff would not likely have surpassed high school or trade school graduation. The corresponding female actuarial numbers were then applied to calculate the earning capacity award.[12] It is noted that no upward adjustments were made to account for the closing wage gap nor to compensate the plaintiff for her lost opportunity to marry (i.e. her loss of shared family income).

In *Cherry* v. *Borsman*,[13] the infant female plaintiff was born with permanent disabilities due to the negligence of the defendant doctor. Given the evidence relating to the plaintiff's family environment, the British Columbia Court of Appeal (BCCA) found that the trial judge had correctly assessed her probable pre-accident level of education. Further, the BCCA confirmed the use of gender-specific statistics **without** any upward adjustments acknowledging that it was solely within the trial judge's discretion whether or not to account for the changing place of women in the labour force. Finally, the BCCA upheld the lower Court's 47 per cent reduction from an award for lost benefits of shared family income for two reasons. First, it was uncertain whether the plaintiff would have married even if she had been born healthy. Second, the enormous expenses incurred in raising children weighed against any possible savings resulting from a shared family income.

Solving the Problem

While there have been a few different suggestions for reform made in the legal literature,[14] there have been only two main judicial approaches to the problem.

1. The Acceptance of "Male" Rather Than "Female" Statistics

The starting point is *Tucker (Guardian ad litem of)* v. *Asleson*[15] wherein the BCSC recognized that gendered earnings statistics may be inappropriate for use when determining a young female plaintiff's earning capacity. In *Tucker*, the plaintiff was a seriously injured eight-year-old girl. The Court was faced with the choice of using male or female actuarial numbers when assessing her future earning capacity.

5 Male earnings statistics were used for young female plaintiffs in *Chu* v. *Jacobs*, [1996] B.C.J. No. 674 (British Columbia Supreme Court) and *B.I.Z.* v. *Sams*, [1997] B.C.J. No. 793 (British Columbia Supreme Court). Further, male earnings statistics (reduced by a 6% discount) were used for a young female plaintiff in *Terracciano (Guardian ad litem of)* v. *Etheridge*, [1997] B.C.J. No. 1051 (British Columbia Supreme Court).

6 See, for example, *Tucker (Guardian ad litem of)* v. *Asleson* (1991), 62 British Columbia Law Reports (2d) 78, (1991) 86 Dominion Law Reports (4th) 73 (British Columbia Supreme Court), varied (1993) 78 British Columbia Law Reports (2d) 173, (1993) 102 Dominion Law Reports (4th) 518 (British Columbia Court of Appeal) [hereinafter *Tucker* and cited to Dominion Law Reports] where actuarial evidence was adduced which estimated the lifetime earnings of a university educated British Columbia male as $947 000 and the similarly situated woman's earnings as $302 000.

7 E. Gibson, "The Gendered Wage Dilemma in Personal Injury Damages" in K. Cooper-Stevenson & E. Gibson, eds., *Tort Theory* (Toronto: Captus Press, 1993) 185 at 197.

8 See note 2 at 446 and E. Gibson, "Loss of Earning Capacity for the Female Tort Victim: Comment on *Toneguzzo-Norvell (Guardian ad litem of)* v. *Burnaby Hospital*" (1994) 17 Canadian Cases on the Law of Tort (2d) 78 at 85. Elaine Gibson states that there are a number of reasons for the wage gap including unionization rates, occupational segregation and direct wage discrimination. Further, due to time taken off of the paid labour force as a result of family responsibilities, women may not receive the same amount of education, training, experience, opportunities and promotions as men.

Justice Finch stated:

> I accept, as a starting point, that **the measure of the plaintiff's earning capacity should not be limited by statistics based upon her sex.** Before the accident the plaintiff was a bright little girl growing up in a stable home environment. In Canada, no educational or vocational opportunities were excluded to her. She could have become a doctor, lawyer, or business person. Or, in line with her childhood wish, a veterinary. Of course she might have done none of those things. She might have dropped out of school, and never held gainful employment of any sort. Those considerations, however, speak to the likelihood of her achieving her capacity, rather than what that capacity was.[16] [emphasis added]

The Court therefore rejected the gender-specific statistics and adopted the lifetime earnings of the average university educated male ($947 000). However, Justice Finch then proceeded to apply a 60-65 per cent deduction in order to account for contingencies such as the possibility that the plaintiff would not have become a university graduate. The BCCA, with brief reasons, upheld this award on the basis that the trial judge had not made a reversible error.

It is noteworthy that while the Court claimed that the plaintiff's earning capacity should not be limited by her sex, the ultimate result (after the enormous contingency deduction) was only slightly higher than what the "female" numbers would have produced. If the Court was concerned that the plaintiff may not reach the university level but truly wanted to use the male actuarial numbers, it could have used male "post-secondary non-university certificate" or "lifetime earnings of all men" statistics. Nonetheless, the case is still remarkable in that male earning statistics were used as a starting point for a young female plaintiff.

However, the *Tucker* method of using male statistics as a starting point for **all** female plaintiffs has not been followed. The problem is linked to the theoretical context within which tort law lies. It is commonly agreed that the function of tort law is to address corrective justice and not distributive justice. In other words, the role of tort law is not to "fix" social inequalities (such as the wage gap between men and women); rather, this is the job of the legislatures.[17]

The first judicial method, using **male** earning statistics for certain young female plaintiffs, can be seen in several recent decisions of the BCSC.[18] However, it is noted that these decisions do not commit the Court to distributive justice. To the contrary, applying male statistics in cases where the courts are satisfied that the female plaintiff would have likely pursued a professional career is simply a convenient method to fully "correct" the gender problem.

In *B.I.Z.* v. *Sams*,[19] prior to a motor vehicle accident, the young female plaintiff had completed a two year accounting course and intended to obtain a business degree and become a Certified General Accountant.[20] Justice Hunter based the award for future earning capacity on **male** "financial manager" earning statistics for a number of reasons. First, Hunter rationalized that the plaintiff's career choice was not one where there was a large wage gap between male and female earnings. Second, the BCSC was satisfied that

9 See E. Gibson, above, at 83 and S. A. Griffin, "The Value of Women - Avoiding the Prejudices of the Past" (1993) volume 51 Part 4 Advocate 545 at 549.

10 This deduction was applied in *B.I.Z.* v. *Sams*, see note 5.

11 (1986) 10 British Columbia Law Reports (2d) 273 (British Columbia Supreme Court), affirmed (1988) 33 British Columbia Law Reports (2d) 290, (1988) 55 Dominion Law Reports (4th) 247 (British Columbia Court of Appeal).

12 The award of $140 000 for loss of future earning capacity was upheld by the British Columbia Court of Appeal. It is noted that this includes a discount of 31 per cent due to the plaintiff's residual earning capacity.

13 (1990) 75 Dominion Law Reports (4th) 668 (British Columbia Supreme Court), varied (1992) 70 British Columbia Law Reports (2d) 273, (1992) 94 Dominion Law Reports (4th) 487 (British Columbia Court of Appeal).

14 First, for a detailed analysis of the capacity (opportunity cost) approach, see note 2 at 480. Second, for a canvassing of the gender-neutral statistics option (without automatically rejecting gender-specific data in other areas), see E. Gibson, note 8 at 93. For a rejection of gender-neutral earning statistics as a viable option by Chief Justice McEachern dissenting in *Tucker*, see note 6 at 534. Third, for a discussion of a possible movement toward an approach based on individual needs, see note 2 at 485 and note 7 at 209.

15 See note 6.

16 See above at 83.

17 See E. Gibson, note 7 at 199. This view is also expressed by Chief Justice McEachern in his dissent in *Tucker*, see text accompanying note 31.

18 See note 5.

she would not have taken a great deal of time off work for child-bearing and rearing (thereby not resulting in a large wage difference between her and her male counterpart). It was reasoned that the plaintiff would have arranged for a nanny or full-time daycare services in order to continue with her career. Finally, the trial judge did not think that she would have worked part time, and therefore should not be penalized by using female numbers which are lower in part due to the greater amount of part time work done by females. It is to be noted, however, that there were deductions for lost income while absent from the work force (for child-bearing). Thus, despite the court's previous progressive reasoning, it applied part of the traditional marriage contingency deduction. Further, the court did not consider the existence of maternity benefits which may have reduced or made unnecessary this deduction.

In *Chu* v. *Jacobs*,[21] a fifteen-year-old female was seriously injured in a motor vehicle accident. The court found that prior to the accident, she was an athletic and brilliant girl who had won awards and been on the honour roll at school. At the time of trial, she was enrolled in the Business Administration program at Simon Fraser University. In considering how to value lost future earnings (due to delayed promotions, future surgery etc.) and a one year delay into the workforce as a result of the plaintiff's injury, the court was faced with a choice between female and male management statistics. Justice Boyd considered evidence that differences in wage rates between male and female university graduates today are not due to gender but instead are attributable to behavioral factors. As a result, male earnings statistics were accepted:

> While there may be cases in which it would be dangerous to accept a male earnings profile as some forecast of future earnings for a female, I have little hesitation in doing so in this case. For some time prior to the accident, and even following the accident (despite the serious traumatic injuries and ongoing residual disability), Eva has demonstrated that she is a keen student and a hard worker. I am confident that she has the scholastic ability, and more importantly, the determination and single-mindedness necessary to complete her Bachelors degree. I expect that Eva will indeed enter the workforce, albeit a year late, and that she will thereby suffer a loss of earnings equivalent to that calculated by Mr. Carson, admittedly adopting a male earnings profile.[22]

Finally, in *Terracciano (Guardian ad litem of)* v. *Etheridge*,[23] a sixteen-year-old girl was rendered a paraplegic in a motor vehicle accident. In regards to future earning capacity, the BCSC was faced with a choice between the use of female and male earning statistics. Justice Saunders acknowledged that female statistics reflect gender bias and that "it may be as inappropriately discriminatory to discount an award solely on statistics framed on gender as it would be to discount an award on considerations of race or ethic origin."[24] Further, he was not convinced of the "propriety, today, of this Court basing an award of damages on a class characteristic such as gender, instead of individual characteristics or considerations related to behavior."[25]

The plaintiff's pre-accident potential was therefore analyzed by looking at her work history, pre-accident personality, school marks and good examples of work motivation

19 *B.I.Z* v. *Sams*, see note 5.

20 It is noted that this case is different from the others discussed in this article as it involves a young female plaintiff who did have a pre-accident work history. However, the court does not use the plaintiff's pre-accident earnings as there was evidence that she would have left this job (as her father was terminally ill and she intended to pursue higher education). As such, the case is analyzed in much the same way as cases where a young female plaintiff does not have any pre-accident work history. Specifically, the court bases the earning capacity award on the probable level of success that the plaintiff would have achieved "but for" the accident.

21 *Chu* v. *Jacobs*, see note 5.

22 See above at paragraph 26.

23 *Terracciano (Guardian ad litem of)* v. *Etheridge*, see note 5.

24 See above at paragraph 81.

25 See above.

26 One of the consequences of adopting the male numbers was that contingencies of only 16 per cent were applied as opposed to the approximately 33 per cent contingencies applied to female statistics.

27 *Chu* v. *Jacobs*, see note 5 at paragraph 25. Contrast with *D.* (*Guardian ad litem of)* v. *F.*, [1995] B.C.J. No. 1478 (British Columbia Supreme Court) where the Court refused to adopt male earning statistics as the female plaintiff was likely to only obtain a "traditional" low-paying job. Justice Humphries at paragraph 124 stated that "most of these jobs have been traditionally filled by females and it would be artificial to apply historical male earning rates to future losses of the plaintiff."

found in her family. As a result, the wage of the plaintiff's older sister was used as a proxy for the plaintiff's earning capacity. The lifetime loss was calculated by using 6 per cent less than the equivalent average male's earnings with one year of post-secondary education as this was comparable to the sister's wage.[26]

Why would a court feel justified in using male numbers in certain situations without any concern that it may be endorsing distributive justice? First, there is evidence that the gendered wage gap does not exist (or is closing relatively quickly) in professional careers.[27] Second, an assumption may be made that women in professional careers are unlikely to take a great deal of time off work in order to have and raise children and instead may purchase the services of a nanny or daycare provider. As a result, the woman's wage in the long run will likely not suffer. Further, the problem of valuing work done in the home does not need to be addressed in this scenario. Third, women in professional positions are less likely to work part time. Therefore, they should not be negatively affected by historical data showing low earning statistics for women (i.e. low in part because they reflect the greater amount of part-time work done by women).

Even with the use of male earning statistics, women may still be penalized for the time taken off the paid workforce to remain at home and raise children.[28] However, it is noted that as the valuation of unpaid work in the home (and other unwaged work) becomes more accepted in the courts,[29] it follows that no deduction should be made from a woman's earning capacity in regards to the income lost while she is child-rearing. Further, no deduction would occur if the courts used the "capacity" rather than the "probable earnings" conceptual basis of valuing earning capacity.[30]

2. Retaining Female Earning Statistics and Applying Positive Contingencies

Chief Justice McEachern's dissent in *Tucker* focuses on the use of male earning statistics for determining earning capacity awards for female plaintiffs. He would have sent the matter back for a new trial on this issue. McEachern's main objection with the approach can be summarized as follows:

> While we may strive for social justice, as it is perceived from time to time, the courts must deal with the parties who are before them, plaintiffs and defendants, on the basis of realistic predictions about the future, and not just in accordance with understandable wishes that society, in some of its aspects, were different from what it really is. At the present time, as the average statistics clearly show, women earn far less than men. Deplorable as that is, it would be unfair to defendants in this and other cases, some of whom are underinsured women, to ignore that reality. The most the courts can do is ensure, so far as may be possible, that proper weight is given to identifiable societal trends so that the assessment of the Plaintiff's future losses will reflect relevant future circumstances.[31]

McEachern, therefore, would have applied the average earnings of **all** women and then enhanced this number with upward adjustments relating to any factors indicating that the plaintiff would have exceeded this "all woman" performance.[32] He stated that other upward contingencies may then be applied, such as those accounting for the

28 This deduction was explicitly applied in *B.I.Z v. Sams*, see note 5.

29 The leading case in the area of the valuation of homemaker's services is *Fobel v. Dean and MacDonald* (1989), 78 Saskatchewan Reports 127 (Saskatchewan Court of Queen's Bench), varied (1991) 93 Saskatchewan Reports 103, (1991) 83 Dominion Law Reports (4th) 385 (Saskatchewan Court of Appeal).

30 For a brief description of these two conceptual notions, see note 2.

31 See note 6 at 533-4.

32 For example, evidence may support the use of trade school or university graduation statistics.

33 See, for example, *Beaudry v. Hackett*, [1991] B.C.J. No. 3940 (British Columbia Supreme Court), *Newell v. Hawthornthwaite* (1988), 26 British Columbia Law Reports (2d) 105 (British Columbia Supreme Court), *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1991] B.C.J. No. 2206 (British Columbia Supreme Court), varied (1992) 73 British Columbia Law Reports (2d) 116 (British Columbia Court of Appeal), varied (1994) 1 Supreme Court Reports 114, (1994) 110 Dominion Law Reports (4th) 289 and *Mulholland (Guardian ad litem of) v. Riley*, [1993] British Columbia Journal No. 920 (British Columbia Supreme Court), aff'd (1995) 12 British Columbia Law Reports (3d) 248 (British Columbia Court of Appeal). It is noted, however, that the wage gap will likely not be accounted for in cases where the plaintiff would likely be employed in a traditional low-paying job (*D. v. F.*, see note 19). This is due to the concern that tort law should not offer distributive justice by attempting to "correct" society's inequities.

increased participation of women in the workforce, those correcting for the narrowing wage gap and those accounting for the loss of shared family income.

Other courts have followed McEachern's lead and have utilized female earning statistics (based on the level of education that the plaintiff likely would have achieved) plus upward adjustments to "correct" the gendered statistics. First, both prior and subsequent to *Tucker*, positive contingencies have been added into awards to account for the narrowing of the wage gap.[33] Second, the implicit marriage contingency deduction found in the gendered statistics has been countered by awarding damages for the lost benefits of a shared family income[34] as well as an increased award of non-pecuniary damages.[35] Third, an upward contingency may be added based on the trend toward greater participation in the **full-time** workforce by women.[36] Fourth, as the valuation of unpaid work in the home and other unwaged work becomes more accepted by the courts,[37] it follows that no deductions should be made from a woman's earning capacity in regards to the income lost while she is child-rearing.[38]

Conclusions

All young female children and young females with no work history face the same "statistical discrimination" problem when courts assess their future earning capacity. However, given the two judicial approaches to the problem, it seems that young female plaintiffs are not being treated consistently. The young female plaintiff who can convince the court that she would likely have pursued a professional career "but for" the accident[39] has the statistical problem **fully** corrected since all of the gender bias is erased from the equation. However, the method used for all other young female plaintiffs is not yet perfected. While some courts have taken steps to correct the statistics by adding on one or more of the positive contingencies outlined above, it is not yet common practice to systematically add **all** of them back into the award. Therefore, young female plaintiffs who do not "qualify" for the first judicial method (such as infants and those who can not convince the court that a professional career was imminent) will not have the statistics "corrected" to the same degree. Recognizing this, counsel should be prepared to advocate the use of all possible positive contingencies when this second judicial method is utilized.

Stacy and Billy Re-Visited

Stacy's earning capacity award has been appealed. Her counsel is prepared with two arguments. First, Stacy should be awarded $800 000 on the basis of male statistics as she would have likely pursued a professional career "but for" the accident. In support of this, evidence will be adduced showing that her family is loving and stable and both of her parents are university educated. Stacy's counsel is prepared, however, for the possibility that the court may reject this first option because of its speculative nature. The second argument is to retain the use of the $300 000 female earning number but then

34 The origins of this award are found in *Reekie v. Messervey* (1986), 4 British Columbia Law Reports (2d) 194, additional reasons at (1986) 10 British Columbia Law Reports (2d) 231 (British Columbia Supreme Court), aff'd (1989) 36 British Columbia Law Reports (2d) 316, (1989) 59 Dominion Law Reports (4th) 481 (British Columbia Court of Appeal) and *Moriarty v. McCarthy*, [1978] 2 All English Reports 213 (Queen's Bench Division). Examples of it being applied in female children cases can be found in *Cherry v. Borsman* (see note 13), *Mulholland v. Riley* (see note 33) and *Tucker v. Asleson* (see note 6). The concerns are that courts may find that the financial costs of having children balance out with the savings of an interdependent relationship such as marriage. Therefore, a diminished sum for loss of shared family income may be awarded (*Cherry v. Borsman*, see note 13) or no award at all (*Scarff v. Wilson*, see note 11). Other problems are that a court may find that it is too speculative to determine whether a very young child would have married or not (*Scarff v. Wilson*, see note 11), that the child may not have married at all (*Cherry v. Borsman*, see note 13) or that the plaintiff has not had her ability to marry impaired (*Sanderson v. Betts*, [1990] B.C.J. No. 2720 (British Columbia Supreme Court). A further problem in using an award of loss of shared family income to "counter" the implicit marriage contingency in female awards lies in the fact that men have also received awards for loss of shared family income. See, for example, *McKenzie v. Van-Kam Freightways Ltd.*, [1990] B.C.J. No. 868 (British Columbia Supreme Court).

add on positive contingencies bringing the result up to approximately $800 000. These contingencies include those accounting for the changing role of women in the labour force and the closing of the gendered wage gap over the next century, the valuation of work done in the home and the economic efficiencies that Stacy will lose because she will not participate in a shared family income.

35 An increased sum of non-pecuniary damages may be given to compensate the plaintiff for the lost opportunity to marry and raise children as in *Newell* v. *Hawthornthwaite*, see note 33. It is noted, however, that the BCSC consequently rejected the awarding of a sum for the lost benefits of marriage (i.e. loss of shared family income).

36 This factor was considered in *Newell* v. *Hawthornthwaite*, see above.

37 See note 29.

38 At the very least, the courts should recognize, as the BCSC did in *Wassell (Guardian ad litem of)* v. *Pile*, [1994] B.C.J. No. 1837 (British Columbia Supreme Court) that this deduction should not be made more than once (as it has already been accounted for implicitly in the female earning statistics).

39 This proof can be undertaken either through evidence of the plaintiff's pre-accident intentions or supporting evidence such as family background as in *Terracciano (Guardian ad litem of)* v. *Etheridge*, see note 5.

Patent Pending
Are Higher Life Forms Patentable?

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Biotechnology" encompasses the activities of science as they are applied to living organisms.[1] It is made up of a number of sub-disciplines, the most notable of these being "genetic engineering." Genetic engineering involves altering the genetic makeup of cells by deliberately inserting, removing or altering individual genes.[2] By utilizing these techniques, scientists are able to create organisms with specifically designed physical properties and genetic makeup.

It is evident that such an area of scientific research and practice touches on a multitude of ethical and legal dilemmas. Especially controversial among these issues is how the Patent Act[3] should treat the living products of biotechnology. Specifically, should it be possible to patent genetically engineered higher life forms such as plants and animals?

This paper will canvass the law in Canada, illuminate the legal reasoning behind the current Canadian policy, and will attempt to predict the directions that the law may follow when the federal court speaks upon the patentability of the genetically engineered "Oncomouse."

Introduction to the Oncomouse

The world's first patent for a living animal was granted by the United States in April of 1988 to a pair of inventors from Harvard Medical School for a *"transgenic mammal,"* commonly referred to as the "Harvard-mouse" or "Oncomouse."[4] The Oncomouse is produced by micro-injecting active human breast cancer Deoxyribonucleic Acid (DNA) into a mouse embryo[5] and subsequently implanting this organism into a "surrogate" female mouse. The resulting offspring is an organism with a high sensitivity to carcinogens, a predisposition to develop cancerous tumors, and the capacity to pass these unique characteristics on to its own offspring. The Oncomouse represents a valuable tool for both human breast cancer research and the detection of carcinogens in food and the environment.

The patent owners possess a legal right to prevent other inventors from making, using, or selling any genetically altered mammal with human breast cancer DNA.[6] This

1 *Canadian Dictionary of the English Language* (ITP Nelson: Toronto 1997) at 139.

2 S. Chong, "The Relevancy of Ethical Concerns in the Patenting of Life Forms" (1993) 10 Canadian Intellectual Property Reporter, 190.

3 Patent Act, Revised Statutes of Canada 1985, c. P-4.

4 R.E.Fishman, "Patenting Human Beings: Do Sub-Human Creatures Deserve Constitutional Protection?" (1989) American Journal of Law and Medicine, 465.

5 See note 4 at 465.

6 See note 4 at 465.

The real issue in this appeal is the patentability of a form of life.

would also include *all* offspring of the genetically altered mice which reveal these traits. Patent protection has also been issued in other parts of the world for the Oncomouse. The Oncomouse is a patented invention in both Japan and Europe.[7]

The Oncomouse in Canada

A Canadian patent application for the Oncomouse was filed by its inventors on June 21, 1985.[8] This application was initially rejected by the Canadian Patent authorities, but subsequently was submitted to the Patent Appeal Board for review.[9] In August of 1995, the Patent Appeal Board upheld its earlier decision and issued a second rejection which was released on August 4th, 1995.[10] The basis for the rejection, which will be discussed in detail below, was that the patent claims for a "transgenic mammal" fell outside the definition of "invention" as stated in section 2 of the Patent Act.[11]

7 R.A. Rae, "Patentability of Living Subject Matter" (1993) 13 Canadian Intellectual Property Reporter, 43.

8 Decision of the Commissioner of Patents on Application 484,723 released on Aug. 4, 1995 at 1.

9 See note 8 at 2.

10 See note 8 at 1.

11 Appellant's Memorandum of Fact and Law, in *President and Fellow of Harvard College* v. *Commissioner of Patents*, Federal Court of Canada Trial Division, Court File No. T-275-96, at 6.

Patent Protection Generally

The granting of patents is ultimately governed by the Commissioner of Patents pursuant to the Patent Act.[12] The Act indicates that a patent will only be granted for an "invention," which section 2 defines as:

> any new and useful art, process, machine, **manufacture** or **composition of matter**, or any new and useful improvement in any art, process, machine, manufacture or composition of matter.[13]

Thus, section 2 indicates that there are two requirements for receiving a patent. First, the item for which the patent is needed must be an "invention," and second, that invention must be both "new" and "useful." As will be demonstrated, it is the interpretation of the general term "invention" which has given rise to the debate over whether a higher life form is patentable. In particular, there is considerable disagreement as to what constitutes a "manufacture" or a "composition of matter."

Previous Jurisprudence

In the case of the Oncomouse, section 2 has been interpreted as **not** applying to patent claims for a "transgenic mammal." This interpretation is consistent with the most recent Canadian jurisprudence regarding the patenting of higher life forms. In fact, according to the Commissioner of Patents, the rejection of the Oncomouse as a candidate for a patent was "strongly influenced" by the Federal Court of Appeal decision in *Pioneer Hi-Bred Ltd.* v. *Commissioner of Patents ("Pioneer").*[14]

Before beginning a discussion of the *Pioneer* case, it will be helpful to examine the jurisprudence that preceded this decision. Prior to *Pioneer*, the Patent Appeal Board had granted patents for fungi and certain living micro-organisms. In fact, it appeared as though this trend would be extended to higher life forms.[15] For example, in *Re Application of Abitibi ("Re Abitibi")* [16] it was held that a culture of five known fungi which had been adapted to live on various effluents produced from wood pulp processing did constitute patentable subject matter. The Patent Appeal Board further suggested in *Re Abitibi* that it saw no reason why the patentability of living organisms should not be extended to higher life forms such as plants and animals provided they meet the requirements of the Patent Act.[17]

Despite the optimistic remarks of the court in *Re Abitibi*, the likelihood that higher life forms such as plants and animals could be patented was attenuated by the decision in *Pioneer*.[18] In this case, the applicant sought to patent a new variety of soybean plant that was produced by traditional cross-breeding techniques, but which still required direct human intervention in the breeding process. Despite this element of scientific intervention, the Federal Court of Appeal in *Pioneer* rejected the soybean patent application on the ground that a plant variety produced by cross-breeding did not fall within the definition of "invention" as set out in section 2 of the Patent Act.[19] The court specifically stated that the plant could not be considered a "manufacture" nor a "composition of matter." This rejection was appealed, and the issue of higher life form patentability was put before the Supreme Court of Canada in 1989. Unfortunately, the Supreme

12 Patent Act, see note 2.

13 Patent Act, see note 2.

14 Decision of the Commissioner of Patents on Application 484,723 released on Aug. 4, 1995 at 7 affirming *Pioneer Hi-Bred Limited* v. *Commissioner of Patents.* [1987] F.C. 8 (Federal Court of Appeal).

15 *Re Application of Abitibi Co.* (1982), 62 Canadian Patent Reporter (2d) 81 at 89.

16 See note 15 at 90.

17 See note 15 at 90.

18 *Pioneer Hi-Bred Limited v. Commissioner of Patents,* [1987] F.C. 8 (Federal Court of Appeal) hereinafter "*Pioneer*."

19 See note 18 at 495-496.

Court disposed of the case on an issue entirely distinct from whether or not higher life forms should be patented.[20] In fact, the decision turned on the fact that the patent application did not properly disclose the invention.[21] Nevertheless, the Supreme Court did indicate that: *"The real issue in this appeal is the patentability of a form of life."*[22] Further, the court clarified that two types of genetic engineering exist. The first type involves an actual change in the genetic material, via a molecular or chemical process, while the second type consists of crossing different plant breeds through traditional methods.[23] Supreme Court Chief Justice Lamer specifically remarked that the products of the latter method did *not* appear to be patentable subject matter. However, he did not comment on the patentability of organisms produced by the former method presumably because the case could be decided solely upon the technical matter of disclosure.

The decision in *Pioneer* represented both the first and last time that the issue of higher life form patentability has come before a Canadian federal court. Although the Commissioner of Patents has referred to the case as a means by which to interpret section 2 of the Patent Act, it is, in fact, of limited guidance due to the Supreme Court's reluctance to directly address the patentability issue. Nonetheless, *Pioneer* has clearly set the stage for a court to rule upon the patentability of higher life forms which have been produced by "true" genetic engineering.

President and Fellows of Harvard College v. *Commissioner of Patents*

The Commissioner of Patent's 1995 rejection of the Oncomouse patent application was appealed by its inventors to the Federal Court of Canada in November of 1997. Once again, the subject of higher life form patentability must be addressed by the Federal Court, and in this instance, it is unlikely that the court will be able to side-step the primary issue of whether or not patents should be granted for higher life forms. The decision of the court is still pending.

In their appeal, the inventors will attempt to demonstrate that a number of assertions made by the Commissioner of Patents (Respondent) in the previous decision are incorrect.[24] To this end, the appellants have broken down their analysis into a number of closely related sub-issues. However, the Commissioner submits that these sub-issues are more accurately characterized as *factors* which should be used to determine the "true" issue of whether or not a transgenic non-human animal is an *"invention"* within the meaning of section 2 of the Patent Act.[25]

The Commissioner's assertion that there is only one true issue to be decided is a correct one.[26] Are the animals in question "inventions" as defined under section 2 of the Act? The Commissioner submits that the transgenic mammal in question is *not* an "invention" because there has not been a sufficient degree of control exercised in its creation. He distinguishes previously granted patents which have only been for simple organisms and asserts that the Oncomouse is a much more complex organism. The Commissioner argues that the Appellants have claimed a "transgenic mammal with an activated oncogene sequence," while their disclosure is only sufficient to reproduce *one* of the qualities of the described mammal – a predisposition to cancer.[27] He contends

20 *Pioneer Hi-Bred Limited* v. *Canada (Commissioner of Patents)*, [1989] 1 Supreme Court Reports 1623 at 1643.

21 Section 23 of the Patent Act requires the inventor to make specification correctly and fully of the apparatus so that an inventor of ordinary skill in the art could recreate the invention. In this instance, the court held this requirement was not met. This conclusion was influenced by the fact that random chance was a factor in the successful manufacture of the invention. See note 20 at 1643.

22 See above at 1632.

23 See above at 1633.

24 See note 11 at 2.

25 Respondent's Memorandum of Fact and Law, in *President and Fellow of Harvard College* v. *Commissioner of Patents*, Court File No. T-275-96.

26 See note 25 at 4.

27 See note 25 at 6.

that in order for an organism to constitute an "invention," the inventors must exert a significant degree of control over the organism.[28] The Oncomouse is not considered "fully invented" because it is a higher life form and as such is characterized by a level of complexity beyond what the inventor has disclosed in his application.

Even if the invention were to meet the "degree of control" test as is set out above, the Commissioner maintains that the patent application must still fail under a broader ground of attack. He would argue that the subject matter does not come within the definition of "manufacture" or "composition of matter" as stated in section 2 without "greatly distorting their ordinary meanings."[29]

"Manufacture" and "Composition of Matter" Defined

Both parties in this appeal have submitted definitions of the terms "manufacture" and "composition of matter" that were approved in *Pioneer* at the Court of Appeal, but which were originally derived from the United States Supreme Court decision in *Diamond and Commissioner of Patents* v. *Chakrabarty ("Diamond")*.[30] In *Diamond*, a U.S. court examined the corresponding provision, 35 U.S.C. ß 101 of the U.S. Patent Act.[31] It was stated there that a "composition of matter" includes:

> all compositions of two or more substances and all composite articles, whether they be the results of chemical union, or of mechanical mixture, or whether they be gases, fluids, powders or solids.[32]

The U.S. Act defines "manufacture" as:

> the production of articles for use from raw materials, prepared by giving to these materials new forms, qualities, properties, or combinations whether by hand labor or machinery.[33]

The Appellants propose that according to the plain and ordinary meaning of the terms, a transgenic, non-human mammal is both a "manufacture" and a "composition of matter."[34] It qualifies as a "composition of matter" because it is produced by combining a gene with a fertilized mammalian egg. This necessarily involves both a "mechanical union" (micro-injection) and a "chemical union" (integration of the gene into the chromosomes). This new composition of matter is also a "manufacture" because it is produced by "hand labour" and results in a "new form" – the transgenic mammal.[35] The Appellants submit that the patent application is valid on this basis.

Summary of the Oncomouse Appeal

The Commissioner and the inventors agree that the central issue to be addressed in the case is whether or not a higher life form can be patented, and that specific definitions should be used to determine whether that subject matter is patentable. Despite this initial accord, each party focuses on different aspects of the patentability issue in order to arrive at its own conclusions.

On the one hand, the Commissioner of Patents has emphasized that because the organism at issue is more complex than organisms which have been patented in the past, the Oncomouse does not fall within the section 2 definition of "invention." In order for the Oncomouse to qualify as an "invention," the inventors would have to

28 See note 25 at 5.

29 See note 25 at 8.

30 *Diamond, Commissioner of Patents and Trademarks* v. *Chakrabarty* (1980), 206 U.S.P.Q. 193 at 193.

31 Title 35 U.S.C. ß101

32 See note 30 at 193.

33 See above at 193.

34 See note 11 at 21.

35 See above at 21.

exercise a greater level of control over the entire genetic engineering process. Furthermore, it is contended that the ordinary meanings of "manufacture" and "composition of matter" do not encompass the Oncomouse.

On the other hand, the Appellants contend that this "control" requirement functions to allow for the patenting of lower life forms while denying the patent for higher life forms which are inherently complex. This uneven application of the Patent Act would arguably constitute an error in law. In support of this position, the appellants have held up section 40 of the Patent Act which states that the Commissioner may reject applicants which are not "*by law* entitled to be granted a patent." The appellants contend that there is no authority to reject an application merely because the subject matter is increasingly complex. The inventors further argue that the subject matter of the Oncomouse is both a "manufacture" and a "composition of matter" pursuant to section 2 of the Patent Act.

The Canadian approach to the patentability of higher life forms is in direct contrast to that of the U.S. which advocates the patenting of 'everything under the sun made by man.'

Considerations

While the Federal Court has been asked to make a decision based upon the above-mentioned legal criteria, it is inevitable that broader policy issues and societal attitudes will play a major role in the final outcome. Although it is not the intention of this paper to provide an in-depth analysis of the moral concerns relating to the patenting of biotechnology,[36] it is important to be aware that these and other factors will influence the final outcome.

The most recent Canadian jurisprudence advocates taking an extremely cautious approach towards the patenting of higher life forms. This reluctance is in direct contrast to the earlier, more liberal interpretation that was established in *Re Abitibi*. The Commissioner of Patents has indicated that the opinions expressed in *Pioneer* at the Court of Appeal have been influential in the previous and continuing rejection of the Oncomouse patent application. However, as suggested above, it is arguable that the remarks in *Pioneer* should be confined to the facts of that case – not only because the Supreme Court eventually decided upon other grounds, but also because there was no statement at the Court of Appeal which indicated anything more than a refusal to extend patentability to a "unique but simple variety of soybean."[37] Nonetheless, while *Pioneer* does not per se prohibit the patenting of higher life forms produced by true genetic engineering, it clearly establishes that there exists an atmosphere of caution among the judiciary when it comes to the interpretation of section 2.

The Canadian approach to the patentability of higher life forms stands in direct contrast to that of the U.S. which advocates the patenting of "everything under the sun made by man."[38] Although Canadian courts are often reluctant to use U.S. precedents when interpreting Canadian statutes, in this specific instance, there is a close factual tie between the two jurisdictions which renders the U.S. jurisprudence particularly relevant. In fact, section 2 of the Canadian Patent Act is markedly similar to the 35 USC 101 provision which acts to protect "anyone who invents or discovers, a process,

36 Further reading can be found in S. Avisar, "The Ethics of Biotechnology – The Arguments in Favour of Patents" 10 Canadian Intellectual Property Reporter 209; and in S. Chong, "The Relevancy of Ethical Concerns in the Patenting of Life Forms" 10 Canadian Intellectual Property Reporter 189.

37 *Pioneer Hi-Bred Limited* v. *Commissioner of Patents*. [1987] F.C. 8 at 14. (Federal Court of Appeal).

38 See note 24 at 197.

machine, manufacture, composition of matter, or improvement thereof." It is a well acknowledged fact that "the statutory provisions of Canadian law have borrowed extensively from the United States system." [39] Furthermore, in this particular appeal, both the appellants and the respondents advocate that we should define "manufacture" and "composition of matter" according to the U.S. court's definition in *Diamond*. It should be recalled that in that instance, it was decided that human-made, genetically engineered bacteria were patentable subject matter, and the *Diamond* case has led the way for a U.S. tradition of expansive patent protection. While Canada should certainly maintain an independent jurisprudence, it should also not neglect the fact that its patent legislation has drawn from a U.S. source. The U.S. jurisprudence clearly advocates the patenting of higher life forms. Many Canadian patents are issued for foreign technology that is developed in the U.S. Moreover, the fact that biotechnology is moving towards a trend of international globalization constitutes yet another reason why the Canadian Patent Office should look beyond the Canadian jurisprudence and patenting tradition when it decides the issue of patenting higher life forms.

The movement to procure patent protection for living organisms has been met with substantial resistance from opponents. Individuals who oppose the patenting of higher life forms are generally also opposed to genetic engineering and genetic research. Typically, the concerns of these individuals relate to the sanctity of life, the fear of "playing God," and the risk that there exists a slippery slope of interference with the natural order that could potentially lead to "unholy" consequences. These are important concerns and should in no way be minimized by trivializing the values that underlie them. Keeping this in mind, it is arguable that the majority of persons who oppose the granting of patents for higher life forms do so because they are opposed to the research activity itself and not to the possibility that such activity might receive patent protection. Therefore, this opposition appears to represent an inappropriate importation of ethical concerns into the patent system.[40]

The Canadian courts and the general public need to be aware that the Patent Act does not regulate (nor does it attempt to regulate) the subject matter over which it considers patentable. The object of the Patent Act is to encourage research and the sharing of information. It attempts to do so by providing the opportunity for an inventor to gain financial reward from the efforts of his or her ingenuity, scientific know-how, and subsequent disclosure of the technology. This opportunity takes the form of an exclusive right to make, use, or sell a particular invention. In essence, the inventor is granted a limited form of property right over a particular manufacture or composition of matter. Should this property right be extended to a genetically engineered mammal? Such rights have already been granted over simple organisms; does the situation differ for complex mammals? These questions become more urgent as the life forms under consideration approach human and human-likeness. The answers to them lie in how society views genetically engineered animal life and where it chooses to draw the distinction between animals that are proper subjects of genetic engineering and those

39 I. Goldsmith, *Patents of Invention* (Toronto: Carswell, 1981).

40 For an opposing viewpoint, see S. Chong, "The Relevancy of Ethical Concerns in the Patenting Life Forms" 10 Canadian Intellectual Property Reporter 189.

that are not. This question cannot be answered strictly by the Patent Act.[41]

The fact that the Patent Office refuses applications made upon a particular subject matter simply means that subject matter is unregulated by patent legislation. It does not amount to a prohibition upon the use of that technology, nor does it mean that there will be a reduction in the use of products which utilize that technology. The current practice of refusing to patent higher life forms merely encourages companies to conduct research of this type outside Canada – the products of which are not prevented from being used in Canadian industry. Further, it forces researchers to seek other methods, such as keeping the information secret, in order to protect their inventions. Arguably, a situation where genetic research activities go undisclosed is not a desirable one for the overall good of our society.

While it is possible that revising current policy in order to allow the patenting of higher life forms might conceivably encourage more research in this area (which is the objective of the Patent Act), it does not follow that it will then become more difficult to regulate genetic engineering practices. In fact, by allowing a more liberal interpretation of section 2, the courts arguably make room for Parliament to enact specific legislation regulating the fruits of biotechnology. This is the more appropriate and measured approach to take if we are to achieve a satisfactory resolution to the issue of genetic engineering.

Irrespective of which factors the court eventually considers in its decision, it should be recalled that the "Harvard mouse" patent has led the way in the United States, Europe and Japan for the patenting of higher life forms. Despite the atmosphere of conservatism in the Canadian courts, it is likely that a conclusive decision regarding the patentability of higher life forms will once again follow in the wake of the Oncomouse patent application. The decision is being awaited.

This paper would not have been possible without the assistance of Michael Manson and Chris Robinson of Smart & Biggar of Vancouver. Any errors remain the responsibility of the author.

41 Directly addressed by S. Chong, see above.

Consent: A Relevant Distinction?

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Mary and Gwen allege being the victims of sexual assault by the same man, in separate incidents. As a child Mary also alleged sexual abuse by her step-father, though he was never prosecuted, while Gwen has only ever been involved in consensual sexual activity prior to the current assault. Defence counsel seeks to introduce the sexual history of both complainants, contending that Mary has a history of fabricating accounts of sexual assault, and that Gwen is lying about consensual sexual activity to avoid feelings of shame and guilt.

Section 276 of the Criminal Code,[1] which establishes limits on judicial discretion in deciding to admit or exclude evidence of a complainant's sexual history, governs treatment of both Gwen's and Mary's histories. This provision exists to prevent reliance on myths about women and rape in determining material issues at trial, and as such can be seen by the defence as an obstacle to securing an acquittal for an accused. For both women, defence counsel will attempt to link sexual activity to credibility – an inference prohibited by section 276. However, while the section would likely prevent the admission of Gwen's history, Mary's position is less predictable, since it is unclear if section 276 extends to evidence of prior non-consensual sexual activity. If a narrow interpretative approach is adopted, without regard to legislative intent, policy and common sense, Mary's evidence of non-consensual sexual history would be more vulnerable to harmful myths about women and rape than Gwen's consensual sexual history. This paper will argue that a more contextual approach should be used to prevent an illogical and irrelevant distinction from deciding how such evidence, and thus how sexual assault complainants, shall be treated.

History of Section 276

The history of section 276, or the "rape shield" provision, demonstrates the tension between what are perceived to be two competing legal interests: the fair trial of a person charged with sexual assault, and protecting the dignity of the complainant and the administration of justice. Courts have traditionally found these two interests to be incompatible, failing to recognize that the use of myths and stereotypes about women

1 Criminal Code, Revised Statutes of Canada 1985, c. C-46 (hereinafter "the Code").

...it is illogical to contend that a complainant somehow 'engaged' in a sexual assault, in the same way that it would be illogical to say that a bank teller "engaged" in a robbery.

and sexual assault do not ensure, but rather prevent a fair trial. Section 276 and its predecessors were enacted to prevent the use of such detrimental pre-conceptions to determine the guilt of an accused person and to ensure trial fairness. At common law, all such evidence, be it of consensual activity or not, was considered relevant to guilt, indicative of a prevailing belief that unchaste women were less truthful and/or more prone to consent to sexual activity.

Procedural safeguards were first introduced in 1976 with section 142 of the Code. This section prevented defence counsel from using the witness stand to humiliate the complainant, and required the judge, before admitting potentially harmful evidence about the complainant, to be satisfied that excluding it would prevent a just determination of an issue of fact, such as the credibility of the complainant. However, the Supreme Court of Canada in *Forsythe* v. *the Queen*[2] interpreted the provision as a measure designed to protect the dignity of the complainant, and as such it had to be counterbalanced by extending even greater powers of cross-examination to an accused.[3] The Supreme Court thus reversed the rules governing the use of this evidence by making the complainant a compellable witness for the accused during an *in camera* hearing, and by allowing the accused to adduce evidence to rebut the testimony of a complainant regarding prior sexual history.[4] The decision in *Forsythe* illustrates two important judicial trends relating to legislative restrictions on the admission of evidence of sexual history. First, courts view the goals of ensuring a fair trial for the accused and preserving the dignity of the complainant as being mutually opposed and exclusive interests. Second, courts routinely use trial fairness as a reason to frustrate and ignore the legislative purpose behind provisions which limit their discretion to admit such evidence.[5]

Following the judicial perversion of section 142, a second attempt to curtail judicial discretion was made in 1982 with the introduction of section 276 of the Code. Section 276 significantly restricted the defence's ability to cross-examine a complainant on her sexual history by delineating circumstances when such evidence might be admissible and by requiring its relevance be demonstrated prior to admission. Thus, for the first time in legislative history, the Code established an evidentiary rule creating a presumption against relevance and admissibility of such evidence. However, with the Supreme Court's decision in *R.* v. *Seaboyer; R.* v. *Gayme*,[6] section 276 was struck down as violating an accused's constitutional right to a fair trial. Again, despite legislative

2 *R.* v. *Forsythe*, [1980] 2 Supreme Court Reports 268; 112 Dominion Law Reports (3d) 385 (Supreme Court of Canada) (hereinafter *"Forsythe"*).

3 The Supreme Court in *Forsythe* used section 142 to extend the ability of an accused to adduce evidence of a complainant's prior sexual history by holding that this evidence was not bound by the collateral evidence rule which would have limited the ability of an accused to rebut testimony about prior sexual history.

4 See note 2.

5 For further discussion of how courts used section 142 to actually expand the trial rights of an accused, see Christine Boyle, "Section 142 of the Criminal Code: A Trojan Horse?" (1981) 23 Criminal Law Quarterly 253 at 264.

6 *R.* v. *Seaboyer; R.* v. *Gayme*, [1991] 2 Supreme Court Reports 577, 83 Dominion Law Reports (4th) 193 (hereinafter cited to Dominion Law Reports as *"Seaboyer"*).

attempts to admit only relevant evidence to determine an accused's guilt, the Supreme Court viewed protecting the interests of the complainant and the accused as mutually exclusive concerns, of which the latter required ultimate protection by the courts.

The current section 276 represents the most recent attempt by Parliament to structure judicial discretion. It offers far less protection to a complainant than its predecessor. The section outlines circumstances which would make evidence of prior sexual activity *inadmissible*. Under this section, evidence is not admissible to support the inference that because of prior sexual activity, the complainant is more likely to have consented, or is less worthy of belief. To be admissible, evidence must be of a specific instance of sexual activity, must be relevant, and the prejudicial effect of the evidence must not outweigh its probative value. Thus, the revised restrictions allow for a greater amount of judicial discretion in determining the admissibility of evidence of prior sexual activity of a complainant than its precursor. Judicial decisions have subsequently narrowed the breadth of restrictions Parliament established to control admission of irrelevant evidence. It is within the context of this most current section that the relevance and admissibility of evidence of prior, non-consensual sexual activity must be discussed. Will this provision be interpreted to restrict the admission of Mary's non-consensual sexual history or will it again solely cover Gwen's consensual sexual history?

The Issue: Narrow Interpretation Versus a Contextual Approach

Recent judicial decisions concerning the admissibility of the recorded history of a complainant highlight the importance of the application of section 276 when considering evidence of prior non-consensual sexual activity. The Supreme Court decision of *R.* v. *O'Connor*[7] has eliminated many of the restrictions on evidence the defence may access and may put to a complainant in cross-examination. The decision requires that complainants disclose personal therapeutic records if the judge determines they are necessary for the accused to make full answer and defence.[8] It is thus more probable that information concerning a complainant's previous non-consensual sexual activity will be available, and thus become the subject of an admissibility argument.[9] In examining the current wording used in section 276, the provision can be interpreted to extend the restrictions on the admission of such information. It is this interpretation which clearly coincides with Parliamentary intent as well as with policy considerations. However, if a narrow, non-contextual approach is taken, the opposite conclusion may be reached, and legislative goals will be frustrated once again

The Narrow Approach

Section 276 was drafted in accordance with the guidelines and principles espoused by Madame Justice McLachlin in *Seaboyer*, and thus that decision may be used to define the scope and extent of the provision. McLachlin, writing for the majority, states that "evidence of *consensual* sexual conduct on the part of the complainant may be admissible for purposes other than an inference relating to the consent or credibility of the complainant where it possesses probative value on an issue in the trial" [emphasis added].[10] It is arguable that if the current section 276 is modelled upon the decision in

7 *R.* v. *O'Connor*, [1995] 4 Supreme Court Reports 411; 130 Dominion Law Reports (4th) 235 (hereinafter *"O'Connor"*).

8 See above. For further discussion on the implications of the *O'Connor* decision on disclosure of therapeutic records, see John Epp, "Production of Confidential Records Held by a Third Party in Sexual Assault Cases: *R.* v. *O'Connor*" (1996) 28 Ottawa Law Review 191.

9 The significance of the availability of a complainant's history in defence counsel's strategy is amplified by the recent decision of *R.* v. *Carosella*, [1997] 1 Supreme Court Reports 80; 142 Dominion Law Reports (4th) 595, which allows the remedy of a stay of proceedings where a third party fails to provide disclosure of a complainant's history.

10 See note 6 at 281.

Seaboyer, McLachlin's use of the word "consensual" places evidence of non-consensual sexual activity beyond the scope of the legislative restrictions. However, the exact drafting of the provision should be more relevant in determining its scope and breadth.

At first glance, the specific wording used in Parliament's drafting of section 276 also appears to favour the exclusion of evidence of non-consensual sexual activity from its restrictions. The provision states that "evidence that the complainant has engaged in sexual activity … is not admissible." If the word "engaged" is interpreted to require some wilful participation by the complainant, then arguably a complainant could not have engaged in a sexual assault, and evidence of such activity would thus be beyond the scope of the section 276 protections. Indeed, some courts have opted to follow this line of reasoning. In *R.* v. *Vanderest*,[11] Justice Lysyk of the British Columbia Supreme Court concluded that Parliament's use of the word "engaged" limited the scope of the section, restricting its application to evidence of previous consensual sexual activity. The case was thus sent back to the trial level to determine the admissibility of the evidence according to the general rules of admissibility.[12] This reasoning was echoed in *R.* v. *Sakakeesic*[13] wherein Justice Stach of the Ontario Court of Justice (General Division) stated that the scope of section 276 was limited by the word "engaged".[14] Similarly, Justice Roscoe of the Nova Scotia Court of Appeal in *R.* v. *B. (O.)*[15] adopted the rationale espoused in *Vanderest*, and thereby overruled the trial judge who had held that section 276 did apply to non-consensual activity. Roscoe, citing Lysyk in *Vanderest* held that it is illogical to contend that a complainant somehow "engaged" in a sexual assault, in the same way that it would be illogical to say that a bank teller "engaged" in a robbery.[16]

However, even if a narrow approach to the interpretation of section 276 is preferred, it is possible to reach the opposite conclusion: that evidence of prior non-consensual sexual activity of the complainant should be subject to the section 276 restrictions on admissibility. While McLachlin used the word "consensual" in *Seaboyer* when discussing the type of prior sexual activity subject to section 276,[17] the current provision does not include this important modifier. Rather section 276 refers to "evidence that the complainant has engaged in sexual activity." Parliament's choice not to adopt the word "consensual" may indicate its intent not to limit the scope of the section to consensual sexual history, in the way McLachlin did. Further, the Standard College Dictionary definition of the term "engaged" includes being "involved in conflict."[18] Such a definition brings evidence of prior non-consensual sexual activity within the scope of section 276. At the least, such a definition renders the precise scope of the section more ambiguous than that adopted by the courts discussed above.

Similarly, if the literal phrasing chosen by Parliament is to decide the application of section 276 to this evidence, its choice not to adopt the exact wording in *Seaboyer* is indicative of its intent. In *Seaboyer*, McLachlin held that "evidence that the complainant has engaged in *consensual sexual conduct* on other occasions … is not admissible solely to support the inference that the complainant is by reason of such conduct…"[19] [emphasis added].

In contrast, section 276 states: "evidence that the complainant has engaged in

11 *R.* v. *Vanderest* (1994), 91 Canadian Criminal Cases (3d) 5 (British Columbia Supreme Court) (hereinafter *"Vanderest"*).

12 See above at 7.

13 *R.* v. *Sakakeesic*, [1994] Ontario Judgments No. 2021 (Ontario General Division).

14 See above at 7.

15 *R.* v. *B.(O.)* (1995), 146 Nova Scotia Reports (2d) 265 (Nova Scotia Court of Appeal).

16 See above at 286.

17 See note 6 at 281.

18 Funk & Wagnall's Standard College Dictionary, Longmans: Canada, at 438.

19 See note 6 at 281.

sexual activity … is not admissible to support an inference, by reason of the *sexual nature of that activity*" [emphasis added].

While McLachlin specifically referred to the conduct which she defines as consensual sexual activity, Parliament only refers to the sexual nature of the activity. This difference indicates Parliament's intent to prevent the use of myths about women and sexual assault from determining key issues at trial – it is the sexual nature of the activity which triggers the use of these myths, and thus the wording of section 276 is indicative of its greater breadth of application. A sexual assault clearly is an activity which is sexual in nature, and as such is within the scope of the provision.

Further confusion about the boundaries of section 276 is caused by subsection (2) which states that "no evidence shall be adduced … that the complainant has engaged in *sexual activity* other than the *sexual activity* that forms the subject matter of the charge"[emphasis added]. This subsection therefore refers to "sexual activity" when discussing both the alleged assault by the accused, and the evidence of a complainant's sexual history. Given Parliament's use of the same term to refer both to consensual activity (from a complainant's past), and non-consensual activity (the subject matter of the charge), any legislative distinction between consensual and non-consensual sexual activity, such as that drawn by Lysyk in *Vanderest*, seems to disappear. Again, the language of section 276 renders the exact scope of the section more ambiguous than the decisions discussed above would suggest.

Despite the availability of a narrow interpretation which would apply section 276 to evidence of non-consensual activity, and the fact that the ambiguous drafting requires a more purposive approach, courts have generally rejected both responses. Instead, the admissibility of this evidence has been left to judicial discretion, and thus is more vulnerable to myths and stereotypes about sexual assault complainants.

A Contextual Approach

As discussed, the narrow interpretation of section 276 yields an ambiguous answer as to whether the provision applies to evidence of the complainant's prior, non-consensual sexual activity. Should the restricting provisions of the section therefore extend to this type of evidence? In the Supreme Court decision of *R.* v. *Hasselwander*,[20] Mr. Justice Cory, writing for the majority, stated that where doubt exists as to the exact meaning of a statute, "the real intention of the legislature must be sought, and the meaning compatible with its goals applied."[21] Further, Madame Justice Wilson, in *Edmonton Journal* v. *Attorney-General for Alberta et al.*,[22] affirmed the contextual or purposive approach to statutory interpretation, by requiring consideration of Parliament's intention in formulating a provision or statute.[23] A contextual approach to interpreting section 276 would also require a consideration of the legislative goals being addressed, the history and judicial perversion of "rape shield" legislation, and the policy considerations for limiting the breadth of the section. When these contextual factors are considered in determining the section's scope, its application to evidence of non-consensual sexual activity is clear – the restrictions must apply.

20 *R.* v. *Hasselwander*, [1993] 2 Supreme Court Reports 398.

21 See above at 413.

22 *Edmonton Journal v. Attorney-General for Alberta et al.*, [1989] 2 Supreme Court Reports 1326; 64 Dominion Law Reports (4th) 577 (hereinafter cited to Dominion Law Reports).

23 See above at 581.

Legislative Goals of Section 276

The preamble to An Act to Amend the Criminal Code[24] which outlines the current section 276, is a useful tool in determining the legislative intent of the provision. The preamble states that Parliament is:

> gravely concerned about … the prevalence of sexual assault against women and children … intends to promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15 … wishes to encourage the reporting of incidents of sexual violence or abuse … believes that at trial of sexual offences, evidence of a complainant's sexual history is rarely relevant.[25]

Logically, there is no reason why the intention of Parliament, preventing the use of harmful myths and stereotypes about women from influencing the trier of fact, would not also include protecting complainants with a previous incident of non-consensual sexual activity. Nothing in the preamble indicates that victims of a previous sexual assault are somehow less worthy or deserving of such protection, or that a distinction should be made between evidence of prior non-consensual activity and evidence of consensual activity.

Logically, there is no reason why the intention of Parliament, preventing the use of harmful myths and stereotypes about women from influencing the trier of fact, would not also include protecting complainants with a previous incident of non-consensual sexual activity.

Research has revealed that women who have been sexually victimized as children are at least 2.4 times more likely to be re-victimized as adults than women who have not suffered victimization as children.[26] Further, Holly Johnson and Vincent Sacco conclude that 39 per cent of all women have been victims of sexual assault, and 25 per cent of all women have experienced both unwanted sexual touching and violent sexual attacks[27] – both of which would be characterized as non-consensual sexual activity for our purposes. If this distinction continues to be used to limit the application of section 276, it will further marginalize an already marginalized group: women who have suffered sexual abuse in their past. It will also send a dangerous message that these women somehow require or deserve less respect and protection of and from the law; a message not only inconsistent with, but antithetical to, the intention of Parliament.

The legislative intention to encourage the reporting of sexual assault is an important consideration in the contextual interpretation of section 276. If a distinction between prior consensual sexual activity and non-consensual sexual activity were to be drawn, it would serve as a disincentive for victims of sexual assault to report these offences. Victims of sexual abuse would be discouraged from reporting and seeking therapeutic help, knowing not only that any records may be made available to the defence, but further, that evidence of non-consensual sexual activity will be more readily admissible than other evidence of sexual conduct. Arguably, examination in court would be a more painful experience for a complainant with a prior sexual assault than for a complainant with previous consensual activity. This result is clearly contrary to both social policy and the intention of Parliament.

Policy Considerations

A contextual interpretative approach to section 276 highlights particular policy considerations. Firstly, there exists a concern that evidence which the defence seeks to admit will be characterized as non-consensual so as to allow it to bypass the scrutiny of section 276. It is conceivable that defence counsel may introduce evidence by characterizing it as non-consensual, and thus avoid the requirement of first demonstrating its probative value. Further, if such evidence is admitted, and a jury then perceives the evidence actually to be

24 An Act to Amend the Criminal Code (Sexual Assault), Revised Statutes of Canada 1992, c.38.

25 See above.

26 Gail Wyatt, Donald Guthrie & Cindy Notgrass, "Differential Effects of Women's Child Sexual Abuse and Subsequent Sexual Victimization" (1992) 60 Journal of Consulting and Clinical Psychology 167 at 170.

27 Holly Johnson & Vincent Sacco, "Researching Violence Against Women: Statistics Canada's National Survey" (1995) 37 Canadian Journal of Criminology 281 at 294.

of consensual acts, the jury might inadvertently draw the improper inferences that section 276 was designed to prevent. This policy consideration underscores two important points: first, the distinction between evidence of consensual and non-consensual sexual activity is, in this context, an artificial one; and second, to allow such a distinction to operate in the application of section 276 could lead to illogical and harmful results.

Further, if section 276 is narrowly interpreted to apply only to evidence of prior consensual activity, any prior non-consensual act will be available to the defence to attempt to introduce without adherence to the section's procedural requirements. Following *O'Connor*, an accused will have greater opportunity to search the therapeutic and other records of a complainant, increasing the likelihood that an incidence of non-consensual activity will be found. Indeed, since the introduction of the current section 276, defence counsel have increasingly sought access to a complainant's personal records, in part due to the difficulties in demonstrating the relevance that section 276 creates.[28] If the narrow interpretation of section 276 remains predominant in judicial decision-making, the result will be that complainants who have been sexually abused in the past will be at a greater risk of abuse during the trial procedure than complainants who only have a history of consensual sexual acts. This is an unfair and illogical distinction, contrary to the objectives and goals identified in the preamble to section 276.

Moreover, a narrow approach to the determination of the scope of section 276 would yield absurd results. For example, section 150.1 of the Code removes consent as a defence to sexual offences where the complainant is under the age of fourteen years, but allows the defence of consent provided the accused is under the age of sixteen years, is less than two years older than the complainant and is in neither a position of trust nor authority in relation to the complainant. Therefore, prior sexual activity of a complainant will be characterized as consensual depending on her age at the time of the activity. It would be unfair to afford a complainant the protections of section 276 because she was 14 at the time of the previous activity, and thus legally able to give consent, but to deny that protection to a complainant who was 13 at the time of this previous activity. A narrow and non-inclusive interpretation of section 276 may, however, lead to this illogical result. Policy and common sense require that either the interpretation be made more broad and inclusive, or there be a legislative amendment to the provision to specifically extend the present restrictions to evidence of prior non-consensual sexual activity.

Is a Legislative Amendment Required?

Given the current judicial trend of interpreting section 276 in a narrow fashion, one must question whether a legislative amendment or judicial correction is required. Do the existing rules of evidence governing relevance and admissibility sufficiently protect evidence of prior non-consensual sexual activity from improper use?

Other Limits of Section 276

While a narrow interpretation of section 276 may result in evidence of non-consensual sexual activity not being subject to its restrictions, it may be argued that the other factors a court is to consider in determining the applicability of section 276, nonetheless, restrict the admission of this evidence. Subsection 276(3) states that a

28 For further discussion of the tactics of defence counsel seeking access to personal records of complainants, see Karen Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases" (1997) 9.1 Canadian Journal of Women and the Law 148.

court should consider:

> society's interest in encouraging the reporting of sexual assault offences … the need to remove from the fact-finding process any discriminatory belief or bias…the potential prejudice to the complainant's personal dignity and right of privacy … the right of the complainant and of every individual to personal security and to the full protection and benefit of the law.

These interests are clearly at stake if evidence of non-consensual sexual activity is not afforded the protections of the section. The application of the factors in subsection 276(3), like the application of general rules of admissibility, involve a great deal of judicial discretion – this discretionary element therefore requires scrutiny.

General Evidentiary Rules of Admissibility

Assuming a court's decision is to restrict section 276 to evidence of consensual sexual activity, it is this author's contention that the general rules of relevancy and admissibility are insufficient to prevent the use of myths and stereotypes from improperly influencing a trier of fact. The amendments made in 1976, 1982 and most recently in 1992, creating the current section 276, were all Parliament's responses to the courts' treatment of complainants and their use of misguided notions of relevance. Indeed, Andrea Bowland contends that "at all levels, courts took the 1976 provision, designed to improve upon the common law rules, and made the ordeal of testifying in sexual assault trials even worse for complainants."[29] For evidence to be admitted, its relevance must be demonstrated, and its probative value must outweigh its prejudicial effect. Relevance, however, must be understood to be a subjective concept, vulnerable to the personal opinions and beliefs of an individual judge.

Relevance is heralded as an objective legal standard capable of being applied in a neutral fashion. This is a dangerous belief, not only because of its falsity, but more importantly because it paints judicial decisions with the brush of neutrality, obscuring their underlying subjectivity and perpetuating the very myths and judgments section 276 seeks to eliminate. Madame Justice L'Heureux-Dubé notes in *Seaboyer* that "the concept of relevance has been imbued with stereotypical notions of female complainants and sexual assault"[30] thereby rendering so-called "common sense" or "logical determinations of relevance" vulnerable to the influence of inappropriate and improper myths about complainants.[31] Similarly, Sadie Bond notes the prevalence of the myth that "bad women cannot be raped", which implies that for sexual activity to be assaultive, characteristics such as chastity and innocence are required of the victim.[32] Therefore, if a woman has an incident of non-consensual sexual activity in her past, in absence of the protective restrictions of sections 276, this myth may influence a judge's determination of relevance, and improper inferences and admissions of evidence may be made.[33] The prevalence of stereotyping under the subjective test of relevance is perhaps best illustrated by the fact that, until recently the Code required a complainant's evidence be corroborated in order for there to be a conviction for rape.[34] Similarly, only recently, with the enactment of section 278 of the Code, did rape become legally recognized within the context of marriage. Thus, there is evidence that myths about women and sexual assault have indeed influenced legislative decisions in the past, and further

"at all levels, courts took the 1976 provision, designed to improve upon the common law rules, and made the ordeal of testifying in sexual assault trials even worse for complainants."

– Andrea Bowland

29 Andrea Bowland, "Sexual Assault Trials and the Protection of 'Bad Girls': The Battle Between the Courts and Parliament" in J.V. Roberts & R.M. Mohr, eds., *A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 241 at 242.

30 See note 6 at 227.

31 See above at 228.

32 Sadie Bond, "Psychiatric Evidence of Sexual Assault Victims: The Need for Fundamental Change in the Determination of Relevance" (1993) 16 Dalhousie Law Journal 416 at 418.

33 For further discussion of the myths about women and sexual assault and their impact on the determination of relevance, see Zsuzsanna Adler, "The Relevance of Sexual History Evidence in Rape: Problems of Subjective Interpretation" (1985) Criminal Law Review 769 at 779; T. Brettel Dawson, "Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance" (1987) 2 Canadian Journal of Women and the Law 310.

34 See note 6 at 224.

evidence that judicial decisions are not immune from these persistent myths.[35]

For example, in Wigmore's treatise on evidence, he comments on the "nature" of some women alleging rape:

> their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts…one form taken by these complexes is that of contriving false charges of sexual offences by men.[36]

This author's authority in judicial thought makes this statement particularly alarming. Similarly, in 1984, Mr. Justice Allen of the Manitoba Provincial Court stated that "unless you have no worldly experience at all, you'll agree that women occasionally resist [sexual activity] at first but later give in to either persuasion or their own instincts."[37] Such comments from courts and legal scholars reflect how myths about women remain prevalent in legal thought, and how they may influence the supposedly "objective" determination of relevance. McLachlin, writing in *Seaboyer*, identifies two now apparently unfounded myths: unchaste women were more likely to have consented, and were less deserving of belief.[38] Her contention that these myths are now "discredited"[39] is a naïve assumption, contradicted by her own reasoning. McLachlin provides examples of situations where evidence of prior sexual activity would be relevant, though excluded under the previous section 276, but these examples draw upon the same myths she claims no longer affect judicial reasoning. For example, she identifies the "extorting prostitute" and the "teenage girl crying rape" to hide promiscuous but consensual sexual activity as situations where previous sexual activity may be relevant.[40] The only way these examples require evidence of prior sexual history to legitimately advance the inquiry is if the evidence leads to an inference that the complainant is more likely to have consented, and is likely to have lied about the consent – an inference that clearly engages these supposedly "discredited" myths.[41] As relevance is a subjective concept, and myths about women and sexual assault persist in the judicial consciousness, the general rules of evidence do not provide sufficient protection against improper inferences being drawn from evidence of prior, non-consensual sexual activity of the complainant.

Relevance of Evidence of Prior Non-Consensual Sexual Activity of a Complainant

The final argument in favour of excluding this evidence from the purview of section 276 is that such evidence may actually be relevant to the assertion by the defence that the complainant has a history of, and a motive to, fabricate allegations of sexual assault. Counsel for the defence will contend that the history of a complainant demonstrates a pattern of fabrication, and that the current allegation of sexual assault is false. However, how are the courts to determine if a prior allegation is "false"? Falsity of an allegation is difficult to ascertain given the significant under-reporting of sexual offences and the reluctance on the part of the police to charge, the Crown to prosecute, and the courts to convict. A mere failure to report, charge, or convict cannot be used as evidence of a pattern of fabrication. It would be ironic if a woman could be accused of fabrication by the same justice system which, in the past, failed to charge or convict an accused of sexual assault, and thereby created the appearance of dishonesty on her part.

In *R.* v. *Riley*,[42] the Ontario Court of Appeal held that the only reasonable

35 For further discussion of how myths about women and rape have pervaded judicial and legislative reasoning, see the dissenting judgment of Supreme Court Justice L'Heureux-Dubé in *Seaboyer*, see note 6.

36 *Evidence in Trials in Common Law*, Volume 3A (1970), at 376.

37 "Woman Assaulted by Boyfriend to File Complaint Against Judge", *The [Toronto] Globe and Mail* (27 March 1989) A8.

38 See note 6 at 258.

39 See above.

40 See above at 265-8.

41 For further discussion of the influence of social myths on McLachlin's decision see Elizabeth Sheehy, "Feminist Argumentation Before the Supreme Court of Canada in *R.* v. *Seaboyer*; *R.* v. *Gayme*: The Sound of One Hand Clapping" (1991) 18 Melbourne University Law Review 450.

42 *R.* v. *Riley* (1992), 11 Ontario Reports (3d) 151 (Ontario Court of Appeal).

justification for cross-examining a complainant on evidence of previous non-consensual sexual activity is to establish a pattern of fabricating allegations, and then only if the defence is in a position to demonstrate that she had recanted earlier accusations, or that they were "demonstrably false."[43] While the application of section 276 to evidence of prior non-consensual sexual activity was not at issue before the Court, it did identify the potential unfairness created by a discussion of false accounts, and ruled that there should be extreme restrictions placed on the admissibility of evidence of previous allegations of non-consensual sexual activity to prevent irrelevant, illogical and prejudicial assertions from being drawn from such evidence.[44] Further, if evidence is introduced to argue that an inference from past conduct can be drawn, it closely resembles evidence specifically excluded by section 276. Indeed, in *Seaboyer* McLachlin stated that evidence introduced for such a purpose parallels the "prohibited use of the evidence and must be carefully scrutinized."[45] Where myths are used as the foundation of a defence, restrictions on the admissibility of this evidence cannot be said to violate an accused's right to a fair trial – the Canadian Charter of Rights and Freedoms[46] guarantees a fair, not favourable trial. Protecting of the administration of justice through restricting evidence of non-consensual sexual activity and protecting one's right to a fair trial are not mutually exclusive and opposed interests. In fact, limiting admission of previous non-consensual activity is an appropriate way to maintain their balance.

Is a Legislative Response Appropriate?

In the wake of *Seaboyer*, many are questioning the benefit of seeking traditional "legal" solutions to the imbalance faced by complainants in the court. Consistently the Supreme Court has failed to act in accordance with Parliament's intent to protect the administration of justice and the complainant by restricting the use of irrelevant evidence. By interpreting the right to a fair trial and the right of a complainant to have her dignity protected as mutually opposed concerns, courts have repeatedly undermined the procedural safeguards Parliament has deemed necessary. If this illogical distinction continues to prevail, victims may be even more hesitant to report and pursue sexual assault prosecution through the criminal trial process. Defence counsel's increased access to a complainant's personal and therapeutic records, coupled with an erosion of procedural protections applied to the admission of this evidence, greatly reduces the benefit of a complainant pursuing a response from the criminal justice system. If the ultimate goal of prosecuting sexual assault is to eliminate the incidence of sexual assault, and truly provide assistance to complainants, energy may be better directed towards education and more accessible and confidential therapy, rather than towards pursuing an elusive criminal justice response. The narrow approach to interpreting section 276 can only hamper society's interest in criminalizing sexual assault. Thus, the legislature should amend the Criminal Code to extend the restrictions of section 276 to all evidence of sexual history.

43 See above at 154.

44 See above.

45 See note 6 at 266.

46 Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982 being Schedule B of the Canada Act 1982 (UK), 1982, c. 11.

Property in Human Tissues: History, Society and Possible Implementations*

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IS IN HIS SECOND YEAR AT OSGOODE HALL LAW SCHOOL. HE PREVIOUSLY COMPLETED TWO YEARS OF THE BACHELOR OF BUSINESS ADMINISTRATION (CO-OP) PROGRAM AT WILFRED LAURIER UNIVERSITY.

Property is an abstract concept. It is defined so broadly that almost anything may be encompassed by the term, from the physical to the intangible and intellectual. However, it is disputed whether a person "owns" his or her body, or more specifically, whether it is desirable to have property interests in one's own body. This issue is certainly multifaceted, and this paper considers several contexts in which the issue is becoming increasingly relevant in modern society. For example, many North American drivers fail to sign organ donor cards, resulting in a dire shortage of organs, and one reason for this failure to donate may be that people are reluctant to provide a valuable commodity without compensation. This problem could be addressed by creating property rights in human tissues.

As medical technology advances, the need for law reform in the area becomes more urgent. The purpose of this paper is to canvass some of the key issues, including a consideration of the common law, current statute law, and public policy concerns, any of which may influence the feasibility of law reform. While several possible options for such reform will be summarized, it should be evident that none of these is ideal, but rather that there is a pressing need for further discussions which should lead to the establishment of direct regulation of property interests in human tissues.

Background

Historically, the common law classified human bodies as either those which are deceased or those which are alive, and the case law is generally divided along these lines. Each division will be dealt with in turn.

Property Rights in Deceased Bodies and their Tissues

Several early English cases laid the foundation for the law of property in deceased bodies that exists in Canada. The issue was dealt with in Coke's *Institutes*,[1] which stated that deceased persons buried in consecrated grounds were protected by ecclesiastical law and therefore the buried cadaver was *res nullis*;[2] it was considered illogical to state that simply because something is of a religious nature that it is not owned by any person.[3]

** This paper is dedicated to Andrew M. Kuske and Professor Kent McNeil (Osgoode Hall Law School). Special thanks goes to Liz Kitchen.*

1 Sir E. Coke, *Third Part of the Institutes of the Laws of England*, 6th ed. (London: W. Rawlins, 1681).

2 P.D.G. Skegg, "Human Corpses, Medical Specimens and the Law of Property" (1975) Anglo-American Law Review 412 at 412.

3 See above.

... it is disputed whether a person "owns" his or her body ...

Early in the eighteenth century, the case of *Dr. Handyside* enunciated what could best be described as the "no property" rule for deceased bodies.[4] There could be no prosecution for theft of a corpse because it was not property; however, the items buried with the corpse were viewed as property of the executor. In most cases of "grave-robbing," theft was considered on grounds other than the theft of the body itself.[5]

Beginning in 1788, three cases (*R.* v. *Lynn*,[6] *R.* v. *Fox*,[7] *R.* v. *Sharpe*[8]) articulated more modern discussions of human beings as property. *Sharpe*, as the last to be decided, merits further discussion. In this case, the defendant disinterred the corpse of his mother with the intention of reburying it adjacent to the grave of his deceased father. The Court applied the following rule:

> Our law recognises no property in a corpse, and the protection of the grave at common law, as contradistinguished from the ecclesiastical protection to consecrated grounds, depends upon this form of indictment.[9]

This passage has been interpreted to mean that because the corpse is not property, and therefore cannot be stolen, the only way to be liable for a crime when disinterring is by public policy at common law. The trilogy decisions were based on reasons other than the "no property" rule for corpses, focusing instead on policy and established, although stretched, principles of conventional jurisprudence. Generally, courts were reluctant to

4 This case was unreported throughout the eighteenth century and was eventually referred to in the nineteenth century in E.H. East, *Pleas of the Crown* (London, 1803) 652. In the case, an action was brought to determine the proper resting place of "Siamese Twins." The doctor had apparently obtained the body for study. The entire record of this case states as follows:

"There can be no property in a dead corpse; and therefore stealing it is no felony, but a very high misdemeanour. In the case of *Dr. Handyside*, where trover was brought against him for two children that grew together; Lord C.J. Willes held the action would not lie, as no person had any property in corpses. But a shroud stolen from the corpse must be laid to be the property of the executors, or whoever else buried the deceased, and not of the deceased himself."

The apparent result is that one may steal a body, as it is not property, but not anything attached to or clothing the corpse.

Skegg, see note 2, at 413.

See also: W. Boulier, "Sperm, spleens and other valuables: The need to recognize property rights in human body parts" (1995) 23 Hofstra Law Review 693 at 706.

5 Skegg, see note 2.

find property rights in the human body and tried to decide the cases "correctly" on other grounds.

The later case of *Williams* v. *Williams*[10] determined that the executors of a will are not bound to dispose of the body in the manner prescribed by the deceased's will. The Court held that a person cannot bequeath his or her body because there is "no property" in a human's remains. Canadian common law has generally followed *Williams*,[11] and it would appear that *Williams* is still the primary source of the "no property" concept and that it is applicable in Canada. In conclusion, the common law generally has not recognized interests in deceased persons, their corpses, or "gifts" of the corpses from a testator to a beneficiary.

Property Rights in Living Bodies and their Tissues

1. Obsolete Common Law

In the past, the law has allowed ownership by one person in another. Examples which are now obsolete in Canadian law include attachment of a debtor's person as payment of a debt,[12] slavery, or possession of a woman's body by her husband.[13] Courts have found such ownership to be clearly immoral.

2. Current Common Law

Tort law is one of the few remaining common law constructs that has not done away completely with the concept of property loss in damages to living human beings. An example of these "non-pecuniary" losses can be found in the case of *Andrews* v. *Grand & Toy Alta. Ltd.*[14] in which Supreme Court of Canada Justice Dickson set out three potential ways to allocate a monetary value to personal injury. First, the "conceptual" approach treats each faculty as a proprietary asset with an objective value.[15] Therefore, the value of a body part would be almost "pre-determined" by tariff. Second, the "personal" approach values injuries in terms of the loss of happiness to the particular victim. Third, the "functional" approach attempts to determine the compensation to provide "reasonable" solace for the person's misfortune. The "functional" approach is prevalent; however property concepts are implicated because in order for tort law to compensate bodily losses, a person's body must have value.[16]

Statute Law

Canadian courts have been hesitant to allocate property to body parts, and legislation which regulates the area further removes any property rights in human tissues. In Ontario, for example, relevant legislation includes the Coroners Act,[17] the Anatomy Act,[18] and the Human Tissue Gift Act.[19] The provincial acts are generally uniform in substance throughout Canada and consequently provide a regulatory framework.

Coroners acts in Canada supersede common law powers of coroners to intervene and take possession and control of a deceased body for the purposes of investigation.[20] These statutes also provide for autopsies to be performed in the event of an inquest pursuant to other statutes.[21] Of specific interest is a provision in the Ontario Coroners Act which allows the coroner to remove a deceased's pituitary gland and deliver it to a

6 *R.* v. *Lynn* (1788), 100 English Reports 394 (Court of King's Bench).

Lynn was convicted on indictment for entering a burial ground and disinterring a corpse which was later removed and used for dissection. The Court, in spite of the case law to the contrary, stated that although no person shall have property in a corpse, the act committed was addressable by common law as contrary to public decency. It was also given that the indictment delivered was such that it was still phrased in terms of stealing the corpse and the clothes. The corpse's theft alone would not result in a felony; however, the theft of the clothes would.

7 *R.* v. *Fox* (1841), 114 English Reports 95 (Court of Queen's Bench).

In *Fox*, a debtor had died while in prison and the coroner had ordered a burial. The jailer refused to release the body until the executors paid the sum of money that was owing. The Court held that regardless of who has possession, the executors have an immediate right to possession so that a proper burial may take place. This was an extension of the "no property" rule in that it stated that withholding a body is contrary to public policy and should be prevented by the courts.

8 *R.* v. *Sharpe*, (1856-57) Dearsly & Bell's Crown Cases 160 (Court of Queen's Bench) [hereinafter *Sharpe*].

9 See above at 163.

medical practitioner for use with a patient who has a pituitary gland deficiency.[22] This provision allows an agent of the state to remove an item of value from a body without a *positive* request to do so by either the deceased or the deceased's estate, unless it is "reasonably" known that the deceased or his/her estate is unwilling to comply.[23] This reverse onus provision suggests that pituitary glands, at least, are in the public domain unless a person or his/her estate specifically declares them to be otherwise.

The anatomy acts in Canada evolved from 19th century English enactments which were intended to respond to cadaver thefts and sale to educational institutions, and to address common law developments that might have led to property rights in the body and body parts. Pursuant to anatomy acts in Canada, the entire body of a person may be donated to a medical school for the purposes of anatomical dissection. The intention of the deceased is important but not binding on the next of kin; the next of kin must authorize the donation of the body for scientific study.

Human tissue gift acts regulate the removal and use of cadaveric and non-cadaveric tissues. The Canadian system is based primarily on gift-driven motives and the consent of the donor or the family of the deceased individual.[24] Ontario's statute is generally representative of legislation in the other provinces and the territories, and appears to renounce property interests in human beings. Section 10 of the Human Tissue Gift Act, for example, bans dealing in human tissue for valuable consideration:

> No person shall buy, sell or otherwise deal in, directly or indirectly, for a valuable consideration, any tissue for a transplant, or any body or part or parts thereof other than blood or a blood constituent, for therapeutic purposes, medical education or scientific research, and any such dealing is invalid as being contrary to public policy.[25]

The section is problematic in that while it appears to prohibit all sales, "tissue" does not include regenerative tissues, such as skin, bone, blood, and blood constituents.[26] In addition, the statute itself contains a measure of ambiguity and is in need of reform. First, it is uncertain whether any of the excluded types of tissue would still fall under the term "body parts" as used in section 10.[27] Second, the suggestion has been made that cellular or sub-cellular by-products are excluded from this definition.[28] Third, it should also be noted that while the statute addresses gifts, it does not address other natural mechanisms of conveying human tissue to another. Typically organs are donated and that donation is a voluntary process of surrendering a person's tissue in the form of a gift. Fourth, the Act does not deal with waste products. Body fluids or tissue that are left over from an operation or test are no longer in the control or possession of the "donor"; however, the statute does not explicitly prohibit obtaining and converting the "waste" for the financial gain of another.[29] Fifth, the statue may potentially be circumvented: if the organ is not "sold" for "valuable consideration," but rather if it is given, then the act of transplant is viewed as a service.[30] Without a "sale," it would appear that the statute is ineffective. This point has yet to be litigated.[31] A further criticism of the Act is that the penalty provisions are too lenient,[32] but no province has yet responded to proposals to increase penalties.

10 *Williams* v. *Williams* (1882), 20 Ch D. 659 [hereinafter *Williams*].

In this case, a testator directed that "within three days after my death, or as soon as conveniently may be, my body shall be given to my friend Miss Eliza Williams, to be dealt with by her in such a manner as I have directed to be done in a private letter to her." In addition, directions were given that Miss Williams be reimbursed out of the estate for any expenses she may incur in disposing of the body. The letter to Miss Williams requested that the body be cremated and placed in a vase, to be disposed of as Miss Williams wished. The family, and the executor had the body buried despite protest from Miss Williams. Miss Williams, some time later, disinterred the body, had it cremated and removed from the country. She brought an action to collect damages for her expenses in this matter.

11 *Hunter* v. *Hunter* (1930), 65 Ontario Law Reports 586, [1930] 4 Dominion Law Reports 255 (Ontario High Court) held that the burden of disposing of a deceased body falls to the executor but that the executor may dispose of the body as he/she sees fit (be it burial or by cremation). *Edmonds* v. *Armstrong Funeral Home Ltd.*, [1930] 25 Alberta Law Reports 173, [1931] 1 Dominion Law Reports 676 (Alberta Court of Appeal) allocated the burden to the surviving spouse, who possessed the legal obligation to dispose of the body as s/he wished. *Miner* v. *Canadian Pacific Railroad* (1911), 3 Alberta Law Reports 408 (Alberta Court of Appeal) allocated the burden to next of kin who possessed the legal obligation to dispose of the body as s/he wished.

12 B.M. Dickens, "The Control of Living Body Materials" (1977) 27 University of Toronto Law Journal 142 at 144.

In summary, in Canada today there are no express legislative indications that property in human tissues exists. Instead, there are express indications of an active legislative intent to eliminate property interest in human tissues.

Policy Considerations

Although Canadian legislation does not embrace the concept of property in human tissues, both it and the common law can be modified in accordance with public policy. There is a concern that the current legislative provisions are insufficient and therefore should be altered to effectively allow a more efficient delivery of human organs and tissues to those who need them, when they need them. There are a number of problems with Canadian legislation. For example, few people sign organ donor cards,[33] and hospitals and health care professionals are often unaware as to whether a person has signed a card.[34] In addition, relatives are given the ability to countermand any wishes expressed by the deceased.[35] When there is no effective indication as to the deceased's intention, two factors can affect the donation of tissues. First, the nearest relative's willingness to authorize the removal of tissue may constitute a valid direction,[36] and second, health care professionals have a limited coercive role in the organ donation process as they are regulated by hospital policy or the like.[37] Creating property in human tissues can make the statutes more effective, and a more commercialized (property-based) system may effectively rectify the concern that there is currently an insufficient supply of organs for transplant demand.[38]

Quality of Available Organs

It is claimed that if human organs are sold, the supply of organs that are diseased or unhealthy will increase significantly.[39] This fear centres around the belief that the poor, indigent, malnourished, or alcoholic will make up the largest proportion of the new class of donors, and that people in these groups will misrepresent their medical condition in order to qualify for the potential monetary rewards of organ donation.[40]

In contrast, it is claimed that inherent economic incentives will increase quality,[41] as individuals purchasing organs for resale will likely carefully check the quality of their organs and donors so as to maintain the highest quality possible. Economic analysis shows that once the supply of organs is more plentiful, suppliers providing sub-standard organs will be driven out of the market by competitive activities.[42] In fact, the increased supply of organs available through organ sales could result in more instances where surgeons are able to find the organ that is best suited to the recipient.[43]

Economic Externality

An objection to sale of organs, the likely by-product of property in human tissues, is that there will be negative economic externalities that will prohibit the sale of organs. In other words, the fact that people often feel uncomfortable about dealing in human organs[44] is an externality which increases the price to the ultimate consumer. The public may be concerned about the moral repercussions of endorsing trade in human tissues, or the potential health consequences for donors (including health complications

13 S.A. Mortinger, "Spleen for Sale: *Moore* v. *Regents of the University of California* and the Right to Sell Parts of Your Body" (1990) Ohio State Law Journal 51 (1990) 499 at 503.

14 *Andrews* v. *Grand & Toy Alta Ltd.*, [1978] 2 Canada Supreme Court Reports 229, 83 Dominion Law Reports (3d) 452 (Supreme Court of Canada).

15 See above.

16 See above.

17 Coroners Act, Revised Statutes of Ontario 1990, c. C-37.

18 Anatomy Act, Revised Statutes of Ontario 1990, c. A-21.

19 Human Tissue Gift Act, Revised Statutes of Ontario 1990, c. H-20.

20 Coroners Act, see note 17, section 2.

21 Manitoba Law Reform Commission, Report on The Human Tissue Act (March 31, 1986) at 21.

22 Coroners Act, see note 17, section 29.

Extraction and use of pituitary gland

29.—(1) Any person performing a post mortem examination of a body under the warrant of a coroner may extract the pituitary gland and cause it to be delivered to any person or agency designated by the Chief Coroner for use in the treatment of persons having a growth hormone deficiency.

Objections

(2) This section applies where the coroner or person performing the post mortem examination has no reason to believe that the deceased has expressed an objection to his or her body being so dealt with after death or that the surviving spouse, parent, child, brother, sister or personal representative objects to the body being so dealt with, and although no consent otherwise required by law is given.

23 Coroners Act, see note 17, s.29(2).

or even death). If public sentiment is clearly against such activities, there could potentially be no trade in organs whatsoever due to a high economic externality.[45]

FIGURE ONE – ECONOMIC EXTERNALITIES[46]

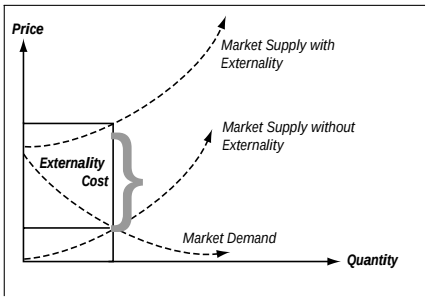

Figure One indicates that if the externality is large enough, there will be such potentially prohibitively high costs that no market equilibrium will occur.

The economic externality argument, however, is questionable as it overlooks an important factor. In response to concerns about harm to donors and thus to society, thousands of people die each year because organs are not available for transplant, a fact that might outweigh this concern. Society will likely benefit from an increased organ supply and a likely improvement in transplant procedures (through increased practice and financial motivations for innovation). Therefore, the general externalities will likely balance each other such that the standard economic supply and demand model will tend to function unaltered.[47] This model will operate in a more efficient manner than the current regulatory system of donations.

Altered Supply of Organs

Opponents raise the argument that sales in human tissues, and organs specifically, will create a decreased supply of "free" organs for the less affluent. Commercialization in the human tissues trade takes away motivation (other than goodwill) to donate tissues for "free," at least when a donor and donee are not acquainted with each other, with the result that the affluent will be able to afford the available tissues and the less wealthy will simply go without.[48] This is a valid policy concern as people should have equal access to health resources.

However,[49] there are indications that the market price for organs will decrease as the supply of organs increases. In addition, an economy of scale is achieved by allowing specialization in the provision of organ transplants with the higher available supply.[50] The reduction in costs will likely save the provincial health plans significant sums of money while not creating the affluence-dominated system as suggested by the opponents of property interests in human tissues.[51]

D. Valuable Scientific Research and Exploitation

A further public policy issue was raised in the case of *Moore* v. *Regents of the University of California*.[52] John Moore suffered from a rare type of leukemia which required the removal of his spleen for the purposes of treatment. He received treatment at UCLA and samples of his blood, bone marrow, and other bodily substances were

24 J.M. Gilmour, "'Our' Bodies: Property Rights in Human Tissue" (Fall 1993) 8 Canadian Journal of Legal Studies 113 at 116.

25 Human Tissue Gift Act, see note 19, section 10.

26 See above, section 1.

27 As an aside, a statutory drafting analysis implies that "body parts" and "tissues" are not synonymous. The inclusion of the terms "tissues," and "body parts" means that "tissues" should not include "body parts" as that would render those terms invalid. Therefore, to give all the words meaning, then the proper interpretation would have "body parts" only applying to items which are not "tissues". This provision has yet to be litigated and as a result, there is no additional information as to how this provision would be interpreted.

28 Gilmour, see note 24, at 116-17.

29 It is illegal to purchase, sell or handle human tissue. However, the conversion of materials obtained legally is not addressed in any provision of the Act. Finally, "conversion" requires that there be property interests at one time. That property interest was not created by the statute.

30 Gilmour, see note 24, at 117.

See also: B.M. Dickens, "The Ectogenic Human Being: A Problem Child of Our Time" (1980) 18 University of Western Ontario Law Review 241.

31 Gilmour, see above. Note: although the possibility exists for an exemption, any actions may be found void at common law as against public policy.

32 The Ontario statute provides for penalties of up to 6 months in prison, and a $1000 fine, upon summary conviction.

33 Report on The Human Tissue Act, see note 21, at 23.

34 See above.

35 See above.

regularly taken for testing. During repeated return visits to UCLA, tests identified that Moore's tissues could be converted into a "cell line" which had unusually high immune chemicals. This "cell line" was of great value to the pharmaceutical community and consequently a patent was awarded to the researchers who later assigned that patent back to UCLA. Moore was later asked to "voluntarily" sign over the rights in his tissues and research flowing from those tests. At this point Moore asserted a claim to the research work reportedly worth $3 million (with royalty-type payments up to ten times that amount). Moore claimed ownership in his cells and their derivatives and a breach of informed consent.

The Court in *Moore* was concerned that the recognition of a property right in Moore's spleen cells would discourage scientists from conducting socially valuable research. In addition, recognition of a property right would interfere with free trade of information essential to useful scientific progress. Exchange of medical information is a valid social objective as it leads to greater scrutiny of samples which may lead to scientific discovery. By establishing property rights, it is felt that scientists would either be "scared" or administratively restrained from engaging in independent research which may have legal consequences.

Moore also considered the prevention of unremunerated exploitation. People are outraged when confronted with the possibility of such a loss of control over their bodies, or the bodies of loved ones. As the California Court of Appeal noted in *Moore*, many people have moral, ethical, and religious objections to research or transplants being performed on human tissue.[53] If surgery patients, such as Moore, are not allowed the right to sell their organs to medical researchers, they will lose several rights. The "victim" not only loses the right to claim the profits reaped from the use of his/her organs, but will also lose the best means of controlling the disposition of the organs.

The moral and ethical concerns may also be mitigated against by the fact that the legal system is inherently ill-equipped to deal with such ethical, moral and scientific questions.[54] It is suggested that the recognition of even limited property rights in the human body would among other things lead to the establishment of a right to bodily privacy.[55] This would have the effect of creating a greater sense of value in the human body than is currently present in society. This is clearly a benefit of *any* regulation (whether or not it establishes complete property rights in human tissues).

Potential Implementations of Property Rights in Human Tissues

Given the above policy concerns, it is evident that the issue of property rights in human tissue requires further discussion, and the next logical step is a discussion of the potential implementations of property rights in human tissues. While few authors have yet considered how to implement these property rights, Judy Ogden has provided a comprehensive study of the area and this paper places notable reliance on her study.[56]

36 See above at 27.

37 See above at 28.

38 Gilmour, see note 24, at 136.

39 Mortinger, see note 13, at 508.

40 See above at 508.

41 See above at 510.

42 See above at 510.

43 See above at 510-11.

44 See above at 509.

45 See above at 509.

46 M. Parkin & R. Bade, *Microeconomics: Canada in the Global Environment*, 2nd ed. (Toronto: Addison-Wesley Publishers Limited, 1994) at 533.

47 Mortinger, see note 13, at 511.

48 See above, at 510.

49 See: Gilmour, see note 24; Boulier, see note 4.

50 Parkin & Bade, see note 46 at 254.

51 Mortinger, see note 13, at 511.

52 *Moore* v. *Regents of the University of California*, 271 California Reporter 146 (Supreme Court of California, 1990) [hereinafter *Moore*].

Prior to trial, the defendants were successful in nullifying the claim of property rights in human tissue. On appeal the California Court of Appeal reversed the finding of the trial Court and held that Moore could indeed satisfy the claim of conversion of his property. The Supreme Court of California granted review and held that Moore did not have a cause of action for conversion, although he could proceed with the action insofar as it was based on lack of informed consent and breach of fiduciary duty. Appeal to the Supreme Court of the United States was denied.

53 Mortinger, see note 13, at 510.

54 I. Jane Churchill, "Patenting Humanity: The Development of Property Rights in the Human Body and the Subsequent Evolution of Patentability of Living Things," 8 Intellectual Property Journal 249 at 282.

55 See above.

A. Pre-Death Contracting

1. Description

Many contracts made pre-death, for the care of the body post-death, are honoured. In actuality, their legal enforceability is highly questionable. The body, after death, is treated under law as a form of quasi-property which is inheritable under statutes governing intestate succession.[57] To increase the likelihood that a person's pre-death intent to donate organs is honoured, it would be important to give those intentions legal significance. Either consent may be extended to cover the organ/tissue donation post-death, or contracting may be allowed to cover organ/tissue donation (in addition to numerous other post-death arrangements).[58] Table One documents the process under this option.

Canadian courts have been hesitant to allocate property to body parts …

TABLE ONE

STEP:	DESCRIPTION:
1	A purchaser and seller arrange for the purchase of the seller's compatible organ.
2	The contract between the two parties is signed and consideration is provided.
3	The contract is subject to the condition precedent that the seller dies.
4	When the seller dies, the transaction is completed by the estate of the deceased.

2. Advantages and Disadvantages

The advantages of this process are significant. Minor changes in legal theory and practice are required.[59] People would not have total property rights in their bodies; rather, the right would be limited to human tissue issues, post-death.[60] The implementation would also be straightforward, requiring provincial statutes to be only slightly modified. Finally, this option has a measure of political feasibility. The extension proposed would be consistent with the current widespread support for personal autonomy and related Charter arguments.[61]

One disadvantage of this method lies in the difficulty in ascertaining the genuine nature of the contract.[62] In addition, an administrative problem exists with regards to ensuring that the evidence of intent to donate is delivered in a timely fashion to medical personnel.[63] Despite these concerns, it appears that the advantages of this method outweigh its disadvantages, and this option may be a moderate position that finds common ground between the two extremes of ownership in human tissues.

Irrevocable Trusts

1. Description

The option of using an irrevocable trust is grounded in existing trust law. The essential idea is that potential donors would be given some incentive, payable currently or in the future, to make an irrevocable commitment to donate their tissues or organs at the time of their death.[64] The promise could be evidenced in various ways, such as a national data bank or a discrete mark (tattoo).[65] It would also be possible to assign the interest, for monetary value, to others. Table Two summarizes a possible transaction under this option.

56 J.S. Ogden, *Improving Human Organ Availability for Transplantation: Legal Paradigms and Policy Options* (Ann Arbour: UMI Dissertation Services, 1996). Ogden's study is statistical in nature and generally considers technical implementations rather than policy concerns. Her study uses survey results to determine the feasibility of each potential implementation option. This paper relies on measures of efficiency rather than statistical data. As well, it should be noted that Ogden's study is based on American law, and that this paper suggests implementations which are practicable in the Canadian legal environment.

57 See above at 125.

58 See above.

59 See above at 129.

60 See above at 130.

61 See above.

62 See above at 127.

63 See above.

64 See above at 131.

65 See above.

TABLE TWO

STEP:	DESCRIPTION:
1	The purchaser buys the rights to several compatible organs. Financing is obtained as required.
2	The purchaser pays for the right to the organ after the death of a donor.
3	The donors hold the organs in trust until one of them dies.
4	When one compatible donor dies, the benefit vests in the beneficiary upon the execution of the trust.
5	The transplant takes place.
6	The remaining organs being held in trust can effectively be assigned to other persons in need of that particular organ.
7	The remaining beneficial interests are conveyed for consideration to another party or parties.
8	The purchaser of the original organ pays for the outstanding financing from the proceeds of step 7.

… people often feel uncomfortable about dealing in human organs …

2. Advantages and Disadvantages

The key advantage of this option is that it is firmly grounded in traditional trust law doctrine, which is widely understood. Also, it enables a large pool of organ donors to be reached.[66] The process avoids the unsavoury concept of organ "trading," by allowing only the trade of rights to the organ once a person is deceased and thus creating a "futures-type" market in human tissues.[67] A financial incentive may motivate a larger segment of the public to donate than if donation was voluntary. In terms of dealing with research and scientific development, the tissue removed after death, for payment in the present.[68] Therefore, it would not impede scientific discovery and would provide for "fair" compensation.

This option has few disadvantages. The major concern is that the creation of a futures market would require strong regulatory mechanisms for control over the market.[69] The requirements of the regulatory mechanism would include guarantees of voluntariness, and requirements for non-coercive marketing of organs and tissues.[70] Further, there may be issues relating to whether the donor has a fiduciary duty to protect and keep healthy his or her body or organs. Similar to the way in which professional athletes are restricted in their personal lives, future donors may be restricted from engaging in dangerous activities. Relevant legal tests, however, already exist in other legal practice areas, such as criminal law, contract law and evidence. Imposition of fiduciary duties may be regulated through statute, and may also be subject to suitable compensation. This option is capable of meeting all relevant policy considerations and, given the proper implementation of a regulatory scheme, can be politically feasible.

Regulated Pre-Death Sales

1. Description

This proposed option would allow the body to be treated as the property of its inhabitant prior to death. This is by far the proposal with the widest scope.[71] Its attraction is the potential for compensation for an organ unneeded by a person prior to

66 See above at 135.
67 See above.
68 See above.
69 See above at 136.
70 See above.
71 See above at 138.

death. Currently organs, such as kidneys, are removed prior to death, but with no financial incentives.[72] This proposed implementation would add the benefit of private financial remuneration. Table Three documents a possible transaction under this method.

TABLE THREE

STEP:	DESCRIPTION:
1	A purchaser and seller arrange for the purchase of the seller's compatible organ.
2	The contract between the two is signed and consideration is provided.
3	There is no condition precedent and consequently the execution of the tissue removal can be either now or at some time in the future.
4	The tissue is implanted or studied by the purchaser and the transaction is completed at that time.

… there are indications that the market price for organs will decrease as the supply of organs increases.

2. Advantages and Disadvantages

The advantages of this system are that benefits accrue directly to the donor, thus providing a powerful incentive to donate. However, there are several inherent disadvantages, the greatest relating to political feasibility. Public concern about organ sales is presumably based on the commoditization of the body and the political abuses of such a policy.[73] In addition, social structures and institutions would have to be redeveloped to create a regulatory market to prevent misuse of this system.[74] These disadvantages make it unlikely that this option would ever be implemented by provincial legislatures.[75]

Recognition of "Right to Commerciality"

Description

Moore enunciates the idea that a person has a "right to commerciality." This means that a person has the right to the commercial benefits of his/her body parts through an analogy to the right of publicity.[76] In contrast to a person's right to "privacy," the right of "publicity" protects the monetary value of a celebrity's name, likeness and *distinctive characteristics*.[77] Courts endeavour to protect the unique traits of an individual from unauthorized commercial exploitation, and by analogy, a person could be allowed to claim a "right of commerciality" in the part of the body when that part is exploited for profit by an unauthorized person.[78]

This method operates primarily as a remedial measure, by indirectly recognizing property interests in a person's tissues. Table Four documents the way in which people can be compensated for use of their tissues.

72 See above.

73 See above.

74 See above at 140.

75 See above.

76 See: *Ali* v. *Playgirl, Inc.* 447 F.Supp. 723 (United States District Court, S.D. New York, 1978); *Gould Estate* v. *Stoddart Publishing Co.* (1996), 30 Ontario Reports (3d) 520, [1995] Ontario Journal No. 3925 (Ontario Court of Justice, General Division); *Krouse* v. *Chrysler Canada Ltd. et al.* (1974), 1 Ontario Reports (2d) 255, [1972] 2 Ontario Reports 133-154 (Ontario Court of Appeal); *Horton* v. *Tim Donut Ltd.*, [1997] Ontario Journal No. 390 (Ontario Court of Justice, General Division); *McCreadie* v. *Rivard*, [1995] Ontario Journal No. 3117 (Ontario Court of Justice, General Division).

77 Mortinger, see note 13, at 513.

78 See above at 513.

TABLE FOUR

Step:	Description:
1	The donor is involved in a procedure in which tissues are removed either for testing or study.
2	The organ or tissue is then tested and utilized for its intended purpose.
3	Should the intended purpose yield a profitable result (any research that earns profit), there can be some prior agreement (between the "donor" and the researcher) as to the compensation.
4	Should the compensation not be in accordance with the agreement, then the donor can bring a statutorily recognized cause of action to recover his/her lost benefits.

People are outraged when confronted with the possibility of such a loss of control over their bodies …

1. Advantages and Disadvantages

Application of the right of commerciality in the context of human tissues may avoid several key objections raised by those who oppose the sale and trade in body parts and tissues.[79] The application of such a rule would not lead to a property interest in organs that are used for pure, non-profit research or transplant.[80]

This option may not increase the volume of donated organs, leaving supply stagnant at a point below equilibrium and far less than demand. While this option would prevent the policy concern of "exploitation" from arising, it does not comprehensively address the problem. It may provide an acceptable transitional position given conservative political attitudes, but it is insufficient to satisfy the greater policy objects of motivating the public to trade and efficiently allocate organs.

Further, by viewing the human body as a commercial vehicle, an argument can be made that the human body is to be inherently devalued. If the body is viewed as a production facility for biological materials then there is the potential that the body will no longer maintain the same "value" and that the degeneration of the human body is not a desirable social by-product.[81] The alternative argument is that the introduction of an explicit commercial inducement for biotechnology allows those who make the research possible at a fundamental level to receive the benefit of that research. The "right to commerciality" approach would allow the sharing of the profits without actually allowing a person fully alienable rights in his or her body.[82]

Conclusions

Although the definition of "property" is very broad, it is not generally broad enough to encompass the human body as property. As this paper discussed, Canadian common law does not acknowledge property interest in the body, although there is a tenuous representation in tort law. In addition, provincial legislation which regulates the transfer of human bodies and their parts tends to restrict property interests and prohibits commercial transactions in tissues. However, a number of policy concerns give rise to the need to develop some concept of property interests in human organs and tissues.

While this paper has raised several possible solutions to guide law reform in the area, the best option appears to be the creation of irrevocable trusts in human tissues. This option addresses the majority of policy concerns both for and against property in

79 See above at 514.

80 See above at 514.

81 B. Hoffmaster, "Between the Sacred and the Profane: Bodies, Property, and Patents in the *Moore* Case" (1993) 7 Intellectual Property Journal 115 at 131.

82 See above.

human tissues, while requiring the fewest alterations to current legal doctrines. Although this alternative appears to be best, further discussion is necessary to address regulatory changes that must be implemented. A logical "next-step" is to engage in a study that will evaluate the public's views in order to enact the best legislation for the current social mores.

To conclude, as medical technology advances, the issue of property rights in human tissues becomes a pressing concern.[83] Such property rights do not currently exist in Canada, and if they are to be created, a very complex set of policy issues must be reconciled. Statutory reform is recommended to implement a basic regulatory regime for property rights in human tissues. It is preferable for legislative bodies, which theoretically reflect the public's mores, to regulate to a comfortable level, rather than allowing this very complex matter to go before the courts where issues may be determined based on distorted and misused principles of law.

83 Some issues not discussed in this paper include cloning of mammalian tissues and genetic engineering. Recently, technology has allowed the cloning of tissue from a grown mammal, presenting interesting property issues regarding potential application to human beings. Questions of ownership (which are beyond the scope of this paper) would arise if a person could use his or her tissue to create another human being; for example, would the tissue donor "own" the product of the tissue? Another example is the recent approval in Canada of the sale of skin manufactured from human cells. These biotechnology developments add increased pressures on legislatures to address property issues in human tissues.

Protection of Health Information Privacy: The Challenges and Possibilities of Technology

FEATURE ARTICLE

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Legal and philosophical interest in the right to privacy has intensified in recent years along with the rapid development of new technologies. Even the famous early article by Warren and Brandeis[1] was written in response to concerns about technological innovations of the day – photography and surveillance technologies – and their use to invade the private lives of individuals.

A century later, these concerns remain, but many others have joined them. Advances in information and communications technology have increased our ability to collect, store and transmit data about individuals. While these advances are useful in many positive ways, some see them as bringing us closer to an Orwellian dystopia where "Big Brother" can watch and record the actions of every individual, and where the individual has lost control over information about herself and thus over her very life. As a reaction to these concerns, lawyers and academics have been attempting to formulate theories and policies to define the rights of individuals and the limits on the use of technology by government and other organizations with respect to personal information.

Among the categories of personal information which may be at issue in these analyses, health information is of particular interest for a number of reasons. First of all, it is widely recognized that the information which may be contained in a person's medical records is among the most sensitive kinds of personal data,[2] and thus carries serious risks for personal privacy. In addition, the privacy of health information is a universal concern which, to a greater or lesser extent, affects every member of society. In part because of these two points, the medical profession and the law has traditionally placed a high value on the confidentiality of medical information and the relationship between health care providers and their patients. Recently, this ethic has been challenged by developments in information and communications technology and by

1 S. D. Warren & Louis D. Brandeis, "The Right to Privacy" (1890) 4 Harvard Law Review 193.

2 "Health care information is perhaps the most intimate, personal, and sensitive of any information maintained about an individual." L. O. Gostin et al., "Privacy and Security of Personal Information in a New Health Care System" (1993) 270:20 Journal of the American Medical Association 2487 at 2487.

...it is widely recognized that the information which may be contained in a person's medical records is among the most sensitive kinds of personal data, and thus carries serious risks for personal privacy.

changes in the structure of the health care system. The issue is all the more difficult because there are many legitimate and important reasons for the use and disclosure of health information, including the provision of health care, monitoring and improving quality of care, promotion of public health and the efficient administration of costly health care systems.

As a result of this tension, the past few years have seen intensified academic and legislative activity related to the issue of confidentiality in health care. The challenge is not only to clarify the extent and the bearers of duties to safeguard privacy, and to reconcile these duties with the efficient and effective delivery of health care services – these concerns, while difficult and in need of resolution, are not new. Concerned persons are also now struggling to identify and deal with the effects of developments in

3 See e.g. S. B. Petersen, "Your Life as an Open Book: Has Technology Rendered Personal Privacy Virtually Obsolete?" (1995) 48 Federal Communications Law Journal 163 at 164: "Information privacy is the right to control how information about oneself is used by those to whom it is disclosed." Westin defines privacy as the "claim of individuals, groups and institutions to determine for themselves when, how and to what extent information about them is communicated to others." A. Westin, *Privacy and Freedom* (New York: Atheneum, 1967) at 32.

4 Contemporary knowledge of genetics also means that human tissue and the genetic information it contains may be traced to the individual, making the concept of "non-identifiable" samples or genetic data essentially obsolete (L. O. Gostin, "Genetic Privacy" (1995) 23 Journal of Law, Medicine & Ethics 320 at 322). This is one of the ways in which advances in genetics pose unique challenges for the privacy of health information – a fascinating topic which would require a paper of its own to do it justice. See e.g. the article by Gostin cited above and others in the same volume; R. Wachbroit, "Rethinking Medical Confidentiality: The Impact of Genetics" (1993) 27 Suffolk University Law Review 1391.

5 Gostin points out that in some cases information need not be traced to a particular individual for it to be considered sensitive; the disclosure of information about a "discrete population" such as a small community or a racial or ethnic group may also affect valid interests. L. O. Gostin, "Health Information Privacy" (1995) 80 Cornell Law Review 451 at 520. See also E. W. Clayton, "Panel Comment: Why the Use of Anonymous Samples for Research Matters" (1995) 23 Journal of Law, Medicine & Ethics 375. It is still personal information, however, which poses the greatest threat to privacy.

communications and especially information technology on patients' privacy. Despite the increased attention these matters have received, there is (perhaps predictably) as yet no firm consensus on how we should proceed. The uncertainty is no doubt due in part to the range of competing interests and objectives to be balanced, but also reflects long-standing disagreements about the nature and value of privacy, and the relationship between technology and society. It will be the aim of this article, after a very brief review of existing laws and policies on privacy, to examine some of the technological challenges to privacy in health care and proposed responses in the context of some of these larger debates about privacy and technological progress.

I. Data Protection: Legal and Philosophical Perspectives

A. The Concept of Privacy

Privacy is a broad concept which has been defined in many different ways. It may encompass a number of aspects, but generally, refers to the right or capacity to shield some aspects of one's life from the scrutiny of others, to draw a boundary between the public and private spheres of one's existence. The particular aspect of privacy which is at issue here is sometimes referred to as "information privacy": the right to control when, how and by whom personal information about oneself is communicated to and used by others.[3] Personal information, in turn, can be defined as any information about an individual which may be identified with that individual in some way. This identification need not be by name or even by anything so obvious as an identification number; there are many ways in which information may be traced to its subject, and technology is increasing the number of ways in which this may be done, by facilitating the matching of data sets, for example.[4] Whenever data may be traced to its subject, it has the potential to reveal private information about that person and is thus considered sensitive.[5]

When we speak of invasion of privacy, there are two categories of actions and actors we may be concerned with. The first, which is perhaps the one that springs first to mind, is the unauthorized collection, use or disclosure of information, which may occur when the security intended to protect the data is inadequate, and persons who are not authorized to do so obtain access to personal information. Unauthorized access may also occur when staff members breach their own duties of confidentiality and allow access by others, who then use the information for various purposes.[6] Although such violations have received much public attention, the second category, involving authorized uses, may be equally important. Some maintain that "the most serious threats to privacy come from authorized users of health information."[7] The sheer number and variety of authorized users means that widespread dissemination of personal information is inevitable, and this makes it difficult to control the use of such information.[8]

Opinions differ as to the interests and values that are protected by a right to privacy. One view sees privacy as crucial to the protection of human dignity and personality, while the other major perspective emphasizes the importance of privacy to society and social relationships.[9] An example of the former is the well-known early article on "The

6 *The Report of the Commission of Inquiry into the Confidentiality of Health Information* by H. Krever (Toronto: Queen's Printer for Ontario, 1980) [hereinafter Krever Commission] was initially ordered in response to public outcry following reports that police officers, private investigators, and others had improperly gained access to confidential health information from hospitals and the Ontario Health Insurance Plan; see vol. 1 at 1 and c. 5-13.

7 "Health Information Privacy," see note 5 at 485.

8 See above. "The Institute of Medicine found that the number of authorized users of the computer-based record is too exhaustive to list, and would parallel the complete list of individuals and organizations associated directly or indirectly with health care." See above at 485-86.

9 F. D. Schoeman, "Privacy: Philosophical Dimensions in the Literature" in F. D. Schoeman, ed., *Philosophical Dimensions of Privacy: An Anthology* (Cambridge: Cambridge University Press, 1984) 1 at 8.

10 See note 1 at 205, 211.

11 See above at 205, 211; and at 213: "the principle … is in reality not the principle of private property, unless that word be used in an extended and unusual sense."

12 See above at 197.

13 See e.g. E. J. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" in Schoeman, ed., see note 9, 156 (originally published in (1964) 39 New York University Law Review 962).

Right to Privacy" by Warren and Brandeis, in which the interest protected was referred to as "inviolate personality,"[10] an interest distinct from that of private property[11] and broader than that protected by the law of slander and libel which "are in their nature material rather than spiritual."[12] Other authors have similarly emphasized the importance of privacy as respect for the dignity, integrity and autonomy of individuals.[13]

The second view is a more instrumentalist one. According to this view, without the protection of privacy, there is no possibility of intimacy, nor, therefore, of interpersonal relationships based on love and trust.[14] Privacy also plays an important role in the relationship between the individual and the state, and restraining the power of the government to gather and use information about the private lives of individuals is seen as an important means of curbing totalitarian tendencies of the state.[15] Recent articles have also emphasized the value of privacy for ensuring the participation of autonomous persons in a democratic society.[16]

The concept of privacy encompasses a variety of different interests, and some have questioned whether there is such a thing as a coherent interest in privacy as such.[17] They have also argued that the interests promoted by privacy, though important, are not unique, but rather are interests common to and protected by other areas of the law.[18] Various laws also offer protection against some of the harms that might follow from violations of privacy, such as the prohibition of discrimination on the basis of personal characteristics. The ongoing debate concerns the question of whether there are also distinct interests and harms which can only be protected by an independent right to privacy.

B. Legal Protection of Personal Information

The law relating to the protection of personal information is very complex,[19] and varies considerably among jurisdictions. For example, United States courts have recognized a limited cause of action in tort for invasion of privacy.[20] American judges have also found that a right of privacy, while not explicitly stated in the Constitution, is implicit in some of its provisions.[21] In Canada, however, only a narrow category of cases have protected an individual's "reasonable expectation of privacy" in the context of the right in section 8 of The Charter of Rights and Freedoms to be "secure against unreasonable search and seizure."[22] There have been some suggestions that the section 7 guarantee of life, liberty and security of the person may include privacy interests, but "the Supreme Court seems reluctant to make more than vague pronouncement on the matter."[23] Canadian courts have also been unwilling to recognize an independent tort of invasion of privacy, although they have applied other categories such as trespass, nuisance, libel, slander, injurious falsehood or passing off to provide remedies to plaintiffs in many of the same types of cases.[24]

In several provinces in Canada, provincial statutes create a civil cause of action in tort for the invasion of privacy,[25] and various federal and provincial statutes protect privacy in specific contexts.[26] Information held by the government is treated separately under the federal Privacy Act[27] and provincial freedom of information acts,[28] which

14 C. Fried, "Privacy" in Schoeman, ed., see note 9, 203 (originally published in (1968) 77 Yale Law Journal 475); R. S. Gerstein, "Intimacy and Privacy" in Schoeman, ed., see note 9, 265 (originally published in (1978) 89 Ethics 76).

15 See e.g. P. M. Schwartz, "Privacy and Participation: Personal Information and Public Sector Regulation in the United States" (1995) 80 Iowa Law Review 553 at 560.

16 See above; S. Simitis, "Reviewing Privacy in an Information Society" (1987) 135 University of Pennsylvania Law Review 707.

17 Schoeman, see note 9 at 5.

18 E.g. W. L. Prosser, "Privacy" in Schoeman, ed., see note 9, 104; J. J. Thomson, "The Right to Privacy" in Schoeman, ed., see note 9, 272.

19 The law on privacy was once compared to "a haystack in a hurricane" (*Ettore* v. *Philco Broadcasting Co.,* 229 F. 2d 481 (3d Circuit 1956), quoted in Prosser, see above at 117.) This survey, necessarily brief, will not attempt to untangle all the various strands of the law relating to privacy, nor does it pretend to be exhaustive.

20 The common law cause of action in the United States is based on four categories set out in an article by Dean Prosser: intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; public disclosure of embarrassing facts; publicity which places the plaintiff in a false light; and appropriation of the plaintiff's name or likeness, see note 18 at 107.

21 See e.g. *Griswold* v. *Connecticut*, 381 United States [Reports] 479 [1965] (Supreme Court); *Whalen* v. *Roe*, 429 United States [Reports] 589 [1976] (Supreme Court).

provide protection against the disclosure of personal information and allow an individual to access information about herself (as well as other publicly held information). Quebec is unique in that it provides an explicit right to privacy in its Charter of Human Rights and Freedoms,[29] limits the right of persons to collect, use and disclose personal information about others in the Civil Code,[30] and, most notably, is the only province with legislation protecting personal information held by the private sector.[31]

Internationally, the past few decades have seen the development of standards for the protection of personal information. The right to privacy is recognized in several international agreements on human rights, including the International Covenant on Civil and Political Rights[32] and the European Human Rights Convention.[33] Canada has also formally adopted the OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data (OECD Guidelines)[34] which were developed in 1980 to help harmonise national privacy legislation and thereby facilitate the international flow of data.[35] Although the OECD Guidelines are not binding, they have been extremely influential in the development of laws and policies on personal information throughout the world, including New Zealand's Privacy Act 1993.[36] The Guidelines set out eight basic principles:[37]

Collection limitation – data should be collected by fair and lawful means, and should be limited.

Data quality – data should be relevant, accurate, complete, and up to date.

Purpose specification – the purposes for which data is collected should be specified at the time of collection and use should be limited to those and compatible purposes.

Use limitation – personal data should not be used or disclosed for other than specified and compatible purposes except with consent or by legal authority.

Security safeguards – personal data should be secured against loss, unauthorized access, etc.

Openness – policies and practices should be open, and people should be able to find out what information is being kept and used for what purposes and by whom.

Individual participation – the individual should have the right to know whether a data controller has information about him; to have timely, affordable and effective access to that information; and to challenge its accuracy.

Accountability – the data controller is accountable for compliance with these principles.

The principles, which have come to be called, collectively, "fair information practices," include some protection for personal privacy but also a number of other related concerns, for example ensuring the accuracy of information and transparency of policies and procedures.

C. Privacy of Health Information

Health law has always placed a high value on the autonomy of individual patients. This shows itself mostly in the requirement of informed consent and the idea, expressed most famously by Justice Cardozo in *Schloendorff* v. *Society of New York Hospital* that

22 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11 [hereinafter Charter]. See e.g. *R.* v. *Duarte* [1990] 1 Supreme Court Reports 30 (Supreme Court); *R.* v. *Dyment* [1988] 2 Supreme Court Reports 417 (Supreme Court of Canada).

23 D. C. Kratchanov, "Personal Information and the Protection of Privacy" in *Ensuring Privacy Protection on the Information Highway* (Toronto: Insight Press, 1995) 97 at 108.

24 G. H. L. Fridman, *The Law of Torts in Canada*, vol. 2 (Toronto: Carswell, 1990) at 192.

25 Privacy Act, Revised Statutes of British Columbia 1996, c. 373; Privacy Act, Revised Statutes of Saskatchewan 1978, c. P-24; Privacy Act, Re-enacted Statutes of Manitoba 1987, c. P-125; Privacy Act, Revised Statutes of Newfoundland 1990, c. P-22.

26 See Fridman, see note 24 at 197-98. See also Kratchanov, see note 23 at 110-11.

27 Revised Statutes of Canada 1985, c. P-21.

28 E.g. Freedom of Information and Protection of Privacy Act, Statutes of Alberta 1994, c. F-18.5.

29 R.S.Q. 1977, c. C-12 (Supp. 1993), section 5.

30 S.Q. 1991, c. 64, sections 35-41.

31 Act Respecting the Protection of Personal Information in the Private Sector, S.Q. 1993, c. 17. For a discussion of the Quebec legislation, see P.-A. Comeau & A. Ouimet, "Freedom of Information and Privacy: Québec's Innovative Role in North America" (1995) 80 Iowa Law Review 651.

32 16 December 1966, 999 United Nations Treaty Series 171, article 17(1): "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

"every human being of adult years and sound mind has a right to determine what shall be done with his own body."[38] Respect for the patient as an autonomous individual is also implicated in the physician's duty not to breach the confidence of her patient and the patient's ability to claim a measure of control over her own health information.[39] The instrumental value of privacy in the health care setting involves the importance of a patient's trust in his care providers. If a patient fears disclosure of personal information, he may avoid seeking treatment[40] or offer false information, potentially harming both his own health and that of others.[41]

Much of the law on personal data is also applicable to medical information; for example in Canada medical records held by public institutions such as hospitals and health boards may be covered under provincial information and privacy legislation.[42] In the health care context there are additional sources of ethical and legal obligations to respect patients' privacy, however, and several jurisdictions have found it appropriate to pass separate legislation specific to health information.

Physicians have obligations to preserve confidentiality under the Hippocratic Oath and the codes of conduct of professional bodies.[43] Breach of these obligations may leave a physician open to disciplinary proceedings by those bodies. A common law action may also be brought on a number of bases,[44] including breach of confidence, negligence, breach of contract[45] and breach of fiduciary duty.[46] These actions may not be effective ways of enforcing a patient's rights,[47] and are subject to exceptions and gaps in protection.[48] Perhaps the most serious problem is that most of these duties, even if they can be effectively enforced, apply only to physicians. Dozens if not hundreds of other people may have access to any one person's health records, and the nature and extent of their duties may be unclear. Computerization of records exacerbates this problem since it may make it difficult to determine who "holds" the record and thus bears the responsibility of protecting it.[49]

In response to concerns raised by the incomplete protection provided by the common law and intensified by technological developments, several jurisdictions have developed specific laws for the protection of health data. New Zealand issued the Health Information Privacy Code 1994[50] under its Privacy Act 1993[51] which sets out twelve health information privacy rules, incorporating the OECD principles as well as more detailed provisions on use and disclosure, and limits on the use of unique identifiers. The past few years have seen a number of proposed acts in the United States, including the Fair Health Information Practices Act 1997,[52] the Medical Privacy in the Age of New Technologies Act[53] and the Medical Records Confidentiality Act of 1995.[54] In Canada, no similar legislation yet exists, although a number of provinces are considering the possibility of enacting health information legislation.[55] In June 1997 a proposed Health Information Protection Act was introduced in the Alberta Legislature.[56] The bill is currently being studied by a government committee, and the government has invited public comment in anticipation of the bill being reintroduced in 1999. More recently, in

33 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 United Nations Treaty Series 221, article 8(1): "Everyone has a right to repect for his private and family life, his home and his correspondence."

34 Reproduced as Appendix 1 in J. Michael, *Privacy and Human Rights: An International and Comparative Study, with Special Reference to Developments in Information Technology* (Paris: UNESCO Publishing, 1994) at 139-44. (OECD is the Organization for Economic Cooperation and Development.)

35 Kratchanov, see note 23 at 112. Canada adhered to the Guidelines in 1984.

36 Statutes of New Zealand 1993, No. 28.

37 The principles appear as articles 7 to 14 of the OECD Guidelines, see note 34.

38 (1914), 105 North Eastern Reporter 92 (New York Court of Appeal) at 93.

39 *McInerney* v. *MacDonald*, [1992] 2 Supreme Court Reports 138 (Supreme Court of Canada) at 148: Health information is "information that goes to the personal integrity and autonomy of the patient." The patient "has a 'basic and continuing interest in what happens to this information, and in controlling access to it.'"

40 S. E. Corsey, "The American Health Security Act and Privacy: What Does it Really Cost?" (1994) 12 Journal of Computer and Information Law 585 at 599.

41 This is a major issue in public health policy, since it is feared that mandatory reporting of communicable and sexually transmitted diseases, while important for public health authorities, may deter people from seeking diagnosis and treatment.

late 1997 the Ontario Ministry of Health released a draft Personal Health Information Protection Act, 1997,[57] which is similar to the Alberta bill in many respects.

II. Technological Developments and Their Impact on Privacy

Although concerns about privacy are common to all societies at various stages of technological development,[58] advances which have taken place over the last few decades are seen as greatly increasing the potential for the invasion of privacy. It is increasingly difficult to draw strict boundaries between various types of technology, but two broad categories, communications and information technology, will be examined here.

A. Communications Technology

Although most attention has been focussed on information technology, "a revolution in communications technology has redirected policy attention to another issue that has long been pertinent – the protection of personal communication channels."[59] New technologies such as the facsimile (fax), cellular communications and various types of computer networks have increased the ease and speed of transmitting information in numerous forms and in unprecedented quantities. The benefits of these for improving the quality and efficiency of medical care are unquestionable: they allow convenient and accurate communication for consultations among health care providers, and between care providers and their increasingly mobile patients. A whole field, known as "telemedicine," is developing to make use of communications technology to provide better care to patients in remote locations, and to allow consultation with specialists without the necessity of costly and difficult travel.[60] Telemedicine is also increasingly being used in the education of health practitioners.[61] All of these uses are important in improving the quality of care and access to care, and in reducing costs – it has been estimated that "America's health care expenses might be reduced by more than $36 billion annually with more efficient use of telecommunications."[62]

Confidentiality concerns have been raised with respect to a number of aspects of such communications. For example, do transfers of data for specialty consultations require the consent of the patient?[63] What about transmission of images or other information for teaching purposes? In addition to these deliberate disclosures, there is always the potential for interception and use of data by unauthorized persons.[64] Cellular telephones, for instance, are particularly vulnerable to interception.[65] Interception may occur through the intentional efforts of the unauthorized persons or by mistake, as, for example, when information is accidentally sent by fax to someone other than the intended recipient. Policies will have to be developed to deal with these potential threats to privacy.

B. Information Technology

Most of the recent discussions about the protection of personal information and in particular health information have focussed on the impact of developments in information technology and the increasing use of computerized record systems. "The health care industry is in the midst of an era of unprecedented computerization of medical records

42 See e.g. Freedom of Information and Protection of Privacy Act, above note 28, section 1(1)(g), (j). The British Columbia Freedom of Information and Protection of Privacy Act, Statutes of British Columbia 1992, c.61, since 1995 has covered, in addition, professional governing bodies such as the College of Physicians and Surgeons. Freedom of Information and Protection of Privacy Act (Amendment), Statutes of British Columbia 1993, c.46, section 28(6), section 30. E. Shaw, J. Westwood & R. Wodell, *The Privacy Handbook: A Practical Guide to Your Privacy Rights in British Columbia and How to Protect Them* (Vancouver: B.C. Civil Liberties Association, 1994) at 103. A similar amendment is proposed for Alberta; see "Information and Privacy Legislation Being Extended First to Education and Health Care," Government of Alberta News Release, August 27, 1997.

43 W. H. Minor, "Identity Cards and Databases in Health Care: The Need for Federal Privacy Protections" (1995) 28 Columbia Journal of Law & Social Problems 253 at 278-79; Shaw, Westwood & Wodell, see above at 100.

44 Shaw, Westwood & Wodell, see note 42 at 102; "Health Information Privacy," see note 5 at 509.

45 Courts may incorporate a duty of confidentiality into an implied contract between physician and patient; "Health Information Privacy," see note 5 at 509 n. 292; S. Rodgers-Magnet, "Common Law Remedies for Disclosure of Confidential Medical Information," "Appendix 1" in Krever Commission, see note 6, vol. 3, 297 at 323.

46 *McInerney* v. *MacDonald*, see note 39 at 148-50.

47 Shaw, Westwood & Wodell, see note 42 at 102.

and data."[66] Computerizing records is part of many health care reform proposals, since it would not only increase efficiency but also significantly cut costs.[67] However, the general public is apparently nervous about the potential effects of these changes: in recent polls 85 per cent of people said that protecting confidentiality of medical records was very important to them, and 90 per cent believed that computers make it easier for someone to improperly obtain personal information.[68] While there is some disagreement about the exact nature and extent of the impact of technology on the protection of privacy, there is no doubt that "pervasive use of computers has enhanced society's ability to collect, store, retrieve, process, and disseminate data on individuals, quite often without the individual's knowledge and consent."[69]

For instance, the ease of recording and storing information in computer databases may mean that information will be collected and retained that might not have been otherwise.[70] The centralized storage of large amounts of information also increases the likelihood and severity of breaches of privacy. Traditionally, records have been kept in manual form in a number of different (and usually secure) locations, making it difficult to obtain information and especially to obtain and combine a wide range of data from various sources.[71] Unless special protections are built into the system, access to a database can provide an authorized or unauthorized user with an unprecedented amount of information. Even when different sets of data are held in different systems, it is often possible to "link" or "match" the data for a particular individual using some identifier. This practice, known as computer matching, presents a serious threat to personal privacy since it allows a user to compile a detailed dossier or profile on an individual by linking data from many different sources,[72] and thereby acquire extensive knowledge about that person,[73] without the individual's knowledge or consent. Matching may also detach information from its context and lead to the proliferation of false or misleading information.[74]

As a result, the means by which health information is identified in a computer system has become extremely important. In health care, the use of unique identifiers (a name, number or other unique marker for each individual)[75] would allow a comprehensive record for each patient to be compiled from information scattered geographically and over the years. These "patient-based longitudinal records," which would contain "all data relevant to the health of an individual … collected over a lifetime,"[76] would carry obvious benefits for quality of care and administrative efficiency. However, the additional threat to privacy means that limits on the use of unique identifiers may be appropriate.[77] Of special concern is the use of an identifier that would allow links to be made between health records and other forms of personal data. For example, privacy advocates in the United States strongly resisted the proposed use of the social security number (SSN) as an identification number for the reformed health care system.[78] Because of the widespread use of the SSN by both government and private entities, the SSN may be used to access and link information about many aspects of a person's life.[79] Those concerned about privacy are alarmed at the prospect of this pool of information

48 "Health Information Privacy," see note 5 at 509-11.

49 See above at 511.

50 New Zealand Privacy Commissioner, Health Information Privacy Code 1994 (Auckland, N.Z.: Privacy Commissioner, 1994). Found at http://www.knowledge basket.co.nz/privacy/health/hipcnc.htm.

51 See note 36.

52 H.R. 52, 105th Congress, 1st Session. Found at ftp:/ftp.loc.gov.pub/thomas /c105/h52.ih.txt. This bill was introduced in the House of Representatives January 7, 1997 by California Representative Gary Condit. Condit introduced earlier versions of this bill in 1994 and 1995 (H.R. 435), which were supported by industry representatives, privacy advocates and health policy experts; J. Goldman, "Statement of Janlori Goldman, Deputy Director, Center for Democracy and Technology, Before the House Committee on Government Reform and Oversight Subcommittee on Government Management, Information and Technology on Medical Records Technology," found at http://www.cdt.org/privacy/health/960614_testimony.html.

53 House of Representatives 3482, 104th Congress, 1st Session.

54 S. 1360, House of Representatives 52, 105th Congress, 1st Session.

55 See Ontario Ministry of Health, *A Legal Framework for Health Information* (Consultation Paper) June 1996; Manitoba Health, *Privacy Protection of Health Information* (Discussion Paper) May 1996.

56 Bill 30, Health Information Protection Act, 1st Sess., 24th Leg., Alberta, 1997 [hereinafter Bill 30].

57 Found at http://www.gov.on.ca/health/english/profess/phipa/phipa.html on 12 February 1998.

including intimate details about a person's health. The use of a number specific to the health care system would help to alleviate these concerns.[80]

The choice of an identifier is one issue to be considered with respect to health care cards. Developing technology has also added other issues, however. Various types of cards have been used for identification and insurance purposes in the health care system for many years. Typically, these cards carried basic information that was printed or embossed on the card.[81] Several types of "advanced card technologies" ("smart cards") are now available, including magnetic strip, integrated circuit and optical storage cards.[82] These cards can not only store much larger amounts of information (including images such as x-rays, for optical storage cards), but can also process information and be used to access central databases.[83] The cards could be used for identification, insurance, communication between care providers and as a portable, comprehensive patient records, which could be valuable for emergency and outreach care.[84] Pilot projects have already begun testing the use of such cards in many countries, including Canada.[85] Reactions have been ambivalent: some fear misuse of smart cards – the cards would be vulnerable to theft or fraudulent use by third parties – while others feel that use of these cards could actually enhance individuals' control and privacy.[86]

New information technologies also pose significant challenges for the definition and enforcement of duties to protect privacy. For example, since a centralized database containing health records could be accessed from a number of different points in a connected system of computers, in contrast to a paper record which is physically located in one place, it may be difficult to determine who should bear the primary responsibility for ensuring that no unauthorized access takes place. Furthermore, physical security measures,[87] while essential, will not be sufficient to protect computerized records; efforts must be made to build security into the system itself. Another enforcement problem is that with computerized data, a breach of security may be difficult or impossible to detect. "In an electronic, on-line system, the data can be viewed, studied, and downloaded from any location. The viewer of the information has not acquired any physical materials, making any theft virtually undetectable."[88]

C. Using Technology to Protect Privacy

Although the literature has chiefly emphasized the threats to privacy that are posed by new technologies, some authors recognize that technology also has the potential to protect personal information. While no system can ever offer perfect security, "[p]resent health information technology can provide appropriate safeguards and can protect health information" if it is appropriately designed, monitored and maintained.[89] In addition to all the usual measures to secure manual records, such as limiting physical access and placing controls on staff members with access to the records,[90] security features can be built into the software of computerized information systems.[91] The extent to which new technologies threaten privacy depends to a large extent on the implementation of such measures.

58 See R. F. Murphy, "Social Distance and the Veil" in Schoeman, ed., see note 9, 34 (originially published in (1964) 66 American Anthropologist 1257); A. Westin, "The Origins of Modern Claims to Privacy" in Schoeman, ed., see note 9, 56 (originally published as part of A. Westin, *Privacy and Freedom* (New York: Atheneum, 1967)). Of course, what is considered private may vary among societies.

59 F. W. Weingarten, "Communications Technology: New Challenges to Privacy" (1988) 21 John Marshall Law Review 735 at 735.

60 D. D. Bradham, S. Morgan & M. E. Dailey, "The Information Superhighway and Telemedicine: Applications, Status, and Issues" (1995) 30 Wake Forest Law Review 145. Some of the applications include electronic information exchange, image transfers (e.g. ultrasound, x-rays) and consultation by telephone or videoconferencing. See above at 152-59.

61 The first telemedicine project, dating back to the 1950s, involved teleconferencing lectures transmitted between state hospitals. See above at 149.

62 See above at 147.

63 See above at 162.

64 See above.

65 Privacy Commissioner of Canada, *Annual Report* 1992-93 (Ottawa: Privacy Commissioner of Canada, 1993) [hereinafter Privacy Report 1992-93] at 19-20. There are statutory and criminal prohibitions on some interceptions of private communications, e.g. in Canada Criminal Code, Revised Statutes of Canada 1985, c. C-46, ss. 183-196; Radiocommunication Act, Revised Statutes of Canada 1985, c. R-2, s.9; in the United States Omnibus Crime Control and Safe Streets Act of 1968, 18 United States Code Annotated § 2510 (West 1970 & Supp. 1987) (the "Title III Wiretap Act"); Electronic Communications Privacy Act, 18 United States

For example, "[i]n the absence of protections, the holder of an identity card that allows the retrieval of [personal] information is stripped of her ability to control the flow of personal, private information."[92] However, the ability to program a "smart card" means that it "could also be used as part of an access control system to protect personal data. The memory of a smart card could be divided into several zones, each with different levels of access and security … Several technologies are available to restrict access to sensitive data, including personal identification, user verification, and cryptography."[93] Given these protections, some claim that smart cards could actually enhance privacy and individual control of personal information. This is unlikely since the information on the card would probably be duplicated in a central database,[94] but at least a properly designed card would not significantly increase the risk to privacy.

Security features to restrict access could also be built into central databases, however. Methods to identify users and restrict access include passwords and identification numbers, physical devices such as cards and keys, and physical characteristics (fingerprints, voice sample, retina scans).[95] Differentiated levels of security could, for example, allow a physician to "have access to the complete medical file, while an individual in the billing department would only have access to that data necessary for proper billing."[96] The system, having recorded all requests for access, could produce a record of all disclosures, sometimes referred to as an audit trail, which "can help determine if there has been inappropriate or fraudulent access."[97]

Other security measures could include designating terminals for particular uses and restricting their functions to those uses, for instance data input only, or reading (but not modifying) particular types of data.[98] Alarms triggered by multiple attempts to access information would help to deter unauthorized persons,[99] and requiring medical staff to be responsible for use of their passwords (which the computer would record and report) would discourage them from disclosing their passwords to unauthorized users.[100] Various methods of encryption could also be used to make access more difficult.[101] Encryption may also be an important way of reducing the risk of interception of electronic communications.

III. Responses to Technological Developments

Priscilla Regan has described different types of responses to the development of new technologies and their impact on privacy:

> Despite the fact that it was possible to invade privacy before a particular technology was used, debate about technology and privacy inevitably revisited the question about the importance of the technology. Did the technology cause the privacy invasions? Or did technology exacerbate threats to privacy that already existed? Or was the technology itself neutral, not playing a direct role but making possible either increased privacy or diminished privacy depending on those who applied the technology?[102]

Regan goes on to define three "schools of thought on the role of technology and social change."[103] The first, the "technology determinists," believe that "technology has become an end in itself … a force subject to no external controls," and that social changes follow inevitably from technological changes.[104] The opposite view, that of the

Code § 2510 (West Supp. 1987). For a discussion of the difficulty of designing legislation to deal with rapidly changing communications technology, see R. S. Burnside, "The Electronic Communications Privacy Act of 1986: The Challenge of Applying Ambiguous Statutory Language to Intricate Telecommunications Technologies" (1987) 13 Rutgers Computer & Technology Law Journal 451.

66 Minor, see note 43 at 254.

67 Corsey, see note 40 at 586. See also Minor, above at 294: billions of dollars could be saved each year through administrative simplification, more efficient research, and fraud prevention.

68 Goldman, see note 52.

69 Petersen, see note 3 at 164.

70 L. M. Benjamin, "Privacy, Computers and Personal Information: Toward Equality and Equity in an Information Age" (1991) 13 Communications & Law 3 at 4.

71 "Health Information Privacy," see note 5 at 494.

72 Petersen, see note 3 at 168.

73 "Health Information Privacy," see note 5 at 494.

74 Simitis, see note 16 at 718-19.

75 In 1993, the Province of Alberta assigned all eligible residents a "Personal Health Number," which is a unique identifier to be kept for life by each individual. Alberta Health, *1993-1994 Annual Report* at 23.

76 "Health Information Privacy," see note 5 at 458.

77 In 1991, Ontario enacted the Health Cards and Numbers Control Act, Statutes of Ontario 1991, c.1. The New Zealand Health Information Privacy Code 1994, see note 50, limits the use of unique identifiers (rule 12).

78 "Health Information Privacy," see note 5 at 459-61. Although this debate has largely taken

"technology neutralists," is that "technology has no independent force … [and] remains under human control. It is possible to anticipate all possible effects of technological change and to choose the end desired."[105] Finally, the middle view taken by "technology realists" maintains that a "dynamic relationship" exists between technology and society and that "the actual direction of change depends on both the capabilities of the technology and the uses to which it is put." Social policy is reactive and cannot have complete control: "technology determines the range of choices, and not all consequences of a choice can be predicted."[106]

The identification of these schools of thought is useful in analyzing the various responses to technological changes in health information, although it is probably more accurate to describe the range of views as a spectrum than as a set of strict categories. At one end of the spectrum are those who maintain that technology has not effected any substantial change on the processing and use of information; computers and modern communications devices are merely new vehicles for the same operations. Therefore only the most minimal of changes is necessary, for example changing definitions in legislation to include the new forms of records, either by legislative amendment or by judicial interpretation. Until quite recently, this appeared to be the approach that was in fact taken in several areas of the law: computer programs were deemed to be literary works in copyright law,[107] and fraud and theft using computers were dealt with, however unsuccessfully, under traditional criminal statutes.[108] Even recent health information bills in the U.S. have merely broadened definitions of "protected health information" to include information "recorded in any form or medium"[109] and directed the holder of information to formulate adequate security measures.[110] The definitions of "health information" and "record" in the recent Alberta bill includes information "in any form."[111] Its definition of "anonymous individual health information" contemplates the encryption of information.[112] It is interesting to note, however, the Ontario draft act does contain some provisions specifically dealing with electronic transfer of information[113] and computer linkage of records.[114]

Although legal responses have generally been limited to these minimal modifications, there appears to be a consensus among academic writers that technological developments are resulting in substantial effects on privacy protection. Even if new technologies merely facilitate rather than cause invasions of privacy, the mere fact that technology makes serious breaches easier is significant. "It is a cliché, but nevertheless true, that the inherent inefficiency of manual filing systems was quite an effective privacy protection device until recent advances in automatic data processing. … The major change has been one of scale as well as intensity."[115] There is nearly universal agreement, then, on the fact that technology is having a substantial effect on informational privacy. However, there is much less consensus on the appropriate approach to be taken in response to these changes.

place in the U.S., similar problems have arisen in Canada; see discussion of the use of the Social Insurance Number as a health care number in Prince Edward Island, *Privacy Report 1992-93,* see note 65 at 30-31.

79 "Health Information Privacy," see note 5 at 460; Minor, see note 43 at 265-68.

80 "Health Information Privacy," see above at 461; Minor, see above at 277.

81 M. Campbell, "Advanced Technology in the Health Care Sector: Selected Legal Implications" (1992) 13 Health Law Canada 164 at 164.

82 See above at 164-65.

83 See above.

84 See above at 165.

85 "Health Information Privacy," see note 5 at 462. For examples of Canadian projects, see Privacy Commissioner of Canada, *Annual Report 1995-96* (Ottawa: Privacy Commissioner of Canada, 1996) at 6-8.

86 "Health Information Privacy," see note 5 at 463.

87 A list of recommended physical security measures for computer systems is set out in Krever Commission, see note 6, vol. 2 at 182-84.

88 "Health Information Privacy," see note 5 at 494. For a discussion of similar problems in the investigation and prosecution of "computer crimes," see M. A. Jurkat, "Computer Crime Legislation: Survey and Analysis" (1986) 2 Annual Survey of American Law 511.

89 Campbell, see note 81 at 166.

90 One physical security measure specifically suggested for computers is the use of "[l]ine-of-sight barriers … to prevent unauthorized individuals from reading terminal displays while others are using them." J. D. Cohen, "HIV/AIDS Confidentiality: Are Computerized Medical Records Making Confidentiality Impossible?" (1990) 4 Software Law Journal 93 at 111.

A. Enhancing Privacy Protection in the Information Age

A considerable amount of effort has been expended in trying to develop a legal and technological framework for protecting privacy in the context of the new methods of recording, storing and transmitting data. Institutions are being encouraged to devise and implement policies that take into account the additional challenges of technological developments.[116] As we saw above, a variety of security measures have been identified to help ensure privacy of personal data. An implicit "technology neutral" perspective assumes that although technology poses threats to privacy, the law and technology itself can be effective in countering these threats, and some even claim that "[a]utomation of health data is … an opportunity to *improve* informational privacy."[117]

Although the potential for technological and legal protections of privacy do seem promising, several factors indicate that our optimism should be cautious and qualified. To put it in Regan's terms, the more appropriate response would be a realist one which recognizes that we cannot have complete control in the face of rapidly developing technologies. Technological safeguards may be effective in making access to records difficult – perhaps even more difficult than in traditional manual record systems. However, all admit that no security system is perfect, and we must acknowledge the possibility of unauthorized access in even the best designed system. If access is obtained, the new technology makes any breach of security more serious by allowing easier access to larger amounts of data and facilitating the processing of data for use in ways not anticipated, let alone consented to, by the data subjects. The only way to avoid this problem would be to severely limit the *collection* of data so that it is simply not there to be accessed. However, this cannot be an acceptable solution, at least in the health care context, where many "powerful reasons exist for the broad collection and use of health data."[118]

Matters are further complicated if we recall the distinction between threats to privacy from authorized versus unauthorized users. The development of security measures focusses on preventing unauthorized access to information systems and their records. However, new technologies also expand the range of authorized users and uses of information, and restricting the range of authorized uses and disclosures involves much more difficult policy choices that balance individual interests in privacy with potential benefits in terms of quality of care, efficiency and public health protection.[119]

B. Is Privacy Obsolete?

In the face of these difficulties, some have taken the more radical stance that technology has made privacy impossible and that we should treat the whole notion of protecting privacy as obsolete. This deterministic attitude sees technology as driving society and social values, not the other way around.[120] Rather than keep up the futile exercise of trying to protect privacy, we should dispense with that concept altogether and turn to other, more appropriate paradigms for the management of information.

A compromise approach might retain a fairly high standard of security and privacy only for certain kinds of extremely sensitive data. For example, the American Medical

91 For a description of various physical and access and information control measures, see Corsey, note 40 at 602-604.

92 Minor, see note 43 at 256.

93 "Health Information Privacy," see note 5 at 462-63.

94 See above at 463.

95 Cohen, see note 90 at 111, n. 145.

96 See above at 111-12.

97 "Health Information Privacy," see note 5 at 492.

98 Krever Commission, see note 6, vol. 2 at 184.

99 See above at 185.

100 Cohen, see note 90 at 112.

101 Krever Commission, see note 6, vol. 2 at 185.

102 P. M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (Chapel Hill, NC: University of North Carolina Press, 1995) at 11.

103 See above.

104 See above.

105 See above at 12.

106 See above at 13.

107 Copyright Act, Revised Statutes of Canada 1985, c. C-42, section 2: "'literary work' includes ... computer programs ... ."

108 Jurkat, see note 88 at 513ff.

109 See e.g. Medical Records Confidentiality Act of 1995, see note 54, section 3(14); Fair Health Information Practices Act 1997, see note 52, section 3(3).

110 Medical Records Confidentiality Act of 1995, see above, section 111; Fair Health Information Practices Act 1997, see above, section 105.

111 Bill 30, see note 56, sections 1(1)(g), (n).

112 See above, section 1(1)(b): "'anonymous individual health information' means health information in which identifying facts have been removed or encrypted."

113 See note 57, section 4(5).

114 See above, Part IV.

Record Association guidelines recommended that at least in some facilities, data on HIV and AIDS should not be included in computer databases at all, but should be restricted to manual files.[121] If we doubt that any safeguards can be adequate, it may be preferable to remove particularly sensitive records from new record keeping systems altogether. Alternatively, a high level of physical and technical security, too costly and impractical for use in the whole system, could be put in place to protect highly sensitive information. American health policy has already showed a tendency to provide different levels of privacy for categories of information considered to be more sensitive: for example, there are special laws protecting the records of drug and alcohol rehabilitation centres,[122] and most states have specific legislation targeting HIV/AIDS information.[123]

There are a number of problems with such an approach, however. First of all, a clear discrepancy in the treatment of specific types of information may actually defeat the purpose of protecting privacy, since it can lead, for example, to the result that "the very fact that a certain individual's health record is confidential discloses the fact that the individual has HIV."[124] Second, the kind of information that is highly sensitive may vary considerably from individual to individual, and many different kinds of information – an almost infinite variety – must be considered potentially sensitive.[125] Access to apparently innocuous information may also have serious consequences if it can be linked to other information.[126] A strict categorical approach also is unresponsive to legitimate needs for disclosure and use of information classified as sensitive.[127]

Furthermore, one school of thought holds that privacy actually has negative effects on individuals and society. "One argument for [protecting privacy] was that intimate facts about oneself … are often embarrassing if disclosed to others than those to whom we choose to disclose them." Far from enhancing our dignity or autonomy, however, "[w]e have made ourselves vulnerable – or at least far more vulnerable than we need be – by accepting that there are thoughts and actions concerning which we ought to feel ashamed or embarrassed."[128] Applying this view to the specific problem of protecting sensitive information, we must take seriously the possibility that by creating special categories of information – HIV status, a history of substance abuse or psychiatric care – to be protected with the utmost secrecy, we are in fact further stigmatizing individuals to whom those categories apply. The implication is that some kinds of medical conditions are acceptable for public knowledge, but others must be kept hidden. Although an individual is, in theory, free to waive the privilege of privacy, there is a strong suggestion that she should not do so.

Some might argue that these concerns should lead us away from the notion of privacy altogether, and toward accepting that we should not seek to conceal information about our past or present health for fear of perpetuating the idea that we should be ashamed of it. Unfortunately, given the great personal cost that we know often does result from disclosure of, for example, a person's HIV status, to adopt such an approach as a matter of public policy would be unfair and irresponsible. It seems that a better

115 Michael, see note 34 at 8. See also L. A. Albinger, "Personal Information in Government Agency Records: Toward an Informational Right to Privacy" (1986) 2 Annual Survey of American Law 625 at 627: "In the past, the very difficulty of record-keeping provided some privacy protection. Records often were handwritten, unwieldy, seldom reproduced, easily lost or destroyed, or too widely dispersed to be conveniently collected."

116 See e.g. note 110 and accompanying text; Cohen, see note 90 at 111ff; Krever Commission, see note 6 at 182ff. See J. R. Reidenberg, "Setting Standards for Fair Information Practice in the U.S. Private Sector" (1995) 80 Iowa Law Review 497 for a skeptical view on the effectiveness of relying on voluntary adoption of fair information practices in the private sector.

117 "Health Information Privacy," see note 5 at 492 (emphasis in original). See also Krever Commission, see note 6, vol. 2 at 161.

118 "Health Information Privacy," see note 5 at 453.

119 See "Health Information Privacy," note 5 at 471ff for a discussion of these and other anticipated benefits of a health information infrastructure.

120 See above at 4; Regan, see note 102 at 11.

121 Cohen, see note 90 at 108.

122 "Health Information Privacy," see note 5 at 503.

123 Cohen, see note 90 at 104.

124 Minor, see note 43 at 282, quoting submissions to Subcommittee hearings on the Fair Health Information Practices Act 1994.

125 "Health Information Privacy," see note 5 at 503-504.

126 Krever Commission, see note 6 at 170-71. One of the unique properties of information is its potential for synergies in combination with other information. See e.g. R. C. Dreyfuss & D. W. Leebron, "Foreword:

alternative would be to define a minimum, uniform required level of privacy for all health information, and allow individuals to designate specific items or categories of information which they do not wish to be disclosed.[129]

Another approach might be to dispense with protecting privacy itself and instead direct our attention to preventing the harms that may result from disclosure and improper use of personal information. Anti-discrimination laws can be amended or interpreted to ensure that discrimination on the basis of information gained by access to an individual's health record is subject to legal sanction. Human rights legislation typically includes "physical disability" as a prohibited ground of discrimination;[130] this language has been interpreted to include AIDS and HIV and other physical conditions.[131] The influence of this approach can be discerned from the fact that despite some attempts to draft a bill to protect the privacy of genetic information,[132] current legislative activity in the United States is focussed on bills designed to deal with the effects of access to genetic information, in particular discrimination on the basis of genetic characteristics in insurance.[133]

There is no doubt that anti-discrimination laws can help to prevent harm to individuals from the disclosure and use of their health information. The range of harms targeted by such laws is limited, however. Even assuming that the laws are effective in preventing discrimination in employment, housing, public services and the like, they cannot prevent more subtle but equally serious harms, for example to an individual's interpersonal relationships. Exclusive reliance on legal prohibitions of certain types of harms that may flow from improper use and disclosure is only an acceptable approach if we deny that there are unique, independent interests protected by the right to privacy, such as the injury to one's dignity and intimate relationships.

As we saw above, there are some writers who insist that privacy as such is superfluous as a legal concept because all of the relevant interests can be protected in other ways.[134] Especially now that technological developments have increased the difficulty and cost of protecting privacy, it would be foolish, if this is true, to continue to focus our attention on privacy rather than on those other aspects which are more easily dealt with in the information age. For instance, several experts[135] in the area have forcefully maintained that we must do away with the idea of privacy as "informational seclusion" and instead work to foster the individual's ability to control the use of information – a right to "informational self-determination."[136] This approach begins with the recognition that "in many instances the processing of personal information will take place" and then looks at how to "create a structure within which personal data may be utilized while an individual's capacity for decisionmaking is respected and encouraged."[137] Perhaps privacy was valued for its role in enhancing personal autonomy, but by controlling the use of information, and ensuring that information processing is procedurally fair and transparent, the same goal may be achieved in a way that is more appropriate to the contemporary context.

Privacy and Information Technology" (1986) 2 Annual Survey of American Law 495 at 497: "Two separate pieces of information may be worth little, while the combination is worth a fortune."

127 "Health Information Privacy," see note 5 at 503.

128 R. A. Wasserstrom, "Privacy: Some Arguments and Assumptions" in Schoeman, ed., see note 9, 317 at 330.

129 For example, Alberta's Bill 30, see note 56, provides in section 16(1) that an individual or her representative may request at any time that a record or any portion of a record containing personal health information not be disclosed in the context of the provision of health services without consent. The Ontario Draft Personal Health Information Protection Act (see note 57) has a similar provision in section 14(1)(1.), which says that the subject of personal health information may instruct the custodian of the information in writing that certain information is not to be disclosed for the purposes of providing or facilitating health care to the subject.

130 E.g. Human Rights, Citizenship and Multiculturalism Act, Revised Statutes of Alberta 1980, c. H-11.7; Charter, see note 22; Americans with Disabilities Act, 42 United States Code § 12101 (Supp. 1992).

131 A. S. Leonard, "Discrimination" in S. Burris et al., eds., *AIDS Law Today: A New Guide for the Public* (New Haven: Yale University Press, 1993) 297 at 299-301.

132 See the draft Genetic Privacy Act, found at http://www-busph.bu.edu/Depts/LW/GPA/GPA.htm; and articles in "The genome imperative: symposium" (1995) 23 Journal of Law, Medicine & Ethics 309-81.

133 See Electronic Privacy Information Center, "EPIC Online Guide to 105th Congress Privacy and Cyber-Liberties Bills" found at http://www.epic.org/privacy/bill_track.html. Many

This analysis is primarily concerned with the use of information by governments and other organizations to control the behaviour of individuals,[138] and as a response to this concern it seems reasonable and appropriate. In the context of health information, for example, medical records may be used to monitor and control use of health services,[139] and it is no doubt important to ensure that this control is not excessive and is not abused. However, there are also a number of other concerns that arise in the context of health information, and among them is the individual's dignity and the injury it may suffer from having very sensitive private information disclosed against her will. The patient's autonomy, which has been vigorously protected by health law, is not just impaired by attempts by an insurer to control use of services; the decision how and when to share personal information is itself also an important aspect of autonomy.

IV. Conclusion

Therefore, I would argue that there is an independent and important interest served in limiting the dissemination of information, independent from procedural fairness in the collection, use and disclosure of data. The range of all possible harms cannot be addressed by other types of legislation, and a selective approach to privacy protection suffers from many weaknesses. It goes without saying that privacy cannot be absolute, at least if the individual wants to receive health care,[140] and in some cases, where a compelling public interest exists, even regardless of the individual's wishes. This does not mean, however, that information systems should not be legally and technically designed to minimize disclosure of personal information whenever possible and to the greatest possible extent. The concept of minimal intrusion, that when disclosure is necessary it should involve the smallest possible amount of information and the minimum number of recipients, is, in fact, an accepted part of policies on health information and personal information generally.[141] It is also commonplace to respect the subject's autonomy by requiring consent for disclosure in most cases.[142]

These rules limiting disclosure are currently accepted as part of information policies; the other aspects of fair information practices add different and perhaps equally important types of protection. My concern, however, is that positions which deny or minimize the significance of protecting privacy as an independent value may eventually lead to limits on disclosure being relaxed, overwhelmed by exceptions or discarded altogether. The remaining fair information practices rules and other forms of legislation such as anti-discrimination statutes will provide individuals with a reasonable degree of protection with respect to some interests, but cannot compensate for a loss of privacy.

The development of new data processing technologies has made these concerns more urgent in two related ways. First, the technology itself, without adequate protective measures, increases the scope and intensity of threats to privacy. Second, technological advances have acted as a catalyst to provoke a re-examination of the value of privacy. Since the

states also have legislation prohibiting genetic discrimination in health insurance. See K. H. Rothenberg, "Genetic Information and Health Insurance: State Legislative Approaches" (1995) 23 J. L. Med. & Ethics 312.

134 See note 18 and accompanying text. One of these other aspects is the individual's interest in private property. One of the effects of technological development in information processing is the increasing commodification of information. See e.g. A. W. Branscomb, *Who Owns Information?: From Privacy to Public Access* (New York: Basic Books, 1994). One possibility, then, might be to shift the emphasis from protecting privacy to creating and enforcing property rights in personal information. This has been suggested by some commentators, e.g. M. S. Faigus, "*Moore* v. *Regents of the University of California* – A Breach of Confidentiality Within the Physician-Patient Relationship: Should Unique Genetic Information be Considered a Trade Secret?" (1993) 24 University of West Los Angeles Law Review 299. There are, however, numerous difficulties with treating information, especially personal information, as property. Unfortunately an adequate discussion of these issues is beyond the scope of this paper.

135 Simitis, see note 16; Schwartz, see note 15.

136 This phrase is borrowed from a German judicial decision; see Simitis, above at 734.

137 Schwartz, see note 15 at 555.

138 Simitis, see note 16 at 710-24. Simitis describes the use of information by health insurers, school authorities, various branches of government and employers to enforce conformity in individual behaviour.

139 See above at 710-12.

protection of privacy in the information age, if it is possible at all, will require an additional investment, interested parties have renewed debates about the question of whether privacy is worth protecting. The answer may well be different depending on the kind of information and the context in which it is collected and used. In the renewed analysis provoked by the new technologies, it is important to be aware of these differences and of the whole range of concerns. A single approach to information policy may not be appropriate for all contexts just as we have learned it is not appropriate for all times. Unless we are willing to accept a deterministic view that we cannot control what the effects of technology will be, we must make choices carefully, considering all of the possible values and interests.

140 It bears mentioning here that the common law recognizes the right of an individual to refuse medical care, even when such care would apparently be in the individual's best interests. See e.g. *Malette* v. *Shulman* (1990), 72 Ontario Reports (2d) 417 (Ontario High Court).

141 See e.g. Bill 30, note 56, sections 37 (disclosure restricted to non-identifiable health information where this is sufficient for the purposes of disclosure) and 38 (disclosure permitted only to the extent necessary for the purposes of disclosure); Health Information Practices Code 1994, see note 50, Rule 11(3): "Disclosure under subrule (2) is permitted only to the extent necessary for the particular purpose"; Fair Health Information Practices Act of 1997, see note 52, section 111(c)(1): "A use or disclosure of protected health information by a health information trustee shall be limited, when practicable, to the minimum amount of information necessary to accomplish the purpose for which the information is used or disclosed."

142 See e.g. OECD Guidelines, note 34, article 10: "Personal data should not be disclosed, made available or otherwise used for purposes other than [the purposes specified when data was collected] except: (a) with the consent of the data subject; or (b) by the authority of law"; Bill 30, see note 56, sections 29 (disclosure permitted with the consent of the subject) and 30 (circumstances in which disclosure without consent is permitted); Fair Health Information Practices Act of 1997, see note 52, section 112.

Is Viewing a Web Page Copyright Infringement?

FEATURE ARTICLE

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It is quite common, while "surfing the net," to come across copyright notices such as the following:

> This Service is protected by copyright pursuant to Canadian copyright laws, international conventions, and other copyright laws. Any reproduction, modification, publication, transmission, transfer, sale, distribution, performance, display or exploitation of any of the content of this Service, whether in whole or in part, without express written permission, is prohibited.[1]

The Internet is increasingly becoming a mainstream source of information and entertainment. Creators naturally want to ensure that their works will continue to be protected to the same extent as with more traditional media such as print, audio recordings, and broadcasting. Yet electronic publishing is far from an easy analogical extension of traditional media; paradoxes abound in any extension of print-based concepts to the digital world. For instance, applying the existing copyright framework to online works has the counter-intuitive consequence that the mere reading of the above copyright notice would violate it. By contrast, no copyright violation transpires when one watches the copyright trailer on a rented video. Online copyright notices similar to the one above appear on thousands of publicly accessible Internet sites, accessible by millions of Internet users. Should online creators be able to bring actions of copyright violation against those who access their content, even when that content is ostensibly made available for free? Proposals currently before lawmakers for updating copyright law will make it possible for online creators to use the courts to collect licensing fees "after the fact." This paper will argue that it is a mistake to apply copyright to online publishing in a way that does not recognize some basic facts and intuitive distinctions concerning digital communication.

Technical Background

To understand the legal issues particular to copyright law and the Internet, it is important first to understand some of the technical aspects of how information is transferred across the Internet. The most basic relationship between computers on the Internet is

1 Adapted from the copyright notice on the CANOE (Canadian Online Explorer) web page. URL: http://www.canoe.ca/Canoe/copyright.html.

To anyone accustomed to using the Internet as a source of information, the idea that viewing a web document is tantamount to a copyright violation is at best counter-intuitive.

the client-server relationship. The client is the computer controlled by the user. A server stores data, and distributes files on request from clients. A typical client-server interaction might be something like the following: a user wants to search for a file on a server; the client formulates the query and sends it to the server; the server retrieves the file from storage and sends it back to the client; the client, in turn, presents or manipulates the file in a way useful to the user.[2]

This over-simplified explanation of how the Internet works already involves concepts central to copyright. Though we speak of a server "sending" a file, such sending is only figurative. On a technical level, servers transfer only copies of files, and not the original files themselves. The files remain on the server, ready for the next request

2 Jim Carroll and Rick Broadhead, *Canadian Internet Handbook* (Scarborough: Prentice Hall Canada, 1994) at 67-73.

from another client. Every file transferred over the Internet is copied in one way or another. Even an e-mail message is "sent" by making a copy on the recipient's computer. Under the established copyright regime, copying is the exclusive right of the copyright owner, yet the Internet gives this power to virtually anyone. So, it appears that there is the potential for copyright infringement in virtually every Internet transmission. While it is arguable that a great deal of Internet traffic, such as e-mail and "chat," is not protected by copyright, there is much on the Internet that consists of original, creative or artistic work, and so falls under the copyright aegis.

Increasingly, the original, creative work found on the Internet is expressed in the medium known as the World Wide Web. The problem of copyright on the Web is exacerbated by the technology used to implement it. The client software programs that access documents on the Web are known as web "browsers."[3] When the user wants to view a particular web page, the browser sends a request out over the Internet to the appropriate web server for a file called an HTML file. The web server sends a copy of the file back to the browser; the browser in turn interprets and displays on screen the text and graphics of the web document, according to the instructions contained in the HTML file. The HTML file itself contains the text for the document, but the graphics files, being much larger, are kept as separate files on the server, and are called up individually by the browser. The end result produced on the user's screen by the browser software, combining text, layout, and images, is known as a "web page."

It is because of the large size of a typical graphics file that web browsers have a particular feature, known as a "cache."[4] The cache in a browser has important copyright implications. The browser caches, or stores, in the memory of the user's computer copies of the text and images of visited web pages.[5] The purpose of caching is to improve access to web pages. The time it takes for an entire web page to reach the user depends on the information-carrying capacity (the "bandwidth") of the Internet connection between the web server and the user's computer. Information bottlenecks in this connection, such as the slow speed of a user's modem, can significantly increase the wait. The problem is most apparent when accessing web pages that are replete with graphics.[6] Caching helps circumvent the problem of limited bandwidth. By keeping copies of web files "within easy reach" on the user's hard drive, the browser does not have to use up bandwidth to retrieve files from the web server every time the user revisits a particular web page. In cases where the user frequents a few web pages on a regular basis, it is faster to retrieve the large image files for those pages from the user's own computer than from across the Internet. The practice of caching has helped to prevent the Internet from becoming completely overloaded by the exponential growth of World Wide Web traffic.[7]

Legal Implications

Reading a web page involves making a copy of it in the memory of the client computer. At the very minimum, there must be a copy of the information in the computer's

3 Two examples of web browsers are Netscape Navigator and Microsoft's Internet Explorer.

4 For a more detailed explanation of caching, see The World Wide Web Consortium (W3C), "Architecture - Cache." URL: http://www.w3.org/pub/WWW/Library/User/Architecture/Cache.html. In fact, caching can occur in many more places than just web browsers. So called "proxy caching" occurs in corporations' firewalls, with commercial online services such as AOL and CompuServe, and even at the Internet node or junction connecting a geographical region, such as a small country, to the rest of the Internet. So, there is the possibility for a creator's web page to be duplicated at many locations, all without the creator's knowledge.

5 Browsers use both RAM memory and hard disk space as cache storage. Caching in RAM aids the revisiting of web pages over the course of one session of web use; caching on the hard disk aids the revisiting of web pages from one session to the next.

6 A picture may be worth a thousand words, but in information terms, those words would occupy only a few kilobytes of disk space, whereas the picture may require many tens of times more.

7 For some studies on the benefits of caching, see "Web traffic characterization: an assessment of the impact of caching documents from NCSA's web server," The National Centre for Super-Computing Applications (NCSA). URL: http://www.ncsa.uiuc.edu/SDG/IT94/Proceedings/DDay/claffy/main.html. See also "A survey of the functionality and effectiveness of current caching systems." URL: http://www.surfnet.nl/surfnet/projects/desire/caching.html.

Random Access Memory (RAM); otherwise, the client software would be unable to interpret and display the web page. To lessen the impact of an ever-increasing demand on a system of only finite resources, browsers pragmatically incorporate disk caching. Does this make the act of viewing a web page a potential copyright violation? Some lawmakers seem to think that it might. Both the U.S. Department of Commerce's White Paper on Intellectual Property on the National Information Infrastructure[8] ("The White Paper") and Industry Canada's Information Highway Advisory Council (IHAC) report on copyright[9] maintain that the mere viewing of a web document is governed by copyright principles. The IHAC report is of the view that "any act of [digitally] accessing a work constitutes a reproduction, [and a]s such, … is subject to the right of reproduction."[10]

The court found that because the copy created in RAM can be "perceived, reproduced, or otherwise communicated," the loading of software into RAM creates a "copy" under section 101 of the U.S. Copyright Act.

To anyone accustomed to using the Internet as a source of information, the idea that viewing a web document is tantamount to a copyright violation is at best counter-intuitive. It is simply a fact of digital communication that files must be copied to be sent. While copyright violations must surely occur on the Internet, one would expect that they would be the exception, and not the rule. There must be something wrong, one might argue, with an analysis that makes the common, intended use of a web page a *prima facie* copyright violation. In what follows, this paper will trace the legal reasoning that led to the conclusion that "the act of browsing a work in a digital environment should be considered an act of reproduction."[11] The focus will be on the U.S., for the reason that the underlying arguments are often made more explicit, both in the White Paper and in the secondary literature. The IHAC report does not give many insights into its own reasoning. It acknowledges drawing upon the National Information Infrastructure Task Force's preliminary report ("The Green Paper"). Instead of providing an argument for why browsing ought to be considered a copyright violation, the IHAC report simply alludes to the crucial issue being settled "based on the United States Model."[12] On the issue of browsing, as with several other issues, the Canadian report takes its cues from the American.

United States: The White Paper

The White Paper's position is based on strict interpretation of the U.S. Copyright Act. For a work to be eligible for copyright protection under U.S. law, it must be instantiated in some physical object: "Copyright protection subsists … in original works of authorship fixed in any tangible medium of expression."[13] A tangible medium is that from which the work can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[14] Copies of a work are "material objects … in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated."[15] The means by which a work can be fixed includes, but is not limited to, writing, engraving, perforating, punching, sculpting, or any other means of physically inscribing the work onto a material object, either graphically or in symbols. Significantly, this non-exhaustive list extends to include digitally encoding. To be fixed, the physical embodiment of

8 Information Infrastructure Task Force, "Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights" (1995). URL: http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.txt.

9 Information Highway Advisory Council, "Copyright and the Information Highway: Final Report of the Sub-Committee on Copyright" (March, 1995). URL: http://xinfo.ic.gc.ca/info-highway/reports/copy-right/copy_e.txt.

10 See above at 11.

11 See above at 43.

12 See IHAC, Recommendation 6.3; URL: http://info.ic.gc.ca/info-highway/final.report/eng/rec6.html#rec. 6.3.

13 17 United States Code §102(a) (1988 & Supp. V 1993).

14 See above.

15 17 United States Code § 101 (1988); definition of "copies."

the work must exist "for a period of more than transitory duration."[16] The law considers magnetic storage to be a sufficiently stable form for the purposes of fixation.[17]

As mentioned, web browsers typically capture copies of web page text and images and cache them on the user's hard drive, where they might remain until used in the future. The White Paper considers these files to be reproductions for copyright purposes. Unauthorized disk caching would therefore be a violation of the copyright owner's exclusive reproduction rights. What is interesting is that the White Paper's position on browsing implicates an even more basic function of a web browser. Web browsers interpret and display on screen the contents of the web page; for example, they wrap lines of text to fit the width of the screen. This task requires some minimal computation on the part of the client.[18] To perform any sort of computation in connection with the web page, the software must first form a representation of it in RAM, on which to conduct the necessary computations. In other words, the very act of reading a web page has as a precondition the making of a copy of the web page, if only in RAM. The White Paper considers such copies in RAM to be reproductions of the work. Consequently, the White Paper finds that the copying of information from one computer to another across a network is subject to the exclusive reproduction rights referred to in section 106 of the U.S. Copyright Act.[19]

The Case Law: *MAI* v. *Peak*

To justify its position, the White Paper cites *MAI Systems Corp.* v. *Peak Computer Inc.*[20] In *MAI* v. *Peak*, the 9th Circuit Court took it to be generally accepted that that the act of loading a program from a medium of storage into a computer's memory creates a copy of the program. The court looked to the Final Report of the National Commission on New Technological Uses of Copyrighted Works (1978) ("CONTU"),[21] and to *Vault Corp.* v. *Quaid Software Ltd.*,[22] as the authorities for this. Although though the court pointed out that neither of these authorities made a distinction between RAM and more permanent forms of memory, such as ROM (Read Only Memory), it found no reason to believe that the copy created in the RAM is not fixed. The court found that because the copy created in RAM can be "perceived, reproduced, or otherwise communicated," the loading of software into RAM creates a "copy" under section 101 of the Copyright Act.[23] The White Paper supports the application of *MAI* v. *Peak*, which ostensibly concerns the loading of computer software into RAM to the whole of digital communication on the Internet and beyond.

Canadian case law has considered the copyright status of software loaded in computer memory. In her well-regarded decision in *Apple Computer, Inc.* v. *Mackintosh Computers Ltd.*,[24] Federal Court Justice Reed ruled that software embodied in ROM chips is under the protection of section 3 of the Canadian Copyright Act. Though Reed recognized the distinction between RAM and ROM, her ruling concerned only the latter.[25] There is, therefore, no direct Canadian authority which establishes the conclusions in the IHAC final report concerning browsing. As a result, the IHAC report simply

16 17 United States Code § 101 (1988); definition of "fixed."

17 *Stern Electronics, Inc.* v. *Kaufman*, 669 Federal Reporter 2d 852, 855 (2d Circuit 1982).

18 Carroll and Broadhead, see note 3, at 67-68.

19 17 United States Code § 106 (1988).

20 *MAI Systems Corp.* v. *Peak Computer Inc.*, 991 F.2d 511 (9th Circuit 1993).

21 House of Representatives Reports No. 1307, 96th Cong., 2nd Sess., pt. 1, at 13.

22 *Vault Corp.* v. *Quaid Software Ltd.*, 847 Federal Reporter 2d 255, 260 (5th Circuit 1988).

23 *MAI* v. *Peak*, see note 21 at 519.

24 *Apple Computer, Inc.* v. *Mackintosh Computers Ltd.*, (1987) 10 Canadian Intellectual Property Reports (3d) 1 (Federal Court Trial Division). The decision has been upheld by both the Federal Court of Appeal and the Supreme Court.

25 Interestingly, Justice Reed characterized RAM as "volatile," because it loses its information when the power is turned off, whereas ROM is "permanent in nature" (*Apple* v. *Mackintosh*, see above at 10). This distinction becomes important below.

defers to the White Paper, it its statement that, "In some countries, accessing a work in a digital environment is considered a reproduction, even where the work is temporarily stored in the … RAM of a computer."[26] Since the IHAC report defers to the White Paper on the crucial issue of the status of information stored in RAM, and the White Paper relies on *MAI* v. *Peak* as its authority on the issue, the validity of both reports rests on *MAI* v. *Peak* being a good rule of law.

Objections to *MAI* v. *Peak*

The authors of the White Paper consider *MAI* v. *Peak* to be "well-established law."[27] This assessment has been severely criticized by some commentators. Professor James Boyle reports that out of twelve law review articles discussing the *MAI* v. *Peak* judgment, only one defends it.[28] Boyle lists criticisms voiced in submissions to public hearings, and in articles published in journals, newspapers and magazines.[29] Two issues arise from *MAI* v. *Peak*: whether it is a correct rule of law in itself, and whether it ought to be applied to communication on the Internet. On the first issue, critics characterize the case as controversial in its own right, with ample authority and legislative history to the contrary. On the second, critics charge that only mechanical, positivist reasoning would elevate *MAI* v. *Peak* to the decisive case on which to build a new legislative regime for the coming information age.

There are two objections to the *MAI* v. *Peak* ruling as a correct rule of law. The first objection is that copies stored in RAM are too ephemeral and impermanent to be considered copies for the purpose of copyright. Section 101 of the U.S. Copyright Act clearly states that for a copy to be fixed, it must exist for more than a fleeting moment. The objection maintains that copies in RAM are not sufficiently fixed to be copies, because the stored information is lost as soon as the power to the computer is switched off. There are clear indications in the legislative history of the U.S. Copyright Act that the intent of the statute is to exclude the very instances that *MAI* v. *Peak* allows. For instance, a 1976 U.S. House Report reviewing the Copyright Act stated that works are not sufficiently fixed if they are "purely evanescent or transient [in nature], such as those projected briefly on a screen, shown electronically on a television or cathode ray tube, or *captured momentarily in the 'memory' of a computer."*[30]

Evanescent Copies

In the common-law, Anglo-American tradition, copyright law has always placed central importance on the physical instantiation of information: for a work to be copyrighted, it must be embodied in some physical form. The rights bestowed by copyright law grant control over that physical object. In particular, copyright law grants control over the creation of additional physical instantiations of the information through copying the information from one physical object to another. This emphasis on rights over the physical copying of information reflects the way in which traditional, print-based creators could most easily control their revenue. The printing press was the obvious and most practical locus at which to control the dissemination of information, since it was

26 IHAC, see note 10 at 43.

27 See Bruce Lehman, "Response to Law Professors' Open Letter" in James Boyle, "The Debate on the White Paper." URL: http://www.harvnet.harvard.edu/online/moreinfo/boyledeb.html at 7.

28 James Boyle, see above at 19.

29 See above at 18.

30 House of Representatives Reports No. 1476, 94th Cong., 2nd Sess. at 52-3, emphasis added. Reprinted in (1976) U.S.C.C.A.N. at 5666-67. Strangely, the White Paper quotes approvingly this passage from the House Report. It is unclear how the White Paper intends to avoid inconsistency.

the bottleneck in the system from creators to consumers.[31] The copies produced by the printing press then had to be conveyed to their consumers. In the U.S. and in other countries, the exclusive right of distribution gave creators further control over their revenue.

The basic way in which works were disseminated changed little with the advent of newer media, such as photographs and recordings. These forms of communication are similarly tied to physical objects, produced at an identifiable locus, and distributed to users by a process physically distinct from their reproduction. As such, copyright law did not have to undergo any significant modifications; phonographs and photographs were successfully subsumed under the copyright regime as analogical extensions of the printed work. Radio and television broadcasting represented the first move away from a physical object being the vehicle of distribution. Yet the law retained the link with a physical embodiment of the information, by requiring that the work be fixed simultaneously with its transmission. The distribution of the work is under the control of the copyright owner or someone authorized by the owner. As the means of distribution, broadcasting is a neutral conduit for information. The information flows from an active creator to a passive user, with the only copy of the information existing at the creator's end. A representation of the information exists in a minimal sense at the receiver's end of the conduit – for instance, in the form of the pattern of glowing pigments on the surface of the picture tube of a television screen. But these representations quickly disappear; they are too evanescent in nature to be considered copies for the purposes of copyright law. Permanent copies of the information can be made; for instance, home video recordings are considered to be reproductions.[32]

Digital communication poses a problem for the existing copyright framework, as it is unclear whether transmission of a work over the Internet should be considered to be a distribution, a duplication, or both. The Internet is not simply a neutral conduit to convey information from an active creator to a passive user. There is a significant degree of interpretation and manipulation of the information on the part of the user. The issue is whether these facts should make any relevant difference to copyright law.

The Canadian IHAC report recommends that the Copyright Act be amended to include a definition of browsing, namely any "temporary materialization of a work on a video screen, television monitor, or a similar device … but not to include any permanent reproduction of the work in any material form."[33] The definition follows the "evanescent copy" analysis when it stipulates that information materialized on a computer monitor is too temporary to be considered a reproduction. However, computer monitors require intelligent computer components, including RAM and a CPU, to function.[34] We know that the IHAC follows the White Paper in holding that RAM copies are sufficiently fixed to count as reproductions. What is interesting about the proposed definition of browsing is how close it comes in its language to the assertion quoted above made by the 1976 U.S. House Report, to the effect that copies captured in computer memory are too transitory to be considered copies for the purposes of

31 The terms "locus" and "bottleneck" are borrowed from Guthrie's very helpful historical comments on copyright made in *Matrox Electronic Systems Ltd.* v. *Gaudreau*, [1993] Recueils de Jurisprudence de Quebec 2449 (Supreme Court).

32 In the United States, home video recordings, though reproductions, are not copyright infringing reproductions, if made for the purposes of "time shifting" – the recording of a television program, for example, at night, for watching during the day. See *Sony Corp. of America* v. *Universal Studios, Inc.* 464 United States Reports 417 (1984).

33 IHAC Recommendation 6.4 URL: http://xinfo.ic.gc.ca/info-highway/final.report/eng/rec6.html#rec. 6.4.

34 The White Paper, at page 8, comments thus: "Under current technology, when an end-user's computer is employed as a 'dumb' terminal to access a file resident on another computer such as a BBS or Internet host, a copy of at least the portion viewed is made in the user's computer." (White Paper, at 8.) This is somewhat misleading. In the era before the advent of the personal computer, "mainframe" computers would be operated via "dumb terminals," consisting of a keyboard and a monitor. All of the computing would be carried out on the mainframe; no computing power would reside at the terminal end as the terminal was a neutral input/output device. Dumb terminals therefore fit very nicely with the "evanescent copy" analysis. However, the White Paper errs in its assessment of "current technology": no personal computer is a mere "dumb terminal." One might argue that copyright law should consider personal computers running web browsers, their RAM notwithstanding, to be no different from old-style dumb terminals, insofar as they are mere conduits of information, albeit with certain abilities of interpretation and manipulation. It is clear, however, that this is not the White Paper's position.

copyright law. The House Report posits that there is no fundamental difference between images on a computer screen and representations of those images formed in the computer's memory. Yet the position of both the IHAC and the White Paper is diametrically opposed to the findings of the House Report.

Policy Considerations

The second objection to *MAI* v. *Peak* as a correct rule of law is that it is at odds with the principles and policies underlying copyright law. The express purpose of U.S. copyright law is to encourage the production of new creative works for the edification of the public.[35] This goal is achieved by means of an economic incentive: creators are allowed a limited monopoly to generate profits through the production and dissemination of permanent copies of their work. Copyright statutes protect the expectation of a fair return on the creator's intellectual investment. *MAI* v. *Peak* inverts the economic power structure of the copyright framework, by giving creators control over the use of the work, and not simply over its creation and distribution. This represents a significant departure from the statutory intent of copyright law.[36]

… creators are allowed a limited monopoly to generate profits through the production and dissemination of permanent copies of their work.

MAI v. *Peak* has since been questioned by the courts on the grounds that it gives creators more control over their works than is intended by copyright law. In *DSC Communications Corp.* v. *DGI Technologies* ("*DSC* v. *DGI*"), [37] the court deployed a concept called copyright misuse. This doctrine can be used as a defence against copyright violation in cases where the copyright owner attempts to use copyright for purposes inimical to the statute's intent. In *MAI* v. *Peak*, one computer company successfully used copyright law to prevent a rival company from even turning on a computer that had the former's software as its operating system. In a similar fact situation, the court in *DSC* v. *DGI* found that such actions do not fall within the scope of rights protected by copyright law.[38] The *MAI* v. *Peak* rule of law is therefore a controversial one, in that it is contrary to legislative history, and indeed the very purpose of copyright law.

Applying *MAI* v. *Peak* to the Internet seems natural enough given its assumptions. If one assumes that use of a digital work necessarily involves a reproduction of the work, then it is quite natural to grant that the exclusive rights creators already have over the reproduction of their works extend to cover use as well, since the two are by assumption co-extensive. However, this reasoning could only be carried out by blindly applying concepts over-extended from their original context. Moreover, it runs the risk of ignoring important policy considerations.

Chief among the policy-related concerns is the objection, raised by groups representing users' interests, that a legislative regime based on *MAI* v. *Peak* would upset the balance of interests between creators and users. The worry is that every piece of information on the Internet will come with a price tag. By applying to the Internet a very broad definition of copying, such that mere use amounts to copying, every use of information on the Internet becomes a licensing opportunity: the information highway

35 United States Constitution, Art. 1, § 8, Cl. 8.

36 This objection is made by Bradley J. Nicholson, "The Ghost in the Machine: *MAI* v. *Peak* and the Problem of Copying in RAM" 10 High Technology Journal of Law 1 (1995). Cited in Boyle, see note 29 at 20.

37 *DSC Communications Corp.* v. *DGI Technologies*, 95-10850, (5th Circuit 1996).

38 Unlike the U.S. statute, the Canadian Copyright Act does not include an explicit statement of the purposes of the statute. This would make it more difficult to employ the copyright misuse defence in Canada.

will turn into a toll highway. One critic warned: "Tell those third graders to have their credit cards ready."[39] It is claimed that applying the *MAI* v. *Peak* model to the Internet would separate the information "haves" from the "have-nots," despite both governments' avowals to the contrary.

The prevalent attitude on the part of Internet users is that information should be free and unencumbered; copyright law only hinders the free flow of information, and so the information highway should be made into a "copyright-free" zone. At times, this attitude has verged on community activism, with campaigns to drive out those who seek to commercially exploit information on the Internet. The White Paper vigorously opposes this "information should be free" argument. It points out that "copyright law imposes no obligation upon copyright owners to make their works available."[40] The Canadian IHAC report shares a similar attitude: it maintains that "it should be left to copyright owners to determine whether and when browsing should be permitted on the Information Highway."[41] The White Paper rejects the notion of an exclusive right to browse and states that such a right would deny creators' rights to expect a fair economic return on their investment. The White Paper intends to let the market determine what constitutes fair licensing arrangements.[42] It argues that free market incentives are the only way to ensure that creators populate the Internet with information content.

This "laissez-faire" attitude seems to many critics to be hardly an answer to the problem of the division between the "haves" and the "have-nots"; if anything, it is precisely the problem. The worry is that market forces heavily favour creators' over users' interests. However, the spirit of community activism prevalent on the Internet can be a powerful market force. The attitude that information ought to be free and unencumbered can exert considerable downward market pressure on online subscription fees.

Fair Dealings

There is a further factor that maintains the balance between the interests of creators and users. Users who violate the right of reproduction may in certain circumstances invoke statutory exceptions to protect them from liability. In Canada, a user may appeal to the doctrine of "fair dealings" as defence against copyright infringement.[43] Section 29 of the Copyright Act stipulates that "fair dealing for the purpose of research or private study does not infringe copyright."[44] Fair dealing protects users from liability, provided that the use of the work is both fair, and for one of the listed purposes.[45] It is plausible that someone browsing a web page might claim private study or research.[46] However, use for the purpose of private study must in addition be "fair," for the fair dealing defence to take effect. What, then, is a "fair" dealing of a work? Canadian copyright statute does not specify any criteria for a finding of fair dealing.[47] Being an equitable defence, fair dealing is a judgment call. In *Hubbard* v. *Vosper*, [48] an English court set out general guidelines for weighing fair dealings defences:

39 James Boyle, see note 29 at 17.

40 White Paper, see note 9 at 16-17.

41 IHAC, Recommendation 6.4.

42 White Paper, see note 9 at 31: "intellectual property law leaves the licensing of rights to the marketplace."

43 A similar, though not identical, concept in the U.S. is "fair use." See 17 United Sates Code § 107 (1988).

44 Revised Statutes of Canada 1985, C-42 section 29.

45 Section 29.1 allows criticism or review as two further uses that would qualify as fair dealings, provided that the original author or source is credited.

46 What exactly constitutes private study or research? Must it be not-for-profit? It borders on pointing out the obvious to mention that most web surfing hardly counts as study or research.

47 The situation is different in the U.S., where the U.S. Copyright Act specifies four criteria for a fair use finding, as an aid to the jury.

48 *Hubbard & Anor.* v. *Vosper & Anor.* [1972] 2 Queen's Bench [Reports] 84.

> You must first consider the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. … Next, you must consider proportions. To take long extracts and attach short comments may be unfair.[49]

These guidelines for finding fair dealing clearly apply only to cases where material from one work is used within another work. The guidelines seem appropriate in the context of a printed work, but they do not fit well with browsing on the Internet. There is no excerpting, nor adding comments of one's own, when one downloads a copy of a web page; one does not embed the document in a context which would bring to bear the standard fair dealings defence.

Copyright law is unprepared to meet the challenges that come with an information age.

The biggest obstacle to the fair dealings defence is the fact that when one browses a digital document, the whole of the document is replicated. In its Final Report, the Canadian Subcommittee on Copyright writes: "Canadian decisions on [fair dealings] are rare but Canadian courts appear to have decided … in at least one instance, that the reproduction of the totality of a work was not a fair dealing, irrespective of the purposes of the reproduction."[50] If this is the state of Canadian law, it has important consequences for web browsing. It would mean that no instance of accessing a document from the Internet could be considered a fair dealing because such accessing involves the reproduction of the entirety of the document. However, the report goes on to suggest that "fair dealing provisions are capable of offering sufficient protection to users of copyright material on the [Internet]."[51] Perhaps aware of this inconsistency, the report makes the recommendation that criteria and guidelines for fair dealing be clarified with respect to their applicability to browsing on the Internet.[52]

The IHAC report contends that the fair dealing issue is otiose for the majority of Internet transmissions because in its view most uses will be authorized.[53] Authorization can come in two forms: explicit and implicit. Express licenses are becoming increasingly popular on the Internet. Authors are expressly granting specified rights to make copies and otherwise use the work, while reserving all other copyrights for the author. Some authors even go so far as to explicitly disclaim all copyrights, or express their intent to donate the work to the public domain. Certainly that is their right and privilege, assuming that the writer is the owner of all copyrights in the work.

Implied License

While there is yet no legal precedent, it is likely that the courts will develop the concept of an implied license in connection with the Internet. Those who publish works on the World Wide Web generally do so with the understanding that the Internet is an open network, allowing all users on the network unrestricted access to the document, unless they take technological steps to restrict access.[54] Such web pages carry with them an implied license to do all those things now considered "normal" use, including reading the text, viewing the graphics, and clicking on hypertext links to other pages. It is hard to imagine a web page author being successful in litigation for an action of copyright violation of a web page with unrestricted access. Courts rule pragmatically; it is

49 See above at 94.

50 IHAC, see note 10 at 21. It is not clear which case the report is referring to; most likely, it is *Zamacois* v. *Douville* (3 Fox Pat. C. 44 (Exchequer Court)), in which the court established that fair dealing cannot include the complete replication of the work. However, *Zamacois* is a case of literary criticism, where an entire work was reproduced, followed by some commentary. The case hardly seems applicable to digital communication, in which copying is the *sine qua non* of even reading a work, let alone form a critical opinion of it.

51 IHAC, see note 10 at 22.

52 IHAC, Recommendation 6.5 URL: http://info.ic.gc.ca/info-highway/final.report/eng/rec6.html#rec. 6.5.

53 IHAC, see note 10 at 12. See also IHAC, Recommendation 6.3 URL: http://info.ic.gc.ca/info-highway/final.report/eng/rec6.html#rec. 6.3 at 8.

54 Perhaps with some education that informs web authors about the practices of RAM and disk caching, the implicit authorization might plausibly encompass those practices.

impractical to use the court system as a collection agency for license fees.[55] Those authors who want compensation for the use of their web page must look to technological solutions for licensing arrangements, such as password-protected access.[56] The fact that the text and images exist as representations in the user's RAM should not be seen as anything more than simply a necessary causal condition of normal use. As for the practice of disk caching, it is again hard to imagine that a court would assign special legal difficulties to a pragmatic feature designed to improve the speed of the Internet. In fact, there are good reasons to hold that disk caching is in the interests of all stakeholders involved in the Internet.

Browsing versus "mirroring"

The purpose of copyright law is to prevent an author's work from being illegitimately appropriated; neither RAM caching nor disk caching threatens to do this. An online work would be appropriated if a user were to take a copy of a web document and upload it to another web server. It is this server-to-server copying, rather than server-to-client copying, that is a threat to the copyright owner's rights. Server-to-server copying, known as "mirroring," is the analogue of copying works in the more familiar print and audio-visual media. It would be like taking a book out of the library, photocopying it in its entirety, and selling the copy to another. Photocopying a book threatens the revenue of the publisher of the book, because it has taken away from the publisher the opportunity to satisfy that particular demand for the book. Likewise, mirroring threatens a web publisher's revenue. Typically, a web publisher generates revenue by selling advertising space on the page. What gives this advertising space its value to an advertiser is the "hits," or traffic, that the page receives from the general Internet public. The advertising rates are therefore tied to the hits expected of the page. A "mirror" of a page could potentially draw away traffic from the original site, thereby adversely affecting the web producer's advertising revenues. Server-to-client copying does not threaten revenue; quite to the contrary – it is what typically generates revenue for a web page producer.

Could the Canadian Copyright Act be amended to make clear the distinction between these two forms of copying web documents – the copying involved in web browsers, which is typically welcomed by web authors, and the copying involved in mirroring, which is typically opposed to online creators' interests? The current copyright framework does not have a sharp enough tool to distinguish server-client copying from server-server copying, since both forms of copying are equally reproductions of the work. Capturing the distinction in technological terms may become quickly obsolete as the online environment evolves to one of greater interactivity. The difference between the browsing and mirroring does rest on the issue of intent – only the latter is intended to beget further (server-client) copying. Perhaps, then, the fair dealings doctrine may be able to differentiate between the forms of copying. However, as shown above, fair dealing in its present form rules out web browsing altogether. This makes the doctrine unsuitable for distinguishing browsing from mirroring.

55 The collection of licensing fees through rights clearance is also completely impractical, because web page creators are far too numerous and scattered for there to be any feasible clearinghouse arrangement.

56 It is not surprising that both the American and Canadian final reports recommended amending the copyright legislation to make any attempt to circumvent technological protection of copies of works a criminal act.

Conclusion

Copyright law is unprepared to meet the challenges that come with an information age. The concepts that have sufficed for traditional media are ill-equipped to handle new categories and relations. The information age is characterized by a divorce of information from its physical embodiment. Copyright law continues to labour under an ontology that persists in connecting information with physical objects. We see a foreshadowing of the legal difficulties to come in the seemingly innocuous act of viewing a web page. There are several ways to proceed in reducing the growing pressures that information technology exerts on the copyright framework: either governments could amend current legislation along the lines of the proposal found in the White Paper and the IHAC report, or they could allow the courts to settle the issues. Given the difficulty of capturing in statutory language the intuitive difference between the kind of copying that occurs in browsing and the copying that occurs in mirroring, perhaps it is best to leave the matter to the judiciary, where this distinction has a better chance of being recognized.

Employee Privacy: A Critical Examination of the *Doman* Decision

FEATURE ARTICLE

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Privacy is among the most valued rights in western society. In Canada, this right is protected by the Charter of Rights and Freedoms[1] ("Charter"), the federal Privacy Act,[2] and provincial privacy legislation.[3] Like all other rights in our society, however, the right to privacy is subject to a delicate balance between competing individual and societal interests.

It is with this in mind that the issue of employee privacy rights should be considered. In the last twenty years, the right of employee privacy has been hotly debated in labour law as a result of mandatory drug testing, electronic surveillance, employee searches and other intrusions into employee privacy. Such developments have resulted in the inevitable clash of views on privacy in the employment relationship. Employers justify privacy intrusions on the basis of security, protection of property, and prevention of fraud. Unions, on the other hand, argue that privacy intrusions result in health risks[4] and deprive employees of dignity and integrity. Unions also stress that employees may be involved in activities outside the workplace which are beyond the legitimate interests of the employer.[5] Employees expect freedom from surveillance unless employers have legitimate reasons for conducting surveillance and there are no other practical ways to obtain the sought information.

In a labour relationship, unions have the opportunity to authorize and restrict intrusions on employee privacy through collective bargaining. For example, a collective agreement may contain a provision setting out the conditions under which an employer can demand that an employee submit to a drug test. Where the protection of a privacy right is not considered in the collective agreement, these rights are subject to the residual rights doctrine.[6] In such cases, arbitrators are usually called upon to determine whether the employer's actions were reasonable by balancing the interests of employees and employers.

How are arbitrators in British Columbia balancing privacy interests in the employment relationship? With respect to "off-site" surveillance of employees, the jurisprudence has yet to produce a clear standard. Specifically, the arbitral cases

1 Revised Statutes of Canada 1985, App. II, No. 44, Schedule B, Part I.

2 Revised Statutes of Canada 1985, c. P-21.

3 British Columbia, Manitoba and Saskatchewan each have a statute making an invasion of privacy actionable. See the Privacy Act in each province: Revised Statutes of British Columbia 1996, Chapter 373, Section 1 ; Re-enacted Statutes of Manitoba 1988, c. P125; Revised Statutes of Saskatchewan 1978, c. P-24.

4 Some studies have shown that as a result of higher stress levels, there is a higher incidence of health problems among monitored employees. See K. DeTienne and R.D. Flint, "The Boss's Eyes and Ears: A Case Study of Electronic Employee Monitoring and the Privacy for Consumers and Workers Act" (1996) 12 The Labor Lawyer 93.

Although the collective agreement did not expressly contain a right to privacy, the Arbitrator states that it was impossible to read the agreement outside the value system imposed by the Charter and the British Columbia Privacy Act.

addressing the admissibility of videotape evidence capturing off-site employee activities have not balanced employer rights against privacy concerns in a consistent manner. The "founding" and most influential case in this area is *Re Doman Forest Products Limited, New Westminster Division* ("*Doman*").[7] In *Doman*, Arbitrator Vickers excluded reliable *viva voce* and videotape evidence which strongly suggested that the grievor was abusing sick leave benefits, not on technical rules of admissibility, but rather because the grievor's privacy was invaded. It is this decision which has created much of the existing confusion pertaining to the employee's right to privacy away from the workplace.[8]

This article takes a critical look at the *Doman* decision and asks whether it is consistent with other privacy jurisprudence, or if it has unreasonably expanded the scope of employee privacy to the detriment of employers. Because of the lack of certainty in the jurisprudence in this area, a critical examination of the *Doman* decision may be useful in determining whether a shift away from the standards articulated in *Doman* are necessary or desirable.

The *Doman* Decision

In *Doman*, the grievor was a long-serving employee with an extensive record of absenteeism between 1984 and 1989.[9] On Friday, October 20, 1989, the last day of the grievor's vacation, he called the company to say that he would be sick on the subsequent Monday. The company superintendent who took the call asked the grievor how he knew what his condition would be in advance. The grievor replied that he would call back on Monday if he was sick. That same day, a decision was made by the company to monitor the employee if he did not report for work on Monday. The grievor called in sick Monday morning, indicating that he could hardly get out of bed. This prompted the company to dispatch two investigators to conduct a surveillance of the employee's activities. The investigators observed and videotaped the grievor directing work on a construction site. He was also observed performing various construction tasks. Consequently, the grievor was discharged for fraud.

At arbitration, the employer was permitted to call evidence depicting the circumstances under which the video surveillance was conducted. This included the employee's sick leave record, the fact that he had made a false Workers' Compensation Board ("WCB") claim four years earlier, and the suspicious nature of the telephone call that the grievor made to the company. The union objected to the admissibility of the videotape

5 Most writers for employee privacy agree that the right is not absolute and can be intruded upon under certain conditions.

6 This doctrine stands for the proposition that, where a collective agreement is silent on a matter, the employer retains the right to implement any action or policy.

7 (Preliminary Award) (1990), 13 Labour Arbitration Cases (4th) 275; (Award) summarized 21 Canadian Labour Arbitration Summaries 479.

8 See J. Ford, "The Right To Privacy in Employment: a Management Perspective" (1991) 1 Labour Arbitration Yearbook 95; A. Barss, "Search and Surveillance in the Workplace: The Employee's Perspective" (1992) 2 Labour Arbitration Yearbook 181; B. Bilson, "Search and Surveillance in the Workplace: An Arbitrator's Perspective" (1992) 2 Labour Arbitration Yearbook 143; L. Shouldice, "Employee Surveillance" (May 1994) 1 Employment and Labour Law Reporter 17.

9 It is noted that Arbitrator Vickers concluded that there was nothing unusual about the employee's pattern of non-attendance. However, some critics disagree, calling his absenteeism record "horrendous."

evidence and the observations of the investigators on the grounds that the grievor's right to privacy had been violated. The union relied upon section 8 of the Charter which guarantees "the right to be secure against unreasonable search or seizure." While the union conceded that the Charter did not apply to private party disputes, it relied upon the principles put forward by Supreme Court Justice McIntyre in *R.W.D.S.U., Loc. 580* v. *Dolphin Delivery Ltd.* ("*Dolphin*").[10] Specifically, it urged the arbitrator to apply the common law in light of the values enshrined in the Charter. Vickers agreed that as an adjudicator, he was called upon to acknowledge fundamental Charter values when adjudicating a private dispute. He went on to consider *R.* v. *Duarte*[11] and noted that the Supreme Court of Canada strongly affirmed the concept of individual privacy. As a result, Vickers drew a parallel between the vulnerability of individuals to intrusion by the state and the powerlessness of an employee in relation to an employer.

Although the collective agreement did not expressly contain a right to privacy, the Arbitrator stated that it was impossible to read the agreement outside the value system imposed by the Charter and the British Columbia Privacy Act.

Although the collective agreement did not expressly contain a right to privacy,[12] Vickers stated that it was impossible to read the agreement outside the value system imposed by the Charter and the British Columbia Privacy Act. In his assessment, a balance had to be struck between the right of the employer to investigate a potential abuse of sick leave and the right of the grievor to be left alone. According to Vickers, there were three questions that had to be considered to achieve this balance and these are referred to in this article as the *Doman* test:

- Was it reasonable in all the circumstances to request a surveillance?
- Was the surveillance conducted in a reasonable manner?
- Were there other alternatives open to the company to obtain the evidence it sought?

Vickers held that the surveillance was an unreasonable invasion of the grievor's privacy and therefore, both the videotape evidence and the investigators' *viva voce* evidence were inadmissible. As a result, the dismissal was unwarranted and the grievor was reinstated with back pay.[13] Vickers gave several reasons for the failure of the first branch of the *Doman* test. First, at the time the surveillance was ordered, the company had insufficient evidence to warrant the initiation of surveillance. Vickers stated that it was the responsibility of the company official who received the grievor's Friday phone call to have asked him further questions if the call was perceived as suspicious. According to Vickers, before surveillance is resorted to, the employer, at minimum, is required to put some threshold questions to the employee regarding the nature of the illness, her ability to perform work, and whether she anticipates doing anything other than resting at home. As well, Vickers noted that because the grievor was a long-serving employee with no disciplinary record, the company had an obligation to confront him with its concerns before taking further action. Additionally, Vickers noted that the employer had taken into account a previous incident in which the grievor had fraudulently claimed WCB benefits (which were denied based on surveillance evidence). This had occurred four years prior to the incident in question and did not, in the arbitrator's view, provide grounds to conduct further surveillance.

10 [1986] 2 Supreme Court Reports 573, 33 Dominion Law Reports (4th) 174.

11 [1990] 1 Supreme Court Reports 30, 65 Dominion Law Reports (4th) 240. This is considered one of the leading cases on section 8 of the Charter. It dealt with the question of surreptitious electronic surveillance on an individual by a state agency.

12 In most privacy intrusion cases, the collective agreement provides little or no assistance. Where the collective agreement contains provisions dealing with privacy, they must of course, be heeded. See C.L. Rigg, "The Right to Privacy in Employment: An Arbitrator's Viewpoint" (1991) 1 Labour Arbitration Yearbook 85.

13 It is noted that only fifty per cent back pay was ordered. As the period between the suspension and the final award was close to one year, the result was therefore equivalent to a six month suspension.

Doctrinal Consistency

Is the decision in *Doman* regarding employee privacy rights, and the conditions under which an employer may invade that privacy, consistent with existing doctrines? Are the standards which Vickers creates for employers reasonable? In answering these questions, the main sources used by Vickers in arriving at his decision in *Doman* will be considered: arbitral jurisprudence, decisions under the British Columbia Privacy Act, and Charter cases dealing with privacy.

An employer has a legitimate right to protect company property and may institute search policies to enforce this right.

Arbitral Jurisprudence

The three-step test set out in *Doman* to determine whether there has been an invasion of the employee's privacy is similar to tests put forward in other arbitral privacy decisions.[14] Therefore, in comparing the result in *Doman* to other arbitral cases, it is useful to examine how other arbitrators have answered the following questions: (i) when is it reasonable for the employer to invade the employee's privacy; (ii) is the invasion of privacy conducted reasonably; and (iii) under what circumstances are there no other means by which the employer can obtain the sought information. It is important to note that the privacy interests which arbitrators have to consider are different depending upon the degree of intrusion resulting from the employer's actions. The type of off-site surveillance conducted in *Doman* is considered a serious potential invasion of privacy as it involved the employer delving into the employee's personal life away from the workplace. On the other hand, the posting of a security guard at the workplace entrance to monitor employees as they enter and leave would be considered a potentially minor privacy intrusion. As the applicable standards vary from one privacy context to another, the situations considered here are those which are regarded as being potentially serious privacy intrusions.

1) Employee Search Cases

Employee search cases involve situations in which the employer subjects employees or their personal belongings to physical searches on the work site. In such cases, employers are interested in protecting company property and deterring employee theft. Employees, on the other hand, are concerned with being subjected to random searches which do not respect their integrity.

The leading arbitral case concerning employee searches in British Columbia is *Re Lornex Mining Corp. and U.S.W.* ("*Lornex*").[15] *Lornex* dealt with union grievances arising out of the employer's policy that all lunch boxes were subject to being searched when employees left company property. The arbitrator considered the relevant case law and stated that the invasion of privacy in this context was reasonable. This was due to a recognition that an employer has a legitimate right to protect company property and may institute search policies to enforce this right.[16] Thus, it would appear the first part of the *Doman* test (whether it was reasonable in the circumstances to invade the employee's privacy) was passed.

However, the arbitrator found that the invasion of privacy was not conducted

14 J. Ford, "The Right To Privacy in Employment: a Management Perspective" (1991) 1 Labour Arbitration Yearbook 95.

15 (1983) 14 Labour Arbitration Cases (3d) 169.

16 This same reasoning was used in *Royal Oak Mines Inc. and Canadian Association of Smelter & Allied Workers Local #4* [1992], British Columbia Decisions Labour Arbitration 475-01.

reasonably and therefore the search policy was ultimately deemed to be an unreasonable privacy intrusion. Specifically, the arbitrator found the search policy to be unreasonable because the searches were conducted randomly by security guards who had no objective criteria to determine who would be searched. Further, the arbitrator held that employees who were not under suspicion had a right not to be singled out in an arbitrary manner. Therefore, had there been objective reasons for searching a particular employee, it appears that the employee searches would have been reasonable.

Employers should not be free to intrude upon the privacy of employees at a whim.

What are the differences between the invasion of privacy conducted in *Doman* and in *Lornex*? In *Doman*, the employer intruded into the employee's private life away from work, while in *Lornex*, the employer was more concerned with the employees' on-site activities.[17] This difference has significance. It is clear that an employer, in most cases, can more easily justify an interest in the activities of his employees at the workplace as opposed to off-site. Beyond this, however, the cases are not that different. In both cases, the employer took action to prevent deception and loss of company property. It can be argued that *Doman* is similar to *Lornex* in the sense that the action taken by the employer was the only reasonable means by which employee fraud could be detected.

The main principle flowing from *Lornex* seems to be that employers should not be free to intrude upon the privacy of employees at a whim. Employers should have reasonable suspicion that an employee is engaged in a fraudulent activity before his privacy can justifiably be invaded. However, despite the fact that the surveillance in *Doman* was conducted based on objective evidence, it was still held to be unreasonable. Therefore, *Doman* seems to establish that an invasion of an employee's privacy will only be justified where the employer has conclusive proof of the employee's fraud and no other alternatives exist for obtaining the sought information. This standard of reasonableness is higher than that established for employers in British Columbia employee search cases.

2) Employee Drug Testing Cases

In drug testing cases, employers demand that employees submit to drug tests in order to ensure the safety of the employee and her co-workers. Additionally, employers use such tests to determine whether an employee is fit to perform a particular task.[18] However, such testing can reveal more about an employee than an employer is entitled to know. For example, a drug test may reveal that an employee is pregnant or is taking prescription drugs for a medical condition unrelated to the employee's work.

Among the recent arbitral decisions dealing with drug testing and privacy rights is *Esso Petroleum Canada Ioco Refinery, A Division of Imperial Oil Ltd. and C.E.P.U., Local 614* ("*Esso*").[19] In *Esso*, the British Columbia Arbitration Board considered whether a company policy requiring random urine and breath tests for drugs and alcohol, mandatory periodic blood tests, and mandatory employee self disclosure regarding substance abuse constituted an unacceptable invasion of the employees' privacy. In a thorough review of the jurisprudence, the Board distilled a two-step test: (i) is there justification or adequate cause for the tests; and (ii) are there other reasonable ways in which the problem in the work place could be addressed.

17 However, it is noted that on-site searches can reveal information about the employee's off-site activities.

18 D. Ibister, "Justifying Employee Drug Testing: Privacy Rights Versus Business Interests" 5 Dalhousie Journal of Legal Studies 255-270.

19 [1995] British Columbia Decisions, Labour Reports 100-01.

In applying these tests, the Board determined that the majority of the employer's policy was unacceptable as it affected the dignity and privacy of individual employees.[20] However, the Board upheld certain aspects of the drug and alcohol policy which allowed tests to be conducted when the employer had reasonable cause and after significant work accidents.

What is reasonable cause in this context? While the Board in *Esso* did not elaborate on this issue, one answer can be found in a non-British Columbia arbitral case: *Fiberglas Canada Inc. and A.C.T.W.U.* ("*Fiberglas*").[21] In *Fiberglas*, the arbitrator found that the employer had reasonable cause to demand mandatory random drug tests of employees who had completed a drug dependency program. The arbitrator also noted that the drug tests were important tools used to control the abuse of drugs.

The standard of reasonableness required of employers in *Doman*, however, is much higher than that required of employers in drug testing cases. In *Doman*, the employee had an extensive absentee record and was known to have made a fraudulent WCB claim. The employee was also absent under highly suspicious circumstances and was known to be working on another construction site while in the service of the employer. Nonetheless, this compelling evidence did not meet the *Doman* standard established by Vickers. The *Doman* standard of reasonableness, therefore, appears to be inconsistent with the standard articulated in drug testing cases.

Privacy Act Jurisprudence

In *Doman*, Vickers stated that although there was no provision in the collective agreement ensuring the right to privacy, it was impossible to read the agreement outside the principles contained in *inter alia* the British Columbia Privacy Act. In order to effectively critique the *Doman* decision, therefore, it is necessary to examine the statement of law contained in the Act. It is argued here that, when compared with the principles put forward in the Act and the related case law, the standards created by *Doman* are unreasonably stringent in their application to employers.

Sections 1 through 3 of the Act establish the factors to be examined when determining whether there has been an invasion of privacy: (i) whether the violation of privacy was willful and without claim of right; (ii) whether there was a reasonable degree of privacy to which the litigant was entitled, due regard being given to the lawful interests of others; and (iii) the relationship between the parties.

The first factor under the Act is that a person willfully and without claim of right violates the privacy of another. The fact that the video surveillance in *Doman* was willful is indisputable. Unfortunately, the case law does not tell us what constitutes a "claim of right." Although various arguments can be generated here, let us assume that this criterion is satisfied.

The second factor to be considered under the Act is whether the litigant is entitled to a reasonable degree of privacy, due regard being given to the lawful interests of others. What constitutes a "reasonable degree of privacy" is not articulated in the Act and must be inferred from the case law. *Insurance Company of British Columbia* v. *Somosh*

20 By definition, mandatory drug testing affects privacy. The real issue is whether it is warranted. For this discussion see E. Oscapella "Drug Testing and Privacy: 'Are You Now, Or Have You Ever Been, a Member of the Communist Party?'; McCarthyism, Early 1950's: 'Are You Now, Or Have You Ever Been, a User of Illicit Drugs?': McCarthyism, 1990's" (May 1994) 2 Canadian Labour Law Journal 325.

21 (1989) 5 Labour Arbitration Cases (4th) 302.

("*Somosh*")[22] dealt with a claim by an insurance company to recover money that it had paid to the defendant. The insurer hired a private investigator to telephone the defendant's place of employment and inquire about his earnings and personal habits. The defendant counter-claimed for invasion of privacy. The Court found that these inquiries violated the defendant's privacy as they went beyond the plaintiff's legitimate interests and the nature of the dispute in which the two parties were involved.

Unlike his counterpart fifty years ago, today's employee does not sell himself to his employer; only his labour is sold.

In *Davis* v. *McArthur* ("*Davis*"),[23] a married woman hired the defendant, a private investigator, to monitor her husband whom she suspected of having an affair. The court found that the defendant's surveillance of the plaintiff did not constitute a violation of privacy. First, the defendant was acting as an agent for the wife who had a legitimate interest in her husband's activities. Further, the defendant's behaviour did not attract public attention and was not offensive.

Considering the principles flowing from these cases, it is difficult to conclude that the second factor under the Privacy Act was satisfied in *Doman*. First, an employee who is defrauding his employer or engaging in highly suspicious activities should not be entitled to a reasonable degree of privacy while engaging in those activities. Second, the nature of the surveillance conducted in *Doman* did not exceed the legitimate interests of the employer. Given the nature of the relationship between the parties and the possibility of fraud on the part of the employee, the employer possessed a legitimate interest in knowing what the grievor was doing on the day in question. Further, the employer in *Doman* sought only to know whether the grievor was being deceitful. In conducting the surveillance, the employer did not attempt to ascertain anything beyond what the grievor was doing while claiming to be sick.

The final factor under the Act is whether the privacy of the individual was violated as a result of the "nature, incidence, or occasion of the act or conduct," due regard being given to the relationship between the parties. With regard to the "nature of the conduct" the court in *Davis* found that the behaviour of the defendant did not attract public attention and was not carried out in an offensive manner. The same can be said for the surveillance conducted in *Doman* in which the grievor did not become aware of the surveillance until arbitration. The Act also considers the relationship between the parties. Although the courts have not interpreted the significance of specific relationships between plaintiff and defendant, it can be inferred from the case law that a closer relationship will make the claim of invasion of privacy more difficult to succeed. Specifically, the husband-wife relationship in *Davis* was sufficient to give the wife a legitimate interest in the affairs of her husband; this is contrasted with *Somosh* where the insurance company was deemed to not have a legitimate interest in the personal habits of the defendant.

What is the significance of the employment relationship? Clearly, a substantive answer to this question is beyond the scope of this paper. However, a few general points can be made. Unlike his counterpart fifty years ago, today's employee does not sell himself to his employer; only his labour is sold. However, it is inappropriate to characterize

22 (1983) 51 British Columbia Law Reports at 344 (British Columbia Supreme Court).

23 (1971), 17 Dominion Law Reports (3d) 760, [1971] 2 Western Weekly Reports 142 (British Columbia Court of Appeal). In *Davis*, the defendant used various means of tracking the plaintiff including attaching an electronic device to his car to ascertain his whereabouts.

this relationship as purely contractual. On the contrary, common law dictates that the employment relationship involves the exercise of reasonable skill, loyalty and good faith on the part of the employee and the provision of compensation and a reasonably safe working environment by the employer. Furthermore, in many contemporary employment relationships, employers arrange for the payment of sickness benefits or other forms of insurance or indemnities when an employee is ill or injured. An employer clearly has a legitimate interest in maintaining the integrity of the system of employee protection from those who would advance fraudulent claims.[24] For these reasons, the position taken here is that the employment relationship may be among the more "special" relationships in which a breach of privacy is not as easily found.

Supreme Court Justice Dickson states that Section 8 is intended to provide a broader protection of the individual's right to privacy than could be found in traditional common law doctrines.

The Charter and the Right to Privacy

In *Dolphin*, the Supreme Court of Canada stated that the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. As a result, in *Doman*, Vickers attempts to bring the values of the Charter directly into the assessment process in which the privacy interest of the employee is weighed against the surveillance procedure set up by the employer. The values Vickers refers to are those captured in section 8 of the Charter which states that "everyone has the right to be secure against unreasonable search or seizure."[25] In *Hunter* v. *Southam Inc.*,[26] Supreme Court Justice Dickson states that Section 8 is intended to provide a broader protection of the individual's right to privacy than could be found in traditional common law doctrines.[27] Dickson, however, makes it clear in *Hunter* v. *Southam* that the guarantee of security afforded by section 8 only protects a "reasonable" expectation of privacy.[28] In *Doman*, Vickers makes reference to Dickson's judgment and states:

> Electronic surveillance by the state is a breach of an individual's right to privacy and will only be countenanced by application of the standard of reasonableness enunciated in *Hunter* v. *Southam*. I must now relate those values to the realm of a private dispute between an employer and an employee whose relationship is governed by the terms of the collective agreement.[29]

What is the standard of reasonableness to which Vickers refers? The general thrust of the Supreme Court on privacy matters is effectively captured in the following extract from *Hunter* v. *Southam*:

> To associate [the point at which the interests of the state prevail] with an applicant's reasonable belief that relevant evidence may be uncovered by the search, would be to define the proper standard as the possibility of finding evidence. This is a very low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions of considerable latitude. It would tip the balance strongly in favour of the state and limit the right of the individual to resist to only the most egregious intrusions. I do not believe this is a proper standard for securing the right to be free from unreasonable search and seizure.[30]

Dickson suggests that the line should be drawn as follows: "[t]he state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly based probability replaces suspicion."[31]

24 *Re Canadian Pacific Ltd. and Brotherhood of Maintenance of Way Employees*, (1996) 59 Labour Arbitration Cases (4th) 111, Canada (*Picher*).

25 Section 8 of the Charter also includes protection from video surveillance. See *R. v. Wong*, [1990] 3 Supreme Court Reports 36, 60 Canadian Criminal Cases (3d), 460.

26 [1984] 2 Supreme Court Reports 145, 11 Dominion Law Reports (4th) 641 (hereinafter cited to Dominion Law Reports).

27 See above at page 650.

28 See above at page 652.

29 See note 7 at 279.

30 See note 26 at 167.

31 See note 26 at 167.

Several observations can be made. First, the judges who have interpreted section 8 of the Charter recognize that it is necessary to balance the interests of the individual and the state. This balance is achieved by focusing on whether the interest claimed by the state is important enough to justify sweeping away the protection under the Charter. To be of sufficient importance, the agents of the state must show reasonable grounds in order to justifiably infringe upon a private person's constitutional rights. Second, these cases must be considered against the backdrop of *state* intrusion into the private lives of individuals. It is highly debatable whether the concern regarding an invasion of privacy by *individuals* would be viewed as an equally significant threat. The view taken in this article is that in *Hunter* v. *Southam*, the Supreme Court was articulating the standard of reasonableness which had to be met by the state rather than by private parties. The realities and potential power imbalances involved in the employment relationship are quite different than in the state-citizen relationship. Therefore, to apply a strict Charter standard to the employment relationship is improper.

Third, in the Charter cases, like in the arbitral and British Columbia Privacy Act jurisprudence, we are confronted with the ambiguities surrounding the term "reasonable." Although *Hunter* v. *Southam* gives some guidelines as to how judges should apply this standard, specific criteria are not provided and the decision maker is left with a significant amount of discretion. The view taken here is that when one considers the importance of the right to privacy, the requirement of "credibly based probability" and the employment context in general, it follows that the situation confronted by the employer in *Doman* provided reasonable grounds upon which to infringe an employee's privacy.

Subsequent Arbitral Surveillance Jurisprudence

Have the standards articulated in *Doman* shifted with respect to subsequent off-site surveillance jurisprudence? As there have not been many decisions in this area and those that do exist have shown considerable variations, a definitive conclusion cannot yet be reached. Furthermore, because the decisions in this area are particularly fact driven, it is difficult to compare the standards applied in each case. However, it appears that the most recent decisions, while endorsing the analysis used in *Doman*, do tend to achieve a reasonable balance between employer interests in preventing fraud and employee privacy concerns.

The first case to deviate from the standard imposed in *Doman* was *Re Steels Industrial Products and Teamsters Union* ("*Steels*"),[32] the facts of which were very similar to *Doman*. In *Steels*, Arbitrator Blasnia concluded that (i) because of the employee's history of untruthfulness it was reasonable for the employer to have conducted the surveillance and (ii) the surveillance did not harass or cause nuisance to the grievor and was therefore conducted in a reasonable manner.

The more stringent *Doman* standards resurfaced in the next case to consider the issue of the admissibility of video surveillance evidence: *Re Alberta Wheat Pool and Grain*

32 (1991), 24 Labour Arbitration Cases (4th) 259.

Workers' Union, Local 333 ("*Alberta Wheat Pool*").[33] In this case, Arbitrator Williams held that the videotape evidence provided by a private investigator was inadmissible because the employer failed on the first step of the *Doman* test. In *Alberta Wheat Pool*, the grievor had a long history of absenteeism due to illness and injury over a thirty-three year period. Due to suspicious circumstances and rumours that the grievor was building a house while on long-term disability, the employer retained a private investigator to videotape the grievor's activities. The videotape confirmed that the employee was engaged in building a home. According to Williams, although the employer's suspicions were justified, the surveillance itself was not because the decision to conduct the surveillance was made the same day that the employer heard the rumour.

The most recent cases, however, have produced a different result than *Alberta Wheat Pool*. In *Greater Vancouver Regional District and G.V.R.D.E.U.* ("*G.V.R.D.*")[34] Arbitrator McPhillips applied the *Doman* test to an off-site surveillance situation and concluded that the surveillance evidence was admissible. The employer's suspicions that the employee was abusing sick leave benefits were based upon a supervisor's direct observations of the employee's suspicious behaviour and medical opinions indicating a lack of basis for the illness.

In *Pacific Press Ltd. and Vancouver Printing Pressmen Assistants and Offset Worker's Union, Loc. 25* ("*Pacific Press*"),[35] Arbitrator Devine found that the employer's decision to conduct off-site surveillance of an employee was reasonable. This was due to the employee's long record of absenteeism and evidence which indicated that the employee was running a hang-gliding business while claiming sick leave benefits. The surveillance evidence, however, was ultimately rejected because Devine determined that the surveillance was not conducted in a reasonable manner. The facts indicated that the private investigators contacted the employee and asked for a hang-gliding lesson. Therefore, the proactive nature of the investigators' surveillance invalidated the surveillance evidence.

Do these latter two cases indicate a shift from the strict standards imposed in *Doman* and later in *Alberta Wheat Pool*? Again, as these decisions are particularly fact driven, a certain conclusion is difficult to reach. However, it appears that, while approving of the analysis used in *Doman*, the most recent cases seem to hold employers to a more reasonable standard in determining whether the breach of an employee's privacy is justifiable.[36]

Conclusions

It is clear that employers may only invade the privacy of their employees when it is reasonable to do so: when the invasion is conducted reasonably and when there are no less intrusive means for the employer to obtain the information that it seeks. Reasonableness is a common theme that runs through the privacy jurisprudence including Charter, arbitral and Privacy Act cases.

The case law interpreting the Charter provides the standard of reasonableness *for the state*. In *Hunter* v. *Southam*, the Supreme Court held that the state's interest starts to prevail over the individual's interest when credibly based probability replaces suspicion.

Reasonableness is a common theme that runs through the privacy jurisprudence including Charter, arbitral and Privacy Act cases.

33 (1995), 48 Labour Arbitration Cases (4th) 332.

34 (1996), 59 Labour Arbitration Cases (4th) 45.

35 (1997), 64 Labour Arbitration Cases (4th) 1.

36 *Re Canadian Pacific Ltd. and Brotherhood of Maintenance of Way Employees,* (1996) 59 Labour Arbitration Cases (4th) 111, Canada (*Picher*) is a recent non-B.C. off-site surveillance which makes extensive reference to *Doman*. Despite factual similarities to the *Doman* case, arbitrator *Picher* also seems to apply the more reasonable standard found in the recent B.C. jurisprudence.

The view taken here is that the actions of the employer in *Doman* were reasonable when considered within a contextual framework (i.e. the employment relationship is different from a state intrusion into the lives of citizens).[37]

What does the Privacy Act add to the definition of reasonableness? First, the Act and the case law seem to focus heavily on preventing individuals from invading the privacy of another when they have no legitimate reason to do so. The second main principle is that the manner in which the individual's privacy is intruded upon must also be reasonable. These seem like fair principles which protect an individual from random privacy intrusions, yet at the same time, recognize that others may sometimes have legitimate reasons to invade a person's privacy.

Finally, arbitral jurisprudence has also established principles of reasonableness. In both the employee search cases and the drug testing cases, the arbitrators are concerned with overly broad employer policies which allow for arbitrary and unjustified invasions of the employee's privacy. In both contexts, however, arbitrators recognize the right of an employer to conduct searches or request tests of an individual employee when she has legitimate reasons to suspect that employee. In the context of drug testing, for example, an employer is deemed to have reasonable grounds to request an employee to submit to random drug tests when the employee is known to have suffered from a drug problem.[38]

The ultimate finding in *Doman*, however, seems inconsistent with these principles. The standard of reasonableness imposed upon the employer is more onerous than the standard articulated in the cited authorities. It requires employers to have an unreasonably high level of proof and a lack of other possible alternatives before conducting off-site surveillance. The result is that the employee's right to privacy has been unnecessarily and unfairly enhanced by the *Doman* decision.

In order to determine where the balance should lie between employer and employee interests, a number of factors are relevant. First, the collective agreement should be considered. If the parties turn their minds to the conditions under which privacy can be invaded, then clearly this is the governing standard within their particular employment relationship. As has been noted, however, privacy concerns are not often addressed within a collective agreement, leaving the arbitrator to balance the opposing interests of the employer and the employee. A fair way to accomplish this task is to apply the *Doman* analysis but with the more reasonable standards found in *G.V.R.D.* and *Pacific Press:*

1. Was it reasonable, in all of the circumstances, to request a surveillance?

It is clear that a standard of reasonableness is necessary to determine when the right of privacy can be intruded upon. The various standards considered seem to suggest a common sense approach: does the employer have credible evidence upon which to justify a decision to intrude upon the employee's privacy? Mere suspicion will not suffice. On the other hand, the employer should not be required to produce "the smoking gun." The view taken here is that the employee's relevant prior incidents of

37 It is acknowledged that without specific and objective criteria, this argument is based primarily on opinion. Still, I reach my ultimate conclusion considering the general guidelines set out by the Charter jurisprudence.

38 See note #21.

misconduct coupled with his highly suspicious behavior gave the employer reasonable grounds upon which to conduct an investigation.

2. Are there any reasonable alternatives open to the employer?

It seems fair that it is only justifiable for an employer to invade an employee's privacy when there are no other *reasonable* alternatives. Such a requirement recognizes the importance that society places on the right of privacy. In *Doman*, it does not appear that there were other reasonable alternatives open to the employer. Even had the employer confronted the grievor before initiating the surveillance, it seems likely that the employee would have been untruthful, considering his past misconduct. Additionally, when *Doman* was told by his supervisor that it was ridiculous to predict his illness in advance, he gave no response other than to say that he would call back if he was sick. Therefore, it is arguable that the employer in *Doman* had good reason to believe that a direct confrontation would be fruitless and might jeopardize an attempt to discern the truth. On the other hand, if an employer is confronted with a situation in which she has no evidence other than rumors that an employee is abusing sick leave benefits, she would not have reasonable grounds to conduct a surveillance. Instead, the employer would be obliged to confront the suspected employee with the rumours or perhaps consult the doctor who provided the medical slip.

3. Was the surveillance conducted in a reasonable manner?

It is also important that the dignity of employees be protected. An investigation by the employer should not invade the employee's privacy beyond the level required nor harass or cause a nuisance to the employee. For example, it would be unreasonable for an investigator to commit a crime in order to videotape an employee. This seems to be a fair way to protect the employee's right to privacy while also recognizing the employer's legitimate interest in preventing and deterring fraudulent activities.

In summary, while the language of this test is almost identical to the one set out by Vickers in *Doman*, the standards applied are substantially different. This test requires employers to meet a more reasonable standard before proceeding to undertake employee surveillance. It reflects the concept that while society values privacy, it does not demand that privacy be an absolute right. An individual's privacy can be justifiably invaded when it is reasonable to do so. This article suggests that the *Doman* case extends the scope of privacy rights beyond the standard articulated in arbitral, Privacy Act and Charter jurisprudence. While the test used in *Doman* appears appropriate, it seems that the manner in which it is applied by Vickers has the effect of subjecting employers to unreasonably onerous standards. The most recent arbitral cases seem to indicate a shift from the rigid *Doman* standard of reasonableness. The position taken here is that such a shift is both necessary and desirable. However, considering that *Doman* continues to be a leading case in the employee privacy area, it remains to be seen if this movement in the jurisprudence away from *Doman* will continue.

Putting an End to Unreasonableness: Judicial Review and Local Governments

FEATURE ARTICLE

MICHELLE LAWRENCE STUDIED AT THE UNIVERSITY OF WESTERN ONTARIO'S SCHOLAR'S ELECTIVE PROGRAM BEFORE ATTENDING THE UNIVERSITY OF VICTORIA. SHE WILL COMPLETE HER LAW DEGREE AT THE UNIVERSITY OF OTTAWA LAW SCHOOL.

Local government by-laws are subject to rigorous judicial scrutiny in Canada. Under the cover of the "unreasonableness doctrine," courts engage in a strict form of judicial review and, at times, excessive interference with the delegated decision-making authority of local governments. This paper will examine the roots of the unreasonableness doctrine and its application as a vehicle for judicial intervention in local government affairs. It will be argued that an attitude of suspicion and distrust underlies the judiciary's use of the unreasonableness doctrine. This attitude is premised on the historic belief that judicial supervision is required to prevent local governments from acting irresponsibly. With this in mind, it will be further argued that the unreasonableness doctrine, as applied by Canadian courts to local government by-laws, is an arcane tool for judicial paternalism which ought to be abandoned.

The Unreasonableness Doctrine

Courts have long held that by-laws may be invalidated if they are "unreasonable." The classic judicial pronouncement on the unreasonableness doctrine, as it relates to local government by-laws, is *Kruse* v. *Johnson.*[1] This case concerned a prosecution under a by-law which made it an offense to "sing in any public place or highway within fifty yards of any dwelling-house after being required by any constable … to desist." The English Divisional Court was asked to quash the by-law on the ground that it was unreasonable.

In a celebrated judgment, Lord Russell cautioned against the use of the unreasonableness doctrine as a conduit for excessive judicial interference and, accordingly, established a strict legal test:

> I think courts of justice ought to be slow to condemn as invalid any by-law … on the ground of supposed unreasonableness. … I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws … as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are

1 *Kruse* v. *Johnson,* [1898]. 2 Queen's Bench [Reports] 91 (Divisional Court).

With municipal governments taking on a larger role – especially after amalgamations in Toronto and Ottawa – the tendency of courts to usurp democratic decisions is increasingly unjustifiable

> unreasonable and *ultra vires*." But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there.[2]

As this excerpt suggests, the Divisional Court used "unreasonable" as an umbrella term encompassing the exercise of bad faith, discrimination, and oppressive conduct. A regulation, to be reasonable, must survive scrutiny on all these substantive sub-grounds.[3]

Lord Russell further held that the unreasonableness doctrine applies more rigidly to private corporations than public bodies.[4] Private enterprises, he found, were not subject to adequate levels of parliamentary or electoral control.[5] On the contrary, the decision-making power of these businesses was virtually unfettered. Hence, the judiciary must assume a supervisory role and, through the unreasonableness doctrine, restrain private corporations when necessary to protect the public interest. Public governments, however, deserved greater deference by virtue of their representative nature and public-interest purpose. Therefore, local by-laws, he wrote, generally should be interpreted benevolently and supported if possible. The unreasonableness doctrine, then, should only be used to quash the enactments of local governments if, despite generous judicial treatment, they continue to be unreasonable.[6]

The English Court of Appeal in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[7] ("*Wednesbury*") narrowed the application of the unreasonableness doctrine. The plaintiff in this case challenged the reasonableness of a local authority's decision to license the Sunday opening of a cinema on the condition that children under 15 years of age be excluded. Lord Green M.R., in his decision, held that the unreasonableness doctrine should be applied only to extreme and overwhelming cases:

> It is true to say that if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, the courts can interfere … but to prove a case of that kind would require something overwhelming.[8]

It appears that Lord Green intended to preserve the decision-making ability of local governments and immunize them from the political whims of the judiciary. This sentiment accords generally with Lord Russell's approach in *Kruse* v. *Johnson* and indicates an underlying desire to defer to local decision-makers on public-interest matters.

2 See above at 99-100.

3 Denys C. Holland and John P. McGowan, *Delegated Legislation in Canada* (Toronto: Carswell, 1989) at 225-27.

4 *Kruse* v. *Johnson*, see note 1 at 97-100.

5 See above at 97-99. Lord Russell enumerated provisions in The Local Government Act, 1888, which safeguard against the irresponsible exercise of delegated authority of public bodies. In particular, he cited section 23 which provided that a by-law could not be made without two-thirds of council members present. As well, a by-law could not come into force immediately. A copy of the by-law first had to be placed on the town hall for not less than forty days and another copy had to be sent to the Secretary of State. Within forty days of the delivery of this document, the Queen could disallow the proposed enactments or extend the forty-day consideration period.

6 See above at 99-100.

7 *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*, (1947), [1948] 1 King's Bench [Reports] 223 (English Court of Appeal).

8 See above at 230.

The Application of the Unreasonableness Doctrine in Canadian Law

In 1907, Lord Russell's judgment in *Kruse* v. *Johnson* was officially adopted in Canada by Justice Irving of the British Columbia Court of Appeal in *Moloney* v. *Victoria (City)*.[9] A solid line of jurisprudential authority subsequently emerged in support of the *Kruse* v. *Johnson* and *Wednesbury* approach to unreasonableness considerations.[10] Most recently, for example, the British Columbia Court of Appeal in *Canadian National Railway Co.* v. *Fraser-Fort George (Regional District)*[11] affirmed the lower court's application of the *Wednesbury* test for unreasonableness. In this case, the Regional District of Fraser-Fort George passed a taxing by-law enabling it to provide telephone services to a local community. However, the by-law had the effect of imposing 95 per cent of the tax burden on the petitioner, the Canadian National Railway Company. CN Rail argued that the by-law was unreasonable. The court agreed. It held that the regulation was a transparent attempt by the regional government to create a tax base to support local telephone service at the railway company's expense. In the court's opinion, the unreasonableness of the by-law was *overwhelming*. Accordingly, it was quashed.

Holland and McGowan, in their work *Delegated Legislation in Canada*,[12] argue that, despite such jurisprudence, Canadian courts tend to quash delegated legislation for unreasonableness in circumstances which do not meet the "overwhelming" threshold set in *Wednesbury*.[13] These authors cite *Bell* v. *R.*[14] as an example of judicial misapplication of the unreasonableness doctrine. In this 1979 case, the Supreme Court of Canada considered the validity of a zoning by-law which stipulated that a particular type of residence in North York, Ontario could be occupied only by a "family." Bell, who lived in a home with two friends, was prosecuted because he and his roommates did not fit within the by-law's definition of family. Bell argued that the by-law was unreasonable. This submission failed at trial but was accepted by a majority at the Supreme Court.

In finding the impugned enactment unreasonable, the Court noted that the by-law, if fully enforced, would prevent all unrelated persons from living together anywhere in the city.[15] With this in mind, the Court found that the circumstances of the case satisfied the doctrinal test for unreasonableness. It held that personal qualifications were not *reasonable* considerations in decisions regarding land use or zoning. The by-law's definition of "family" as persons related by consanguinity, marriage or adoption constituted "such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men."[16]

Holland and McGowan agree that the by-law's requirements, when applied broadly, are intrusive. However, they question whether the by-law, in the circumstances of this particular case, is as "overwhelming" as that contemplated in *Wednesbury*.[17] Considerations of a land user's personal characteristics, after all, are not always unreasonable. For instance, they are important in decisions regarding low-income housing and homes for people with disabilities. Holland and McGowan conclude that the Court in *Bell* adopted the language of *Kruse* v. *Johnson* and *Wednesbury* but did not apply those cases correctly. The Court did not interpret the by-law benevolently nor attempt to

9 *Moloney* v. *Victoria (City)* (1907), 6 Western Law Reporter 627 (British Columbia Court of Appeal). The decision of Justice Irving was reversed by the Supreme Court of Canada, but not on this point.

10 Other cases to adopt the *Kruse* v. *Johnson* model include *Shaddock* v. *Calgary (City)* (1959), 29 Western Weekly Reports 49 (Alberta District Court); *Edmonton (City) By-law No. 1546, Re* (1953), 10 Western Weekly Reports (New Series) 407, [1954] 1 Dominion Law Reports 253 (Alberta Court of Appeal); *Winnipeg Merchandisers Ltd.* v. *Winnipeg (City),* [1963] 3 Western Weekly Reports 530 (Manitoba Court of King's Bench); *Kelly* v. *Edmonton (City)*, [1931] 2 Dominion Law Reports 705 (Alberta Supreme Court Trial Division); *Howard* v. *Toronto (City)* (1927), 61 Ontario Law Reports 563, [1928] 1 Dominion Law Reports 952 (Ontario Court of Appeal); *Rogers* v. *Toronto (City)* (1915), 33 Ontario Law Reports 89 (Ontario High Court); *By-law 8030, Winnipeg (City), Re* (1914), 6 Western Weekly Reports 1430 (Manitoba Court of King's Bench); and *Stark* v. *Schuster* (1904), 14 Manitoba Reports 672 (Manitoba Court of Appeal).

11 *Canadian National Railway Co.* v. *Fraser-Fort George (Regional District)* (1994), 1 British Columbia Law Reports (3d) 375, 29 Administrative Law Reports (2d) 97 (British Columbia Supreme Court), affirmed (1996), 26 British Columbia Law Reports (3d) 81, 140 Dominion Law Reports (4th) 23 (British Columbia Court of Appeal).

12 *Delegated Legislation in Canada*, see note 3.

13 See above at 226.

14 *Bell* v. *R.* (1979), 2 Supreme Court Reports 212, 98 Dominion Law Reports (3d) 255 (Supreme Court of Canada) as cited in *Delegated Legislation in Canada, supra*, note 3 at 226 (hereinafter cited to Dominion Law Reports).

support it. In so doing, it did not respect the deferential approach advocated by both Lord Russell and Lord Green. Rather, it exaggerated the *unreasonableness* of the by-law by removing it from the context of the case.

Assessment of the Unreasonableness Doctrine

In general terms, unreasonableness as a ground of review can be useful. For instance, the unreasonableness doctrine gives the judiciary a broad latitude to review enactments.[18] As a result, subordinate decision-makers are accountable to the standards established by courts. As well, the doctrine of unreasonableness may be invoked in civil rights cases not covered by The Charter of Rights and Freedoms[19] and, consequently, may operate as a substitute for some Charter arguments.[20]

Nonetheless, authors Evans, Janish, Mullan and Risk, in their text *Administrative Law*,[21] caution against the use of the unreasonableness doctrine as a tool for the judicial review of discretionary decisions. In particular, they note that the judiciary, in applying this doctrine, may disregard the expertise of an agency or the democratic legitimacy of an elected body and override delegated decision-making power by improperly substituting its own views of substantive *reasonableness*. In addition, Evans et. al. argue that the concept of unreasonableness is simply too vague to assist the courts in crafting appropriate orders to control abuses of discretion. Specific problems, they submit, require specific solutions.[22]

These concerns are particularly problematic in the context of by-laws enacted by elected local governments. In assessing the reasonableness of a by-law, a court usurps the function of local governments elected to make such decisions on behalf of constituents. The community, in electing a particular individual or political party, entrusts this government with the power to exercise discretion in the public interest. This includes the power to determine what is *reasonable* for the community.

In fact, one may argue that modern Canadian society has little need for intrusive judicial supervision of elected governments as the democratic system itself includes safeguards against the unfettered and irresponsible use of delegated discretionary power. Governments must be reelected at the expiration of each term. They are subject to intense media scrutiny and to lobbying by citizens groups. Similarly, the public is entitled to attend council meetings. Such requirements encourage governments to exercise decision-making power responsibly, transparently, and in accordance with public opinion. Moreover, governments which are oppressive and corrupt eventually will suffer redress at the ballot-box. While these safeguards alone cannot guarantee that governments will never enact unreasonable by-laws, they will help to deter such behaviour by making decision-makers accountable to the electorate. The judicial review of by-laws for reasonableness, then, is not required to ensure that local governments act reasonably.

The Abolition of Unreasonableness?

Legislatures have attempted, without success, to abolish the unreasonableness doctrine as it applies to municipal governments. British Columbia, for example, enacted legislation directing courts not to review Vancouver's municipal by-laws for unreason-

*In assessing the reasonableness of a by-law, a court usurps the function of local governments elected to make such decisions on behalf of constituents. The community, in electing a particular individual or political party, entrusts this government with the power to exercise discretion in the public interest. This includes the power to determine what is **reasonable** for the community.*

15 See above at 262.

16 See above at 263.

17 *Delegated Legislation in Canada*, see note 3 at 227.

18 J. M. Evans et al., *Administrative Law: Cases, Text, and Materials*, Fourth Edition, (Toronto: Emond Montgomery, 1995) at 1051.

19 Revised Statutes of Canada 1985, App. II, No. 44, Schedule B, Part I.

20 See note 18 at 1051-52.

21 See above at 1052-53.

22 See above at 1049-52.

ableness. A prohibition on the use of unreasonableness as a ground of judicial review was included in section 148 of The Vancouver Charter:

> A by-law or resolution duly passed by the Council in the exercise of its powers, and in good faith, shall not be open to question in any Court, or be quashed, set aside, or declared invalid, either wholly or partly, on account of the unreasonableness or supposed unreasonableness of its provisions or any of them.[23]

The governments of Ontario and Saskatchewan have enacted almost identical provisions.[24] Such provisions constitute a clear legislative direction to courts requiring them to disregard challenges to the reasonableness of a municipal by-law.

In some cases, courts have cited these prohibitive provisions as authoritative in preventing them from considering challenges based on unreasonableness.[25] Nonetheless, Felix Hoehn, in *Municipalities and Canadian Law*,[26] claims that these prohibitive sections do little to prevent courts from quashing by-laws they find to be unreasonable. Rather, such provisions lead to courts invoking and, when necessary, infusing considerations of unreasonableness into other doctrines of judicial review to achieve the result they desire.[27] For example, a court may find that the by-law offends another, slightly different doctrine, such as bad faith or discrimination. Other courts, with the aid of the express authority doctrine, may interpret these sections so narrowly as to render them virtually meaningless. A review of these doctrines reveals that they are vague and malleable. Courts easily can disguise within them considerations of a by-law's reasonableness.

1. The Doctrine of Discrimination

The doctrine of unreasonableness, as enunciated by *Kruse* v. *Johnson*, included within its definition a doctrine of discrimination.[28] It follows, then, that the statutory abolition of the doctrine of unreasonableness should also abolish considerations of discrimination. The Manitoba Court of Appeal in *Rex* v. *Paulowich*,[29] however, took the opposite view. It held that a provincial statute which abolished the doctrine of unreasonableness did not simultaneously eliminate the doctrine of discrimination. In this case, George Paulowich, a non-resident, was prosecuted for selling milk without a license. He challenged the validity of the municipality's by-law which required only non-residents to have licenses to sell milk within the community. Paulowich contended that the by-law was *ultra vires* because the power to discriminate between residents and non-residents was not expressly conferred to the municipal government by statute. It was argued, in response, that discrimination was a branch of unreasonableness.[30] Hence, section 286(2) of The Municipal Act, which barred considerations of unreasonableness, prohibited the Court from reviewing the by-law for discrimination. The Court rejected this argument and quashed the conviction.

The Court of Appeal held that, despite the abolition of the unreasonableness doctrine, by-laws still may be quashed if they discriminate improperly. Manitoba Chief Justice Prendergast adopted the 1880 decision of the Supreme Court of Canada in *Jonas* v. *Gilbert*[31] which held that the power to discriminate must be expressly authorized by law.[32] Thus, a discriminatory by-law is not valid unless the authority to enact such a by-law is specifically provided for in the enabling statute. It appears, then, that the court in

23 Vancouver Charter, Revised Statutes of British Columbia 1996, Statutes of British Columbia 1953, c.55, at section 148.

24 Municipal Act, Revised Statutes of Ontario 1990, c. M.45, section 101(2) and Urban Municipal Act, 1984, Statutes of Saskatchewan 1983-84, c. U-11, section 91(2).

25 *Levi* v. *Vancouver (City)* (1988), 40 Municipal and Planning Law Reports 219 (British Columbia Supreme Court) at 222; *Law* v. *Flin Flon (City)*, [1995] 101 Manitoba Law Reports (2d) 4, 4 Western Weekly Reports 108 (Manitoba Court of Queen's Bench) at 117; *Re Vancouver License By-law 4957* (1978), 5 British Columbia Law Reports 193, 83 Dominion Law Reports (3d) 236 (British Columbia Court of Appeal) at 203; and *Manitoba Association of Dog Owners Inc.* v. *Winnipeg (City)* (1993), 99 Manitoba Reports (2d) 100 (Manitoba Court of Queen's Bench) at 103-4.

26 Felix Hoehn, *Municipalities and Canadian Law: Defining the Authority of Local Government* (Saskatoon: Purich Publishing, 1996).

27 See above at 26.

28 *Kruse* v. *Johnson*, see note 1 at 99-100.

29 *Rex* v. *Paulowich, sub. nom. Paulowich* v. *Dankochuck*, [1940] 2 Dominion Law Reports 106, 1 Western Weekly Reports 537 (Manitoba Court of Appeal) (hereinafter cited to Dominion Law Reports).

30 See above at 109.

31 *Jonas* v.. *Gilbert* (1880), [1882] 5 Supreme Court Reports 356.

32 See note 29 at 108-9.

R. v. *Paulowich* circumvented the legislative abolition of the unreasonableness doctrine by applying the doctrine of discrimination as an independent head of judicial review rather than treating it as a subset of the unreasonableness doctrine.

2. The Doctrine of Bad Faith

In *Winton Ltd.* v. *North York (Borough)*,[33] the Ontario Divisional Court subsumed the unreasonableness doctrine within the legal test for bad faith:

> To say that Council acted in what is characterized in law as "bad faith" is not to imply or suggest any wrongdoing or personal advantage on the part of any of its members … But it is to say, in the factual situation of this case, that Council acted *unreasonably* and arbitrarily and without the degree of fairness, openness, and impartiality required of a municipal government.[34]

The Court's formulation of the doctrinal test for bad faith clearly involves considerations of unreasonableness. Hence, even though unreasonableness was not available to the Court as a separate head of judicial review, the judiciary was able to entertain it by inconspicuously integrating it into the doctrine of bad faith.

3. The Doctrine of Express Authority

The express authority doctrine is based on *Dillon's Rule* which provides that a municipal by-law, to be valid, must emanate from a power expressly delegated to the municipality in provincial legislation.[35] The Ontario Court of Appeal, in *Ottawa Electric Light Co.* v. *Corporation of Ottawa*,[36] modified this rule slightly, holding that municipalities can also exercise any power implied in – or necessarily incidental to – expressly granted powers, as well as powers essential to the declared object of the municipal body. Any reasonable doubt about the existence of a power, however, will result in that power being denied. Courts, thus, are able to limit the scope of a local governmentís decision-making authority by narrowly interpreting power-granting provisions and object clauses in enabling statutes.

The leading case on the interpretation of enabling statutes is *R.* v. *Greenbaum*.[37] Morris Greenbaum was convicted under a Toronto municipal by-law for unlawfully selling goods along a city road. He challenged the by-law, which regulated sidewalk use, on the grounds that it exceeded its enabling statute. The Supreme Court of Canada, in determining the scope of the municipality's jurisdiction, declined to apply liberal canons of interpretation. Rather, the Court adopted the rule in *Sun Oil Co.* v. *Verdun (City)*: a bylaw that exceeds a municipality's jurisdiction even slightly is *ultra vires*.[38] Thus, rather than expressly quash a by-law for unreasonableness, the court may so narrowly construe the enabling statute that the by-law is itself rendered *ultra vires*.

Why Preserve Unreasonableness?

As the jurisprudence illustrates, the judiciary has preserved its ability to consider the reasonableness of municipal enactments despite the statutory abolition of the unreasonableness doctrine. It is surprising that courts subject elected *local* governments to the unreasonableness doctrine but not federal or provincial governments nor – in some cases – certain unelected decision-makers. Local governments resemble provincial legislative assemblies and the federal Parliament in that they are elected to represent

33 *Winton Ltd.* v. *North York (Borough), sub. nom. Re H.G. Winton Ltd. and Borough of North York* (1978), 20 Ontario Reports (2d) 737, 88 Dominion Law Reports (3d) 733 (Ontario Divisional Court) (hereinafter cited to Dominion Law Reports).

34 See above at 741.

35 *Municipalities and Canadian Law*, see note 26 at 1.

36 *Ottawa Electric Light Co.* v. *Corporation of Ottawa* (1906), 12 Ontario Law Reports 290 at 299.

37 *R.* v. *Greenbaum*, [1993] 1 Supreme Court Reports 650, 100 Dominion Law Reports (4th) 183 (Supreme Court of Canada).

38 *Sun Oil Co.* v. *Verdun* (City) (1951), [1952] 1 Supreme Court Reports 222, 1 Dominion Law Reports 529 (Supreme Court of Canada).

particular constituencies and make decisions in the public interest. Hence, one might expect courts to offer the same degree of deference to local governments as they afford to provincial and federal government bodies.

The constitutional origins of Canada's governments may explain the judiciary's differential treatment of their respective enactments. Stricter standards of review for local government enactments, as compared to provincial and federal legislation, may be explained by the fact that local governments do not receive legislative authority directly from the constitution.[39] Rather, they are creatures of statute. Their authority to enact by-laws is delegated by provincial governments relying on the latter's power to regulate municipal institutions and govern most local matters under sections 92(8) and 92(16) of The Constitution Act, 1867.[40] Thus, it may be argued that municipalities are constitutionally inferior and, therefore, not entitled to curial deference.

The judiciary has preserved its ability to consider the reasonableness of municipal enactments despite the statutory abolition of the unreasonableness doctrine. It is surprising that courts subject elected ***local*** *governments to the unreasonableness doctrine but not federal or provincial governments nor – in some cases – certain unelected decision-makers.*

This reasoning, however, fails to explain why municipal governments receive a standard of judicial review different from that applied to unelected agencies. These two types of bodies share a similar constitutional status. Both are subordinate decision-makers; neither are endowed with inherent legislative authority. Nonetheless, non-elected administrative decision-makers are not all subject to review for unreasonableness. Hence, the continued use of the unreasonableness doctrine with respect to municipal by-laws must be based on factors other than the constitutional status of the decision-maker.

A more likely explanation for the judiciary's unique treatment of local enactments stems from a historic paternalism inherited from the English judiciary. For centuries, courts in England viewed local governments with suspicion and distrust. During medieval times, English systems of local government centered around justices of the peace.[41] These individuals were appointed to enforce statutes and maintain the peace. They had broad powers to fulfill this task, including exclusive jurisdiction to try offenses and supervise ordinances.[42] Justices of the peace were also responsible for determining all accusations of negligence, misfeasance and nuisance and for imposing punitive sanctions. In this way, justices of the peace held a powerful judicial function within the community.

Elaborate local government structures subsequently emerged during the sixteenth and seventeenth centuries to deal with additional duties delegated from Parliament.[43] It was often necessary to divide administrative and judicial duties in order to accommodate increased responsibilities. Justices of the peace maintained a judicial function within these systems while administrative matters were delegated to community groups and, at times, local parishes.

In the eighteenth century, with the dawning of the Industrial Revolution and increased urbanization, communities demanded greater support from governments for poverty relief, policing and sanitation. Parliament recognized that such needs could be accommodated most efficiently and effectively by local groups. Hence, it entrusted local governments with significant authority to administer certain public services.[44]

39 See above.

40 Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3.

41 Sir William Holdsworth, *A History of English Law* vol. X, (London: Metheun & Co., 1938) at 127.

42 See above, vol. IV, (London: Metheun & Co., 1924) at 134.

43 See above at 137.

44 Ann McDonald, "In the Public Interest: Judicial Review of Local Government" (1983) 9 Queen's Law Journal 62 at 88.

Widespread distrust of local groups, however, made it politically impossible for Parliament to delegate more jurisdiction.[45]

This distrust stemmed from the oppression and corruption which pervaded local governments.[46] At this time, small groups of self-appointed leaders often dominated local administration and influenced decisions for their own interest. These decision-makers were subject only to the supervision of a central government and the courts. The central government, however, was largely unsuccessful in regulating local public bodies. As a result, continuous supervision by the courts was necessary to ensure their fair and effective operation. The machinery of judicial review provided courts with a vehicle for guiding and disciplining deviant governments. With prerogative writs, indictments, informations and civil actions, the courts could assess and quash enactments.

The judiciary generally was loathe to defer to local governments on public-interest matters, as it shared the community's distrust of, and suspicion toward, these bodies. Concern about corruption at the local level led courts to invoke their powers of judicial review to quash by-laws which interfered, even slightly, with the rights and freedoms of local citizens. The doctrine of unreasonableness, because it was broad and relatively undefined, provided courts with wide latitude to invalidate many offensive regulations. In this context, any attempt to abolish unreasonableness as a head of judicial review would likely have met with great resistance from the courts, as it would have significantly derogated the judiciary's ability to restrain deviant, or incompetent, local governments.

Legislative Attempts to Neutralize Judicial Distrust

Legislatures, it appears, do not share the judiciary's distrust of local governments. Rather, they prefer to confer greater power and responsibility on these decision-makers. In particular, legislatures throughout Canada have attempted to overcome the strict and narrow readings which courts give to the jurisdiction and authority of local governments by delegating broad grants of powers. Section 102 of Ontario's Municipal Act is a good example:

> Every council may pass such bylaws and make such regulations for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act as may be deemed expedient and are not contrary to law, and for governing the proceedings of the council, the conduct of its members and the calling of meetings.[47]

Section 189 of the Vancouver Charter contains an even broader grant of power: "The Council may provide for the good rule and government of the city."[48] Comparable sections exist in the legislation of other provinces.[49] Such clauses, interpreted liberally, would give municipalities wide latitude to legislate in matters of local concern.

Unfortunately, however, the judiciary has frustrated such legislative attempts to confer greater powers upon municipalities by interpreting these power-granting provisions narrowly and restrictively. The leading case on the interpretation of such clauses is *Morrison* v. *Kingston (City)*.[50] Ontario's Municipal Act, as noted above, conferred upon municipal councils the power to enact by-laws and regulations on matters of health, safety, morality and welfare. The Ontario Court of Appeal read down the section. Municipalities, it held, were prohibited from enacting by-laws with respect to health,

45 See above at 88.

46 *A History of English Law* vol. X, see note 40 at 243-46. For a detailed discussion of the historical developments of local government, see K.B. Smellie, *A History of Local Government* (George Allen and Unwin Ltd., 1957) and Sir Chester Norman, *The English Administrative System 1780 – 1870* (Claredon Press, 1981) as cited in McDonald, see note 44 at 62.

47 Municipal Act, Revised Statutes of Ontario 1990, c. M-45, section 102.

48 See note 23.

49 Urban Municipality Act, 1984, Statutes of Saskatchewan 1983-84, c. U-11, section 83; Municipalities Act, Revised Statutes of Prince Edward Island 1988, c. M-13, sections 57, 112; Dartmouth City Charter, Statutes of Nova Scotia 1978, c. 43A, section 132; City of Charlottetown Act, Statutes of Prince Edward Island 1979, c. 22, section 41. These statutes are cited in *Municipalities and Canadian Law*, see note 26 at 2.

50 *Morrison* v. *Kingston (City)*, [1937] 4 Dominion Law Reports 740 (Ontario Court of Appeal).

safety, and morality because these areas were the responsibility of other governments.[51] As well, a municipal council could not legislate matters regarding "welfare" because the term was too vague:

> The power to legislate for the "welfare" of the inhabitants is too vague and general to admit of definition. It may mean so much that it probably does mean very little. It cannot include powers that are otherwise specifically given, nor can it be taken to confer unlimited and unrestrained power with regard to matters in which a conditional power only is conferred upon the subsidiary Legislature.[52]

As this excerpt suggests, the Court required grants of power to be specific and not confer power over areas within the jurisdiction of another level of government.

In *Shell* v. *Vancouver*,[53] the Supreme Court of Canada considered the interpretation of such enabling clauses. The Court was asked to determine the validity of resolutions passed by the City of Vancouver, in which the city undertook not to do business with Shell Canada Products Ltd. because of the company's business interests in apartheid-era South Africa. The city argued that the impugned resolutions were authorized pursuant to section 189 of The Vancouver Charter which permitted the council to provide for the "good rule and government of the city."[54]

The case split the top court 5-4. Supreme Court Justice Sopinka's majority decision, supported by four judges, [55] endorsed a narrow, literal interpretation of this clause. A municipal authority, Sopinka wrote, is authorized only to act in furthering municipal purposes as set out by statute, namely, those which are stated expressly in the enabling legislation and those which are compatible with the purpose and object of the statute.[56] The majority found that the resolutions related to matters outside of the city's municipal boundaries and, therefore, did not fall within the purposes of the Vancouver Charter:

> Clearly there is no express power in the Vancouver Charter authorizing the Resolutions and, if they are valid, the respondent must rely on such powers being implied … So far as the purpose of the Vancouver Charter is concerned it is perhaps best expressed in section 189, which provides that "Council may provide for the good rule and government of the city." In this regard its purpose does not differ from the purpose generally of municipal legislation which, as stated above, is to promote the health, welfare, safety or good government of the municipality. This places a territorial limit on council's jurisdiction. No doubt council can have regard for matters beyond its boundaries in exercising its powers but, in so doing, any action taken must have as its purpose benefit to the citizens of the city. The Vancouver Charter is careful to expressly provide for activities in which council is permitted to engage outside of its limits even when such activities clearly redound to the benefit of the inhabitants of the city. Such activities include participation in public works projects with other municipalities (s. 188) and acquiring property required for the purposes of the city (s. 190).[57]

The majority thus narrowly construed section 189 of the Vancouver Charter, finding an implied territorial limitation. It held that municipal enactments, to be valid, must be in furtherance of local issues. As these resolutions related to matters "beyond the boundaries of the city,"[58] they were outside the council's legislative jurisdiction.

Sopinka also rejected arguments by the city that the resolutions were validly enacted under other parts of the Vancouver Charter.[59] Section 137 gave the city the ability to partake in commercial, industrial or business undertakings. Section 190 allowed the

51 Health and safety were addressed in provincial legislation and morality was dealt with in the federal government's Criminal Code.

52 See note 50 at 744.

53 *Shell Products* v. *Vancouver (City)* (1994), 1 Supreme Court Reports 231, 110 Dominion Law Reports (4th) 1 (Supreme Court of Canada) (hereinafter cited to Dominion Law Reports).

54 See above at 15.

55 The majority consisted of Justices Sopinka, La Forest, Cory, Iacobucci and Major.

56 *Shell*, see note 53 at 15.

57 See above at 15-16.

58 See above at 16.

59 See above at 15.

municipal council to acquire personal property for the city's purposes. Section 199 permitted the council "to do all such things as are incidental or conducive to the exercise of the allotted powers."[60] As with section 189, the court construed these sections narrowly as well:

> These sections are general sections found in most if not all municipal Acts and must be construed subject to the limitations imposed by the purpose of the statute as a whole. Any powers implied from their general language must be restricted to municipal purposes and cannot extend to include the imposition of a boycott based on matters external to the interests of the citizens of the municipality.[61]

Clearly, this narrow interpretation of the enabling statute had the effect of severely constraining Vancouver's municipal government to the point that it was confined to the strict and literal wording of the statute.

Justice McLachlin wrote a vigorous dissent. Along with three other judges, she criticized the majority's interventionist approach.[62] She held that the majority undermined the legislative purpose of section 189 by construing it narrowly:

> The truth of the matter is that provisions in municipal Acts for the "good government" or general welfare of the citizens, far from being mere surplussage as my colleague [Sopinka] suggests, found their origin in the desire of legislatures to prevent the decisions of municipal councilors being struck down by the courts. If the courts interpret them narrowly, they will defeat the very purpose for which these provisions were enacted.[63]

In contrast to Sopinka, McLachlin advocated a liberal interpretative approach akin to that articulated by Lord Russell in *Kruse* v. *Johnson*. She held that section 189 of the Vancouver Charter did not confine Vancouver's municipal council to matters within city limits. On the contrary, when read broadly the section led to a different result.[64]

Justice McLachlin also favoured a deferential standard of review for the enactments of local government. In language echoing Lord Green's decision in *Wednesbury*, she wrote that "unless a municipality's interpretation of its power is 'patently unreasonable,' in the sense of being coloured by bad faith or some other abuse, the interpretation should be upheld."[65] McLachlin was unwilling to interfere with the decisions of local governments in circumstances which are neither overwhelming nor extreme. She also criticized attempts by courts to mask excessive and improper interference within doctrines of judicial review:

> Rather than confining themselves to rectification of clear excesses of authority, courts under the guise of vague doctrinal terms such as "irrelevant considerations," "improper purpose," "reasonableness," or "bad faith," have not infrequently abrogated to themselves a wide and sweeping power to substitute their views for those of the elected representatives of municipalities.[66]

Judicial interference in local matters, she held, was generally undesirable. The judiciary, instead, should respect the electorate's decision to entrust a public body with the freedom and responsibility necessary to make important decisions.

A deferential approach, according to McLachlin, serves a number of purposes.[67] First, it complements the democratic values upon which Canada's modern political system is based:

> [A broad, deferential approach] adheres to the fundamental axiom that courts must

60 See above.

61 See above at 15.

62 Chief Justice Lamer and Justices L'Heureux-Dubé and Gonthier concurred with McLachlin.

63 *Shell*, see note 53 at 33.

64 See above at 32.

65 See above at 28.

66 See above at 25.

67 See above at 25-27.

> accord proper respect to the democratic responsibilities of elected municipal officials and the rights of those who elect them. This is important to the continued healthy functioning of democracy at the municipal level. If municipalities are to be able to respond to the needs and wishes of their citizens, they must be given broad jurisdiction to make local decisions reflecting local values.[68]

McLachlin held that courts are not suitable decision-makers on public interest matters. The responsibility of assessing the needs and desires of the public is best exercised by elected governments. Judicial interference in the democratic, decision-making process usurps the efficiency and legitimacy of government.

In the same vein, McLachlin held that courts are not suitable decision-makers on public interest matters. The responsibility of assessing the needs and desires of the public is best exercised by elected governments. Judicial interference in the democratic, decision-making process usurps the efficiency and legitimacy of government.[69]

Secondly, judicial interference forces elected governments to be accountable to standards of reasonableness established by the courts. In an attempt to meet these standards, the government may depart from the expectations of the electorate. As a result, the local government is forced to spend time and money defending its enactments. McLachlin held that such actions can be expensive and inefficient:

> Excessive judicial interference in municipal decision-making can have the unintended and unfortunate result of large amounts of public funds being expended by municipal councils in an attempt to defend the validity of their exercise of statutory powers.[70]

Finally, McLachlin noted numerous cases in which a flexible, deferential approach has been applied to non-elected administrative boards and agencies.[71] Courts, she held, tend to be sensitive to the context in which these bodies operate and often defer to the special expertise of tribunals. McLachlin could not find any obvious reason why municipal governments, which also have specialized understanding of their communities, should be subject to stricter standards of judicial review than non-elected decision-makers or why they should not receive some degree of curial deference.[72]

The Need for Reform

As *Shell* demonstrates, legislative attempts to immunize local governments from strict judicial review have failed. Similarly, earlier jurisprudence illustrates the willingness on the part of courts to manipulate doctrines of judicial review so as to retain the power to consider the *reasonableness* of a local government enactment even though the unreasonableness doctrine itself is barred by provincial statute. As McLachlin notes in her dissent, unwarranted judicial interference in the affairs of local governments severely impairs the ability of these governments to respond to community needs. Likewise, continued judicial reliance on unreasonableness considerations and the departure of Canadian courts from the spirit of deference outlined by Lord Russell, are extremely problematic. Judicial interference in this form undermines the function of a local government to determine what is *reasonable* for its own community. Local governments, through this doctrine and others, are held on judicial review to standards of reasonableness that emerge not from a grass-roots electorate, but from a detached judiciary.

At one time, when local governments were tainted by widespread corruption, judicial standards of reasonableness may have been effective in protecting citizens from oppressive enactments. However, democracy at the local level has eradicated the need for a judicial check on the *reasonableness* of local decision-makers. The democratic

68 See above at 25-26.
69 See above at 26-27.
70 See above.
71 See above at 27.
72 See above.

system may not ensure the *competent* exercise of delegated discretion, but it certainly does provide safeguards and incentives for responsible and proper use of this power. Besides, incompetence is a subjective determination which the electorate, not the courts, must assess. It appears, therefore, that no clear justification remains for preserving the unreasonableness doctrine in opposition to the direction and desire of legislatures.

Options for Change

As noted earlier, the judiciary has preserved the unreasonableness doctrine, in a variety of forms, despite its legislative abolition. How, then, can a true abolition of this doctrine be effected? How can deference be ensured? A constitutional change – elevating the status of local governments and expanding their jurisdiction – may encourage judicial deference. Alternatively, provincial legislatures may attempt to confer greater jurisdiction on local governments through select and carefully-drafted grants of power. However, the autonomy of local governments most likely will be enhanced not by constitutional or legislative amendments, but by a change in judicial attitudes. Rather than distrust local governments, the judiciary could afford them greater deference and, in doing so, honour the legislative abolition of the unreasonableness doctrine.

1. Constitutional Change

The Constitution Act, 1867, could be amended to confer on local governments direct legislative authority over municipal institutions and matters of local concern. Such an amendment would alter the constitutional status of local governments from subordinate decision-makers to sovereign powers. This kind of constitutional change would require, at a minimum, an amendment to provincial jurisdiction as set out in section 92 of the Act.

A municipality itself could not initiate such an amendment to the constitution. Pursuant to section 46(1) of The Constitution Act, 1982,[73] constitutional amendments must be initiated by the Senate, House of Commons or a provincial legislative assembly. The amendment must then be supported by both Houses of the federal Parliament as well as the legislatures of at least two-thirds of the provinces, provided that they represent at least half of Canada's total population.[74]

Constitutional change recognizing the jurisdiction of local governments would send a strong signal to the judiciary that this level of government deserves significant curial deference. However, such a change would not address the root cause of judicial interference which, as noted earlier, appears to be the judiciary's historic distrust of this level of government. At the same time, the elevation of local governments to sovereign status threatens to completely remove "local matters" from provincial jurisdiction. Most, if not all, provincial legislatures would resist an amendment so significantly reducing their jurisdiction. Moreover, Canada's present political climate, with its recent history of unsuccessful constitutional change, is probably not conducive to any proposals for constitutional amendment. Attempts to enhance the status of local governments likely would be frustrated by the divisive politics surrounding constitutional issues in Canada.

2. Legislative Initiatives

73 *Constitution Act*, 1982, Schedule B of the *Canada Act* 1982, U.K., 1982, c. 11.

74 See above at section 38(1).

Provinces are more likely to support legislative initiatives to increase the jurisdiction of local governments in selected areas. To this end, provincial legislative assemblies could delegate greater powers to local governments without reducing their own jurisdiction over municipal institutions and local matters. Such legislative change, unlike a constitutional amendment, may be easily effected as it requires only majority support in a provincial legislature.

Canada's present political climate, with its recent history of unsuccessful constitutional change, is probably not conducive to any proposals for constitutional amendment.

The government of Alberta has pursued this option. In 1987, it established the Municipal Statutes Review Committee, with the mandate to examine emerging trends among local governments and make recommendations for legislative change.[75] The committee, in its review, foresaw increased activism on the part of municipal governments in the coming century. Overall, it envisioned the growth of participatory democracy.[76] Locally, citizens likely would become more involved in their community's affairs. Advances in technology would facilitate fast, comprehensive opinion-polling, thereby enabling governments to respond to public opinion in a timely and appropriate manner.[77] In addition, the committee predicted further downloading by provincial governments to municipalities of public services which may be administered more economically at the local level.[78] These changes would create increased expectations of accountability and place greater demands on the time and resources of local governments. As a result, municipalities would require more autonomy, flexibility and freedom from excessive judicial interference and restraint.

The work of the Alberta committee culminated in 1994 with the creation of a new Municipal Government Act.[79] This Act contained extensive changes, designed to vest greater powers in municipal governments and, simultaneously, reduce judicial intervention in local affairs. In particular, the Alberta Act bestows on municipalities "natural person powers."[80] Subject to certain conditions, municipalities in Alberta are now able to do anything that an individual legally can do. This includes hiring employees, entering into contracts, and acquiring property. Such power should liberate municipalities from the strict wording of enabling statutes and eliminate the need for detailed and express grants of powers.

In addition, the new Act explicitly recognizes the ability of municipal governments to pursue policy matters.[81] In other provinces, local governments are restricted, by the doctrine of express authority, to the strict policy positions of the province as set out in their enabling statute. Explicit recognition of the ability to act on policy issues will broaden the general jurisdiction and decision-making power of municipalities by allowing them to pursue projects based on their own policy initiatives.

As well, Alberta's Municipal Government Act attempts to overcome the doctrine of express authority by delegating to municipalities entire spheres of jurisdiction.[82] Rather than expressly and specifically enumerating municipal powers, the Act contains carefully drafted grants of power and statements of purpose. Section 3 of the new statute articulates the municipalities' purposes in general terms:

(a) to provide good government;

(b) to provide services, facilities or other things that, in the opinion of council, are

75 F. M. Saville and B. Cotton, "An Overview of the Proposals for a New Municipal Government Act for Alberta" (1991-92) 5 Canadian Journal of Administrative Law and Practice 93.

76 Alberta Municipal Statutes Review Committee, *"The Municipal Government Act": Local Autonomy, You Want it, You Got It* (Legislation Paper Nos. 1 to 6) at 4-5.

77 See above at 5.

78 See above.

79 Municipal Government Act, Statutes of Alberta 1994, c. M-26.1.

80 Saville and Cotton, see note 75 at 94.

81 See above.

82 See above at 95.

necessary or desirable for all or part of the municipality; and

(c) to develop and maintain safe and viable communities. [83]

This section operates in conjunction with section 7 of the Act which grants municipalities authority to pass by-laws in different jurisdictional areas.[84] Drafters avoided the need to enumerate municipal powers *per se* by including in this section a general description of the jurisdictional spheres in which a municipality may legislate.

The Alberta Act retains a statutory abolition of the unreasonableness doctrine, but, unlike the legislation of other provinces, uses clear, unconditional language barring considerations of unreasonableness on judicial review: "No bylaw or resolution may be challenged on the ground that it is unreasonable."[85] The concise use of language in this provision may minimize the opportunity for the judiciary to find implied conditions or exception to the general prohibition on unreasonableness considerations.

The enactment of the Municipal Government Act reveals a strong desire on the part of Alberta's provincial government to increase the jurisdiction and autonomy of local governments. It remains to be seen, however, whether the judiciary will confer a corresponding amount of deference upon local governments, given its tendency to thwart past legislative efforts.

3. Judicial Deference

As long as the judiciary retains its distrust for local governments, it will continue to thwart the exercise of power by these public bodies. It has already been demonstrated that courts have overcome the express legislative abolition of the unreasonableness doctrine by cleverly infusing it into other independent heads of review. Moreover, courts have undermined legislative efforts to confer broad grants of power to these governments by applying narrow and restrictive canons of interpretation. Further legislative change, short of a constitutional amendment, also will be frustrated by judicial unwillingness to defer to local governments, unless the judiciary itself terminates its centuries-old practice of supervising local governments.

Courts must cast aside their outdated distrust of local governments, inherited from a period when local public bodies were generally oppressive and corrupt. Today's democratic process deserves greater deference. The judiciary must follow McLachlin's lead in *Shell* and acknowledge the representative character and democratic legitimacy of local public bodies and afford them the same degree of curial deference given to provincial legislatures and the federal Parliament.

In doing so, the courts must honour the direction of legislatures. Rather than narrowly interpret enabling statutes so as to restrain local governments, the judiciary instead can interpret grants of power both broadly and purposively. Moreover, the judiciary must respect the desire of legislatures to abolish the unreasonableness doctrine. It must honour the fact that, in the Canadian political system, local governments, not the courts, are empowered to determine what is reasonable for the electorate.

Conclusion

83 Municipal Government Act, see note 79.

84 Saville and Cotton, see note 75 at 95.

85 Municipal Government Act, see note 79 at section 539.

The judiciary's continued use of reasonableness considerations on judicial review of local government by-laws is symptomatic of its general unwillingness to defer to this level of government on public-interest matters. Legislative efforts to bar such considerations and overcome judicial paternalism have failed. Rather than follow the direction of legislatures, the judiciary – through the manipulation of various doctrines and canons of interpretation – has maintained a paternalistic hold on these public bodies. Judicial interference in the affairs of democratically elected local governments undermines parliamentary sovereignty. Moreover, it contradicts the general practice of the courts to defer to particular administrative boards and agencies; it causes inefficiencies in government administration; and, most importantly, it offends democratic principles. Unfortunately, however, it is difficult for legislatures alone to put a stop to the judiciary's interventionist practices.

The judiciary must abandon its suspicions about and distrust for local governments.

Change must begin within the courts. The judiciary must abandon its suspicions about and distrust for local governments. Instead, it must defer to public bodies, trusting both the democratic system and the electorate to restrain unreasonable decision-makers. In doing so, the courts must abandon the unreasonableness doctrine as a tool for judicial paternalism over the affairs of local governments.

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