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Editorial

Welcome to the latest issue of *Appeal: Review of Current Law and Law Reform*. Now in its sixth year, the journal continues to provide a forum for student scholarship on current legal issues. The goal is to publish works that are timely, relevant, and which address possibilities for Canadian law reform.

Once again, *Appeal* is proud to present articles on topical, timely and diverse issues of interest to the legal profession as well as the general public. In the Trends and Developments section, Valerie Jepson considers how the Canadian legal framework can handle the growing Internet gambling industry, drawing on the American and Australian regulatory regimes. Deirdre Sheehan uses the British Columbia Court of Appeal's decision, *R. v. Sharpe*, to demonstrate that despite the public outcry, the judiciary is fulfilling its proper role by ensuring that the Parliament is acting in accordance with the Canadian Constitution. The advantages and disadvantages of using class action as a tactic to fight for the rights of people with disabilities are the focus of Lynn Pierce's article. Bram Rogachevsky outlines the emergence of Strategic Lawsuits Against Public Participation (SLAPP) and recent trends in the judiciary's response to such actions. Finally, Allison Fieldberg discusses a critical difference in the way child support is calculated for high-income families and suggests means of reducing or eliminating the disparity.

In the Feature Articles section, the winner of the 2000 Cassels, Brock & Blackwell Paper Prize, Elaine Davies, describes the history of gun control legislation in Canada and goes on to argue that the increasingly restrictive regulation of firearms is motivated by the Government's desire to allay public fear, rather than to find a workable means of reducing violence. Secondly, Robert Stack provides an analysis of the controversial Supreme Court of Canada decision, *Semelbago v. Paramadevan*, which had grave impacts on the law of specific performance, and makes several recommendations for reforming the law. In the final article of the volume, Patrick Donnelly surveys the potential liability of various parties in the "leaky condo" fiasco in British Columbia. The article deals more generally with the liability of governments in negligence and the legal accountability of such defendants.

The Editorial Board would like to thank the numerous volunteers, including students, professors, and lawyers in the community, for their help and the various law firms for their financial support. Such assistance enables *Appeal* to continue its tradition of publishing high-quality, relevant and timely student scholarship year after year. We hope you enjoy this year's volume of *Appeal*.

The Appeal Editorial Board

VALERIE JEPSON
IS A SECOND YEAR
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OF CALGARY.

Internet Gambling and the Canadian Conundrum

I. Introduction

The past ten years have been a time of great expansion in the Canadian gambling industry.¹ Provincial governments, which maintain primary control of gambling activities, have struggled to develop socially-acceptable policies to guide this expansion. Just as the casino and video gambling policies of the 1990s settle, and some of the public debate dissipates, the Internet gambling issue awaits. To date, Canadian federal and provincial governments have not enacted a new legal framework to deal with the emerging Internet gambling issue.² Two countries that Canadian policy makers are sure to have their eyes on are Australia and the United States, applicable jurisdictions because of their federal status. Australia serves as the example of state-managed liberalization by allowing Internet gambling to flourish within a strong regulatory framework. Conversely, federal policy-makers in the United States have focused on an outright ban of the activity.

This paper summarizes the Internet gambling policy options developing in Australia and the United States and places Canada's gambling framework within this context. In all three countries, individual state, territorial, or provincial governments have exercised licensing, regulation, and/or operational control over land-based gambling activities, as opposed to national government³ control. I will argue that Canadian policy-makers face unique challenges because of the degree of involvement provincial governments have practiced in land-based gambling activities.

A. What is Internet Gambling?

Internet gambling refers to the placing of real money bets using one's personal computer via the Internet. Three general types of Internet gambling sites exist: sports/event wagering, lottery ticket sales, and casino-game-style betting.⁴ It is the casino version of Internet gambling that perhaps draws the most public attention because of its high-quality graphics and virtual casino experiences offered.

Internet casino gambling emerged in its sophisticated form in 1995.⁵ The most recent figures estimate that by 2001, Internet gambling revenues could surpass ten billion dollars

¹ See *The Canadian Gambling Patchwork*. (Calgary: Canada West Foundation, 1999).

² In 1996 Liberal MP Dennis Mills introduced Private Member's Bill C-353 *An Act to Amend the Criminal Code of Canada* (the regulation of internet casinos) in November 1996. The Bill was not sponsored by the governing party and did not pass second reading. No provincial government has legislated regarding Internet gambling to date. See British Columbia, *White Paper on Gaming Legislation: Gaming Legislation and Regulation in British Columbia* (Victoria: Gaming Project Working Group, 1999) at 241.

³ National government refers to the "Federal Government" in the United States and Canada and "the Commonwealth" in Australia.

⁴ Australia, *Draft Report on Australian Gambling* (Commonwealth Productivity Commission, 1999) at 17.4; hereinafter cited as "Productivity Commission Report." Found at <http://www.pc.gov.au/inquiry/gambling/draftreport/index.html> on 2 February 2000.

(U.S.) world-wide.⁶ While there are no conclusive statistics regarding the number of users, what is known is the sustained growth of Internet gambling sites available to Internet surfers. It is estimated that more than two hundred and eighty web sites that provide opportunities to gamble on the Internet exist.⁷

The possibility of Internet gambling poses at least four issues for policy-makers in federal states:

1. If Internet gambling is desirable, how should it be developed? If it is not, how should it be controlled?
2. Which level of government is better positioned to regulate or control the activity? Further, is it possible to place “controls” on Internet gambling sites, such as to enforce any regulation imposed by governments?
3. In the “borderless” Internet, how can governments generate revenue from gambling activities?
4. What kind of social costs are involved in Internet gambling?

This paper highlights some available policy options stemming from the above issues. There is less of an emphasis on the social costs of Internet gambling; however, this topic has formed the basis for a great number of government and academic studies and reports.⁸

B. Where are Internet Gambling Sites Located?

Uncertainty in North America surrounding the legality of Internet gambling has led to the creation of several “safe-havens” for Internet gambling service providers in many Caribbean countries.⁹ In some of these havens, such as Antigua, systems for licensing have been established. Typically, the licensing procedures established in the “haven” countries require minimal effort and cost.¹⁰

As well, a number of Internet casinos operate out of five Australian states and territories. These sites offer gambling opportunities to users worldwide.¹¹ As explained below, some Australian states and territories have introduced licensing programs that, arguably, provide more security than the “haven” countries.

5 Cynthia Janower, “Gambling on the Internet,” (1996) 2(2) *Journal of Computer-Mediated Communications*. Found at <http://www.ascusc.org/jcmc/vol2/issue2/jcmc223.htm> on 17 January 2000.

6 United States, *National Gambling Impact Study* (Washington: National Gambling Impact Study Commission, 1999) at 5-1; hereinafter cited as “NGIS.” There is no consistent measurement of the total revenues because of the newness of the industry. Also see note 4 at 17.11 for more estimates.

7 Martin Stone, “Canada holds online gambling aces,” (1996) Canada Computer Paper. Found at <http://www.tcp.ca/1999/9904/online/gambling/gambling.html> on 23 October 1999.

8 For example, the *NGIS* and the *Productivity Commission Report* are the most recent compilations of government consideration of the gambling issue generally. In the Canadian context, consider annual reporting of the Nova Scotia Alcohol and Gaming Authority and the recent B.C. *White Paper* (see note 2). As well, the Canada West Foundation has put forward a number of reports concerning the social costs of gambling in general. See Canada West Foundation home page. Found at <http://www.cwf.ca>.

9 See note 4 at 17.5.

10 See above.

11 See above at 17.5 and 17.6.

II. The Canadian Legal Framework Applied to Internet Gambling¹²

It is first necessary to understand the basic framework for legal gambling in Canada. The power to legislate in relation to matters of criminal law is constitutionally assigned to the federal government in section 91(27). It has been held that sections 92(7) and 92(13) of the *Constitution Act, 1867*¹³ —provincial jurisdiction over the administration of charities and over property and civil rights — grant authority to provinces to legislate and regulate those gambling activities.¹⁴ The current gambling provisions were added to the Criminal Code of Canada¹⁵ in 1969, at which time electronic forms of gambling were not explicitly contemplated. In 1985 the Code was amended to address electronic forms of gambling and to hand sole responsibility over it to provincial governments.

The Code creates a number of gambling offences. As an example, consider section 206(1)(b) of the Code, which makes it illegal to operate or participate in any games of chance or lottery schemes. The section states:

Everyone is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years who sells, barter, exchanges or otherwise disposes of, or causes or procures, or aids or assists in, the sale, barter, exchange or other disposal of, or offers for sale, barter or exchange, *any lot, card, ticket or other means or device for advancing, lending, giving, selling or otherwise disposing of any property by lots, tickets or any mode of chance whatever.* [Emphasis added.]

Operators are subjected to harsher penalties than players; section 206(4) states that anyone who “buys, takes or receives a lot, ticket or other device mentioned in subsection (1) is guilty of an offence punishable on summary conviction.” Based on these provisions, it is likely illegal for a Canadian resident to gamble on the Internet in their own home. Note, however, that if section 206 were the only lottery scheme provision in the Code, most lottery schemes would be illegal.

Many gambling activities are permitted in Canada because of section 207 of the Code, which creates exceptions to the overall ban. Section 207(1)(a) permits “lottery schemes”¹⁶ that are “conducted and managed”¹⁷ by provincial governments. A second exception is carved out for provincially licensed lottery schemes conducted by charitable organizations, exhibition associations, and in certain circumstances, private individuals (sections 207(1)(b-d)).

According to section 207(4)(c), lottery schemes “operated on or through a computer, video device or slot machine” are not permitted unless they are conducted and managed under the exception in section 207(1)(a) — the provincial government exception. Given section 207(4)(c), and the reality that gambling profitability has been highest in the area of machine gambling, several provincial governments have become involved in the provision of machine gambling activities such as slot machines and video lottery terminals. Under the current framework, Internet gambling would likely fall under section 207(4)(c), and would therefore only be legal if conducted and managed by a provincial government.

A. The Canadian Conundrum

There exists a fundamental distinction between the Canadian model of gambling

¹² In writing the following section, I have benefited greatly from advice and discussions with Hal Pruden, Counsel in the Criminal Law Policy Section of the Federal Department of Justice, Ottawa.

¹³ Constitution Act, 1867 (U.K.), 30 & 31 Victoria, chapter 3, reprinted in Revised Statutes of Canada 1985, Appendix II, number 5.

¹⁴ *Furtney v. The Queen*, [1991] 3 Supreme Court Reports 89. Also B.C. *White Paper*, see note 2 at 40.

¹⁵ Criminal Code, Revised Statutes of Canada 1985, chapter C-46.

¹⁶ “Lottery schemes” is defined in section 207(4), for the purpose of section 207, of the Code to include “a game or any proposal, scheme, plan, means, device, contrivance of operation ... whether or not it involves betting, pool selling or a pool system of betting.” Subsections 207(4)(a-c) set out types of “lottery schemes” that are prohibited absolutely.

¹⁷ “Conduct and manage” is the wording used in the Criminal Code. The authors of the B.C. *White Paper* conclude that “conduct and management is not simply a matter of having a dominant role. The government or licensed charity must be ‘the operating mind’ of the lottery scheme,” see note 2 at 64. For a detailed statement of Canadian gambling law in general, see Patrick J. Monahan & A. Gerold Goldlist, “Roll Again: New Developments Concerning Gaming” (1999) 42 Criminal Law Quarterly 182.

control and the American and Australian models. In Australia and the United States, state and territory governments generate revenue from gambling indirectly through taxation. In Canada, regulated gambling activities benefit charitable organizations, exhibition associations, and provincial governments via *direct revenue* streams. Therefore, for those activities that are provincially “conducted and managed,” the lottery schemes are — at some level — managed by provincial governments. There is little room in the Canadian framework for privately-operated, commercial lottery schemes.

The conduct and management of provincial government gambling operations is distinct from provincial government regulation of gambling activities. Regulation refers to licensing and encouraging compliance with gambling regulations. In Canada, the same government often performs these two tasks. For conduct and management purposes, provincial governments either contract with private companies to deliver gambling activities such as casinos, lotteries, and video lottery terminals (VLTs), or they directly operate such lottery schemes. At all times, the provincial government must be the “operating mind” of the lottery scheme.¹⁸

The exclusive control exercised by Canadian provinces in the area of lottery schemes is deliberate. Provinces began to lobby for the elimination of federal involvement in lottery schemes in 1979 and were successful in removing this possibility in 1985. There is no indication that provincial governments would be interested in diminishing this control — and its accompanying revenue streams — for the area of Internet lottery schemes. Canadian provinces have devoted considerable energy to establishing unique, locally-responsive frameworks for land-based gambling. In some cases, provincial governments have been particularly alive to local public opinion, with some going so far as to require plebiscite before gambling expansion.¹⁹ In light of the energy spent to develop provincially-unique gambling policies, it would not be surprising if Canadian provincial governments sheltered against federal government involvement in either the conduct and management or the licensing of Internet lottery schemes.

B. Proposed Legislation

Although no province has enacted legislation to alter the current legal framework for Internet gambling, there has been some activity in Parliament, in the form of a private member’s bill, not supported by the Government. In 1997 MP Dennis Mills introduced Bill C-353, *An Act to Amend the Criminal Code (Internet Lotteries)*.²⁰ Although this Bill died on the order paper of the 35th Parliament, it is worth noting because it proposed a radical change. Bill C-353 proposed to enable either the federal or provincial governments to license private Internet gambling operators and to implement a taxation scheme — a major departure from the current framework in Canada. The minimal debate that occurred in the House of Commons upon first reading of the Bill did not examine the unique suggestion to legalize large-scale, privately-operated lottery schemes and to then tax earnings; nor did the discussion get into any detail about a potential amendment to the Code to introduce federal government licensing of games of chance.²¹

18 See note 14. And, *Keystone Bingo Centre Inc. v. Manitoba Lottery Foundation* (1990), 76 Dominion Law Reports (4th) 423.

19 For example, new casino development in Ontario can only occur after a successful plebiscite in the affected community. B.C., Alberta, and Saskatchewan have used plebiscite to address government gambling policies.

20 Bill C-353, *An Act to Amend the Criminal Code (Internet Lotteries)*, 2d Session, 35th Parliament, 1996, (1st Reading 25 November 1996).

21 Canada, 35th Parliament, Debates, 2d Session (13 February 1997).

C. Summary

Under the existing Code framework, if there is to be legal Internet gambling in Canada it must be conducted by provincial governments. To date, there are no provincially-operated Internet casinos.

III. Australia as an industry front-runner

Australia permits land-based gambling activities through private operators with state or territory²² regulation. State and territorial governments are involved in regulating and taxing land-based gambling activities, such as casinos. In Australia, there are no publicly-managed gambling activities.

In some Australian states, the development of a comprehensive Internet gambling regulatory scheme has been fueled by a desire to maintain state and territory control over gambling, and to position Australia as an international leader in the field.²³ As a result, Australian state and territorial regulatory frameworks serve as apt experimentation models for other federal states.

In May 1996, the State and Territory Gaming and Racing Ministers came together to develop a *Draft Regulatory Control Model For New Forms of Interactive Home Gambling*²⁴ (hereinafter the *Draft Model*). The *Draft Model* argues that, “[p]rovided all States and Territories participate in the Model, the assistance of Federal bodies is unnecessary to provide effective regulation of interactive home gambling products sourced from within Australia.”²⁵ The *Draft Model* proposes that each state and territory develops consistent legislation to establish licensing and regulation standards for Internet gambling outside the purview of any Commonwealth body. Licensing systems would be established and adequate player protection would be encouraged. A taxation system that applies taxes based on the location of the gambler would also be established.

Since the release of the *Draft Model*, two states and two territories have implemented Internet gambling legislation: Queensland, Northern Territory, the Australian Capital Territory and Tasmania. In general, recent new state legislation has fallen in line with the *Draft Model*.²⁶

As the states and territories of Australia assert their control over gambling regulation, it is not clear that the Commonwealth government is content to stay out of the field. In July 1999 the Productivity Commission of the Australian Commonwealth Government issued *A Draft Report on Australian Gaming*, (hereinafter “*Productivity Commission Report*”) with an extensive section regarding Internet gambling. The *Productivity Commission Report*’s authors state,

[e]xisting policy measures by individual States and Territories represent pragmatic responses to the rapidly evolving opportunities and threats posed by online and interactive gambling. They do not necessarily represent the optimal policy response.²⁷

At the very minimum, the *Productivity Commission Report* suggests that it is more sensible to “take a national approach” to the regulation of Internet gambling. The international quality of Internet gambling and the technological complexity of the issue keeps this debate alive.

Authors of the *Productivity Commission Report* suggest that, “[o]ne reason why regulatory

22 In Australia, as in Canada, there exist both states (equivalent to Canadian provinces) and territories (equivalent to Canadian territories), which are distinct from the national government known as the Commonwealth (equivalent to the Canadian “Federal Government”).

23 Jan McMillen & Peter Grabosky, “Trends and Issues in Crime and Criminal Justice, No. 88: Internet Gambling,” (1998) Australian Institute of Criminology. Found at <http://www.aic.gov.au/publications/tandi/tandi88-txt.html> on 17 January 2000.

24 Australia, *Draft Regulatory Control Model for New Forms of Interactive Home Gambling* (State and Territory Gaming and Racing Ministers, 1996). Found at http://www.qogr.qld.gov.au/int_g_lic.html on 17 January 2000. Note: “Interactive Home Gambling” is the term used in Australia to describe a type of gambling, which includes Internet gambling.

25 See above.

26 See note 4 at 17.39 – 17.40. Tasmania’s legislation departs most freely from the suggested model, but for an example of legislation that aligns most closely with the *Draft Model*, see the *Interactive Gambling (Player Protection) Act*, 1998, enacted in the state of Queensland.

27 See note 4 at 17.44.

frameworks for Internet gambling tend to depart from principles adopted in other gambling modes is that regulators are aware of the profound difficulties of implementing a similar framework for the essentially anarchic internet.”²⁸ Further, commentators have been skeptical about the plausibility of the Australian states and territories to self-regulate in the Internet gambling field without dissent.²⁹

IV. The United States: A Nation-wide Ban

The problem presented in Australia may be bypassed in the United States, where policy-makers have demonstrated increasing momentum to introduce a nationwide ban on most forms of Internet gambling. In the United States, gambling is regulated uniquely by each state. In all but two states, forms of gambling exist.³⁰ Similarly to Australia, gambling revenues typically benefit state governments via taxation, with the states acting as regulators.

Existing federal legislation has been applied by some states to make the establishment of Internet gambling sites illegal for American citizens.³¹ In fact, the Federal Department of Justice has stated that existing federal law makes Internet gambling illegal.³² While the Department of Justice has made no commitment to prosecute these offences under the current provisions, movements are afoot to unify and strengthen the American position on Internet gambling. Based on two significant developments, it appears as though the influential wisdom in the United States favours a shifting of control to the federal government for Internet gambling, with the introduction of a nationwide ban.

The first development began in 1997 when Senator Jon Kyl introduced the Internet Gambling Prohibition Act (hereinafter the “IGPA”).³³ The original IGPA died on the Senate floor, but a revamped IGPA was introduced in 1999. The Senate unanimously passed the latest version on November 19, 1999 and a companion bill is currently before the House of Representatives.³⁴ The IGPA of 1999 amends the Federal Criminal Code to make it illegal for companies to establish online gambling venues. The Act exempts from penalty some forms of Internet gambling such as state lottery sales and authorized horse race betting.³⁵

The second development began in 1996 when Congress commissioned the *National Gambling Impact Study* (hereinafter “NGIS”).³⁶ In July 1999 the NGIS Final Report was released. The first formal recommendation of the study states that “. . . .states are best-equipped to regulate gambling within their own borders with two exceptions—tribal and internet gambling.”³⁷ [Emphasis added].

The NGIS recommends that Internet gambling regulation takes a form similar to what was set out in the IGPA:

the federal government should prohibit, without allowing new exemptions or the expansion of existing federal exemptions to other jurisdictions, Internet gambling not already authorized within the United States or among parties in the United States and any foreign jurisdiction.³⁸

The Commission would charge federal bodies with the responsibility of developing control mechanisms to deal with infractions. “Because it crosses state lines, it is difficult for states to adequately monitor and regulate such gambling.”³⁹

28 See above at 17.5.

29 See note 23.

30 See the *NGIS*, note 6 for a complete discussion of the gambling framework in the United States.

31 See note 5. See Harley J. Goldstein, “On-line Gambling: down to the Wire?” (1997) 8 *Marquette Sports Law Journal* 1. See John Edmund Hogan, “World Wide Wager: the Feasibility of Internet Gambling Regulation” (1998) 8 *Seton Hall Constitutional Law Journal* 815.

32 *NGIS*, see note 6 at 5-7. Goldstein, see above at 18.

33 Internet Gambling Prohibition Act, S.474, 105th Congress (1997).

34 Internet Gambling Prohibition Act, S.692, 106th Congress (1999).

35 Bill Summary & Status for the 106th Congress. Found at <http://thomas.loc.gov>.

36 National Gambling Impact Study Commission Act, Public Law number 104-169, 110 Statutes at Large 1482 (1996).

37 Recommendation 3-1 of the *NGIS*, see note 6.

38 Recommendation 5.1 of the *NGIS*, see note 6 at 5-12.

39 See above.

A. The Reaction

Much of the American literature regarding Internet gambling has focused on the introduction of Senator Kyl's original Bill. In light of the NGIS recommendations, passage of the 1999 version seems likely. However, several criticisms have been raised.

One author criticizes the original Bill for its dismantling of state-control over gambling regulation. She states, "[t]he better approach would be a recognition of the long-held federal position that gambling should be permitted to exist in those states whose citizens choose to have it."⁴⁰ Another significant problem is enforcement. "While the IGPA would deter companies from locating their Internet gambling operations within the United States, Internet gambling would still flourish, as companies would simply base their businesses in countries with more hospitable gambling laws."⁴¹

Law Professor Jack Goldsmith has provided an alternative view regarding the plausibility of enforcement. He argues that criticism based on the perceived efficacy of regulatory legislation should not factor into the policy debate, and enumerates various avenues the federal government can take to bolster a regulatory program dealing with the Internet. "The United States can achieve a great deal of regulatory control over these trans-jurisdictional communities by regulating these local persons and property."⁴² Goldsmith argues that regulation of Internet gambling, like all other variations of government regulation, can be achieved when the harms produced by the activity outweigh the costs of the regulation.⁴³

B. Summary

Presently, legislative initiatives suggest that the United States is headed for an outright prohibition of Internet gambling. The difficulty of regulation has caused legislators and commentators to look to the federal level of government to enter uncharted territory and to regulate an aspect of gambling.

V. Canada in Context

In both the United States and Australia, legislators are grappling with the issue of which level of government should regulate Internet gambling. In Canada, the key issue will be whether Internet gambling is desirable as a government policy option. While this policy debate has yet to unfold in Canada, the issue is certain to arise as Internet gambling options become increasingly available.

Under the current framework, provincial governments have the authority to introduce legal Internet lottery schemes in Canada. Due to the highly political response to gambling expansion of the past ten years, provincial governments may be reticent to enter the Internet gambling industry. This reticence will likely be due to concerns about the increasing accessibility of gambling.

The requirement that provincial governments conduct and manage electronic lottery schemes raises a plethora of policy issues including:

- (i) Is it appropriate that a *government* operate Internet gambling sites?
- (ii) How does a government's dual role as operator and regulator affect the integrity of the latter role?

40 Stevie A. Kish, "Betting on the Net: An Analysis of the Government's Role in Addressing Internet Gambling," (1999) 51(2) Federal Communications Law Journal 449 at 464.

41 See above at 462.

42 Jack Goldsmith, "What Internet Gambling Legislation Teaches about Internet Regulation" (1998) 32(4) International Lawyer 1115 at 1117.

43 See above at 1120.

The above questions can, of course, be raised in regard to the treatment of land-based gambling. For example, is it appropriate that a *government* operates a land-based casino? In several provinces the answer has clearly been, “yes,” that it is appropriate for provincial governments to provide casino entertainment services. While it may seem incidental that a government is operating a land-based casino, is the perception the same if it is on the Internet? I submit that the Internet gambling industry sharpens the government gambling issue. As a policy option, it is less appropriate for a government to offer entertainment services, imbued with social costs such as addiction, in a medium that is infinitely accessible.

Provincial governments may find that citizens have a higher comfort level for some forms of Internet gambling. While on-line lottery ticket sales may seem appropriate, full-fledged Internet casinos may not. It will be the task of the policy maker to gauge public opinion in this respect.

There is another concern about government-operated gambling that the Internet gambling issue brings to the fore. Provincial governments have become reliant on revenues from land-based gambling activities. If Internet gambling options chip away at the established government industry, governments will be required to respond to protect existing revenues. If Internet gambling is not a desired policy option their hands will be tied. As this minor example illustrates, it may be that in times of greater diversity of gambling options, provinces-as-operators are no longer the most appropriate vehicles to deliver gambling services.

VI. Conclusion

The public debate about Internet gambling has not yet emerged in Canada. In Australia and the United States two distinct policy options are being tested. Australian states and territories have taken a preemptive strike against federal involvement in regulation. American legislators propose sweeping legislation that will remove state jurisdiction for certain forms of Internet gambling. It is not clear whether the Canadian Parliament, or provincial legislatures, will deem it necessary to alter the current Code framework. I predict that the increased level of accessibility that accompanies the Internet gambling industry will cause Canadians to question the appropriateness of a government-as-operator model. The current Canadian framework may not be the most appropriate model for Canada to take advantage of — or to manage the social costs of — the lucrative Internet gambling industry.

Judicial Activism in *R. v. Sharpe*:An Administration
or Perversion of
Justice?

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1 "Porn ruling draws public wrath" *Toronto Star* (25 January 1999) A16; Ian Bailey, "Judge in BC child-porn case receives death threat over ruling" *Globe & Mail Metro Edition* (23 January 1999) A10; Carla Yu, "See no evil: moral taboos tumble as a judge uses the charter to legalize child porn" *British Columbia Report* v.10:7 (8 February 1999) at 38-42; Mark Hume, "Child porn will flourish without law, police warn" *National Post* (27 April 1999) A1, A8.

2 *R. v. Sharpe* (1999), 169 *Dominion Law Reports* (4th) 536 (British Columbia Supreme Court).

3 Revised Statutes of Canada 1985, chapter C-46; hereinafter cited as "the Criminal Code".

4 Part I of the *Constitution Act, 1982*, being Schedule B to by *Canada Act 1982* (U.K.), 1982, c.11; hereinafter "the Charter."

5 *R. v. Sharpe* (1999), 175 *Dominion Law Reports* (4th) 1 (British Columbia Court of Appeal); hereinafter cited to *Dominion Law Reports* as "*Sharpe*."

I. Introduction

Few Canadian judicial decisions have generated more outrage¹ than the 1999 British Columbia Supreme Court² ruling striking down the Criminal Code of Canada³ prohibition of child pornography possession. The British Columbia Court of Appeal affirmed the finding that the prohibition was an unjustifiable restriction on freedom of expression, as guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms,⁴ in July of 1999.⁵ These judgments were labelled "completely unacceptable and inappropriate"⁶ and prompted the dire warning that such liberal interpretation of the Charter's guarantees would give license to extreme social deviance and lead incrementally to the legalization of "intergenerational sex."⁷ This outrage quickly became a criticism of the judiciary and a "justice system wholly oblivious to the public mood."⁸ The Official Opposition in Parliament was also quick to jump on the controversial ruling, issuing such statements as the following:

the real legal nuclear bomb . . . is the abuse of judicial authority exercised by judges such as the one in this case, where they use their own narrow parochial, social, political values to impose them on society, contra the virtual unanimity of Canadian democracy.⁹

Further, the Opposition also suggested that as a response to such judicial politics, the Federal Government use the Charter's section 33 "notwithstanding clause" to uphold the prohibition on possession of child pornography.¹⁰

An examination of the reasoning of the majority at the Court of Appeal, however, illustrates that outrage surrounding the ruling is more "ignorance conjured up . . . [by] the spectre of a judge giving judicial approval to sexual exploitation of prepubescent children . . . contrary to the will of Parliament"¹¹ than legitimate concern over judicial activism. Indeed, rather than an example of the courts usurping the power of the legislature, the *Sharpe* decision is a demonstration of the judiciary fulfilling its proper institutional role by ensuring that Parliament acts within the legal confines of the Constitution.

II. Background

At issue in the *Sharpe* case is the constitutional validity of section 163.1(4) of the

Criminal Code,¹² which prohibits possession of pornography for the purpose of private viewing or communication (known as simple possession). To understand the ambit of the prohibition, section 163.1(4) must be read in the context of section 163.1(1), which defines child pornography. Section 163.1(1) contains several subsections, which may be explained as follows. Subsection (1)(a) refers to visual representations that (i) show a person who is depicted as being under the age of eighteen and is depicted as engaged in explicit sexual activity; or (ii) the dominant characterization of which is the sexual depiction of a sexual organ or the anal region of a person under the age of eighteen. This subsection has been interpreted as potentially covering any visual representation, including sketches, sculptures, and cartoons, and extends to materials that were created without the use of actual children.¹³ Subsection (1)(b) refers to any written or visual material that advocates unlawful sexual activities with a person under the age of eighteen years. Thus, this section captures purely imaginative written works, potentially even one's diary.¹⁴

At both the trial and appeal levels, the Crown conceded that the impugned provisions infringe section 2(b) freedom of expression guaranteed by the Charter. Thus, the only issue before the courts was whether the prohibition of simple possession of child pornography

⁶ Terry Murray, "Pediatrician groups protest BC child pornography ruling" *Medical Post* v.35:7 (16 February 1999) 2, 73.

⁷ "Southam's Big Mistake" (Feb. 8, 1999), *British Columbia Report* v.10:7 (8 February 1999) 42.

⁸ See above.

⁹ See above. Statement of Jason Kenney, Reform.

¹⁰ Nahlah Ayed, "MPs debate whether to reinstate child pornography law" *Canadian Press Newswire* (2 February 1999).

¹¹ Justice Southin commenting on the media furor in *Sharpe*, above note 5 at para. 5.

¹² Revised Statutes of Canada 1985, chapter C-46, as enacted. Statutes of Canada 1993, chapter 46, section 2.

¹³ See note 5 at paras. 161, 128.

¹⁴ See above at para. 197.

could be justified as a reasonable limit of freedom of expression under section 1 of the Charter.

The framework of the section 1 analysis was established in 1986 in *R. v. Oakes*.¹⁵ There are two main branches of inquiry under the test. First, the government must establish that the impugned provision has an objective that is a pressing and substantial concern. If so, the analysis moves onto the second branch, “Proportionality,” where the court assesses whether the *means* chosen to attain the legislative objective are reasonable and demonstrably justified in a free and democratic society. Here the court assesses the rational connection between the law and its objectives, whether the law is sufficiently tailored, and the balance struck between the deleterious and salutary effects of the impugned measures.¹⁶

At the British Columbia Court of Appeal, Justices Rowles and Southin (with Chief Justice McEachern dissenting) upheld the trial decision and found that the law was not a reasonable limit, primarily on the grounds that it failed the minimal impairment test as being overbroad.

III. The Vices and Virtues of Judicial Review

Charter section 1 analysis underscores the debate over the proper role of judiciary in Canada—a sometimes dormant but potentially divisive issue. After the entrenchment of the Charter, the courts became vastly more powerful in the Canadian political system.¹⁷ Not only can the judiciary determine *who* can make laws through division of powers jurisprudence, but since entrenchment, it also has the power to rule that *no level of government* can enact a particular law (subject to the section 33 override) if it violates a protected right.¹⁸

Initial interpretation of the section 1 limiting provision suggested that courts would be strict with legislative violations of the enshrined rights.¹⁹ Generally, the jurisprudence has not followed such early indications, rather suggesting a path of deference to legislators,²⁰ perhaps the result of the Court wishing to uphold legislation that promotes a desirable social agenda.²¹ In fact, the *Oakes* test has become a highly contextualized analysis, in which courts balance many factors,²² such as whether the legislation is aimed at protecting a vulnerable group²³ and whether the violated right is closely connected to the core principles of the Charter.²⁴ In balancing these factors, the courts may adopt a more deferential or activist analysis in assessing the reasonableness of government action.

Whatever the perceived trend, an all-encompassing analysis of judicial review under the Charter is difficult and conclusions drawn are contentious.²⁵ Thus, it is perhaps instructive to examine the case that has again revived the debate over judicial activism in Canada: the Court of Appeal’s reasoning in *Sharpe*. This paper will explore arguments that advocate and oppose judicial review of legislation in the context of the Court of Appeal’s judgment. Through this examination, I will illustrate that the *Sharpe* decision reveals the necessity rather than the pitfalls of judicial review under the Charter.

A. Framing Democracy

Critics primarily charge that the Charter allows judges to usurp legislative power and

15 *R. v. Oakes*, [1986] 1 Supreme Court Reports 103; hereinafter cited to Supreme Court Reports as “*Oakes*.”

16 *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 Supreme Court Reports 835, modified the last requirement of the Proportionality branch of the *Oakes* test.

17 Brian Dickson, “The Canadian Charter of Rights and Freedoms: Context and Evolution” in Beaudoin & Mendes, eds., *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1996) 1-1 at 1-15.

18 W.A. Bogart, *Courts and Country: the limits of litigation and social and political life of Canada* (Toronto: Oxford University Press, 1994) at 257.

19 Errol P. Mendes, “The Crucible of the Charter: Judicial Principles v. Judicial Deference in the context of Section 1” in Beaudoin & Mendes, eds., *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1996) 3-1 at 3-11.

20 See above at 3-11.

21 See above at 3-32.

22 *Thomson Newspapers (c.o.b. Globe and Mail) v. Canada (A.G.)*, [1998] 1 Supreme Court Reports 877.

23 *Irwin Toy Ltd. v. Quebec (A.G.)* [1989], 1 Supreme Court Reports 927.

24 *R. v. Keegstra*, [1990] 3 Supreme Court Reports 697; hereinafter cited to Supreme Court Reports as “*Keegstra*.”

25 For an example see note 18 at 277-286, Bogart discussing the works of F.L. Morton and Peter Russel. See also Carmen Whitteimer, “The pro-Charter side strikes back: An Osgoode Hall study claims that judges are, if anything, not peremptory enough” *Alberta Report* v.26:18 (16 April 1999) 30-31.

decide fundamental questions of social policy, which are better left to elected representatives than an unrepresentative, unresponsive judiciary.²⁶ The counter-argument is that the courts are rather fulfilling their institutional role whereby they ensure that government acts in accordance with the freedoms enshrined in the Charter.²⁷ In rendering decisions, the courts are not only assessing a particular situation but also creating a framework within which Parliament will pursue future actions.²⁸ Therefore, the court is bound to consider not only the individual case but also the broader implications and ramifications of its decision.²⁹

Although the courts will consider the importance of a particular government policy, the tangential and broader effects of government action under that policy are also examined. A worthy motive will not alone legitimize every government action. The importance of government policy is recognized in the first step of the *Oakes* test: pressing and substantial legislative objective. Here, Justice Rowles accepted arguments advanced that Parliament's objectives were to protect children from both the direct and indirect harms of child pornography. Direct harm refers to the exploitation of actual children in producing child pornography. Indirect harm refers to the dangers flowing from the use of child pornography—including the desensitization of society to the sexualization of children and the use of pornography by paedophiles in grooming potential victims and confirming “cognitive distortions” (the illusory belief that their behaviour is normal).³⁰ In thus characterizing the legislative intent as multi-faceted and broad, the second stage of the *Oakes* test, Proportionality, is easier for the Crown to meet. If an objective entails addressing several problems, the government will more likely be able to justify using diverse means in meeting those problems. Therefore, the government was granted more room within which to justify the scope of section 163.1(4).

However, Chief Justice McEachern took his endorsement of Parliament's objectives a step further, and completely yielded to the government, refusing to “second-guess Parliament on either the scope of the definition it chose . . . or on the prohibition of simple possession.”³¹ There is a danger in following an analysis that allows the importance of a legislative objective to answer any concerns raised over the means used in accomplishing that objective. Such reasoning suggests that if Parliament asserted an objective of compelling enough importance, there would be no limits on the extent to which Parliament could violate fundamental rights. In her reasons, Justice Rowles expressly rejected the notion that the government can rely solely on the pressing nature of its objectives, asserting that to do so “would ultimately eviscerate the rights and freedoms guaranteed by the Charter.”³²

In enunciating the framework under which the government could pursue child pornography legislation and limit freedom of expression, Justices Rowles and Southin were mindful that the principles articulated in this case might be applied to future situations. Thus, they were wary of issuing categorical edicts and acknowledged the potential for situations where serious infringement of a right would be justified. One of Justice Southin's strongest objections to the provision was that it criminalizes the private possession of expressive material. Justice Southin noted that presently the possession of other forms of objectionable material is not prohibited.³³ She therefore found that any restriction on private thoughts must

26 See note 18 at 269-270.

27 Lorraine Weinrib, “Limitations on Rights’ in a Constitutional Democracy” in Macklem, et. al., eds. *Canadian Constitutional Law*, 2nd ed. (Toronto: Emond Montgomery Publications, 1997) 617 at 617.

28 Scott Reid, “Penumbra for the people: Placing judicial supremacy under popular control,” in Anthony A. Peacock, ed., *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation and Theory* (Don Mills, ON: Oxford University Press, 1996) 186 at 189.

29 See note 27 at 617.

30 See note 5 at para. 42.

31 See above at para. 274.

32 See above at para. 206.

33 See above at para. 92.

be based on the most compelling evidence of necessity³⁴—evidence that the government failed to adduce.

This ruling does not conclude that as a matter of policy Parliament can not criminalize simple possession of child pornography. It was not on the government's objective that the Court ruled but rather on the basis needed for a restriction on private expression. In demanding clear and compelling evidence of necessity, the Court articulated a framework within which Parliament can pursue its objectives.

B. A Needed Check

Those who reject an activist role for the courts and who favour absolute parliamentary supremacy envision Parliament as the guarantor of liberty—liberty being the freedom to do what the will of the majority, expressed through Parliament, does not forbid. Conversely, those who favour the entrenchment of rights in the Charter accept that Parliament sometimes disregards its role as protector of individual liberties and must be held accountable for these lapses.³⁵ Essentially, Charter supporters are fearful of the power of an unchecked majority. The courts are thus perceived as an essential constraint against the potential rashness of parliamentary action.³⁶

Even at the time of enactment, the provisions banning child pornography were criticized for their overbreadth and difficulties of interpretation.³⁷ The Bill itself was passed and received Royal Assent within six weeks of being introduced. It is not surprising that such a rushed bill on such a contentious issue has received subsequent scrutiny and been found lacking.

Ultimately, the legislation failed to meet the test of minimal impairment under the Proportionality branch of the *Oakes* test, due in part to evidentiary failings in the government case. It was conceded that the government could legitimately prohibit pornography that harmed actual children in its production. Therefore, Justices Rowles and Southin limited their analysis as applying to pornography that does not exploit actual children in its creation. The government was thus required to justify the provisions by showing a reasonable apprehension of indirect harm to children arising from purely imaginative works.³⁸ Most evidence indicated that the indirect dangers of child pornography (as used for grooming and confirming cognitive distortions) arose from depictions of actual children engaged in sexual activity. One influential report recommended limiting prohibitions of child pornography possession legislation to depictions of actual youth.³⁹ Justice Rowles thus declined the government's invitation to "infer" a risk of harm from imaginative works, when balanced against the prohibition's profound invasion of freedom of expression and privacy.⁴⁰

In light of these evidentiary problems, the imprecise and expansive language used in the provision resulted in the legislation being found overbroad. One factor relied upon heavily by Justice Rowles was the extension of the prohibition to private communication. In determining that restrictions on similar forms of expression, such as hate speech and obscenity, are allowable, the courts have relied to an extent on the fact that the legislation did not extend to private viewing or communication.⁴¹ Further, the sweeping scope of prohibited materials

34 See above at para. 124.

35 R.P. Kerans, "Address" (Charter 15: A symposium on the Charter After 15 years, University of Alberta, 1996) [unpublished]. Also see note 18 at 256.

36 Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, 1992) at 48.

37 B. Blugerman, "Beyond Obscenity: Canada's new child pornography law" (1993) 11 Entertainment & Sports Law 3 at 5-7.

38 See note 5 at para. 183.

39 See above at para. 184.

40 See above at para. 185.

41 See note 24. See also *R. v. Butler*, [1992] 1 Supreme Court Reports 452.

under the provision was problematic. Elements of the prohibition that were particularly troublesome included the following: that it extended to adults depicted as being under the age of eighteen; that it extended to depictions of sexual activity between individuals aged fourteen to eighteen, when actual sexual activity between such individuals is legal; that other jurisdictions employ less intrusive measures; and that it catches those under the age of eighteen who have records of their own sexual activity.⁴²

It is worth noting that the majority did not find all elements of the provision unconstitutional and supported a prohibition of pornography that depicts actual children. Justice Southin even notes that parts of the prohibition “would be less troubling if it were confined to persons under the age of fourteen years,”⁴³ clearly inviting Parliament to refine this law to meet the standards of Charter scrutiny.

C. Thwarting Progressive Initiatives

Another endorsement of the Charter and judicial review is that in granting protection to individuals, the courts must sometimes measure fundamental rights against the collective welfare, an unpopular task best performed by an independent judiciary.⁴⁴ However, this argument is countered by the contention that the courts are historically conservative institutions and are thus as likely to regressively thwart progressive government initiatives as to be agents of social justice.⁴⁵ Therefore, it is asserted that Parliament is often more effective at improving the welfare of Canadians than the courts⁴⁶ and, of necessity, performs a role of mediating between competing groups and conflicting interests, where one interest must inevitably be subordinated to the greater good.⁴⁷

This concern is at least partially addressed by the *Oakes* test itself. In a section 1 analysis the court does not in isolation consider only the infringed right. The courts also recognize and accord weight to any factors that compete with and mitigate the importance of interests protected by the Charter right. Although ultimately not enough to justify this intrusion on freedom of expression, the conflicting interests at issue in this case were recognized and accorded different levels of importance. In assessing the government’s actions, Justice Rowles adopted a deferential standard and noted that in protecting vulnerable groups, here children, the government need not adopt the least intrusive means of accomplishing its objectives.⁴⁸ Further, she recognized that child pornography is not closely related to the “core” principles underlying Charter protection of freedom of expression: the search for truth, participation in the political process, and individual self-fulfillment.⁴⁹ Therefore, the expression was granted a lesser degree of protection and the government could more easily justify its restriction thereof.⁵⁰

Additionally, the final stage of the *Oakes* test—weighing the salutary and detrimental effects of the legislation—requires that the court explicitly address whether the provision truly accomplishes its objective in a beneficial manner. In finding that the provisions met this final step of the Proportionality test, Chief Justice McEachern determined that the objective of protecting children was owed greater weight than the unlikelihood that the law would catch innocent possessors. Although he conceded that the definition could criminalize some

42 See note 5 at paras. 126, 128, 197.

43 See above at paras. 127.

44 See note 28 at 189-190.

45 See note 18 at 259-260. To illustrate, Bogart uses the case of *Singh et. al. v. Minister of Employment and Immigration*, [1985] 1 Supreme Court Reports 177, where the Court struck down legislated procedures for disposing of refugee claims because they did not afford an oral hearing. New procedures created a backlog of 85,000 cases by the end of 1988 and were nearly \$100 million dollars overbudget by 1989.

46 See above at 267.

47 See note 19 at 3-24.

48 See note 5 at para. 156.

49 See note 24 at 762-67.

50 *R. v. Lucas*, [1998] 1 Supreme Court Reports 439 at 459.

conduct that does not present a serious risk to children, he asserted that such instances would be very rare, ultimately finding that any real risk of harm to children is enough to tip the scales in favour of the legislation. In reaching this conclusion, however, Chief Justice McEachern balanced the “risk of harm to both children and society against the right of every person, innocent or nefarious, to possess *any kind* of child pornography.”⁵¹ His analysis clearly included pornography that uses actual children in its production.

Resolving the balance in favour of the impugned provisions was more difficult under the approach of Justices Rowles and Southin, who considered only the more narrow prohibition of materials that do not use actual children in their creation. Thus, the potential of harm from imaginative works was balanced against the potential incarceration of innocent people. The scant evidence of harm arising from imaginative pornography was found to be an insufficient justification for the scope of materials prohibited, which potentially could include innocent behaviour.⁵² In assessing the risk of incarceration, Justice Southin noted that the existence of such a penalty also raises the possibility that legitimate expression will be chilled as people are forced to become their own censors. Further, she found the salutary effects of the provision minimal in the context of the overall legislative scheme, which includes prohibitions of the sale, distribution, publication, manufacturing, and importation of child pornography.⁵³

Thus, despite the recognition of competing interests and the low level of protection afforded child pornography, the scant evidence of danger to children arising from purely imaginative materials⁵⁴ was insufficient to show a reasonable basis for the government’s action. Overall, the actual benefits of the prohibition of imaginative works were minimal and did not outweigh the real danger that innocent people could be charged under the provision. The government did not establish that section 163.1 of the Code was a proportional response to the problem of child pornography, and the infringement of freedom of expression failed to be a “reasonable limit demonstrably justified in a free and democratic society.”⁵⁵ And because Parliament has declined to act by either amending the provisions or overriding the *Sharpe* ruling,⁵⁶ the criminal justice system is left in limbo.

D. The Inertia of Parliament

Parliament’s inaction in the wake of the *Sharpe* case does, however, illustrate a potential danger of judicial activism: the sapping of the democratic process. While acknowledging the deficiencies of the political process, objectors to judicial intervention contend that courts hand down conclusions rather than build consensus. Therefore, the danger attaching to any court imposed solution, no matter how enlightened, is that politicians and the public will no longer seek consensus but will leave tough decisions to the courts, a course of action that ultimately breeds populist apathy and resentment.⁵⁷

The federal government has resisted calls to overturn the ruling, being content to “let justice run its course instead of rewriting its legislation before the Supreme Court [of Canada] rules.”⁵⁸ As noted, the laws were poorly drafted from the outset—encompassing a wide breadth of materials of little potential harm. Further, section 163.1 was not even the initiative of the present Liberal government but of its Progressive Conservative predecessor. Arguably,

51 See note 5 at para. 291. Emphasis added.

52 See above at para. 213.

53 See above at para. 214.

54 See above at para. 184.

55 Section 1, see note 4.

56 Janice Tibbets, “B.C. urges high court to weigh public opinion in pornography case” *National Post* (2 October 1999) A4.

57 See note 18 at 269–270.

58 See note 56.

the present Parliament could amend the laws without losing face. Instead of amending the legislation, however, Parliament is content to let the courts deal with the unwieldy provisions and also bear the criticism. The focus of the debate should be a problematic, poorly-drafted law. Instead, the focus has been the unpopular role that the courts play in reviewing government action—a role that only becomes necessary when Parliament has failed in its own duty.

In a recent speech, Preston Manning admonished the government for abdicating its responsibilities. He advocated reforming measures, including “a process of pre-legislative review to ensure Parliament clearly specifies within each statute it passes the intent of that statute, and obtains independent legal advice of the Charter compatibility of bills before they leave [Parliament] . . . rather than after.”⁵⁹ His comments are particularly revealing of Parliamentary lassitude as his “reforming” measures amount to nothing more than an obvious and elementary review that is necessary for all proposed legislation.

IV. Conclusion

Overall, the *Sharpe* case simply does not support the contention that the judiciary is running amok with unchecked power and deciding fundamental issues of policy. The judgment does not issue an edict that the government cannot prohibit possession of child pornography. It merely states that the governments must limit such prohibitive measures to pornography that uses actual children in its production or present evidence that children are put at risk by pornography that is purely imaginative. Nor does this case signal that the courts are diverging from a deferential analysis under section 1 of the Charter. Although deference ought to be afforded to Parliament in many instances, the notion of deference must not be extended too far. In requiring the government to adduce something more than scant evidence to justify its violation of entrenched rights, the courts are merely ensuring that Parliament is meeting its obligation to act within the limiting framework of the Constitution.

⁵⁹ Douglas Fisher, “Manning challenges the Trudeau legacy” *Toronto Star* (17 October 1999) C7.

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Raising the Roof on Community Housing for People with Disabilities:

Class Actions in Canada

I. Introduction

Provincial legislation permitting class actions first came into force in Québec in 1979.¹ Legislation in Ontario and British Columbia has permitted class actions since January 1, 1993² and August 1, 1995,³ respectively. Judicial commentary on the British Columbia and Ontario acts suggests that these are favourable to a class of people whose primary common claim is their shared history of being disadvantaged in our society.⁴ This article looks at American civil rights class actions related to deinstitutionalization of people with disabilities, and the right to live in the least restrictive environment, as a possible model for contemporary disability rights advocates in Canada.⁵

Deinstitutionalization is the term used to describe the public policy transformation beginning in the 1970's with regard to traditional asylum systems of care.⁶ Closely aligned with this transformation is the broader concept of community based care.⁷ At this writing, these issues remain very much alive for people with disabilities in British Columbia. Physically disabled, long-term residents of the George Pearson Rehabilitation Centre in Vancouver recently opposed a threatened transfer to a new mega-institution.⁸ Former George Pearson residents, living for some time independently in the community,⁹ now face proposed cutbacks in funding that may force them back into long-term care.¹⁰ In the Greater Victoria Capital Region, long term residents of the community with serious physical disabilities are suffering from drastic reductions in their home care services.¹¹ Revisions to the British Columbia Mental Health Act have expanded the criteria for involuntary admission for people with mental illness to include "prevention" of the person's substantial mental or physical deterioration.¹²

These present realities reflect the crucial role played by political power in determining how well people with disabilities are served by deinstitutionalization.¹³ The following discussion will outline the merits of class action suits as a new forum in which disabled people can exercise their political power in Canadian courtrooms.

II. Class Actions: the Promises and the Pitfalls

As for all plaintiffs, whether it is advantageous for people with disabilities to pursue a

1 Act Respecting the Class Action, Statutes of Quebec 1978, chapter 8; as amended Statutes of Quebec 1992, chapter 57.

2 Class Proceedings Act, Statutes of Ontario 1992, chapter 6; hereinafter cited as "the Ontario Act."

3 Class Proceedings Act, Statutes of British Columbia 1995, chapter 21; hereinafter cited as "the BC Act."

4 John Campion and Victoria Stewart, "Class Actions: Procedure and Strategy" (1997) 19 *The Advocates' Quarterly* at 22. On the disadvantaged and the public interest, see section 31(1) of the Ontario Class Proceedings Act, 1992 and *Edwards v. Law Society of Upper Canada* (1994), 26 *Carswell Practice Cases* (3d) 116 (Ontario Class Proceedings Committee).

5 Mary Hayden, "Class-Action, Civil Rights Litigation for Institutionalized Persons with Mental Retardation and Other Developmental Disabilities: A Review," (1997) 21 *Mental and Physical Disability Law Reporter* 411 at 411. For a recent example of the abuses of asylum care of the mentally disabled in Canada, see Ingrid Peritz, "Abuses uncovered at Montreal 'asylum'" (18 February, 1999) *The Globe and Mail* A1.

6 Jonathan Bach, "Requiring Due Care in the Process of Patient Deinstitutionalization: Toward a Common Law Approach to Mental Health Care Reform," (1989) *The Yale Law Journal* 1153 at 1153; see also Martha Drassinower and Sara Levine, "More Sinned Against Than Sinning: Housing, Mental Illness and Disability" (1995) 6 *Windsor Review of Legal and Social Issues* 91 at 95-98.

class action will depend on the facts and circumstances of the case, as well as on a careful consideration of various litigation alternatives and strategies.¹⁴

A. Advantages of Class Actions

Class actions offer several distinct advantages for plaintiffs. They provide a more powerful litigation posture for the class representative and their counsel.¹⁵ There is strength in numbers.¹⁶ Consider the following institutionalized people with mental disabilities: restrained on their beds or in straight jackets;¹⁷ lying in their own urine and feces on cold floors while staff watched television;¹⁸ beaten or raped by staff.¹⁹ All of these people were plaintiffs in major American class action suits whose members numbered in the hundreds to thousands.

Because of the greatly expanded exposure to liability afforded by class actions, a defendant is much more likely to treat the litigation seriously than would be the case in individual litigation.²⁰ In injunctive suits, the defendants are fully aware that certification of a class will enhance the effective enforcement of any final judgement and may also serve as the legal foundation for damage claims on behalf of the class under further jurisdiction, or even in subsequent litigation by class members.²¹

Another major advantage of class actions, particularly where only injunctive or declaratory relief is sought, is the avoidance of mootness when the representative is no longer able to act as a plaintiff.²² It is not uncommon for an institution-based class action on behalf of people with disabilities to involve plaintiffs “who are, may be, or have been” hospitalized (*Dixon v. Kelly* (1993); *Florida Association for Retarded Citizens (ARC) v. Grabam* (1982)).²³ This generality of class is helpful in institutional reform decrees, where the population of class members is ever changing, and the litigation may drag on for years.²⁴

⁷ In Canada, this concept is represented in the social and political notion of independent living; see *Nothing Personal, The Need for Personal Supports in Canada* (Toronto: The Roeher Institute, 1993) at 10. In the United States, the right to community based care has been represented in the legal notion of the least restrictive alternative; see *Shelton v. Tucker*, 364 US Supreme Court Reports 479 (1960). John Parry, “Mental and Physical Disability Rights: The Formative Years and Future Prospects,” (1996) 20 *Mental and Physical Disability Law Reporter* 627 at 628. See also: *Brenster v. Dukakis*, 544 Federal Supplement 1069 (US District Court for the District of Massachusetts 1982); *Michigan ARC v. Smith*, 475 Federal Supplement 990 (US District Court for the Eastern District of Michigan 1979); *New York ARC v. Carey*, 393 Federal Supplement 715 (US District Court for the Eastern District of New York 1975).

⁸ Bert Forman, M.S.W., Director of Rehabilitation Programs, B.C. Paraplegic Association, in conversation with Lynn Pierce, January, 2000.

⁹ British Columbia, *Creating Housing for Healthy Communities* (Victoria: Social Planning and Research Council, 1993) at 20.

¹⁰ See note 8.

¹¹ See above.

¹² Mental Health Act, Statutes of British Columbia 1999, chapter 288, section 22, see especially section 22(3)(c)(ii).

¹³ Three distinct movements of deinstitutionalization have emerged in Canada around people with developmental disabilities, people with mental illness, and people with physical disabilities (Christine Gordon, B.A., B.Sc., Project Coordinator, B.C. Coalition for People with Disabilities, in conversation with Lynn Pierce, June, 1998).

¹⁴ Herbert Newberg and Alba Conte, *Newberg on Class Actions*, Third Edition, (New York: McGraw Hill, 1992) at 5-4.

¹⁵ See above.

¹⁶ See David Lepofsky, “Equality Rights for Handicapped Persons in the Charter: Putting the Accent on Individual Ability,” *What You Need to Know About Disability Law* (Toronto: Department of Continuing Legal Education, The Law Society of Upper Canada, November 6 1993) at 136-137.

A related benefit of avoidance of mootness is that satisfaction of the requirements of litigation by a class representative extends to absent class members.²⁵ This is helpful for class members who are too disabled to participate personally²⁶ or who fear publicity of a stigmatizing disability such as mental illness. Encouragement by counsel of alternative participation by these individuals will enhance direct representation of these clients' expressed wishes.²⁷

For some people class actions may be their only way into court. Consider these people with mental illness: patients prohibited from visiting with other patients and discouraged from speaking with staff or outsiders;²⁸ or persons made homeless in New York City after being discharged under a state policy of least restrictive, community care.²⁹ When the plaintiff is poor, marginalized, legally incompetent, ignorant of legal rights, or unable to assert rights for fear of sanctions or otherwise, and these disabilities are shared by others similarly situated, the class action may be the only effective means to obtain judicial relief.³⁰

Class actions also present several procedural advantages for plaintiffs. The court will place greater weight in balancing tests to determine injunctive relief.³¹ When a plaintiff seeks preliminary or permanent injunctive relief, the court will not only determine the likelihood of the plaintiff's success on the merits, but will also weigh the harm to both parties of granting or withholding the injunction sought.³²

In the United States, over the past twenty-five years, injunctive relief has been the primary means of addressing administrative policies, legislative enactments, and clinical decisions that created or perpetuated the injurious conditions and extended institutionalization of disability service systems.³³ Successful declaratory and injunctive class actions may serve as the basis for ancillary damage claims or subsequent actions by class members.³⁴ This is particularly relevant in actions calling for deinstitutionalization and least restrictive care, where plaintiffs may have experienced neglect or abuse directly as a result of institutionally sanctioned decisions or policies.

Injunctions have been used where chronic and persistent overcrowding has led to dangerous living conditions³⁵ (*Woe v. Cuomo*, 1986;³⁶ *Michigan ARC v. Smith*, 1978).³⁷ Courts have also been compelled to order preliminary injunctions to halt physical and sexual abuse of mentally disabled children by staff (*Michigan ARC v. Smith* (1978); *Wyatt v. Poundstone* (1995)).³⁸ Injunctions can also provide a preliminary means of halting institutional "dumping" of people with disabilities into the community.

The use of the class device also provides the plaintiff with a broader base for pre-trial discovery and presents the court with a more complete record on which to reach its decision. Factual records depicting widespread discrimination or other broad violations³⁹ often have been the impetus for legislative reform.⁴⁰ In disability litigation, where the lived reality of the client is often worlds away from that of members of the court,⁴¹ attorneys have an opportunity to provide a sufficiently detailed, vivid, and compelling explanation of the facts so as to bring them alive. Such presentations provide a crucial counteraction to the power of diminishing myths and stereotypes about people with disabilities, and educate the court about the importance of their interests and injuries.

17 "Practice Manual," (1977) 3 Mental and Physical Disability Law Reporter 298 at 306.

18 "Improper Care: Settlement Agreement; Mental Retardation," (1991) 15 Mental and Physical Disability Law Reporter 145 at 145.

19 "Least Restrictive Environment; Contempt," (1994) 18 Mental and Physical Disability Law Reporter 254 at 254.

20 See note 14 at 5-5.

21 See above at 5-5 and 5-6.

22 See above at 5-6 and 5-7.

23 *Dixon v. Kelly*, No. 74-285 (US District Court for the District of the District of Columbia, May 14, 1993); *Florida ARC v. Graham*, No. 79-48-Orl-Civ-Y (US District Court for the Middle District of Florida 1982). "Community Services; M.I.; Special Master; Attorneys' Fees," (1993) 17 Mental and Physical Disability Law Reporter 272 at 272.

24 See note 14 at 5-7.

25 See above at 5-13.

26 Herr, see note 7 at 634.

27 See above at 641.

28 "V.A. Hospital in New Jersey the Subject of a Broad-Based Class Action," (1979) 3 Mental Disability Law Reporter 319 at 319-320.

29 "New York lawsuit for more community services is justiciable," (1984) 8 Mental and Physical Disability Law Reporter 388 at 388.

30 See note 14 at 5-12.

31 See above at 5-14.

32 See above at 5-15.

33 Steven Schwartz, "Damage Actions as a Strategy for Enhancing the Quality of Care of Persons with Mental Disabilities," (1989) 17 Review of Law and Social Change 651 at 656.

34 See note 14 at 5-16.

35 "Suit Attacks Conditions at New York MR Facility at Wassaic," (1977) 1 Mental Disability Law Reporter 272 at 272-273.

36 *Woe v. Cuomo*, 638 Federal Supplement 1506 (US District Court for the Eastern District of New York 1986). "Care and treatment in state facilities scrutinized," (1986) 10 Mental and Physical Disability Law Reporter 538 at 539.

37 *Michigan ARC v. Smith*, No. 8-70384 (US District Court for the Eastern District of Michigan March 3, 1978). "Comprehensive Deinstitutionalization Order for Michigan Mental Retardation Facility," (1979) 3 Mental Disability Law Reporter 391 at 391.

The class action also provides an opportunity for people with disabilities to expand their voices beyond the court room.⁴² This increases public awareness of the issues and organizes public support for legal reform.⁴³ Widespread public support and attention focused on a class action may prompt politicians to settle with the plaintiffs, even if it is not clear that the public authority will be found liable. Pursuit of a class action may even be unnecessary, where a test case convinces the government to settle all outstanding actions.⁴⁴

The public relations benefits of class actions are well illustrated in the early 1970's events surrounding Willowbrook, a 5,000 resident New York institution for people with developmental disabilities.⁴⁵ The launching of two parallel class actions in the midst of a series of televised reports brought the atrocities being committed there to the attention of the American public⁴⁶ (*New York State Association for Retarded Children (ARC) v. Carey*⁴⁷ and *New York State ARC v. Rockefeller*).⁴⁸ The decisions of the courts established fundamental civil rights for people in warehouse-like conditions at Willowbrook and similar institutions across the country, and re-created American law related to people with mental disabilities.⁴⁹

A related benefit of class actions is the strengthening of the final judgement, which may stipulate that continuation of the unlawful activity by the defendant would expose it to contempt proceedings or summary liability in subsequent litigation. A class judgement possesses deterrent value of significantly greater impact than that of a judgement in individual litigation under similar circumstances. American civil rights suits have shown that voluntary compliance is encouraged when exposure to effective class action litigation would be the alternative.⁵⁰

III. Disadvantages of Class Actions

A number of significant disadvantages from the plaintiff's perspective must also be considered before embarking on a class action. When a class complaint is filed, the class representative must always act for the best interests of the class, even when these may conflict with individual interests.⁵¹ Delay of individual relief may be a threat to the health, or life, of a person with disabilities whose challenge to egregious living conditions may not be resolved for years.⁵² Prolonged involvement in the action may affect the disabled plaintiff's ability to pursue other important rights and entitlements.⁵³

The ethical challenges of representing such numbers of disabled individuals, while paying adequate attention to individual differences, can be daunting.⁵⁴ Ascertaining the expressed wishes of individuals may involve some interpretation due to varying levels of intelligence, competency, or ability to communicate.⁵⁵ Being faithful to the disabled client's objectives is crucial to their representation.

People with disabilities live largely at or below the poverty line.⁵⁶ The added costs associated with class actions⁵⁷ and reliance on public legal assistance programs limit litigation where state institutions or governments are the defendants.⁵⁸ In BC, a lack of government funding for class actions, combined with an inability to seek costs against the unsuccessful defendant, will likely inhibit future use of declaratory or injunctive class actions.⁵⁹ This

38 *Michigan ARC v. Smith*, No. 8-70384 (US District Court for the Eastern District of Michigan March 3, 1978); *Wyatt v. Poundstone*, 892 Federal Supplement 1410 (US District Court for the Middle District of Alabama 1995). "Personal Safety; Consent Decree; Preliminary Injunction," (1995) 19 Mental and Physical Disability Law Reporter 596 at 596. "Federal Court Issues Preliminary Injunction to Stop Abuse at Plymouth Center," (1978) 2 Mental Disability Law Reporter 551 at 551.

39 See note 14 at 5-17.

40 Herr, see note 7 at 635.

41 David Ferleger, "Civil Rights Disability Practice: Expediting Institutional Mistreatment Litigation," (1988) 12 Mental and Physical Disability Law Reporter 309 at 309.

42 See note 14 at 5-18.

43 See above at 5-25.

44 David Cohen, "Government Liability and Class Action Legislation" *Class Action Suits*, (The Continuing Legal Education Society of B.C., Vancouver, November 1995) 6.3 at 6.3.04.

45 *New York State ARC v. Rockefeller*, 357 Federal Supplement 752 (US District Court for the Eastern District of New York 1973), *consent decree approved sub nom. New York State ARC v. Carey*, 393 Federal Supplement 715 (1975). Parry, see note 7 at 627.

46 Parry, see note 7 at 627.

47 *New York State Association for Retarded Children (ARC) v. Carey*, N 393 Federal Supplement 715 (US District Court for the Eastern District of New York 1975) (Memorandum and Order of March 10, 1976, No. 72 c-356); 551 Federal Supplement 1165 (1975); 706 Federal Reporter 2d 956 (1983), *cert. denied* 464 US Supreme Court Reports 915 (1983), 7 Mental and Physical Disability Law Reporter 226 at 460.

48 357 Federal Supplement 752 (1973).

49 Parry, see note 7 at 627.

50 See note 14 at 5-24.

51 See above at 5-26.

52 See note 41 at 309. See also Hayden, note 5 at 421-423.

53 See note 14 at 5-27.

54 Herr, see note 7 at 633.

55 See above at 621 and 633.

56 Hayden, see note 5 at 420.

57 See note 14 at 5-28-5-29.

58 Hayden, see note 5 at 421.

59 Ward Branch, *Class Actions in Canada Release No. 2*, (Vancouver: Western Legal Publications, November 1997) at 5-7.

suggests that if the BC statute is to provide an effective means of access to justice, the BC Government should follow the lead of Québec and Ontario and provide funding for class actions.⁶⁰

A further disadvantage of class actions is the potential exposure to a broader array of defence tactics, slowing the progress of litigation.⁶¹ The defendants in institution-based litigation are bureaucracies with the financial and legal resources to indulge their inherent tendencies to resist laws and policies that they do not want to implement. A now infamous example of bureaucratic intransigence is found in *Dixon v. Weinberger* (1975).⁶² In this case, involving St. Elizabeth's Hospital in Washington, D.C., a 1975 class action decree mandating less restrictive alternatives for patients with mental illness was yet to be implemented in 1999.⁶³ Such inability or unwillingness to comply with judicial decrees has been widespread.⁶⁴

The common history of inadequate decrees that do not vindicate a right to placement outside of an institution or provide effective monitoring of rights related to institutional conditions, suggests that courts may need to engage in powerful, sweeping enforcement mechanisms to assure that decrees are both just and effective.⁶⁵ This will also serve to compensate for the disparities in power and control between establishment defendants and disabled plaintiffs, which lie at the heart of such intransigence.

Finally, a potential disadvantage of class actions is their possible reception in some courts.⁶⁶ Consideration should be given not only to the judge's demonstrated position on human rights and disability issues, but also to his or her receptivity to an institutional reform class action. The judge must be prepared to implement and monitor major changes in the law and in the relations among governmental bodies.

Sweeping and detailed orders typically require ongoing judicial monitoring of compliance that may span years.⁶⁷ Structural injunctions also establish the courts as a new source of authority and accountability for the managers of public institutions.⁶⁸ Given the onerous burdens and uncertain results of conventional class action enforcement mechanisms, judges (and plaintiffs) may wish to engage alternative dispute resolution resources and ombudsmen to ensure settlement and enforcement after judgement of the class action has been given.⁶⁹ These alternative methods could also ensure that the action serves the plaintiffs' goals, rather than those of their lawyer, or the court.

IV. Conclusions

American institution-based class actions have at times provided stunning, but essentially pyrrhic, legal victories that ultimately failed to have any meaningful impact on the lives of the plaintiffs they were intended to serve. Furthermore, the impact might have been highly questionable from the perspective of equality rights. Class actions often work too slowly, may be incapable of making the precise decisions necessary for institutional change, and are often ineffective in implementing court orders.⁷⁰ The interests of the disabled plaintiff can be lost in the consequent legal wrangling.

Class actions have also been the sole forum for justice, providing the impetus for

60 Campion and Stewart, see note 4 at 31.

61 See note 14 at 5-30.

62 *Dixon v. Weinberger*, 405 Supplement 974 (US District Court for the District of Columbia 1975).

63 Herr, see note 7 at 633.

64 Roy Reynolds, Jeanne Dooley, and John Parry, "Court Monitors and Special Masters in Mental Disability Litigation: Variables Affecting Implementation of Decrees," (1998) 12 *Mental and Physical Disability Law Reporter* 322 at 322. Also see Melissa Warren and Robert Moon, "Dixon: In the Absence of Political Will, Carry a Big Stick," (1994) 18 *Law and Psychology Review* 329-359.

65 Michael Lottman, "Enforcement of Judicial Decrees: Now Comes the Hard Part," (1976) 1 *Mental Disability Law Reporter* 69 at 69-75.

66 See note 14 at 5-34.

67 Donald Horowitz, "Decreeing Organizational Change: Judicial Supervision of Public Institutions," (1983) 1983 *Duke Law Journal* 1265 at 1267.

68 See above at 1268. Horowitz also discusses the implications of judicial supervision of public institutions.

69 Roger Fisher and William Ury. *Getting to Yes* (Second Edition) (Toronto: Penguin Books, 1991).

70 John Parry, "Executive Summary and Analysis," (1980) 4 *Mental and Physical Disability Law Reporter* 3 at 3.

important changes in practice, policy, and legislation that have had lasting effects on the lives of disabled people. These actions have resulted in systemic improvements in the quality and quantity of care offered to people with disabilities. Many of these actions served to enforce equality rights. Ultimately, it is the rights and interests of the individual plaintiffs that must remain at the forefront when considering the merits of embarking on a class action.

Disability rights advocates in Canada have traditionally divided their time between pursuing cases of discrimination to ensure equality rights of people with disabilities and on developing critiques and building broad support for systemic change.⁷¹ Often missing in the court's analysis has been the history of institutionalization and segregation experienced by people with disabilities, specifically because of their disability and because they are often poor and unable to afford appropriate housing.⁷² Class actions appear to provide a viable, uniquely high profile, forum from which to shape political will to enforce the rights of a greater number of people with disabilities.

71 See note 16 at 330. For community living, see *Alcoholism Foundation of Manitoba v. Winnipeg (City)* (1990), 69 Dominion Law Reports (4th) 697 (Manitoba Court of Appeal), leave to appeal to Supreme Court of Canada refused (1991), 77 Dominion Law Reports (4th) vii (note) (Supreme Court of Canada); *Fernandes v. Director of Social Services (Winnipeg Central)* (1992), 93 Dominion Law Reports (4th) 402 (Manitoba Court of Appeal), leave to appeal to Supreme Court refused (1993), 99 Dominion Law Reports (4th) vii (note) (Supreme Court of Canada). See for health services: *Eldridge v. British Columbia (Attorney General)* (1997), 218 National Reporter 161 (Supreme Court of Canada).

72 Sandra Goundry and Yvonne Peters, *Litigating for Disability Equality Rights: The Promises and the Pitfalls*, (Winnipeg: The Canadian Disability Rights Council, April 6, 1994) at 30.

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Strategic Lawsuits Against Public Participation:

Combating an Assault on the Democratic Process

On June 27th, 1999, ten residents of Denman Island, British Columbia, set up an information table at the entrance to a road used by development company 4064 Investments Ltd. in carrying out its logging practices. The action was a culmination of more than two years of community effort to promote sustainable forestry on ecologically sensitive land.

In May, the Denman Island Local Trust Committee received approval to enact five new bylaws aimed at ensuring responsible logging operations. By early June, the Islands Trust, the body responsible for bylaw enforcement, had received several complaints concerning 4064's non-compliance with bylaw stipulations.¹ The Trust's Investigations Officer attempted to correspond with the developer to notify him of the complaints and to request that all activity resulting in violations cease immediately.

Affidavit evidence sworn by island residents and company employees suggested that logging practices on the site continued unabated, despite the notice of non-compliance.² The Committee responded by filing an application for an interlocutory injunction against 4064 in the hopes of suspending the alleged illegal activity. Local residents also staffed a table on one of the two roads leading to the site, where information on the bylaws was disseminated.

On July 7th, two days before the injunction application against 4064 was to be heard, ten local residents were served with a Writ of Summons. The plaintiff's claim for damages, injunctive relief and costs was based on the allegation that "the defendants' blocking of the road and other protest activities have unlawfully obstructed the plaintiff... to use of the plaintiff's property, and in particular have unlawfully interfered with the plaintiff's logging activities on the property."³

These allegations, along with the causes of action relied on by the plaintiff for support, triggered an association no longer unfamiliar to the Canadian environmental and legal community. The concept of Strategic Lawsuits Against Public Participation, or SLAPPs, has emerged to describe civil actions with no reasonable basis or merit advanced with the intent of stifling participation in public policy and decision making. This paper will trace the emergence of the SLAPP phenomenon in Canada and analyze the myriad of challenges that confront the

1 Letter from Watson Smith, Bylaw Investigations Officer, to 4064 Investments Ltd. c/o Mike Jenks (June 11, 1999). The complaints alleged two violations within the company's Development Permit Area: one with regard to excess logging on steep terrain, and the other based on exceeding the maximum permitted cut in the area.

2 Affidavit No.A991804, Victoria Registry (July 2, 1999).

3 Writ of Summons No.C993489, Victoria Registry (July 6, 1999).

development of a judicially based response. It will focus on the recent trends in the judiciary towards recognizing the impact of SLAPPs and accepting a prominent role in discouraging SLAPP litigation. Finally, it will argue that judicial activism in the SLAPP arena requires support from legislatures in order to protect the role of public participation in the democratic process.

I. Background - The American Experience

While relatively new to the Canadian legal scene, the SLAPP phenomenon has become an integral development in American public law over the last decade, and has resulted in the creation of a substantial body of jurisprudence.⁴ In addition, anti-SLAPP legislation has been extensively enacted across the United States, including major initiatives in California, New York, and Washington.⁵

American courts have attempted to come to terms with the potentially chilling effect of SLAPP suits on the right of citizens to participate in decision-making. In the early 1990's the phenomenon was recognized by a New York court as relating to "suits without substantial merit that are brought by private interests to stop citizens from exercising their political rights or to punish them from having done so."⁶ The Court went on to describe the implications of such a suit:

SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense. The longer the litigation can be stretched out, the more litigation can be churned, the greater the expense that is inflicted, the closer the SLAPP filer moves to success...

The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent.⁷

4 Chris Tollefson, "Strategic Lawsuits Against Public Participation: Developing A Canadian Response" (1994) *The Canadian Bar Review* 200 at 201.

5 See above.

6 *Gordon v. Marrone*, 590 *New York Supplement Reporter* 2d 649 (1992) at 656.

7 See above.

American research has revealed that SLAPPs are typically filed by large, economically powerful organizations and are targeted at private citizens or groups whose activities have interfered with the filer's economic interests.⁸ Their proliferation has been tied to increased public access to government and courts with respect to decisions affecting the environment.⁹

In the United States, the most potent protection for SLAPP targets has been offered by the First Amendment to the U.S. Constitution.¹⁰ Strategic lawsuits have been found to violate the right to petition government guaranteed by the Constitution by intimidating those engaged in public debates.¹¹ Courts have provided precedent to protect public expression by articulating legal tests for granting early dismissal of such claims.¹²

II. SLAPPs in Canada - A Charter-based response

Over the last decade, several Canadian lawsuits, especially in British Columbia, have raised significant SLAPP issues. There has been increased pressure on courts to develop a response similar to the one formulated by their American counterparts. The greatest impediment to this movement has been the reluctance of courts to rely on protections afforded by the Canadian Charter of Rights and Freedoms as the focus of a judicially based response.

Like the First Amendment in the United States, Section 2(b) of the Charter purports to protect public participation under the rubric of "freedom of expression."¹³ Canadian courts have chosen to interpret this protection in a broad, generous fashion, thereby reinforcing a commitment to the principles of personal autonomy and the marketplace of ideas. The promotion of these values provides a seemingly natural progression towards a Charter-based response to SLAPP litigation.¹⁴

However, judicial action in this regard has been effectively blocked by the notion that the Charter does not apply to civil disputes between private parties. The decision handed down by the Supreme Court of Canada in *Retail, Wholesale and Department Store Union v. Dolphin Delivery*¹⁵ held that for the Charter to apply to a legal proceeding, that proceeding must contain some element of government action. This principle, strictly applied, effectively precludes the use of the Charter as a means of protecting political expression in the ostensibly private arena of SLAPP litigation.¹⁶

Since *Dolphin Delivery*, case law suggests a less rigid stance by the Supreme Court on the application of the Charter to the common law. Some post-*Dolphin* decisions have supported the notion that in certain circumstances, judicial action, including application of the common law, does constitute a government action for the purposes of triggering Charter scrutiny.¹⁷

More significantly, the comments of Chief Justice Dickson in *B.C.G.E.U. v. B.C.(A.G.)*¹⁸ suggest a distinction between a purely private dispute and one with a strong public aspect.¹⁹ To the extent that a SLAPP affects public participation, the absence of a government actor may not necessarily be a bar to a Charter-based defence. In addition, judgments that reflect sensitivity to the social and political issues inherent in SLAPP litigation would be consistent with the notion, expounded in *Dolphin*, that the judiciary is to apply and develop the

8 G.Pring & P.Canan, "Strategic Lawsuits Against Public Participation: An Introduction for Bench, Bar and Bystanders" (1992) 12 *Bridgeport Law Review* 937 at 938. Frequently, SLAPPs are aimed at political activists involved in environmental or land use disputes. These targets are often small grassroots organizations with limited financial resources.

9 See note 4 at 204.

Increased access was a result of the enactment of statutory regimes requiring public input as well as judicial liberalization of the rules on standing. As citizens and groups began more aggressively and ably to pursue various avenues of participation, their efforts were met with increased resistance, often under the guise of SLAPP litigation.

10 Chris Tollefson and Janet Promislow, "A Primer on SLAPP Suits" (1997) *Taiga News* No.21 at 2. The scope of protection covered by the First Amendment has been interpreted broadly, encompassing communications to all three branches of government, as well as to administrative agencies. Different forms of expression have also been protected, ranging from letter writing and public meetings to sit-ins and public protests.

11 *Sierra Club v. Butz*, 349 Federal Supplement 934 (US District Court for the Northern District of California 1972).

12 *Protect Our Mountain v. District Court*, 677 Pacific Reporter 2d 1361 (Colorado 1984). The Court suggested a reverse onus, whereby the filer would need to establish that the suit should not be dismissed.

13 See note 4 at 221.

14 See above at 223.

15 [1986] 2 Supreme Court Reports 573.

16 See note 4 at 224.

17 *R v. Bernard*, [1988] 2 Supreme Court Reports 833, *R v. Swain*, [1991] 1 Supreme Court Reports 933, and *B.C.G.E.U. v. B.C.(A.G.)*, [1988] 2 Supreme Court Reports 214. While these cases have focused primarily on criminal law, many have postulated that the Supreme Court will soon be asked to revisit its decision in *Dolphin* and may well consider using the Charter to protect an individual whose rights are violated as a result of a court action.

principles of the common law in a manner consistent with the values of the Charter.²⁰

III. The Common Law - Trends in the Judiciary

While the debate over Charter application to the common law rages on, Canadian courts have begun to recognize the dangers of the SLAPP phenomenon and to take measures to combat the trend. The most widely publicized manifestation of this process has been the ongoing saga of *Daishowa Inc. v. Friends of the Lubicon*.²¹ In 1988, Daishowa received logging rights over a large area of disputed Alberta land claimed by the Lubicon Cree Nation. The company built a pulp mill and began to exercise its logging rights under the agreement. In 1991, a small, unincorporated group known as the Friends of the Lubicon initiated a boycott of Daishowa paper products in the hopes of persuading the company to commit to a moratorium on logging until a land claim settlement was achieved.²² The boycott took the form of petitioning Daishowa customers and informational picketing, and soon spread to tremendous proportions.²³

In late 1994, Daishowa mounted a lawsuit against the Friends naming a variety of economic torts and seeking a permanent injunction restraining boycott activities. The facts of the case, parties involved, nature of the charges, and inferred motives for the company's actions classified the case as a paradigmatic SLAPP suit.²⁴ In the first of a series of legal battles, the General Division of the Ontario Court rejected Daishowa's bid for an interim injunction. The reasons, handed down in 1995, held that Daishowa had not brought forth evidence sufficient to justify a pre-trial injunction, particularly where the targeted activity entailed political expression.²⁵

In January 1996, the Ontario Divisional Court overturned Justice Kiteley's decision to deny Daishowa's application for an injunction against the Friends' activities.²⁶ The stage was set for a court to make a resounding statement on the future of the boycott and, implicitly, on the future of SLAPP litigation.

In April 1998, Justice MacPherson of the Ontario Court of Justice made such a statement in the course of refusing Daishowa's claim for a permanent injunction restraining boycott activities. The decision held that Daishowa failed on its claims for interference with economic and contractual relations, inducing breach of contract, intimidation, and conspiracy.²⁷ The boycott and picketing of the Friends was held not only to be lawful but to having sent an important public message about the plight of the Lubicon, which deserved a forum and protection of freedom of expression.²⁸

Justice MacPherson did recognize that the Friends were to be held liable for disseminating false statements that tarnished Daishowa's reputation;²⁹ however, in the clearest indication of the Court's distaste for the lawsuit against the Friends, MacPherson ordered nominal damages of \$1 for defamation. The decision amounted to a reprimand of Daishowa's actions but stopped short of using the term SLAPP to describe the suit.

Justice Singh of the Supreme Court of British Columbia took the next step in May,

18 [1988] 2 Supreme Court Reports 214. The Court held that the Charter applied to a decision of the Chief Justice of British Columbia to grant an injunction.

19 See above. It has been advanced that while the source of harm in a typical SLAPP suit might be private, the issues at hand and the target of the harm, the political process, are undeniably public in nature.

20 See note 15 at 198.

21 (1998), 39 Ontario Reports (3d) 620.

22 Chris Tollefson, "Strategic Lawsuits and Environmental Politics: *Daishowa Inc. v. Friends of the Lubicon*" (1996) *Journal of Canadian Studies* at 123.

23 See above. By the fall of 1994, close to 50 companies representing some 4,300 retail outlets had joined the boycott.

24 See above at 124.

25 *Daishowa Inc. v. Friends of the Lubicon*, (1995), 30 *Canadian Rights Reporter* (2d) 26. Justice Kiteley cited the American protection of peaceful boycotting and picketing and noted that the Charter protects such activities, which should not be considered illegal for the purposes of private tort litigation insofar as they are undertaken with the purpose of influencing government policy and informing the public.

26 See note 22 at 129. The Court also took exception with the conclusion that the Charter affords protection for developments in the common law.

27 See note 21 at 665.

28 See above at 648.

29 See above at 665.

1999 while delivering his reasons in the unreported case of *Fraser et al v. Corp. of District of Saanich et al.*³⁰ The case involved an application by the plaintiff to the Ministry of Health for funding to redevelop and enlarge an assisted care facility. The Ministry called on the defendant to approve the project, a decision that was to be determined largely by the position of the neighbourhood residents. The application for funding was denied by the District, and the hospital responded by preparing to go ahead with the project.³¹

The residents then expressed their views by demanding that the property be down-zoned into an appropriate single family residential zone and attempting to have the property re-designated as a heritage building. The District complied with the re-zoning recommendations, leading the plaintiff to commence an action against both the District and a group of neighbourhood residents.³² The residents responded with an application to strike out the writ and statements of claim, and sought special costs.

The Court's analysis relied on the interpretation of Rule 19(24)(a) of the British Columbia Rules of Court³³ set out by the Supreme Court of Canada in *Carey Canada Inc. v. Hunt*.³⁴ Justice Singh proceeded to work through the list of alleged torts, in each instance finding a lack of factual basis needed to support the claim. Instead, he found what amounted to "bald assertions"³⁵ by the plaintiff, and described the action as without merit. The claim fell within *Carey Canada's* "plain and obvious" test and was duly dismissed.

In addressing the defendants' claim for special costs, Justice Singh dealt explicitly with the SLAPP phenomenon by defining it, acknowledging its importance, and relating it to the facts of the case. He commented that in addition to being unreasonable and without merit, the claim had been used to stifle the democratic activities of the defendants. In closing, he found the plaintiff's conduct "reprehensible and deserving of censure by an award of special costs."³⁶

The most recent manifestation of the SLAPP phenomenon concerns the controversial Silver Spray development plan in East Sooke, British Columbia. Members of the Rural Association of East Sooke are attempting to protect a local area plan governing development. They have been met by an action claiming that statements made by Association members are defamatory of the Silver Spray developer. In preparing its motion to dismiss the charges, the Sierra Legal Defence Fund has noted that the statements referred to by the filer were innocuous and largely verifiable comments concerning logging practices in the area.³⁷ The developer has also been accused of engaging in tactics tantamount to intimidation and harassment in an attempt to silence opposition from area residents. The result of the action, set to be heard in the spring of 2000, will add another important component to the developing judicial response to SLAPP litigation.

IV. Implications for SLAPP Targets

The decision of the Supreme Court of British Columbia in *Fraser* has the opportunity to be of groundbreaking importance. An analysis of the Denman Island dispute, for instance, reveals a similar attempt to stifle public participation in community decision making. The

30 (1999) Victoria Registry [99-1793].

31 See above at 4. All patients were transferred out of the hospital.

32 See above at 1. The statement of claim against the residents alleged negligence, conspiracy, bad faith, breach of fiduciary duty, and interference with contractual relations, and also demanded special, punitive, and aggravated damages in connection with the loss, economic harm, and injury suffered by the plaintiff.

33 See above at 2. The rule entitles a court to strike out a claim at any time during the proceeding on the ground that it discloses no reasonable claim or defence.

34 [1990] 2 Supreme Court Reports 959. The test to be applied is whether it is plain and obvious that a plaintiff's statement of claim discloses no reasonable claim.

35 See note 30 at 13.

36 See above at 16.

37 Conversation with Karen Wristen, Executive Director of the Sierra Legal Defence Fund (January, 2000).

endorsement on the Writ of Summons against the ten residents cites claims for general, special, aggravated, and punitive damages for conspiracy, trespass to property, nuisance, intentional interference with economic and contractual relations, and intentionally causing harm through unlawful means.³⁸ Each one of these claims may reasonably be refuted not only for holding little chance of success, but also for containing no factual basis or merit.

The conduct of the residents was lawful throughout the process, from the enactment of the bylaw through to the application for injunction. The information table set up by the summoned resulted in no damage to property, as sworn to by an RCMP officer on the scene, and was dismantled pending the decision on interlocutory relief. As for the assertions regarding economic interference, there seems to be no indication that the volume of business done by the developer was impeded by the defendants. Along with the traffic that passed by the table unabated, an alternate route leading to the site was also utilized by 4064's loggers.

The decisions in *Daishowa* and *Fraser* suggest that courts are becoming more receptive to the implications of SLAPP suits, and more willing to chastise litigants for launching unreasonable actions. Win or lose, defending SLAPPs helps root the phenomenon more deeply in the public consciousness and spreads awareness of the assault on public participation.

However, most targets of SLAPPs lack the resources and expertise needed to carry a defence or counterclaim to fruition. Settling claims out of court amounts to a victory for the filer, who cares not about winning a trial, but aims at deterring future opposition and achieving community acquiescence.³⁹ The lack of formal guidelines for courts to identify SLAPPs and dismiss them summarily means that targets must often bow to the pressure to settle. At the time of writing, lawyers for the Denman Island residents and 4064 Investments are working on a settlement that will save the residents the expenses inherent in a lengthy trial process but will fail to promote awareness or to address the fundamental issues raised by SLAPP litigation.

V. Help on the Way? - A Legislative Response

In order to confront the multitude of challenges raised by the SLAPP phenomenon, a judicially based response must receive support and direction from the legislatures. Statutory initiatives must attempt to promote participation in the political process by addressing the imbalance of power that underlies SLAPP litigation.⁴⁰ Practical measures taken to meet this goal would require substantial reform but would be justified as prudent public policy decisions by virtue of the benefits to the democratic process that such legislative action would procure.

The main theories of reform that have been advanced primarily target the mitigation of gross inequalities in financial resources commonly found between the filer and the target of a SLAPP. One proposal focuses on a means of expediting the early identification and dismissal of SLAPPs. A procedural avenue for a target to file a pre-trial motion to dismiss an action without merit⁴¹ would alleviate the overwhelming costs inherent in a prolonged court process. Through this initiative, the legislature might arm the courts with a set of criteria by which to assess the motion for early dismissal. Such guidelines would force the filer of a suit to rely only

38 See note 3.

39 See note 4 at 206.

40 See above at 229.

41 See above.

on reasonable claims of action, while eliminating the uncertainty often cited as a consequence of unfettered judicial discretion.

Another impetus for reform is reducing the economic burden of defending against SLAPPs.⁴² While a pre-trial mechanism would help address this concern, and government sponsored legal aid programs would prove invaluable, most of the initiatives in this area have focused on cost reform. The most progressive notion would allow the target of an action which has been dismissed, either summarily or following a trial, to full compensation for all expenses incurred during the process.⁴³ This proposal allies itself with the movement towards an exception to the general rule on costs for public interest litigants.⁴⁴ Reforming the allocation of costs would help equalize the playing field between combatants and ensure that important issues of common interest are brought to the forefront of the public agenda.

A further disincentive to the filing of unsubstantiated claims would be the effect of legislative involvement on the public image of SLAPP filers. A clear message from the legislature would increase public awareness of the issue and rally support for individuals and grassroots public interest groups against tactics of intimidation. Corporations wary of the implications of a negative public image on their financial success will be forced to weigh the costs and benefits of proceeding with SLAPP actions.

A major movement towards a legislative response has come in the form of a proposed Public Participation Act.⁴⁵ The foundation of such an enactment would be a clear statutory declaration of the right of public participation as an essential component of democracy. Other important features of the Act involve mechanisms for the early dismissal of SLAPPs, the award of lawyer fees and court costs, and a SLAPP-back provision which would create a specific cause of action against a plaintiff who institutes a SLAPP and would allow the court to award damages to any person injured by such a suit.⁴⁶

An examination of legislative initiatives in the United States has demonstrated the viability of anti-SLAPP legislation, and will provide valuable procedural guidance towards the entrenchment of a Public Participation Act in Canada. In an unprecedented step, the Attorney General of British Columbia has publicly announced his commitment to facilitating a legislative response to SLAPP litigation. Such an active approach by policy makers towards burgeoning legislation will have a profound impact on the future of the SLAPP phenomenon in Canada.

VI. Conclusion

The experience of the past decade has indicated that SLAPPs have established themselves in the Canadian legal system. SLAPP litigation has a profoundly detrimental impact on principles of democracy and public policy. The serious implications of the phenomenon demand an active response. Despite the lack of direct Charter involvement, trends in the judiciary suggest that courts are prepared to address and confront the challenges raised by

42 See above at 231.

43 See above at 232.

44 The current "two-way" approach requires an unsuccessful litigant to pay costs to the victorious party.

45 A proposed Act for British Columbia has been formulated by the Committee for Public Participation in Nanaimo, B.C., and has been submitted to the Provincial Government for review.

46 See Committee for Public Participation, "A Proposed Public Participation Act for British Columbia" (1999).

SLAPP litigation. Legislative initiatives are required to secure support for judicial action, and to assist courts in assuming a meaningful role in the proliferation of public involvement in the democratic process.

Section 4(b) of the Federal Child Support Guidelines:

Why Two Kicks at the Can isn't Fair

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I. Introduction

When family dissolution occurs, custodial parents ask that child support be paid by the non-custodial parent. This demand, upheld in the courts and in legislation, illustrates our society's basic belief concerning the family: it is a social unit in which parents have obligations of support and responsibility to their children even after the family comes apart. The Federal Child Support Guidelines (the "Guidelines") came into effect on May 1, 1997 and are the mechanism by which courts now decide what dollar figure a non-custodial parent must contribute to his or her child's living expenses.¹ Enactment of the Guidelines signalled a departure from the traditional approach to deciding corollary relief, whereby judicial discretion determined support levels according to the needs of the child and the means, needs, and circumstances of the parents as demonstrated by the budgets produced by each party. Under the Guidelines, the amount of child support a non-custodial parent must pay is now directly correlative to this parent's income and the number of dependent children in the family, and is referred to as a "Table amount."²

The Guidelines are intended to make child support awards more consistent, to decrease the friction between parents making disparate claims of their ability to contribute, to make the calculation of child support more objective, and to decrease the number of cases going to court. In short, the Table amounts were intended to eliminate to a large degree the perceived subjectivity and idiosyncrasy of child support awards up to this point.³ Section 1 of the Guidelines explicitly states this legislative intent.⁴

To some degree, the Guidelines have met these goals. Judges now rely on Table amounts to determine child support awards, and although still a complex process, this determination is assumed to be more objective.⁵ However, there is still a large element of judicial discretion and therefore subjective decision-making evident in the determination of child support awards for wealthy families. Where the non-custodial parent has an income in excess of \$150,000, judges may choose between two different subsections of the Guidelines to

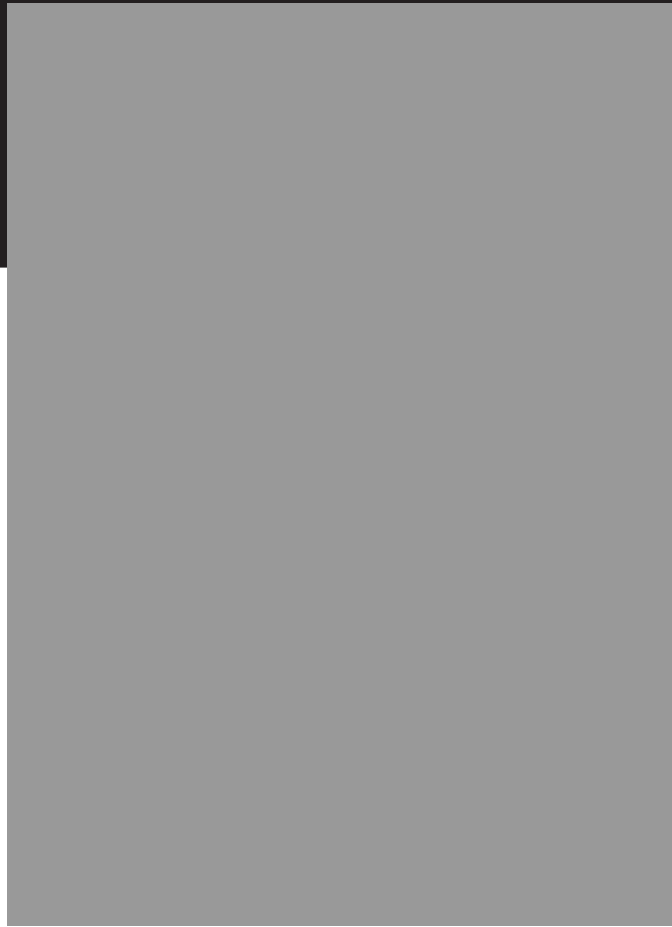
1 Federal Child Support Guidelines, SOR/97-175.

2 Schedule 1 to the Guidelines outlines the Table amounts correlative to income and the number of children.

3 Allan Shipley, "Custody Law Reform in Ontario: The Children's Law Reform Act", in B. Landau, ed., *Children's Rights and the Practice of Family Law* (Toronto: Carswell, 1986), at 164.

4 See note 1 section 1.

5 In the *Paras* formula, the determination of child support was based on totaling up the amount of support required and apportioning that amount between the two parents. This involved a determination of each party's ability to contribute and made the quantum of child support especially difficult to ascertain.



award child support. Pursuant to section 4(a), Judges award the Table amount of support for the first \$150,000 plus a percentage of the income exceeding \$150,000, depending on the number of dependent children in the family. If the court finds this amount “inappropriate”, it can depart from this calculation under section 4(a) and use section 4(b) to award child support based on the Table amount for the first \$150,000 of income and then for the balance, determine child support based on the means, needs, and other circumstances of the children.

This paper will highlight the problems inherent in section 4(b) and comment on how this subsection produces a disparity in the way in which child support is calculated between families whose incomes are above \$150,000 and those whose incomes are under this amount. To illustrate, when a parent’s income is below \$150,000, child support is calculated by *two* measures: the Table amount is awarded, plus any special or extraordinary expenses calculated under section 7 that can be justified as necessary in relation to the child’s best interests and reasonableness of the expense.⁶ By contrast, families with incomes over \$150,000 have *three* measures to determine child support if the level is determined under section 4(b): the Table amount in respect of the first \$150,000, plus the amount the court, in its discretion, considers appropriate in regards to the balance of the income, *plus* any special or extraordinary expenses under section 7.⁷

⁶ Section 3 of the Guidelines outlines this presumptive rule.
⁷ See note 1 section 4.

As a result, wealthy families have two opportunities by which to claim discretionary expenses and poorer families have only one opportunity. This is clearly unfair, as the application of section 4(b) broadens the means by which wealthy families can claim support as compared to families with incomes under \$150,000. Therefore, it is necessary to rein in the use of section 4(b) through stricter budget analysis, lessening the degree of latitude given wealthy families in the provision of discretionary expenses, and by limiting the use of section 4(b) to provide for estate planning. Judicial discretion in itself is not necessarily the problem, as many of the Guidelines require judicial discretion in their application.⁸ The problem however, as exemplified in *Baker v. Francis* in reference to budget analysis, is that wealthier families apply for child support under a lesser degree of judicial scrutiny than do poorer families.

II. *Baker v. Francis*

Baker v. Francis (“*Baker*”), decided by the Supreme Court of Canada in September 1999, affirms the use of section 4(b) as a means to determine child support for wealthy families.⁹ Although the child support level in this case was determined using section 4(a), this case is useful in that it discusses section 4(b), as well as the use of budgets in the determination of child support for the wealthy family. In *Baker*, the parties married in 1979, had two children, and divorced in 1987. At the time of the divorce, the appellant Baker was employed as a lawyer in a large Toronto firm, while the respondent Francis worked as a high school teacher. Shortly after the divorce, the appellant experienced a dramatic upsurge in his financial situation. Through a career change from lawyer to president and CEO of 7-Up Canada Inc., his net worth rose to an estimated \$78,000,000.

The case was first brought before the Ontario Divisional Court in 1997.¹⁰ At that time, the appellant father’s annual income was \$945,538. As his income greatly exceeded \$150,000, there existed no articulated Table amount. Therefore, in order to determine child support, the trial judge used section 4(a) to determine a child support award of \$10,034 per month for the family’s two children who were then aged 11 and 13.¹¹

At the Ontario Court of Appeal, the appellant Baker argued that the Court should use section 4(b)(ii) of the Guidelines to craft a more “appropriate” award.¹² He was, in essence, arguing that the child support level determined under section 4(a) greatly exceeded his children’s reasonable needs and was therefore “inappropriate.”¹³ However, the Ontario Court of Appeal affirmed the trial judge’s decision, finding that the amount of support awarded by the trial judge was not inappropriate, as inappropriate must mean “inadequate.”¹⁴

Although Baker continued his appeal to the Supreme Court of Canada, Supreme Court Justice Bastarache, speaking for the unanimous majority, affirmed the decision of the Ontario Court of Appeal. He stated that the trial judge did not abuse her discretion by applying section 4(a) to award child support which greatly exceeded the last-stated Table amount correlative to an income of \$150,000.¹⁵ Bastarache affirmed the trial judge’s award by stating that to focus

8 A few examples of where judicial discretion is also invoked are section 3(2)(b), where child support is awarded for children over the age of 19, and section 5, where support is awarded against a spouse acting in place of a parent.

9 *Baker v. Francis*, [1999] Can. Sup. Ct. LEXIS 58.

10 *Francis v. Baker* (1997), 150 Dominion Law Reports (4th) 547.

11 See above at 559.

12 (1998) 157 Dominion Law Reports (4th) 9.

13 See above at 7.

14 See above at 14.

15 See note 9 at 5.

solely on the size of the child support payment to determine its appropriateness disregards how this child support payment actually meets the needs of the child.¹⁶ Secondly, in regards to section 4(b), Bastarache stated:

The plain wording of s.4(b)(i) dictates that these [wealthy] children can predictably and consistently expect to receive, at a minimum, the Table amount for the first \$150,000 of their parents' income. They can further expect that a fair additional amount will be awarded for that portion of income which exceeds \$150,000.¹⁷

Clearly, Bastarache affirms that the child support award for that portion of income that exceeds \$150,000 can be fairly determined under section 4(b)(ii) if the amount under section 4(a) is found to be inappropriate. Implicitly, the Court affirms also that it is fair that wealthy families have two opportunities to rely on judicial discretion to increase the level of support awarded beyond the Table amount of \$150,000.

By contrast, for families with incomes within the stated Table amounts, there is only one avenue by which discretionary expenses can be awarded. For these families, there is no legislative imperative for judges to take two “stabs” at providing discretionary expenses like there is under section 4(b). In this way, for children of poorer families, the definition of “support” and the means by which it is determined is narrower than for the children of wealthier families.¹⁸ In this endorsement of section 4(b), the Court fails to recognize the disparity produced by the section and therefore fails to make any recommendations as to how its application can be made more fair.

III. Budget Analysis

One way to make the application of section 4(b) more fair is to adopt a different means of budget analysis. Unfortunately, the *Baker* judgment does not provide an alternative means by which to use budgets in the case of the wealthy family, but instead, only goes so far as to recognize their inherently problematic nature. To illustrate, in *Baker* the Supreme Court of Canada found that consistent with section 21(4) of the Guidelines, a custodial parent is required to provide certain financial information in the form of a child expense budget when the non-custodial parent earns more than \$150,000.¹⁹ These budgets are used to determine child support under section 4(b)(ii) and inform the court as to how special or extraordinary expenses should be awarded under section 7. However, the Court states that custodial parents need not justify each and every budgeted expense,²⁰ acknowledging that the “inherent imprecision” of child expense budgets must be kept in mind.²¹ Instead, budgets should constitute evidence of a *general* living standard, and speak to the reasonable needs of the child even in their over or underestimation of actual expenses.²²

As a result, *Baker* allows that the accuracy of budgets in the case of wealthy families need not be subject to rigorous examination by the court. Although rightly acknowledging the difficulty in using budgets, in that when family members live together as a household it is almost impossible to dissect which aspect of a particular expense is attributable to a particular individual, the Court seems unsympathetic to the fact that for poorer families, budgets *are*

16 See above at 44.

17 See above at 32.

18 Laura Morgan, “Child Support and the Anomalous Cases” (1996) 13 Canadian Journal of Family Law at 207.

19 See note 9 at 37.

20 See above at 40.

21 See above at 40.

22 See above at 39.

strictly scrutinized in the presumption that poorer families should not be liberal with their expenses.

Therefore, instead of a generalized overview of a wealthy family's expenses and a subjective determination by the judge if these expenses are reasonable or not, it is necessary to expect that wealthier families present not just the expense, but what percentage of each parent's income that expense constitutes. The custodial parent must be expected to list the actual expenditure on different items such as food, clothing, or school supplies, and the percentage of total income these expenses constitute. Then, the non-custodial parent must itemize these expenses in the same way. As a result, both parents will provide the percentage of total parental income that expenses such as food, housing, and extra-curricular activities compose. Then when a judge decides child support on the basis of a budget, it will be a comparison of the relative abilities of each parent to contribute to their child's living expenses, rather than a "wish list" of expenses by one parent used to indemnify the other. This requires financial disclosure by both parties, and lends a sense of transparency to the process of deciding child support. Hopefully, this type of accounting will result in an "accountability" on the part of each parent for the expenses they incur.

IV. Special or Extraordinary Expenses under Section 7

In a similar vein, because there is often money available to provide for special or extraordinary expenses under section 7 within wealthier families, whether through the application of section 4(a) or (b), awards for special expenses often include those never contemplated prior to family breakdown. In this way, special expenses may become a tool used not to further the child's best interests, but instead to punish the non-custodial parent. As a result, the determination of special expenses could be viewed as a "win as much as you can" proposition: if there are financial resources available to provide for private kayaking lessons, the custodial parent is entitled to seek that expense on behalf of their child and claim its reasonableness, even if private kayaking lessons were not provided to the child prior to family breakdown.²³

As well, because special expenses for the wealthy family are not subject to the same degree of scrutiny as they might be for a poorer family because of the availability of financial resources, judicial decisions as to which expenses are allowed and which are not, appears capricious and arbitrary in some situations. For example, special or extraordinary expenses and their reasonableness must be determined in context with the available financial resources of the family. However, it is generally acknowledged that expenses considered extraordinary in a typical family can be quite ordinary in a wealthy one. Therefore, where a discretionary expense moves from extraordinary to reasonable in the context of a wealthy family's available financial resources is ultimately within the particular judge's discretion. As in the case of *Greenwood v. Greenwood*, a judge may find in his or her discretion that country club membership fees and the acquisition of a drum kit are reasonable discretionary expenses, but that the purchase of a

²³ The *National Post* reports in the case of *Simon v. Simon* (1997), 34 Reports of Family Law (4th) 310, that the custodial mother claimed expenses of \$10,000 for hockey camp and \$300 per hour for golf lessons; A. Matte, "Millionaire NHLer in court battle over providing child support" *National Post* (17 January 2000). Found at <http://www.nationalpost.com/home.asp?f=000117179066>

baby grand piano is not, although none of these expenses was contemplated pre-divorce.²⁴ Instead, what is reasonable and what is extraordinary, and therefore disallowed, should be based on complete financial disclosure by both parents.

Therefore, the decision as to which special expenses will be allowed should come after a budget analysis, as outlined above, is completed. The judge will then have a more complete perspective of the financial means of each parent. Then, as with every family, these expenses must be shared by each parent with regards to their respective financial circumstances. Expenses not contemplated prior to family breakdown must be justified by the custodial parent. It is not fair to require one parent to provide for the whole expense, unless it is determined by the judge from an analysis of each parent's means, that it would be unfair to require the custodial parent to contribute. Determining section 7 expenses in this way could curb outlandish requests for special expenses by custodial parents and subject requests for special expenses to the same scrutiny as is applied to requests by poorer families.

V. Estate Planning

A further complication in determining child support for wealthy families occurs when the wealthy child's right to familial assets is enforced not only in the present, but into the future as well. Although it is clearly a benefit to wealthy children to make child support resemble estate planning, it also clearly extends beyond the legislative intent of the Guidelines, which were to allocate parental resources in the present. Within section 4(b), judicial discretion has extended child support from a determination of a child's immediate needs to a requirement that parents allocate their assets to protect that child's financial future. Laura Morgan suggests that as a result, support has a more expansive definition for wealthy families which includes post-age of majority support and post-age of majority trust funds and savings.²⁵

Clearly, child support in this case involved not only maintenance in the present, but an allocation of funds that would "vest" in the child's future in order to provide and protect for that child. Most often the disposition of child support is ordered in this way when the non-custodial, payor parent is a professional athlete. It is argued that a professional athlete's high-earning potential is short-lived, and the development of a trust acts to prevent harm to a child when his or her parent's income drops. In this way, child support acts as a protective measure for the wealthy children of professional athletes, ensuring that support levels and standard of living will not vary greatly as a result of fluctuations in the non-custodial parent's income. It also dictates that judicial discretion decide how a custodial parent will spend the child support awarded.

The decision in *Simon v. Simon* in the Ontario Court of Appeal comments on the assignment of child support to trust funds, and limits how judges in Ontario may extend the notion of child support in this way.²⁶ In this case, a professional hockey player signed a two-year contract giving him an annual income of \$1,200,000, at which time his ex-spouse applied

24 (1998) 37 Reports of Family Law (4th) 422.

25 See note 18 at 162.

26 [1999] Ontario Journal No. 4492 (Court of Appeal) (QuickLaw).

for an increase in child support. Initially awarded \$5,000 per month, of which \$1,000 was to be paid into an interest-bearing trust account to be established and administered as the parties agreed, the mother applied to the Ontario Court of Appeal to increase the child support award to \$9,215 per month and reduce the trust fund payment to \$750 on the basis that neither party had requested the trust fund allotment be varied.²⁷

The Ontario Court of Appeal had specific comments to make in regards to the establishment of trust funds. Although counsel for the respondent father had brought forth numerous American authorities in which judges have placed child support payments in trust accounts where the payor spouse was a professional athlete, Justice MacPherson stated that absent a good reason to impose a trust, the court should not do so.²⁸ Furthermore, MacPherson states that unless there is clear evidence that the custodial parent is misusing the support payments, the presumption is that the custodial parent will do their best to provide for the child's immediate needs as well as their future care and education.²⁹ Based on argument put forth in the Saskatchewan Court of Appeal in *Bachorik v. Verdejo*,³⁰ it is the custodial parent's prerogative to direct how the child support payment is ultimately to be used. In fact, MacPherson defers to the arrangements of the parents in regards to trust funds, and this is why he refused to support the variance in the trust fund contribution and reinstated the \$750 allocation.³¹

Aside from arguments in support of a custodial parent's right to dictate how a child support award will be spent, when trust funds are allocated within a provision like section 4(b) the Guidelines' objectives are undermined because there is no legislation which states that trust funds must be put in place as a function of child support. Although estate planning in this manner is a benefit to wealthy children, the allocation of some portion of the child support award to a trust fund cannot be extended to all families who apply for support under the Guidelines and is not required by legislation. Therefore, in order to prevent this misapplication of the Guidelines, judicial discretion should refrain from designating portions of child support as trust funds and instead defer to parents to arrange how a child support payment will be spent within the family.

VI. Conclusions

If we acknowledge that the use of section 4(b) will continue, then it would be prudent for family law practitioners and judges to reexamine how budgets are used to determine child support, how special expenses are awarded, if the allocation of trust funds make sense, and how child support is awarded to wealthy families in general in a way that is unfair to poorer families. To promote legitimacy within family law, and to promote the stated goals of the Guidelines, it would be best that child support for the wealthy family be determined under section 4(a) in most cases. However, because of the endorsement in *Baker* of the appropriateness of section 4(b), this does not seem likely. If section 4(b) continues to be applied, the

27 The initial child support agreement in 1994 was comprised of child support payments of \$2200 per month, where \$750 of this award would be placed in a trust fund.

28 See note 26 at para. 37.

29 See above at para. 37.

30 *Bachorik v. Verdejo* (1999), 175 Dominion Law Reports (4th) 633.

31 See note 26 at para. 40. The Simons had a pre-existing arrangement as part of their divorce order as to how much of the child support award would go into the trust fund.

above-mentioned changes would realign section 4(b) with objective 1(b) of the Guidelines, which is to “reduce the conflict and tension between spouses by making the calculation of child support orders more objective.” This would only benefit the great number of families whose economic relationships are prescribed by the Guidelines.

We want our court system to be a just, speedy, and efficient process; the Guidelines were intended to promote these goals. However, when families spend enormous amounts of time and money in court to interpret how the Guidelines apply to their families, this litigation produces a state of affairs which certainly does nothing to promote the best interests of the children involved. As we have been told in innumerable decisions by the Supreme Court of Canada, the best interests of the child are paramount, and it is necessary to reexamine the way child support is determined for the wealthy family in order to see that it conforms.

Winner 1999 Cassels Brock & Blackwell Paper Prize**ELAINE M. DAVIES**

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Note: This paper is an abridgement of a more detailed analysis and historical review of gun legislation in Canada. The original article, which received the Maclean Scholarship in Legal History in Criminal Law, is available by contacting *Appeal*.

1 The Firearms Act, An Act Respecting Firearms and Other Weapons Statutes of Canada, 1995, chapter 39, as amended 1996, chapter 19, section 76.1.

2 In Canada these horrific incidents included the massacre of the Gakhal family in Vernon in 1996, the killings of four professors at Concordia University in 1992, and the slayings in the restaurant, Just Desserts, in Toronto in 1994. This should not be understood to be an exhaustive list.

3 An Act to Amend the Criminal Code, Statutes of Canada 1995, chapter 39.

The 1995 Firearms Act: Canada's Public Relations Response to the Myth of Violence

I. Introduction

On February 14, 1995 the federal government of Canada introduced Bill C-68, The Firearms Act, An Act Respecting Firearms and Other Weapons.¹ It received third reading on November 22, 1995 and Royal Assent on December 5, 1995.

Choosing the fifth of December acknowledges the anniversary of the Ecole Polytechnique massacre of 14 women students, which occurred on December 6, 1989. Of all the violent incidents in the 1980s and 1990s involving multiple victims, the massacre in Montreal was the single most important catalyst for the increased legislative control of firearms.² Whatever the merits or faults of the 1995 Firearms Act, it should be understood as the federal government's response to Canadians' demand that something be done to stem the tide of violence. By focussing on a readily identifiable aspect of violence — guns — this legislation demonstrated that the federal government was committed to doing something to stop violence.

The 1995 Firearms Act and the concurrent amendments to the Criminal Code³ made a number of profound changes to criminal law in Canada. They include mandatory minimum prison sentences for firearms offences, registration of all firearms including long guns, and the restriction or prohibition of a number of previously legal firearms. Nearly all of these changes were controversial and pitted legal gun owners, upset by what they perceived as a loss of rights, against groups demanding tighter controls on the use and possession of some firearms and the outright ban of others.

This paper analyses the Firearms Act by placing it within the development of Canada's control of firearms and the social and economic reasons behind each successive change. The first part of this paper sets out the history of Canadian gun control, starting with the pre-Confederation Acts and the introduction of the Criminal Code in 1892. The development of the modern regime is then traced from 1892 up to and including the 1991 legislation.

The second part of this paper explores the 1995 legislation. The reaction to the controls enacted in 1991 is first reviewed, followed by the government's movement towards introducing further legislation. The key changes brought about by the 1995 Firearms Act and the modifications to the Criminal Code are outlined. The section finishes by exploring the debate within Canada, both inside and outside of the House of Commons.

The paper concludes by closely exploring the factors that precipitated these legislative changes. Through a review of the statistics on violence and the most recent report on sentencing, the writer suggests that the federal government was more motivated to allay Canadians' fears than to actually find workable means to reduce violence. Finally, it is proposed that the actual result of this public relations investment could be the ultimate reinforcement of the erroneous perception that Canada is an increasingly violent society.

II. The History of Gun Control in Canada

In the limited debate concerning the 1892 Criminal Code of Canada, the Minister of Justice, Sir John Thompson, defended the severity of the sanctions for the carrying of weapons by stating that "this has been the law for a long time, and we have never heard any objection to it."⁴ Thompson's statement is as true today as it was in 1892: Canada has always controlled its citizens' use of guns. There is no constitutional right to bear arms in Canada and there has never been a national mentality that equates gun ownership with civil liberty. Even

⁴ *House of Commons Debates* (1892) as reproduced by James Crankshaw in, *The Criminal Code of Canada and the Canada Evidence Act, 1893* (Montreal: Whitefore and Theoret Law Publishers, 1894) at 832.

5 An informative discussion of the historical reasons for the difference in mentality between Canada and the United States is in Marilyn Simonds, "Code of Arms: Once There were Guns in Every Cabin and Canoe" (March/April 1996) 116(2) *Canadian Geographic* 44. This article is referred to at some length below but strictly for Simonds' reasons for changes in Canadian firearms laws.

6 An Act to Prevent the Unlawful Training of Persons to the Use of Arms, and the Practice of Military Evolutions; and to Authorize Justices of the Peace to Seize and Detain Arms Collected or Kept for Purposes Dangerous to the Public Peace, S.C. (United Kingdom and Ireland) 1867 (2nd Sess.), chapter 15.

7 An Act to Make Provision Against the Improper Use of Firearms, S.C. (U.K.) 1877 (3rd Sess.), chapter 30.

8 See note 5. This is a quote of the then Minister of Justice, Dominick Blake.

9 See note 7 at sections 1, 2 and 3.

10 Revised Statutes of Canada 1886, chapter 148.

11 Revised Statutes of Canada 1886, chapter 149.

12 The Criminal Code was actually called The Criminal Code of the Dominion of Canada in 1892.

13 See George W. Burbridge, *Digest of the Criminal Law* (Montreal: Carswell & Co., 1890). After the publication of this *Digest*, Burbridge went on to help draft Canada's first Criminal Code. It is interesting to note that while Burbridge's *Digest* is modelled on James Stephen's *Digest of the Criminal Law* 3rd ed. (London: MacMillan and Co., 1883), neither Stephen's *Digest* nor the *Report from the Royal Commission on the Law Relating to Indictable Offences, 1878-79* vol. XX., *British Parliamentary Papers, Criminal Law* vol.6 (Irish University Press, 1971), provides for any regulation or control of firearms or punishment for offences committed using firearms. It appears, therefore, that the form of gun control exerted at this time was not inherited from the British but was legislation made in Canada for Canadians.

14 See Burbridge above at section 102.

today, where passions run high amongst the gun lobby, its membership predominately favours some form of gun control — it is only a very small minority that supports American-style gun ownership rights.⁵

A. The Lead up to the 1892 *Criminal Code* of Canada

What Thompson referred to in 1892 as "the law for a long time," existed at least since 1867 with the passing of An Act to Prevent the Unlawful Training of Persons to the Use of Arms.⁶ The statute's title reflects the legislative concern that precipitated its passage: the prevention of armed rebellion against the government. Thus, it focused on preventing people from coming together for the purpose of military training. Considering the Rebellions in Upper and Lower Canada in 1837 and 1838, the passage of this legislation seemed an obvious remedy.

In 1877, the Parliament passed An Act to Make Provision Against the Improper Use of Firearms.⁷ This Act was passed in response to concerns expressed by Canadians that "the practice of carrying firearms was becoming too common" and, as such, the Act shifted the emphasis to controlling the use and possession of firearms.⁸ Under this legislation, it became an offence to carry pistols or air guns without cause or to point a firearm at another person. The Act also punished those arrested with a pistol or air gun upon their person in the commission of an offence or with the intent of doing harm to another.⁹

The Revised Statutes of Canada of 1886 contains two Acts that controlled the use and possession of firearms. The first, An Act Respecting the Improper Use of Firearms and Other Weapons essentially reproduced the 1877 Act.¹⁰ The second statute is entitled An Act Respecting the Seizure of Arms Kept for Dangerous Purposes.¹¹ It duplicates the 1867 Act, except that it deleted the prohibitions preventing the gathering, meeting, and training of persons for military exercises. The purpose of the combined new Acts, therefore, was no longer that of preventing armed rebellions against the government but rather was the earliest form of the modern regime of gun control.

B. The 1892 *Criminal Code* of Canada¹²

As can be seen from the above statutes, Thompson was correct in his assertion that the control of firearms was well-established law in Canada prior to 1892. Thus, though the new Criminal Code added details and constraints to the regime of gun control, it essentially followed the path of its predecessor statutes.¹³ The Code, for instance, did not prohibit the possession or wearing of weapons. If, however, a person possessed a firearm for a "dangerous" purpose, even having it in one's private dwelling was an offence. The open carrying of offensive weapons and that of a concealed pistol or air gun without justification were both prohibited.¹⁴

C. Legislation to Control Firearms, 1892 - 1969¹⁵

Legislation passed in 1913 increased the control of firearms.¹⁶ New provisions made it

mandatory to obtain a permit if one wished to carry a concealed weapon on their person. A permit was not required if the weapon was kept in a dwelling house or business. The Act also made it an offence to sell, give, or lend any concealable weapon to another person who did not hold such a permit. The details of each sale, including the name of the purchaser, the date, and a description of the weapon, had to be recorded.

In 1920, the Code was changed to make it mandatory to have a permit for all firearms, regardless of where they were kept.¹⁷ A notable exception was for the shot guns and rifles already possessed by British subjects.

The 1921 Act to Amend the Criminal Code repealed the 1920 blanket permit requirement. Long guns were now exempted, although pistols and revolvers continued to require a permit. For “an alien” to possess any type of firearm, he or she was still required to first obtain a permit.¹⁸ The permits had one year terms and were to be issued if the officer was satisfied with the applicant’s “discretion and good character.”¹⁹

Legislation passed in 1933 introduced a new principle into the firearms control regime. A prospective owner now had to provide a reason for his or her wish to possess certain types of firearms when applying for a permit.²⁰

The first universal registration system was introduced in the 1934 Act to Amend the Criminal Code.²¹ It required that all pistols and revolvers be registered at a registry located in each province. Long guns, however, remained outside of the system.

This rash of additional firearm controls in the 1920s and 1930s was concluded with legislation passed in 1938.²² It became mandatory that pistols and revolvers be re-registered every five years. The Act also made it an offence for anyone to “alter, deface or remove any manufacturer’s serial number on or from any pistol, revolver or other firearm capable of being concealed upon the person.”²³

It is not easy to explain why successive federal governments were so concerned with firearms in the 1920s and 1930s.²⁴ As national crime statistics were not collected until 1961, it is not possible to ascertain whether the concern arose out of increased crime in Canada. In “Code of Arms: Once There Were Guns in Every Cabin and Canoe,” author Marilyn Simonds proposes that the ownership of firearms began to acquire a moral taint in the 1920s — a change brought about by the urbanization of Canada.²⁵ By 1920, almost half of Canada’s population lived in the cities, and this new urban population had little or no reason to own the guns, which had formed a traditional and necessary part of a rural lifestyle. This change to the nature of Canadian society brought about the increasing control of firearms both in this decade and in ones to come.

Simonds further suggests that, as with all other periods when new firearms controls are introduced, “in times of general anxiety, it seems, we look for ways to feel in control — and set our sights on the gun.”²⁶ Factors increasing Canadians’ anxiety at this time included the return of the World War I veterans to widespread unemployment, economic depression, labour

15 In writing this section, I have benefited from the work of Martin Friedland, *A Century of Criminal Justice: Perspectives on the Development of Canadian Law* (Toronto: Carswell Legal Publications, 1984) at 125-128. I also made use of the “History of Firearms Control in Canada Up to and Including the Firearms Act,” on the Government of Canada Canadian Firearms Centre’s website found at www.cfc-ccaf.gc.ca on January-February 1999. I have, however, primarily relied upon the statutes themselves.

16 An Act to Amend the Criminal Code, Statutes of Canada 1913 (2nd Sess.), chapter 13.

17 An Act to Amend the Criminal Code, Statutes of Canada 1920 (3rd Sess.), chapter 43, section 2.

18 An Act to Amend the Criminal Code, Statutes of Canada 1921 (5th Sess.), chapter 45, section 2.

19 See above at section 2(3).

20 An Act to Amend the Criminal Code, Statutes of Canada 1933 (4th Sess.), chapter 25.

21 Act to Amend the Criminal Code, Statutes of Canada 1934 (5th Sess.), chapter 47, section 121a (1), (2). This 1934 registration is generally described as handgun registration.

22 Act to Amend the Criminal Code, Statutes of Canada 1938 (3rd Sess.), chapter 44, section 6(3).

23 See above at section 4i.

24 The Conservative Party was in power with R. B. Bennett as Prime Minister from 1930 to 1935. The Liberal party returned to power with Mackenzie King as Prime Minister in 1935.

25 See note 5.

26 See above.

27 Professor Friedland notes that there was a complete "absence of pressure groups of victims" amongst the numerous lobbying groups around the passage of Bill C-83, the 1977 legislative changes. See note 15 at 85. This should be compared with the massive mobilization and influence of such groups as CAVEAT and the Coalition for Gun Control in the 1990s.

28 See note 5.

29 An Act To Amend the Criminal Code, Statutes of Canada 1947 (3rd Sess.), chapter 55. This amendment was to section 260 of the Criminal Code and is at section 7(a) of the Act.

30 An Act to Amend the Criminal Code, Statutes of Canada 1950 (2nd Sess.), chapter 11, section 2.

31 An Act to Amend the Criminal Code, Statutes of Canada 1951 (3rd Sess.), chapter 47, section 7 (sections 115-129).

32 Firearms were defined in the 1951 Act as "anything that a person uses or intends to use as a weapon." See above at section 2, paragraph 25 of the Code. In 1954, this definition was repealed and replaced by a "pistol, revolver, or a firearm that is capable of firing bullets in rapid succession during one pressure of the trigger." J.C. Martin, *The Criminal Code of Canada* 1st ed. (Toronto: Cartwright & Sons Ltd., 1955) at section 98(b).

33 See above at section 7 [new Code section 125(4)].

34 Criminal Law Amendment Act, 1968-69, Statutes of Canada 1968-69 (1st Sess.), chapter 38 section 6 (repeal and replacement of sections 82-98). The changes had been originally introduced as Bill C-142 on June 28, 1967 by Pierre E. Trudeau, then Minister of Justice in the Liberal Government of Lester B. Pearson. This Act died on the order paper with the election. The new Minister of Justice, John Turner, re-introduced the gun control measures as part of a very large number of criminal law changes in Bill C-150 Criminal Law Amendment Act which received royal assent on June 27, 1969.

35 See above at new section 99(4).

36 See note 5. This is a reference to the bombings that preceded the October crisis in 1970 and the declaration of the War Measures Act. See note 15 at 127.

strikes such as the 1919 Winnipeg General Strike, as well as the pervasive 'Red Scare' following the Russian Revolution. Professor Martin Friedland, another commentator on these changes, suggests that an additional reason may have been the influence of the United States during an era when President Roosevelt was making a number of gun control proposals.²⁷

Changes to the Code's firearms provisions after World War II placed more emphasis on offenders. Simonds suggests that the relaxation of gun control measures at this time was a natural post-war phenomenon:

Guns traditionally regain respectability in times of war, when economies are strong. After every war, there is an upsurge of interest in firearms, as men who are trained in their use return to society and war surplus is added to the commercial market.²⁸

Thus, in 1947, constructive murder provisions were expanded to include the causing of a death if the offender had upon his or her person any weapon and death ensued therefrom, regardless of a lack of intent to cause the death.²⁹ In 1950 the requirement that firearms owners re-register their firearms (all types except long guns) every five years was dropped.³⁰ Instead, registration certificates became valid for an indefinite period.

In 1951, all of the sections in the Criminal Code involving firearms were rewritten.³¹ Besides simplifying the firearms offences, the key changes enacted in 1951 were the setting up of a central registry system under the Commissioner of the RCMP, the inclusion of automatic weapons in the definition of firearms, and the requirement that they be registered for the first time.³² The Act also reintroduced annual handgun permits and defined, once again, the reasons that one might obtain such a firearm: to protect life or property, for use in connection with one's profession or occupation, and for use in target practice at a shooting club.³³

The federal government turned its attention to the laws governing firearms again in the late 1960s. The Criminal Law Amendment Act passed in 1969 divided firearms into categories of prohibited, restricted, and permitted weapons.³⁴ The enumerated reasons for possessing a restricted weapon, specifically handguns, remained the same. However, there was a new provision that allowed the Commissioner to refuse to issue a certificate if notice was given "of any matter that may render it desirable in the interests of the safety of other persons that the applicant should not possess a restricted weapon."³⁵

Friedland and Simonds agree that the federal government brought forward these legislative changes at this time to alleviate the heightened anxiety of Canadians who perceived that Canada was becoming increasingly violent. Simonds and Friedland, however, disagree as to the cause of this anxiety. Simonds suggests it was caused by the ongoing political violence in Quebec while Friedland points to the influence of events in the United States, particularly the shootings of Robert Kennedy and Martin Luther King.³⁶ It is possible that the government also wished to alleviate any concerns generated by legislative changes that had reduced the application of the death penalty.³⁷

D. The 1977 Legislation

In 1977, the Liberal Government introduced Bill C-51, the Criminal Law Amendment

Act, 1977, which became law on August 5, 1977.³⁸ The new legislation made it mandatory for a firearms acquisition certificate (FAC) to be obtained prior to acquiring any new firearms.³⁹ A FAC could be refused if the issuing officer decided it was not in the interests of the safety of either the applicant or others to provide one, if the applicant had been convicted of an indictable offence involving violence (this type of prohibition was in itself not new, but the targeting of violent offences was), had been treated for a mental disorder, or had a history of violent behaviour. This certificate had a term of five years. The new Act also eliminated the protection of property from the short list of reasons one could proffer to obtain a certificate for a restricted weapon.⁴⁰ There was also a new provision designed to limit the ownership of restricted weapons to “*bona fide* gun collectors.”⁴¹ Fully automatic weapons were also prohibited. Finally, mandatory minimum sentences were re-introduced for the use of a firearm in the commission of an offence.⁴²

There was no clear statement by the federal government as to why it felt that stricter gun controls were required in 1977. One oft-cited reason is that the legislation was designed to calm the fears of Canadians stemming from the elimination of the death penalty.⁴³ Yet, it is interesting to note that statistics collected by the government at this time indicated that the primary concern of Canadians was inflation (57%).⁴⁴ Only 15% of the survey’s respondents identified crime/personal security/violence as a primary concern.

E. The 1991 Legislation

As outlined in the introduction, the murder of fourteen women in Montreal on December 6, 1989, provoked a huge outcry amongst Canadians. The singling out of women by the gunman resulted in the issue of violence against women becoming central to a wide-ranging discussion about violence. Faced with this demand to halt violence against women and violence in Canada generally, the federal government responded by enacting new firearms controls.

A newly formed victims’ rights lobby certainly helped to push the federal government to decide to respond to the massacre in this manner.⁴⁵ A number of women’s groups and female students in Montreal banded together following the slaying of the women. Two of these groups, Ecole Polytechnique Gun Control Committee and the Canadian Coalition for Gun Control, were devoted solely to achieving stricter firearms legislation. Support for such changes ultimately broadened to include medical associations, church groups, police organizations, and similar organizations. It was a lobby with tremendous popular support — a fact which did not go unnoticed by successive governments.⁴⁶

The 1991 legislation, Bill C-17, An Act to Amend the Criminal Code and the Customs Tariff in Consequence Thereof, was passed into law on December 5, 1991 — an acknowledgment of the Montreal massacre which had started the process.⁴⁷ Notwithstanding its short legislative life, it was a significant piece of legislation designed to more harshly penalize the

37 The Code was changed in 1967 to confine the use of the death penalty as a punishment for the murders of police officers and prison guards.

38 Criminal Law Amendment Act, 1977, Statutes of Canada 1977 (2nd Sess.), chapter 53. This was the government’s second attempt. Its first was Bill C-83 introduced in 1976, and would have instituted a licensing requirement for persons possessing long guns, similar to the 1995 registration requirements. This bill died on the order paper in July of 1976.

39 This brought the purchase of long guns within a system of control. However, people who already owned such firearms were not required to obtain a FAC.

40 See note 38 at new Code section 106.1 (3)(c).

41 See above at new Code section 106.1(4).

42 See above at new Code section 83(1)(c) and (d). Mandatory minimum sentences had been in the Code for the misuse of firearms prior to 1947. This was then dropped as the 1947 Criminal Code set out the penalty of capital punishment for deaths caused by guns. See note 15 at 127.

43 See note 15 at 136. At this time Parliament, also as part of a compromise in eliminating the death penalty, created first and second degrees of murder. This was new to Canadian criminal law. See Don Stuart, *Canadian Criminal Law: A Treatise* 3rd ed. (Toronto: Carswell, 1995) at 220.

44 Ministry of the Solicitor General, *National Attitudes Towards Crime and Gun Control* (Ottawa: Supply and Services, 1977) at 3-5.

45 See Friedland at note 15 at 84.

46 Throughout the late 1980s and 1990s, up to eighty percent of Canadians favoured stricter gun legislation. For a selection of articles discussing the public support for gun control, see “The Gun Debate: Gun Control Bill Enjoys Wide Support” *Montreal Gazette* (30 September 1998) B3; “Ontario Big on Gun Control: Poll Shows Huge Support for Firearms Registry” *Toronto Star* (16 March 1998) A6; “Gun Control Typifies Urban-Rural Split in Canada” *Vancouver Sun* (12 February 1997) A9; “Most Want Gun Control: Opponents Out of Step, Poll Indicates” *Montreal*

Gazette (23 December 1996) A8; "Search For a Law: As Violent Crimes Involving Guns Escalates in Canada, Opposing Sides Battle Over a Proposed Gun-Control Law" (October 1991) 57(2) *Canada and the World* 8 at 9. This last article indicates that, in 1991, 79% of Canadians supported stricter gun control legislation. The gun lobby has vehemently argued that Canadians are ill-informed, and that when questioned on an individual basis, many people who support gun control demonstrate an ignorance of what the current laws are, how one can obtain a gun, what constitutes a "gun," and the like. See H. Taylor Buckner [Professor at Concordia University], "Sex and Guns: Is Gun Control Male Control?" Found on National Firearms Association website at www.nfa.ca/reports on January-February 1999.

47 An Act to Amend the Criminal Code, Statutes of Canada 1991 (3rd Sess.), chapter 40. Minister Campbell's first attempt was withdrawn after pressure from the government's own backbenchers. Bill C-80, An Act to Amend the Criminal Code, 2nd Sess., 34th Parl., June 26, 1990.

48 See above at new Code sections 106(1) and (1.1).

49 See above at new Code section 106(9.1).

50 See above at new Code section 100(12)(a). See also, new Code section 103(10) which increased the maximum penalty from 5 to 10 years for possession when the individual, due to safety concerns, was prohibited by a court order from owning firearms.

51 See above at new Code section 100(1)(a) and (b).

52 See above at new Code section 84(1).

53 See above at new Code section 84(1)(f).

54 See above at new Code section 2(c.1).

55 See above at new Code section 84(1).

56 Bill Trent, "The Medical Profession Sets its Sights on the Gun-Control Issue" (1991) 145 (10) *Canadian Medical Association Journal* 1332-1340 at 1334.

57 See above. The NFA, an Edmonton based organization, is one of the leading voices of the Canadian gun lobby.

misuse of firearms, to make it harder to obtain firearms, and to remove certain kinds of weapons from legal possession.

One of the most important modifications was to the Firearms Acquisition Certificate system. After an application for a FAC was submitted, it was subject to a delay of a minimum of twenty-eight days prior to being issued.⁴⁸ Screening could potentially include interviewing an applicant's "neighbours, community/social workers, spouse, dependents" or anyone who the firearms officer thought might be able to "provide information pertaining to whether the applicant has a history of violent behaviour, including violence in the home."⁴⁹ Mandatory safety courses were also expanded to include instruction on the firearms laws.

The misuse of firearms was dealt with more strictly and penalties for firearms-related offences were generally doubled in the new Act. For instance, the penalty for being caught in possession of a firearm or ammunition when prohibited to do so was increased from a maximum of five years imprisonment to that of ten years.⁵⁰ If a first time offender was convicted of an indictable offence with a punishment of ten years of imprisonment and, in the commission of the offence, had "used, threatened or attempted" violence against another, he or she was prohibited from possessing any firearm for ten years.⁵¹ For second time offenders, the prohibition was for life.

The 1991 Act also expanded the categories of prohibited and restricted weapons. Specifically responding to the Montreal massacre, new controls were introduced on military, paramilitary, and high-firepower guns.⁵² This included the prohibition of large capacity cartridge magazines⁵³ and firearms that had been converted to avoid the 1977 legislative prohibitions.⁵⁴ A definition of a "genuine gun collector" was also added:

an individual who possesses or seeks to acquire one or more restricted weapons that are related or distinguished by historical, technological or scientific characteristics . . . has consented to periodic inspections . . . has complied with such other requirements as are prescribed by regulation respecting knowledge, secure storage and the keeping of records in respect of the restricted weapons.⁵⁵

III. The 1995 Firearms Act

A. Reaction to the 1991 Act

The 1991 Act had been intended as a "grand compromise" between those who demanded greater restrictions and those who feared such changes.⁵⁶ However, it rapidly appeared that no one was happy with the new Act. The National Firearms Association (NFA) described the 1991 legislation as "abysmally stupid."⁵⁷ On the other end of the spectrum, the Coalition for Gun Control described the 1991 Act as only a "step in the right direction" and argued that real control of firearms could only be accomplished through a universal registration system.⁵⁸

This wide-spread and vocal criticism of the 1991 legislation laid the groundwork for further legislative change. It is noteworthy that the federal governing party also changed from

the Conservatives to the Liberals in 1993 — another explanation for the enactment of new legislation. Based on the fact that popular support for stricter controls stayed at roughly 80% throughout this period, while a number of violent incidents involving firearms continued to generate pressure for changes, it would have taken a brave government not to bring forward its own prescription for preventing further firearms violence in Canada.

B. The New Liberal Government

In 1993 a Liberal majority government was elected, led by Jean Chrétien, with Allan Rock appointed as the Minister of Justice. Prior to this election, the Liberal Party had set out their vision of governance in their “Red Book.” Amongst a number of other goals, this platform proclaimed the Liberals’ intention to reform the justice system and to be tougher on crime and criminals. This rather vague ideal eventually translated itself into the 1995 Firearms Act and the concurrent changes to the Criminal Code.

This transformation began at the 1994 biannual convention of the Liberal Party, wherein the Women’s Commission presented a resolution asking for tighter gun control laws. It was adopted by a unanimous vote. In his address to the convention, Prime Minister Chrétien made the resolution a centrepiece of his speech:

... I believe that the time has come to put even stricter measures in place . . . I will be asking my Minister of Justice to examine your resolution very closely and to draft tough gun control legislation. . . What Canadians want and what we must provide is tough action.⁵⁹

C. The 1995 Act

1. The Firearms Act and Concurrent Changes to The Criminal Code

The Firearms Act of 1995, though the most recent development on a continuum of increasing firearms control, is, nonetheless, unique on a number of grounds.⁶⁰ For instance, the regulation of firearms is now administered by a separate piece of federal legislation though the punishment for offences involving firearms remains within the Criminal Code.⁶¹ Secondly, the control of firearms stretches across a staggering 135 sections. It is an enormous piece of legislation, particularly when one considers that many of the specific rules have been developed through regulations. The most notable features in the 1995 Act are its purpose, its broadly based registration system, its inspection powers, the penalties for non-compliance, and its complex “grandfathering” clauses.⁶² Equally important but less noticed changes were made to the Criminal Code wherein many mandatory minimum sentences were introduced for firearm related offences.

The Act’s purpose very clearly indicates that the possession of any firearms in Canada is now de facto illegal unless the proper licences, permits, and registration are obtained. The Act also prescribes the mechanism for the manufacture, sale, and importation and exportation of all firearms.

The new registration system requires all firearms to be registered. An individual

58 Heidi Rathjen [Executive Director of the Coalition], “Gun Control: An Analysis of Bill C-17” (Winter 1992/1993) 10(1) *Women’s Education* 47-48 at 47. See also, Susan Riley, “Ms Representing Feminism? The Troubling Ascent of Kim Campbell” (May 1993) 26(8) *This Magazine* 11-15.

59 *House of Commons Debates* (16 February 1995) at 9719. During the debate on Bill C-68, Mr. Lincoln, an Ontario Liberal MP who supported the Act, quoted Mr. Chrétien’s speech. Two comprehensive studies were undertaken for the government: Thomas Gabor, “Impact of Availability of Firearms on Violent Crime, Suicide and Accidental Death” (June 1994), and, Terence Wade and Roger Tennuci, “Technical Report: Review of Firearms Registration” (Ottawa: RES Policy Research Institute: November 1994). Both reports are at the Canadian Firearms Centre Website found at www.cfc-ccaf.gc.ca in February 1999.

60 See note 1.

61 The idea for this division was to take all the administrative, regulatory, and registration sections out of the Code. There were also changes to the Code itself, which are discussed below.

62 “Grandfathering” is defined by the federal government in the following manner: a term used to describe the legal right of an owner to keep a firearm that was once restricted or non-restricted, but is now prohibited. Canadian Firearms Centre (March 13, 1998) “How the Law Applies to Me If . . . I Own ‘Grandfathered’ Prohibited Firearms” *Information Bulletin* at 1.

registration certificate is issued for each firearm. This is in addition to the requirement that an individual first obtain a license (essentially a FAC) prior to acquiring any firearms. The license is valid for five years for an individual, one year for a business, and three years for museums.⁶³ The term of a firearm's registration certificate is as long as the current owner possesses it, or until it ceases to be a firearm.⁶⁴ The Canadian Firearms Registry maintains records on every license, registration certificate, and authorization, as well as refusals for any of these.⁶⁵ The registry is administered by the federal government's new Canadian Firearms Centre.

The Act provides for a wide range of search and seizure powers to ensure that firearms are properly stored. An inspector can at any "reasonable time . . . inspect any place" where he or she has reasonable grounds to believe a business is being carried on and where there is a gun collection.⁶⁶ The owner or person in charge of a business is under a duty to assist the inspector by providing him or her with all relevant information and "all reasonable assistance to enable him or her to carry out the inspection."⁶⁷ An inspector does not have such a broad range of immediate powers in regard to a dwelling house and can only enter and search if he or she has the permission of the owner or a warrant.⁶⁸

The Firearms Act creates a broad range of new offences that an owner of firearms can be charged with. If an individual does not assist a firearms inspector, he or she can be charged with an indictable offence or a summary conviction offence punishable by up to two years imprisonment.⁶⁹ The same penalty also applies to an individual who fails to comply, without lawful excuse, with the conditions of his or her licence, registration certificate, or authorization.⁷⁰ Further, anyone who does not register all their firearms, refuses to produce a firearm to an inspector, or fails to return a revoked license, registration certificate, or authorization can be convicted of a summary offence.⁷¹

Part of the complexity of the Firearms Act is its "grandfathering" clauses. This creation of exceptions is not new to firearms legislation; however, the new Act is particularly complicated. A firearm can be restricted for one owner yet be prohibited for another based on such factors as the date of acquisition, when it was manufactured, the date it was registered, and, in some instances, when it was converted to become a less lethal weapon.

The Firearms Act does not include any mandatory minimum prison sentences; however, concurrent with its introduction, the Criminal Code was amended to provide for such sentences for offences carried out with a firearm. This expanded the number of mandatory minimum sentences that judges are required to prescribe from nine to twenty-nine within the Code. The new mandatory minimum prison sentences mainly provide for one year for a first offence and three or more for a second offence, yet it is noteworthy that these sentences are, for the most part, to be served consecutively with the sentence for the main offence. In addition, mandatory minimum sentences of four years were added to ten violent offences undertaken with a firearm, including criminal negligence causing death, manslaughter, murder, sexual assault, and the causing of bodily harm with intent, amongst others.⁷²

63 See Firearms Act, note 1 at section 64(1), (3) and (4). The licensing of museums and their staff was a new concept introduced in the 1991 legislation.

64 See above at section 66(a) and (b).

65 See above at section 83(1).

66 See above at section 102(1).

67 See above at sections 102, 103(a)-(b), and 104(1)(a)-(b).

68 See above at section 104(1) and (2).

69 See above at section 103.

70 See above at section 110.

71 See above at sections 112, 113 and 114.

72 An Act to Amend the Criminal Code, Statutes of Canada 1995, chapter 39 at new Code sections 85, 86, 92, 95, 96, 99, 100, 102, 103, 220, 236, 239, 244, 272, 273, 279, 279.1, 344 and 346.

2. Bill C-68: Its Objectives as Outlined by the Government

In introducing the legislation and later responding to questions, Minister Rock repeatedly emphasized that the legislation was essential to protect what he described as “our Canadian approach”:

From time to time issues and questions arise which permit the legislature of a country to define what kind of future it wants for the country. It seems to me that on the subject of the regulation of firearms we have just such an issue. We have an opportunity for Parliament to make a statement about the kind of Canada that we want for ourselves and for our children, about the efforts we are prepared to make to ensure the peaceful and civilized nation that we have and enjoy . . .⁷³

The centrepiece of Bill C-68, and the element which caused most of the controversy, was the introduction of a central registry system for all firearms. Universal registration was described as the means to choke off the source of firearms used in crimes by making firearms owners more responsible in their firearms storage. It was also designed to prevent people who should not have access to a firearm from obtaining one.

3. The Larger Canadian Debate On the Firearms Act

(a) Support for the 1995 Firearms Act

Supporters of the 1995 Act were drawn from a wide range of backgrounds including those from the medical profession, police organizations, city mayors, victims-rights groups, and other groups specifically organized to promote tighter firearms controls. Support coalesced primarily around two key elements: (i) the Act would reduce access to firearms, which would lower the rates of accidents, suicides, and murders carried out with firearms and (ii) the universal registration system would make gun owners more accountable, provide necessary information to police as to the ownership of firearms at a particular location, and control the circulation of firearms in Canada by recording all sales and imports.

(i) Reduction of Firearms

The Conférence des Régies Régionales de la Santé et des Services Sociaux, the Canadian Public Health Association, and the Canada National Safety Council, as well as other medical associations from across Canada, were front and centre in their support for the 1995 Act. The organizations argued, both before the Standing Committee reviewing Bill C-68 and in the media, that the presence of a firearm in a home greatly increased the risks of suicide, murder, and accidents and that the “universal link” in this chain of violence was access to firearms.⁷⁴ These associations maintained that educational programs were not sufficient and that a universal registration system would be more effective.

Mayor Barbara Hall, speaking on behalf of all city mayors in the Federation of Canadian Municipalities, applauded the firearms legislation and described it as essential to “ensure a more sustainable, safer urban environment.”⁷⁵ Hall, however, stated that the restriction of access to firearms was only a first step and that a more comprehensive anti-violence strategy should be developed to include programs that address the roots of crime and

⁷³ See note 59 at 9711.

⁷⁴ It was the Standing Committee on Justice and Legal Affairs that reviewed Bill C-68. This review and hearings lasted from April 24, 1995 to June 12, 1995. CD-ROM, House of Commons, 1st Sess., 35th Parl., *Committee Minutes of Proceedings and Evidence*, (27 April 1995) at 945 (Mr. Florian Saint-Onge).

⁷⁵ See above (4 May 1995) at 945.

76 This is an indication that, while supporters of the Act had been brought together in a shared commitment to reducing violence in Canada, there was not complete harmony whether the Act in itself would achieve that goal. See for instance, the split of CAVEAT from other victims-rights groups when CAVEAT issued report cards on each province's crime fighting from a perspective that incorporated support or opposition to the gun registration and overall social programs. "Caveat on CAVEAT: A Victims-of-Crime Group Transforms Into a Social Spending Hobby" (December 4, 1995) 10(46) *Western Report* 31.

77 See note 74 (4 May 1995) at 945.

78 See above at 1535.

Wendy Cukier, President of the Coalition and a professor at Ryerson University, described the Coalition in the following manner to the Standing Committee on May 11, 1995: We were founded in 1990 and we're a non-profit organization aimed at reducing firearms death and injury. Since 1990 the Coalition for Gun Control has advocated possession permits and registration of all firearms, controls on the sale of ammunition, further restrictions on handguns, a ban on military weapons and large-capacity magazines, stiffer penalties for firearms misuse and measures to counter illegal importation. Based on that position, over 300 organizations from across country have endorsed the position of the Coalition for Gun Control. Beyond speaking on behalf of a large number of victims-rights and anti-violence groups, the Coalition's visibility as an advocate of tighter controls, and particularly that of Wendy Cukier herself, partly came about because those

violence.⁷⁶ Nonetheless, in her view, this Act was a "significant part of the solution" in regard to crimes and violence.⁷⁷

The most visible supporter of the 1995 Act was the Coalition for Gun Control.⁷⁸ This organization's sole reason for coming into existence was to obtain tighter legislative controls on the use and possession of firearms. The Coalition argued that controls on access to firearms would reduce gun-related deaths and injuries. They also asserted that the investment required by the legislation was far less than the costs of not passing it.⁷⁹

(ii) Universal Registration System

Medical groups applauded the Act's universal registration system. They saw it as a means of making gun owners more responsible, which would ultimately make Canadian society safer. Police organizations added that the tighter control over firearms that would be exerted through the registration system was "critical to the safety of our communities" and that law enforcement agencies required these changes in order to work to prevent future violence.⁸⁰

Deputy Chief David Cassels of the Edmonton Police Department stated that the universal registration system would help the police protect communities more effectively.⁸¹ This protection would include better enforcement of court orders prohibiting the ownership of firearms, alert police to the existence of firearms when responding to an emergency in a domestic situation, promote more careful storage of firearms and a better reporting of firearm thefts, as well as aid the police solve crimes involving firearms.

(b) Opposition to the 1995 Firearms Act

In opposition to this legislation and the concurrent changes to the Criminal Code were members of Parliament — primarily those of the Reform Party, but also some back bench Liberals and members of the Bloc Quebecois. Outside of the House of Commons, the groups that opposed the legislation included the National Firearms Association; provincially based firearms groups; wildlife conservation interests; Métis and Aboriginal organizations; and the governments of the Northwest Territories, the Yukon, Manitoba, Alberta, and Saskatchewan. This diverse opposition resulted in a range of arguments against the Act: (i) that universal registration is an ineffective and expensive program, (ii) that non-compliance with the registration system will punish law-abiding citizens without affecting criminals' use of firearms, (iii) that the legislation erodes guaranteed rights and is a step towards the confiscation of all firearms, and (iv) that the new mandatory minimum sentences attached to offences with firearms would eliminate judges' discretion and result in overly harsh punishments.⁸²

(i) The Universal Registration System

Opposition parties, particularly Reform members of Parliament, challenged the basis of the government's assertion that universal registration would lead to a reduction in violence. They pressed the government for further evidence to demonstrate how the registration of legally owned firearms of law-abiding citizens would actually reduce violence:

The hon. member [Mr. Lincoln] refuses to deal with real numbers. He says that he

thinks registration will be a deterrent. Those were his words. We do not pass legislation of this magnitude simply because we think something.⁸³

I fail to see, and I have tried very hard to understand, how a registered gun is any less lethal than an unregistered gun.⁸⁴

Reform MPs were particularly offended by the cost of the new registration system, which, they argued, was being hugely underestimated by the government. Even at the proposed \$85 million they argued it was an enormous amount of money to be spent on one single, and possibly ineffective, anti-violence scheme.

Likewise, groups that made presentations at the Committee hearings expressed their concern that the government was focussing too much of its efforts to counter violence into a costly and potentially ineffective measure. It was repeatedly argued that the existing requirement for the registration of hand guns had not prevented their increased use by criminals, yet the government was proceeding to implement an even more expensive and complex registry system.⁸⁵

The Bloc Quebecois (BQ), the then Official Opposition, also expressed concerns as to the effectiveness of the Firearms Act. Contrary to the thrust of arguments made by Reform Party members, the BQ believed that the changes did not go far enough to actually achieve a reduction in violence.⁸⁶ Members of the BQ specifically objected to the long phasing in of the requirements of the registration system, that safety catches were not mandatory on firearms, and to the absence of specific regulations in the legislation as to the storage and transportation of firearms.⁸⁷

(ii) Punishment of 'Law-Abiding' Canadians

Another concern raised by persons opposed to the legislation was that the changes might result in the punishment of law-abiding Canadians. Opponents argued that the sheer complexity of the Act and concurrent regulations could result in law-abiding Canadians being harshly punished for mistakes made in registration or by inadvertently neglecting to register a firearm, while leaving criminals undisturbed in their continued use of firearms.⁸⁸

(iii) Loss of Rights; Move Towards Confiscation

Another focus of opposition to the Firearms Act was the belief that it undermined constitutionally guaranteed rights. Concern was expressed over the way in which the new Act appeared to reverse the burden of proof, increase the search and seizure powers of the state, and potentially strip a gun owner of the right to silence.

There was also opposition to the Act on the grounds that it was effectively a form of expropriation without compensation. The Act made a number of firearms illegal, transforming previously valuable property into something that could not be legally sold or passed on as part of an inheritance, making it essentially worthless.⁸⁹

Another source of opposition was the fear that the legislative changes were a step towards the full confiscation of all legal firearms. This fear was largely a product of a public statement made by Rock, to the effect that only the police and military should own firearms.

opposing the legislation focused their attacks on the organization and Cukier. See for instance, Mark Milke, "Still the Murder Weapon of Choice: Funny How Little Effect 60 Years of Pistol Registration Have Had" (July 14, 1997) 24(31) *Alberta Report* 32. Cukier, however, also directed strong words towards her critics. See for instance, her presentation to the Committee at 1550-1600.

79 See above at 1540.

80 See above at (3 May 1995) at 1535.

Presentation by Chief Brian Ford, Ottawa-Carleton Regional Police Service and Canadian Association of Chiefs of Police.

81 See above (11 May 1995) at 1545.

82 Another argument against Bill C-68, as raised by the provincial and territorial governments opposed to the legislation, is that its pith and substance falls outside the federal government's legitimate authority under section 91(27) of the *Constitution* by intruding upon the provinces' property and civil rights under section 92(13). See, Allan C. Hutchinson and David Schneiderman, "Smoking Guns: The Federal Government Confronts the Tobacco and Gun Lobbies," (1995) 7(1) *Constitutional Forum* 16 at 19. This particular opposition resulted in the *Firearms Reference* (Alberta Court of Appeal) [1998] Alberta Journal No. 1028 (QuickLaw). In a three-two decision, the Court upheld the legislation as being within the federal government's section 91(27) powers. This decision is now on appeal to the Supreme Court of Canada. See also, Shafer Parker, "The Gun Fight Rages On: Bill C-68 Barely Survives a Court Ruling, but Opponents of Gun Control Vow to Stay the Course" (October 12, 1998) 25(43) *Alberta Report* 12.

83 See note 59 (16 February 1995) at 9720 (Mr. Lee Morrison, Saskatchewan Reform).

84 See above at 9735.

85 See note 59 (16 February 1995) at 9720 (Mr. Lee Morrison, Saskatchewan Reform).

86 See above at 9735.

- 85 For instance, see above (8 May 1995) at 955 (John Hardy, Legal Counsel, Saskatchewan Responsible Firearms Owners).
- 86 It is important to note that gun control is extremely popular in Quebec and it would not be inaccurate to suggest that the movement for gun control really began in Quebec. This is not surprising when one reflects that many violent incidents with multiple victims have occurred in Quebec: Denis Lortie at the Legislative Assembly in 1984, Ecole Polytechnique, the Fabrikant killings at Concordia University, and the ongoing problems with gangs.
- 87 See note 59 (16 February 1995) at 9711 (Mrs. Pierrette Venne), (16 February 1995) at 9738-9739 (Mr. Osvaldo Nunez) and (27 February 1995) at 10063 (Mr. Marchand).
- 88 For instance, see above (16 February 1995) at 9744 (Jay Hill).
- 89 See, Joshua Avram, "Rock's Latest Victim, Property Rights: The Minister Admits that Owners of Prohibited Firearms Will Get No Compensation" (April 28, 1997) 24(20) *Alberta Report* 30-31. A discussion of the validity of this argument is difficult due to the number and complexity of grandfathering sections in the Act. Also, some prohibited and restricted firearms can be sold within groups of such licensed gun owners, though they can not be sold publicly. In regards to newly prohibited firearms that were purchased after certain dates, there has been some limited confiscation (voluntary) to date.
- 90 For instance, see note 59 (16 February 1995) at 9750 (Mr. Raymond Bonin, Ontario Liberal MP).
- 91 See above (13 June 1995) at 13691-13692 (Hon. Lucien Bouchard).

Though this early and rather hasty comment was no doubt much regretted by Rock, it had a lasting impact on those opposed to the Act, and the Liberal Government was forced repeatedly to deny that the confiscation of all firearms was a long term goal.⁹⁰ The denials, however, did not allay the fear.

(iv) Mandatory Minimum Sentences

The final concern raised about the legislative changes were those made to the Code — specifically the new mandatory minimum terms of imprisonment for firearm offences. The particular opposition was confined to members of the BQ:

Let us take the example of an 18-year old committing his first offence. . . There is no possibility of the judge looking into the case, making distinctions, taking circumstances into account, or trying to give that young man a chance. When you are 18, you can be rehabilitated after a first offence and become a very good citizen. . . Incarceration becomes the only means of rehabilitating young offenders, of reintegrating them in society. That is serious. . . I am truly astonished because I believe that the forces which impel us to adopt this bill are progressive forces, but not in this case.⁹¹

Mandatory minimum prison sentences are, however, very much in tune with the philosophy of the Reform Party, not to mention with the majority of Canadians for whom long prison terms are popular. The BQ's concerns, therefore, did not receive support nor generate discussion outside of their own speeches in the House of Commons.

IV. Conclusions

As the section detailing the history of firearms control in Canada demonstrates, new and stricter gun control legislation has been put into place whenever social and economic changes occur. This pattern was repeated with the 1991 and 1995 legislative changes. The late 1980s and the 1990s are periods in which, along with the visual images of deaths shown immediately and repeatedly on the nation's television screens, numerous economic and social changes occurred. To many Canadians, this has been a violent era, a perception enlarged and entrenched by the numerous incidents in the United States and elsewhere.

It is too soon to judge whether the Firearms Act and the changes to the Criminal Code will achieve the objectives set out by Minister Rock. One conclusion can be reached: the government has been seen to be doing something about violence in Canada. The Liberal Government has, therefore, succeeded at a further objective. This objective was neither spoken, acknowledged, nor even possibly identified, but it nonetheless was very real: to allay the fears of Canadians by acting on the issue of violence.

The massacres of multiple victims of the late 1980s and 1990s provoked Canadians to demand stricter gun control to curb the violence. The federal government's legislation answered this call. Yet, in doing so, the government's action inadvertently confirmed Canadians' fear that violence is increasing. While violent incidents engendered a very human reaction amongst Canadians, the reality is that these types of killings in Canada are not the norm. The legislation, therefore, acted only to confirm in the minds of Canadians that

incidents involving multiple victims are a common occurrence and that violence overall is on the rise in Canada.⁹²

The irony is that the reverse is the truth. Even though the 1980s and 1990s were decades of rapid social and economic change in Canada, violent incidents have actually been decreasing. In 1998, Statistics Canada reported that the crime rate in the 1990s had been falling steadily, with 1997 having the lowest crime rate since 1980.⁹³ Violent crime declined by 1.1% in 1997, the fifth consecutive year for such a decrease.⁹⁴

The number of homicides is commonly used as an indicator of the level of violence in a given society. In 1997, there were 581 in Canada.⁹⁵ Combined with attempted murder (861 incidents), these crimes accounted for less than one percent of all reported violent crimes. Moreover, the homicide rate has been on the decline since the mid-1970s, and is currently (1997) at its lowest point since 1969.⁹⁶

As for incidents with multiple victims, of the 581 homicides, 533 victims were killed in separate incidents. Therefore, 94% of all homicides involved a single victim.⁹⁷ The thirty-five multiple victim incidents, down from forty in 1996, are described as “consistent with the average for the previous ten years.”⁹⁸ In other words, as awful as each incident is, homicides with multiple victims are not on the increase in Canada. Further, when one considers the image of a stranger taking the lives of numerous victims, it is important to note that over half (55%) of these multiple-victim incidents were situations where the victims and the killer were related. This can be compared to the number of homicides overall, wherein just over one-third of the victims and killers were related (34%).⁹⁹

In regard to the use of firearms in violent crimes, contrary to public perception, their use was not increasing in the 1980s and 1990s. Figures from Statistics Canada indicate that homicides “account for a relatively small portion of all firearm-related deaths.”¹⁰⁰ In 1996, the majority of the 1131 firearms deaths were suicides (78%), while homicides with firearms accounted for 16%.¹⁰¹ In 1974, 47.2% of all homicides were caused by firearms.¹⁰² However, since 1979, the number of homicides with a firearm has consistently remained at one-third of the number of overall homicides.¹⁰³

These statistics about violence in Canada create a very different picture from the one that may be drawn by viewing the 1995 legislative changes in isolation. Contrary to Canadians’ belief, violent crime is decreasing. In fact, it has been decreasing steadily for the last twenty-five years. The use of firearms in the commission of violent crimes has also decreased significantly over the last twenty-five years. Arguably, these downward trends will continue. If creating stricter regulations of firearms may have little impact on the already downward trend of violence in Canadian society, what about the mandatory minimum sentences introduced concurrently in the Criminal Code? This popular measure, which received very little public negative comment from any group other than the Bloc Quebecois, was introduced without any comprehensive research to refute the findings of the 1987 Archambault Report,

92 Added to this is a perception that violent acts are carried out by strangers. This will be discussed below, but it should be noted that two of the four violent, multiple victim, incidents in Canada did not involve strangers: the killings of the professors at Concordia University and the slaying of the Gakal family in Vernon.

93 Statistics Canada, *Juristat* 18 (11) Catalogue No. 85-002-XPE at 3 (hereinafter “Crime in Canada”). In 1997 there were 296,737 violent crimes reported, with violent crime defined as homicide, attempted murder, assault, sexual assault, other sexual offences, abduction, and robbery (at 5).

94 See above at 5. There were 2.5 million reported incidents in 1997 (excluding traffic incidents). Of these violent crimes make up 12%, 58% were property crimes, and 30% were other crimes such as prostitution, mischief, arson, etcetera (at 3).

95 See above.

96 See above. In real numbers, in 1961, the number of homicides in Canada was 233; in 1975, it was 701; in 1996, it was 635; and in 1997, 581. Robberies, sexual assaults, and property crime were all down by varying degrees. Robberies decreased 8%, sexual assaults by 0.9% (this seems a small reduction but it is 26% lower than in 1992), and property crime by 8% (at 6-7).

97 See above at 4.

98 See above.

99 See above.

100 See above at 5.

101 See above. Accidents accounted for 4% while the rest, 2%, are just described as other types.

102 See above at 6. This can be compared to 29% by stabbings, 20% by beatings, 9% by strangulation and suffocation, 4.6% through smoke inhalation or burns, and 1% by poisoning.

103 See above.

which had stated that mandatory minimum prison sentences do nothing to reduce violent crimes.¹⁰⁴ Rather, the Report argued, they place a straight-jacket upon judges' ability to make sentencing decisions, and ultimately create more problems than they resolve.¹⁰⁵ In ignoring the little sound research that existed, the federal government's actions were again, arguably, directed toward fulfilling Canadians' wish for something to be done to stem violence.

Despite this statistical and research evidence, successive federal governments' legislative actions were in response to a public concerned by an apparently increasingly violent society. However, the question remains: should the Canadian Government have responded to the concerns of Canadians about violence in society in this manner?

In order to consider this question fairly, one has to begin by sidestepping the kind of emotion-based argument that says even if only one life is saved, there is sufficient justification for the legislative changes. Getting caught in that trap ignores the fact that the implementation of the registration system in the Firearms Act will cost at least eighty-five million dollars. Even if the cost of the program remains at that figure, this is a very large amount of funding that has been absorbed by one anti-violence program. More significantly, whether universal registration has a positive effect on reducing violence in society, which is questionable, these are real dollars, which are no longer available for other forms of anti-violence programs.¹⁰⁶ Moreover, the Firearms Act and revised provisions in the Criminal Code have made profound changes in Canadian society. Judges' discretion has been fettered by mandatory minimum sentences, the right to privacy, and the freedom from unreasonable searches and seizures. As well, entrenched property rights have been potentially undermined. Again, one comes back to the central question: by acting to allay the fears of Canadians about violence, what have the government's legislative changes actually achieved?

Governments are political creatures. Obviously, it is not "wrong" for a popularly elected government to respond to the electorate's wishes. Granted that reality, however, one can not help but question a government that chose to respond to violence in this manner. It is unlikely that anything could have erased the images of December 6, 1989. Yet, the legislative changes in 1991 and 1995 only momentarily calmed people's fears, if at all. More significantly, by reacting in this manner without regard to the decreasing rate of violence in Canada, the government's actions have arguably actually confirmed and reinforced the fears of Canadians. The belief that violence is increasing in Canada and that broad new measures are absolutely essential to defend Canadian society has been essentially corroborated by the government.

The ironic conclusion is that when the next crisis occurs, be it economic, social, or the inevitable massacre, the Federal Government, trapped by its own past responses, will likely again be forced to introduce even tougher and increasingly expensive firearms control measures. Canadian history indicates that this is a recurring pattern. Whether or not these measures will reduce violence is unknown, but what is clear is that by reacting in this manner to

104 Canada, The Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Ministry of Supply and Services Canada, 1987) [The Archambault Report].

105 It should be noted that this report recommended that all mandatory minimums be abolished, excepting for the offences of murder and high treason, on the basis that they were neither just nor effective. Prior to the 1995 changes there were nine mandatory minimum prison sentences in the Code.

106 In *The Firearms Act - Annual Report* (December 2, 1999) the costs to date are described as having cost \$124.4 million since 1995, while operating costs per year are estimated at between \$50 and \$60 million. The report states that all these costs are expected to be recovered by user fees charged by the program and indicates that \$6.3 million has been recovered to date. Found at www.cfc-ccaf.gc.ca/general_public/news_releases/default.html, on January 11, 2000.

a false perception that violence is increasing in Canada, this fear is confirmed and ultimately re-enforced.

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1 [1996] 2 Supreme Court Reports 415, (1996), 136 Dominion Law Report (4th) 1; hereinafter cited as "*Semelhago*".

2 See above at para. 22.

3 See above at para. 14-20.

4 See above at para. 19.

5 O.V. Da Silva, "Case Comment: The Supreme Court of Canada's Lost Opportunity: *Semelhago v. Paramadevan*" (1998) 23 Queen's Law Journal 475 (QuickLaw); N. Siebrasse, "Damages in Lieu of Specific Performance" (1997) 76 Canadian Bar Review 551 at 551.

6 Da Silva, see note 5 at 1.

A Revised Remedy:

Trends and Tendencies in the Law of Specific Performance since *Semelhago v. Paramadevan*

I. Introduction

In 1996, the Supreme Court of Canada handed down its decision in *Semelhago v. Paramadevan*.¹ The decision altered the law on specific performance and contracts for the sale of land. *Semelhago* ruled on three important points. First, courts are no longer to grant specific performance automatically in the case of a breach of contract to sell land; the remedy is available only when the land is unique.² Second, a successful plaintiff may elect at trial to take damages *in lieu of specific performance*. This compensation should equal any losses between breach and the trial; therefore, the plaintiff has no duty to mitigate damages.³ Third, damages in lieu of specific performance are to be a "full replacement" for performance.⁴ Taken together, these three rules have a somewhat odd effect. By applying the uniqueness criterion to real property, the Supreme Court brought the treatment of land closer to orthodox contract principles; however, its rulings on both deductions and the date of measurement have made damages in lieu of specific performance a remedy quite removed from regular damages.

Semelhago has already been the subject of academic scrutiny and judicial interpretation, so it is not too early to ask whether it is good law. Several commentators have stated that the Court missed a chance to investigate the purpose of specific performance and develop the law according to sound policy and principle.⁵ Others have wondered if *Semelhago* provided enough guidance to lower courts.⁶ This essay will touch on both questions. It is useful to begin, however, where the Supreme Court did, with the issue of specific performance and the sale of land as it stood, before *Semelhago*.

II. Two Remedies: Damages and Specific Performance

Specific performance is a way to enforce a contract. As a court order forcing a party to do what it promised, specific performance is an exact and material remedy. In the common law tradition, however, it is an extraordinary redress. Courts usually employ monetary damages to compensate innocent parties. Traditional contract theory considers damages to be cheaper

and simpler, in part because they allow parties to respond to the market while they await adjudication.⁷

It is not simple, however, to capture in a dollar figure the value of a contractual loss. The general rule is that damages are to place the plaintiff in the position he would have been in if the defendant had executed his part of the arrangement. Courts remunerate this “expectation interest” by awarding the value of the lost good or service, less the expense of gaining it. In addition, redress is available only for losses that were unavoidable.⁸ The plaintiff, therefore, has to “mitigate” her losses by taking other opportunities. In a marketplace where values fluctuate, the principle of mitigation becomes important in assessing damages. Mitigation indicates the time at which a court will consider that losses have become avoidable. Courts generally consider that a plaintiff can mitigate after the breach, so that, traditionally, it is the market value of the good around the time of breach that establishes the plaintiff’s losses.⁹

Specific performance stands outside of this complex architecture because it does not embody a loss in a dollar figure. As well, mitigation does not work in a situation where a defendant demands actual performance; the innocent party must wait and be ready to perform. The inapplicability of the mitigation principle opens the possibility for a sort of “windfall” or unfair advantage. First, a plaintiff who successfully pursues specific performance avoids mitigation. He can, in a rising market, watch his losses swell and he may benefit from

7 S.M. Waddams, *The Law of Contracts*, 3rd ed.

(Toronto: Canada Law Book Inc., 1993) at 460.

8 P. Perell, “Damages and Fluctuating Land Values” (1996) 18:4 *Advocates’ Quarterly* 401 at 402.

9 See above at 404-5.

continuing to hold whatever resources he intended to expend in the original contract. Second, the plaintiff has a chance, with greater knowledge of the market, to reconsider the merits of the contract. When confronted with a fundamental breach, a plaintiff has several options: do nothing; mitigate and sue for damages; or demand specific performance. Specific performance *revives* the contract, so that its terms remain in force until the plaintiff decides that it is at an end and seeks damages.¹⁰ If she chooses specific performance, she will receive the good or property promised by the defendant; in an obvious sense, whether the market is rising or falling, the plaintiff has what she bargained for. Yet, the original contract, unless it had special terms, would not have offered the plaintiff the option to adhere to the contract only if it continued to be beneficial. Specific performance potentially allows speculative parties an advantageous second chance to assess rewards and risks, and it may provide less market-savvy parties with capital gain opportunities they might never have considered when contracting. A family home purchaser, for instance, may receive a property the market value of which has greatly inflated, perhaps to the point that resale becomes attractive.

The law on specific performance, however, has a device to solve this problem: for the most part, the remedy has been available only when a plaintiff would not be able to mitigate and collect damages. As a “gloss” on the common law, the equitable remedy was accessible only when damages would not fully compensate the loss because the innocent party had a special interest in the actual object of the contract.¹¹ The rule in modern Canadian law is that specific performance is possible only when the goods are *unique*, either because they have intangible qualities or are in very short supply.¹² Such goods are difficult to replace; therefore, the plaintiff cannot be expected to mitigate, either to satisfy his own desire or to stop the market-value loss from swelling. In the context of a rising market for the good or service, a windfall may drop on the plaintiff. However, he should not be in a position to benefit from the rise, since he has a special interest in the actual good, not its market value.

The doctrine of uniqueness, thus, has the same purpose as the principles of mitigation and trial date of assessment: in a fluctuating market, these principles confine the innocent party to their “expectation” interest. There were, however, two complications with specific performance in relation to real property. First, until *Semelbago*, courts considered all land to be unique. Second, there is case and statutory authority for the proposition that plaintiffs may claim damages *in lieu of specific performance*. Both of these principles raise the possibility of over-compensating the plaintiff.

The idea that all land requires the protection of specific performance seems to have derived from two sources. First, land had a special status in law because it yielded a special economic and social status in pre-industrial Britain.¹³ Second, courts of equity did not want property questions settled in common law courts because they were not certain that plaintiffs would receive expectation rather than reliance damages.¹⁴ As expectation became the general rule in damages, this “expectation” rationale for specific performance disappeared, as did much of the social significance of land. Thus, before *Semelbago*, some authorities were calling for an end to the special treatment of property.¹⁵

10 See note 1 at para. 15.

11 See note 7 at 464.

12 See for example, *Asamera Oil Corp. v. Seal Oil & General Corp.* (1978), [1979] 1 Supreme Court Reports 633 at 668, 89 Dominion Law Reports (3d) 1 at 26.

13 D. Cohen, “The Relationship of Contractual Remedies to Political and Social Status: A Preliminary Inquiry” (1982) 32 University of Toronto Law Journal 31.

14 J. Chapman, “A Stacked Deck: Specific Performance and the Real Estate Transaction” (1994) 16:2 Advocates’ Quarterly 240 at 243-44.

15 See above at 240; See note 7 at 464.

The other complication is the right to choose damages *in substitution for* specific performance. The Lord Cairns' Act (1851) granted a power to Courts of Chancery that is now reflected in some Canadian jurisdictions by the following clause:

A court that has jurisdiction to grant an injunction or order specific performance may award damages in addition to, or in substitution for, the injunction or specific performance.¹⁶

The meaning and original purpose of this clause are not immediately apparent, but a British court considered the provision in *Wroth v. Tyler*.¹⁷

In *Wroth*, the Court held that it could not order specific performance to enforce the sale of a house because the vendor's wife had not consented to the transaction; as a result, damages would have to substitute for performance.¹⁸ Between contract and trial, however, the value of the house had risen considerably. Justice Megarry of the Chancery Court measured damages from the date of trial, so that the damage award reflected the increase in value. He justified the measurement on three grounds: measuring from the breach would result in under-compensation; damages at common law are flexible; and damages in equity under the Lord Cairns' Act are to be a full substitution for the equitable remedy.¹⁹

In this case, the frustration of specific performance perhaps justified moving the date of measurement. The statement that damages are flexible, however, left open the issue of when courts should depart from the norm of assessment at date of breach. Both the issue of damages and the question of the special status of land came before Canadian courts in *Semelhago*.

III. *Semelhago v. Paramadevan*

The fact scenario of *Semelhago* was similar to that of *Wroth*, the vendor breaching a contract for the sale of a house while prices were rising. In August of 1986, the plaintiff, Semelhago, entered into a contract to buy a house in the Toronto area from the defendant, Paramadevan. Closing was to be October 31, 1986; the price was \$205,000. The purchaser planned to pay \$75,000 of this sum in cash and raise the rest by taking out a six-month mortgage on his old house, which he planned eventually to sell. Paramadevan, however, repudiated the contract in a rising market. The property was worth \$325,000 by the date of the trial, an increase of \$120,000. The defendant stayed in his own property, which increased in value from around \$190,000 at the time of breach to \$300,000 by the date of the trial, a rise of \$110,000. The purchaser sued the vendor for specific performance or damages in lieu thereof, and elected damages at trial.

The controversial character of Semelhago's claim lay in the fact that it was, arguably, larger than his expectation interest. If he had made an original claim for damages only, the court would have expected him to mitigate after the breach. Equally, had Semelhago persisted in a successful specific performance claim, he would have been given the actual property; and whether he could have enjoyed a windfall would have depended on whether he wanted the house itself or planned to sell it and capture the increase in value. But the claim for damages in lieu of specific performance, if awarded according to the full replacement principle of *Wroth*,

16 Ontario of the Courts of Justice Act, Revised Statutes Ontario 1990, chapter C.43, section 99. In other Canadian jurisdictions, the power is based on general provisions retaining the equitable jurisdiction of the court: J.B. Berryman et al., *Remedies: Cases and Materials*, 2nd ed. (Toronto: Emond Montgomery Publications, 1992) at 974.

17 [1973] 2 Western Law Reports 405 (High Court: Chancellor Division) (United Kingdom); hereinafter cited as "*Wroth*."

18 See above at 421.

19 See above at 427. See also *Johnson v. Agnew*, [1980] Appeal Cases 367 (House of Lords) (United Kingdom).

opened the possibility of overcompensation. Semelhago would be able to obtain the entire rise in the worth of the property in question as well as the leap in the value of his old property, which he had intended to sell before the residential price inflation.

Perhaps the judge who most clearly understood these facts was Justice Corbett of the Ontario Trial Division Court. She suggested that the property was not unique and was disturbed by the fact that the plaintiff benefited from the increase in the value of his original home.²⁰ She did not think, however, that the case law supported a denial of the remedy. Precedent also constrained her judgment on the assessment of damages. She noted that a court could calculate Semelhago's loss in many different ways. The plaintiff himself suggested that the court should recognize the cost of gaining the benefit and subtract the following: the contract price of the property, the cost of carrying the mortgage, and interest earned on the unspent \$75,000.²¹ But Corbett also entertained the idea of subtracting the value of the purchaser's house from that of the vendor, a formula that would have resulted in an award of \$25,000.²² She even thought of measuring damages as the difference between the two rises in value, which would have resulted in an award of \$5,000.²³ Corbett felt, however, constrained by the decision of the Ontario Court of Appeal in *306793 Ontario Ltd. in Trust v. Rimes*.²⁴ *Rimes*, which had a similar fact pattern, overturned trial deductions according to the principle that damages in lieu of specific performance must be a complete replacement. Deferring to *Rimes*, Corbett awarded Semelhago the difference between the contract price and the value of the property at trial — that is \$120,000.

Paramadevan appealed the trial decision on the basis that it represented a windfall for the plaintiff. The Court of Appeal²⁵ did not feel constrained by *Rimes*. It distinguished the case with the subtle factual distinction that the purchaser in *Rimes* was a shell company, one designed only to purchase land and not to invest money after a breach.²⁶ But the short judgement did not explain which sorts of deductions are licit. Counsel for the parties presented two options. The purchaser reiterated the deductions he had submitted to the trial judge, while the vendor argued that damages should be the difference between the two increases of value. Justice Austin of the Court of Appeal accepted the formula of the purchaser with the somewhat vague justification that the method allowed the court to “track the events” of the transaction.²⁷ The result, with legal and appraisal costs, was a damage award of \$81,733.96.

Thus, the Court of Appeal had ruled that deductions should be made in the circumstances, but had not provided a theoretical justification or much practical guidance in terms of the types of deductions courts should make. Why, for instance, did the Court deduct money made from the cash purchase funds but not from the plaintiff's unsold house? A more principled, but perhaps less practical, decision came down from the Supreme Court of Canada.²⁸ Paramadevan again argued that Semelhago had received a windfall and should have only \$10,000 in damages. Semelhago replied that Corbett's original assessment of \$120,000 was correct and that neither it, nor the smaller award of the Court of Appeal, constituted a windfall. The purchaser, however, did not cross appeal to have damages restored to \$120,000.

20 See note 1 at para. 7. The decision was not published but large portions of it are reproduced in the Supreme Court of Canada decision as well as in academic articles, such as that of Da Silva, who was counsel for Semelhago.

21 See above at para. 6.

22 See above at para. 7.

23 With respect, the judge seems to have done her math wrong here. The difference was \$10,000.

24 (1979), 25 Ontario Reports (2d) 79, 100 Dominion Law Reports (3d) 350 (Court of Appeal).

25 *Semelhago v. Paramadevan* (1994), 19 Ontario Reports (3d) 479 (Court of Appeal).

26 See above at 482.

27 See above.

28 See note 1.

Supreme Court Justice Sopinka wrote the unanimous decision.²⁹ He thought that the case involved, essentially, the application of *Wroth*. He noted that common law damages are flexible and that the Lord Cairns' Act rule enables courts to grant a substitution of damages for specific performance to a plaintiff who chooses damages at trial.³⁰ While the date of breach was the norm for measuring damages, the date depended on the ability of the purchaser to buy similar goods. Where the good is unique, different rules are needed, since a plaintiff can not mitigate after the breach and prices may rise before trial.³¹ As well, in terms of principle, a claim of specific performance revives the contract, so that the date of breach is postponed until the plaintiff elects damages.

These reasons for pushing back the date of assessment may have a relatively solid footing in principle and policy; however, Sopinka was, perhaps, less convincing in arguing that a court should not deduct from any resulting windfall. He agreed with *Wroth* that the wording of the Lord Cairns' Act meant that damages had to be a full equivalent of specific performance and that, therefore, a court could not make deductions.³² The factual scenario of *Semelbago* illustrates the logic behind the rule. Following Sopinka's thinking, if *Semelbago* were to receive actual specific performance, he would have the increase in the value of both properties. Damages in lieu of specific performance could give him no less.³³ As a result, Sopinka dismissed the appeal and suggested that, had the purchaser advanced a cross appeal, the Court may have granted damages of \$120,000.³⁴

It was by means other than deductions that Sopinka sought to solve the problem of overcompensation or unfair advantage. He held that courts should treat land as any other good. Sometimes it would merit specific performance, but usually it would not. The test would be uniqueness. The only guide Sopinka appended to the concept of uniqueness was whether it would be possible for the innocent party to mitigate. Property had to be "unique to the extent that its substitute would not be readily available."³⁵ Though he suspected that the property was not unique, Sopinka did not open this subject to inquiry. He concluded:

In the circumstances, this Court should abide by the manner in which the case has been presented by the parties and decided in the courts below. In future cases, under similar circumstances, a trial judge will not be constrained to find that specific performance is an appropriate remedy.³⁶

These comments ended a centuries old tradition of special status for land in the contract law of remedies.

As we shall see, some critics of *Semelbago* have argued that the uniqueness test constrains the real purpose of the remedy, which is to reflect the idiosyncratic interests of parties to a contract, and that the Supreme Court did not understand what interest specific performance is intended to safeguard.³⁷ It may be that the *Semelbago* decision was based more on principles than theory. The short decision did not provide a full analysis of the purpose of the remedy and the role of the uniqueness test. Nor did the Court address some of the foreseeable problems with the test, such as the fact that the quality of uniqueness is a matter of degree, assessments of which are naturally subjective. As well, the Supreme Court may have been too quick to hold that *Wroth* should apply to a situation where the plaintiff, not the

29 The decision in the case was unanimous, although La Forest made a caveat that he did not think the Court should authoritatively settle the question of when specific performance is available since the Court had decided to conform to the assumption of the lower courts that specific performance was proper in the case. See above at para. 1.

30 See above at para. 16.

31 See above at para. 14.

32 In Sopinka's view, the *Wroth* principle of full substitution, not the fact that the purchaser was a shell company, explains the result in *Rimes*. See above at para. 17.

33 See above at para. 16 and 19.

34 See above at para. 19.

35 See above at para. 22. [Emphasis added].

36 See above at para. 23.

37 Da Silva, see note 5 at 5.

court, chooses damages. *Damages in lieu of specific performance* represents the junction of two very different remedy regimes, common law damages and performance in equity, and it therefore demands deft handling. In the next two sections, we shall look at how courts have applied the *Semelhago* principles of uniqueness and equivalent damages. We shall also consider how the law could be improved.

IV. Uniqueness and the Sale of Land

While Sopinka's comments on uniqueness were *obiter dicta*, courts have consistently treated them as law.³⁸ At the same time, however, courts have felt free to give weight to an earlier British Columbia Supreme Court decision, *McNabb v. Smith*.³⁹ This judgment stressed not just the uniqueness test but the discretionary nature of specific performance. In practice, little separates the *McNabb* and *Semelhago* principles since the uniqueness test is so flexible that a court can use it to assert its discretion.

Indeed, it is difficult to find principles in the cases that define uniqueness. One distinction, provided by some authorities, is between residential and commercial property. Before *Semelhago*, Professor Waddams suggested that specific performance should be accessible to disappointed homebuyers but not commercial plaintiffs.⁴⁰ *Semelhago's* lawyer has published an article arguing his client had an idiosyncratic "consumer" interest in the coveted property, and so merited the special protection of equity.⁴¹ As well, there are two pre-*Semelhago* precedents for disallowing specific performance where the interest of the innocent party is essentially commercial. One is the aforementioned *McNabb*, where a plaintiff was barred from appealing to equity because she planned to resell the house for which she contracted.⁴² The other precedent was *Chaulk v. Fairview Construction Ltd.*⁴³ In that case, the Newfoundland Court of Appeal denied a purchaser of condos specific performance because he was reselling the indistinguishable properties.⁴⁴

The distinction between commercial and residential property has an immediate appeal; however, courts have not found the idea all that useful. For instance, in *Konjevic v. Horvat Properties Ltd.*,⁴⁵ the Ontario Court of Appeal ruled that a homebuyer seeking specific performance could find another home. *Corse v. Ravenwood Homes Ltd.*⁴⁶ came to the same conclusion, noting the home was "just a residence in a residential subdivision," despite the fact it was being built to purchaser specifications.⁴⁷ In contrast, *Re Tropiano and Stonevalley Estates Inc.*⁴⁸ held that an innocent party was entitled to the equitable remedy because the property "is a residential property" the location of which was significant to the buyers.⁴⁹

Thus the question of whether or under what circumstances residential property should attract specific performance is an issue that remains open. *Semelhago* itself offers little assistance in this regard. Sopinka's scant references to the issue suggest that he did not think much of the residential/commercial distinction. For instance, he stated that:

Residential, business and industrial properties are all mass-produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available.⁵⁰

It is, however, more difficult than Sopinka thought to apply consistently terms such as "mass

38 See for example *Corse v. Ravenwood Homes Ltd* (1998), 226 Alberta Reports 214 (Queens Bench) at para. 15; hereinafter cited as "*Corse*."

39 (1981), 30 British Columbia Law Reports 37, 124 Dominion Law Reports (3d) 547 (Supreme Court); hereinafter cited to Dominion Law Reports as "*McNabb*."

40 See note 7 at 464.

41 Da Silva, see note 5 at 7. Chapman makes a similar argument: see note 14 at 252.

42 See note 39 at 552.

43 (1977), 14 Newfoundland & Prince Edward Island Reports 13 (Newfoundland Court of Appeal); hereinafter cited as "*Chaulk*."

44 See above at 21.

45 (1998), 40 Ontario Reports (3d) 633 (Court of Appeal); hereinafter cited as "*Konjevic*."

46 See note 38.

47 See above at 9 [emphasis added].

48 [1998] 36 Ontario Reports (3d) 92 (General Division) [emphasis added].

49 See above at 98.

50 See note 1 at para. 20.

produced” or “consumer goods” to either kind of property, as we shall see.

In fact, courts have not consistently denied specific performance from commercial litigants, and the cases on the issue offer few steady criteria for defining uniqueness in a business setting. *McMurray Imperial Enterprises Ltd. v. Brimstone Acquisitions & Asset Management Inc.*,⁵¹ applying *Semelbago*, withheld specific performance on the basis that the lands in dispute were commercial. Similarly, in *White Room Ltd. v. Calgary (City)*,⁵² the Alberta Court of Appeal denied specific performance to remedy the breach of a contract for the lease of building space. While the majority appeared open to the idea that commercial land may be unique, it demanded a higher standard of proof than did the dissenting judge, who saw important connections between the layout and location of the property and the plaintiff’s business scheme.⁵³

In contrast to the above cases, specific performance was available in *Comet Investments Ltd. v. Northwind Logging Ltd.*⁵⁴ and *Morsky v. Harris*⁵⁵ because the location or features of the land gave the property a special significance. *Westwood Plateau Partnership v. WSP Construction Ltd.*⁵⁶ ordered specific performance because the purchaser in a multiphase deal had made improvements to the property before breaching the contract. Partial performance altering the character of the land was also important in *Comet*,⁵⁷ where a vendor sued for specific performance after having sub-divided land in accordance with a contract that the purchaser breached. In both *Westwood* and *Comet*, one could view partial performance as making the land unique or see it in “terms of the equity of the matter” – to use a phrase from *Comet*.⁵⁸

It is probably true that the “equities of the matter” explain many of the cases where uniqueness was ostensibly decisive. For instance, an old principle of equity is the rule that you have to come to it with “clean hands.” Some cases carry more than a suggestion that parties who are culpable of impropriety may have a more difficult time winning an argument about the singularity of the land in question. In *Morsky*, where a claim for specific performance succeeded, the Court suspected the reasons that the defendants gave for not performing to be plainly false.⁵⁹ *Taylor v. Sturgeon*⁶⁰ was more sympathetic to the purchaser defendant, who had, relying on the vendor’s false representations about water percolation, contracted for land upon which he could not in fact build a house. The Court clearly had no desire to force the defendant to take possession of a property he could not use, and this disinclination may be a reason why it ruled the land was not unique.⁶¹

Various other concerns have guided the application of the uniqueness test. For instance, courts have been careful to protect the interests of third party purchasers. The majority in *White Room* did not think the evidence of uniqueness was sufficient, perhaps because enforcing a lease with specific performance would have stopped the city, which had recently bought the building, from demolishing an edifice that was uneconomical to repair.⁶² In *Corse*, the Court stated openly that it did not want to order specific performance because a third party had bought the land.⁶³ Master Funduk decided there was little particular about the property.⁶⁴ Similarly, the Federal Court of Canada in *Gleason v. Dawn Light (The)*⁶⁵ held that a certain ship could not be the object of an order for specific performance under *Semelbago*

51 (1997), 210 Alberta Reports 97 (Queen’s Bench).

52 (1998), 216 Alberta Reports 44 (Court of Appeal); hereinafter cited as “*White Room*.”

53 See above at para. 24, 26 and 49.

54 (1998), 22 Real Property Reports (3d) 294 (British Columbia Supreme Court) at para. 38; hereinafter cited as “*Comet*.”

55 (1997), 155 Saskatchewan Reports 193 (Queen’s Bench) at para. 39. The Court of Appeal denied specific performance because the vendor’s wife had not consented to the sale: (1998), 168 Saskatchewan Reports 27 (Court of Appeal); hereinafter cited as “*Morsky*.”

56 [1997] 37 British Columbia Law Reports (3d) 82 (Supreme Court); hereinafter cited as “*Westwood*”.

57 See note 54 at para. 31.

58 See above at para. 39.

59 See note 55 at para. 17.

60 (1996), 156 Nova Scotia Reports (2d) 147 (Supreme Court).

61 See above at para. 19.

62 See note 52 at para. 5.

63 See note 38 at para. 21.

64 See above at para. 18.

65 (1997), 130 Federal Trial Reports 284 (Trial Division)

principles. The ship was not singular and it had been sold to a third party, a fact that provided “a further strong discretionary reason for refusing to grant this remedy.”⁶⁶

Each of the cases above suggests that the important decision for a lawyer arguing specific performance may not be *Semelbago* but the earlier *McNabb* decision, which enunciated the following broad principle: “Specific performance is a discretionary remedy. A Court of equity seeks to do what is just and equitable in the circumstances of the particular case.”⁶⁷ Whether or not a court is candid about the exercise of its discretion, the uniqueness test does not seem to put many limits on judicial freedom. It may be that courts have only begun to fill the concept with meaning. As noted above, courts have disagreed whether commercial players can expect to enjoy the remedy. That dispute turns on the question of what uniqueness means in the circumstances. Certainly, business properties have peculiarities and can offer particular business opportunities. But the line of cases coming down from *Chaulk* suggests that a businessperson can always mitigate a lost profit opportunity, because she can always invest elsewhere.⁶⁸ The inconsistency of the case law suggests that courts can choose either to level all businesspeople into impersonal market agents who seek the same shapeless goal – profit – or to recognize the special interest some businesspeople may have in certain properties that serve specific purposes.

High courts could, perhaps, create a precedent on the issue of singular business opportunities; however, in other ways, it seems difficult to give the uniqueness test a more certain form. The greatest problem is the fact that land and the structures on it are rarely mass-produced in the same way as televisions or cars. Many lots, homes, and commercial or industrial spaces have some distinguishing features. Unlike typical consumer goods, all properties have set “locations.”⁶⁹ This fact may explain Master Peterson’s reasons in *Konjevic*:

Finally, much has been made of the uniqueness of the land. *All land is, of course, unique and purchasers may want it badly for numerous reasons.* However, in the circumstances of this case, considering that the Firestones are, in essence, an innocent party to the dispute between Horvat and Konjevic, in my view damages would be the most equitable remedy.⁷⁰

Thus, the question for a justice confronted by a claim for specific performance will often be not whether the land is unique, but whether it is *sufficiently unique*. The sense of sufficiency may come from considerations such as fairness, practicality, compensation, and so on. It would improve the test if courts were always to state openly both that they are using the criterion of uniqueness as a “rule of thumb” in exercising a discretionary power and that uniqueness is not the only factor.

As well, courts should define uniqueness more precisely in order to make the rule predictable. One standard of singularity is the principle of mitigation, or rather the impossibility of mitigation: property is sufficiently unique when an alternative cannot be found. *Semelbago* emphasized mitigation in its description of uniqueness, and the judge in *Peate v. Elmsmere Ltd. Partnership* held that: “In my view, the test of uniqueness in these cases, focuses principally on whether or not other property would be available to satisfy a claim for specific performance by the plaintiff.”⁷¹ A stress on mitigation may seem rather circular since a court

66 See above at para. 12. This part of the judgment was upheld on appeal: (1998), 145 Federal Trial Reports 320 (note) at para. 2 (Court of Appeal).
67 See note 39 at 551.
68 See note 51.
69 D. Harris, A. Ogus and J. Phillips “Contract Remedies and the Consumer Surplus,” (1979) 95 Law Quarterly Review 581 at 588.
70 See note 45 at 637 [emphasis added].
71 [1997] Ontario Judgements No. 4871 (General Division) (QuickLaw) at para. 21.

has to look at the singularity of the property to decide whether a plaintiff could have mitigated. But the question of whether there are actual, reasonable alternatives to a good or property is more specific and concrete than whether the item has, in the abstract, any unique features. Indeed, the uniqueness test exists to identify parties who cannot mitigate and therefore may have specific performance. A party who is unable to find a replacement property will likely be a party who has a special interest in the land that is unrelated to its fluctuating market value. Courts should, therefore, try to assess the quality of uniqueness with the measure of mitigation.

Mitigation depends in part on the desires of the innocent party since she needs to find an alternative that conforms to her personal expectations. Thus, there is another reason, some argue, to say all land is unique: all buyers have individual tastes or requirements. Potential purchasers value the same good or property differently. The difference between the normative value of a good – its price – and its worth to an individual is called “consumer surplus” or “utility”. Economists also measure this surplus as the variation between what a person pays and what he would be willing to pay.⁷² Several authors have argued convincingly that specific performance, with its stress on uniqueness, has been a way for courts to protect this special interest.⁷³ Da Silva states: “The award of specific performance itself is a recognition of the unique interests of the consumer purchaser.”⁷⁴ But he goes on to argue that uniqueness should not limit specific performance because *all buyers* have a specific interest in the goods or properties they purchase. The question, therefore, is whether uniqueness hinders or helps courts in applying specific performance to the interests it is meant to protect.

If we assume, however, that damages will remain the main remedy for the contract law, then the uniqueness criterion is necessary. One of the functions of the test is to limit the remedy to situations where, in a rising market, a party cannot take advantage of specific performance to speculate and receive a windfall because their interest in the property is special. While the proponents of consumer surplus have a point that all land has a particular value to the buyer, a typical consumer surplus can evaporate quickly if the market for the property inflates. The purchaser of a house, for example, may agree to a contract for \$100,000 but be willing to pay \$115,000. If housing prices were to move quickly upward between a breach and a trial, a purchaser who is successful in a claim for specific performance would have an incentive to sell and gain a windfall. Whatever such a buyer wanted in the beginning, specific performance would give him a lottery ticket that had already shown itself to be a winner.

Since courts cannot apply mitigation to specific performance in order to limit the remedy to the expectation interest, they must employ the uniqueness test to ensure that plaintiffs have an interest in the property that is “special,” unrelated to market value, so they want the good itself rather than a windfall. Uniqueness here, though still an uncertain and discretionary criterion, would require either a truly intangible interest, such as attachment to a family property, or a very large difference between what a person pays for a good and what they would pay, that is a consumer surplus out of the ordinary. Indeed, if the purpose of

72 See note 69 at 583.

73 See above at 586.

74 Da Silva, see note 5 at 15.

uniqueness described here is correct, then the essay can offer courts a principle to help them decide what is unique. In assessing a special interest, a court should ask not only whether a party could have mitigated a loss, but also whether the party would take advantage of a market gain. In other words, would the plaintiff keep the property if the market for it rose dramatically? For the plaintiff seeking specific performance, the object of the contract cannot be fungible: mitigation should be impossible and *any potential windfall should be unrealizable*. Courts have already recognized the idea to some degree, since they sometimes deny specific performance to plaintiffs who plan to sell the property.⁷⁵

The analysis above would not find acceptance among commentators who advocate specific performance as a way to capture consumer surplus. Uniqueness, however, is needed to keep specific performance chained to expectation. As well, unless we want to make specific performance the regular remedy, then the problem of protecting ordinary consumer surplus is essentially a problem of damages. The solution may be to add a percentage of the price to a claim for damages.⁷⁶ In this way, courts could protect common surplus without resorting to exceptional remedies. After all, the ordinary disappointment of a consumer is no more extraordinary than the ordinary loss of profit of a businessperson. If damages are to remain the main remedy of Canadian contract law, courts must use them to compensate both lost profit and utility.

V. Damages in Lieu of Specific Performance

We noted above that mitigation ensures that damages are no larger than a party's expectation interest and the requirement of uniqueness may provide the same service for the remedy of specific performance. What principle, then, guards against windfalls in the case of damages in lieu of specific performance? A party seeking specific performance cannot, in general, be expected to mitigate; thus, it will continue to have its purchase funds or properties until after trial, and, at the same time, it can expect to have the equivalent in damages of an order of specific performance. What such a plaintiff cannot have is a special interest in the thing the court finally awards — damages. In the opinion of both the Ontario Court of Justice and Court of Appeal justices in *Semelbago*, if a claim for damages in lieu of specific performance coincides with a rising market, it would be equitable for the court to deduct the windfall from the damage award. The Supreme Court of Canada disagreed.

Commentators differ on whether *Semelbago* resulted in overcompensation. Some suggest that damages in lieu of specific performance result in a windfall only when the property is not unique.⁷⁷ The problem with this notion is that damages cannot give the innocent party the lost quality of uniqueness. Others argue that windfall damages provide compensation for lost consumer surplus.⁷⁸ A stable or falling market, however, offers no compensation for lost utility, while a rising market tide may lift a lucky plaintiff beyond her surplus. In either case, the remedy will not reflect consumer surplus but the vicissitudes of the market.⁷⁹

The result in *Semelbago* seems to have been a windfall caused by the simultaneous application of two principles. First, a plaintiff who sues for specific performance can choose

⁷⁵ See above at 18.

⁷⁶ See note 69 at 583-84.

⁷⁷ See note 8 at 422-23.

⁷⁸ Da Silva, see note 5 at 13.

⁷⁹ Siebrasse, see note 5 at 566.

damages at trial. Second, such damages must be a full replacement for specific performance; a court cannot make deductions.⁸⁰ We shall examine each of these conclusions in turn. The ability of a court to grant damages in lieu of specific performance comes, as we have seen, from the Lord Cairns' Act. The idea that the plaintiff can elect damages at trial, however, has a different source: the rule that a claim of specific performance revives the contract and it remains in existence until the plaintiff decides that it is at an end and seeks damages.

The combination of these two sources of law, however correct in principle, makes little sense in policy. A plaintiff who begins an action for specific performance does not have to mitigate and can judge the marketplace. If she sees the market is rising, she can then ask for damages. This may happen in a case such as *Semelhago*, where the considerable rise in the value of the house likely outstripped any particular attachment that Semelhago had to it. The unfair advantage and the potential for windfall gains indicate that the rules need adjustment.

In terms of the first principle, there is an issue of statutory interpretation. Research into the policy behind the Lord Cairns' Act does not show that Parliament intended to give plaintiffs a lottery ticket. The general purpose of the Act was to facilitate the fusion of common law and equity courts. It was also to deal with situations where courts find that a plaintiff may deserve specific performance but a court cannot grant the remedy for some reason.⁸¹ That was the scenario in *Wroth*. Nothing frustrated equity in *Semelhago*; rather, the plaintiff dropped the equitable redress after it had allowed him to avoid mitigation. The speculative potential of the Lord Cairns' Act remedy can be removed by a Supreme Court of Canada ruling that courts can award damages in lieu of specific performance but plaintiffs cannot elect them.

The second *Semelhago* principle that can lead to overcompensation is the doctrine of awarding full equivalent damages. Again, the source for this ruling seems to be the Lord Cairns' Act, where it states that courts can grant damages in addition to or in substitution for specific performance. Once more, there is little reason to think that the drafters of this passage intended to do anything as revolutionary as free damages from the limits that mitigation imposes. *Wroth*, *Semelhago* and other authorities⁸² decided that substitution means that a plaintiff who chooses damages at trial must have an award of the same market value as he would with an order of specific performance. This statutory analysis seems rather simplistic, almost cavalier. As Norman Siebrasse notes, the only logic behind the full substitution rule "is that if the purchaser would have gained a windfall from an order of specific performance he should also gain one from an order of damages in lieu of specific performance."⁸³ But the criticism can go deeper. Specific performance and damages in lieu thereof embody different interests. Separate treatment, therefore, is not difficult to justify.

In the case of specific performance, the court protects an interest in a unique product, not its worth on the market. The special interest test ensures that the plaintiff seeks something that is — for her at least — not fungible. She neither wants nor will she receive the market value of the land or good. In the case of damages in lieu of specific performance, the court cannot grant the unique interest; it can only offer compensation. The remedy mirrors the

80 Da Silva, see note 5 at 12-13.

81 J.A. Jolowicz, "Damages in Equity: A Study of Lord Cairns' Act" (1975) 34:2 Cambridge Law Journal 224 at 225.

82 See above at 230.

83 Siebrasse, see note 5 at 558.

plaintiff's expectation interest as much as is possible with money. Since the remedy is pecuniary (and therefore fungible), there is a possibility of a windfall. Overcompensation results from market fluctuations and has nothing to do with the unique interests of plaintiffs. Considering that damages in lieu of specific performance present this danger of excess indemnification much more than specific performance, courts should not expect an order of damages to match an order of specific performance in its exact market value, which can balloon with any random gust of inflation.

Thus, when defining *in substitution*, we should simply keep in mind that damages and specific performance are, so to speak, apples and oranges. The one cannot ever be an exact substitute for the other; nor is it equitable to give certain disappointed orange buyers (those facing fortuitous market conditions) two apples for the trouble of losing one orange. The core principles of contract law state that where it intends to compensate a party with monetary damages, a court should seek to limit those damages to the party's expectation interest. This centrepiece of common law should stay on the table when damages in lieu of specific performance come to the bar. Only the means of ensuring expectation need be different. In the case of the Lord Cairns' Act remedy, mitigation is not feasible, so a court should use deductions to circumscribe damages within the boundaries of expectation. One suspects that if the "no deductions" rule remains in place, courts facing a fact pattern like that of *Semelbago* will avoid overcompensation by ruling that the property is not unique, so that the rules of common law damages apply. Thus, the application of the uniqueness test might become even more influenced by policy considerations.

VI. Conclusion

The Supreme Court of Canada in *Semelbago* was likely correct in holding that the uniqueness test for specific performance should apply to land. The test limits claims of specific performance to cases where the plaintiff cannot use the remedy to judge the market and gain a windfall. The test is indefinite, however, and may be especially difficult to apply to land, since real property is neither always unique nor often mass produced. Specific performance is an equitable, discretionary remedy. Uniqueness is, therefore, a beacon light for a court trying to steer a just course through the "equities of the matter." Litigants and counsel should know about the court's equitable discretion and courts should tell them that uniqueness, a vague criterion, might not be decisive.

As well, courts should strive to limit their own manoeuvring room (and the uncertainty of the rule) by slowly giving some content to uniqueness. Justices and counsel ought to refer to precedents of what has qualified as unique in different situations, such as in the domain of residential and commercial real estate. A good, basic start would be a consistent application of the "impossibility of mitigation" definition of uniqueness. Courts should also consider whether a plaintiff would sell the property in a rising market. This test directs courts to identify the real intentions and interests of specific plaintiffs and would ensure against speculative lawsuits.

Semelbago's conclusions on damages in lieu of specific performance are more problematic. A plaintiff pursuing specific performance is supposed to have a special interest in land. It makes little sense to allow him at trial — after he has avoided mitigation — to choose damages, something in which he cannot have a special interest and which, traditionally, uses mitigation to keep itself within the compass of expectation. This prerogative to choose damages shelters interests the law is not intended to recognize: unfair advantages in judging the market and windfall gains. The election of damages in lieu of specific performance should be at the disposal of the court alone, and courts should use the Lord Cairns' Act remedy only to compensate plaintiffs whose claim for specific performance is valid but has been frustrated by events, as in *Wroth*.

As well, a court that cannot give a plaintiff its special expectation interest should grant instead the party's monetary expectation interest, which may be less than the market value of the property at date of trial. No policy, principle, or language in the Lord Cairns' Act warrants awarding some plaintiffs (those who drift onto a market swell) an award that is beyond their expectation interest. The Supreme Court of Canada should overrule the "plaintiff election" and "no deductions" verdicts of *Semelbago*, or the Legislature should remedy the flaws.

The most appropriate conclusion to the problem of specific performance as it relates to land would consist of three remedies covering the plaintiff's expectation interest in three different situations. First, damages should protect ordinary interests. Second, specific performance, when possible, ought to cover special interests. Third, damages in lieu of specific performance should safeguard special interests where performance is not possible and the court can only offer monetary compensation. For these principles to operate, there needs to be a refinement of the *Semelbago* uniqueness test and a reversal of the *Semelbago* principles of full equivalent damages and the right of plaintiffs to choose damages at trial. These changes would resolve the problem of specific performance and land in a manner consistent with the central principles of contract law.

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Is the Province Liable?:

Leaky Condo

Owners in British Columbia Seek Compensation in the Courts

I. Overview

A. Introduction

On September 29, 1999, the Vancouver Sun reported that Jim Currie, the former head of the British Columbia Building Standards Branch, had been warning the Minister of Housing as early as the 1980s that the provisions of the British Columbia Building Code were inappropriate for the province's coastal climate.¹ This revelation was merely the latest in a long series of frustrations for BC condominium owners. Due to a number of factors, including faulty construction techniques and the use of questionable building materials, condominiums failed to remain watertight. Furthermore, due to building design, there was no means for water to escape once inside the building structure. Buildings affected began to rot from the inside out, leading to the current "leaky-condo crisis," which has resulted in estimated costs to homeowners of between \$500 and \$800 million.²

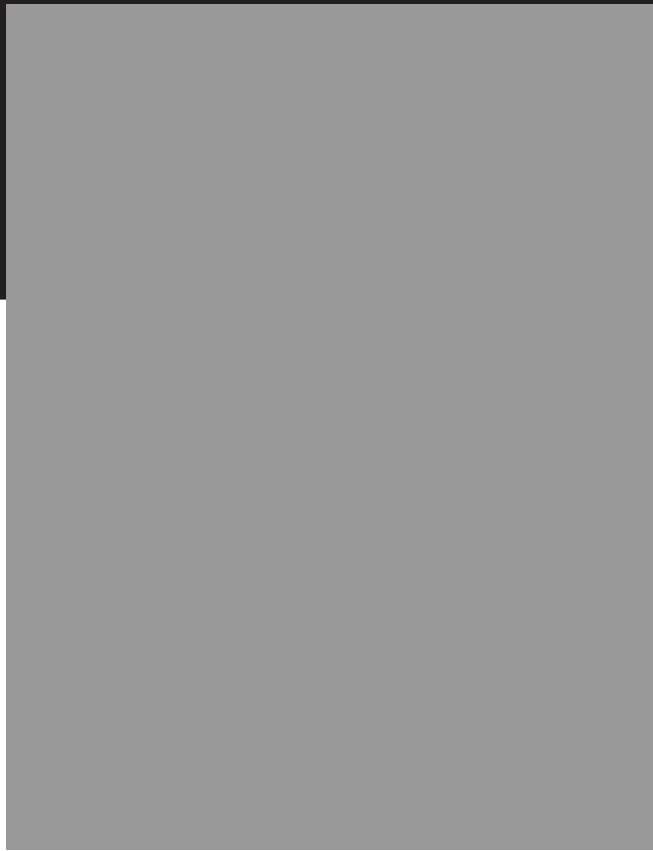
Condominium owners naturally sought answers as to who was responsible and who could be made to compensate them for their losses. Their frustration mounted when it became apparent that a large proportion of the repair bill was going to fall upon their own shoulders. Condominiums were often sold without express warranties by the developer, and common law warranties were applicable only in limited circumstances. For those fortunate enough to be covered under the common law, recovery proved difficult as many developers worked through project-specific limited liability companies whose assets were depleted once the building was finished. Finally, a voluntary, industry-run warranty program, in place since 1975, proved to be ineffective.

Claims in tort provided some promise because a broader spectrum of defendants was available. Architects, engineers, subcontractors, building inspectors, and others who were not involved in contractual relationships with condominium owners were also named as defendants. However, courts have thus far only allowed recovery for owners' repair costs where the defect in construction created a "substantial danger."³ The scope of what constitutes a substantial danger has yet to be determined, but owners are likely precluded from relief where the construction is shoddy but not dangerous.

1 P. Fong, "Building Condo Chief Predicted Condo Rot: Health of occupants and structural integrity sacrificed to energy conservation, letter says" *The Vancouver Sun* (29 September 1999) A4.

2 British Columbia, *The Renewal of Trust in Residential Construction* (Victoria: Commission of Inquiry into the Quality of Condominium Construction in British Columbia, 1998) at 14; hereinafter cited as "the Barrett Report."

3 See *Winnipeg Condominium Corp. No. 36 v. Bird Construction*, [1995] 1 Supreme Court Reports 85.



In response to the growing crisis, the provincial government in 1998 appointed a Commission of Inquiry, headed by former Premier David Barrett. The Barrett Commission made 82 recommendations, mainly concerned with how to avoid similar problems in the future. The province also provided \$75 million to establish a reconstruction fund, which was created under the newly implemented Homeowner Protection Act.⁴ The fund lasted for less than a year before it was bankrupted by the vast number of claims made by condominium owners.

In light of the possibility that adherence to the Building Code was a partial cause of condo leakage, it seems that the province itself may not have discharged its responsibility to affected owners. The province probably acted carelessly in failing to ensure that the Building Code was appropriate for the West Coast climate. Whether or not this amounts to legal negligence is a matter that may soon be before the courts. Furthermore, by failing to act once it possessed knowledge of the dangers posed by condo leakage, the province may have breached a duty to warn homeowners of the risks. For owners of leaky condominiums seeking relief, the possibility of a damages award against the province should provide a small ray of sunshine in an otherwise gloomy outlook.

B. The Leaky-Condo Problem

The Barrett Commission Report cites a number of factors which led to the leaky-condo crisis.⁵ Among these are the use of building materials based on their aesthetic qualities rather than water resistance, ineffective monitoring by municipal inspectors, a lack of accountability by builder/developers, and the failure of architects and engineers to ensure quality construc-

⁴ Statutes of British Columbia 1998, chapter 31.

tion. The major cause of condo leakage is the widespread failure of building envelopes, which include a building's roof, walls, and materials inside of the walls. In an effort to maximize energy conservation, buildings were designed to be air and water-tight without accounting for the possibility that water might somehow get into the building walls. In any case, the end result of the leaky condo crisis is that condominium owners are stuck with properties that have been significantly devalued and average repair costs of \$23,300 per affected unit.⁶

II. Tort Liability

A. Potential Defendants (and Why They May be Immune from Liability)

1. The Builder/Developer

There is no general common law warranty available to purchasers of new homes. The common law distinguishes between houses (or condominiums) that were completed at the time of purchase and those that were not. For owners whose units were completed at the time of purchase, the common law does not provide relief and the doctrine of *caveat emptor* applies. For those who purchased before completion, the transaction would be subject to an implied warranty that the house was fit for habitation and constructed in a good and workmanlike manner using suitable materials. Professor Mary Anne Waldron reasons that the distinction was made because the purchaser of a completed house could inspect the building before buying. This would not be possible where the building was not yet completed.⁷ Professor Waldron further notes that while courts have been willing to give a fairly broad definition to what constitutes an incomplete house, this still leaves many homeowners without protection.⁸

There has been a voluntary, industry-run warranty program in British Columbia since 1975. However, the New Home Warranty program did not operate at arms-length from industry and generally was not effective because of stringent conditions on the recovery of claims. The program covered only patent defects in workmanship, materials, and the building envelope; and only for one year. Most defects came to light only after the warranty had expired.⁹ Perhaps the most significant result of the program to homeowners is that it delayed the implementation of a statutory warranty scheme by the provincial government until 1998.¹⁰

Due to privity of contract, common law warranties and express warranties given by builder/developers would only apply to the initial purchaser of the condominium. Owners without warranties and secondary purchasers who did not buy from the builder/developer were forced to look to tort law for a cause of action. In *Winnipeg Condominium Corporation No. 36 v. Bird Construction*¹¹, the Supreme Court of Canada allowed an action by a secondary purchaser against the builder of a condominium building, although the Court was careful to limit when relief would be available. For the majority, Justice LaForest stated that the duty of care could be breached when a failure to use due care in constructing the building resulted in a "substantial danger to health and safety." As will be discussed later, what constitutes a "substantial danger to health and safety" may be difficult for the courts to define. While it is reasonable to limit liability in such cases, the distinction is likely to prove unworkable for buildings which take years to rot to the point of presenting a health or safety risk.

5 See note 2 at v-vi.

6 See above at 13.

7 Mary Anne Waldron, "How T-Rex Ate Vancouver: The Leaky Condo Problem" (1999) 31 Canadian Business Law Journal 335 at 340-341.

8 See above at 341-342.

9 See note 2 at 44-46.

10 See above at 44; for more on the Homeowner Protection Act, see note 7 at 358-364.

11 See note 3.

One final barrier remains for the condo owners who are fortunate enough to have a cause of action against builders/developers. The corporate structure of most builders/developers precludes recovery against individual defendants. Moreover, these corporations often take the form of project-specific companies whose assets are depleted once the project is finished. Hence, even for condominium owners who have judgments in their favour, recovery may be impossible.

2. Architects/Engineers

Architects and engineers are frequently named as defendants by plaintiff condominium owners and strata corporations. One reason why they make attractive defendants is that their liability insurance ensures some recovery by plaintiffs in the event of a successful result at trial. As there is no contractual relationship between architects/engineers and the homeowners, any relief sought must be in tort. One potential problem in recovery is the courts' insistence on distinguishing between physical damage to property and pure economic loss. Where either injury to person or physical damage to property occurs as a result of the negligent performance of an architect or engineer's duties, it is clear that tort liability may follow.¹² On the other hand, where the damage is pure economic loss, recovery is not guaranteed. Most of the losses to condo owners are the costs of repair. Courts consider this to be pure economic loss despite the fact that the repair is undertaken to prevent the almost inevitable damage to property that may have been caused, at least in part, by the negligence of the architects and engineers. In *Winnipeg Condominium*, the Supreme Court of Canada held that tort liability could ensue for pure economic loss where the failure of architects and engineers, among others, resulted in a substantial danger to health and safety.¹³ The problem with this, however, is that when a defect is shoddy, but does not constitute a substantial danger, recovery will be prohibited. By denying relief in these circumstances, courts effectively are punishing condominium owners who work promptly to mitigate the damage caused by the negligence of those who were involved in the construction process.

3. Municipal Inspectors

In *Kamloops (City) v. Nelson*¹⁴ a municipality was held to be liable for negligence when a municipal building inspector did not adequately inspect the foundation of a building under construction. As Professor Waldron discusses, the province responded by passing legislation that made it very difficult to bring lawsuits for negligent inspection.¹⁵ A statutory waiver of liability for inspectors, along with a six month limitation period, will make it very difficult for condominium litigants to bring a successful action against municipalities for negligent inspection.

B. Potential Liability of the Provincial Government

1. The Building Codes

Among the parties whose role in the condominium crisis was examined by the Barrett Commission were the provincial government, as administrators of the provincial Building Code,¹⁶ and the City of Vancouver, whose Building By-law essentially mirrors the provincial code. The BC Building Code is based on the National Building Code, a model code created by

12 McLachlin & Wallace, *The Canadian Law of Architecture and Engineering*, (Toronto: Butterworth, 1987) at 139.

13 See note 10; see note 7 at 350.

14 [1984] 2 Supreme Court Reports 2.

15 See note 7, at 347-349. For example, section 285 of the Municipal Act, Revised Statutes of British Columbia 1996, chapter 323, establishes a six month limitation period for commencing actions against municipality, while section 286 requires notice be given within two months of the damage being sustained. Section 294(8) of the Vancouver Charter, Statutes of British Columbia 1953, c.55 now provides that there is no legal duty to ensure that any building plans approved by the City comply with any enactments, and that the City and its employees may not be held liable for any failure to enforce or detect contraventions of the Building Code.

16 A regulation made pursuant to s. 692 of the Municipal Act, Revised Statutes of British Columbia 1996, chapter 323.

the National Research Council, which has been voluntarily adopted by the provinces with a view to implementing relatively uniform building standards across the country.

There has been much debate as to the extent to which the building codes have contributed to the leaky condo crisis. Their insistence on air and water-tight buildings has proven to be impractical in the rainy West Coast climate as it is virtually impossible to ensure that the building remains absolutely sealed. The use of these “face-sealed” systems has led to widespread failure of building envelopes when moisture becomes trapped within them. A more appropriate approach would be to anticipate the ingress of water into a building and to attempt to minimize its effects.

Compounding the problem is the use of polyethylene as both an air and vapour barrier. The Building Code does not expressly require the use of polyethylene, but it was often required by inspectors.¹⁷ The Barrett Commission noted that the use of polyethylene was inappropriate for taller buildings that were exposed to wind-driven rain.¹⁸

Barrett acknowledged that the building codes did not take into account the “unique building envelope needs of B.C.’s coastal climate.”¹⁹ Generally, though, the Barrett Commission downplayed the role of the building codes:

The Provincial [Building] Code is intended to represent minimum standards regarding life safety, health, and structural sufficiency of buildings. It is neither a textbook on building design, nor a criterion for quality or workmanship... The Commission was unable to find evidence that the building code, per se, has caused the [leakage] problems.²⁰

2. Crown Liability Generally

Even assuming that the province acted carelessly in its adoption of the Building Code, it is far from certain that the government would be held liable in tort to condominium owners. Not all governmental action is subject to judicial scrutiny. The courts tend to respect the division of power between the legislative and judicial branches of government and recognize that they may not be equipped to assess the complex decision making process of government policy makers.²¹ Furthermore, there is a concern that a flood of litigants could claim damages as a result of even the most broadly applicable governmental decisions. Finally, the concern that the government should not be an insurer at the expense of taxpayers is especially relevant in the leaky-condo context. Courts faced with the question of whether the province was negligent will be certain to weigh these factors against the irresponsible actions of the province and the resulting effect on condominium owners.²²

In order to obtain damages in tort against the province, claimants will have to establish that the government breached a duty of care to condominium owners. The test for whether a duty of care exists is set out in Lord Wilberforce’s judgment in *Anns v. London Merton Council*.²³ The first question to be asked is whether there is a sufficiently close relationship of proximity between the parties so that in the contemplation of the authority, carelessness on its part might cause damage to the other party. The province, in enacting the Building Code, almost certainly did so with the intent to ensure the protection of occupiers of property. Likewise, the Municipal Act grants the authority to municipalities “for the health, safety and protection of

17 See note 2 at 21.

18 See above at 22.

19 See above at 23.

20 See above at 19-20.

21 L. Klar, “Extending Tort Liability of Public Authorities” (1990) 28 *Alberta Law Review* 648 at 650.

22 See A. Linden, *Canadian Tort Law*, 6th ed. (Toronto: Butterworths, 1996) at 613-614. Justice Linden points out that it is odd that courts should be so reluctant to use tort law as a means to review governmental action when review already occurs under the following mechanisms: the Charter and Constitution, administrative law, ombudsman, human rights agencies, contract law, and the criminal law.

23 [1978] Appeal Cases 728 (House of Lords). The reasoning in *Anns* was adopted by the Supreme Court of Canada in *Kamloops v. Nilson*, see note 14.

persons and property” to pass bylaws regulating the construction of buildings.²⁴ Consequently, it would seem that in choosing to regulate construction, both the province and the various municipalities are under a *prima facie* duty of care to condominium owners.

The second step of the *Anns* test involves asking whether there is a policy reason for denying the existence of the duty. In the context of public authorities, this involves a determination of whether the actions in question were a matter of policy or whether they were part of the operational stages of an activity. It is only the latter that will give rise to a duty of care.

The leading Canadian case on government liability is *Just v. British Columbia*.²⁵ In *Just*, a large rock fell from a ledge and landed on the plaintiff’s car, injuring the plaintiff and killing his daughter. The issue before the Supreme Court of Canada was whether the failure of inspectors to remove the hazard constituted a breach of the province’s duty of care to the Plaintiff. In *Just*, Supreme Court Justice Cory discussed the difference between policy and operations. According to Justice Cory, policy decisions are usually made by persons of a high level of authority. Moreover,

[t] rue policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors. However, the implementation of those decisions may well be subject to claims in tort.²⁶

Therefore, in order to be exempted from negligence liability, a decision must be a ‘true policy decision.’ Justice Cory gave the example of a decision concerning the inspection of lighthouses. If a decision not to inspect lighthouses was made on the basis that the available funds were required elsewhere, then this would be a *bona fide* policy decision that would be unassailable.²⁷ On the other hand, once the decision to inspect lighthouses was made, the system of inspections would have to be reasonable and reasonably carried out; only the initial decision to inspect would be protected as a true policy decision.²⁸ The net result of the Supreme Court’s decision in *Just*, which allowed the plaintiff’s claim against the province, was “a significant shrinking of the scope of ‘true policy decisions.’”²⁹ Professor Klar refers to these types of decisions as “threshold decisions,” and states that, “they decide in general terms whether something will or will not be done.”³⁰ Further, “details... regarding the manner and characteristics of the project fall into the operational aspect of government.”³¹

Just probably represents the high-watermark for restricting governmental immunity from negligence actions. In *Brown v. British Columbia*,³² the Supreme Court appears to have backtracked somewhat from *Just*. The plaintiff was injured when his car skidded on a patch of black ice and went down an embankment. Justice Cory clarified his comments in *Just* when he stated that policy decisions were not to be limited to so-called “threshold” decisions made at the highest level of authority. Hence in *Brown*, the decision to have road crews on a summer schedule despite the presence of icy roads was not one that gave rise to a finding of negligence.

3. Legislative Decisions

While *Brown* may cast some doubt as to the scope of a true policy decision, it is undeniable that the trend since *Just* has been to make governmental bodies more accountable in

24 Revised Statutes of British Columbia 1996, chapter 323, section 694(1).

25 [1989] 2 Supreme Court Reports 1228.

26 See above.

27 See above at 1242; a true policy decision will be subject to review if it was not *bona fide*. See above at 1245 and *Kamloops v. Neilson*, note 14; at 35.

28 See note 25 at 1243.

29 See note 21 at 653.

30 See above at 653.

31 See above.

32 [1994] 1 Supreme Court Reports 420.

tort. The effect of this increased sphere of liability on the exercise of uniquely governmental actions remains to be seen. *Welbridge Holdings Ltd. v. Greater Winnipeg (Corporation)*³³ has often been cited in support of the proposition that a governmental body, in exercising its legislative powers, does not owe a duty of care to any member of the public. The municipality passed a zoning bylaw that was subsequently struck down as invalid due to a failure to follow the required procedures. A builder who relied on the bylaw brought an action seeking damages caused after the bylaw was struck down.

Justice Laskin found that a duty of care was not owed by the municipality:

The defendant is a municipal corporation with a variety of functions, some legislative, some with also a *quasi-judicial* component... and some administrative or ministerial, or perhaps better categorized as business powers. In exercising the latter, the defendant may undoubtedly (subject to statutory qualification) incur liabilities in contract and in tort, including liability in negligence. There may, therefore, be an individualization of responsibility for negligence in the exercise of business powers which does not exist when the defendant acts in a legislative capacity or performs a *quasi-judicial* duty.

A municipality at what may be called the operating level is different in kind from the same municipality at the legislative or *quasi-judicial* level where it is exercising discretionary statutory authority. In exercising such authority, a municipality (no less than a provincial Legislature or the Parliament of Canada) may act beyond its powers in the ultimate view of a court... It would be incredible to say in such circumstances that it owed a duty of care giving rise to liability in damages for its breach.³⁴

In *Welbridge*, Justice Laskin used traditional administrative law classifications of governmental action to outline when a duty of care might be owed. Legislative and quasi-judicial functions were exempted from a duty of care while administrative or ministerial powers were not. Justice Laskin's reasoning, however, was the same as that which would later be espoused in *Anns* by Lord Wilburforce — when the Crown was exercising its discretionary authority, it would be exempt from a duty of care.³⁵

Welbridge was decided before the Supreme Court narrowed the scope of governmental immunity in *Just*. However, courts have continued to apply *Welbridge* in situations where a government's legislative function has been the subject of an action.³⁶ It is suggested that *Welbridge* should not be used by a court in order to avoid the closer judicial scrutiny of governmental action called for by *Just*. Justice Laskin's analysis in *Welbridge* was essentially the policy/operational test, but with different terminology. Instead of policy decisions, Justice Laskin referred to legislative and quasi-judicial powers. Less discretionary, operational powers were referred to as "administrative or ministerial" or "business powers."³⁷ Whereas Justice Laskin's test is essentially the same as the policy/operational test, it suffers from the same weakness as its successor — the characterization of governmental functions into clearly defined categories does not take into account the inevitable overlap between the categories.³⁸

There is no doubt that what have previously been referred to as legislative decisions have many of the characteristics of true policy decisions as described by Justice Cory in *Just*. However, many governmental actions which might be considered to fall in the legislative sphere also have operative characteristics. This is true with respect to the decision to enact a

33 (1970) 22 Dominion Law Reports (3d) 470 (Supreme Court of Canada).

34 See above at 477.

35 *Welbridge* was applied in *Kwong v. R.*[1979] 2 Western Weekly Reports 1; affirmed 12 Canadian Cases on the Law of Torts 297 (Supreme Court of Canada). In both cases, claims of government negligence based on a failure to regulate were denied.

36 See *Birch Builders v. Esquimalt (Township)* (1992), 90 Dominion Law Reports (4th) 665 at 671 (British Columbia Court of Appeal), where Justice Hollinrake states, "I do not think that the principles enunciated by the Supreme Court of Canada in the *Just* case apply to a case such as this where what is under attack is what, in my opinion, is the legislative function of the municipal council."

37 See note 33 at 477.

38 See *Anns*, note 23 at 754 where Lord Wilberforce states that "although the distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many operational powers or duties have in them some element of 'discretion'."

building code pursuant to the authority granted under the Municipal Act. The initial decision to do so was a true policy decision. The decision would have been made at a high level — either by a municipal council or by the Lieutenant Governor in Council, depending on which building code is applicable. A further characteristic of a true policy decision is that it must be made on the basis of political, economic, or social factors. The decision to implement a building code is certainly political and is based at least in part on a desire to protect the home-owning public — a social concern. To this extent, a court may be justified in refusing to find a cause of action on the basis that the implementation of the building codes was a true policy decision.

It is suggested, however, that there is also an operational element in the enacting of a building code. The implementation of the initial policy decision to enact a code would involve establishing precise technical standards that make up the scheme of the building code. This decision would be more operational in nature since it would be based on administrative direction, expert or professional opinion, and technical standards rather than on larger political, economic, or social factors.³⁹

4. Duty to Warn and the Crown

As mentioned above, it appears that members of the provincial government had some indication that the Building Code was inadequate as far back as the 1980s. By failing to act on this information, it is suggested that the province may have breached a duty to homeowners to warn them of the impending damage that they faced. One group upon whom a duty to warn is frequently imposed is product manufacturers.⁴⁰ In *Dagneault v. Interior Roads Ltd.*, Justice Goldie gave a general description of when a common law duty to warn will arise: “Generically, such a duty [to warn] has been recognized where it is within the reasonable expectation of one party that a failure to warn may be likely to result in harm to another.”⁴¹

There is a number of cases where the Crown has been held to have had a duty to warn those who have been placed in a dangerous situation as a result of the Crown’s action or inaction.⁴² Such a duty arose in *Grossman et al. v. The King*.⁴³ The appellant in this case was preparing to land his airplane at the Saskatoon Airport. Upon seeing workers on the runway, he diverted his course and landed on a grass runway. While taxiing to a stop, he crashed into a ditch that had been cut across the runway. The appellant’s plane was damaged beyond repair and his passenger was injured. The Supreme Court of Canada allowed the appeal, finding a duty of care based on common law occupiers’ liability. Justice Taschereau found that the airport employee had a duty to persons using the airport to warn of existing dangers.

The plaintiff in *Jane Doe v. Metropolitan Toronto (Municipality) Police Commissioners*⁴⁴ alleged that the police breached a duty to warn her of the presence of a serial rapist in her neighbourhood. All of the rapist’s prior attacks were confined to women living in second or third floor apartments within a single neighbourhood in Toronto. Justice MacFarland found in favour of the plaintiff on the basis that by failing to warn the plaintiff of the presence of the rapist in the neighbourhood, the defendants were grossly negligent.⁴⁵

39 See Justice Cory’s discussion in *Just*, note 25 at 1240.

40 See *Buchan v. Orto Pharmaceutical (Can.) Ltd.* (1986), 25 Dominion Law Reports (4th) 658 (Ontario Court of Appeal); *Hollis v. Dow Corning Corp.*, [1995] 4 Supreme Court Reports 634.

41 [1995] 8 Western Weekly Reports 168 at 178 (British Columbia Court of Appeal).

42 See *O’Rourke et al. v. Schacht*, [1976] 1 Supreme Court Reports 53; *The King v. Hochelaga Shipping and Towing Company Ltd.*, [1940] 1 Supreme Court Reports 153; *D.B. v. British Columbia (Superintendent of Family and Child Services)* [1997] 30 British Columbia Law Reports (3d) 201 (British Columbia Supreme Court); *Mitchell v. Vancouver* 10 Canadian Cases on the Law of Torts 139 (British Columbia Supreme Court).

43 [1952] 1 Supreme Court Reports 571.

44 (1998) 39 Ontario Reports (3d) 487 (Ontario Court General Division).

45 See above at 524. By failing to warn, the defendants were also found to be in breach of the plaintiff’s equality rights under section 15 of the Canadian Charter of Rights and Freedoms. Liability under section 15 arose following the Court’s findings that the warning was not given on the misguided basis that the women in the neighbourhood, once warned, would become hysterical and scare off the rapist.

The potential impediment to finding a duty to warn is that courts seem to require a pre-existing duty of care. In *Grossman*, a duty of care was owed by the Crown to users of the airport by virtue of the common law of occupiers' liability. In *Jane Doe*, the police were held to have both statutory and common law duties of public protection.⁴⁶ As stated above, the government was under a duty to homeowners to use reasonable care in creating the technical standards that comprise the Building Code. A litigant who establishes a duty of care must still establish breach of duty, causation, and damage. Justice Cory in *Just* suggested that where a duty of care is established, policy-type considerations such as budgetary concerns can be taken into account in determining the standard of care. Hence, where the passage of legislation or regulations is involved, it can be expected that the standard of care will be easily met. Therefore, it is possible that in failing to amend the Building Code once its inadequacies came to light did not amount to a breach. However, it is harder to accept the failure of the government to take any action at all once it learned of the Code's inadequacies. In failing to act, it is argued that the province breached a duty to warn condominium owners of the dangers posed by the faulty construction of their buildings.

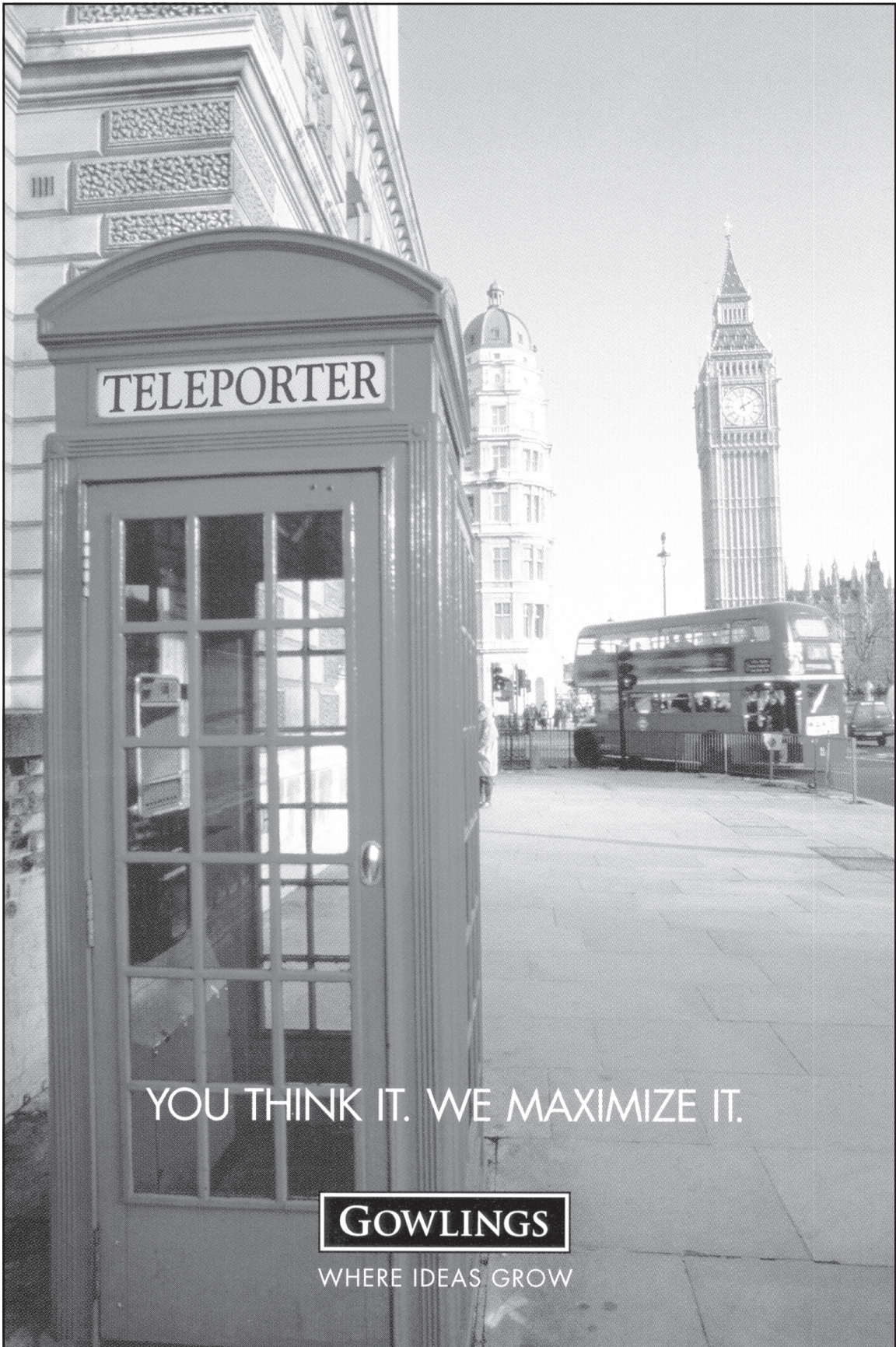
III. Synthesis and Conclusions

Condominium owners who are forced to look to the courts for relief face a number of impediments. Remedies for breach of warranty are available only to original, pre-completion purchasers, and there are significant impediments to enforcing judgments against builders/developers. The liability of municipalities and their building inspectors has been significantly limited by statute. Following the Supreme Court's decision in *Winnipeg Condominium*, tort recovery against builder/developers, architects, and engineers will only be allowed where the defect caused by the defendants' negligence amounts to a substantial danger to health and safety. Such a restriction is unworkable in a situation involving the type of damage sustained by condominiums where progressive and unrelenting rot inside the walls of the building will take years to cause a substantial danger. Litigants should not be forced to wait before having a cause of action, nor should they be denied relief when they take prompt action to repair the defect.

For condominium owners faced with the long term rotting of their homes, negligence claims against the provincial government may offer some relief. By adopting the Building Code and not warning the public when its problems became apparent, the province played a significant role in the "leaky condo crisis." Whether the courts will find the Crown liable in tort remains to be seen.

In the final analysis, there are policy reasons for and against finding the province liable. The government should not have to shoulder the burden every time a group suffers an unfortunate loss, especially when it is the taxpayers of the province that ultimately foot the bill. Those who support governmental immunity will claim that a government that acts irresponsibly should be held accountable only at the polls. Accountability at the polls is essential, but a government that acts negligently should also be held accountable in the courts.

⁴⁶ See also *Mochinski v. Trendline Industries Ltd.* (1996), 29 Canadian Cases on the Law of Torts (2d) 1, where the Crown was held to have a common law and statutory duty of care that could not be delegated to contracting road crews. The duty of care gave rise to a duty to warn of hazards facing users of the roads.



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