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Killing of Falun Gong for their Organs: The Alberta Connection

by
David Matas

GUEST OPINION

David Matas is an international human rights lawyer based in Winnipeg, Manitoba, Canada. These are revised remarks condensed from a presentation at the Central Library, Calgary, 18 January 2013 and the Education Centre, University of Alberta, Edmonton, 19 January 2013.

I want to talk about the killing of Falun Gong for their organs from an Alberta perspective. Falun Gong is a blending and updating of ancient Chinese spiritual and exercise traditions. It began in 1992 with the teachings of Li Hong Zhi and quickly spread throughout China with the encouragement of the Government officials who considered the exercises as beneficial to health and to the finances of the health system.

By 1999, Falun Gong practitioners were, according to a Government survey more numerous than the membership of the Communist Party. At this point, out of fear of losing its ideological supremacy and jealousy at its popularity, the Party banned Falun Gong. The Party began a prolonged, persistent, vitriolic national and international campaign of incitement to hatred against Falun Gong prompting their marginalization, depersonalization and dehumanization in the eyes of many Chinese nationals.

Those who did the exercises after 1999 were arrested and asked to denounce the practice. Those who did not were tortured. Those who refused to recant after torture disappeared. David Kilgour and I concluded that many of the disappeared were killed for their organs. While it would take me too far afield to go through all the evidence that led us to that conclusion, I will mention a few bits.

• Investigators made calls to hospitals throughout China, claiming to be relatives of patients needing transplants, asking if the hospitals had organs of Falun Gong for sale on the basis that, since Falun Gong through their exercises are healthy, the organs would be healthy. We obtained on tape, transcribed and translated admissions throughout China.

• Falun Gong practitioners who were detained and after torture recanted and who then got out of detention and out of China told us that they were systematically blood tested and organ examined while in detention. Other detainees were not. The blood testing and organ examination could not have been for the health of the Falun Gong since they had been tortured; but it would have been necessary for organ transplants.

• Falun Gong practitioners who came from all over the country to Tiananmen Square in Beijing to appeal or protest were systematically arrested. Those who revealed their identities to their captors would be shipped back to their home localities. Their immediate environment would be implicated in their Falun Gong activities and penalized.

To avoid harm to people in their locality, many detained Falun Gong declined to identify themselves. The result was a large Falun Gong prison population whose identities the authorities did not know. As well, no one who knew them knew where they were. This population is a remarkably undefended group of people, even by Chinese standards. This population provided a ready source for harvested organs.

• China maintains what the Government of China euphemistically calls reeducation through labour camps. Those Falun Gong who refused to recant disappeared into the camps.

These camps are both arbitrary detention slave labour camps and vast live organ donor banks. The Laogai Research Foundation estimated in 2008 that the number in the camps then currently detained was between 500,000 and two million souls. The United States Department of State's Country Reports for China report that foreign observers estimate that Falun Gong adherents constitute at least half of the inmates in the country's reeducation through labour camps.

• China has two parallel power structures, a Communist Party structure and a state structure. The Party structure governs the state structure. Every state position up and down the system, in the centre and the regions, has a parallel Party position. It is the Party organ that instructs the parallel state organ.

The Party established an office for the repression of Falun Gong called the 610 office, named after the date of its

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Inside....

Staff and Volunteers

We have been busy these past few months. **Damilola Olawuyi** finished articling at ACLRC. Articling student **Dorab Colah** is currently working with us. **Pamela Dos Ramos** and **Brenda Johnston** continue to work on the Anti-Racism Education Project. We are fortunate have been working with excellent volunteers over the last few months—including **Rabia Shuaib** and **Samantha Casselman** and others. Thanks also to the Pro Bono Law Students who assist us with various projects over the past university year.

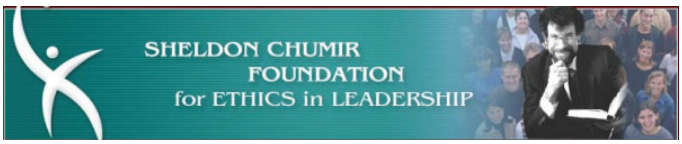
Thanks! - Linda McKay-Panos

Upcoming Events

February 26th, 2013
Noon to 1:30 pm
Room 2370 Murray Fraser Hall
Bill C-45: Changes to the Indian Act and Other Environmental Laws — Effects on First Nations Peoples
Featuring: Robert Janes
Janes Freedman Kyle Law Corporation
Robert Janes practices civil litigation in the Victoria and Vancouver offices, focusing on constitutional, aboriginal and commercial litigation.

Free: Light Lunch will be provided

More information? 403 220.2505



THE RULE OF LAW IN AN AGE OF TERROR

Keynote Speaker:
DENNIS EDNEY
Former Lawyer for Omar Khadr

WHEN: Thursday, February 28, 6:30 - 8:30 PM
WHERE: Murray Fraser Hall, Room 3360,
University of Calgary, Faculty of Law

FREE EVENT; Dessert reception to follow.

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The Canada-China Foreign Investment Promotion and Protection Agreement (FIPPA): Tipping Point for Canadian Sovereignty, First Nations Rights/ Sovereignty and Environmental Protection

by Brian Seaman

Although the *Omnibus Bill, Bill C-45,* must be read in context with the *FIPPA* pact, I have restricted my comments here to the various parts of FIPPA that I see as particularly problematic. I will be re-reading the relevant parts of *Bill C-45* again in the coming weeks as part of an article I want to put together for the *Idle No More* movement as a resource. The various acts under the *Omnibus Bill* that address First Nations lands certainly constitute an attack on existing Aboriginal rights under the pre-Confederation Treaties, among other sources of law. The rights under these Treaties remained law after Confederation, notwithstanding the various attempts by successive Canadian governments to destroy Aboriginal rights and culture, whether we are talking about banning the Ghost Dance, the Residential Schools system, the *Indian Act* and now, *Bill C-45,* which represents a violation of section 35 of the *Constitution Act* of 1982. Section 35 recognizes and affirms the existing and Treaty rights of Canada's Aboriginal peoples, who are defined to include Indians (I prefer the term First Nations but this is the word used in section 35), the Métis and the Inuit.

The comments that follow are restricted to the subject areas where I have relevant knowledge: i) constitutional law, ii) environmental law, and iii) the *Canadian Charter of Rights and Freedoms*. The provisions in *FIPPA* regarding the arbitration of investment disputes, which indeed comprise a large part of the agreement, should be left to a corporate lawyer who specializes in such matters as they are outside my field of knowledge and thus competence. From this point on, I will refer to *FIPPA* as "the pact" or "the agreement" and I will refer to the C*anadian Charter of Rights and Freedoms* as "the *Charter*." I will stress that though the pact equally binds China, when I refer to "us" throughout my critique, I am of course referring to Canada and its citizens. Finally, for anyone who wants "talking points," I have bulleted these and put them in a bold font.

Summary of Main Obligations

The first part of the pact that undermines Canadian sovereignty is found in the section headed **Withdrawal or Denunciation**, which in effect locks us in for 31 years.

It says the agreement remains in effect for 15 years. Then it says that either party can withdraw upon giving one year's notice in writing of an intention to quit. However, this provision is a red herring because it goes on to say that for any investments made before the date that the termination of the agreement becomes effective, the provisions of the agreement will remain in force for another 15 years.

> ***If the agreement is ratified and the China National Offshore Oil Company (CNOOC) invests money in the construction of a pipeline, unless it gets its pipeline or pipelines to the west coast, Canadian taxpayers could be on the hook for whatever financial losses or other unforeseen costs CNOOC or any other Chinese companies doing business in Canada incur. This is why, among other reasons, it is critical to oppose ratification.**

Article 1 Definitions

Sub-section (6) "Measure" is defined to include a law or regulation.

Sub-section (7) "Existing measure" is defined to mean "a measure existing at the time this Agreement enters into force."

What this means is that if the pact is ratified, even if a future federal government were to change parts of *Bill C-45* or repeal it, such an act would not affect this agreement with China. To put it in other words, all those parts of *Bill C-45* that pertain to Aboriginal lands, inland rivers, watersheds, and lakes that were exempted out from environmental protection for the benefit of industrial development, mining, a pipeline or oil extraction would continue to apply to Chinese companies operating in Canada.

> ***It seems that for the Canadian Government, Canadian sovereignty is less important than a business and investment agreement with China. The federal government does not appear to have any regard for Aboriginal rights or environmental protection.**

Sub-section (22) The word "territory" is defined in terms of what constitute the national territories over which Canada and China respectively exercise sovereignty. For both countries, territory is defined to include land territory, air space, internal waters and territorial sea. Then things get rather interesting. For Canada, reference is made to us having an exclusive economic zone and having sovereignty over our continental shelf in accordance with the *United Nations Convention on the Law of the Sea (UNCLOS),* which has been incorporated into Canadian domestic law. However, there is no mention of *UNCLOS* in the definition of Chinese territory, which refers to China exercising sovereign rights or jurisdiction over territorial air space and "any maritime areas beyond the territorial sea over which, in accordance with international law and its domestic law, China exercises sovereign rights or jurisdiction…."

> ***China currently has maritime territorial disputes with many of its Asian neighbours including most notably Japan and its naval vessels routinely venture into the disputed territorial waters of other Asian countries deliberately running over fishing lines and otherwise threatening fishing vessels, ramming them or firing shots over their bows.**

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establishment, the 10th day of the sixth month, June, of 1999. The 610 office is a Party office only, not a state office. The 610 office is the instrument of the Party instructing the police, the prisons, the labour camps, the prosecution and the courts on the repression of Falun Gong. Because persecution of the Falun Gong is Party directed, deflecting it, avoiding it, or combating it, is a political impossibility.

• Waiting times for transplants of organs in China are days and weeks. Everywhere else in the world waiting times are months and years. A short waiting time for a deceased donor transplant means that someone is being killed for that transplant.
• There is no other explanation for the transplant numbers than sourcing from Falun Gong. China is the second largest transplant country in the world by volume after the US. Yet, until 2010 China did not have a deceased donation system and even today that system produces donations that are statistically insignificant. The living donor sources are limited in law to relatives of donors and officially discouraged because live donors suffer health complications from giving up an organ.

The Government of China does acknowledge that the overwhelming proportion of organs for transplants in China comes from prisoners but asserts that the prisoners who are the sources of organs are all sentenced to death. Yet, the number of prisoners sentenced to death and then executed that would be necessary to supply the volume of transplants in China is far greater than even the most exaggerated death penalty statistics and estimates. Moreover, in recent years, death penalty volumes have gone down, but transplant volumes, except for a short blip in 2007, remained constant.

Research in reports published in June 2006, January 2007, and in the book *Bloody Harvest*, November 2009 all of which I co-authored with David Kilgour and in the book *State Organs* August 2012 I co-edited with Torsten Trey concluded that the bulk of prisoners who are sources of organs are mostly practitioners of Falun Gong, sentenced to nothing. Ethan Gutmann, in a chapter published in *State Organs*, presents research showing that there are other transplant victim prisoners of conscience - Uighurs, Tibetans and Eastern Lightning House Christians.

The Government of China accepts that sourcing of organs for transplants from prisoners is ethically wrong. The Government in March 2012 committed to ending the reliance on prisoners for organs in five years. The Government further indicated that this phasing out would start in this year, 2013.

A Government official, Deputy Health Minister Huang Jeifu, went further, conceding in a mid November 2006 speech that: "too often organs come from non consenting parties". The World Health Organization Guiding Principle 11 requires transparency of sources, open to scrutiny, while ensuring that personal anonymity of donors and recipients are protected. China does not respect this principle, so that claims of consent that sometimes are made, despite what Huang Jeifu said, are unverifiable. As well, because prison is a coercive environment, consent in such a context is not meaningful.

A. The Alberta Falun Gong Population

There are six Alberta connections to the killing of Falun Gong for their organs I want to draw to your attention. One is the local Falun Gong population from China.

The victims of persecution of Falun Gong in China are not just in China. They are here in Alberta. Some are here in this audience. These people can tell you in much more specific detail than I can about the politicised Party direction of the persecution of Falun Gong up and down the Chinese power structure, throughout China, the incessant, vituperative incitement to hatred against Falun Gong in China, the impossibility of getting out a contradictory or even different message about Falun Gong, the total repression of divergent voices, the Party insistence on recantation of Falun Gong beliefs in writing, the arbitrary detention without prosecution, trial or sentence in mental hospitals, detention centres and re-education through labour camps of those who would not recant, the brutal systematic unending dehumanizing torture of those in detention who continue to refuse to recant, the systematic blood testing and organ examination of Falun Gong practitioners in detention and the absence of such testing and examination of non-Falun Gong prisoners, and the massive population of unidentified Falun Gong prisoners in detention, people who refuse to disclose their identities to anyone to protect their home environment.

The people who lived through these experiences, who can tell you these tales of horror, are not strangers in a far away land. They are our neighbours.

B. The Calgary Consulate Incitement

A second connection of the killing of Falun Gong for their organs and Alberta has to do with the activities of the Calgary Chinese Consulate. Four individuals while attending a conference at the University of Alberta in Edmonton on June 11, 2004, witnessed two members of the Chinese Consulate distributing anti-Falun Gong literature. They complained to the police that this literature amounted to a hate crime against Falun Gong. The police agreed. The Edmonton Police recommended prosecution.

Any hate crimes prosecution within Canada must first have the consent of the Attorney General. The Attorney General of Alberta refused consent.

The complainants challenged the decision of the Attorney General not to consent to prosecution in the Alberta Queen's Bench. I acted as their lawyer. I submitted to the Court that the Attorney General of Alberta failed to recognize the causal role of propaganda in China against Falun Gong in the persecution of Falun Gong. The anti-Falun Gong material distributed by the two consulate members has strong similarities to the propaganda that has incited hate within China. Since this sort of material has generated hatred in China, it is compelling evidence that the material would likely expose a person to hatred in Canada.

The application of the complainants was dismissed. Mr. Justice Wilson in April 2007 for the Court did not side with the Attorney General on whether the material amounted to incitement to hatred, but rather refused to overrule the exercise of the discretion of the Attorney General. According to the Court, the matter had to be left to the Attorney General to decide.

C. The CNOOC Takeover of Nexen

The Chinese National Offshore Oil Company or CNOOC obtained the approval from the Government of Canada for purchase of the private Alberta based company Nexen. CNOOC has been a bitter and vicious persecutor of Falun Gong. CNOOC's subsidiary in Tianjin, the Bohai Oil Corporation, has

its own 610 office subsidiary, called the Falun Gong Treatment Group or Special

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Case Group.

Bohai/CNOOC's security force and management assisted local police to arrest, detain and send to brainwashing centres or mental institutions their employees who practised Falun Gong. Those sent to mental hospitals, including pregnant women, were injected with nerve damaging drugs.

Falun Gong employees were fined in huge amounts, arbitrarily searched, dismissed, their pay withheld and their possessions confiscated. Those not dismissed were denied benefits and bonuses. They were paid wages equivalent only to the minimum cost of living, regardless of their seniority, position, expertise or education.

There are 77 individual documented verifiable testimonies of this sort of extreme persecution. There are Falun Gong practitioners now in Alberta who worked for CNOOC and were harassed for their beliefs but managed to escape the worst ravages of CNOOC persecution because they got out of China in time. These practitioners personally know others who suffered far worse victimization.

Zeng Qinghong has a central figure in the leadership of the Communist Party. Jiang Zemin was his protégé. Zeng was the member of nine member governing body of the Communist Party of China from 2002 to 2007. He was vice president from 2003 to 2008.

Zeng was also a leader in the persecution of Falun Gong. He was the Communist party official to whom the Minister of State Security reported and he made sure that the whole public security system went after Falun Gong.

Zeng, before he went to Beijing and Communist Party Headquarters, worked for CNOOC. Fu Chengyu who became head of CNOOC after Zeng left is a Zeng disciple and crony. Fu was chosen by Zeng. This close connection between Fu and Zeng means that the persecution of Falun Gong has been given the highest priority in CNOOC.

If you are a Falun Gong practitioner, employment for CNOOC in China is the first stop on a train whose final destination, potentially at least for some, is an unmarked white van where your organs are extracted and taken to the nearest hospital. Stops along the way are meetings with your immediate superior, then the Communist Party officials who run your office, then the local detention centre, then either a mental hospital or a re-education through labour camp.

In my view, in light of this history, the Government of Canada was mistaken in approving the CNOOC takeover of Nexen. Now that the takeover has been approved, the issue of persecution is not over. On the contrary, Albertans should be insisting that their new neighbour stop the persecution of Falun Gong within all CNOOC companies, that all 610 offices in all CNOOC companies be dismantled, that CNOOC admit openly, publicly and in full detail its human rights violating past and that CNOOC compensate fully all its victims for the harm that all CNOOC companies have inflicted.

D. The Shen Yun Performing Arts

Calgary and Edmonton Government theatres, in application of a policy guideline, have required that the orchestra of the Shen Yun Performing Arts be submerged in a pit covered with a dark net for its performances. The company refuses to perform in these circumstances.

Shen Yun is the aesthetic equivalent of Falun Gong, a modernization and blending of ancient Chinese traditions. The hosts in Alberta for Shen Yun are the Calgary and Edmonton Falun Dafa Associations.

Although Alberta officials call the net a safety net, the net in fact creates an unacceptable risk to the dancers by preventing coordination between dancers and the orchestra conductor who, in the pit and under the net, cannot see the dancers. The caging of the orchestra in the net also prevents the audience from seeing the blending of Chinese and Western musical instruments. In addition, the musicians understandably feel they are being treated disrespectfully, being required to play, in substance, in a cage.

Shen Yun performs globally. The Alberta Government theatres are the only theatres in the world that have prevented performance with insistence on an inapplicable net requirement.

Now I do not suggest for a moment that the Alberta officials who have in effect blocked the return of Shen Yun are somehow in cahoots with the Government of China in the repression of Falun Gong. Rather the Alberta officials are oblivious to the global environment in which they operate. Their inflexibility, their insistence on a Procrustean one size fits all policy for the net, shows I would suggest not complicity, but rather a blinkered approach, ignorance of the context and consequences of their actions.

The Communist Party of China attempts to suppress the old China, the classical China, the pre-Communist China, and the real China. Falun Gong spiritually and Shen Yun aesthetically try to keep this traditional China alive. The Alberta Government theatre management, by putting in place conditions that objectively prevent the performance of Shen Yun, become part, by effect even if not by intent, of this stultification of classical Chinese culture.

The Government of Alberta justifies the insistence on the net by asserting that the net requirement is imposed on everyone. However, as this situation amply demonstrates, there is a big difference between formal and substantive equality, between sameness and equity.

E. Spam

Fake e-mails coming from Beijing spread round the world to discredit Falun Gong. I have received many such e-mails myself. I know how, with technical support, to trace the source of these e-mails and see, by tracing the internet protocol address of the source, that the source is Beijing.

Many of these phoney e-mails target Albertans. In 2010, before the net requirement was imposed in Edmonton and Shen Yun was performing there, anti-Falun Gong spammers sent a wave of e-mails to Edmonton theatre managers in an attempt to stop Shen Yun from performing there. In 2011, e-mails containing diatribes appearing to come from Falun Gong were sent to Edmonton city councillors.

In 2012, a person posing as a Falun Gong practitioner named 'Serena,' thanked Edmonton East MP Peter Goldring by e-mail for supporting Falun Gong and Shen Yun Performing Arts, and told him that she had spread posters featuring his image around the world with the words 'Peter supports Falun Dafa!' written on them. When Goldring expressed his concern that his image was being used without permission, Serena told him he would be 'punished' if he opposed her actions.

An e-mail sent to a Southern Alberta Jubilee Auditorium manager involved in the dispute with Shen Yun Performing Arts written in broken English accused the manager and Alberta Culture Minister Heather Klimchuk of being 'evil' if they did not show support for Shen Yun. The e-mail said that those who oppose the show will be 'punished.'

These e-mails make Falun Gong

appear irrational, zealous, and unbalanced. They appear to aim to

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discredit the group and their activities.

None of the senders identified in these e-mails are known to local Falun Gong practitioners and their messages are uncharacteristic of Falun Gong. The Alberta recipients have not, to my knowledge, sought technical support to identify the source of these e-mails. They should do so.

F. Isotechnika

Information on the internet in the spring of 2012 showed that the Edmonton based company Isotechnika intended to commence clinical trials in the end of August 2012 in China of the antirejection drug Voclosporin under a contract with the Chinese company 3SBio. The drug would be used in kidney transplant patients.

David Kilgour and I wrote last July to the Government of Canada Minister of Health, the United States Commissioner of Food and Drugs, and the European Medicines Agency Executive Director requesting that their agencies indicate that, in deciding whether to approve the antirejection drug Voclosporin for use within your jurisdiction, they would not accept data generated from clinical trials in China. We wrote to these agencies:

> "Clinical testing in China of transplant antirejection drugs do not, in our view, meet international standards of transparency, traceability, and informed consent with special regard to vulnerable populations. There is nothing now in place, as far as we can see, that would allow your agency to be satisfied beyond a reasonable doubt that the sourcing of the organs for the clinical trials of Voclosporin is proper."

We also wrote Isotechnika itself asking them to commence a moratorium on trials in China for Voclosporin until such time as transparency allows independent outsiders to be satisfied beyond a reasonable doubt that the sourcing of organs for those trials meets international ethical standards. These letters generated responses and discussions, but no concrete commitments.

Isotechnika has not, as far as I know, to date commenced the conduct of these trials in China but also has not publicly renounced the intention of conducting them. The drug company Novartis in August 2010 issued a statement that the company was observing a moratorium for its clinical immunosuppressive drug trials in China. Isotechnika should do the same.

Conclusion

These six Alberta connections to the persecution of Falun Gong may seem to be a sequence of bits and pieces. Yet, they should be considered as a whole.

The failure to appreciate that victims of the persecution of Falun Gong are here, the refusal to prosecute Chinese Calgary consulate officials for incitement to hatred against Falun Gong, the approval of the CNOOC takeover of Nexen, the insistence on a net requirement for Shen Yun which prevents their performance, the inaction about tracing the phoney spamming anti-Falun Gong e-mails, and the failure of a local pharmaceutical company to commit to a moratorium on the conduct of clinical trials in China of anti-rejection drugs have a cumulative effect. They both manifest and foster ignorance and blindness.

Where is the coordination, the strategy, in Alberta, to combat the persecution of Falun Gong and, in particular, the killing of Falun Gong for their organs? It seems nowhere to be found.

How high a priority in Alberta does the combat against the persecution of Falun Gong and, in particular, the killing of Falun Gong for their organs have when Canadians are faced with competing considerations? The priority it seems is not that high. Competing considerations all too often carry the day.

When we put all the different bits and pieces together, the picture that forms is not pretty. Canadians have been doing far less in Alberta than we could to combat the persecution of Falun Gong and, in particular, the killing of Falun Gong for their organs.

We cannot act unless we see. People concerned about human rights violations often wring their hands, asking what can we possibly do about them? The answer is a lot, when the consequences are right here in front of us. By disassociating the various components of the Alberta consequences, we present unnecessary obstacles to perceiving and combating the persecution.

Do you want to do something about the killing in China of the Falun Gong for their organs? If so, I suggest do something now, here, in Alberta.

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by the Canadian Bar Association (CBA), although this may reduce processing times, the amendment also creates an unduly restrictive system that will remove large numbers of people from the application process who could, in time, qualify (*Letter,* at 2). This has the potential of turning asylum seekers towards smugglers in order to escape harm. Thus, this amendment, just like section 117, can have the opposite effect than that intended by Parliament, by driving refugees into the hands of smugglers.

It will be very interesting to see what happens with the *Appulonappa* case. The Crown is appealing Justice Silverman's ruling to the British Columbia Court of Appeal (Dene, Moore, *Crown to Appeal BC Court Ruling Striking Down Portion of Human Smuggling Law,* The Canadian Press, January 21, 2013), and the case may likely end up at the Supreme Court of Canada. Stay tuned.

Coming Soon:

ACLRC will soon be providing information on our website for Temporary Foreign Workers, Employers and human resources persons.

See aclrc.com

Employer's Guide: Trans-identified People in the Workplace

by Melissa Luhtanen

In 2013 the ACLRC will be releasing its new Employers' Guide For Trans-identified People In The Workplace. This Guide helps employers and employees understand their rights and responsibilities within the workplace, when someone comes out as transgendered. The *Employers' Guide* talks about: definitions, human rights law in the workplace, accommodation, responding to medical requests, revealing one's gender identity to coworkers, the use of gendered bathrooms and privacy issues. The following are some excerpts from the Guide.

The *Alberta Human Rights Act* protects trans-identified people from discrimination in employment under section 7. Under the Act, the ground of "gender" includes "being male, female or transgender" (Protected areas and grounds under the Alberta *Human Rights Act*, Online: Alberta Human Rights Commission website: http://www.albertahumanrights.ab.ca. (Accessed November 27, 2012)). Therefore, "transgender" people are protected from discrimination and harassment in employment, and any terms or conditions of employment. Employers have a duty to accommodate a trans-identified person who needs time-off work for medical reasons, such as surgery or recovery from surgery. Employers also have a duty to accommodate a trans-identified person who returns to work, presenting in their "new" gender. This gender may look "new" to the employer and other employees, but is the transgender person's inner identity.

Employees also have duties regarding accommodation, such as informing the employer of the need for an accommodation, providing a doctor's note for medical issues, discussing potential accommodations that would work for both the employer and employee, and keeping the employer informed of accommodations that are not working. The employer has a duty to accommodate an employee to the point of "undue hardship". However, it is important to remember that Courts and Tribunals have found that some hardship may be necessary in accommodating an employee. An example of a reasonable accommodation would be giving a person time off for surgery, allowing them to use the washroom that matches their gender identity, or ensuring that they can access their medical benefits. Sometimes these accommodations will involve increased costs to the employer (e.g., for time-off work) or a change within the workforce. The Alberta Human Rights Commission has more information on the duty to accommodate (Duty to Accommodate Online: Alberta Human Rights Commission website: http://www.albertahumanrights.ab.ca/Bull_DutytoAccom_web.pdf (Accessed November 27, 2012)) on its website: www.albertahumanrights.ab.ca.

Part of the accommodation process will likely involve the trans-identified employee using the bathroom that corresponds with his or her identified gender. There have been some cases (See: *Ferris v Office and Technical Employees Union, Local 15* [1999] BCHRTD No 55. *Sheridan v Sanctuary Investments Ltd,* [1999] BCHRTD No 43, 33 CHRR D/467 (BC Trib)) that have addressed the use of gendered washrooms. These cases have notably said that using the appropriate washroom is "significant" in the identity of a trans-identified person. Refusing to protect an employee's rights regarding the use of a washroom that matches their gender identity has been found to be discriminatory.

For more information about the Employers' Guide or to book a speaker from the ACLRC please contact us at 403.220.2505 or go to our website at www.aclrc.com.

Congratulations to Yessy Byl, our Northern Alberta Human Rights Educator, for being awarded The Law Society of Alberta's 2013 Distinguished Service Awards in the Category of Pro Bono Legal Service

The Law Society's description of Yessy's accomplishments:

"Ms. Byl demonstrates a proactive, passionate commitment to advocating for the rights of Temporary Foreign Workers within the Alberta Legal Community and beyond. With a dynamic background in labour relations law, Ms. Byl has been a volunteer lawyer with the Edmonton Community Legal Centre (ECLC) since 2003. Over 100 low-income individuals and families have benefited from free legal services extended by Ms. Byl, who provides legal support and advice to Temporary Foreign workers. Her pursuit of justice not only manifests in her pro bono work on individual case files, she is a dedicated advocate and agent for social change. She has made significant contributions to research and publications, written letters, delivered speeches and engaged the public to enhance understanding of this fast-growing group of immigrants in Alberta. She is recognized as being single-handedly responsible for the organization of the Temporary Foreign Worker funding and project implemented by the ECLC, as well as the commencement of immigration outreach clinics. Moreover, she is a shining example of pro bono legal service working to "right situations where she discovered wrongdoing for those unable to adequately fend for themselves."

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***The federal government, in its apparent wish to have a business and investment agreement with China at any price, is willing to acquiesce to aggressive bullying by China of other Asian nations in violation of the International Law of the Sea.**

Article 14 Taxation

Sub-section (1) "Except as provided in this Article nothing in this Agreement shall apply to taxation measures."

***Thus, Canadian sovereignty in general, and Aboriginal rights and environmental protection are not priorities for the federal government. However, retaining Canadian sovereignty over making or changing tax laws is of utmost concern for them—that, and apparently having a business and investment deal with China at the expense of taxpayers, Aboriginal rights and the environment.**

Article 15 Disputes between the Contracting Parties

Sub-sections 1-8 set out how disputes between Canada and China are to be settled. Disputes are to be resolved through secret negotiations and if that doesn't work, then disputes are to be resolved through secret tribunals who have the final say.

***Arriving at a negotiated settlement through diplomacy is to be tried first.**

***If a settlement cannot be negotiated within six months, either party can ask that the dispute be submitted to an *ad hoc* arbitration tribunal. (*Ad hoc* tribunal means this is a specially constituted tribunal formed for this one purpose only).**

***The governments of China and Canada each appoint one of their citizens to this tribunal. These two people then select a third person from another country that has diplomatic relations with both Canada and China. That person will chair the tribunal.**

***This tribunal decides its own rules for procedure. They can decide to conduct hearings in secret if they want to.**

***The decision of this tribunal is final. There is no appeal to any court,whether in China or Canada.**

Article 17 Transparency of Laws, Regulations and Policies

According to this article, each country has to provide to the other advance notice of any proposed new law, regulation or policy or proposed changes to any existing law, regulation or policy. This will give the federal governments of both countries the opportunity to review and comment on proposed new laws, regulations or policies or proposed amendments.

***The wording of Article 17 is vague and broad enough to include anything that could impact on a business investment so that does include Aboriginal rights, unsettled land claims and of course, environmental protection. Giving the Chinese government a say in how, among other things, Aboriginal land claims are to be settled or what kind of environmental protection laws we have in place here in Canada is very concerning.**

Article 24 Arbitrators

According to Sub-section (2) (b), the members of the arbitration tribunal are to be "independent of, and not be affiliated with, or take instructions from, either Contracting Party…."

***CNOOC is completely owned by the Government of China. China's appointee to the tribunal will likely be taking his/her marching orders from the Government of China. Where is the transparency in this process?**

Article 33 General Exceptions

Sub-section (2) allows each country to enact environmental laws subject to the following: that these laws are "not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment…."

***This provision is open to an interpretation that would favour trade and business interests over environmental protection requirements.**

Sub-section (5) (b) (i) sets out that either country can sell arms, ammunition and other military hardware and technology and nothing in this agreement has any impact on that.

***So, military hardware, technology are exempt from the agreement while its effects on environmental and aboriginal concerns are not.**

In conclusion, by way of summary:

***Canadian sovereignty over environmental laws and fresh water is not important to the federal government. Neither are Aboriginal rights.**

***Rule of law takes a back seat to resolving disputes of all kinds that might arise and which affect Chinese businesses and investments in Canada (including Aboriginal land claims or the clean-up costs for an oil spill) to the decisions of secret tribunals that are free to make up their own rules and whose decisions are final.**

***Taxation, military production and technology remain exempt from the agreement while environmental laws cannot constitute a disguised restriction on international trade or investment.**

This agreement has been ratified — time will tell how it affects Canadian sovereignty, aboriginal land claims and other rights, as well as environmental protection matters.

R v Appulonappa: Section 117 (Human Smuggling Provision) of the *Immigration and Refugee Protection Act* Struck Down as Unconstitutional

By Dorab Colah

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Introduction

On September 26, 2007, Janet Hinshaw-Thomas was arrested at the United States-Canada border at Lacolle, Quebec. Ms. Hinshaw-Thomas, the director of a US based refugee resettlement organization, had arrived at the border with 12 Haitians, all seeking refugee protection within Canada. Ms. Hinshaw-Thomas did not seek financial compensation from the refugee claimants, nor were her actions clandestine in nature. In fact, she had emailed the Canadian border authorities five days in advance telling them when she would arrive at the border and how many refugee claimants she would be bringing. She was charged by the Canadian authorities for violating section 117 of the *Immigration and Refugee Protection Act (IRPA),* which criminalizes human smuggling. Section 117(1) states that "no person, shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport, or other document required by this Act".

Given that Ms. Hinshaw-Thomas' actions were motivated by humanitarian reasons, there was significant public outcry following her arrest, and on November 7, 2007, the charges against her were dropped without explanation. However, many refugee advocates feared that others like Ms. Hinshaw-Thomas would find themselves similarly charged, and argued that section 117 of the IRPA should be amended so as to expressly exclude individuals who assist refugees into Canada based on humanitarian motives or close family ties (Canadian Council For Refugees, *Proud to Aid and Abet Refugees, Campaign Backgrounder*, January, 2008 at 1 (Backgrounder)). To this date, the Government has not amended section 117. However, on January 11, 2013, those supporting an amendment to the smuggling provision received good news when the British Columbia Supreme Court handed down its decision in *R v Appulonappa*, 2013 BCSC 31 (*Appulonappa).*

In *Appulonappa*, Justice Silverman found that section 117 of the IRPA violated section 7 of the *Canadian Charter of Rights and Freedoms,* Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (UK), 1982, c. 11 (*Charter*). The accused argued, and Justice Silverman agreed, that because section 117 was written in a way that could criminalize the conduct of persons who assist refugees due to close family ties or for humanitarian reasons, the provision was overbroad and inconsistent with the principles of fundamental justice. Justice Silverman found that section 117 would not be able to be saved under section 1 of the *Charter*, and thus, it was deemed to be of no force or effect.

Facts

In *Appulonappa*, four individuals were accused of human smuggling under section 117 of IRPA in relation to the arrival of 76 Tamil migrants on board the MV Ocean Lady of the B.C coast in October of 2009. Prior to the jury selection for their trial, an application was made to the Court to determine whether section 117 of the IRPA violated section 7 of the Charter, which provides that individuals may not be deprived of their rights to life, liberty and security of the person, except in accordance with the principles of fundamental justice (Appulonappa, at para 29).

Defining "Human Smuggling"

Justice Silverman began his assessment of the case by stating that there is no commonly accepted definition of human smuggling (*Appulonappa*, at para 65). Article 3 of the *Migrant Smuggling Protocol (Protocol) d*efines the crime of "smuggling of migrants" as:

> the procurement, in order to obtain, directly or indirectly, **a financial or other material benefit,** of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident [**emphasis added]**.

States that are signatories to the *Protocol* are required to implement domestic legislation that captures the essence of the definition laid out in the *Protocol.* However, as noted by Justice Silverman, this definition is a "negotiated minimum" standard, and States are entitled to pass domestic legislation that is broader in scope than the definition in the *Protocol* in order to protect state interests (*Appulonappa*, at para 69). Section 117 of IRPA reflects a broader definition than that in the *Protocol*, and, similar to Canada, Australia, the United Kingdom, and the United States have also defined the act of human smuggling much broader than the negotiated minimum standard, as neither of these countries include "financial or material benefit" as an element of the offence of human smuggling (*Appulonappa,* at para 72).

Justice Silverman went on to discuss how certain categories of persons and conduct were excluded from the definition of human smuggling laid out in the *Protocol*. These would include individuals who provide support to migrants for humanitarian reasons, as well as those who provide support due to close family ties (*Appulonappa*, at para 84). Justice Silverman pointed out that various international documents have stressed that the Protocol was never intended to capture the actions of individuals who, without receiving any financial or material gain, assist refugees due to family ties or for humanitarian reasons (*Appulonappa*, at para 85-86). However, Justice Silverman also noted that there is no international instrument, or domestic legislation that expressly prohibits the prosecution of humanitarian aid workers or close family members from being charged with smuggling (*Appulonappa,* at para 87).

Explaining "Over-breadth"

Citing the Supreme Court of Canada (SCC) case of *R v Heywood,* [1994] 3 S.C.R. 761 at 792-794, Justice Silverman explained that when courts consider whether a piece of legislation is overbroad, the courts must first consider the objective of the legislation, and then ask whether the State, in pursuing that objective, uses means that are broader than necessary to accomplish

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it (*Appulonappa*, at para 90). Under section 7 of the *Charter*, if legislation infringes one's life, liberty, or security of the person in a manner that goes beyond what is needed to accomplish the governmental objective, that legislation will be deemed to violate the principles of fundamental justice and will therefore violate section 7 of the *Charter*. Further, Justice Silverman noted that in deciding whether legislation is overly broad, the SCC has stated that courts may consider the application of the legislation to hypothetical scenarios, provided that those scenarios are "reasonable" (*Appulonappa*, at para 93-94).

Defence Arguments

The Defence noted that the objective sought by the Government in implementing section 117 of IRPA was to combat human smuggling, but argued that the wording of the section captured actions of persons that the Government had no intention of prosecuting, going beyond what was needed to accomplish the governmental objective. Thus, the defense claimed that the provision was overly broad (*Appulonappa*, at para 97).

The Defence provided three hypothetical situations to illustrate the over-breadth of section 117. The first involved a situation where friends or family members arriving in Canada as refugees at the same time assist other family members to arrive as refugees together with them. Under this scenario, a mother arriving as a refugee with her child could be considered a smuggler under section 117, as she could be seen as aiding or abetting the arrival of her child. Similarly, a husband who arrives with his spouse after the husband does all the preparatory work could also be in violation of section 117. Individuals who are not family members could also be caught by section 117. If two refugee claimants travel together, each assisting the other to arrive in Canada, both could be found liable under section 117 (*Appulonappa,* at para 104).

A second hypothetical raised by the Defence was where a Canadian citizen sent money to a family member in another country with a legitimate need to escape that country. If the Canadian family member sent the money knowing that it would be used to pay a human smuggler, that family member would likely be captured by the wording of section 117 (*Appulonappa*, at para 105).

The final hypothetical provided by the Defence involved a situation where humanitarian or legal workers assist refugee claimants to arrive at a port of entry in order to make a refugee claim. In addressing this hypothetical, the Defence raised the case of Ms. Hinshaw-Thomas as an example of how humanitarian workers can be captured by the wording of section 117 (*Appulonappa*, at para 107). The Defence pointed out that international instruments that Canada is a signatory to, such as the Protocol, have stressed that the individuals represented in the above hypotheticals should not be prosecuted for human smuggling *(Appulonappa*, at para 106). Thus, the Defence claimed that the wording of section 117 captures a wider range of conduct and persons than is necessary to achieve the government's objective (*Appulonappa*, at para 109).

Crown Arguments

The Crown argued that the objective of section 117 was to stop human smuggling and to protect the victims of human smuggling. The Crown argued that section 117 was deliberately drafted in a broad fashion so as to provide the government with flexibility in achieving its objective. The Crown argued that the section did not go beyond what was necessary to achieve the government's objective and thus, was not overbroad (*Appulonappa*, at para 112). The Crown stated that although the legislation does not expressly exempt humanitarian workers or family members, "…it has been the practice of Canada to not charge such persons, and that…such a practice is best assessed on a case by case, and fact by fact basis. It is best fulfilled by discretion, rather than by statute" (*Appulonappa*, at para 119).

The Crown also attacked the hypotheticals used by the Defence. It argued that the proposed hypotheticals were not reasonable, stating that they were far-fetched, marginally imaginable, remote and extreme examples. It argued that there was no possibility that the persons suggested in the hypotheticals would be charged under section 117 (*Appulonappa,* at para 122).

In addition, the Crown argued that section 117(4) of IRPA serves as a mechanism that would prevent the prosecution of humanitarian workers and family members. Section 117(4) states that "no proceedings for an offence under this section may be instituted except by or with the consent of the Attorney General of Canada." The Crown agreed that the *Protocol* and other international instruments signed by Canada never intended that humanitarian workers or family members be charged with human smuggling. The Crown stated that section 117(4) reflects this intention, as the Attorney General may not consent to the prosecution of humanitarian workers or family members who assist refugees. Although the Attorney General has the discretion to determine whether there is evidence that an individual is conducting the legitimate activities of a humanitarian worker or family member, once the Attorney General is satisfied that a person is a humanitarian worker or family member, he or she has no discretion to consent to a charge (*Appulonappa*, at para 131).

Finally, the Crown argued that Parliament is entitled to deference in the means that it has chosen to fulfill its objective, stating that it would be improper for the Court to strike down section 117, as it would amount to an unwarranted judicial intervention in an area dealt with properly by the Parliament of Canada (*Appulonappa*, at para 134).

Analysis by Justice Silverman

Responding to the Crown's argument that the proposed hypotheticals were not reasonable because no person in the hypotheticals could ever be charged, Justice Silverman found the Crown's position untenable. He stated that "the determination of whether or not a hypothetical is reasonable must be based upon the activity complained of, not upon the possibility of whether or not persons would ever be charged" *(Appulonappa*, at para 148). He added that the hypotheticals were "technically within the scope of human smuggling under section 117", yet "…are not within the objectives that Canada is trying to achieve through section 117. To the contrary, it is the clear intention of the government not to prosecute

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such people" (*Appulonappa*, at para 149). However, that intention is not expressed within section 117, which makes the section much broader than necessary. Justice Silverman added that the over-breadth of the section would make it "…impossible for persons to know if certain activities (those of humanitarian aid workers and close family members) will result in charges under section 117, despite "Canada's intention to the contrary" (*Appulonappa,* at para 153). Thus, Justice Silverman found the section cast "too wide a net" and found it "…inconsistent with the principles and purposes of the international Conventions and Protocols" *(Appulonappa*, at para 155).

Justice Silverman also rejected the Crown argument that section 117(4) would serve as a mechanism to prevent the prosecution of persons that Parliament did not intend to target. First, Justice Silverman raised the example of Ms. Hinshaw-Thomas to show that section 117(4) does not always act as a safeguard against the prosecution of humanitarian workers (*Appulonappa*, at para 160). Second, he added that even if section 117(4) operates to protect humanitarian workers and family members, it is unclear how such persons could raise this as an issue. Would they raise it in Court, or raise it with the Attorney General? Who would carry the burden of raising it? Under what circumstances could a decision to prosecute be challenged? (*Appulonappa*, at para 161) In addition, Justice Silverman noted that even if there was an obligation not to prosecute family members and humanitarian workers, it was unclear how that obligation could be enforced by the courts. Moreover, if the obligation was a matter of policy, Justice Silverman noted that there was nothing preventing that policy being changed by administrative fiat *(Appulonappa*, at para 161). Finally, Justice Silverman stated that there was no evidence before him detailing the standard that guides the Attorney General's discretion in deciding to lay, or withhold a charge, and that there was nothing requiring such a standard to be made public. Even if such a standard existed, and was made public, it would still be more challenging for a person to anticipate conduct that could be penalized to the same certainty than if that conduct was based upon actual legislation. Essentially, a person could not know whether or not the Attorney General would consent to a prosecution (*Appulonappa*, at para 161).

Justice Silverman ruled that section 117 of IRPA could not be saved by section 1 of the Charter, which requires the Court to balance the impugned legislation with the public interest. Thus, Justice Silverman declared section 117 to be of no force or effect (*Appulonappa,* at para 168-178).

Commentary

Justice Silverman's decision in this case was the correct one. Following the arrest of Ms. Hinshaw-Thomas, three former Attorneys General and three former Ministers of Immigration authored a letter stating that section 117(4) has proven inadequate in serving as a safeguard against the prosecution of individuals who assist refugees out of humanitarian concerns or close family ties. The authors concluded by recommending that "appropriate regulatory and legislative changes should be adopted" (*Backgrounder*, at 9). Justice Silverman correctly recognized the shortcomings of section 117 (4) when determining the over-breadth of section 117.

Furthermore, the rule of law requires that individuals be provided notice of what they can and cannot be legally penalized for. As Justice Silverman noted, there was no evidence detailing what standard the Attorney General uses in deciding whether to prosecute cases dealing with human smuggling. The consequence of failing to provide such notice is that it can have a "chilling effect" on the activity in question. Essentially, individuals will not engage in an activity, albeit innocent, out of a fear that they may be found criminally liable.

It is also important that courts enforce laws as they are written, as opposed to interpreting implicit, but unstated executive policy or legislative intentions. In its arguments, the Crown asserted that it is not the government's intention to prosecute humanitarian workers or family members who assist refugees due to compassionate reasons. This is also reflective of international opinion. If this is so, the government should revise section 117 in a way that makes it clear what activities are considered, and not considered to be human smuggling.

This case also raises another issue. Human smuggling is considered an activity worthy of criminal sanction due to the belief that it allows criminal, and/or terrorist organizations to prey upon, and exploit vulnerable individuals seeking to escape life-threatening situations. If this is true, it is important that the government provides asylum seekers with incentives to use legal and government sanctioned channels to escape from danger. As discussed earlier, the over-breadth of section 117 may create a "chilling effect", which could preclude humanitarian workers or family members from assisting asylum seekers. Without these parties available to help them, individuals seeking refuge may turn towards criminal and/or terrorist organizations to help smuggle them to Canada, which is exactly the type of activity that the government is trying to fight.

Recent amendments to the *Immigration and Refugee Protection Regulations* have also disincentivized, rather than incentivized, the use of legal channels to safety (Canadian Bar Association, *Immigration and Refugee Protection Regulations: Private Sponsorship of Refugees Program, Letter to Citizenship and Immigration,* July 9, 2012) (*Letter*). Resettled refugees are either government assisted or privately sponsored. Private sponsors can consist of Sponsorship Agreement Holders (SAH's), Groups of Five (five or more Canadian citizens or permanent residents over the age of 18), or community sponsors. The government has managed the demand from SAH's by imposing a cap on the number of refugees they may sponsor. This has driven refugees to Groups of Five and community sponsors. The new amendment to section 153 of the IRPR manages the demand to Groups of Five and community sponsors by requiring the United Nations High Commission on Refugees (UNHCR) or a foreign state to recognize that the foreign national being sponsored is a refugee. As noted

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Supreme Court of Canada Changes Direction on Discrimination and Disability

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By Linda McKay-Panos

The caselaw on disability and discrimination has had its highs and lows over the past decade and a half. A recent decision of the Supreme Court of Canada, *Moore v British Columbia (Education)* 2012 SCC 61 ("*Moore*"), provides hope for those with disabilities, particularly learning disabilities, and their families.

The first significant Supreme Court of Canada ("SCC") case in the disability area was *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 ("*Eldridge*"). Two medical patients, who were hearing impaired, successfully argued that the British Columbia government's failure to provide sign language interpreters as an insured benefit under the Medical Services Plan violated *Canadian Charter of Rights and Freedoms* ("*Charter*") section 15(1) by discriminating on the ground of physical disability. The SCC noted that this was an example of *adverse effects discrimination* because hearing impaired patients failed to benefit equally from a service (health care) offered to the general public (paras 63 to 73). The SCC noted that they were not ruling that sign language interpretation would have to be provided in every medical situation; effective communication should take into consideration such factors as the importance of the information to be communicated, the context in which the communications will take place and the number of people involved (para 82). In finding that the policy was not saved by *Charter* section 1 (reasonable and justifiable in a free and democratic society), the court noted that the claimants were asking only for equal access for services that are available to all, and that the government had not provided evidence that equal access would unduly strain the fiscal resources of the state. Thus, the government had not reasonably accommodated the appellants' disability, nor had it accommodated the appellants' need for accommodation to the point of undue hardship (para 87; 94).

It is important to note that the factors considered in finding discrimination under *Charter* section 15(1) relied upon by the court in *Eldridge* were those laid out in *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 (*Andrews*):

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

Seven years later, the disability community was disappointed with the result in *Auton (Guardian ad litem of) v British Columbia (Attorney General)* 2004 SCC 78 ("*Auton*"). A number of parents of autistic children applied for a declaration that the province of British Columbia's failure to fund applied behavioural therapy for autism violated *Charter* section 15(1). While the government had funded a number of programs for autistic children, it did not establish funding for the applied behavioural therapy program because of financial constraints, and the newness and controversial nature of the therapy. While the lower British Columbia courts found that the failure to fund the autism therapy for autistic children violated *Charter* section 15(1), the SCC disagreed and allowed the government's appeal.

The outcome in *Auton* was influenced by the developments in the years after *Eldridge*, when the SCC appeared to move away from the *Andrews* test for discrimination to a test that was set out in the case of *Law v Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497 (*Law*). In *Auton,* the SCC, guided by *Law*, set out the following issues as guidelines for determining whether there was discrimination (para 26):

> (1) Is the claim for a benefit provided by law? If not, what relevant benefit is provided by law?
> (2) Was the relevant benefit denied to the claimants while being granted to a comparator group alike in all ways relevant to benefit, except for the personal characteristic associated with an enumerated or analogous ground?
> (3) If the claimants succeed on the first two issues, is discrimination established by showing that the distinction denied their equal human worth and human dignity?

In analyzing the three issues in *Auton*, the SCC first noted that the British Columbia *Medicare Protection Act* did not promise that any Canadian would receive funding for all medically required treatment. All that was conferred was core funding for services provided by medical practitioners, with funding for non-core services left to the province's discretion. Thus, the benefit was not provided for by the law (para 35). The SCC distinguished the *Eldridge* case on this point, by stating that *Eldridge* was concerned with unequal access to a benefit that the law conferred, and with applying a benefit-granting law in a non-discriminatory fashion. By contrast, *Auton* was concerned with access to a benefit that the law had not been conferred (para 38).

While the SCC had concluded that there was no benefit provided by law, the court went on to consider the other two issues. With respect to finding a comparator group (issue #2), the court

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held that the appropriate comparator group was (para 55):

> a non-disabled person or a person suffering from a disability other than a mental disability (here autism) seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required.

Because there was no evidence of how members of the appropriate comparator group were treated, a finding of discrimination could not be sustained (para 62).

With regard to discrimination (issue #3) the SCC said that the failure to establish the basis for a claim for discrimination deprived them of a foundation for inquiring whether any distinction was discriminatory in the sense of treating autistic children as second-class citizens and denying their fundamental human dignity (para 63).

As demonstrated in *Auton*, after *Law*, selecting an appropriate comparator group and requiring that the distinction denied a person's equal human worth and dignity created confusion and obstacles for claimants seeking to rely on *Charter* section 15(1).

In the years following *Auton,* the SCC revisited the *Law* test in *R v Kapp,* 2008 SCC 41 ("*Kapp*") and *Withler v Canada*, 2011 SCC 12 ("*Withler*"), and addressed some of the concerns with finding an appropriate comparator group and the issue of human dignity in the discrimination analysis.

In *Kapp*, the SCC said the following about discrimination (paras 17 to 18):

> [17] The template in Andrews, as further developed in a series of cases culminating in Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, established in essence a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? These were divided, in Law, into three steps, but in our view the test is, in substance, the same.
>
> [18] In Andrews, McIntyre J. viewed discriminatory impact through the lens of two concepts: (1) the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds; and (2) stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant's or group's actual circumstances and characteristics. …. Additionally, McIntyre J. emphasized that a finding of discrimination might be grounded in the fact that the impact of a particular law or program was to perpetuate the disadvantage of a group defined by enumerated or analogous s. 15 grounds….

In *Withler*, the SCC said the following with respect to comparator groups (paras 2, 60 and 63):

> [2] To resolve this appeal, we must consider comparison and the role of "mirror" comparator groups under s. 15(1), an issue that divided the courts below. In our view, the central issue in this and other s. 15(1) cases is whether the impugned law violates the animating norm of s. 15(1), substantive equality: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. To determine whether the law violates this norm, the matter must be considered in the full context of the case, including the law's real impact on the claimants and members of the group to which they belong. The central s. 15(1) concern is substantive, not formal, equality. A formal equality analysis based on mirror comparator groups can be detrimental to the analysis. Care must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the "proper" comparator group. At the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?
>
> …
>
> [60] In summary, a mirror comparator group analysis may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply. In all these ways, such an approach may fail to identify — and, indeed, thwart the identification of — the discrimination at which s. 15 is aimed.
>
> …
>
> [63] It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.

Now we arrive at the *Moore* case in 2012. At first glance, one would expect the result to be similar to the *Auton* case. However, it more closely resembles the outcome in *Eldridge*. First, it should be noted that *Moore* is a case based on British Columbia's *Human Rights Code*, rather than the *Charter.* However, in many human rights cases, the courts rely on discrimination case-law based on the *Charter* (particularly Charter section 15(1)).

Jeffrey Moore's father, Frederick, filed a human rights complaint against the School District and the British Columbia Ministry of Education alleging that Jeffrey had been discriminated against because of his disability and had been denied a service customarily available to the public contrary to BC's *Human Rights Code*, section 8. Jeffrey had a severe learning disability and the

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intense remedial instruction he needed for his dyslexia was not available in the public school system. Based on the recommendation of the public school psychologist, Jeffrey was enrolled in specialized private schools that charged tuition (paid by his family). The Human Rights Tribunal concluded that the failure of the public school system to give Jeffrey the support he needed to have meaningful access to the educational opportunities offered by the Board was discrimination under the *Human Rights Code.* In addition, the Tribunal ordered that Jeffrey's parents be reimbursed for the costs related to his attendance at private schools, as well as $10,000 for pain and suffering (para 20). The Tribunal also found that there was systemic discrimination by the District because of the underfunding of the Severe Learning Disabilities programs and the closing of a Diagnostic Centre aimed at providing services to students with severe learning disabilities. Thus, the Tribunal ordered a wide range of systemic remedies against both the District and the Province of BC (para 22).

The Supreme Court of BC overturned the Tribunal's decision, finding that Jeffrey's situation should be compared to other special needs students and not to the general student population. This failure to compare Jeffrey with the appropriate comparator group had tainted the whole discrimination analysis and, as a result, the Court overturned the Tribunal's decision (para 23). A majority of the BC Court of Appeal agreed with the BC Supreme Court, stating that he should not have been compared to the general student population (para 24). One dissenting Justice would have allowed the appeal, holding that special education was the means by which meaningful access to educational services was achieved by students with learning disabilities (para 25).

The SCC agreed with the dissenting Justice, and held that if Jeffrey was compared only to other special needs students, full consideration cannot be given to whether had had genuine access to the education that all students are entitled to in British Columbia (para 31).

The SCC next looked at whether BC or the District had any justification for their conduct (e.g., in closing the Diagnostic Centre). While the Tribunal had accepted that the District faced financial difficulties, it also found that the cuts were disproportionably made to special needs programs. Also, the District had not looked at any alternatives that could be made available to accommodate special needs students if the Diagnostic Centre were closed. Thus, the finding of discrimination against Jeffrey was restored (para 53).

However, the SCC declined to uphold the Tribunal's finding that systemic remedies were necessary. The Tribunal had ordered the following (para 57):

> *That the Province allocate funding on the basis of actual incidence levels, establish mechanisms ensuring that accommodations for Severe Learning Disabilities students are appropriate and meet the stated goals in legislation and policies, and ensure that districts have a range of services to meet the needs of Severe Learning Disabilities students.
> *That the District establish mechanisms to ensure that its delivery of services to Severe Learning Disabilities students meet the stated goals in legislation and policies, and ensure that it had a range of services to meet the needs of Severe Learning Disabilities students.
> *The Tribunal remained seized of the matter to oversee the implementation of its remedial orders.

The SCC held that since the claim was made on behalf of Jeffrey, the remedies should address his situation. The other systemic remedies were too remote. While evidence of systemic discrimination was admissible to demonstrate discrimination against Jeffrey, the remedy should address the individual complaint.

Some disabilities advocates are disappointed that the systemic remedies were not upheld, but this does not mean that other people cannot benefit from the ruling in the case. If they are in the same situation as Jeffrey, they can complain to the Human Rights Tribunal or they can expect that the Province and District will provide appropriate assistance so as to avoid future human rights complaints.

One can now understand (if not agree with) the divergence between the outcomes in these cases. The difference largely flows from the differing focus on the elements of a claim of "discrimination", and in particular, the role of comparator groups in the analysis. In *Auton*, the appropriate comparator group was front and centre and functioned to Auton's detriment. In addition, *Auton* focused on the discretionary nature of the services in question (they were "non-core" services). This is a formal view of discrimination in which the impact of the denial of services (adverse effect) was not considered. In *Moore*, the SCC focused on the access to equal benefit from a service provided to the general public (as in *Eldridge*).

Disability advocates will hope that the ruling in *Auton* was merely a detour on the path to substantive equality for persons with disabilities.

ACLRC Re-Brands

You will soon notice that ACLRC has refreshed our colours and our logos. We will also be changing our website and have added a presence on facebook. You will notice other social media opportunities on our website! Please visit our facebook page and "like" us so we can have more functionality on facebook:

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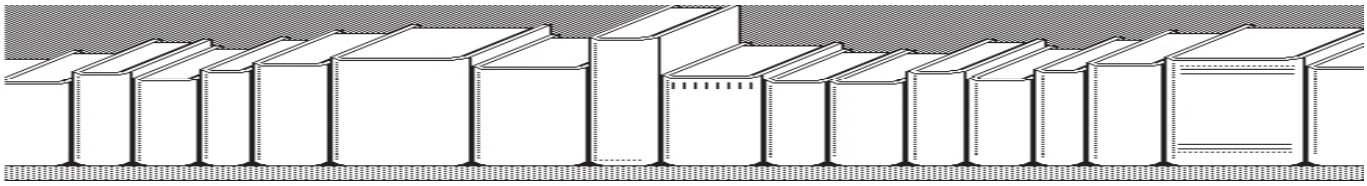

NEW Employer's Guide: Trans-identified people in the Workplace Handy guide to terminology, pertinent human rights law, privacy, revealing gender identity to other employees, use of bathrooms and other issues regarding accommodation of trans-identified persons in the workplace. 4 pages. Available in booklet format (free) or online at aclrc.com (downloadable resources).

Fetal Alcohol Spectrum Disorder and the Adult Criminal Justice System in Canada Fetal Alcohol Spectrum Disorder (FASD) affects adults and children around the world. In the past several years, there have been a number of Canadian initiatives addressed at dealing with youth in the criminal justice system who have FASD. The damage inflicted by alcohol consumption during pregnancy is permanent. Thus, although programs aimed at dealing with criminal behaviour of youth are admirable, FASD may also be a factor in many adults engaged in criminal behaviour. Our report focuses on the central issues faced by adults with FASD in the criminal justice system. These include making false confessions, being permanently unfit to stand trial, being unable to rely on the defence of not criminally responsible on account of mental disorder, the relevance of FASD to the sentence received after a finding of guilt, and finally, the effectiveness and desirability of incarceration for FASD adults. 114 pages. 2012. ISBN # 1-896225-64-2 ($25+ s/h).

LGBT Rights: Climbing the Judicial Steps to Equality Canadian laws regarding lesbian, gay, bisexual and trans-identified (LGBT) individuals and couples have drastically changed in the past twenty years. After same-sex marriage rights became a reality in early 2000, many people thought that human rights and equality for LGBT people and same-sex couples had been achieved. However, this perception does not play out in a detailed examination of the law, policies and accessing legal resolutions. This paper outlines the areas where the law has not been amended to protect LGBT people and where its application results in differential treatment of LGBT individuals. Includes a history of LGBT rights in Alberta. It then reviews legal areas that have the potential for continued change, interpretation and legislative review, such as human rights, family issues, hate crimes, transgendered persons' rights, refugees and immigrant issues and issues in schools. 80+ pages. 2012 ISBN #1-896225-71-3 ($20 + s/h)

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ACLRC's Civil Liberties Award given to Saima Jamal

Below is the speech delivered by Brian Seaman before the award presentation

Think globally; act locally. We've all heard this saying. For people who want to make the world a better place, the message is clear. We live on one planet. What happens somewhere else does affect our lives locally. What we do locally does have an impact on the world around us.

Think globally; act locally. Nobody is quite sure who first came up with this powerful phrase, this call to speak up, to take action, when faced with evil, evil which comes to us in many faces. It comes to us as racism. It comes to us as sexism. It comes to us as hatred for people living on the other side of a wall. It comes to us as a petroleum company hiring mercenaries to drive indigenous people from their ancestral homeland in the Amazon rain forest.

During these past three years, in her capacity as programme manager at the University of Calgary Consortium for Peace Studies, Saima Jamal has organized dozens of events to raise awareness about human rights and civil liberties issues at home and abroad. In a very real way, Saima has brought the world to our door. There has been much talk over the years about the idea of global citizenship. Saima, through her work, is helping so many of us realize that people everywhere have a right to live their lives freely and in harmony with others and the environment.

As I look around this room, I recognize people who are working locally to raise awareness about human rights, civil liberties and social justice issues in our city, our province, and our country. I recognize too that you, and we at the Alberta Civil Liberties Research Centre, are making important contributions in these areas.

However there are few among us who can match the dedication, the passion and the leadership of the recipient of this year's Alberta Civil Liberties Research Centre award for leadership in human rights. Therefore, it is my honour, my privilege and my pleasure, to present this award to my friend, my colleague, my *apu*, Saima Jamal.

Left to Right: Linda McKay-Panos, Saima Jamal, Brian Seaman

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