CENTREPIECE

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# Deporting Canada's Immigrant Criminals: Procedural Fairness and Inadmissibility due to Serious Criminality

by Shannon Beckett

*Shannon Beckett is entering her third year of studies at the University of Calgary Faculty of Law. This article is based on a much longer paper submitted in an Immigration Law class.*

GUEST OPINION

***Introduction***

The Immigration and Refugee Board of Canada (IRBC) is an administrative tribunal that is responsible for deciding specific immigration and refugee matters in Canada. Part of the Mission Statement of the IRBC is "to resolve immigration and refugee cases efficiently, fairly and in accordance with the law." (Immigration and Refugee Board of Canada – "About the Board," online: Immigration and Refugee Board of Canada http://www.irb.gc.ca/Eng/brdcom/abau/Pages/Index.aspx) This statement is fairly straightforward. A tribunal such as the IRBC is entrusted with deciding cases with huge potential benefits, and consequences for the individuals involved, and it is thus vital that these decisions be made legally and fairly.

This article provides a detailed analysis of the "serious criminality" provision of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*) as it relates to permanent residents in order to determine if the process followed by the various actors involved in assessing inadmissibility under this provision is consistent with procedural fairness and the principles of fundamental justice. Specifically, this article analyses whether the deprivation of the right of appeal to the Immigration Appeal Division for permanent residents under s. 64 of the Act raises questions about the lack of procedural fairness in this process**.** The effect of the removal of the right of appeal to the Immigration Appeal Division is that conviction can lead automatically to deportation. This is problematic because there are a wide variety of offences that could lead to a conviction which meet the criteria of section 64, and further, there are a wide variety of characteristics of individuals convicted of such offences that may warrant humanitarian and compassionate considerations to be taken into account. By mandating deportation in every case, and not taking into consideration individual circumstances, arguably, the objectives of the *IRPA* having to do with keeping Canada safe and preventing serious criminals from remaining in Canada are not being met.

***Inadmissibility based on Serious Criminality under the IRPA***

The objectives and application of the *IRPA*, with respect to immigration, are stated in *IRPA* s. 3(1). Goals such as increasing cultural diversity, supporting the Canadian economy, facilitating commerce, and fostering family reunification appear to be the thrust of this section; however, other objectives of this section include maintaining the security of Canada, and denying access to Canada to persons who are criminals or security risks *(IRPA*, s. 3(1)). The stated objectives of this legislation highlight the tension between fostering immigration into Canada on the one hand, and keeping Canadians safe from potentially dangerous persons on the other. One area where this tension is manifest is in the inadmissibility provisions of the *IRPA*.

The *IRPA* articulates eight distinct types of inadmissibility into Canada which are listed in sections 34 through 41 (*IRPA* ss. 34 to 41). Inadmissibility under these sections tends to result from either an individual's potential to put a strain on Canada's social services, or from an individual's potential to be a safety risk to Canadians.

*- continued on page 4*

*Inside....*

# Staff and Volunteers

We have been busy these past few months. **Kerry Cundal** and **Cole Eslinger** are currently articling at ACLRC. **Adrienne Landry** was with us for several weeks performing an internship for her Masters Degree at Ryerson's University. University of Calgary Faculty of Law student **Shannon Beckett** is our summer law student. **Pamela Dos Ramos a**nd **Brenda Johnston** continue to work on the Anti-Racism Education Project. We are fortunate to be working with excellent volunteers for the last few months—including **Johanna Dias, Monica Cheng, Darcy Cosgrove, Kennedy Thompson, Kathryn Kitchen, Kelly Meier, Efrat Idelson, Jon Kibreab, Ramneet Sierra, Fatima Samhat, Eugenia Iskra** and **others.**

Thanks! *-Linda McKay-Panos*

## Upcoming Events

**ACLRC Brown Bag Lunch Seminars at University of Calgary, Faculty of Law**
**Mark Your Calendar**
**November 30, 2010 (International Human Rights Day) and March 17, 2011 (Int'l Day for the Elimination of Racial Discrimination)**
**Other seminars will be advertised on our website: aclrc.com**

## Gender, Culture and Religion: Tackling Some Difficult Questions

**The Marsha Hanen Symposium on Ethical Leadership and Gender Equality**

The Symposium will explore gender equality issues presented by Canada's cultural and religious diversity

**Sheldon Chumir Foundation for Ethics in Leadership**
**Friday, October 1, 2010 and Saturday, October 2, 2010**
**Metropolitan Conference Centre**
**333 4th Ave SW Calgary**

Registration Required: $90 or $45 for students/low income
Please Contact: www.chumirethcsfoundation.ca

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***Centrepiece***

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# Bully Bosses: When Harassment is Not Discrimination

By Linda McKay-Panos

*Reprinted from LawNow Volume 34 Issue 4*

What legal remedies does an employee have if he or she is verbally or non-verbally bullied by his or her supervisor or co-workers? In the workplace, bullying can include behaviours such as: damaging your reputation, humiliating you in public, accusing you of lack of effort, calling you names, insulting, teasing, or intimating you, preventing your access to opportunities, isolating you physically or socially, imposing undue pressure to produce work, setting impossible deadlines, making consistent unnecessary disruptions, failing to give you credit, assigning meaningless tasks, setting you up for failure or removing responsibility (C. Rayner, H. Hoel, C. Cooper, *Workplace Bullying: What We Know, Who is to Blame and What We Can Do,* London: Taylor and Francis, 2002).

In 2007, the Workplace Bullying Institute of the United States commissioned Zobgy International to collect statistics on bullying/harassment. Their report indicated that 37% of American adult workers had been bullied in the past or were currently being bullied in the workplace (see Results of the WBI US Workplace Bullying Survey online: http://workplacebullying.org/research/WBI-Zogby2007Survey.html). Canadian experts indicate that the prevalence of workplace bullying is likely similar in Canada. For example, the Canadian Association of University Teachers reported in 2005 that 38% of education workers polled reported being targets of verbal abuse, physical threats, and other forms of intimidation by students (Czernis, *Bulletin*, 2005 p. A-23). A 2005 study of 180 Canadian prairie workers by Lee and Brotheridge indicated that 40% reported experiencing at least one incident of psychological harassment or bullying on a weekly basis for at least six months. "When Prey Turns Predatory: Workplace Bullying as a Predictor of Counteragression/bullying, Coping and Well-Being" (2006) 15(3) European Journal of Work and Organizational Psychology 377).

What are some of the social and economic impacts of workplace bullying? Research in the United Kingdom shows that 1/3 to ½ of stress-related illness is due to workplace bullying. A report tabled in the British Parliament estimated that 40 million working days are lost each year because of bullying. Bullying causes not only the target to leave the job; in some cases people who witness the bullying also leave, often without giving feedback ("Bullying: Facts, Figures and Costs", online: http://www.bullyonline.org/workbully/costs.htm#Facts).

In Canada, there has been some legal response to the problem of workplace violence. Occupational health and safety laws in several jurisdictions, including the federal sphere (transportation companies, banks, airlines and other federal undertakings), British Columbia, Alberta, Saskatchewan, Manitoba and Nova Scotia, directly address workplace violence as a health and safety issue. For example, *Alberta's Occupational Health and Safety Act,* R.S.A. 2000 c. O-2, s. 390 requires employers to develop a policy and procedures respecting potential workplace violence. Section 391 requires employers to instruct workers on how to recognize workplace violence, communicate the organization's policy and procedures related to workplace violence, develop appropriate responses to workplace violence, and develop procedures for reporting, investigating and documenting incidents of workplace violence.

While these provincial and federal codes address violence in the workplace, what about harassment (e.g., verbal or non-verbal bullying)? While there is growing recognition of workplace bullying/harassment as a significant problem, and some companies have harassment policies, the only *legal* remedy available in most jurisdictions across Canada is to make a complaint under human rights law. There are limitations to this process, however. The behaviour must be based on discrimination under a ground an in an area recognized by the human rights code(s). For example, if the discriminatory harassment in the employment setting is based on race, religion, gender or other such ground, the human rights law could provide a remedy. However, in many cases, harassment is based on other grounds or perhaps grounds that are not easily identifiable. In these cases, aside from perhaps launching a civil suit for a tort (e.g., of the intentional infliction of mental distress), there is not much in the way of legal protection from this problem.

One exception is Quebec's *Act Respecting Labour Standards* prohibits "psychological" harassment (R.S.Q. c. N-1.1, ss 81.18 and 81.19). Second, Ontario introduced Bill 168, *An Act to amend the Occupational Health and Safety Act,* which deals with violence and harassment in the workplace. It is in force June 15, 2010. The proposed amendments set out a positive duty for every employer to take specific steps to prevent and manage workplace harassment and violence.

Ontario's Bill 168 defines workplace violence and harassment as:

> "workplace harassment" means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known as unwelcome
> "workplace violence" means (a) the exercise of physical force by a person against a worker in a workplace that causes or could cause physical injury to the worker, (b) an attempt to exercise physical force against a worker in a workplace that could cause physical injury to the worker

Under Bill 168, every Ontario employer that regularly employs more than five workers must develop and post a policy addressing workplace violence and harassment. The employer must also develop a program to implement the policy. Further, the program must include measures to control risk of workplace violence and harassment,

- *continued on page 4*

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emergency response procedures reporting procedures to be followed by workers, and investigation procedures.
The Bill also places a duty on the employer to take every reasonable precaution for the protection of a worker, if the employer knows or ought reasonably to know that there is a likelihood that the safety of a worker might be endangered at the workplace by an act of domestic violence.

The employer is also required to provide information and instruction to workers on its workplace violence and harassment policy and program. Further, the employer is required to disclose to its workers the risk of violence from a person with a history of violent behaviour who they may encounter in the course of employment. This latter requirement may engender some privacy concerns as it is widely drafted. For example, is the history of violent behaviour limited to the workplace or could it be any history of violent behaviour?

Finally, Bill 168 adds that an employee can refuse work if there's workplace violence. The endangered employee is required to stay only "as near as reasonably possible to his or her work station".

As the costs (both economic and social) of harassment and violence at the workplace are quite considerable, it is positive that the Ontario government is seeking to address this problem through legislation. This is especially so in the case of harassment, where often the harassment is not based on a ground of discrimination covered under human rights codes, and therefore it is necessary to provide another legal avenue for addressing this increasing phenomenon. In addition, hopefully the education provided about the harassment policy and programs will have the added effect of reducing harassment in the workplace.

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Serious criminality is one of the various ways that permanent residents may be found to be inadmissible to Canada. The grounds for inadmissibility based on serious criminality are stated in section 36 of the *IRPA* which reads:

> 36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for
>
> (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;
>
> (b) having been convicted of an offence outside of Canada, that if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or
>
> (c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

If a permanent resident or foreign national is found to be inadmissible under section 36 then sections 44 and 45 of the *IRPA* set out the appropriate process to be followed. Under section 44(1) an immigration officer who believes that a permanent resident or foreign national is inadmissible may prepare an inadmissibility report which is then sent to the Minister or his or her delegate for review. Under section 44(2), after reviewing the report, the Minister or his or her delegate may then refer the report to the Immigration Division (ID) for an admissibility hearing or, in the case of a foreign national, the Minister's delegate may make a removal order herself. If the matter is referred to the ID, and proof is provided that the permanent resident or foreign national has been convicted of an offence which has a potential punishment of at least 10 years in prison, and/or is convicted of an offence and sentenced to at least 6 months in prison, then the only option for the ID member hearing the matter is found under section 45(d) which requires the member to make the applicable removal order against the individual..

One of the differences between the former *Immigration Act,* R.S.C. 1985, c. I-2 (*IA*) and the *IRPA* is evident in the next step of the process. Under the previous legislation, an individual could appeal to the Immigration Appeal Division (IAD) against the removal order issued by the ID, *(IA*, s. 70(1)(b)). This is still the case for individuals who are sentenced to less than two years in prison, and for individuals who have committed an offence outside of Canada. However, under s. 64 of the *IRPA*, the right to appeal to the IAD is removed for persons in Canada, who are sentenced to two years or more in prison and therefore the decision of the ID to issue a removal order becomes final.

Section 64(2) sets out a specific definition of "serious criminality" which differs from the definition set out in section 36. Section 64(2) specifically requires that an individual be punished *in* Canada, and be sentenced to at least two years in prison, before she will lose her appeal to the IAD. That means that individuals subject to sections 36(1)(b) and(c) are not going to be denied their right to appeal to the IAD as those provisions refer to acts committed outside of Canada. Similarly, individuals falling under 36(1)(a) who are sentenced to less than two years in prison will not lose their right of appeal.

The justification for the removal of the appeal to the IAD for such a specific group of "serious criminals" under section 64 takes us back to the stated objectives of the act, specifically the objectives that relate to keeping Canada secure, and, s. 64 clearly highlights the desire on the part of the legislature, to be able to quickly and efficiently remove persons from Canada who pose some kind of threat to the safety of other Canadians.

*- continued on page 5*

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Under section 63(3) of the *IRPA*, a permanent resident can appeal the decision of the ID to issue a removal order, provided they do not meet the criteria of section 64. The IAD has jurisdiction under section 65 of the *IRPA* to take into account humanitarian and compassionate considerations when deciding whether or not to allow an appeal against a removal order for a permanent resident. Therefore, the effect of the removal of the right of appeal to the IAD is that considerations specific to an individual's case will not be taken into account in the decision to remove her from Canada.

***Procedural Fairness and the Baker Factors***

Procedural fairness is a principle of administrative law that refers to the duty of administrative decision makers to act "fairly" within the context of the process of their decision-making. The Latin phrase *audi alteram partem,* or "listen to the other side," is understood as the most basic articulation of a duty of procedural fairness (David J. Mullan et al, *Administrative Law :Cases, Text, and Materials* 5th ed. WordsWorth Communications, (Toronto: Emond Montgomery Publications Limited, 2003) at 103) and it suggests the idea that a decision maker must at least listen to the position of an individual about whom a decision is being made, before deciding the case. Building on this rule, Canadian courts have held that in cases where procedural fairness is found to be required, the minimum required process is that an individual know the case she has to meet and be allowed to respond to it before a decision is rendered (*Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police*, 88 D.L.R. (3d) 671, [1979] 1 S.C.R. 311, at para 27).

Process is not required in every case of administrative decision-making (*Knight v. Indian Head School Division No. 19*, 69 D.L.R. (4th) 489, [1990] 3 W.W.R. 289, [1990] 1 S.C.R. 653, at para. 30 (*Knight*)). For example, if the decision is, "legislative action in its purest form," then procedural fairness will not be required (*Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735, at paras. 25-29). However, if process is required, then an administrative decision maker must adhere to procedural safeguards if the eventual decision is to be seen as fair, and capable of withstanding judicial review.

In the context of inadmissibility due to serious criminality, decisions by the Minister and/or his or her delegate, immigration officers, members of the ID, and members of the IAD, are all decisions which attract a duty of procedural fairness. This is because the nature of a decision of this kind is specifically directed at an individual, and likely has a significant impact on the individual (*Knight*, at para. 28; there are three factors to consider when deciding whether a general duty of procedural fairness exists; the nature of the decision; the relationship between the parties; and the impact of the decision on the individual).

Even when process and procedural fairness is found to be required however, the content of the duty of fairness is variable, and according to Justice L'Heureux-Dubé in *Knight* "is to be decided in the specific context of each case" (*Knight*, at para. 50). In 1999, the Supreme Court of Canada, in *Baker v. Canada (Minister of Citizenship and Immigration)*, set out five non-exhaustive factors relevant to the determination of the content of procedural fairness: the nature of the decision being made, and the process followed in making it; the nature of the statutory scheme; the legitimate expectations of the person challenging the decision; the impact of the decision on the individual; and the choices of procedure made by the agency itself (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, at paras. 23-27 (*Baker*)). The output of this test dictates whether a higher or lower level of procedural fairness is required.

***Baker Factors and Serious Criminality under the IRPA***

The content of procedural fairness is context dependent, and as such discussing it in the abstract without a specific fact scenario is really nothing more than an exercise in educated guessing. However, a significant amount of information is provided by the *IRPA* itself, and case law on the topic of deportation has shown how the Courts are likely to determine the content of procedural fairness in removal cases. The Federal Court, Federal Court of Appeal and the Supreme Court of Canada have each dealt with procedural issues that arise in conjunction with inadmissibility provisions under the *IRPA*, and its predecessor the *IA*. *Baker, Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3 (*Suresh*), *Cha v. Canada (Minister of Citizenship and Immigration)* (2006), 267 D.L.R. (4th) 324 (Fed. C.A.) (*Cha*) and *Hernandez v. Canada (Minister of Citizenship and Immigration)* 2005 FC 429 (*Hernandez*) have all applied the *Baker* factors to different inadmissibility provisions, and overall these cases demonstrate that the position of the courts is that a more relaxed duty of fairness in removal cases is appropriate.

The particular facts of a case will govern the Baker analysis, and will lead to potentially different outcomes under the *Baker* factors. For example, in *Baker* itself, the court decided that more than a minimal amount of procedural fairness was required and articulated that the individuals affected by the decision had a right to "have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered." (*Baker*, at para. 32). The Courts in *Suresh, Cha* and *Hernandez* all concluded that upon weighting the *Baker* factors against the particular facts of each case, a more relaxed duty of fairness was required. In *Suresh*, the court suggested that at a minimum this duty included the right of an individual to be made aware of the case against him, and an opportunity to challenge the case against him by presenting evidence (*Suresh*, at para. 122). In *Cha* (at para. 52), the court noted that even a low level of procedural fairness required that an individual be fully informed of the case against her, that she be allowed to respond to that case and present evidence. *Hernandez* decided that the duty of fairness required that the individual be made aware of the case to meet by being made aware of the purpose of the interview and the section 44 report (*Hernandez*, at paras. 70-1). Further, the court stated that the duty required that an individual be given the opportunity to make submissions "either orally or in writing," and that an

- continued on page 6

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individual be afforded the opportunity to have counsel attend the interview *(Hernandez,* at paras. 70-1).

The case law in the immigration context suggests that at a minimum, in situations where a permanent resident is at risk of deportation she will be entitled to the procedural rights of being made fully aware of the case against her, and being allowed to respond to the case against her by making submissions.

With respect to the process under the *IRPA* for finding individuals inadmissible due to serious criminality where the individual has been sentenced in Canada to two years or more in prison, a question arises as to how the basic level of procedural fairness required by the *Baker* analysis can possibly be provided if the effect of section 64 is to remove the only obvious opportunity for an individual to respond to the case against her. Again, the output of the *Baker* analysis will be fact and context dependent, and so it is hard to say what level of process will be required in any given case, but the general trend of the case law in this area has been to offer at least the above noted minimal procedural safeguards. It is thus important to look at the specific provisions implicated in this process that may provide an opportunity for this basic level of procedural fairness to be met.

***Procedural fairness and section 44 of the IRPA***

On its face, the *IRPA* appears to predetermine that if an individual is convicted in Canada of an offence and is sentenced to at least two years in prison, she will be automatically removed from Canada. According to the *IRPA*, the only hearing that an individual is afforded throughout the inadmissibility determination process is at the ID, and that hearing will have only one possible outcome if the person meets the criteria above. In such a case, an individual will be ordered removed from Canada. This appears to be an outright denial of procedural fairness in that there is no apparent ability of an individual to respond to the case against her in a meaningful way through a hearing process or otherwise.

However, under section 44(1) of the *IRPA* an officer *may* prepare a report and forward it to the Minister. Similarly, section 44(2) provides that the Minister *may* refer the report to the immigration division. The inclusion of the word *may* in both of these provisions suggests that at both stages of the section 44 reporting process, there is discretion conferred upon the decision maker.

The scope of discretion conferred on immigration officers and Minister's delegates within the context of the section 44 report is covered in detail in the applicable Citizenship and Immigration Canada enforcement manuals. Enforcement manuals are departmental guidelines directing how individuals working in the immigration context are to interpret and apply particular provisions of the *IRPA*, and although these manuals are only guidelines, and are therefore not binding on individual officers, they have been viewed by Canadian courts as a strong indicator of legislative intent and thus have somewhat of a binding effect (*Cha*, at para. 15: "It is trite law that these debates, testimony and governmental guidelines are not binding on government institutions and even less so on the courts, but it is accepted that they can offer useful insight on the background, purpose and meaning of the legislation"). *Enforcement Manuals* 5 and 6 relate specifically to the preparation and review of reports under section 44, and provide direction as to the discretionary nature of sections 44(1) and 44(2).

***Enforcement Manual 5 - Writing 44(1) Reports***

Enforcement manual 5 gives immigration officers "functional direction and guidance on when an officer should consider writing a report under the provisions of A44(1) of the *Immigration and Refugee Protection Act*" (Citizenship and Immigration Canada, *Enforcement Manual 5,* "Writing 44(1) Reports" (10 August 2007) at s. 1 (*Enforcement Manual 5*). The manual opens with a select list of objectives relevant to the *IRPA's* inadmissibility provisions which include the objectives of the *IRPA* outlined in section 3(1)(h) and (i) as discussed above. The manual suggests that immigration officers use these particular objectives as a backdrop when deciding whether to write a section 44 report (*Enforcement Manual 5*, s. 8.1). Section 8.2 of the manual provides a list of factors that immigration officers can consider when deciding to write a section 44(1) report which include factors such as: whether the individual is a permanent resident or foreign national; whether the individual has been cooperative; how long the individual has been in Canada; and whether the permanent resident has accepted responsibility for their actions. However, section 8.3 goes on to narrow the list of factors to be considered in criminal inadmissibility cases. This section states that although the factors under section 8.2 are always to be considered, "in cases of criminal inadmissibility the scope of the discretion […] will greatly diminish". Section 8.3 lists 6 factors to be considered in the context of criminal inadmissibility cases, but 3 of those factors seem to have to do only with the finding of fact that an individual meets the definition of criminality (what was the sentence imposed; what was the maximum sentence that could have been imposed; and has the permanent resident been convicted of any prior criminal offence). The remaining factors seem to focus on the circumstances of the case, implying that an officer may be able to take these circumstantial factors into consideration. However, the list of factors under section 8.3 ends with a note stating that "[r]egardless of the above factors, in all cases where an officer is of the opinion that a person is inadmissible on grounds involving […] serious criminality […] it is important to have a formal record of that inadmissibility. That is best accomplished by preparing an A44(1) inadmissibility report" (*Enforcement Manual 5*, s. 8.3). This statement seems to suggest that an immigration officer has almost no discretion in deciding not to write a section 44(1) report in cases of serious criminality.

Section 8.9 of the manual provides guidance to immigration officers as to what procedural safeguards need to be provided to an individual subject to a section 44(1) report. The manual provides that an individual be allowed to have counsel and/or an interpreter present at the time of interview in order to ensure that the individual understands the nature of the interview (*Enforcement Manual 5*, s. 8.9). More specifically, this section states that an individual needs to be informed of the "criteria against which their case is

- continued on page 7

- continued from page 6

being assessed and the possible outcome of the review.". One of the ways that this is accomplished is through the provision of a form letter which states the nature of the allegation against her, and the potential outcome of the proceedings. This letter also conforms to the guideline requiring that an individual be given an opportunity to "provide information," by outlining certain criteria that may be taken into consideration upon review of the case by the Minister's delegate (*Enforcement Manual 5,* at 22-3). The opportunity to respond varies with the particular letter that an individual is given. In cases involving an interview, the letter implies that oral submissions will be taken into account, whereas if no interview is foreseen, the letter states that an individual may make "a written submission providing reasons why a removal order should not be sought" (*Enforcement Manual 5,* at 22-3).

Superficially, the guidelines seem to conform to the amount of process required for cases involving inadmissibility based on serious criminality as discussed in the relevant case law. However, although it seems clear that an individual at this stage will know the case against her, it is unclear as to how any submissions made by that individual would allow her to participate meaningfully in the proceedings against her, being that the immigration officer, at this juncture, has no obvious discretion not to write the section 44(1) report if the individual meets the criteria of serious criminality. However, the letter provided to individuals in these situations clearly suggests that the written or oral submissions will be taken into account by the Minister's delegate "upon review of the circumstances of [the] case" (*Enforcement Manual 5,* at 22-3). It then becomes important to look at the scope of discretion of the Minister's delegate in making the decision to refer the section 44(1) report on to the ID to evaluate if procedural fairness is accorded at this stage of the process.

***Enforcement manual 6 – Review of reports under A44(1)***

Within the context of the decision by the minister's delegate whether or not to refer the section 44(1) report to the ID, the same basic procedural safeguards are provided for according to enforcement manual 6. With respect to the analysis of the submissions made by an individual at the 44(1) stage of the proceeding, section 19.2 of the manual lists several factors that the Minister's delegate can take into consideration in her decision (Citizenship and Immigration Canada, *Enforcement Manual 6,* "Review of Reports Under A44(1)" (12 April 2007) at 11 (*Enforcement Manual 6*)). An individual's age at the time of landing, length of time in Canada, location of family support and responsibilities, and history of non-compliance are some of the factors that the Minister's delegate can consider both for criminal and non-criminal cases (*Enforcement Manual 6*). As with *Enforcement Manual 5* however, more guidance on factors relevant to criminal cases is provided. The manual states that with respect to criminal cases, "the seriousness of the offence will be an important consideration in assessing whether to refer a report to the Immigration Division" and further that, "[t]he fact that a conviction falls within A36(1) itself is an indication of its seriousness for immigration purposes" (*Enforcement Manual 6*). These statements seem to lead to the conclusion that a Minister's delegate may be very limited in what he can take into consideration when making this kind of decision in cases of serious criminality. Moreover, the factors listed for consideration in criminality cases are limited to factors related to the offence and criminal history of an individual. The enforcement manual makes it clear in section 19 that the Minister's delegate "must assess each case on its own merits," and that the guidelines concerning what factors to take into consideration when deciding whether or not to refer the section 44(1) report on to the Immigration Division, are "not intended to restrict Minister's delegate in the lawful exercise of his discretion" (*Enforcement Manual 6*). However, the language of the sections of the manual dealing with criminality cases strongly suggests a restrictive approach to exercising that discretion in favour of not referring the section 44(1) report on to the Immigration Division.

Upon analysis of the guidance provided to immigration officers and Minister's delegates in writing and referring section 44 reports, a question arises as to whether the opportunity for an individual to make submissions during the section 44 proceedings is actually an opportunity for that individual to participate meaningfully in the process, if neither the immigration officer, nor the Minister's delegate has any significant amount of discretion in cases of serious criminality. It is arguable that meaningful participation by an individual in a case of serious criminality would, at the very least, require fair consideration of an individual's submissions to a Minister's delegate. If, as implied by enforcement manual 6, a Minister's delegate is to use the fact that an individual falls under section 36(1) as a heavily weighted factor suggesting a section 44 report be referred to the ID, then it is arguable, that submissions made by an individual related to matters other than the offence itself (for example the factors articulated in the letter given to individuals at the 44(1) stage of the process), may not be given fair consideration. Because the enforcement manuals are only guidelines and are not binding on officers or Minister's delegates in making their respective decisions, it is necessary to look at judicial treatment of cases involving section 44 reports for further clarification.

***Judicial Treatment of Discretion under Section 44***

The Federal Court and Federal Court of Appeal have considered procedural fairness within the context of the amount of discretion conferred upon immigration officers and Minister's delegates in several cases. In 2004, the Federal Court in *Correia v. Canada (Minister of Citizenship and Immigration),* [2004] F.C.J. No. 964 at para. 24 (*Correia*) distinguished the serious criminality provision from other inadmissibility provisions in the *IRPA* on the basis that in other inadmissibility provisions, "officials are required to make judgments both as to fact and law". The court concluded that because inadmissibility due to serious criminality requires only that a person be convicted and sentenced according to the criteria in section 36(1), that an immigration officer in deciding whether to write a section 44 report is "limited to securing knowledge that the

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- continued from page 7

conviction and sentence were rendered" (*Correia,* at para. 27). Further, the court stated that the Minister's delegate under section 44(2) could likewise only consider the facts of the conviction and of the sentence (*Correia,* at para. 27). The Federal Court in *Leong v. Canada (Solicitor General)* (2004), 256 F.T.R. 298, at para. 19 (*Leong*) agreed with the analysis in *Correia* emphasizing that, "decisions under ss. 44(1) and 44(2) are routine administrative decisions."

In 2005, the Federal Court in *Hernandez* shifted their perspective on this issue. Justice Snider stated that upon the application of the *Baker* factors to a case of deportation based on serious criminality where section 64 prohibited an appeal to the IAD, there still existed a duty of fairness wherein individuals were entitled to know the case against them, and have the opportunity to make meaningful submissions (*Hernandez*, at para. 72). Justice Snider stated that these elements of procedural fairness could be provided for within the context of the section 44 report (*Hernandez*, at para. 79). According to Snider, both the officer and the Minister (or delegate) had discretion in making their respective decisions, and that the scope of this discretion allowed decision makers to consider submissions "related to the applicant beyond the fact of his conviction" (*Hernandez*, at para. 79). Justice Snider responded to the comment by the court in *Correia* that in deciding not to write the report, and/or not to refer the report to the ID officers and Minister's Delegates were effectively finding a person to be ""admissible" for reasons unrelated to serious criminality," (*Correia*, at para. 21) by commenting that "[t]he practical effect of a decision by the officer not to prepare a report is that, in spite of being "inadmissible", as defined in IRPA, there are compelling reasons to allow that person to remain in Canada" (*Hernandez*, at para. 38).

In 2006, the Federal Court of Appeal came to the opposite conclusion in *Cha*. In *Cha*, Justice Decary stated that because the section 44 report is applicable to a wide variety of inadmissibility provisions, "[e]ven when "may" is read as granting discretion, all grants of discretion are not created equal" (*Cha*, at para. 1). Justice Decary went on to suggest that the conferral of discretion through the use of the word "may" would be variable based on factors such as the type of inadmissibility in question, and the status of an individual in Canada (temporary or permanent) *Cha*, at para. 22). Justice Decary concluded that in cases of inadmissibility based on criminality or serious criminality, "[i]mmigration officers and Minister's delegates are simply on a fact-finding mission," implying that they are not permitted to take into account the specific circumstances of any given case (*Cha*, at para. 35). However, it is important to note that in *Cha*, the individual in question was a foreign national and not a permanent resident, and Decary himself stressed that he was "not purporting to rule on any situation other than the very specific one at issue" (*Cha*, at para. 13).

The case law is clearly conflicting on this topic. Whether an individual is a permanent resident or foreign national will potentially bear on the level of discretion immigration officers and Minister's delegates can exercise within the section 44 process, but it is not clear exactly what the overall scope of this discretion is. Whether or not at the section 44 stage of the process immigration officers and Minister's delegates can consider submissions which articulate factors specific to an individual's case, it is arguable that such factors must be considered somewhere in the process in order to ensure that principles of fairness and justice are met. To allow individuals to make submissions only satisfies one aspect of the duty of fairness. In order to be able to participate meaningfully in the process, individuals must have those submissions "fully and fairly considered" (*Baker*, at para. 32). It has been argued that the denial of an appeal to the IAD under section 64 of the IRPA is unconstitutional in that it does not allow for submissions made by individuals concerning the particular circumstances of their case to be considered. However, the Supreme Court has taken a narrow approach to arguments of this kind.

***Procedural fairness and the Canadian Charter of Rights and Freedoms***

Procedural fairness is a core tenet of our legal system, and has a complex relationship to the *Canadian Charter*

- continued on page 9

# New On-Line Resource!

The Alberta Civil Liberties Research Centre is launching a new online web-course on how to combat bullying and harassment in your school. The course, which takes two to three hours to complete online, can be done all at once or in several sessions.

The materials focus on developing a school-wide approach to bullying. Recent research has indicated that involving an entire school and the extended community is a more effective method of addressing bullying than just dealing with single incidents or providing course materials in particular classes. The method described in this online course is based on recent research. It helps teachers to strategize within their schools about how to combat bullying, given the individual strengths and weaknesses of their particular school environment. Often bullying is dealt with on a case-by-case basis. This approach ignores the larger issue within the school or community as a whole. Finding a resolution to an individual case of bullying ignores other environmental factors, such as school culture or family dynamics. Using a whole-school approach addresses the underlying issues and combats bullying in a more comprehensive manner.

The online course has an introduction to the ACLRC and the educational materials we publish. The beginning sections discuss the definition of bullying and how it affects diverse communities, bullying statistics, school policies and other laws. The next section on creating a school-wide approach presents the research on how to: create an anti-bullying policy; implement programs to combat bullying; involve the school, parents and broader community; and evaluate your program. Some preventative ideas on combating individual bullying incidents are also reviewed to help the participant understand what has shown success and what has worsened the bullying problem.

A one-hour version of the course can also be presented by a trained Human Rights Educator at professional development days or conferences. This is a free service funded by the Alberta Law Foundation. For more information or to take the online course, go to aclrc@aclrc.com and click on 'Resources'.

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*of Rights and Freedoms*, *Constitution Act, 1982*, R.S.C. 1985, App. II, No. 44. (*Charter*). Under section 7 of the *Charter*, an individual has the right to life, liberty and security of the person, and also the right not to be deprived of this right except in accordance with the "principles of fundamental justice". In *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, at para. 103 (*Singh*), Justice Wilson noted that in order for the principles of fundamental justice to be adhered to, at a minimum, a duty of fairness must also be adhered to. Similarly in *Suresh,* (at para. 113), the court connected procedural fairness with the principles of fundamental justice by stating that, "[t]he principles of fundamental justice of which s. 7 speaks, though not identical to the duty of fairness elucidated in *Baker*, are the same principles underlying that duty." This is all to suggest that Canada;s top court views procedural fairness as a principle of fundamental justice.

***Section 64 and the Charter***

In *Singh,* at para. 81, Justice Wilson made it clear that the *Charter* applies to "every human being who is physically present in Canada." Thus, it is settled law that the protection of the *Charter* extends its protection both to permanent residents, and to foreign nationals who are in Canada. However, although it applies to all persons in Canada, the *Charter* itself distinguishes between citizens and non-citizens (i.e.: permanent residents). According to Justice Sopinka in *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at para. 26 (*Chiarelli*) "the most fundamental principle of immigration law is that a non-citizen does not have an unqualified right to enter and remain in Canada." This analysis is based on the fact that section 6 of the *Charter*, which deals with mobility rights, distinguishes between citizens and non-citizens. Under section 6(1) a Canadian citizen has a right to enter and remain in Canada, and under section 6(2) permanent residents are granted mobility rights within Canada (*Charter*, s. 6(1) & 6(2)). The inclusion of permanent residents explicitly in section 6(2) and the exclusion of permanent residents from section 6(1) suggests that the right to enter and remain in Canada was explicitly not granted, as a right, to permanent residents (*Chiarelli*, at para. 28-29). This distinction between citizen and non-citizen is a factor that influenced the court in *Medovarski v. Canada (Minister of Citizenship & Immigration),* [2005] 2 S.C.R. 539, at para. 46 (*Medovarski*) to decide that the deportation of someone who is not a citizen of Canada is not, by itself, an infringement on the right to life, liberty, and security of the person. Presumably, the court decided this way on the basis that the right to the liberty of remaining in Canada is conditional for permanent residents on continuing admissibility.

With respect to the *IRPA*, the question arises as to whether, over and above the removal order itself, the section 64 denial of the right to appeal to the IAD (who have jurisdiction to consider humanitarian and compassionate considerations) would be enough to trigger the liberty interest under section 7 of the *Charter*. As discussed previously, procedural fairness requires, at a minimum, that an individual be able to know the case against her and be able to respond to it meaningfully before a decision is made. Considering that the courts have been reluctant to allow for consideration of factors specific to an individual's case within the section 44 proceedings, when an individual is sentenced to two years or more in prison in Canada the effect of the removal of the appeal to the IAD is a mandatory removal order. Within this process, there is no obvious opportunity for an individual to participate meaningfully, as the facts of her conviction and sentence will alone determine the outcome. The removal of the appeal to the IAD appears to remove the ability of an individual in this situation to have the protection of the procedural safeguard of meaningful participation.

*Chiarelli* makes it clear that the denial of humanitarian and compassionate considerations will not be viewed as unconstitutional (*Chiarelli*, at para. 29). Although in *Chiarelli* the Court refrained from deciding whether deportation alone could trigger the section 7 liberty interest, they found that even if the decision to deport the individual did infringe upon his section 7 *Charter* rights, the lack of opportunity to present mitigating factors for consideration did not amount to a breach of the principles of fundamental justice (*Chiarelli*, at para. 29). The Court in *Chiarelli* looked to the former *Immigration Act* itself when they articulated the nature of the principles of fundamental justice in question. The Court stated that:

> There is one element common to all persons who fall within the class of permanent residents described in s. 27(1)(*d*)(ii). They have all deliberately violated an essential condition under which they were permitted to remain in Canada. In such a situation, there is no breach of fundamental justice in giving practical effect to the termination of their right to remain in Canada […] There is nothing inherently unjust about a mandatory order […] It is not necessary, in order to comply with fundamental justice, to look beyond this fact to other aggravating or mitigating circumstances (*Chiarelli*, at para. 29).

At first blush the analysis of the nature of the principles of fundamental justice in this case appears to make sense. However, with respect to the articulation of the law in *Singh* and *Suresh* which both support the idea that procedural fairness itself, is a principle of fundamental justice, the analysis becomes confusing. By failing to decide whether section 7 of the Charter was implicated via a mandatory deportation order which did not take into account the mitigating circumstances of the individual, the court left somewhat of a gap in the law. However, assuming, as the court did, that section 7 was implicated in a scenario of this kind, *Singh* and *Suresh* would seem to suggest that the principle of fundamental justice of procedural fairness would be violated if an individual were not able to make meaningful submissions that were considered by a decision maker.

More recently, the Supreme Court in *Medovarski* stated that removal from Canada without the benefit of an appeal to the IAD was in accordance with the principles of fundamental justice

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in that section 25 of the *IRPA* allows for the evaluation of humanitarian and compassionate considerations specific to an individual's case (*Medovarski*, at para. 47). Although they do not overtly state it, the court in *Medovarski* seems to be implying that procedural fairness, in the form of being able to respond meaningfully, is provided in cases of removal with no appeal, by section 25 of the *IRPA*.

Section 25 allows the Minister to consider humanitarian and compassionate considerations when an individual has been found to be inadmissible (*IRPA*, s. 25). This provision is specific to foreign nationals, so that the Minister can only consider humanitarian and compassionate considerations with respect to permanent residents once the ID has issued a removal order against them, and that order has come into force *(IRPA* s. 46(c)). This is because according to section 46(c) of the *IRPA*, only after a removal order comes into force, does a permanent resident lose her status. All of this is to say that although there is a possibility that the Minister will take these considerations into account, it is not during the process of determining an individual's inadmissibility to Canada, and may actually have to take place once the individual has already been removed from the country.

The inclusion of section 25, which is by no means a guaranteed way for individuals to have their cases heard, apparently led the Court in *Medovarski* to conclude that deportation as discussed above "does not reach the level of a *Charter* violation" (*Medovarski,* at para. 47). The availability of section 25 of the *IRPA* as a means for consideration of case specific factors seems to have influenced Canadian courts to relax their judicial review of the duty of fairness in IRBC decisions of this kind.

***Conclusion***

Because removal from Canada can have such a significant negative impact on individuals subject to removal orders it is important to ensure that decisions of this kind are made fairly. In general, for cases of deportation due to serious criminality, the duty of fairness requires that an individual be made aware of the case against her, and that she be able to respond meaningfully to it. Throughout the removal process there are numerous occasions wherein an individual is made aware of the case against her. The letter given to an individual by an immigration officer after the completion of the section 44 report is one such occasion. However, it is not as obvious how an individual is able to meaningfully respond to the case against her. Inherent in the idea of meaningful participation, is this participation take place prior to a decision being rendered, and the only areas throughout the decision making process wherein an individual might be able to participate are during the section 44 reporting process, during the ID hearing, and during an appeal to the IAD.

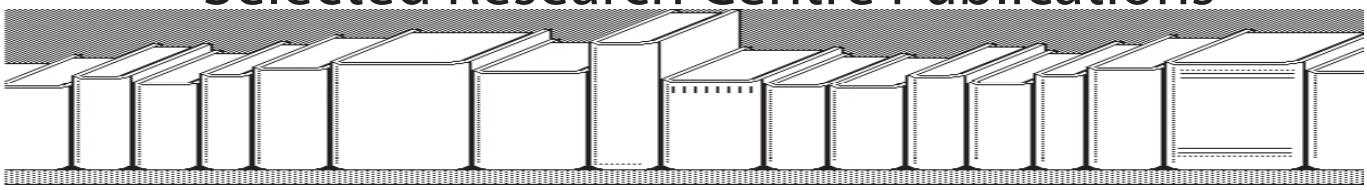
The availability for meaningful participation by an individual within the section 44 reporting process is minimal at best, due to the lack of discretion of immigration officers and Minister's Delegates to consider submissions made by an individual relevant to the specific circumstances of her case. Even if discretion could be inferred by the guidelines outlined in the departmental enforcement manuals, the courts seem to be divided on whether or not discretion is present in the section 44 reporting process, leading to an inconsistency in the law. Further, because the ID is limited to issuing removal orders where the fact of conviction is met, there is no opportunity for meaningful participation at the ID hearing. In cases of serious criminality where section 64 of the *IRPA* is not triggered, an appeal to the IAD would certainly involve meaningful participation by an individual, as the IAD is mandated by section 65, to take into account humanitarian and compassionate considerations specific to an individual's case. However, in cases of serious criminality wherein an individual has been sentenced to two years or more in Canada, the appeal to the IAD is not available, and in those cases, there is arguably no opportunity for an individual to respond to the case against her as the fact of her conviction alone, will lead to a mandatory removal order.

The courts have responded to arguments that procedural fairness is denied by a lack of an appeal process by pointing to section 25 of the *IRPA* as a provision which provides for the evaluation of case specific considerations. However, section 25 is triggered after the decision has been made to remove the individual from Canada, so it is arguable that this provision does not rise to the level of process required by a decision of this kind. Moreover, the provision is arguably of limited assistance to individuals as it is highly discretionary, therefore making it subject to a very low level of process, and is, in any event, unlikely to lead to a removal order being stayed.

The effect of allowing recourse to section 25 of the *IRPA* to take the place of a more formal appeal process wherein the submissions made by individuals affected by the serious criminality provision could be taken into account in a more structured (and arguably more transparent) way, is that participation by an individual in the decision-making process that will eventually lead to her removal, ceases to be meaningful for the individual involved. The practical effect of the removal of the appeal to the IAD is that despite the availability of section 25, individuals falling under the serious criminality provision of the *IRPA*, who are sentenced to at least two years in prison in Canada, are subject to a mandatory removal order.

The evolution of the law in the area of inadmissibility due to serious criminality seems to be towards a high level of deference to the legislature's desire to quickly and efficiently remove persons from Canada who may pose a threat to the safety of Canadians. That Canadian Courts are willing to find that procedural fairness is provided for within the context of the current legislative framework, and that they are lukewarm in their application of the *Charter* to permanent residents facing deportation, highlights this attitude of deference. As a result, it is possible in Canada, for an individual to be deported without anyone having looked too deeply into the circumstances of her case to determine whether she actually poses the kind of threat to Canadians outlined by the objectives of the IRPA, and whether, based on her particular circumstances, she should be allowed to remain in Canada.

# Selected Research Centre Publications



*Human Rights and Resource Development: Teacher and Student Materials A summary document for high school students and their teachers*, based on six research documents prepared by the Alberta Civil Liberties Research Centre and the Canadian Institute of Resources Law. Explores the relationship between human rights laws and the law covering the development of natural resources, such as oil and gas. Includes resources and teaching activities. 80 pages. 2010. ISBN # 1-896225-58-6 ($20 + s/h)

*Genetics, Human Rights and the Next Phase of Human Evolution* A report that was inspired in part by a Conference held by ACLRC in 2007. Discusses the history of the Human Genome Project and its significance for human health and ethical genetic research; briefly outlines the concepts of DNA, genetic engineering, genetic discrimination and genetic screening; analyzes legal issues such as personal autonomy, informed consent and the right to know results of genetic testing; discusses genetic determinism and discrimination; and provides a recommendation for a Genetic Charter 120+ pages. 2010. ISBN# 1-896225-64-0 ($25 + s/h)

*The Rights Angle: Human Rights Education Using the Newspaper - Teacher and Student Materials*. Background information for teachers, and student activities on human rights, the newspaper, the Charter, hate crimes, war crimes, and applicable laws, suitable for secondary school students. Includes reproducible handouts and overheads. 150+ pages. ***Please indicate which province or territory's manual you would like.*** Updated 2008. ISBN# 1-896225-24-1 ($35 + s/h).

*Know Your Rights in the Workplace: A Youth Employment Law Handbook*. Question and answer format deals with legal and other employment issues faced by youth in Alberta: employment standards, discrimination and harassment, work and age, salary, benefits, hours of work and breaks, overtime, safety and working conditions, holidays, and being fired. Includes a resource section and learning exercises. 145+ pages. 2008. ISBN # 1-896225-24-56-X. ($25 + s/h)

*Freedom to Be: A Teachers' Guide to Sexual Orientation, Gender Identity and Human Rights*. Background information and resources for teachers, and students on lesbian, gay, bisexual and trans- identified youth. Includes applicable laws, suitable for grades 9 and up. 116+ pages. 2008. ISBN# 1-896225-52-7. ($25 + s/h)

*Barriers and Borders: How Canada Manages National Security Through Immigration Legislation*. Since 2001, many countries have rushed to implement new immigration and anti-terrorism legislation in the name of increased security, but often without due consideration to their effects on human rights and civil liberties. This study examines Canadian immigration law and the security certificate process in light of the new S.C.C. decision in Charkaoui. 65+ pages 2007. ISBN# 1-896225-31-4 ($15 + s/h)

*Anti- Racism Resource Kit*. This Resource Kit is intended to promote and facilitate anti-racism education, at all levels of the formal education system. The goal is to ensure that every student receives appropriate and effective anti-racism education and support to address personal experiences of racism and enhance safety in self-affirming and productive ways. Includes books, websites and videos for teachers K-12. 130+ pages (new) 2007. ISBN# 1-896225-50-0 ($25 + s/h)

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# Recent ACLRC Events

(Left) **Canada Goes for the Gold**
*** Unless You're a Female Ski Jumper;**
*Sagan v. Vancouver Organizing Commitee for the 2010 Olympics Winter Games*
January 28, 2010 ACLRC Panel Discussion
Law student Monica Cheng (standing) thanks the speakers on behalf of the Equality Committee. Speakers (from right to left: Megan Reid (ski jumper); Nina Hooper-Reid (graduate of U of C Faculty of Law and Megan's next friend); and Linda McKay-Panos (Executive Director ACLRC).

(Right) **Standing Up to Racism: What Can a Community Do? (March 23, 2010)**
Educator Sandy Dore speaks to students and community members on speaking out against racism in his community. The event was held on March 23, 2010 to commemorate the International Day for the Elimination of Racial Discrimination (March 21, 2010). Dore started a campaign to stop racism and the recruitment of youth into white-supremacist groups in his hometown. "People Against Racism, Standing Together Against Racism,"(PAR STAR,) touched a nerve in a town targeted by racist activities and attitudes. "Communities get apathetic if something doesn't galvanize them," says Dore. "We were showing people where we stand."

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