May/June 2012

Community Gardens

International bodies

Sentencing

LawNow

Relating law to life in Canada

Food for THOUGHT

Food is necessary to sustain life, so perhaps it is not surprising that law plays an important part in issues to do with food. We hope this edition of LawNow gives you food for thought!

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Feature: Food and the Law

Special Report: International Bodies of Justice

Departments

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Letter to the Editor

LawNow contributor Professor Peter Bowal received the following message in response to his *Follow up on Famous Canadian Cases* column in the July/August 2009 issue of LawNow.

Hi Peter:

I came across your interesting article "Aunt Laura's Promise" and realized George Constantineau was my great uncle from my mother's father's side. My mom does not know very much about the Constantineaus but here is something you might want to add to your article. Constable George Constantineau was a fallen officer who died in the line of duty around November 1954. I thought that was bizarre considering it sounds like his case was also settled in 1954. You can check this link: http//canada.odmp.org/officer/613-constable-george-constantineau

Great Uncle George left a wife and four children. My mom didn't know her cousins and her parents have passed on and so have all her older brothers. Would you have any information about his children or more information about Laura Constantineau Brunet or who ended up with her home? Even their names would be helpful.

Barbara Ann Romain
Ottawa, Ontario

Food safety à la carte

Sylvain Charlebois

Canadians can contract food-borne illnesses anywhere, from farmers' markets to grocery giants. Our regulations have been successful, but they're geared toward the larger players and dictated by crisis, impeding innovation and commercialization. It's time for a smarter approach.

An off-the-cuff remark made in Toronto recently to more than 600 food industry experts by Galen Weston, executive chairman of Loblaw Cos. Ltd., sparked outrage in farmers' market circles. "Farmers' markets are great … One day they're going to kill some people, though," he said, quickly adding: "I'm just saying that to be dramatic, though."

A shocking comment, perhaps, but the fact of the matter is, it may have already happened. Consumers can contract food-borne illnesses anywhere, including from the stores of supermarket giants such as Loblaws. Such is the reality of food systems. Yes, they were strong words from the head of Canada's largest food retailer, but they point out that a broader, more rational debate on food safety is warranted in our country.

The 2003 mad cow crisis in Canada was really the first major food safety-related event our country had experienced. Although domestic demand for beef went up more than 5 per cent the year after the crisis began, it arguably became more of a trade issue than a food safety one. Some safety regulations did change, mostly on the primary production side.

Then *E. coli*, botulism and *salmonella* came, which progressively led us to Maple Leaf Foods and the tainted deli-meat crisis of 2008. Maple Leaf's recall changed the psyche of many Canadians on how we manage risks as a country. In the past, we blamed Britain, Mexico and the United States, since many recalled products came from abroad. This time, it was a truly Canadian brand harming fellow Canadians, and it hit our Canadian identity to the core. To cope, many investigations were launched and task forces formed. As a result, several public health and food safety regulations were altered.

As a country, we spent millions making our food safety systems more robust, while survey after survey suggests that Canadians trust the safety of our foodstuff. What most Canadians don't know is that most of the regulations were unintentionally projected to the larger players within the food industry. Maple Leaf,

a broader, more rational debate on food safety is warranted in our country.

Loblaws and other food processors and distributors have become astute risk managers. Meantime, smaller food businesses are challenged by the extent of new food safety regulations, including those selling foods at farmers' markets.

The Canadian Food Inspection Agency spends more than $350 million on food safety a year – that's $10 for every Canadian – excluding efforts from the provinces and municipalities. We've never had a public dialogue on the proper threshold for public expenditure related to food safety surveillance.

For industry, particularly for smaller enterprises trying to develop new markets both domestically and globally, the role of the Canadian food safety regulatory regime has become somewhat of an impediment to innovation and successful commercialization. The overall regulatory and policy framework within which the Canadian food industry operates itself interferes with our ability to effectively support industry in innovation, marketing and commercialization. Most Canadians wouldn't know how difficult it really is to start a business in the food industry, mostly as a result of the array of food safety policies.

For industry, particularly for smaller enterprises trying to develop new markets both domestically and globally, the role of the Canadian food safety regulatory regime has become somewhat of an impediment to innovation and successful commercialization.

In food safety, the era in which crises dictate how we regulate should end. Since governments are continuously challenged by budgetary shortfalls, what's needed is a more strategic approach on how we make the food industry more accountable to Canadians. We have the science, but more collaboration is warranted. One scenario would be to compel the larger, more resourceful companies to support the smaller ones. This is already happening, but such practices should be encouraged by regulators. Another option would be to customize regulations for smaller outfits without compromising the health of consumers.

We also need to celebrate our successes in food safety. The mere fact that the 2008 Maple Leaf listeria outbreak was discovered early is an achievement in itself. Many food safety experts still believe that we may have had one major outbreak before, but it went undetected. In the past, systems were not equipped to detect the scope and scale of these outbreaks. Regulatory changes stemming from the 2003 SARS outbreak allowed public health officials to recognize the problem early on. And the Maple Leaf affair allowed us to educate ourselves on what was then considered a relatively unknown pathogen.

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R. v. Ipeelee: Correction, Conviction and Culture

R. v. Ipeelee [2012 SCC 13] is a difficult case. As with most criminal cases, the facts of the case are difficult to stomach: a dizzying confluence of alcohol and drugs and then bursts of violence, particularly against women. Raised without parental guidance in an abusive home, the two defendants, both of whom are of Aboriginal descent, endured a difficult upbringing. Thus, the sentencing decision that the court has to make becomes impossibly difficult.

Facing the harsh reality that men and women of Aboriginal descent are more likely to end up in prison than any other group in Canada, six justices on the Supreme Court of Canada reiterated the need to fully acknowledge the oppressive environment faced by Aboriginals from the day they are born in Canada. Thus, the lower courts need to implement more lenient, more creative solutions that are in line with the distinct culture of the defendants (i.e. consultations with an Aboriginal Elder). Even though this may seem novel, the Court argues that they are merely reaffirming the 1999 decision in *R v. Gladue* [1 SCR 688]; *Gladue* held that the Court must hand down sentences that recognize the unique histories of these Aboriginal offenders. Furthermore, Section 718.2(e) of the *Criminal Code* directs judges to use a different method of analysis in determining the most appropriate sentence. Justice Rothstein, the lone dissenter in this case, provides a counterargument: the safety of the public is of paramount importance.

However, to view this case as a balancing act between the right to special treatment of Aboriginal men and women in Canada against the right to public safety is to distort the real issue. The Court is carving out a space for Aboriginal offenders that does not only accord with their heritage, but also with our strong commitment to justice for everyone.

A Spotty Record

One of the reasons why the decision in *R. v. Ipeelee* was not readily embraced by the court of public opinion is that the two defendants had seriously disturbing criminal records. One of the defendants, Manasie Ipeelee, is a 39-year-old Inuk from Iqaluit. His alcoholism started at the age of 12 after his alcoholic mother died when he was a child. By his 19th birthday, he had 36 convictions, most of which were fueled by his alcoholism. One conviction was for sexual assault; he sexually assaulted a homeless woman while punching her in the face. The other defendant, Frank Ladue, is a 50-year-old man from Ross River Dena Council, a community north of Whitehorse. Sent to residential school since the age of five, he began drinking at nine, followed quickly by hard drugs. His crime record includes numerous sexual assaults against women who were typically drunk or unconscious. The main focus of the case before the Supreme Court of Canada, however, was their long-term supervision order (LTSO), which followed their earlier convictions. Both men, however, broke the terms of the LTSO, so the judge had to re-sentence them. The judge subsequently sentenced them to three years' imprisonment, less a

certain number of months at a certain credit rate. More narrowly, then, the issue in the case "is how to determine a fit sentence for a breach of an LTSO in the case of an Aboriginal offender in particular" (34).

Legislative framework

The majority of the justices emphasize that sentencing is more of an art than a formula. Sure, there are provisions in the *Criminal Code* that help judges in deciding if and how to weigh certain factors, such as previous convictions: "The *Criminal Code* goes on to list a number of principles to guide sentencing judges. The fundamental principle of sentencing is that the sentence must be proportionate to both the gravity of the offence and the degree of responsibility of the offender" (36). The designation of long-term offender, coupled with the long-term supervision order, helps to fulfill the purpose of sentencing set out in Section 718. The LTSO, as a form of conditional release, furthers "the maintenance of a just, peaceful and safe society by facilitating the rehabilitation and reintegration of long-term offenders" (47). A breach of the LTSO is regarded more gravely by the state; a lengthy maximum sentence usually follows.

This degree of severity, however, should be tempered by a contextual approach to sentencing Aboriginal offenders. "Section 718.2(e) of the *Criminal Code* directs that 'all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders [underlining in the original] (56),'" begins Justice LeBel. One of the reasons for the introduction of this provision in 1996 was the sad reality that in 1988 Aboriginal inmates accounted for 10% of the prison population, but only 2% of the greater population in Canada.

Gladue case

With the *Gladue* case, the Court finally had the opportunity to assess how the provision should be applied in terms of sentencing Aboriginal offenders. Section 718.2(e) of the *Code* is more than a remedial provision designed to ameliorate the serious problem of over-representation of Aboriginal people in Canadian prisons. It encourages sentencing judges to have recourse to a restorative approach to sentencing (93); "it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders" (para. 59), Justice Lebel summarizes. He continues, citing the judgment in *Gladue*: "Section 718.2(e) directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders" (37). What *Gladue* specifically entails is as follows:

When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (66).

What is further emphasized in *Gladue* is the fact that judges must weigh additional case-specific information, in addition to taking judicial notice of broad systemic and background factors (83-84).

This ambitious enterprise, laid out in Section 718.2(e) of the *Criminal Code* and then in *Gladue*, has not achieved its goals, regrettably. The majority of the justices in *Ipeelee* note that overrepresentation and alienation of Aboriginal people in prison has only worsened in the years following *Gladue*. Led by Justice LeBel, this is a call for action.

Application to the case

After surveying decisions in which the *Gladue* principle was misapplied, and even considering the multitude of reasons as to why Aboriginal sentencing is misunderstood in Canada, the Court reiterates the need to uphold their earlier decision in *R. v. Gladue*.

Applying *Gladue*, the Court replaces the three-year sentence handed down by the Court of Appeal to Ipeelee with a one-year sentence. They note that there were few culturally-relevant support systems in place in Kingston, Ontario, where he was residing at the time he violated his LTSO. As well, given the fact that Ipeelee had started abusing alcohol at such an early age, one relapse 18 months into his LTSO should not be seen as so grave. The one-year sentence would give him enough time to get back on track in his alcohol treatment, while continuing to emphasize the need to abstain from drinking after his prison sentence. In the case of Ladue, the Court agrees with the appellate court that he should serve a one-year sentence for breaking the conditions of his LTSO. The Supreme Court of Canada underlines the benefits of treatment that would allow Ladue access to "culturally-relevant programming and the resources of an Elder" (96).

Not about balance, but justice

Justice Rothstein voices his dissatisfaction with the majority opinion. Essentially, he regards the project before the Court as one of balancing interests: "In my opinion, Parliament has said that protection of society is the paramount consideration when it comes to such sentencing. Elevating rehabilitation and reintegration into society to a more significant factor diverts the sentencing judge from adhering to the expressed intention of Parliament" (100). He, therefore, sets the interests of public safety and the interests of rehabilitating and reintegrating into society Aboriginal offenders on a crash course. Conceptualized as such, it becomes almost impossible to tip the scales in favour of the Aboriginal offenders.

But that is not the point. The over-arching goals of Section 718 of the *Criminal Code* and the *Gladue* decision are not to separate Canadians into two camps with two competing interests, but rather to unite them with the shared goal of "a just, peaceful and safe society." In the same way that it is not just Aboriginals who benefit from a safer society, it is not just non-Aboriginals who deserve justice in Canada. Given the history of colonialism and systematic abuses suffered by Aboriginal Canadians, the Supreme Court of Canada had the opportunity to meaningfully recognize these unique hardships and, more importantly, to continue the arduous task of remedying them.

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Do Canadians Have a **Right** to Adequate Food?

Linda McKay-Panos

It may come as a surprise, but in Canada we have significant numbers of people who suffer from food insecurity. According to Health Canada, in 2007 to 2008, 7.7% (961,000) of Canadian households were food insecure; this represents 1.92 million adults and children aged 12 to 17. Health Canada's definition of food insecurity is households who are "uncertain of having, or unable to acquire, enough food to meet the needs of all their members because they ha[ve] insufficient money for food" (Health Canada, *Household Food Insecurity in Canada in 2007-2008: Key Statistics and Graphics* online: www.hc-sc.gc.ca/fn-an/surveill/nutrition/commun/insecurit/key-stats-cles-2007-2008-eng.php ("Health Canada, 2007-8"). It is important to note that these statistics do not include homeless individuals.

According to the World Food Summit, 1996, "Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for a healthy and active life." The World Health Organization notes that:

Food security is built on three pillars:

- *Food availability*: sufficient quantities of food available on a consistent basis
- *Food access*: having sufficient resources to obtain appropriate foods for a nutritious diet
- *Food use*: appropriate use based on knowledge of basic nutrition and care, as well as adequate water and sanitation (online: www.who.int/trade/glossary/story028/en/)

Individual Canadians generously contribute to food banks. What about the state's obligation? Do Canadian governments (federal, provincial, municipal) have any legal obligations to address food insecurity?

Why is food security an important issue for Canadians? There are physical and mental health implications of food insecurity; these are very significant for children. In addition to nutritional concerns, child and youth hunger can be associated with poor general health, chronic conditions and asthma (see Sharon Kirkpatrick, Lynn McIntyre, and Melissa Potestio "Child Hunger and Long-term Adverse Consequences for Health" (2010) *Arch. Petrdiatr. Adolesc. Med.* 164(8) pp 754-762).

Another effect of food insecurity is the increased use of food banks. In HungerCount 2011, the Alberta Food Bank Network Association reported that food bank use was 75% higher in March 2011 than in 2008. In addition, 44% of those food banks assisted were children and youth, and one-third of the households helped had income from current or recent employment (HungerCount 2011 – Alberta Provincial Report (online www.foodbankscanada.ca/getmedia/02f0677c-2edf-4124-aa19-76d5edb7183e/HungerCount-2011-Alberta-provincial-report-final.pdf.aspx?ext=.pdf). Food Banks Canada has determined that either short or long-term low income is at the root for the continued need for food banks across Canada (*HungerCount 2011*, page 3 online: http://www.foodbankscanada.ca/getmedia/34ebd534-14db-4bed-96d2-4fcadd5d9a33/HungerCount-2011-web-print-friendly.pdf.aspx?ext=.pdf).

Food banks across Canada have become part of our social fabric. They are supported by charitable and food donations, and individuals must approach them for assistance. Food banks often have trouble keeping up with the demand for their services. Individual Canadians generously contribute to food banks. What about the state's obligation? Do Canadian governments (federal, provincial, municipal) have any legal obligations to address food insecurity? While there may be moral and political obligations to provide for food security, I would like to focus on whether there are any remedies for food insecurity available under domestic or international law.

The right to food security may be seen as part of the body of economic, social and cultural rights as covered by the United Nations and other international legal instruments. The *International Covenant on Economic, Social and Cultural Rights* (acceded to by Canada in 1976) ("*CESCR*") provides that states are obligated to protect economic and social rights, including the right to be free from hunger and to an adequate standard of living, including food (see Article 11). The *Convention on the Rights of the Child* (ratified in 1992) ("*CRC*") provides that the state must ensure that children are provided with adequate nutritious food (Art. 24) and an adequate standard of living (Art. 27). In addition, the *United Nations Committee on Economic Social and Cultural Rights* released Comment 12 in 1999, to interpret the right to adequate food as set out in Article 11 of the *CESCR*.

According to Lorenzo Cotula and Margaret Vidar, writing for the Food and Agricultural Organization of the United Nations (*The Right to Adequate Food in Emergencies,* 2002 at page 25):

> Under international law, States have both "progressive" and immediate obligations to realize the right to adequate food. State obligations may be classified in three categories: the obligation to respect, the obligation to protect and the obligation to fulfil. In turn, the obligation to fulfil includes an obligation to facilitate and an obligation to provide. This classification has been endorsed by the CESCR in its General Comment 12, as well as by a great number of scholars.

The obligation to **respect** means that governments must not violate the right to food; for example by evicting people from their farms. The obligation to **protect** means that government must protect citizens against violations by third parties; for example, by passing food safety regulations. The obligation to **fulfil** means that governments should facilitate the right to food by stimulating employment or enabling an environment where people can feed themselves, and as a last resort, act as provider where people cannot feed themselves because of reasons beyond their control.

The United Nations Human Rights Council has instituted a relatively new Universal Periodic Report system and Canada was among the first states to report and be scrutinized by its peers (other states) in 2009.

Currently, the ability of individual Canadians (or civil society) to legally enforce these international obligations in the international sphere is limited. Once the federal government has ratified an international treaty, the government is obligated to comply with the provisions thereunder. However, failure to comply usually results in placing Canada in violation of its international obligations; a perhaps embarrassing political situation that may be without legal remedy in courts. In addition, ratification of international human rights treaties often brings with it the obligation for states to periodically report on their progress under the treaties. Canada does have reporting obligations under several human rights treaties, including the *CRC* and the *CESCR.* The United Nations will respond with recommendations for changes that, once again, are not legally binding on Canada, but perhaps politically embarrassing. The United Nations Human Rights Council has instituted a relatively new Universal Periodic Report system and Canada was among the first states to report and be scrutinized by its peers (other states) in 2009. Again, there were a number of comments and recommendations with respect to poverty and standard of living in Canada, particularly of new Canadians and Aboriginal peoples. However, there are no legal obligations on the part of the Government of Canada to abide by the recommendations, nor legal consequences for failure to fulfil them.

Some of the international treaties have Optional Protocols attached, which, in certain circumstances, (e.g., after all domestic remedies have been exhausted) permit individual Canadians to complain directly to the United Nations. Unfortunately, the most directly applicable *Optional Protocol to the Covenant on Economic, Social and Cultural Rights* has not been signed by Canada. Canadians do have the ability to complain to the United Nations under the *Optional Protocol to the Convention on*

Civil and Political Rights, but will need to argue that food insecurity fits under an Article of that *Convention* in order to complain. And, once again, even if we can complain to and be heard by the United Nations, the resulting communications from the United Nations are not legally enforceable in Canada.

Implementation of the right to food or the right to an adequate standard of living into Canada's domestic law has been sketchy at best. The right to food is not explicitly written into Canadian statutes.

International human rights treaties have two roles in Canada's domestic legal system. First, they may be implemented into Canadian domestic legislation. This means that Canadians would be able to obtain a legal remedy in a domestic court if such a right had been implemented into our legislation. Second, courts interpreting our *Canadian Charter of Rights and Freedoms* ("*Charter*") will often turn to international human rights law for assistance. This often involves looking at either international treaties that Canada has ratified, or the body of customary international law (law that has arisen by custom over time rather than being written into a treaty).

Implementation of the right to food or the right to an adequate standard of living into Canada's domestic law has been sketchy at best. The right to food is not explicitly written into Canadian statutes. We do have some food safety, agriculture, health, and welfare laws that may be seen to support the right. For example, Quebec has *An Act to Combat Poverty and Social Exclusion,* RSQ 2002, c l-7; Ontario passed the *Poverty Reduction Act*, SO 2009, c 10; Manitoba passed the *Poverty Reduction Strategy Act,* CCSM, 2011 c P-94.7; Nova Scotia has the *Poverty Reduction Working Group Act* SNS 2007, c 31. This legislation provides for the implementation of strategies to reduce poverty and promote social inclusion.

As for using international laws to assist in interpretation of the *Charter*, the *Charter* does not directly contain many social and economic rights; food banks were not prevalent when the *Charter* was drafted. While the Canadian government has stated internationally that the *Charter* as interpreted by the Supreme Court of Canada does protect internationally recognized economic, social and cultural rights (Graham Riches, "The Human Right to Adequate Food: Seeking Domestic Compliance with Canada's International Obligations" Canadian Social Welfare Policy Conference, 2005 University of New Brunswick online: www.ccsd.ca/cswp/2005/riches.pdf), *Charter* case law to date has not been as helpful as it could be. *Charter* sections 15(1) (equality provision) and 7 (right to life, liberty and security of the person) are the most likely sections to be used to argue for a right to food (or other economic, social and cultural rights that involve dignity, security and equality). The Supreme Court of Canada has stated *Charter* rights must be interpreted consistently with Canada's international human rights obligations, including economic and social rights (see for example *Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817). However, the United Nations Committee on Economic, Social and Cultural Rights has stated its concern that governments in Canada frequently argue in court that social and economic rights claims under the *Charter* are merely 'policy objectives' and should not be subject to judicial remedies (Bruce Porter, "Judging Poverty:

Using International Human Rights Law to Refine the Scope of *Charter* Rights" (2000) 15 *Journal of Law and Society Policy* 117 at 139-40). Indeed, assertion of social and economic rights arguments have met with divided success. For example, in the 2002 Supreme Court of Canada case of *Gosselin v Quebec (Attorney General),* [2002] SCR 429, Gosselin argued that Quebec's social assistance scheme, which provided differential welfare benefits to those under age 30, violated *Charter* sections 7 and 15(1). A majority of the Supreme Court of Canada held that Gosselin's *Charter* rights were not violated.

As for other legislation, Canadian and provincial human rights codes protect from discrimination on the basis of source of income (Nunavut, B.C., Alberta, Manitoba, New Brunswick, Nova Scotia, P.E.I.) and/or social condition (Quebec, New Brunswick and Northwest Territories) but none of them directly provides for the right to food or an adequate standard of living.

Canadian and provincial human rights codes protect from discrimination on the basis of source of income (Nunavut, B.C., Alberta, Manitoba, New Brunswick, Nova Scotia, P.E.I.) and/or social condition (Quebec, New Brunswick and Northwest Territories) but none of them directly provides for the right to food or an adequate standard of living.

It seems ironic that in order to exercise our well-protected civil and political rights, Canadians need to have food security and other economic, social and cultural rights protected. However, these protections under Canada's current legal regime are inadequate. Which is more surprising: that in a rich country like Canada there are so many people who face food insecurity, or that there are so few direct legal provisions for the right to food?

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Food Safety in Canada – A Balancing Act?

Carole Aippersbach

In 1967, Pierre Trudeau famously stated that the Canadian government has no place in the bedrooms of the nation. What he didn't comment upon was whether the government had a place in our kitchens. It did – and it still does. Although most of us rarely think of the federal government when we sit down to eat a meal, the reality is that every food we consume has been touched by government regulation. And now, more than ever, the reach of that regulatory power is under debate.

The general process of food regulation begins with the Canadian *Food and Drugs Act* (*FDA*). The *FDA* is an Act of the Parliament of Canada that, amongst other things, governs the production, import, export, transport, and sale of food. It was first passed in 1920 and was most recently revised in 1985. It attempts to ensure that foods sold in Canada are safe, and that their ingredients are disclosed.

The *FDA* gives the federal Minister of Health the power to make additional regulations and polices pertaining to standards for the safety and nutritional quality of food sold in Canada (whether imported or domestic). Naturally, however, the Minister cannot complete all of this work herself/himself, so, as is the case with most governmental powers, the bulk of the work has fallen to the public service. In this case, the part of the public service in question is the Food Directorate (FD). The Food Directorate is the federal health authority responsible for establishing policies, setting standards and providing advice and information on the safety and nutritional value of food. It carries out its responsibilities under the authority of the *FDA*, the *Food and Drug Regulations*, and the *Department of Health Act*.

The Food Directorate is the federal health authority responsible for establishing policies, setting standards and providing advice and information on the safety and nutritional value of food.

The *FDA* also gives the Minister of Health the power to administer the provisions of the *FDA* that relate to public health, safety and nutrition. Again, however, this work has fallen to the public service. This time, to the Canadian Food Inspection Agency (CFIA), a science-based regulatory agency, tasked with assessing risk and enforcing *all* health and safety standards under the *Food and Drug Regulations.* The result: Canada's food safety standards are established by Health Canada (largely through the Food Directorate), but the CFIA responsible for their enforcement.

The CFIA was created in April 1997 by the *Canadian Food Inspection Agency Act*, for the purpose of combining and integrating the related inspection services of three separate federal government departments: Agriculture and Agri-Food Canada, Fisheries and Oceans Canada, and Health Canada. In other words, its formation consolidated the delivery of *all* federal food safety, animal health, and plant health regulatory programs. The CFIA is also responsible for the administration of non-health and safety regulations concerning food packaging, labeling and advertising. The responsibility for the CFIA now lies with the Minister of Agriculture and Agri-Food; however, the Minister of Health (or, more specifically, the Food Directorate) remains responsible for assessing the effectiveness of the CFIA's activities related to food safety.

Many of the food-related policies and the information that we rely upon as consumers have come about through the work of the Food Directorate and the CFIA. An example that many of us see on a daily basis is the standardized "Nutrition Facts" label (specifically governed by the *Consumer Packaging and Labelling Act* and its regulations). This label was first introduced in 2003, and it became mandatory for most pre-packaged food products on December 12, 2005 (and it became mandatory for all on December 12, 2007). This label gives pertinent information not only about the calories per serving, but about 13 core nutrients (including the percentage of these nutrients' daily recommended values). Another example involves the recalls we sometimes hear about, like the one that resulted from the listeriosis outbreak in August of 2008 (when 22 people died after consuming deli meats from a federally-regulated meat

Many of the food-related policies and the information that we rely upon as consumers have come about through the work of the Food Directorate and the CFIA.

plant). Then there are the examples that most of us don't see, ever, let alone on a daily basis. We may not directly know about these safeguards, but they are there trying to protect us. They can be seen in all of the legislation administered by the CFIA, including: the *Plant Protection Act*, the *Meat Inspection Act*, the *Seeds Act*, the *Plant Breeders' Rights Act*, the *Health of Animals Act*, the *Feeds Act*, the *Fish Inspection Act*, and the *Fertilizers Act*.

So wherein lies the debate that I mentioned earlier? Well, upon a careful reading of the above, or the legislation, or even just the CFIA website, you'll note that the CFIA has a dual role: protecting the public *and* assessing risk within the agri-food industry. This can be also be seen in CFIA's statement of values, which states that the CFIA is dedicated to the "safeguarding of food, animals, and plants, which enhance the health and well-being of Canada's people, environment and economy" and that it "works to protect Canadians from preventable health risks and provide a fair and effective food, animal and plant regulatory regime that supports competitive domestic and international markets." In other words, although the CFIA manages food safety, it also assesses risk based not only on food-related concerns, but on concerns for economic forces. These two items are at very different ends of the spectrum, and sometimes they collide head-on.

In other words, although the CFIA manages food safety, it also assesses risk based not only on food-related concerns, but on concerns for economic forces. These two items are at very different ends of the spectrum, and sometimes they collide head-on.

The collision of these various concerns (food safety vs. the economics of food) has been in the news in the past few years, and there is a raging debate as to how to reach the correct balance within the current model. Consider the five following examples:

- In 2010, after many big chains began to make fat-related claims and to provide nutrition numbers for their standard menu items, the Canadian government launched a menu verification program for coffee shops and fast-food restaurants. According to monitoring tests conducted between 2007 and 2009, fat-related claims for 14 out 33 menu items offered at fast-food restaurants understated the fat content. Under the program, the federal government could, and did, test the nutritional claims and held the restaurants accountable if they were found to have provided false information. In mid-2011, this menu verification program was cancelled.[1]
- In January 2007, the government proposed revising food regulations to make it clear to consumers that "whole wheat" is not necessarily "whole grain". The difference? "Whole wheat" effectively means that about 70% of the germ is typically removed, so regular whole wheat bread can be made with flour with a significant percentage of the germ missing (and in scientific studies, it is "whole grains", not "whole wheat" that result in a lower risk of obesity, cardiovascular disease and diabetes). Now, in 2012, five years after unveiling a proposal to end this consumer confusion, Health Canada now says it has no plans to change the food-labelling rule.[2]

- In 2009, the federal government, after a two-year monitoring program showed that voluntary reduction targets were not working, began to plan a two-year phase-in period for regulations to limit the amounts of trans-fats in Canadian foods. Why does this matter? Trans-fats, created by pumping hydrogen into liquid oil at an elevated temperature, raise the levels of low-density lipoprotein (or "bad cholesterol") and can lead to clogged arteries and heart disease. They are added by the food industry to give products longer shelf lives. Documents obtained by the Centre for Science in the Public Interest, showed that, by 2009, the government had gone so far as, amongst other things, to draft the regulations and associated press releases. On February 7, 2012, the government, indicating that that the proposed regulations would be a "burden" on the food industry, announced that it would not make the regulations and, instead, would continue to rely on voluntary reductions.[3]
- In December 2011, the federal government stopped testing grocery-store product labels for exaggerated nutrition claims and unproven health claims. This, despite the fact that, according to internal records released under access to information, test results from previous years showed widespread problems with such food labels. The CFIA is reported to have noted that the program was put on hold due to "budgetary constraints". Inspectors will continue to follow up on consumer complaints.[4]
- As we all know, the CFIA announces recall orders. What many do not know, however, is that recalls are not necessarily always publicized. The CFIA does health-risk assessments and issues public recall notices based on the degree of danger that an item poses. This is the case in many other countries as well. The idea is that consumers would soon be overwhelmed by the sheer number of recalls, many of which would pose low risk (and might not yet even be in stores). For example, a 2009 study found that of 49 recalls related to bottled water, only 7 were made public.[5]

As we all know, the CFIA announces recall orders. What many do not know, however, is that recalls are not necessarily always publicized. The CFIA does health-risk assessments and issues public recall notices based on the degree of danger that an item poses.

As these examples demonstrate, food safety is quite the balancing act. There are laws, but how effective can these laws be if they are not enforced? Budgets are tight and belts must be tightened, but how much regulation is really too much? And how much is too little? Consumers may not want to be constantly alarmed, but the argument of "little risk" is arguably cold comfort to the few who are ultimately affected (especially if there is a death). For example, consumers with allergies or with Celiac Disease now, more than ever, cannot rely on labels. How much of a "burden" is too much for the companies profiting from the food business? How can Canadians make informed choices, if they are not informed?

These are all very difficult questions, and ones to which no clear answers are readily apparent. The roles of Health Canada and the CFIA are ever-evolving – they continue to revolve around globalization, societal changes and the advances of science and technology. No easy task – and not one for the faint of heart. Bedroom, shmedroom – the heat's in the kitchen!

As these examples demonstrate, food safety is quite the balancing act. There are laws, but how effective can these laws be if they are not enforced?

Notes

1. For more information, see http://bites.ksu.edu/news/148053/11/04/30/canada-inspections-food-weights-nutrition-claims-suspended. The original article, entitled "Inspections of food weights, nutrition claims suspended", was in the *Ottawa Citizen* on April 28, 2011. No longer available online.
2. For more information, see www.ottawacitizen.com/health/Health+Canada+backs+whole+wheat+labelling/6255236/story.html#ixzz1r0a4jZ7d.
3. For more information, see www.calgaryherald.com/health/Health+minister+nixed+plan+limit+trans+fats+food+records+show/6110029/story.html and www.cbc.ca/news/politics/story/2012/02/07/pol-trans-fats.html
4. For more information, see www.foodhealthnews.com/2011/12/feds-halt-testing-of-health-nutrition-claims/
5. For more information, see: Martin Mittelstaedt, "Few Bottled-water recalls being made public", *The Globe and Mail*, page A4, Wednesday, March 25, 2009.

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The land gives us more than food, but can the law give back?

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Adam Driedzic

Set foot on Ruzicka Sunrise Farm and something feels different. Whether it is the diversity of birds, the native prairie, or dugouts that test cleaner than some municipal water sources, Don and Marie Ruzicka are clearly deserving of the recognition they have received for environmental conservation. The Ruzickas raise poultry, hogs and beef using a pasture-based model. In contrast to industrial norms, their management practices pursue environmental and economic sustainability together.

I originally went to Sunrise Farm seeking a farmer's opinion on government policies, but within minutes Don and I were talking human values. We are both followers of Aldo Leopold, the pioneering conservationist whose 125th birthday would have been this year. As a young government officer, Leopold's job was to kill wild animals that killed livestock and game species. As he came to respect his prey, he theorized that humans would benefit by protecting natural diversity rather than dominating the living world. He urged public policy-makers and private landowners to promote wildlife habitat, not just produce species for human consumption. In his later years, he took to

Conservation

The supervision, management, and maintenance of natural resources. – (Black's Law Dictionary)

The responsible preservation, management and care of our land and of our natural and cultural resources. – (Alberta Land Use Framework)

A state of harmony between men and land. – (Aldo Leopold)

restoring degraded farmland as a form of recreation that could help the environment. Published posthumously in *A Sand County Almanac* (1949), Leopold's "land ethic" offered ranchers and farmers a more relevant philosophy than wilderness ethics derived from distant peaks. In doing so, he empowered those who work the land to care for the environment, not just care about it.

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How important are today's Leopolds to a sustainable future? Crucial, if one considers the historic settlement of western North America. Despite its vastness, the West is a land of limited livable space. The original homesteads were established on farmable land near water sources, in warm valleys, or on snow-free prairies. Governments kept ownership of the less hospitable, but geopolitically important mountains and forests. Consequently, not much of the West is in private hands, but much of the ecologically important land is. Public parks and wilderness areas simply cannot provide for our full ecological needs. Food is one. Others include clean air, clean water, healthy wildlife, and healthy landscapes. Maintaining a viable habitat for humans and the species on which we depend will require private conservation. Fortunately, despite any ideological differences, environmentalists and agriculturalists often share a belief that they are serving the public good. The big challenges are more practical.

> **Why is it that conservation is so rarely practiced by those who must extract a living from the land? It is said to boil down, in the last analysis, to economic obstacles.**
>
> **– (Aldo Leopold)**

Making laws that promote the agriculture-environment connection is challenging. We need to keep land in agricultural production but we need agricultural practices to be environmentally friendly. New regulations could scare the agricultural sector as it is already struggling financially. Add new costs and farmland becomes more economically valuable for other uses. Flat fields and open ranges get eyed for suburban sprawl or for extracting natural resources from underground. Furthermore, land use

regulations are often perceived to be at odds with private property rights. This standoff is especially tense in the West, where owning a piece of the frontier once promised freedom to do as one pleases. The solution will need to be viable for farmers and respect the place of land ownership in western culture.

Making laws that promote the agriculture-environment connection is challenging. We need to keep land in agricultural production but we need agricultural practices to be environmentally friendly.

One attempt to address this challenge is Alberta's Land Use Framework. This provincial government policy intends to rely on public and private lands in pursuit of ecological sustainability. The Land Use Framework will create regional plans to provide a vision for land use, development, and conservation for defined geographic areas. Once made, regional plans could have legal weight over official decisions like subdivision development or natural resource permitting. To assist in pursuing these visions, several conservation tools are provided by the *Alberta Land Stewardship Act*. These options range from 'soft' to 'hard'. The softest option is to rely on voluntary management practices. Simply hope that more landowners do what the Ruzickas do. Further hope that they make enough of a living to keep on farming. At the hard end of the spectrum is command and control regulation. Government could protect the agricultural or environmental value of land through "conservation directives" that prohibit certain uses. This is the option most likely to trigger property rights claims. *ALSA* allows landowners to challenge regional plans and claim financial compensation if conservation directives cause lost property value.

The middle ground is a series of 'market based' conservation tools: financial incentives to develop land, or disincentives to develop it. *ALSA* could allow landowners to:

- receive public funding for research and development of conservation projects;
- sell offsets to counterbalance the impact that other land users have on the ecosystem; or,
- sell their development opportunities to developers in less ecologically important areas.

Market-based regulation has its critics. As discovered with greenhouse gas offsets, there needs to be assurance of results. Financial deals to conserve private land will likely need to be sealed by conservation easements.

Conservation easements can protect farmland from real estate development but they do not prohibit the extraction of oil, gas, or mineable minerals. This is because in Alberta, like many other places, legal ownership of underground minerals is separate from ownership of the surface.

Conservation easements are legal agreements to restrict development while allowing traditional land uses to continue. Landowners give up their rights to develop their land to a legislatively qualified organization, usually a 'land trust'. Conservation easements are governed by legislation. Under *ALSA*, conservation easements can be used for environmental or agricultural protection purposes. Creating a conservation easement is voluntary, but once in place it is legally enforceable. Conservation easements run with the land, not the landowner, so the land will stay protected even if it is sold.

Conservation easements can protect farmland from real estate development but they do not prohibit the extraction of oil, gas, or mineable minerals. This is because in Alberta, like many other places, legal ownership of underground minerals is separate from ownership of the surface. Hold that thought as we explore whether reliance on the market is enough to promote the public good.

The first ALSA tool to be attempted is a straight financial incentive. To qualify for funding, private projects must align with public policy objectives to conserve ecologically important lands.

The week I returned from Sunrise Farm, the Government of Alberta launched the Land Trust Grant Program, allocating 5 million dollars to conservation easements. The first *ALSA* tool to be attempted is a straight financial incentive. To qualify for funding, private projects must align with public policy objectives to conserve ecologically important lands. The screening process will consider whether the lands in question are vulnerable to competing land uses. This program is a good start for a new public policy initiative, but the real test will come when there are competing public goods. Alberta legislation requires that natural resource projects be in the "public interest" before they can be permitted *(Energy Resources Conservation Act*; *Natural Resources Conservation Act).* The public interest test requires that permitting agencies consider the social, economic, and environmental impacts of the project. When a project is proposed, landowners and easement holders have a right to a hearing because their own legal interests may be directly and adversely affected. This provides an opportunity to raise public concerns; for example, the fact that their area is ecologically significant or that they received public funding for a conservation easement. They can use the hearings to generate political attention, pressure the resource company to negotiate, leverage commitments to limit surface disturbance, or ask the permitting agency to deny the project. Someday, private conservationists might be able to argue that a regional plan prevails over the permitting process. Until that day, the permitting agency has no obligation to conclude that the landowner's personal preference or conservation efforts represent the "public interest". The project can be approved, after which the resource company can force entry onto the land. The landowner will receive, you guessed it: financial compensation.

> **It is hard to make a man, by pressure of law or money, do a thing which does not spring naturally from his own personal sense of right and wrong.**
>
> **– (Aldo Leopold)**

If one theme emerges from the above examples, it is that current law and policy are reducing private conservation to property rights, and property rights to money. This is a very narrow interpretation of the interests associated with living on and caring for the land. Unfortunately, this narrow interpretation could undermine the entire spectrum of regulatory tools. Command and control regulation might not occur if governments fear paying compensation. If governments must pay to infringe on property rights, they will do so to extract natural resources before they do so to

pursue ecological goals. Perhaps of greater concern, voluntary measures will be hard to encourage if what one cares most about could be lost anyway. Conservation may involve a utilitarian balancing in some definitions, but by other definitions it is a moral act. If so, the best reward may be for government policies, plans, and regulations to uphold human efforts and human values. Where private land has public importance, the question becomes not what rights you have, but what you do with them. Until that question is raised, the "public interest" will remain a long way from the 'public good', and the Land Use Framework a long way from Aldo Leopold's land ethic.

If one theme emerges from the above examples, it is that current law and policy are reducing private conservation to property rights, and property rights to money. This is a very narrow interpretation of the interests associated with living on and caring for the land.

As I sat down to my Thanksgiving dinner, delivered by Sunrise Farm, the last thing on my mind was government policy. I was making the agriculture-environment connection by supporting farmers who support the environment.

Adam Driedzic is a lawyer with the Environmental Law Centre in Edmonton, Alberta.


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Growing Community Gardens

Kyla Conner

Mary, Mary, quite contrary,
How does your garden grow?
With silver bells, and cockle shells,
And pretty maids all in a row

Law isn't something most people think about when planting seeds or planning a garden. Soil, sun, and the promised bounty of a late summer harvest aren't often associated with incorporations, contracts, and municipal bylaws. While passion, community support, and hard work are the seeds and soil of any successful community garden, the law provides community gardens with overall structure. For community gardens the law plays an important role in helping like-minded groups of people organize to grow fresh, local, healthy food in their communities.

What is a Community Garden?

A community garden is a place where a group of people collectively garden a piece of land. Community gardens provide participants with fresh, local, and seasonal produce. They create a sense of community among members and preserve local green spaces. While the concept is simple – get a group of people together to garden a piece of land – implementing the concept can be time-consuming and difficult. Who should be involved? What land is available and suitable? Is gardening permitted? How should the garden be operated?

For community gardens the law plays an important role in helping like-minded groups of people organize to grow fresh, local, healthy food in their communities.

Gathering Gardeners

Once a group of like-minded gardeners decide to form a community garden, they need to formally organize and decide how they want their organization to operate. Many community gardens choose to incorporate as societies under the Alberta *Societies Act* which allows five or more people to incorporate for any "benevolent, philanthropic, charitable, provident, scientific, artistic, literary, social, educational, agricultural, sporting or other useful purpose, but not for the purpose of carrying on a trade or business". While not necessary to run a community garden, incorporating allows the organization to own land, enter into contracts, and borrow money. Incorporating also limits the personal liability of the incorporating members, meaning they are not personally responsible for the debts and obligations of the community garden.

In order to apply for incorporation, a community garden must choose a name, state its purpose on the incorporation application form, and create bylaws that govern the society. The community garden's name cannot be similar to any other society or corporation's name in Alberta. The name must also include three elements: a distinctive element, a descriptive element, and a legal element. The descriptive element is a word that makes the name unique and sets it apart from other societies or corporations, the descriptive element describes what the society is or does, and the legal element must be one of a list of permitted endings. Once a name has been chosen, the community garden must obtain a NUANS (Newly Upgraded Automated Name Search) report comparing the community garden's name with those of existing societies and corporations in Alberta. The search results are submitted with the bylaws and application form when applying to incorporate.

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The second requirement for incorporation is a purpose statement. The statement should set out the organization's object or purpose for incorporating. For example, a community garden may state that its purpose is to provide its members with fresh seasonal produce and to encourage more people to try gardening.

The third requirement for the community garden's incorporating members is to draft a set of bylaws. The bylaws set out how the community garden will be organized and how it will operate. There are numerous issues that must be addressed in the incorporating bylaws, including: membership, meeting procedures, the appointment and responsibilities of directors and officers, and the borrowing power (if any) of the society.

If your community garden would like to incorporate or if you would like more information on societies in Alberta please visit Service Alberta at www.servicealberta.ca for more information and links to application forms.

A Place to Grow

Now that the community garden has been incorporated, it needs to find a place to grow. There are numerous factors to consider when looking at prospective garden locations: location within the community, access to water, accessibility for members, and soil quality. Two important legal questions are: how is the land zoned and who owns it?

There are numerous factors to consider when looking at prospective garden locations: location within the community, access to water, accessibility for members, and soil quality. Two important legal questions are: how is the land zoned and who owns it?

In Alberta, every municipality must pass a Land Use Bylaw (LUB). The LUB divides the municipality into districts and sets out permitted and discretionary uses of the land. One of the goals of land use planning is to group similar and compatible uses to reduce conflict. For example, playgrounds and daycares are often permitted on discretionary uses of land zoned for residential use whereas recycling depots and waste service operations are only permitted in lands zoned for industrial use. In some cases, a municipality may not permit a community garden because of concerns over increased traffic, noise, or impacts on neighbouring land. In other cases, certain aspects of the community garden may be prohibited such as composting, keeping bees, raising chickens, or selling the garden's harvest commercially. As a result, it is important for community gardens to find out whether there are any limitations on gardening activities in their area. To find out more, contact your local municipality.

Assuming that community gardening is allowed, the next step is to determine who owns the land. Oftentimes gardening space is provided by municipalities, churches, schools, hospitals or other organizations, but sometimes a vacant lot is the perfect garden location. In order to identify the land owner, the community garden can perform a Land Title Search. In Alberta, private land owners are listed on title. Title information is public record and anyone can request a title search. In general, the legal land description is required but various private registry offices can perform an additional search using the municipal address.

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If the landowner is identified and agrees to allow the community garden, both parties should enter into a written agreement setting out the terms of the arrangement. In general,

the landowner will agree to lease his or her land to the community garden for a set period of time under certain conditions. The lease should include the location of the land to be leased, the use of the land, the duration of the lease, any renewal provisions, and the amount of rent and security deposits. The landowner will want to be waived of any liability that could arise from the community garden's use of the land and will likely require that the organization obtain liability insurance. The landowner will also want the organization to agree to abide by any laws, including municipal bylaws.

Garden Rules help clarify what is expected of gardeners. A set of garden rules help address issues such as the upkeep of the property, participant safety, and work expectations. Having a set of rules helps resolve disputes amongst members, helps reduce conflict with neighbouring land users, and provides for a more enjoyable gardening experience.

Getting Ready to Plant

Once the community garden has incorporated, identified suitable land, and leased the land from the owner, the next step is to organize the community garden's member gardeners. A community garden will usually enter into temporary individual lease agreements with each member and draft a set of garden rules that describe how the garden will be run and how members are expected to behave.

Gardening Agreements are contracts between the community garden society and the individual member. Individual gardeners do not contract directly with the landowner since the society has already leased the land. A gardening agreement provides individual gardeners with a temporary and non-transferable right to garden in exchange for waiving their right to sue and for agreeing to be bound by a set of garden rules.

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Conclusion

Creating a community garden takes a lot of passion, dedication, and dirt. It also takes some planning and a legal know-how to make sure the garden is a welcome and productive part of the larger community. As the children's song goes: "the more we get together, the happier we'll be" planting peas under the beautiful Alberta sun. Happy gardening!

Kyla Conner is a student-at-law with Conner & Conner Professional Corporation in Canmore, Alberta and a member of the Canmore Community Gardening Society.

Encouraging Healthy Eating through Legislation?

The Case for Mandatory Menu Labels

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Nola M. Ries

How many calories in that snack?

Having a mid-morning energy slump? How about a quick visit to Starbucks for, say, a café latté and a blueberry scone to hold you over until lunch? Unfortunately, that energy slump can quickly turn to energy excess with a 700-calorie snack that amounts to more than a third of your daily energy needs.

An interested consumer can visit the Starbucks website to look up calorie details of a large café latté with 2% milk (240 calories) and the blueberry scone (460 calories, no butter or jam). In some locations, Starbucks and other major chains are posting calorie details on food displays and menu boards so customers may consider the caloric implications before they make a purchasing decision.

Menu labels

The growing public health problems of obesity and related chronic diseases, like diabetes, high blood pressure, heart disease, and some cancers, are compelling governments to find new ways to encourage people to eat a balanced diet and avoid unhealthy weight gain. Menu labeling – displaying calorie and other nutritional details on menus – is one tool that legislators hope could help influence consumer eating choices.

A New York state restaurant industry association brought legal action to fight the menu disclosure rule, and according to the *New York Times*, the "lawsuit was litigated more ferociously than death penalty cases."

The United States is leading the way with menu labeling. The City of New York implemented mandatory menu labeling in 2008. A New York state restaurant industry association brought legal action to fight the menu disclosure rule, and according to the *New York Times*, the "lawsuit was litigated more ferociously than death penalty cases." The legal battle concluded in the City's favour, however, and several other U.S. cities and states have followed New York's example. In 2010, the U.S. federal government enacted legislation mandating national chain restaurants (those with 20 or more locations) to display calorie information.

Menu labeling has also attracted government and industry attention in Canada. A *Healthy Decisions for Healthy Eating Act* was debated in Ontario's Legislature in 2009/10 and in August 2011, the British Columbia government launched the Informed Dining Program, a voluntary menu labeling collaboration with the private food service sector. Under B.C.'s program, hospital-based food service businesses are required to post nutrition information on menus. The Canadian Restaurant and Foodservice Association contends that mandatory menu labeling legislation is unnecessary, arguing that some restaurant chains already supply nutrition information through websites and other means.

The theory and the reality

The theory behind menu labeling – whether compulsory or voluntary – is that making nutrition information easily available at the point of purchase will help diners make healthier food choices. But is this theory proven in practice? While many consumers are enthusiastic about menu labels, recent studies suggest that menu labels have minimal impact in shifting consumer choices. More positively, some businesses have responded to health concerns by reformulating their product lines to offer lower-calorie and healthier options. Starbucks, for instance, replaced whole milk with 2% milk in its beverages and launched a selection of "petite", lower-calorie baked goods. Many of the high-calorie options remain, however.

The theory behind menu labeling – whether compulsory or voluntary – is that making nutrition information easily available at the point of purchase will help diners make healthier food choices. But is this theory proven in practice?

According to a consumer survey conducted shortly after the New York City menu labeling rule came into effect, 89% of respondents considered it a beneficial policy change. Nearly all diners were surprised by calorie counts, with 90% saying counts

were higher than they expected. In Canada, a recent federal Public Health Agency survey found that 92% of Canadians support menu labeling. Studies demonstrate that diners, even health professionals like dietitians, consistently underestimate the number of calories in fast food and restaurant meals.

Despite their popularity in opinion polls, menu labels do not necessarily change consumer behaviour in practice. Researchers have visited fast food restaurants in locations where menu labeling is mandatory and collected data on consumers' responses to the nutrition information. Some consumers claim the menu labels persuaded them to select lower-calorie items. After collecting customers' receipts and tallying calorie content, the researchers discovered the diners had not, in fact, ordered fewer calories. Another study found that menu labels had no impact on teenagers' fast food choices as they said taste, rather than calorie information, was most important to them. Diet-conscious consumers, women, and people of higher socio-economic status are more likely to use menu labels to select healthier options, though some consumers who feel virtuous after making a low-calorie choice for one meal may over-compensate by eating more calories later in the day. As another unintended outcome, consumers on a tight budget may use menu labels to make value-for-money judgments and conclude they are better off buying a higher calorie meal that costs the same amount as a lower calorie option.

Studies demonstrate that diners, even health professionals like dietitians, consistently underestimate the number of calories in fast food and restaurant meals.

Some research suggests menu labels are more effective when combined with additional information, such as educational statements about average recommended daily calorie intake, or visual cues like red or green stickers on higher or lower calorie options, respectively. Since implementing mandatory menu labeling, the City of New York has launched a public information campaign to promote the message that "2000 calories a day is all most adults should eat." (See posters at www.nyc.gov/html/doh/downloads/pdf/calories/Calorie-Posters.pdf.) The campaign shows that foods that are commonly considered healthy can be deceptively high in calories. One poster, displaying an apple raisin muffin, shows that, at 470 calories, this hefty snack amounts to nearly a quarter of daily calories. Another poster points out that a nutritious looking chicken rice burrito provides nearly 1,200 calories and poses the question, "If this is lunch, is there room for dinner?"

The bigger picture

Eating behaviour is complex and ongoing research is needed to determine the impacts of menu labels over the longer term, and also to consider what other policies or legislative measures may help encourage healthier choices. Even if governments enact laws requiring food service establishments to post nutrition facts on menu labels, the onus is still on the consumer to use that information in a meaningful way.

Even if governments enact laws requiring food service establishments to post nutrition facts on menu labels, the onus is still on the consumer to use that information in a meaningful way.

Indeed, a criticism of nutrition information measures, including labels on menus and packaged foods, and tools like the Canada Food Guide, is that they place responsibility for healthy behaviours primarily on individuals. Information provision policies are based on a premise that people simply need more facts to change their behaviour, but this approach disregards the many economic, environmental, social and cultural factors that influence and constrain behaviour.

Information provision policies are based on a premise that people simply need more facts to change their behaviour, but this approach disregards the many economic, environmental, social and cultural factors that influence and constrain behaviour.

Food marketing that encourages high-calorie consumption may override the influence of menu labels or other information strategies. Price incentives are also important. For instance, Subway introduced a $5 foot-long sub that encouraged higher average calorie intake among Subway customers, even in U.S. locations where calorie counts were posted on menu boards. Instead of focusing on menu labels, some nutrition experts advocate for smaller portion sizes for fast food and restaurant meals. Interestingly, a recent study investigated whether consumers would accept an invitation to "downsize" their meal by receiving smaller portions of starchy side dishes at a Chinese restaurant. Up to 30% of diners accepted a reduced portion size, even without a discount on the price of the meal. In this study, menu labeling did not promote lower calorie intake.

It is unrealistic to expect that menu labeling, on its own, will make much difference in the ongoing public health effort to control rising obesity rates and lifestyle-related chronic diseases. Nonetheless, it is worth encouraging the food service industry to make calorie and nutrition information easily available to consumers at the point of purchase. Health-conscious consumers who are concerned about nutrition may use menu labels to inform their choices. While some information is likely better than no information in this context, informational strategies alone are not enough and other policy and legal tools, including tax measures and regulation of food marketing and content, may have a broader impact on altering the many obesogenic aspects of modern environments.

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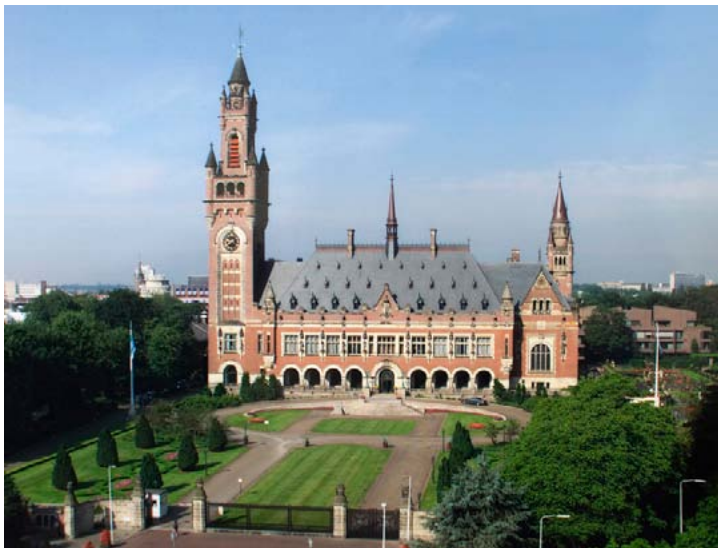
International Criminal Court



International Court of Justice

International Criminal Court and International Court of Justice

Adriana Bugyiova

The International Criminal Court and the International Court of Justice are tribunal courts that deal with various investigations and proceedings of crimes and legal disputes. Both are located in the Hague, Netherlands. Let's see what exactly the mandates of these two institutions are and how their work differs from each other.

The **International Criminal Court** (*Cour pénale internationale* – *ICC*) is a permanent tribunal that prosecutes individuals for crimes against humanity, genocide, and war crimes. It was founded in 2002 by the *Rome Statute of the International Criminal Court*, which was based on "the consensus of the international community that an independent and permanent court was needed, since tribunals like the International Criminal Tribunal for the former Yugoslavia and for Rwanda were

established to try crimes committed only within a specific time-frame and during a specific conflict"(ICJ). Since the *Rome Statute* came into force on July 1 2002, it can only prosecute crimes committed on or after this date. The ICC is intended to be a court of last resort, investigating and prosecuting only where national courts have failed. As of July 2012, it will have 121 member states. (These countries voted against the statute: China, Iraq, Israel, Libya, Qatar, and the United States.) Unlike the International Court of Justice, the ICC is legally and functionally independent from the United Nations. However, the *Rome Statute* grants certain powers to the United Nations Security Council. Pursuant to the *Rome Statute*, the Prosecutor of the ICC can initiate an investigation on the basis of a referral from any State Party, from the United Nations Security Council or initiate investigations *proprio motu* (on his own motion) on the basis of information received from individuals or organizations. As of today, the Court has opened investigations into seven situations: the Democratic Republic of the Congo, Uganda, the Central African Republic, the Republic of Kenya, Cote d'Ivoire, Darfur-Sudan and Libya. It has indicted 28 people, issued 19 arrest warrants and 9 summonses. All ICC public legal documents and decisions are available online at www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/.

The ICC is intended to be a court of last resort, investigating and prosecuting only where national courts have failed.

The International Court of Justice *(Cour internationale de justice – ICJ)* is the primary judicial organ of the United Nations. It was established in 1945 by the UN *Charter* and began its work in 1946 as the successor to the Permanent Court of International Justice, under the League of Nations. Its main functions are to "settle legal disputes (contentious cases) submitted to it by states and to provide advisory opinions (advisory proceedings) on legal questions referred to it by authorized United Nations organs and specialized agencies"(ICJ). This Court does not have the ability to try individuals. The *Statute of the International Court of Justice* is the main constitutional document regulating the Court. The ICJ has fifteen judges who are elected to nine-year terms. English and French are its official languages. All ICJ cases are available online at www.icj-cij.org/docket/index.php?p1=3&p2=2.

A comparative table of these two courts [slightly modified and updated from Dopplick] appears on the next page.

The International Court of Justice (*Cour internationale de justice – ICJ*) is the primary judicial organ of the United Nations. It was established in 1945 by the *UN Charter* and began its work in 1946 as the successor to the Permanent Court of International Justice, under the League of Nations.

	International Criminal Court	International Court of Justice
Year Court Established	**2002**	**1946**
Working Languages	English and French	English and French
UN-Relationship	Independent. May receive case referrals from the UN Security Council. Can initiate prosecutions against individuals from member states without UN action or referral	Official court of the UN, commonly referred to as the "World Court"
Jurisdiction	Individuals	UN member-states (i.e. national governments)
Types of Cases	Criminal prosecution of individuals	(1) Contentious cases between parties (2) Advisory opinions
Subject Matter	Genocide, crimes against humanity, war crimes & crimes of aggression	Sovereignty, boundary disputes, maritime disputes, trade, natural resources, human rights, treaty violations, treaty interpretation, and more
Appeals	Appeals Chamber. Article 80 of the *Rome Statute* allows retention of an acquitted defendant pending appeal	None. The ICJ decision in a contentious case is binding upon the parties. If a state fails to comply with the judgment, the issue may be taken to the UN Security Council, which has the authority to review, recommend, and decide upon enforcement
Funding	Assessed contribution from state parties; voluntary contributions from the UN; voluntary contributions from governments, international organizations, individuals, corporations and other entities	UN-funded
Budget	2010-11 €103.6 million ($ 149.7 million)	2010-2011 $51.01 million
President	Sang-Huyn Song	Hisashi Owada

The ICC and the ICJ play an important role in the international justice system. Whereas the ICC applies public international law and conventions, the ICJ applies treaties signed by the parties to a case. Nonetheless, in order to exercise jurisdiction, both courts depend on states' consent.

As stated by Judge Philip Kirch, a former ICC president, "the role of ICC is increasingly recognized in its contribution to the deterrence of crimes and improving chances for sustainable peace". Also, for the first time in the history of international criminal justice, victims have the

possibility to participate in the proceedings of the ICC and receive, when appropriate, some reparation under article 75 of the *Rome Statute*. These provisions, however, have not been used yet, since all six proceedings of the Court are ongoing and are not without controversy.

As for the impact of the ICJ, the Court is increasingly being called upon to decide a wide range of disputes, like cases concerning the illegal exploitation of natural resources, human rights, treaty interpretation, international environmental law, and the law of international organizations, just to name a few. "It is therefore not surprising that when it comes to determining what the relevant international law rule is, a decision by the ICJ, in general, is treated by the international community as the most authoritative statement on the subject and accepted as the law" (Buergenthal 404). One of the leading examples is the *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. People's Republic of Albania)* where the U.K. was suing Albania for compensation, after two British warships hit sea-mines in Albanian waters at the Straits of Corfu (during the Corfu Channel Incident in 1946), damaging the ships and killing personnel. Albania was ordered to pay the U.K. £843,947 in compensation.

The ICC and the ICJ play an important role in the international justice system. Whereas the ICC applies public international law and conventions, the ICJ applies treaties signed by the parties to a case. Nonetheless, in order to exercise jurisdiction, both courts depend on states' consent.

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European Union Law and the Court of Justice

Connie Mah

The European Union is an economic and political union comprised of 27 member states. It establishes a single economic market to ensure the free movement of goods, services, capital and people. It has seven supranational institutions to govern and effect its purpose, which includes political (the European Commission, the Council of the European Union, the European Council and the European Parliament) and judicial bodies (the Court of Justice of the European Union) in addition to financial ones (the European Central Bank and the Court of Auditors).

The European Union ("EU") has its own legal system, comprised of its legislative branches and a judiciary that binds all of its member states in addition to their national laws.

The EU's legal system is paramount, and its laws (European Union law) have supremacy over the national laws of member states where there is a conflict of laws. Also, where the national law of member states provides lesser rights than European Union law, the courts of the member states can apply European Union law.

European Union law is comprised of three sources of law: primary law, secondary law and supplementary law.

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Primary Law – Treaties

Primary law is mainly comprised of the treaties signed by the EU member states that created the EU and its institutions, and which set out its objectives and procedures, including the constitutional foundation of the EU's legal system. These foundation treaties, and their subsequent amendments, established broad policy goals and created institutions empowered with the legal authority to enact legislation and to enforce and interpret European Union law. The primary policy goal aimed at the principle of co-operation, whereby member states were obligated to not take measures that may jeopardize the attainment of the treaty objectives.

Two treaties formed the constitutional basis for the EU: the Treaty of Rome (also known as the Treaty on the Functioning of the European Union) in 1957, and the Maastrich Treaty (also known as the Treaty on European Union) in 1992. These treaties bound the signatory member states, and were effective as soon as they were in force. The Treaty of Rome stipulated that all prior commitments among signatory member states were eliminated; and set out the role, policies and operation of the EU. The Maastricht Treaty created the EU's formal institutions.

These treaties were amended by the Treaty of Lisbon signed on December 13, 2007, and entered into force on December 1, 2009. The Treaty of Lisbon introduced significant changes to EU institutions, and formally enshrined the *Charter of Fundamental Rights* for the EU. The *European Convention on Human Rights* was established in 1950 to prevent member states from violating human rights, and in 1989, the European Parliament issued a *Declaration on Fundamental Rights.* In 1999, the European Council set up a body to draft a *European Charter of Human Rights* to encompass the broader concept of fundamental rights to apply to the EU, its institutions and member states. The *Charter* was finalized in December of 2000. In 2007, the Treaty of Lisbon formally included the *Charter* as an article, thereby enshrining its constitutionality and codifying fundamental rights (which were previously developed as general principles of European Union law), elevating the *Charter's* legal effect to that of treaties.

Secondary Law – Legislation / Legislative Bodies

The founding treaties created the EU's primary institutions, and imbued powers to adopt legislation to enable the EU to achieve its objectives as specified by the treaties. The treaties provided for three institutions involved in the legislative function of the EU: the European Commission, and the bi-cameral legislature comprised of the Council of the European Union (also known as the Council of the Ministers) and the European Parliament. Depending on the area of legislation, these three institutions have varying relative power in legislative processes. Most legislation is created by the ordinary legislative procedure, whereby the European Commission proposes legislation to the legislative bodies, the Council of the European Union and the European Parliament, who then reach a co-decision.

The Court of Justice of the European Union was established by the Maastricht Treaty, and is seated in Luxembourg.

Secondary law is comprised of legal instruments based on the treaties, including unilateral acts and agreements. Unilateral acts comprise European Union legislation, including regulations, directives, decisions, opinions and recommendations, all of which must have a legal basis in the EU treaties or primary European law. Regulations are binding on member states without additional implementation; whereas directives set objectives, with implementation left to the member states.

Agreements include international agreements signed by the EU, agreements among member states and inter-institutional agreements between EU institutions.

Supplementary Law – Case Law/Judiciary

Supplementary law arises from uncodified sources, which include case law from the Court of Justice of the European Union, international law and general principles of European law. Supplementary law fills gaps in the primary law and secondary legislation.

Court of Justice of the European Union

The Court of Justice of the European Union was established by the Maastricht Treaty, and is seated in Luxembourg. It was originally established in 1952 as the Court of Justice of the European Coal and Steel Communities (a predecessor to the EU), and was renamed the Court of Justice of the European Communities in 1958. After the Treaty of Lisbon came into force in 2009, the Court was renamed the Court of Justice of the European Union.

Its duty is to:

- interpret the EU treaties (but not rule on their validity) and ensure the member states comply with their obligations under the treaties;
- to review the legality of the acts of the EU institutions; and
- to interpret European Union law.

It aims to ensure consistent interpretation and application of the treaties and European Union law among the member states. Given that each member state has its own legal system and language,

the Court of Justice of the European Union adheres to true multilingualism. The language of the case may be any of the 23 official languages of the EU, and the oral hearings involve simultaneous translations. The judges deliberate in a common language, traditionally French, and the decisions are issued in the language of the case as well as being translated into the other languages of the EU.

The judges deliberate in a common language, traditionally French, and the decisions are issued in the language of the case as well as being translated into the other languages of the EU.

The Court of Justice of the European Union is comprised of three courts:

- the European Court of Justice (also known as the Court of Justice), created in 1952, and which originally dealt with all matters under its jurisdiction;
- the General Court, which was created in 1988 to deal with matters as the Court of First Instance; and
- the European Union Civil Service Tribunal, which was created as a specialty tribunal in 2004 to deal with disputes between EU institutions and its employees.

The Court of Justice's jurisdiction is to interpret European Union law, and ensure it is consistently applied among member states; and to determine disputes between member states' governments and EU institutions. There are various types of proceedings heard.

Firstly, courts of member states may submit references to the Court of Justice to clarify a point of European Union law with respect to its interpretation or validity. Often, the national court stays the action before it while it seeks a preliminary ruling. The preliminary ruling is in the form of a judgment or order, and it is binding on the national court that raised the reference and on all other member states' national courts. Only national courts can commence a reference, however, all parties to the proceedings before the national court and any member states or EU institutions may participate in the proceedings in the Court of Justice.

Secondly, actions may be commenced against a member state for failure to fulfil an obligation under European Union law. These proceedings are usually commenced by the European Commission against a member state, although they may be commenced by a member state. Prior to commencing these proceedings, the European Commission must follow procedures to raise the complaint with the member state, permitting it to reply and terminate the failure. If this procedure fails, the action is commenced in the Court of Justice. If the Court renders judgment confirming the member state's failure to fulfil an obligation, the member state is required to take corrective action, failing which it may be subject to fines.

Actions may be commenced for annulment of a regulation, directive or decision adopted by a EU institution by member states or other EU institutions. The Court may declare the law null and void if it was not correctly adopted or not correctly based on the

The Court of Justice has exclusive jurisdiction over actions by member states against the European Parliament or the Council, or actions between one EU institution against another.

EU treaties. Actions against EU institutions for failure to act may also be reviewed by the Court of Justice.

The Court of Justice is composed of 27 judges and eight advocates-general, all of which are appointed for a six-year renewable term. There is one judge from each member state, and the judges elect a president for a three-year term (renewable) from among themselves. The president presides over hearings and deliberations; directs judicial business and administration; assigns cases to the chambers and appoints judges as *rapporteurs* who report on cases. The Court sits in Chambers of a panel of three or five judges, or as a full court of 13 judges for matters considered of exceptional importance as specified in the *Statute of the Court.* The Court's decisions are unanimous, with no minority or dissenting opinions.

The advocates-general are responsible for assisting the Court by providing independent and impartial legal opinions on the cases being heard. They may question the parties at the hearing, and they present their opinions in open court.

Five of the eight advocates-general are nominated by the five largest member states: the United Kingdom, France, Spain, Germany and Italy; while the other three rotate among the remaining member states. The advocates-general are responsible for assisting the Court by providing independent and impartial legal opinions on the cases being heard. They may question the parties at the hearing, and they present their opinions in open court. Their opinions are not binding on the Court, although they have been mainly adopted. Since 2003, their opinions are only required if the case raises a new point of law.

The Court of Justice has its own rules of procedure, which provide for a written and an oral phase. The registrar for the Court is the chief administrator, who acts under the authority of the president and is also appointed for a term of six years (renewable). The registrar is responsible for maintaining the Court's registry, including receipt, transmission and retention of the court documents and pleadings; and maintaining the Court's archives and publications.

There are no costs to commence proceedings; however, lawyer's fees are also not reimbursed by the Court (although a person may apply for legal aid). Between 1952 and 2006, the Court of Justice dealt with about 13,750 cases, mainly involving institutional law, social policy, tax, environmental law, consumer protection and agriculture.

General Court (also known as the Court of First Instance)

Due to the increasing case load of the Court of Justice, it requested the creation of a two-tier court system, resulting in the creation of the Court of First Instance (operational on October 31, 1989) which was renamed the General Court on November 30, 2009.

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The General Court is an independent court that hears cases dealing with direct actions commenced by private individuals,

companies and organizations against EU institutions or regulatory acts; and in respect of failure of EU institutions to act. It also has jurisdiction over actions brought by member states against the European Parliament or Council relating to specific acts. It hears actions seeking compensation for damage caused by EU institutions and staff; and actions based on contracts made by the EU. It also handles appeals from the European Union Civil Service Tribunal. It primarily deals with matters relating to competition law, mergers, cartels, state aid and trademarks. Appeals from its decisions are permitted only on points of law, and are made to the Court of Justice.

Similar to the Court of Justice, proceedings before the General Court generally have a written and oral phase, and the oral phase is usually a public hearing.

The General Court is composed of at least one judge from each member state. It primarily sits in Chambers of three judges, although it may sit as a single judge, in Chambers of five judges, and sometimes as a full court of 13 judges,

It does not have advocates-general to assist the judges. Its registrar is separate from the Court of Justice, but it does use the Court of Justice's other administrative and linguistic services.

It has its own rules of procedure. Similar to the Court of Justice, proceedings before the General Court generally have a written and oral phase, and the oral phase is usually a public hearing. There are no court fees, lawyers' costs are not covered by the Court, and legal aid may be applied for. Any person, body, office or agency of the EU who can prove it has an interest in the proceedings, may attain intervenor status by filing a statement in intervention, which is limited to supporting or opposing the claims of one of the parties, and may be permitted to give submissions at the oral hearing. At the oral hearing, the Court may question the parties' representatives, or the parties themselves.

Commencing a proceeding before the General Court does not stay the application of the impugned act, but the court, upon application, may grant interim measures in the event three conditions are met:

- the substance of the main proceedings appear well-grounded on its face;
- the applicant must show the interim measures are urgent and their absence would lead it to suffer serious and irreparable harm; and
- the interim measures balance the parties' interest and the public interest.

This three-part test is similar to the test for injunctions.

Between its inception in 1989 to 2006, the General Court rendered judgments in more than 5,200 cases, primarily in intellectual property, competition law and state aid.

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European Union Civil Service Tribunal

Initially, matters dealing with the staff at the EU institutions (the EU civil service) were dealt with by the Court of Justice,

and then by the General Court after its creation in 1989. Due to the General Court's increasing case load, the member states signed the Treaty of Nice to permit the creation of judicial panels for specific areas, which came into force on February 1, 2003. In 1994, the European Union Civil Service Tribunal was created as a specialty tribunal to hear and determine, at first instance, disputes between EU institutions and its employees. These disputes include employment issues, such as pay, recruitment, career progress and disciplinary measures; and social security issues, such as sickness, accidents at work, family allowance and old age issues.

In 1994, the European Union Civil Service Tribunal was created as a specialty tribunal to hear and determine, at first instance, disputes between EU institutions and its employees.

The European Union Civil Service Tribunal is composed of seven judges, who are appointed for renewal periods of six years. The European Council appoints the judges with a view to ensure a broad geographical representation from the member states and their national legal systems. The judges choose their own president for a term of three years. The Tribunal usually sits in Chambers of three judges, although a case may be referred to a full court due to the difficulty or importance of the issues of law. The Tribunal may also sit as a single judge or in Chambers of five judges where permitted by its rules of procedure. Decisions of the Tribunal can be appealed, within two months, to the General Court but only on questions of law.

The Tribunal's own rules of procedure are not yet in force, but it is governed by the rules of the General Court except for provisions relating to a single judge. Similar to the Court of Justice and the General Court, the Tribunal's proceedings include a written and an oral phase (which is usually a public hearing); there are no costs to commence the proceedings; lawyer's fees are not covered by the Tribunal; and a party not able to meet the costs may apply for legal aid. Similar to the General Court, the Tribunal may grant interim measures, if three conditions are met. Unlike the other courts, the Tribunal may attempt to assist the parties to reach settlement (at any stage of its proceedings).

The European Union Civil Service Tribunal is composed of seven judges, who are appointed for renewal periods of six years. The European Council appoints the judges with a view to ensure a broad geographical representation from the member states and their national legal systems.

There are about 35,000 members of the EU civil service, and the Tribunal hears about 150 cases a year. The Tribunal also has jurisdiction to hear matters concerning employees of Eurojust, Europol, the European Central Bank and the Office for Harmonization in the Internal Market; but cannot hear cases between national administrations and their employees.

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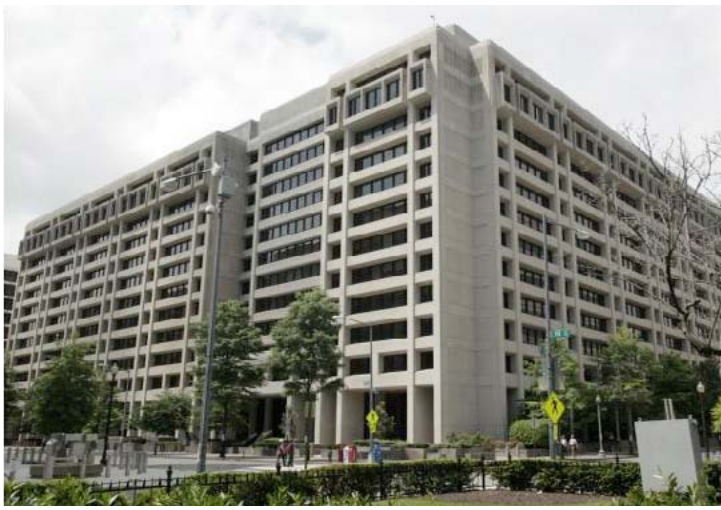
The World Bank Building



The International Monetary Fund Building

The World Bank and the International Monetary Fund

Adriana Bugyiova

The World Bank and the International Monetary Fund are two major international financial institutions. Both were created after the *Bretton Woods Conference* in 1944, held at the Mount Washington Hotel in New Hampshire. The Conference was attended by over 700 delegates from all 44 Allied nations and its goal was to regulate the international monetary and financial order after the end of World War II. They officially formed in December 1945 in Washington, D.C., where both still have headquarters. Let's take a closer look at these two institutions to better understand their roles and involvement in world economic affairs.

The **World Bank** (WB) provides loans and technical assistance to developing countries around the world with the goal of reducing poverty. To accomplish this, it promotes foreign investment and international trade and facilitates capital investment. Given this objective, it makes sense that no wealthy country can borrow from the World Bank. The poorer the country, the more favourable the conditions under which it can borrow from the Bank. The WB is made up of two development institutions owned by 187 member countries: the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The IBRD aims to reduce poverty in middle-income and credit-worthy poorer countries, while the IDA focuses on the world's poorest countries. Together, they provide low-interest loans, interest-free credits and grants to developing countries for a broad range of projects like investments in education, health, public administration, infrastructure, financial and private sector development, agriculture and environmental and natural resource management. Most of its financial resources are acquired by borrowing on the international bond markets and from grants by donor nations. The Bank employs a staff of over 10,000 with expertise in economics, engineering, urban planning, agronomics, statistics, law, and management, as well as experts in telecommunications, education, population and health care.

The WB is made up of two development institutions owned by 187 member countries: the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA).

The **International Monetary Fund** (**IMF**), for its part, is not a bank and does not intermediate between investors and recipients, although it has at its disposal resources valued at over $200 billion. These resources come from the 187 member countries, which pay membership fees based broadly on their relative size in the world economy. Its professional staff members (over 2,400) are for the most part economists and financial experts. In the IMF's own words, its goal is to "[foster] global monetary co-operation, [secure] financial stability, [facilitate] international trade, [promote] high employment and sustainable economic growth, and [reduce] poverty around the world" (IMF).

The International Monetary Fund (IMF), for its part, is not a bank and does not intermediate between investors and recipients, although it has at its disposal resources valued at over $200 billion.

Broadly defined, the two institutions seem very similar. In fact, John Maynard Keynes, one of the founding fathers of the two institutions and a renowned economist of the twentieth century, admitted that he was confused by their names: he thought the Fund should be called a bank, and the Bank a fund (Driscoll). However,

despite many similarities, the World Bank and the IMF are distinct. The fundamental difference lies in the fact that the World Bank is primarily a development institution for poor countries, whereas the IMF is a co-operative institution that maintains an orderly system of payments and receipts between all nations and protects international trade.

Thus, the WB borrows and lends, finances large-scale development projects and offers interest-free loans and grants for projects such as the West Africa Agricultural Productivity Program, where $84 million was allocated to the development and improvement of agricultural technologies. The IMF, on the other hand, seeks to ensure the world monetary system's stability by providing temporary financing to countries with balance-of-payment deficits. For example, the IMF has recently been in the spotlight for granting around €30 billion in bail-out loans to Greece in order to help the country deal with its excessive deficit and to restore international confidence in Greece's ability to repay its debt.

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Here are some additional distinctive features of both institutions (Driscoll):

The International Monetary Fund and the World Bank at a Glance

International Monetary Fund	World Bank
• assists all members – both industrial and developing countries – that find themselves in temporary balance of payments difficulties by providing short-to medium-term credits • supplements the currency reserves of its members through the allocation of SDRs (special drawing rights) • has at its disposal fully paid-in quotas now totalling SDR $204 billion • headed by Christine Lagarde	• assists developing countries through long-term financing of development projects and programs • provides to the poorest developing countries whose per capita GNP is less than $865 a year special financial assistance through the International Development Association (IDA) • encourages private enterprises in developing countries through its affiliate, the International Finance Corporation (IFC) • has an authorized capital of $276 billion • headed by Robert B. Zoelick

Nonetheless, the WB and IMF do collaborate regularly with the primary goal of raising the living standards of its member countries. They hold joint Annual Meetings of the Board of Governors, where member countries' views on current economics and finance issues are presented, and the IMF's Managing Director and the WB's President meet regularly to consult on major issues.

They also issue joint statements and occasionally write joint articles, and have visited several regions and countries together.

. . . the WB and IMF do collaborate regularly with the primary goal of raising the living standards of its member countries

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Sentencing is Important

Phil Lister, Q.C.

No aspect of criminal law gets as little attention as sentencing. And no aspect is as important. After all, almost 90% of all criminal cases end with a sentencing. Yet it's the verdict that everyone usually focuses on. But this year may be different.

The Conservative Government's Bill C-10 has drawn a lot of attention to this area. With minimum sentences for some crimes and mandatory jail time for others, it brings a failed American philosophy into Canada, amidst much controversy.

The goals of sentencing are inherently contradictory and always involve a balancing of competing goals. These three goals are deterrence, denunciation, and rehabilitation. By fining or jailing someone we try to show everyone what this sort of conduct leads to, and we try to show this particular accused the too-high price he (and with increasing frequency, she) must pay for having done this act. So, there are two processes at work here: general deterrence to the public, and specific deterrence to the criminal. The underlying philosophy is that, before committing a crime, a criminal does a mental cost-benefit analysis and decides if the act is worth the punishment: "If I will only go to jail for a year then I'll do it, but if I am going to have to serve two years, that's too steep a price to pay, so I'll refrain." This credits criminals with a degree of foresight and logic that few possess. The

many with fetal alcohol syndrome rarely foresee a consequence that is more than five minutes distant.

The second goal of sentencing is denunciation: that the judge speaks for all of us and proclaims our common values when punishing criminals and thereby denounces their conduct. It reminds the public of values we all hold dear, as expressed in the various prohibitions of the *Criminal Code*.

The goals of sentencing are inherently contradictory and always involve a balancing of competing goals. These three goals are deterrence, denunciation, and rehabilitation.

The third goal of sentencing is supposed to be rehabilitation, giving criminals a "time-out" to realize the error of their ways. The original idea was that this rehabilitation would occur within the criminals' own minds as they silently reflected in their lonely cells on the error of their ways and where it has now brought them.

Of late, this has been altered to reform of their conduct and values through the intervention and assistance of the various helping professions who will counsel offenders via various "programs" and one-on-one lectures, presumably of the Socratic type, so they come to realize how shallow and wrong their values are. Often this helps just by babysitting a younger offender as his mind and body complete the inevitable maturing process.

Revenge for the victim or the victim's family is not supposed to be a goal of sentencing but some say it has now become a fourth principle, and even the dominant one.

Along with these competing goals, the tension between sentencing the crime and sentencing the criminal permeates every case.

What is certain is that more people are going to jail and more people will be going to jail. What they will be like when they get out, and who will pay for the prisons and guards to imprison them, has yet to dominate the debate. But some people are already pointing out that, younger people being powerfully influenced by their peer groups and most criminals being under 30, "tough on crime" really means "tough on criminals" as well as "producing more future crime." And some provincial premiers are complaining that it means the federal government gets the headlines and plays to the crowd, but they get the bill. That a disproportionate number of jail inmates are Aboriginal (30%) as compared to their representation in the Canadian population (3%) has not escaped the notice of critics of Bill C-10. Nor has the failure of this approach in the U.S.A. and the essential bankruptcy of "tough" states like California burdened by tough laws and consequent large jail populations.

These competing values have starkly manifested themselves in Alberta courts in a pair of high profile (at least amongst the legal profession) recent judgments. Justices Jack Watson and Ron Berger of the Alberta Court of Appeal have written strong dissents in *R v Arcand* (2010 ABCA 363) and *R v Lee* (2010 ABCA 1), where each vigorously (to put it mildly) attacked each other's reasoning and values.

Underlying this is the thrust to remove the discretion of trial judges to individually craft a fair sentence in favour of (a) Parliament (Bill C-10) or (b) court of appeal precedents (*R v Arcand*). And,

this is happening in a system that has, to some extent, abdicated its reviewing or appellate function due to deference to the wisdom of our trial judges.

Where this will end up, given that we now have a majority government, seems easy to predict. But we can hope that the controversy surrounding Bill C-10 brings some much-deserved attention to the issue of sentencing and creates greater awareness that the judicial process doesn't always end with the verdict.

And, some provincial premiers are complaining that it means the federal government gets the headlines and plays to the crowd, but they get the bill.

Phil Lister, Q.C., is a lawyer practising in Edmonton, Alberta.

Mandatory Retirement in Canada Has "Gone the Way of the Kiki Bird" – It's Very Rare!

Linda McKay-Panos

One of the first human rights cases I worked on while articling at the Alberta courts involved mandatory retirement. In 1992, Dr. Olive Dickason unsuccessfully challenged the University of Alberta's mandatory retirement policy (see: *Dickason v University of Alberta*, [1992] 2 SCR 1103). While Dr. Dickason was successful in arguing before the Alberta Human Rights Commission Board of Inquiry that the mandatory retirement clause in the collective agreement contravened Alberta's (then) *Individual's Rights Protection Act* (for age discrimination), the Alberta Court of Appeal overturned the decision. A majority of the Supreme Court of Canada agreed with the Court of Appeal, holding that the University had shown that the discrimination was reasonable and justifiable in the circumstances. The courts were impressed with the stated objectives of the University's mandatory retirement policy: preservation of the tenure system; promotion of academic renewal; facilitation of planning; and the protection of "retirement with dignity" for faculty members.

That was the law in 1992, but today there has been a shift. Perhaps because the large baby boomer generation is currently reaching the age of retirement, it seems that the courts and lawmakers have changed their attitudes towards mandatory retirement.

Perhaps because the large baby boomer generation is currently reaching the age of retirement, it seems that the courts and lawmakers have changed their attitudes towards mandatory retirement.

While in 1990, about two-thirds of collective agreements provided for mandatory retirement at age 65 (Derek Knoechel, "Mandatory Retirement Being Retired Across Canada" *Benefits and Pension Monitor* (online: www.bpmmagazine.com/Benefits_Pensions_Online_Exclusives.html), times have changed. In most Canadian provinces, mandatory retirement is either prohibited entirely or permitted only if it is based on a *bona fide* retirement or pension plan, or as a *bona fide* occupational requirement. The Canadian Human Rights Commission has been unsuccessfully calling for the repeal of the mandatory retirement provisions in its legislation since 1979 (Kathryn Blaze Carlson "Tories end forced retirement, decades of 'age discrimination'" 19 December 2011 *National Post* (online: http://news.nationalpost.com/2011/12/18/tories-end-forced-retirement-decades-of-age-discrimination/).

Finally, a recent decision of the Federal Human Rights Tribunal held that *Canadian Human Rights Act,* RSC 1985 c H-6 *(CHRA)*, s. 15(1)(c) violated the *Canadian Charter of Rights and Freedoms*, s. 15(1), and could not be saved by *Charter* s. 1, and thus is unconstitutional. In *Vilven and Kelly v Air Canada (Vilven and Kelly)*, 2009 CHRT 24, two airline pilots challenged their mandatory retirement at age 60. The mandatory retirement provisions of the collective agreement were ruled to constitute age discrimination. The company argued that standards in the airline industry prohibited a person over the age of 60 from certain positions in the air crew of a plane involved in international flights, and that this would cause schedule planning difficulties for the airline. Neither of these arguments was sufficient to save the finding that the mandatory retirement policy was unconstitutional.

CHRA, subsections 15(1) (a) to (c) provide:

15. (1) It is not a discriminatory practice if

(*a*) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;

(*b*) employment of an individual is refused or terminated because that individual has not reached the minimum age, or has reached the maximum age, that applies to that employment by law or under regulations, which may be made by the Governor in Council for the purposes of this paragraph;

(*c*) an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual;

This finding of unconstitutionality seemed to add fuel to the fire for those who were arguing that mandatory retirement should be scrapped from the *CHRA*. In late 2011, Parliament passed legislation that repeals s. 15(1)(c) effective December 2012.

While this will mean mandatory retirement policies are not allowed in some circumstances, there will be some cases where mandatory retirement based on age will be determined to be a *bona fide* occupational requirement (BFOR).

. . . there will be some cases where mandatory retirement based on age will be determined to be a *bona fide* occupational requirement (BFOR).

The BFOR defence (or exception) exists in most human rights legislation across Canada. The Supreme Court of Canada has developed legal factors to be considered when determining whether an occupational requirement is indeed *bona fide*. See: *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (B.C.G.S.E.U.),* [1999] 3 SCR 3 *(Meiorin Grievance)*. These include:

(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;

(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is **reasonably** necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

With respect to considering whether it is impossible to accommodate an employee without imposing undue hardship on an employer, factors considered by the Court include cost, safety, employee morale, interference with other employees' rights, and disruption of the collective agreement.

In the *Vilven and Kelly* case, the matter was appealed to the Federal Court for a second time (see *Air Canada Pilots Association v Kelly and Vilven;* 2011 FC 120, www1.carp.ca/PDF/ReasonsForJudgment.pdf ("*Vilven and Kelly #2*")). Justice Anne Mactavish ruled that the Tribunal had acted unreasonably when it failed to acknowledge and analyze the evidence Air Canada had submitted to support its claim that an age limit of 60 for airline pilots is a BFOR. In particular, she was concerned about the Tribunal's treatment of the evidence of flight operations expert Captain Steven Duke about the unworkability of scheduling pilots who are over 60 and under 65, and first officers who are over 60. Captain Duke had opined that additional pilots would have to be hired by Air Canada to ensure that all flights are properly staffed and would also have to continue paying over-60 pilots whose services could not be used.

In July 2011, the Federal Human Rights Tribunal heard the matter for the third time (see: *Vilven and Kelly v Air Canada*, 2011 CHRT 10). The Tribunal was to re-determine whether age was a *bona fide* occupational requirement for Air Canada after November 2006 (which was the date that the International Civil Aviation Organization's rules were amended to permit pilots under age 65 to

fly internationally as long as one of the pilots in a multi-pilot crew was under 60). Tribunal member Wallace G. Craig held that Air Canada had passed the *Meiorin* BFOR test by (among other things) establishing that the mandatory retirement standard melded the company's needs with the collective rights and needs of its pilots. Further, abolishing mandatory retirement would result in increased operational costs, inefficiency in the scheduling of pilots and negative ramifications for both the pilots' pension plan and the collective bargaining agreement. The Tribunal found that Air Canada would suffer undue hardship in accommodating the complainants' needs. Pilots Vilven and Kelly have applied for judicial review of this decision.

Thus, the defence of *bona fide* occupational requirement can still apply to age discrimination in employment, even though provisions permitting mandatory retirement in human rights legislation will soon be extinct.

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Opening Closed Doors –

When should domestic violence victims sue their abusers?

Rosemarie Boll

Mr. Dhaliwal hit his wife with a closed fist and a broom handle and was convicted of criminal assault. In the divorce, Ms. Dhaliwal included a tort claim for assault and battery and asked for damages (money). She won.[1]

Mr. Danicic intimidated and harassed his former partner by mailing her threatening letters and humiliating sexual photographs. He said he'd send them to Ms. McLean's grandmother, her parents, her doctor and even her hairdresser. Mr. Danicic was charged with extortion and uttering threats. In her family law claim, Ms. McLean asked for damages for intentional infliction of mental suffering and emotional distress. She won at trial[2] and Mr. Danicic's appeal was dismissed.[3]

Two months after meeting by telephone, Ms. Raju travelled to Fiji to marry Mr. Kumar. Eighteen months later he immigrated to Canada. The marriage quickly broke down when he

admitted he'd married Ms. Raju only so that he could come to Canada. When he filed for divorce, his wife claimed damages for fraudulent misrepresentation in inducing marriage. She won.[4]

Ms. Jones divorced her husband. Mr. Jones then moved in with Ms. Tsige. Ms. Tsige worked at the Bank of Montreal – the same branch where Ms. Jones banked. Ms. Tsige snooped in Ms. Jones' account 174 times over four years to see if Mr. Jones was paying child support to his ex-wife. Ms. Jones sued Ms. Tsige for invasion of privacy. She said the snooping was unauthorized, it was highly offensive to the reasonable person, it intruded on a private matter, and it caused her anguish and suffering. The judge gave Ms. Jones damages for a new tort – "intrusion on seclusion."[5]

Injured spouses have successfully sued for assault, battery, sexual assault, confinement, fraudulent misrepresentation and conspiracy.

Criminal or quasi-criminal conduct surfaces regularly in family law. Historically, criminal behaviour was a matter for only the criminal courts. In the 1980s, injured spouses (and abused children) began taking matters into their own hands. Increasingly, they are adding tort claims to their family law proceedings. Injured spouses have successfully sued for assault, battery, sexual assault, confinement, fraudulent misrepresentation and conspiracy. Other claims, such as malicious prosecution, abuse of process, or sexually transmitted diseases have been less successful.

Why Sue?

Tort law can give you a number of things that family law and criminal law can't.

1. Almost every divorce goes ahead on the ground of one year's separation. This no-fault treatment sends the message that family violence is not real violence – a message that justifies cruelty. A tort case can lay the blame for the marriage breakdown.
2. More money. Even if the abuser has been convicted of a crime, the victim can still bring a civil action for compensation. Although most awards are modest (often around $10,000 and ranging upward to $40,000), in extreme cases (38 years of constant mental and physical abuse[6]) the damages can go as high as $175,000.
3. Generally speaking, bad behaviour is not cause for an unequal division of matrimonial property. Most matrimonial property is shared half-and-half. However, if the victim successfully adds a tort claim to a matrimonial property claim, the judge may dip into the abuser's one-half share to satisfy the judgment. The victim ends up with a larger share of the property.
4. Similarly, a victim might be able to use a tort action as a bargaining chip in negotiations. This can be a bit tricky as judges can be skeptical if the issue is raised while negotiating a separation agreement.
5. Unlike the victim's passive role in a criminal case, a tort claim empowers the victim. Tort is plaintiff-driven, not prosecutor-driven. The injured spouse is in charge.

6. Criminal charges usually focus on only a few incidents that can be most easily proven. Tort claims can encompass decades of abuse.
7. Victims commonly feel that the criminal process failed to do justice. Retribution can be an important outcome of a tort case.
8. Victims may believe that a tort action might deter other potential abusers. Some survivors use this type of social action as a part of their recovery plans.
9. Media coverage in high-profile cases exposes and condemns hidden violence. It offers the potential for public education and can encourage other victims to pursue their own claims.

In theory, violence is violence, whether between strangers or between spouses. In practice, there is a fundamental difference between the two.

In theory, violence is violence, whether between strangers or between spouses. In practice, there is a fundamental difference between the two. Tort law evolved to regulate relationships between strangers. In many cases it does not fit the needs of a victim of intimate partner violence. My next column will highlight some of the reasons why a victim may choose to forgo a meritorious tort claim.

Notes

1 *Dhaliwal v. Dhaliwal* 1997 CanLII 2762 (BC SC) http://canlii.ca/t/1f5m8

2 *McLean v. Danicic* 2009 CanLII 28892 (ON SC) http://canlii.ca/t/23tq0

3 *McLean v. Danicic* 2010 ONCA 22 (ON CA) www.ontariocourts.ca/decisions/2010/january/2010ONCA0022.htm

4 *Raju v. Kumar* 2006 BCSC 439 (CanLII) (BC SC) http://canlii.ca/t/1mw8x

5 *Jones v. Tsige* 2012 ONCA 32 (CanLII) (ON CA) http://canlii.ca/t/fpnld

6 *Flachs v. Flachs* 2002 CarswellOnt 1285 (ON SC)

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The Case for an Aboriginal Film Commission: An Educational Revolution

Troy Donovan Hunter J.D.

In British Columbia and other parts of Aboriginal homelands, there are pockets of interest in the movie making industry, which is sometimes referred to as "Hollywood North". As with the rest of the world, the advent of the silver screen, the boob tube and now YouTube, we have seen an entertainment industry develop and flourish. If we go back even further in time, before this industry had even been thought of, we step back into an era of theatre, performance, grace and culture. In Aboriginal cultures this same type of entertainment storytelling was used to transfer a vast richness of history, law, events and even of our own creation.

Screenplay writer Ray Van Eng with Actor Stephen M.D. Chang along with author Troy D. Hunter at the closure of the old bridge in Hope, BC (July 2011), an original Rambo movie set. Chang acted in Rambo's "First Blood" and is currently producing Life for Mile, a movie about Chinese and Indians enduring racism during the construction of the railway in British Columbia.

Original peoples of Turtle Island (North America) have passed on their traditional knowledge from generation to generation through an oral culture. However, that is but one method and there are many other methods, such as the re-creation of an event as in song and dance in the west coast big houses. On the prairies, we have a transference of history and knowledge which is remembered each year as sun dances are held, with original teachings from the most-sacred, White Buffalo Calf Pipe Woman. It is an Aboriginal right to tell stories, to teach history, to transfer knowledge, to share ceremonies, not only within the distinctive society from whence knowledge originated from but also to other societies as a natural and normal progression of Indigenous law. Evidence of this cross-cultural transference of knowledge across Turtle Island over thousands of years can be found in our common Indian sign language, in our cultural practices that each took on their own distinctive ways, in our archaeological sites, in our rock art, in our grease trails, in our rivers and streams, and in our creation stories and oral histories. We have commonalities which could only have occurred by transferring knowledge from one cultural group to another.

Prior to contact with European peoples, the original peoples of North America had a vast economic trading network and had transferred knowledge and practices from one cultural group to another. This was and is the essence of survival. Our ancestors learned how to survive through transference of knowledge, divine guidance or both. Therefore, in my opinion, the Supreme Court of Canada, in the *Van der Peet* case, came to a dead-wrong conclusion on 21 August 1996 with their so-called, "Test for Aboriginal Rights".

The Supreme Court of Canada ruled that, "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group asserting the right". This test for Aboriginal rights ignores the evidence that the original peoples of Turtle Island had on-going, evolving cultures, which changed from time to time to adjust to the world around them and that such changes were often initiated by an individual person taking action rather than a whole cultural group adopting a practice *en masse*. Also, to base Aboriginal rights only upon transference of knowledge from one Aboriginal group to another and not on one culture to another, as in the case of post-contact, is both absurd and unconstitutional on equality grounds.

It would be fair to say that it is an Aboriginal right to tell stories, to teach history, to transfer knowledge, to share ceremonies, not only within the distinctive society from whence knowledge originated from but also to other societies as a natural and normal progression of Indigenous law.

The question now is why? There is an Aboriginal right that belongs to all of the original peoples of Turtle Island. Our stories, our histories, our knowledge, our ways of entertainment not only are evolving, but must be passed on to the generations that follow. The current entertainment industry is dominated by western Eurocentric foundations. In effect, our stories have been silenced as we watch and learn and become indoctrinated by the influence of Hollywood and their writers.

While historically, the voice of the original peoples have been silent as Hollywood dictated how a story is told, some inclusion of the original people's voice has begun to surface. The screenplay for

the 1998 movie, *Smoke Signals* was written by Sherman Alexie, a Spokane/Coeur d'Alene Indian. That low-budget film at a cost of around $2 million, had over $6 million in sales. This is only scratching the surface of what could be the future for Hollywood North as the original peoples come up with their own mainstream blockbuster movies.

The issue here is the Crown providing tax credits to the movie industry, which can potentially impact knowledge and belief systems of all peoples, including Aboriginal peoples, and thus indoctrinating masses of people with an ignorant or lesser view of the original peoples of Turtle Island.

In a recent (24 February 2012) *National Post* article calling for teaching all Canadians the history of residential schools, Wayne K. Spear said it very well when he stated:

> At the core of the Commission's thirty-page report and twenty recommendations is a simple and useful notion, that the time has come to endow the public with a "full history of residential schools and Aboriginal peoples, taught to all students in Canada at all levels of study." Why? For the same reason that Canada has invested in a campaign this year to educate its citizens about the war of 1812: by means of the past, the present has arrived – neither immaculate nor inevitable, but covered in the instructive fingerprints of its circumstance. Ignorance only impoverishes a nation, condemning it to act upon the already failed half-truths and misconceptions of its past. As the [Truth and Reconciliation] TRC Interim Report rightly concludes, "Canadians have been denied a full and proper education." . . . In a country where most non-aboriginal folk have never set foot on an Indian reserve, and where senior federal officials have confessed (to me) that they learned about Indians from cowboy movies, some education aided by the push of political will could do some good."

What I propose is that the Crown recognizes that providing tax credits to the entertainment industry has the potential to impact upon Aboriginal rights, and in order to accommodate that concern, on-going core funding should be provided to First Nations for the creation of an Aboriginal Film Commission.

The Commission would partner with the entertainment industry and train the original peoples in this modern form of storytelling, from writing a screenplay to shooting movies, and distributing such new and evolving products through mediums including movie theatres worldwide.

This Commission would be responsible for engaging with First Nations and with production companies, offering tax incentives, to encourage movies to be made on federal Indian Reserves, bringing benefits such as jobs, economic development and increased tourism.

The Hollywood format for entertainment would be used because it's successful in storytelling, retaining audiences and ensuring that they will return again to spend more money to see more shows.

While historically, the voice of the original peoples have been silent on the sidelines as Hollywood dictated how a story is told, some inclusion of the original people's voice has begun to surface. The screenplay for the 1998 movie, *Smoke Signals* was written by Sherman Alexie, a Spokane/Coeur d'Alene Indian.

Since the original peoples of Turtle Island have vast storytelling customs and traditions, it would be a natural progression of Aboriginal rights to use modern technology and formulas to pass on knowledge and wisdom to future generations. This is also important because the messages told from an original people's perspective will be transferred to the hearts and minds of future generations. In doing so, our world will be richer for it.

Since the original peoples of Turtle Island also have vast storytelling customs and traditions, it would only then be a natural progression of Aboriginal rights to use modern technology and formulas to pass on knowledge and wisdom to the future generations.

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2012 Federal Budget Features Tighter Reporting on Charities' Political Activities

Peter Broder

New charities provisions in the 2012 federal Budget generated more attention than any measures relating to the sector have in a very long time. The government announced that it was tightening rules around charities' political activities. The focus of the new requirements was mostly on enhanced reporting; however, embedded in the announcement was a crucial substantive change.

The catalyst for the new measures seems to have been involvement of some environmental charities in the regulatory processes and public debates over pipelines.

The legislative move – accompanied by an $8 million boost in Canada Revenue Agency (CRA) resources over two years to amend its T3010 charity reporting form and enhance its compliance capability in dealing with political activities – drew both praise and criticism, with some commentators welcoming it as potentially reining in bad actors and others as stifling legitimate disagreement on policy matters. Unfortunately some of this commentary repeated and reinforced common misperceptions about the rules governing registered charities' political activities.

Historically, foundations and other registered charities have enjoyed scope under the *Income Tax Act* (*ITA)* to make gifts to qualified donees. Specifically, the *ITA* provided "'charitable purposes" includes the disbursement of funds to qualified donees". This language allowed the making of gifts

to certain organizations, enumerated in the *ITA*, beyond registered charities, and – perhaps more importantly – meant that the charity making the gift did not have to enquire into its eventual use.

The flexibility this afforded was important. It meant that a foundation could, for example, provide a grant designed entirely to cover the grantee's administrative costs, rather than one that would be spent proportionately or exclusively on the group's delivery of its charitable programs. With many funders and donors now earmarking their support for specific programs or projects, a foundation's ability under the old rules to fully underwrite less popular aspects of a charity's operations has become increasingly valuable. The new provisions will remove this flexibility with respect to funding of political activity.

The new rules will likely add to the already significant confusion in the sector and among the public about the permissible political activities of charities.

Under the new rules, foundations (or other registered charities) making transfers to qualified donees, where "it can reasonably be considered that a purpose of the gift is to support the political activities of a qualified donee,"will have to report the expenditure as having been made on its political activities. This imposes a difficult new administrative burden on funder charities to monitor their aggregate granting potentially devoted to political activities.

Pending the actual legislation and administrative guidance from the Canada Revenue Agency (CRA), it is unclear what the test will be for "it can reasonably be considered," or what due diligence may be expected of granting charities in enquiring into the eventual use of funds they transfer to other qualified donees. However, the existence of this additional monitoring and reporting requirement it likely to cause some charities to not grant to groups engaged in high profile campaigns.

The new rules will likely add to the already significant confusion in the sector and among the public about the permissible political activities of charities. Many funders and operating charities already refrain from work that might be considered political activity (or policy work that advances their charitable purposes) because they don't want to risk non-compliance and possible de-registration. However, there is frequently more scope within the law (and within public opinion) to be assertive in this area than charities may realize.

As to public opinion, the Muttart Foundation's 2008 Talking About Charities survey found that 64% of respondents agreed that "opinions that charities express on issues of public concern have value because they represent a public interest perspective" and shows 80% or higher backing for charities speaking out on issues like the environment, poverty or healthcare; meeting with government officials; using research results to support a message; or, placing advertisements in the media.

Legally, it is well established that charities cannot be constituted – i.e., have a stated object or purpose – to advance a political end. In the case law, political purposes have has been defined as supporting a political party or candidate for public office or seeking to retain, oppose, or change the law or policy or decisions of any level of government in Canada or a foreign country.

This prohibition is framed in terms of purposes, however, and there is recognition both in the case law and in the *ITA* that charities may, within certain limitations, engage in non-partisan political activities. The *ITA*, for example, includes provisions that where a registered charity meets a substantially all test based on it purposes or activities, its nonpartisan political activities are deemed charitable.

As well, the courts have long held that charities may undertake a wide range of public policy work in furtherance of their charitable objects. Such work is not considered political activity and is not subject to limitations (other than not becoming so significant that it becomes a collateral purpose of the organization). Indeed, given what apparently generated the Budget provisions, this may give rise to a minor irony. Depending on an organization's objects, participating in an environmental assessment hearing or public awareness campaign might well be considered to advance a charity's purposes – meaning that the new political activity rules wouldn't apply.

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Employer Access to Your Social Media Life

Peter Bowal and Joshua Beckie

Facebook helps you connect and share with the people in your life.

– Facebook corporate motto

Introduction

Over the last month, the legality of requests by prospective employers to access applicants' Facebook and other social media accounts has arisen. These accounts may reveal a more complete picture of the employee, especially what the employee really thinks, says and does outside of the workplace.[1]

The present economic market still allows employers to be choosy. Employers view the practice as a risk management strategy. They select the best employees for their companies to invest in, and accordingly, seek to obtain and use all relevant information on applicants, particularly since it may be increasingly difficult to differentiate applicants who carefully control their own images and references. The request could equally be made any time to *current* employees, in which case notice, cause and other legal complexities appear.

Essentially, the issue of employer access to one's social media life relates to human rights and privacy. Prospective and current employees are both surprised by the possibility of this intrusion into their personal lives. It is an emotionally charged matter and they are legitimately concerned about it.

Can employers legally do that?

Business Judgment Distinct from Legality

Facebook, a company which claims to respect user's privacy, warns employers against the practice, but it has little control over it. Subject to their ethical imperatives, employers are free to do anything they wish when recruiting employees, so long as they do not violate any laws. The default position, therefore, is legality.

In this issue, as most, the fact that employees are shocked or outraged at a practice does not itself render that practice *illegal*. Emotions, wishful thinking and legions of protesters will not suffice. Unreasonable or unfair employment practices may be legal. One must identify a law – manifested in legislation or common law doctrine – that deems the practice illegal in order for a corresponding remedy to be conferred.

In Canada there are two regulatory branches which potentially may apply here.

Unreasonable or unfair employment practices may be legal. One must identify a law – manifested in legislation or common law doctrine – that deems the practice illegal in order for a corresponding remedy to be conferred.

In Canada there are two regulatory branches which potentially may apply here.

Human Rights Legislation

Employers seeking to access social media accounts of their prospective or current employees will take the position that there is no clear law prohibiting such requests and access. They will acknowledge that human rights legislation compels them to refrain from asking applicants for personal information relating to a prohibited ground of discrimination, such as gender, race, religion, sexual orientation, age and disability.

The mere fact of requiring a basic application form to be completed or interviewing an applicant in person without a screen *can disclose* some of that prohibited information in the process. Incidental or collateral disclosures at an interview – such as whether the applicant is female or elderly or is of a certain race – have not yet made interviews illegal. The possibility of disclosure is not the same as requested disclosure. The same argument might be made about access to one's life on social media: it is not a direct inquiry about legally-protected personal attributes.

Employers may further argue that the law imposes few other restrictions on the employee recruitment and selection process. They may lawfully administer all kinds of tests, subject them to expenses, time and effort, and ask a range of impersonal questions of the candidate. The employer will say the marketplace regulates the recruitment process. If the best employees spurn intrusive employers, these employers will eventually abandon the practice.

However, in a shot across the bow, the Ontario Human Rights Commission recently warned employers to avoid the practice. In a Facebook posting of its own, the Commission wrote: "employers should not ask job applicants for access to information stored on social media or other online sites and that doing so could leave an employer open to a claim of discrimination under the Code."[2] This is advisory only, *not* a binding legal conclusion.

An employer accessing an employee's social media sites may face a practical problem of having to deny that irrelevant or illegal information was used in an employment-related decision. Having access to too much information may force the employer to deny that it had that information or acted upon it. For example, assume a seriously under-performing employee poised for termination announces that she is pregnant on social media and the employer discovers that fact from that source. Any dismissal from the job after that point may prove awkward as the employer will be expected to prove the dismissal was completely unrelated to the pregnancy.

Privacy Legislation

The federal *Privacy Act* mandates federal government agencies to respect individual privacy when collecting and using personal information. These obligations are extended to private sector employers through the federal *Personal Information Protection and Electronic Documents Act* or equivalent provincial privacy legislation. None of this legislation specifically prohibits employers from collecting social media information. Employers must generally obtain prior notice and consent to collect personal information, "only for purposes that a reasonable person would consider appropriate in the circumstances." They may have to justify, in job-specific terms, why they need to know an applicant's personal acquaintances and off-work activities.

The employer will say the applicant "consented" to share this personal information. The privacy officer may disagree, considering the obvious imbalance of relational power between the employer and applicant. The outcome will depend on each case. Applicants have no right to a particular job and consent to their social media life may be as voluntary as other information and participation in the hiring process.

Political parties seek to know everything potentially embarrassing about their candidates before details or photographs surface during an election in the hands of political opponents. The British Columbia NDP was chastened by this experience in 2009 when compromising photographs appeared and its candidate had to withdraw from the election campaign. One would think that history would justify the party checking out such social media sites for prospective candidates. When it sought to do so in 2011, the British Columbia Information and Privacy Commissioner investigated and ruled against this practice:

> … the BC NDP collected a large amount of personal information, including information that may be outdated, irrelevant or inaccurate. … the BC NDP collected personal information from third parties that it did not have consent to collect. There were also reasonable alternatives that could have been used to meet the purposes of vetting candidates. These factors all weighed against the collection being considered to be what a reasonable person would consider appropriate in the circumstances.[3]

This is an illustrative administrative ruling binding only in British Columbia that stands untested by judicial review. Similar rigorous background investigations take place for judges, military conscripts, personal care workers, public transit drivers, airline pilots, and security and law enforcement officials. Employers should be prepared to demonstrate their requests for social networking information is connected to the job; that the information obtained is accurate; that it does not transgress against third parties; and cannot be reasonably obtained by use of other methods and sources.

Conclusion

Employers often receive hundreds of applications for each advertised job. To streamline the final vetting stage, they seek to readily obtain candid personal information to help compare the suitability of the shortlisted candidates. Few employers have the time or resources to sift through social media accounts at length. Rather, the employer's purpose in requesting access may be to simply and summarily screen out applicants who appear to have something to hide in their personal social networking lives.

The line separating private and public information continues to be blurred by social media, which is also a platform to which companies increasingly turn in the course of their business. In a flexible, "always on" informal work culture, the bright lines dividing personal and work time and space are gone. We are in an era where We are in an era where we voluntarily place more and more of our personal information and our social interactions online for very wide, largely uncontrolled circulation. When we do so, we are aware of the inherent difficulty of permanently deleting social media entries and that our expectations of privacy are minimal. To what extent then can we realistically assert rights and control over this information in more sensitive contexts?

For years employers have investigated and monitored employees without their consent and knowledge by conducting basic internet searches and asking around the industry. The difference with social media is that the employer usually must obtain the co-operation of the employee.

We do not have any definitive law on this social media issue yet. There are arguments on both sides – worst case scenarios, opinions, wishful thinking and warnings of outlandishly improbable torts and crimes abound. It makes for tantalizing headlines but the problem probably remains overstated as a true practical concern to most employees. Only a tiny number of companies are serious about seeing your social media accounts.

A more interesting prospect to ponder is what employers would think of an employee who has never opened a social media account at all.

Notes

1. Requiring a release of actual passwords seems to be overkill as it also violates online protocol and security. Employers asking for Friend status should suffice.
2. www.facebook.com/the.ohrc/posts/320570581329371
3. P11-01-MS *Summary of the Office of the Information and Privacy Commissioner's Investigation of the BC NDP's use of social media and passwords to evaluate candidates*, available at: www.oipc.bc.ca/Mediation_Cases/pdfs/2011/P11-01-MS.pdf

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