

# **i**ntellectual Property & Academic Staff [a three part series]

**O**ver the next three issues the CAUT Legal Review will examine the concept of intellectual property - including its legal underpinnings as well as the policy implications and political challenges that it presents.

The series commences with an overview of intellectual property as a legal concept and an examination of the basic rights that academic staff enjoy with respect to it.

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## **Part One: What is Intellectual Property and Who Owns It?**

### **Overview.**

In the last five years the subject of intellectual property has moved from relative obscurity to centre stage at Canadian universities and colleges. The issue's higher profile has prompted an intense discussion about who owns the work of academic staff. It has also set in motion a more fundamental debate about whether it is even appropriate to define

the fruits of academic labour as property, and what impact such a definition has on the nature and purpose of universities.

To meaningfully participate in this discussion, academic staff need a basic understanding of intellectual property as a legal concept.

## **Intellectual Property. What is it?**

The term intellectual property refers broadly to any creation of the mind that can be owned. The concept encompasses two subcategories: industrial property (patents, trademarks, industrial designs, etc.) and copyright (literary and artistic works).

Intellectual property law is set down in federal legislation – for example, the *Patent Act* and the *Copyright Act*. These statutes define what constitutes intellectual property and what rights are associated with its use and ownership. The most fundamental of these rights is the right of the owner of the property to exclude others from using it without permission and/or payment. Of the different types of intellectual property the two that are most relevant to academic staff are copyright and patents.

### **Copyright.**

Copyright protects the creators and owners of expressive "works" such as literature and paintings. In the university environment, examples of material subject to copyright include text books, journal articles, lecture notes, audio visual material and computer software.

Copyright is a bundle of legal rights provided to the owners of these works. These rights include economic rights (the right to publish, produce, reproduce, exhibit and perform a work) as well as moral rights (the right of creators to maintain their honour and reputation in relation to their work and the integrity of the works themselves).

In ordinary circumstances, copyright ownership flows directly to the creator of a work. This is an automatic process, but it is advisable for authors to mark their works with the © sign, their name and the date. It is also possible to voluntarily register a work with the Copyright Office.

There is, however, a very important exception to the rule that the creator of a work is automatically entitled to its ownership. This exception, which will be discussed in greater detail, arises in employment situations.

### **Patents.**

A patent protects the rights of an inventor of a process, product, or device. To achieve patent protection an invention must be novel, have utility and not be obvious to a person skilled in the particular field from which the idea sprang. Examples of patentable discoveries include new pharmaceutical drugs, machinery or synthetic fabrics.

A patent is obtained by making an application to a federal government office. The application process, which is costly and highly technical, consists of a confidential disclosure of the invention, a disclosure that is later made available to the public at large. The patent grants the applicant the right to exclude others from making, using or selling the claimed invention for a set period of time. In Canada this is usually 20 years.

Despite this requirement of eventual disclosure, patentability does depend on secrecy. Any "premature" public disclosure of a discovery derails the patent application. This can bring the patenting process into direct conflict with the tradition of open communication among scholars.

### **Academic Staff Interests in "I P".**

Academic staff create an enormous amount of what can be defined as intellectual property. As the creators of such work, academic staff have an important interest in ensuring that they receive credit for, and control over, their endeavours. Individual intellectual property ownership rights are an important means to secure these interests.

In addition to being creators, academic staff are also great users of intellectual property. Because ideas are not immaculately conceived, but rather are built on the past and present work of others, academic staff have an equally strong interest in ensuring that guarantees of access to works are a central part of university practice and Canadian law. Examples of such guarantees include the fair dealing provisions in the *Copyright Act* and university contract language that ensures scholars have the right to promptly publish research findings. A robust information commons, a place where ideas and information exist not as property, but as the shared heritage of humanity, is in the best interest of scholarship and is fundamental to Canada's social and economic development.

### **Contract Language.**

The specific rules governing the treatment of intellectual property at universities are set down in collective agreements (at unionized institutions) and special plans (non-unionized institutions). In addition to contract language, some universities also have more amorphous "Intellectual Property Policies". These policies often apply more widely than the contractual terms, for example to cover students and researchers at affiliated institutions who are outside the purview of the collective agreement. Such policies often arise as employer initiatives and can be used to circumvent or pre-determine the collective bargaining process.

### **Ownership of Intellectual Property: Traditional Patterns.**

Although there is great diversity in intellectual property contract language across Canada<sup>1</sup> a number of general patterns are discernable in respect to its ownership and the sharing of revenue derived from its sale or licensing.

The longstanding tradition at virtually every Canadian university is that academic staff own the copyright in the literary and artistic works that they create. Typical contract language provides that "the member as author of a work shall hold the copyright to the work, whether or not it has been produced in the course of the member's employment." This term specifically rebuts the presumption in section 13(3) of the Copyright Act that in employment situations copyright ownership flows to the employer. A strong argument can be made that academic staff, as a set of employees enjoying unique rights and freedoms, are outside the ambit of section 13(3). Nonetheless, the prudent course of action chosen by most academic staff associations is to negotiate specific language contracting out of 13(3).

Patents, which protect the rights of an inventor of a process, product, or device, are governed by different ownership patterns. The most frequent arrangement is that the inventor and university share ownership of any patent arising from a staff member's research. Following a very close second to this model is sole ownership by the staff inventor. Placing a distant third is patent ownership by the university administration.

The difference between the treatment of copyright and patents at Canadian universities is attributable to the greater monetary value of patentable inventions; the greater requirement for university resources in the creation of patentable inventions; and the greater complexity and cost of patenting an invention and bringing it to market<sup>2</sup>.

While the vast majority of academic staff in Canada have won legal protection of their intellectual property rights through the collective bargaining process, there are still a few academic staff associations that have not yet negotiated copyright or patent language in

their collective agreements. Obtaining such language should obviously be a priority for these associations.

### Revenue Sharing.

Rules on intellectual property revenue sharing are a feature of most collective agreements/special plans. With patentable inventions, the academic staff share of revenues can range from 0% to 100%, depending on the institution and the circumstances. To the extent it is possible to generalize, the "usual" arrangement is a 50/50 division, although there are so many exceptions that it is virtually impossible to cite an "average" figure.

The degree of university involvement in the development of an invention is one factor often used to determine revenue sharing arrangements. The general rule is that the less university involvement, the less the staff member has to share the revenue. For example, the provision of a salary and normal work environment often only trigger a minimal duty to share. On the other hand, if the university makes an "extraordinary" contribution to the project (for example, additional lab space or research assistance) then the requirement to share may rise. The extent of university participation in the patenting process and in bringing an idea to market is also influential, as is the presence or absence of third party interests (for example, corporate involvement) in the research project.

Revenue sharing has not been a major issue with artistic and literary works. Near total staff ownership in copyright has meant that revenue arrangements have been largely determined between staff members and the publishers/distributors of their works.

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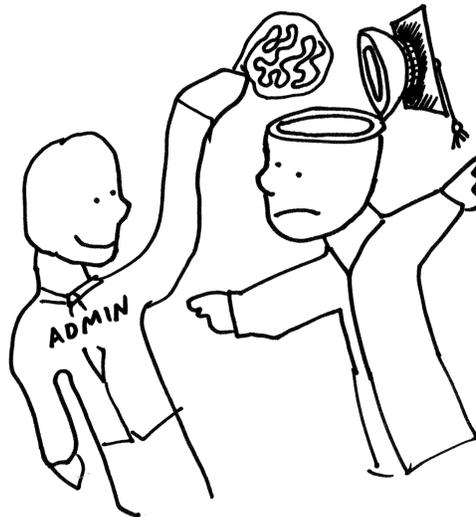
<sup>1</sup> Intellectual property language is negotiated in Canada on an institution by institution basis to meet local needs (rather than being imposed centrally). This is fitting given that what is appropriate at a large research university may not be suitable for a small liberal arts institution. There is an alternative process in the U.S. based on the Bayh-Dole Act and featuring a centrally imposed standard of employer ownership. CAUT does not recommend this alternative, although members should be aware that it seems to be favoured by Industry Canada.

<sup>2</sup> For a complete review of IP ownership at Canadian universities see the Statistics Canada "Survey of Intellectual Property Commercialization in the Higher Education Sector, 1999" available online at <http://www.statcan.ca>.

Part Two of this series will appear in the next issue of the CAUT Legal Review. This next installment will examine the explosive growth of intellectual property as a presence on university campuses and the implications of this phenomena for academic staff.

All three parts of this series are available on-line at:

<http://www.caut.ca/english/member/papers/intellectualproperty.asp>



THANKS, I BELIEVE  
THIS BELONGS TO ME



# La Propriété Intellectuelle et le Corps Universitaire [série en trois parties]

**L**es trois prochains numéros de la Revue de droit de l'ACPPU traiteront du concept de la propriété intellectuelle, notamment ses fondements juridiques ainsi que son incidence sur les politiques générales et les défis politiques qu'il pose.

La série commence par un aperçu de la propriété intellectuelle en tant que concept juridique et par un examen des droits fondamentaux qui en découlent et dont jouit le corps universitaire.

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## Première partie : Qu'est-ce que la Propriété Intellectuelle et Qui en sont les Titulaires?

### Aperçu.

Au cours des cinq dernières années, le sujet de la propriété intellectuelle est sorti d'une obscurité relative pour occuper l'avant-scène dans les universités et collèges du Canada. Cette popularité a déclenché un débat intense sur la détermination des titulaires des droits de propriété des travaux des membres du corps universitaire. Elle en a aussi lancé un autre, plus fondamental, sur la question de savoir s'il est même approprié de définir comme une propriété les fruits des travaux des universitaires, et sur les retombées que cette définition a sur la nature et l'objet des universités.

Afin de pouvoir participer utilement à cette discussion, le corps universitaire doit

comprendre les principes élémentaires de la propriété intellectuelle en tant que concept juridique.

### Qu'est-ce que la propriété intellectuelle?

Dans l'ensemble, le terme « propriété intellectuelle » désigne toute création de l'esprit qui peut être possédée. Le concept englobe deux sous-catégories : la propriété industrielle (brevets, marques de commerce, dessins industriels, etc.) et le droit d'auteur (travaux littéraires et artistiques).

Le droit de la propriété intellectuelle est inscrit dans la législation fédérale, par exemple dans la *Loi sur les brevets* et la *Loi sur le droit d'auteur*. Ces lois définissent la propriété intellectuelle et les droits liés à son

usage et à sa possession. Le plus fondamental de ces droits est celui du titulaire des droits d'empêcher d'autres personnes d'utiliser sa propriété sans son autorisation ou le versement d'une rétribution. De tous les types de propriété intellectuelle, les deux qui touchent le plus le corps universitaire sont le droit d'auteur et les brevets.

### **Droit d'auteur.**

Le droit d'auteur protège les créateurs et les propriétaires des « œuvres » expressives, comme la littérature et la peinture. Dans le milieu universitaire, les œuvres assujetties au droit d'auteur sont, par exemple, les manuels scolaires, les articles de revue, les notes de cours, les documents audiovisuels et les logiciels.

Le droit d'auteur est un ensemble de droits légaux accordés aux propriétaires de ces œuvres, notamment des droits économiques (le droit de publier, produire, reproduire, exposer et exécuter une œuvre) ainsi que des droits moraux (le droit des créateurs de préserver leur honneur et leur réputation par rapport à leur œuvre de même que l'intégrité de leurs œuvres elles-mêmes).

Normalement, la propriété du droit d'auteur revient directement au créateur d'une œuvre. Le processus est automatique, mais il est bon que les auteurs marquent leurs œuvres du symbole © en indiquant leur nom et la date. Il est aussi possible d'enregistrer volontairement une œuvre au Bureau du droit d'auteur.

Cependant, il existe une exception importante à la règle voulant que le créateur d'une œuvre obtienne automatiquement son droit de propriété. Cette exception, qui sera traitée en détail plus loin, s'applique dans le contexte de l'emploi.

### **Brevets.**

Un brevet protège les droits de l'inventeur

d'un procédé, d'un produit ou d'un dispositif. Pour être protégée par un brevet, une invention doit être inédite, avoir une utilité et ne pas être évidente pour une personne qualifiée dans le domaine dans lequel l'idée a surgi. Par exemple, les nouveaux produits pharmaceutiques, la machinerie ou des tissus synthétiques sont des découvertes brevetables.

Pour obtenir un brevet, il faut présenter une demande à un bureau du gouvernement fédéral. Le processus de demande, qui est coûteux et hautement technique, consiste en une divulgation confidentielle de l'invention, divulgation qui est par la suite rendue publique. Le brevet donne au demandeur le droit d'empêcher d'autres personnes de fabriquer, d'utiliser ou de vendre l'invention revendiquée pendant une période déterminée. Au Canada, cette période est habituellement de 20 ans.

Même si l'invention finira par être divulguée, le secret revêt une importance primordiale pour sa brevetabilité. En effet, toute divulgation publique prématurée d'une invention fait dérailler la demande de brevet. Le processus d'octroi du brevet peut alors entrer directement en conflit avec la tradition de communications ouvertes entre savants.

### **Intérêts du corps universitaire au chapitre de la propriété intellectuelle.**

Les membres du corps universitaire créent une somme énorme de ce qui peut se définir comme de la propriété intellectuelle. En tant que créateurs, ils ont très intérêt à faire en sorte que leur propriété soit reconnue comme telle et qu'ils en aient le contrôle. Les droits individuels de propriété intellectuelle constituent un moyen important de garantir ces privilèges.

En plus d'être des créateurs, les professeurs et professeurs sont aussi de grands utilisateurs de propriété intellectuelle. Étant donné que les

idées ne sont pas un don du Saint-Esprit, mais découlent des travaux passés et présents des autres, les membres du corps universitaire ont tout autant intérêt à veiller à ce que des garanties d'accès à des travaux occupent une place centrale dans la pratique universitaire et le droit canadien; par exemple, les dispositions d'utilisation équitable de la *Loi sur le droit d'auteur* et le libellé de la convention avec l'université qui affirme que les savants ont le droit de publier rapidement leurs résultats de recherche. Une solide tribune d'information, un endroit où les idées et l'information constituent non pas un bien mais le patrimoine commun de l'humanité, est dans le meilleur intérêt du savoir et fondamental pour le développement socio-économique du Canada.

### **Libellé de la convention.**

Les règles particulières régissant le traitement de la propriété intellectuelle dans les universités sont établies dans les conventions collectives (dans les établissements dotés d'un syndicat) et dans des régimes spéciaux (dans les établissements sans syndicat). En plus des dispositions de leur convention, certaines universités ont aussi des politiques plus amorphes sur la propriété intellectuelle. Elles s'appliquent souvent plus largement que les dispositions de la convention, par exemple pour couvrir la population étudiante et le personnel de recherche d'établissements affiliés qui ne relèvent pas de la convention collective. Ces politiques sont souvent élaborées à l'initiative de l'employeur et peuvent servir à contourner ou à anticiper le processus de négociation collective.

### **Possession de la propriété intellectuelle - Modèles traditionnels.**

Quoique que les dispositions des conventions touchant la propriété intellectuelle varient beaucoup au Canada<sup>1</sup>, des modèles généraux se dégagent en ce qui concerne les propriétaires et la mise en commun des

revenus découlant de la vente ou de la licence.

La tradition de longue date ancrée dans presque chaque université canadienne est que les membres du corps universitaire sont propriétaires des œuvres littéraires et artistiques qu'ils produisent. Les dispositions typiques de la convention prévoient que « en tant qu'auteur d'une œuvre, le membre détient le droit d'auteur sur cette œuvre, qu'elle ait été ou non produite dans le cadre de son emploi ». Cette disposition réfute la présomption contenue dans l'article 13(3) de la *Loi sur le droit d'auteur*, à savoir que lorsque l'auteur est employé par une autre personne, le droit d'auteur revient à l'employeur. On peut présenter l'argument solide qu'en tant que groupe d'employés bénéficiant de droits et libertés uniques, le corps universitaire est hors de la portée de l'article 13(3). Néanmoins, la plupart des associations de personnel universitaire choisissent la prudence et négocient des dispositions particulières les excluant de cet article.

Les brevets, qui protègent les droits d'un inventeur d'un procédé, d'un produit ou d'un dispositif, sont régis par différents modèles de propriété. Dans l'arrangement le plus fréquent, l'inventeur et l'université partagent la propriété de tout brevet découlant de la recherche d'un membre du corps universitaire. Suivi de près, en deuxième place, est la propriété unique accordée à l'inventeur. Plus loin, à la troisième place, est le modèle selon lequel l'administration universitaire est titulaire du brevet.

La différence entre le traitement du droit d'auteur et du brevet dans les universités canadiennes est attribuable à la valeur monétaire supérieure des inventions brevetables; à la somme accrue des ressources universitaires requises pour créer les inventions brevetables; à la complexité et aux coûts supérieurs du processus d'obtention du

brevet et de la commercialisation de l'invention<sup>2</sup>.

Même si, au Canada, la grande majorité du corps universitaire a gagné la protection légale de ses droits de propriété intellectuelle dans le cadre du processus de négociation collective, il reste encore quelques associations de professeurs et professeurs qui n'ont pas encore négocié de dispositions de leur convention collective relatives aux droits d'auteur ou aux brevets. Elles devraient de toute évidence le faire en priorité.

### **Partage des revenus.**

Des règles concernant le partage des revenus de la propriété intellectuelle figurent dans la plupart des conventions collectives ou régimes spéciaux. Pour ce qui des inventions brevetables, la part des revenus accordée aux membres du corps universitaire peut aller de 0 % à 100 % selon l'établissement et les circonstances. Dans la mesure où il est possible de généraliser, l'arrangement « habituel » est un partage à parts égales, mais il existe tant d'exceptions qu'il est presque impossible de donner un chiffre « moyen ».

Le degré de participation de l'université à la mise au point d'une invention est un facteur souvent utilisé pour déterminer le partage des revenus. La règle générale est que moins l'université intervient, moins le membre du corps universitaire doit partager les revenus. Par exemple, la fourniture d'un salaire et d'un environnement normal de travail entraîne souvent une obligation minimale de partager les revenus. En revanche, si l'université apporte une contribution « extraordinaire » au projet (par exemple, des laboratoires supplémentaires ou une aide à la recherche), alors l'obligation de partager peut être plus forte. Le degré de participation de l'université au processus d'obtention du brevet et de la commercialisation d'une idée peut aussi entrer en ligne de compte, tout comme la présence

ou l'absence de tiers (par exemple, l'intervention d'une entreprise) dans le projet de recherche.

Au chapitre des œuvres artistiques et littéraires, la question du partage des revenus n'est pas aussi importante. Du fait qu'en ce domaine, les membres du corps universitaire possèdent presque entièrement les droits d'auteurs, le partage des revenus est en grande partie déterminé entre ces membres et les éditeurs ou distributeurs de leurs œuvres.

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<sup>1</sup> Au Canada, les dispositions concernant la propriété intellectuelle sont négociées dans chaque établissement pour répondre aux besoins locaux (plutôt que d'être imposées par une instance centrale). Cette approche est appropriée car ce qui convient à une grande université à vocation de recherche ne convient pas nécessairement à une petite université offrant un enseignement général. Les États-Unis ont un autre processus fondé sur la Bayh-Dole Act dans laquelle la norme imposée par une instance centrale est que la propriété revient à l'employeur. L'ACPPU ne recommande pas cette autre solution, quoiqu'il convienne de préciser qu'Industrie Canada y semble favorable.

<sup>2</sup> Une revue complète de la possession de la propriété intellectuelle dans les universités canadienne se trouve dans le document de Statistique Canada « Enquête sur la commercialisation de la propriété intellectuelle dans le secteur de l'enseignement supérieur, 1999 » affiché à <http://www.statcan.ca>.

La deuxième partie de cette série paraîtra dans le prochain numéro de la Revue de droit de l'ACPPU. Cette suite portera sur l'explosion de la croissance de la propriété intellectuelle dans les universités et son incidence sur le corps universitaire.

Les trois parties de cette série se trouvent à l'adresse virtuelle :  
<http://www.caut.ca/francais/membre/documents/intellectualproperty.asp>

## SEXUAL HARASSMENT REVISITED

Are supervisors who carry on consensual relationships in the workplace and enrol senior employees as their sexual confidantes guilty of sexual harassment? According to a recent decision of the Ontario Court of Appeal, *Simpson v. Consumers' Association of Canada*<sup>1</sup> they are.

David Simpson was fired from his position as Executive Director of the Consumers Association of Canada (the “CAC”) amid allegations that he had:

- carried on an open affair with his secretary;
- entered a hot tub naked with staff at a CAC conference and allowed his secretary to be topless there;
- made it known that he liked to swim naked at his cottage and swam naked with his secretary there when staff were present;
- took female legal counsel to a strip club where he hired a table dancer;
- engaged in intimate discussions about his sex life on an ongoing basis with the legal counsel;
- propositioned a new secretary; and
- encouraged sexual pinching at a hospitality suite function.<sup>2</sup>

Simpson sued for wrongful dismissal, contesting his employer’s characterization of his conduct as “sexual harassment”. The trial judge upheld his claim, but the Court of Appeal overturned the decision, rejecting the trial judge’s finding that Simpson could not be held accountable for the prevailing sexual culture at the CAC. Simpson’s application for leave to appeal to the Supreme Court of Canada was refused.

In upholding Simpson’s dismissal, the Court of Appeal found that it was Simpson who had initiated the sexually infused environment in the workplace and that this environment had had a number of adverse consequences for employees. Applying the definition of sexual harassment formulated by Dickson J. in the landmark case *Janzen v. Platy Enterprises Ltd.* (“any sexually-oriented practice that endangers an individual’s continued employment, negatively affects his/her work performance, or undermines his/her sense of personal dignity”)<sup>3</sup> the court examined the different consequences of Simpson’s conduct on the careers of the women in his office.

It found that while Simpson’s relationship with his secretary had been consensual, when he lost interest in her, their work relationship had broken down and she had eventually been forced to resign. A second secretary had had to endure the favouritism of Simpson for the first secretary and had been passed over for work. The female legal counsel, while “going along” with the trip to the strip club, the nude hot tub baths, and becoming the personal confidante of Simpson, had, the Court found, been acquiescing to unwelcome conduct in order to keep her job and to remain one of her boss’s “inner circle”. Finally, an employee who had witnessed the pinching incident and voiced her concerns to other staff, had been blamed by Simpson for being disloyal and making trouble, and had eventually been terminated by him.

The *Simpson* case is significant because of the broad approach taken by the Court of Appeal to the issues of consent, negative impact, and when conduct can be said to have occurred “in the workplace”. In the academic context, one wonders how the judgment might be applied by arbitrators, human rights tribunals and courts in sexual harassment cases involving professors and graduate students, or senior and junior colleagues.

The decision in *Simpson* in fact bears resemblance to two earlier human rights tribunal decisions about sexual harassment in the academy. In one case, *Dupuis v. British Columbia (Ministry of Forests)*,<sup>4</sup> a professor was found guilty of sexual harassment for an ostensibly consensual relationship with a graduate student which began on a field trip. In another case, *Mahmoodi v. Dutton*,<sup>5</sup> a professor was found guilty of sexual harassment on the basis of evidence that he had invited her on two occasions to his home for meetings, where there had been music, candles and wine.

Tarnolpolsky and Pentney, authors of the text *Discrimination and the Law*,<sup>6</sup> have sharply criticized the reasoning in these decisions. They suggest that the tribunals in these cases wrongly abandoned the legislative test for sexual harassment, which requires conduct to be “unwelcome” to the recipient,<sup>7</sup> substituting in its stead the bald criteria of “power imbalance” and “sexualized environment”.

Tarnolpolsky and Pentney also suggest that the tribunals in *Dupuis* and *Mahmoodi* seriously misconstrued the nature of the

academic setting in which relationships between mentors and students and between colleagues can be intensely personal, and power imbalances are often not as acute or straightforward as in the ordinary workplace.

Whether one agrees with Tarnolpolsky and Pentney or not, this group of cases – *Dupuis*, *Mahmoodi* and the recent decision in *Simpson* – should give academic staff pause when entering into sexual or confidante relationships within the broad sphere of the academy. The law may no longer view some of those relationships as consensual – or limited in impact to the individuals directly involved.

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1. (2001), 57 O.R. (3d) 351, leave to appeal to S.C.C. refused, (15 August 2002) S.C.C. File No. 29081.

2. *Ibid.* at para. 71.

3. [1989] 1 S.C.R. 1252 at 1280.

4. (1993), 20 C.H.R.R. D/87

5. (1999) 36 C.H.H.R. D/8.

6. Walter Surma Tarnolpolsky J., *Discrimination and the Law*, looseleaf revised by William F. Pentney (Scarborough: Carswell. 2001).

7. The legislative test is usually framed as conduct of a sexual nature that the respondent “knows or ought reasonably to know is unwelcome” to the recipient.



### QUEBEC'S CUTTING-EDGE LAW

Few collective agreements contain provisions prohibiting personal or psychological harassment. Most employers and unions feel that harassment that is not based on grounds designated by human rights legislation (such as sex, race, and religion) can either be addressed by other legal concepts within the contract or, when it occurs between employees, is “none of their business”. They think including personal harassment clauses in the collective agreement would only serve to set up a “red flag”, attracting all kinds of spurious grievances.

Nevertheless, harassment on personal grounds by superiors and fellow employees can be a serious problem in the workplace, and devastating for the individual employee involved. And, views about whether it needs to be addressed may be changing.

At common law, courts have made a significant start in addressing bullying in the workplace in the context of constructive dismissal cases. Some have found that it is an implied term in every employment contract that the employer treat the employee “with civility, decency, respect and dignity”<sup>1</sup>, or at least in a way that does not render competent performance

impossible.<sup>2</sup> Under this school of thought, breach of the implied term results in a fundamental breach of the contract and constructive dismissal.

More recent cases have preferred to construe personal harassment by supervisors as a repudiation of the employment contract by the employer without cause, resulting in constructive dismissal.<sup>3</sup> In the leading case, *Shah v. Xerox*, the court framed the issue in this way:

Where the conduct of management personnel is calculated to cause an employee to withdraw from the employment, it may ... amount to constructive dismissal. The test ... is objective: it is whether the conduct of the manager is such that a reasonable person in the circumstances should not be expected to persevere in the employment.

Courts have also held employers responsible when the harassment has been committed by fellow employees. Acknowledging that employees cannot repudiate the employer’s contract, they seem to have fallen back on the “implied term” approach. As the court in a recent case, *Stamos*, put it:

Not only is an employer obliged not to treat an employee in a manner that renders competent work performance impossible or continued employment intolerable. An employer has a broad responsibility to ensure that the work environment does not otherwise become so hostile, embarrassing or forbidding as to have the same effect.

In the *Stamos* case, the employer had pursued a strategy of telling the employees to “get along” or avoid each other, characterizing their dispute as “kids fighting over silly stuff”. The court took a dim view of this:

Undoubtedly, as in the school yard there are trivial disputes that are best handled by equal treatment of the protagonists, despite the fact that fault may truly lie with one or the other. But to treat an ongoing problem of this nature in that way is nothing less than an abdication of responsibility. To treat the perpetrator of abuse and his victim identically is unjust and unconscionable.

The kind of behaviour that has entitled plaintiffs to damages in common law cases about personal harassment has included yelling, swearing, sarcasm, name calling, physically aggressive gestures such as finger pointing and standing too close to an employee, excessive and unjustified criticism or scrutiny, tactics intended to demean or intimidate, denial of vacation time, false accusations of misconduct, unwarranted threats about job security, and expressions of misogyny.

In the administrative context, individual employees have also made a start in addressing personal harassment in the workplace by framing their cases as health and safety issues before health and safety and workers' compensation tribunals.

The developments in the common law and administrative law contexts have done little to persuade parties involved in collective bargaining across "English" Canada to address the issue of personal harassment, but in Quebec legislators are moving boldly ahead.

In its typical *avant garde* fashion, Quebec has "taken the bull by the horns" and recently enacted legislation, not only prohibiting personal harassment in the workplace, but also deeming the prohibition to be part of every collective agreement in the province. The legislation, known as Bill 143, will amend the *Act Respecting Labour Standards* and comes into force June 4, 2004. It provides that "every employee has a right to a work environment

free from psychological harassment" and that "employers must take reasonable action to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it."<sup>4</sup>

"Psychological harassment" is defined as:

... any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee.<sup>5</sup>

A single serious incident "that has a lasting effect on an employee" can also constitute psychological harassment.<sup>6</sup>

Under the legislation, employees are expected to employ the arbitration process in their collective agreement to obtain recourse, however, mediation is also available from the Ministry of Labour upon joint application of an employer and a union.<sup>7</sup>

It will be interesting to see what kind of jurisprudence develops under the Quebec provisions. Will it mirror the common law, draw heavily on human rights principles, or focus on a health and safety angle? Will there be an overlap between personal harassment claims and racial and sexual harassment claims? What kind of fact situations will we see?

Clearly the full parameters of the prohibition will take some years to work out. In the meantime, unions in the rest of Canada should, perhaps, start considering the problem of personal harassment more seriously.

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1. *Lloyd v. Imperial Parking Ltd.*, 1996 ABQB 1087.  
2. *Paitich v. Clarke Institute of Psychiatry*, (1988), 19

C.C.E.L. 105 (Ont.H.C.).

3. *Shah v. Xerox Canada Ltd.*, 1998 ONTD 4349, aff'd 2000 ONCA 840; *Saunders v. Chatieau des Charmes Wines Lts.*, 2002 ONTD 3990.

4. Bill 143, *an Act to amend the Act respecting labour standards and other legislative provisions*, 2d Sess., 36<sup>th</sup>

Leg., Quebec, 2002, cl. 81.19 (assented to 19 December 2002).

5. *Ibid.* at cl. 81.18.

6. *Ibid.*

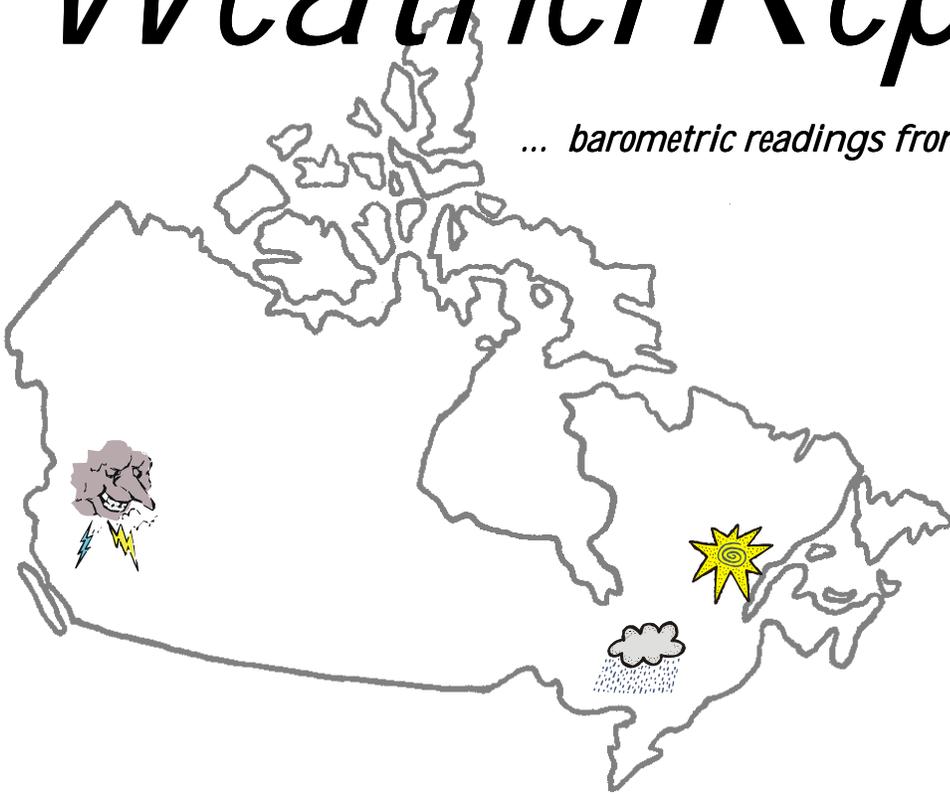
7. *Ibid.* at cl. 81.20.



*"I surrounded myself with the best people,  
but none of them could stand working for me."*

# Weather Report

... barometric readings from across the country



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## **B.C.'s extinct Human Rights Commission**

Amendments to British Columbia's *Human Rights Code* came into force in March 2003. The main feature of the amendments was the abolition of British Columbia's Human Rights Commission. Complainants will no longer be assisted by the investigatory powers and services of the Commission and may, as a result, find it difficult to access the evidence necessary to prove their complaints. As well, the Commission will no longer be there to present meritorious complaints to the Human Rights Tribunal and complainants, who often cannot afford legal representation, may find themselves at a serious disadvantage compared to employers, who usually can afford representation.

## **Alberta's Post Secondary Learning Act**

In May 2003, the Alberta Legislature introduced new legislation known as the *Alberta Post Secondary Learning Act*, or Bill 43, which would prohibit strikes and lockouts in the academic sector and allow the Alberta Learning Minister to dissolve university boards of governors and appoint administrators in their place. The Minister would also be able to take over student associations on campus on the basis that they were being managed in an "irregular" manner. The government hopes to pass the legislation this fall. It would replace the current *Universities Act*, the *Colleges Act*, the *Technical Institutes Act* and the *Banff Centre Act*.

## **Ontario's Mandatory Retirement Elimination Act**

The Ontario government recently introduced a bill that would eliminate mandatory retirement in the province by January 2005. The bill would amend the provision in the *Ontario Human Rights Act* that

currently provides mandatory retirement after the age of 65 does not constitute age discrimination, as well as amending other acts which prescribe mandatory ages of retirement. Under the legislation, mandatory retirement provisions contained in collective agreements would remain in force until the agreements expired.

The legislation, if passed, would bring Ontario's policy on mandatory retirement into line with Manitoba, Quebec, Yukon, the North West Territories, Alberta and Prince Edward Island.

### **Ontario's illegal posting requirement**

Section 63.1 of the *Ontario Labour Relations Act*, which requires employers to post documents in the workplace informing employees how to terminate their trade unions' bargaining rights, has been found by the International Labour Organization to contravene the international *Convention on Freedom of Association*. Canada is a signatory to the *Convention* and the federal government is responsible for ensuring provinces like Ontario comply with it.

### **Federal anti- scab bill**

The House of Commons has completed its first reading of a bill that would explicitly prohibit the use of scabs (strike breakers) in the federal jurisdiction. Known as Bill C-328, it was introduced by the Bloc Quebecois MP Monique Guay and enjoys the support of the Bloc and the NDP. The president of the Canadian Labour Congress, speaking recently in support of the bill, noted that experience in Quebec and British Columbia has shown that an express prohibition on hiring strike breakers contributes "immensely" to civilized industrial relations during work stoppages and significantly reduces the number of work days lost to strike or lock-out.

### **Federal proposal to allow same sex marriages**

In a landmark victory for equality rights, the federal government announced in June 2003 that it would not be appealing court decisions in Ontario, Quebec and B.C. which have ruled the banning of same sex marriages unconstitutional. The Prime Minister announced that the government would be proposing legislation shortly that would recognize same sex unions, while protecting the right of churches and religious organizations to sanctify marriage as they defined it. Once drafted, he said, the legislation would be referred to the Supreme Court of Canada and then put to a free vote in the House of Commons. He said the decision not to appeal had the "full support" of Cabinet, and that the proposed legislation was likely to pass in Parliament's fall session.

The federal government has jurisdiction to define marriage while provincial governments have jurisdiction to issue marriage licenses. Alberta's Justice Minister has suggested that his province might use the "notwithstanding" clause in the Constitution to protect its refusal to recognize same sex marriages if the federal legislation is passed.

Only two other countries, the Netherlands and Belgium, currently recognize full marriage rights for same sex couples.

### **Federal amendments to hate propaganda protections**

In Bill C-250, the federal government has introduced amendments to the *Criminal Code* that would extend its protections against hate propaganda to groups distinguished by their sexual orientation.

### **Quebec's friendly amendments**

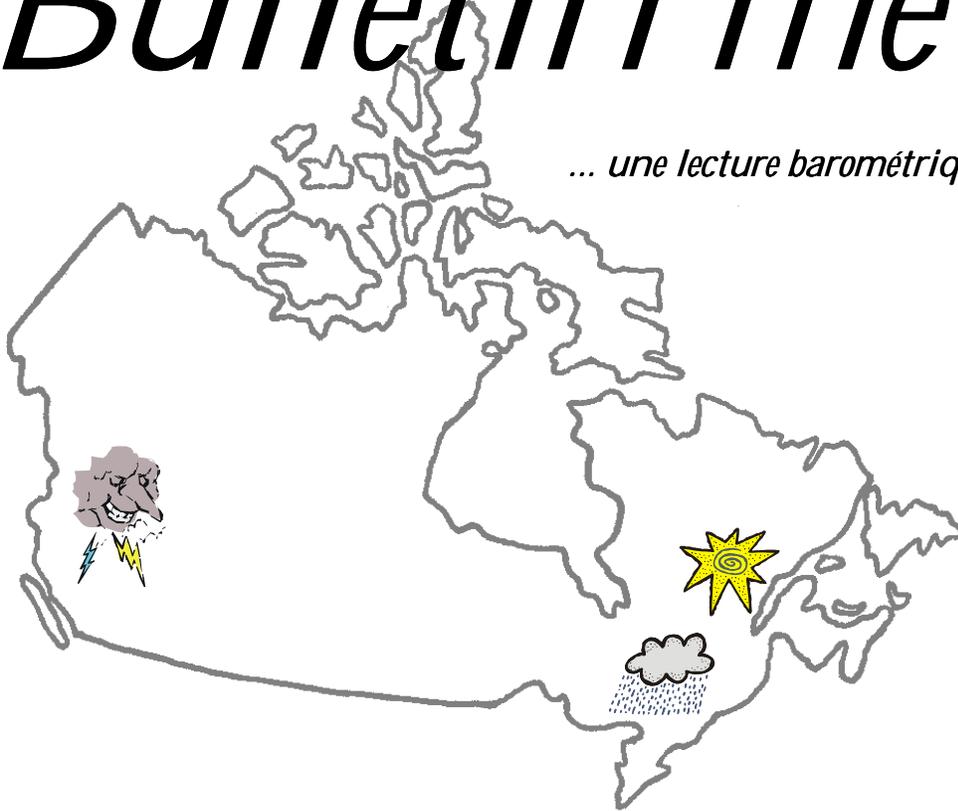
Quebec has recently made major changes to its employment standards and collective bargaining legislation, all of which are friendly to workers. In addition to creating a new prohibition against personal or psychological harassment in the workplace, the province has amended its *Act Respecting Labour Standards* to oblige employers to provide increased notice periods for the “collective dismissal” of employees. Under the new legislation, the amount of notice or pay in lieu of notice increases with the number of employees laid off over a two month period. This will substantially increase the cost of downsizing or closure to employers. The amendments to the *Act* also include a new paternity leave, extended parental and maternity leaves, and new leaves for family obligations. While the prohibition against personal harassment will not come into force until June 2004, most other amendments came into force in May 2003. The legislation “trumps” provisions in collective agreements, contracts and employer policies which do not comply with it, making them invalid at law.

In a recent overhaul of the *Labour Code*, Quebec sped up its certification process and placed new limits on employers' ability to treat employees as independent contractors. It also created a tribunal with exclusive jurisdiction over the *Code*. The new Commission des relations de travail, has broad power to “make any decision it considers appropriate” and its decisions are not subject to appeal, only to limited judicial review.



# Bulletin météo

... une lecture barométrique de tout le pays



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## **La Colombie-Britannique abolit la Commission des droits de la personne**

Les amendements au *Human Rights Code* de la Colombie-Britannique sont entrés en vigueur en mars 2003. Les principales caractéristiques de ces amendements portent sur l'abolition de la commission des droits de la personne de la province. Les plaignants ne pourront plus bénéficier des pouvoirs d'enquête et des services de la commission. En conséquence, ils éprouveront peut-être de la difficulté à obtenir les preuves nécessaires pour justifier leurs plaintes. En outre, avec la disparition de la commission, il ne sera plus possible, par son entremise, de déposer des plaintes valables en droit au tribunal des droits de la personne. Les plaignants qui, bien souvent, ne peuvent se permettre de se faire représenter par un avocat ou une avocate, seront sérieusement désavantagés par rapport aux employeurs qui, en règle générale, ont les moyens de se faire représenter.

## **Alberta : la *Post Secondary Learning Act***

En mai 2003, l'assemblée législative de l'Alberta a déposé une nouvelle loi intitulée *Alberta Post Secondary Learning Act*, ou projet de loi 43, qui interdit les grèves et les lock-outs dans le secteur universitaire. La loi permet au ministre de l'Apprentissage de dissoudre les conseils d'administration universitaires et de nommer des administrateurs à leur place. Le ministre peut aussi prendre le relais des associations étudiantes au motif qu'elles sont gérées de manière « irrégulière ». Le gouvernement espère adopter le projet de loi cet automne. La nouvelle loi remplacera la *Universities Act*, la *Colleges Act*, la *Technical Institutes Act* et la *Banff Centre Act*.

### **La Loi abolissant la retraite obligatoire en Ontario**

Le gouvernement de l'Ontario a déposé un projet de loi qui abolira la retraite obligatoire dans la province à compter de janvier 2005. Le projet de loi modifie la disposition du *Code des droits de la personne* de l'Ontario, lequel prévoit à l'heure actuelle la retraite obligatoire après 65 ans, et étend la protection contre la discrimination en raison de l'âge. Il modifie en outre d'autres lois qui prescrivent un âge obligatoire pour la retraite. Aux termes de la loi, les dispositions sur la retraite obligatoire des conventions collectives demeureront en vigueur jusqu'à l'échéance de celles-ci.

Si elle est adoptée, la loi harmonisera la politique de l'Ontario sur la retraite obligatoire avec celles du Manitoba, du Québec, du Yukon, des Territoires-du-Nord-Ouest, de l'Alberta et de l'Île-du-Prince-Édouard.

### **L'exigence de publication en Ontario est illégale**

L'Organisation internationale du travail a conclu que le paragraphe 63.1 de la *Loi sur les relations de travail* de l'Ontario, qui exige des employeurs de publier un document informant les employés des procédures mettant fin à leur droit d'être représentés par un syndicat, enfreint la *Convention internationale sur la liberté syndicale*. Puisque le Canada est signataire de cette convention, le gouvernement fédéral est tenu de s'assurer que les provinces, notamment l'Ontario, s'y conforment.

### **Le projet de loi fédéral anti-briseurs de grève**

La Chambre des communes a terminé la première lecture d'un projet de loi qui proscriera l'emploi de briseurs de grève au palier fédéral. Le projet de loi C-328, présenté par la députée du Bloc Québécois Monique Guay, reçoit l'appui du Bloc et du NPD. Le président du Congrès du travail du Canada, qui a récemment pris parti publiquement en faveur du projet de loi, a fait remarquer que l'expérience au Québec et en Colombie-Britannique prouve qu'une interdiction expresse de l'embauche de travailleurs de remplacement contribue «immensément» à des relations industrielles durables pendant des arrêts de travail et réduit considérablement le nombre de journées de travail perdues à cause d'une grève ou d'un lock-out.

### **Le gouvernement fédéral permettra les mariages entre personnes de même sexe**

Les droits à l'égalité ont remporté une victoire qui fera date lorsque le gouvernement fédéral a annoncé en juin 2003 qu'il n'interjetterait pas appel de décisions des tribunaux de l'Ontario, du Québec et de la Colombie-Britannique. Ces derniers ont jugé que l'interdiction des mariages entre personnes de même sexe était inconstitutionnelle. Le premier ministre a annoncé que le gouvernement proposerait sous peu une loi qui reconnaîtrait les unions de personnes de même sexe tout en protégeant le droit des églises et des organismes confessionnels de célébrer des mariages selon leur définition. Lorsque la loi sera rédigée, elle sera soumise à la Cour suprême du Canada et fera ensuite l'objet d'un scrutin libre à la Chambre des communes. Il a souligné que la décision de ne pas interjeter appel recevait l'appui total du Cabinet et que le projet de loi devrait être adopté au Parlement à la session d'automne.

Le mariage relève du gouvernement fédéral alors que les gouvernements provinciaux ont compétence pour délivrer des certificats de mariage. Le ministre de la Justice de l'Alberta a laissé entendre que son gouvernement pourrait recourir à la clause dérogatoire prévue dans la Constitution afin de protéger son refus de reconnaître les mariages entre personnes de même sexe si la loi fédérale

est adoptée. À l'heure actuelle, seuls les Pays-Bas et la Belgique reconnaissent de plein droit le mariage de couples de même sexe.

### **Le gouvernement fédéral modifie les protections contre la propagande haineuse**

Le projet de loi C-250 modifie le *Code criminel* pour qu'il étende les protections contre la propagande haineuse à des groupes caractérisés en raison de leur orientation sexuelle.

### **Des amendements favorables annoncés au Québec**

Le gouvernement du Québec a apporté d'importantes modifications à la législation sur les normes d'emploi et la négociation collective qui sont toutes favorables aux travailleurs et travailleuses. En plus de créer de nouvelles dispositions interdisant le harcèlement personnel ou psychologique au travail, le gouvernement a modifié la *Loi sur les normes du travail* pour forcer les employeurs à prolonger la période de préavis des « licenciements collectifs ». Aux termes de la nouvelle législation, le nombre de semaines de préavis ou d'indemnités compensatrices de préavis augmente selon le nombre d'employés et d'employées licenciés pendant une période de deux mois, ce qui augmentera sensiblement les coûts de rationalisation ou de fermeture des employeurs. Les amendements à la *Loi* comprennent aussi un nouveau congé de paternité, des congés parentaux et de maternité prolongés ainsi que de nouveaux congés pour raisons familiales. Les dispositions interdisant le harcèlement psychologique n'entreront en vigueur qu'en juin 2004. Cependant, la plupart des autres modifications sont entrées en vigueur en mai 2003. La législation invalide les dispositions des conventions collectives, des contrats et des politiques patronales qui ne s'y conforment pas.

La récente réforme du *Code du travail* du Québec accélère le processus d'accréditation syndicale et impose de nouvelles limites à la compétence des employeurs de traiter des employés comme des entrepreneurs indépendants. Elle crée aussi un tribunal doté de la compétence exclusive pour assurer l'application du *Code du travail*. La nouvelle Commission des relations de travail jouit de pouvoirs élargis pour rendre les décisions qu'elle juge appropriée. Ses décisions ne sont pas susceptibles d'appel et ne peuvent faire l'objet que d'examen judiciaires.

# Human Rights in the Workplace a Fragile Flower?

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## 1. Introduction.

The Supreme Court of Canada (the “SCC”) appears to have imposed substantial duties on employers to avoid discrimination against employees on the various grounds enumerated in the respective provincial and federal human rights statutes in Canada. If a complainant establishes a *prima facie* case of discrimination on a prohibited ground, the respondent must demonstrate that the discrimination is justified by reason of a *bona fide* occupational requirement (“BFOR”). In *Meiorin*, the SCC ruled that, in order to establish a BFOR, a respondent must demonstrate on a balance of probabilities that:

- (i) the employer adopted the impugned standard for a purpose rationally connected to the performance of the job;
- (ii) the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
- (iii) the standard is reasonably necessary to the accomplishment of that legitimate purpose in that it is impossible to accommodate individual employees sharing the characteristics of the complainant without imposing undue hardship on the employer.<sup>1</sup>

The principles in *Meiorin* were applied by the SCC in *Grismer*<sup>2</sup> with respect to the accommodation of persons with disabilities in the workplace. In *Grismer*, those principles led the Court to move beyond the traditional biomedical view of disablement, to recognize a socio-political perspective that sees the social exclusion and disadvantage of “persons with disabilities” as the product of barriers *created by the structures and culture of society*, rather than by mere physical or mental incapacity.

The evolution of judicial thinking about equality seen in Canadian case law and culminating in the *Meiorin* and *Grismer* decisions mirrors, perhaps, Jerome Bickenbach's three-phase model of social policy development:

- (i) a public recognition of cultural or political commitment to, and consensus about, general goals that guide policy formation and provide the mandate and motivation for reform;
- (ii) the identification of objectives for social planning in light of the goals and actual social conditions; and
- (iii) the proposal of concrete policy solutions in furtherance of the general goals.<sup>3</sup>

However, Bickenbach's model and the judgments in *Meiorin* and *Grismer* fail to anticipate or address the reaction that typically follows major policy changes which threaten the vested interests of powerful groups in society. The structure and culture of the typical workplace fashioned under the protective sphere of a judicially-created management rights doctrine favour employers' interests, and differ significantly from the structure and culture necessary to implement the principles of accommodating persons with disabilities, and others protected by human rights legislation, contemplated by the SCC in *Grismer* and *Meiorin*.

The following discussion of a recent decision of the British Columbia Court of Appeal, *Oak Bay Marina Ltd. v. British Columbia Human Rights Commission (Oak Bay)*,<sup>4</sup> illustrates how employers and courts are resisting the "encroachment" of human rights on management rights. It is suggested that the combined effect of their defence of the management rights doctrine may undermine the laudable principles enunciated by the SCC.

## 2. Management Rights.

James C. Ketchen notes that "the modern managerial enterprise is typified by a hierarchical, bureaucratic, and specialized structure that is designed to facilitate the one-way projection of authority".<sup>5</sup> This echoes Max Weber's view that modern management is typified by the need to control arbitrary decisions by employees and to make employees' behaviour transparent, calculable, and reproducible.<sup>6</sup> In Ketchen's words:

In order to maintain the necessary structure, discipline and hierarchy, bureaucratic management avoids internal public discussion about its methods. Bureaucratic institutions..... foster reliability of behaviour and,

through the use of discipline and inculcation of the organizational ethos, a high degree of conformity with rules and prescribed patterns of decision-making. [Discipline]..... attempts to imbue and reinforce strong sentiments of loyalty and devotion to duty. Thus, there is put upon the organizational member continual pressure for conformity ..... Discipline and hierarchical structure, combined with spheres of competence and conformity to rules, lead often to 'trained incapacity' both for behaviour outside one's sphere and for questioning the very structures and rules that foster the incapacity itself.<sup>7</sup>

Ketchen contends that one of the key aspects of management is the suppression of politics in the name of efficiency or organizational goals. In this context, politics in the workplace is seen as the cooperative struggle to reach agreement. Charles Perrow observes that,

[B]asically [a private business] organization is a tool that masters use to generate valued outputs that they can then appropriate... Nothing is as important as the master's ability to imperatively specify and coordinate the work of employees."<sup>8</sup>

Such view of management was endorsed wholeheartedly by the common law. In recognition of the inherent problems in the doctrine of management rights, the collective bargaining law in North America was established on the principle of "equal partnership" between unions and management. As Brian Langille has observed, the principle of equal partnership quickly evaporated as employers refused to bargain on matters they viewed as within the exclusive domain of management rights. Weak enforcement by labour boards of the statutory duty to bargain in good faith has ensured that traditional "management rights" with respect to the design, organization, and

control of workplaces remain relatively unencumbered by collective bargaining.<sup>9</sup> Resistance by employers aided by the administrators of collective bargaining legislation effectively thwarted legislative attempts to move decision-making in the workplace from hierarchy to partnership.

A problem posed for management by the legal duty to accommodate employees with disabilities (and other groups protected by human rights legislation) is that it provides the opportunity, indeed the need, for open political struggle in the workplace with respect to the rules, systems, standards of performance, structures, hours of work, and so on. Decision-making on such matters is jealously guarded by management as its exclusive "right". As Ketchen notes, this right effectively enables management to change, adapt, ignore, or simply discard its rules should concerns of efficiency, practicality or profitability take precedence.<sup>10</sup>

The duty of accommodation in human rights legislation imposes rules on management in matters traditionally in the exclusive domain of managerial authority and, unlike the workplace rules created by management, the legislated rules cannot be so readily altered or ignored by management. The rules of human rights legislation are both substantive and procedural. Management must not only adjust workplaces to meet the needs of persons with disabilities, it must include such persons and their unions in the process of accommodation. Those defending traditional management rights are doubtless aware that, as employees and unions become accustomed to negotiating workplace accommodation of persons with disabilities and others protected by human rights law, pressure may build for a similar open, cooperative struggle in all matters of the design, organization and control of workplaces. Accordingly, managerial

resistance to the encroachment of human rights law on their traditional privileges should come as no surprise.

### 3. The *Oak Bay* Case.

#### (a) Facts and issues.

Robert Gordy (the complainant) worked capably for Oak Bay Marine Management Ltd. (the employer) as a fishing guide during the summers of 1993 and 1994. In spring 1995, he developed bipolar affective disorder, and was hospitalized for two weeks in May to stabilize a manic episode. In early June 1995, the complainant met with the employer's fishing operations manager and asked the latter to permit him to return to work. The complainant argued loudly and aggressively that he was fit to do so, but the operations manager disagreed. Later that day, the complainant was hospitalized for two and a half weeks and stabilized by medication.

At a meeting in mid-July, the employer's operations manager denied the complainant's request to be rehired. The former took no account of the written opinion of the treating psychiatrist that the complainant's condition had stabilized, and that he would be likely to work safely and competently if he were rehired forthwith. The employer did not accept the psychiatrist's offer to meet to discuss the complainant's condition, or bipolar disorder in general, and failed to explore possible methods of accommodation, including the possible phasing-in of the complainant's return to work.

The complainant alleged that the employer discriminated against him with respect to employment and refused to continue to employ him because of a physical or mental disability, contrary to section 8 of the *Human Rights Act*.<sup>11</sup> The decision of B.C. Human Rights Tribunal (the "Tribunal") upholding the complaint was quashed by the

British Columbia Supreme Court (the “BCSC”) on grounds of its unreasonableness and the failure of the Tribunal to consider relevant evidence. The Court of Appeal upheld the BCSC’s decision to quash, but ordered the matter returned to the Tribunal for rehearing.

(b) The Tribunal’s decision.

The Tribunal held that the employer failed to establish, on a balance of probabilities, that it was not possible to accommodate the complainant without incurring undue hardship.<sup>12</sup> While undue hardship could have been demonstrated by evidence of an unacceptable risk of relapse by the complainant in the course of his duties, the Tribunal found that the employer ignored the treating psychiatrist’s written opinion, relying instead on his own “impressionistic assumption” that the complainant’s bipolar disorder posed too great a risk for employment as a fishing guide. The Tribunal stated, “.....the Respondent’s reaction to the complainant’s condition could only have been based on its fear and ignorance of bipolar disorder.”<sup>13</sup>

The Tribunal found, further, that the employer demanded from the complainant a guarantee of freedom from risk of failure that was higher than that required of other guides, who were notoriously severely fatigued by long hours of work with little respite.

The Tribunal determined that, while there was clear and undisputed evidence that the complainant was unfit for duty on June 6, despite his protestations at that time, there was no relevant evidence that the complainant was incapable of performing the job after July 17 to the standard of safety required by the employer. It was the Tribunal’s opinion that the only relevant evidence available on the complainant’s condition after July 17 supported his fitness

to work safely with some measure of reasonable accommodation by the employer. The Tribunal awarded the complainant compensation for injury to feelings and loss of earnings.

(c) Judicial review.

The BCSC quashed the Tribunal’s decision on grounds of unreasonableness and failure to consider relevant evidence. The “relevant evidence” not considered by the Tribunal was the employer’s awareness of the complainant’s two periods of hospitalization in a relatively short period in May and June 1995, a report of the complainant’s “manic” conduct on the water during a trial run on June 4 accompanied by an experienced guide of the employer, and the operations manager’s observation of the complainant’s aggressive demeanour at a meeting on June 6.<sup>14</sup> The Tribunal considered such evidence irrelevant to establishing whether the employer could accommodate the complainant without undue hardship on July 17 or soon thereafter. The court held that the Tribunal’s failure to consider such evidence was an error of law, subject to the test of correctness.

The Court of Appeal upheld the decision to quash agreeing with the Chambers judge that the Tribunal erred in law in dismissing as irrelevant the experience the employer had of the complainant’s behaviour in early June. The appellate court held that such evidence was clearly relevant for an employer entrusted with the safety of guests and customers.<sup>15</sup> The appellate court placed weight on the evidence before it that bipolar disorder is a “recurrent disorder”, that the complainant’s doctor had advised his disability insurer that the complainant was unfit for work in September 1995 and again in 1996, and that the complainant had chosen to go off his medication before his June 1995 episode. The court inferred from the last point that there was a risk that the

complainant might go off his medicine again. The appellate court referred the case back to the Tribunal so that all the evidence could be considered.

(d) Discussion.

The evidence indicates that the employer based its refusal on July 17 to rehire the complainant on grounds that he:

(i) had been hospitalized and treated for bipolar disorder in May and June prior to the refusal to rehire;

(ii) was in a highly excited state while fishing with a supervisor in early June; and

(iii) reacted aggressively at a meeting with the employer's operations manager on June 6, when informed that he would not be rehired at that time.

The employer took no account of the opinion of the complainant's treating physician in mid-July that the complainant's mood had been stabilized, that he was complying with his prescribed medication program, and that he would be able to work safely as a fishing guide at his previous high standard. The employer declined the physician's offer to discuss bipolar disorder in general and sought no alternative medical opinion. Nor did the employer explore with the physician or the complainant methods of accommodation to meet the standard of reasonable safety, such as a phasing in from part-time to full-time work. The employer took no account of the opinion of two treating physicians that it was very unlikely that the complainant would suddenly become manic while on the water.

The Tribunal disregarded as irrelevant the employer's "experiential" evidence of the complainant's medical condition and was clearly influenced by the remarks of McLachlin J. in *Grismer*:

[This case] is also about combatting false assumptions regarding the effects of disabilities on individual capacities. All too often, persons with disabilities are assumed to be unable to accomplish certain tasks based on the experience of able-bodied individuals. The thrust of human rights legislation is to eliminate such assumptions and break down the barriers that stand in the way of equality for all.<sup>16</sup>

The message from the SCC in *Grismer* is that an individual's rights or privileges must not be removed on the basis of discriminatory assumptions founded on stereotypes of disability, rather than his or her actual capacity to perform the required tasks. The further obligation of employers is to meet the threefold test laid down in *Meiorin*.

Melvin J. of the BCSC sought to distinguish *Oak Bay* from *Grismer*, quoting from the latter:

[*Grismer*] deals with no more than the right to be accommodated. It does not decide that Mr. Grismer had the right to a driver's licence. It merely establishes that he has a right to be assessed... The discrimination here lies not in the refusal to give Mr. Grismer a driver's licence, but in the refusal to even permit him to attempt to demonstrate that his situation could be accommodated without jeopardizing the Superintendent's goal of reasonable safety.<sup>17</sup>

Melvin J. affirmed that the complainant in *Oak Bay* had the right to be assessed, was assessed, and that there was no refusal to permit him to demonstrate that his situation could be accommodated. The BCSC reasoned further that the complainant's assessment was not accepted by the employer due to its concern over the risk to guests that existed. Melvin J. stated:

[T]he risk analysis by the employer, based on the totality of the information the employer had, may have been incorrect but in my opinion it was not discriminatory.<sup>18</sup>

The *Oak Bay* case appears to be a classic illustration of the application of impressionistic assumptions about an individual's ability to work because of a disability. The employer sought no medical opinion, disregarded the medical opinions presented to it by the complainant's treating physicians, and relied on impressions formed about the complainant's ability to work safely based on a manager's and a supervisor's respective observations of the complainant's mood on two occasions six weeks prior to the final decision not to rehire him. Furthermore, the employer made no attempt to discuss with the complainant possible methods of accommodation that would allow him to work within the standard of safety required by the employer. The employer also failed to respond to the written offer of one of the treating physicians to meet to discuss appropriate methods of accommodating the complainant.

It is clear from the evidence that the employer refused to rehire the complainant because of his disability. *Meiorin* establishes that an employer who seeks to justify discrimination by reason of a *bona fide* occupational requirement must demonstrate that it was not possible to accommodate the employee or applicant without incurring undue hardship. As the employer in *Oak Bay* made no attempt to accommodate or even to discuss possible accommodation, the Tribunal's finding of discrimination appears to be as immune from judicial review as one could imagine.

As described above, the respective courts did overturn the Tribunal's decision – on the basis that the Tribunal held the

employer's experiential evidence to be irrelevant. While such evidence may be relevant in establishing the complainant's disability or assessing the risk to the employer posed by his condition, it is difficult to see its relevance to the employer's demonstrating that the complainant's disability could not be accommodated without undue hardship. Such impressions and related assumptions appear to be the very type of "evidence" that the SCC in *Grismer* flagged as an inappropriate basis for determining the capabilities of persons with disabilities.

It may be argued that the Tribunal ought to have "played it safe" by considering such evidence and assigning it low probative value. While this might have protected its decision from judicial review, the Tribunal would have validated the very attitudes and belief systems that the SCC in *Grismer* sought to eradicate from the process of weighing the capabilities of persons with disabilities and employers' duty to accommodate them. The decision of the BCSC in *Oak Bay* demonstrates what an "unruly horse"<sup>19</sup> such impressionistic evidence can be in the hands of employers and courts predisposed to the belief that the doctrine of management rights confers upon employers the inherent right to determine, not only whether it would be undue hardship to accommodate a person with a disability, but whether it is even worth exploring accommodation at all.

Another cause for concern is the reasoning of the BCSC in its determination of the degree of deference a reviewing court should assign to human rights tribunals on questions of mixed fact and law in cases such as *Oak Bay*. Melvin J. states:

.... it is difficult to understand how the Human Rights Tribunal would have a greater expertise than a trial court who

addresses similar law and fact issues on virtually a daily basis. There is little if any distinction between a finding of discrimination pursuant to s. 12 of the Code and the finding of wrongful dismissal, in the case at bar.<sup>20</sup>

This statement illustrates the need for specialized human rights tribunals. It indicates an apparent failure by the court to recognize the technical and ideological complexities of contemporary human rights legislation, or that one of its purposes is to challenge the workplace culture and structures that the courts themselves helped to construct through the management rights doctrine. The court's failure to grasp such complexities is evident in its own error in misapplying the law established by the SCC in *Meiorin* and *Grismer* that, once *prima facie* discrimination is established by a complainant, the onus shifts to the respondent to prove a BFOR. As noted above, proof of a BFOR requires a respondent to demonstrate the impossibility of accommodation without incurring undue hardship.

The Court of Appeal acknowledged this error of the lower court but considered it "technical" and irrelevant to the lower court's decision to quash the Tribunal's ruling due to its failure to consider all relevant evidence. This involves something of a double standard, given that the evidence ignored by the Tribunal would have had no effect on *its* decision because the evidence neither provided proof that the employer had met its duty to accommodate nor relieved the employer of that duty.

To conclude, both courts appear to have disregarded the clear message of the SCC that, if workplace systems and organization discriminate against workers or candidates for employment on grounds of disability, or against others protected by human rights legislation, employers must make accommodation or demonstrate that

accommodation would be an undue hardship. The courts appear to have sanctioned the employer's sole reliance on the type of impressionistic, stereotyping of a person with a disability that the SCC in *Grismer* sought to eliminate. Melvin J. in particular appears to have provided *carte blanche* to employers to decide exclusively on the basis of such impressions and stereotypes whether or not it is worth even considering possible methods of accommodating a person with a particular disability. This assigns inappropriate, indeed unlawful, weight to the common law doctrine of management rights.

#### **4. Reflections.**

Resistance to human rights legislation is neither new nor surprising. It challenges the traditional so-called "management rights" of employers created by the courts and so long the bulwark of the hierarchical structure of workplaces and its one-way flow of authority. The legal duty of accommodation clearly requires workers' participation in the open political struggle in the workplace on matters concerning the organization and control of work. In spite of this, and a human resources management literature replete with warm fuzzy tales about the efficiency of the new order of "flatter" managerial structures, worker-management partnerships and the like, there is continuing employer resistance to real power sharing in the organization and control of workplaces, even on human rights issues.

In spite of landmark cases such as *O'Malley*, *Alberta Dairy Pool*, *Meiorin* and *Grismer*,<sup>21</sup> lower courts, and even some human rights tribunals, continue to accord deference to the doctrine of management rights that is incompatible with employers' duty of accommodation under human rights legislation. This encourages ongoing resistance by employers to the duty.<sup>22</sup> *Oak Bay* is just one more example of judicial and

employer resistance to the inroads made by human rights legislation on management rights and the hierarchical system of workplace organization. Where successful, such resistance helps preserve the one-way projection of authority, workers' conformity to managerial rules and systems, and the absence of open political struggle within the workplace in the development of such rules and systems.

While detailed discussion of change is beyond the scope of this paper, it should be remarked that legislators themselves appear to be complicit in encouraging resistance to human rights legislation by continuing to rely on individual complaint-based systems in spite of the widespread acceptance that human rights discrimination is systemic. Proactive, rather than reactive approaches are essential, and should include regulations and substantial financial incentives from governments to encourage employers to perform their human rights duty of accommodation. The transitional costs that will be incurred in recognizing and accommodating individual needs and abilities in the workplace may be high, but public funding is justified because the realization of human rights in the workplace is in the public interest.

Finally, effective legal enforcement of human rights in the workplace depends on the existence of a sufficient measure of consensus within Canadian society on the primacy of such values, even at the cost of some personal inconvenience or sacrifice. The SCC decisions in such cases as *Grismer* and *Meiorin* contribute no doubt to encouraging broad societal acceptance of the value of human rights in the workplace. Yet, the continuing ideological power of the management rights doctrine among employers, lower courts and tribunals, human resources management textbook authors, and governments mindful of the

contribution of corporate donations to the outcome of elections,<sup>23</sup> indicates that consensus on human rights in the workplace may fall short of that suggested by the language of human rights legislation.

As a result, human rights in Canadian workplaces remain a fragile flower.

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1. *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 at para. 54, McLachlin, J. [*Meiorin*].
  2. *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [*Grismer*].
  3. J.E. Bickenbach, *Physical Disability and Social Policy* (Toronto: Univ. of Toronto Press, 1993) at 4. Other notable elements in the phases of policy development include the enactment of provincial and federal human rights legislation, the Canadian Charter of Rights and Freedoms, the Abella Report, and development of the doctrine of systemic discrimination acknowledged by the Supreme Court of Canada in *Ontario Human Rights Commission v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536 [*O'Malley*].
  4. 2002 BCCA 495, aff'g 2000 BCSC 1728, rev'g 2000 BCHRT 16 [*Oak Bay Marina*].
  5. James C. Ketchen, "Revisiting Fuller's Critique of Hart - Managerial Control and the Pathology of Legal Systems: The Hart-Weber Nexus" (2003) 53 U.T.L.J. 1, at 15 [Ketchen].
  6. H.H. Gerth ed., *Essays in Sociology*, (New York: Oxford University Press, 1963) at 299.
  7. *Supra* note 6 at 14.
  8. C. Perrow, *Complex Organizations: A Critical Essay* (New York: McGraw-Hill, 1986) at 260, cited in Ketchen, *supra* note 5 at 15.
  9. See Brian Langille, "Equal Partnership in Canadian Labour Law" (1983) 21 Osgoode Hall L.J. 496. The public sector collective bargaining legislation of most Canadian jurisdictions imposes restrictions on issues that can be bargained or arbitrated in order to protect management rights.
  10. See Ketchen, *supra* note 5 at 14.
  11. S.B.C. 1984, c. 22, now section 13 of the *Human Rights Code*, R.S.B.C. 1996, c. 210.
  12. There was no dispute that the standard of performance required by the Respondent met the requirement of steps one and two of the *Meiorin* test.
  13. *Oak Bay Marina*, *supra* note 4 at para. 178.
  14. *Oak Bay Marina*, *supra* note 4 at para. 24.
  15. One presumes that the court also had in mind the Respondent's duty of care to other users of the waterway and to its employees, including

(potentially) the Complainant.

16. *Grismer*, *supra* note 2 at para. 15.

17. *Grismer*, *supra* note 2 at para. 44.

18. *Oak Bay Marina*, *supra* note 4, para. 36.

19. See *Richardson v. Mellish*, [1824] 2 Bing. 229 at 252, 130 E.R. 294, Burrough, J.

20. *Oak Bay Marina*, *supra* note 4 at para. 19.

21. *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489; *Meiorin*, *supra* note 1, *Grismer*, *supra* note 2.

22. Such cases include *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561; *Woolworth Canada Inc. v. Human Rights Commission Newfoundland* (1994), 114 Nfld. & P.E.I.R. 317; *Roosma v. Ford Motor Co. of Canada* (1996), 53 D.L.R. (4<sup>th</sup>) 90; *Barnes v. Canada Life Assurance Co.* (1994) 24 C.H.R.R. D/409; and *Bonner v. Ontario (Ministry of Health)* (1992), 16 C.H.R.R. D/485.

23. The unwillingness of the Ontario Government to apply the *Ontarians With Disabilities Act*, S.O. 2001, c.32, amended by 202 Sched. C, s.18 to the private sector illustrates the influence of the business lobby on government. The public relations and political lobbying campaign of the Ontarians With Disabilities Act Committee illustrates action that can influence the societal consensus on the accommodation of persons with disabilities within and beyond the workplace.

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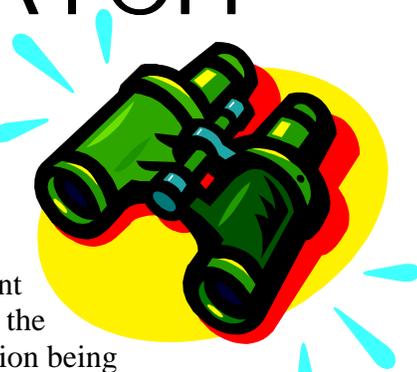
# CIVIL LIBERTIES WATCH

## Lawful Access

Last summer, the government released a consultation document entitled “Lawful Access” which discussed amendments it proposed to make to the Canadian *Criminal Code* and *Competition Act* in preparation for Canada’s ratification of the *Convention on Cybercrime*. Last month, the government released a summary of the public submissions it received regarding the document during its limited consultation process. The summary shows that only a handful of civil society groups turned out to the three roundtables held in fall, 2002 in Ottawa, Montreal and Vancouver, and that with the exception of the Canadian Libraries Association and the Internet Law Group from the University of Manitoba, there was no input from the Canadian post-secondary sector.

The low turnout was not surprising, perhaps, given the low-key manner in which the government invited submissions, the nature of the legislation being amended, the vagueness of the consultation document, and the technical complexity of the subject. However, the lack of input was unfortunate since the government’s proposal could have serious implications for Canadian academics, and for Canadian society in general.

The *Convention on Cybercrime*, the treaty which is driving the government’s proposed amendments, was signed by Canada, the U.S., and 28 other countries on November 23, 2001. It calls for the harmonization of



domestic criminal law regarding cyber crime offenses, international cooperation between law enforcement agencies, and – the issue with which the “Lawful Access” document is concerned – the enhancement of domestic law enforcement powers of investigation.

Negotiations for the *Convention on Cybercrime* were apparently difficult and prolonged. They had, in fact, been sliding towards deadlock when the events of September 11, 2001 galvanized the parties to conclude the agreement.

The U.S. has since made the global adoption of the *Convention* part of its “National Strategy to Secure Cyber Space”, along with a plan to create a North American safe cyber zone. There is, no doubt, intense political pressure on Canada to follow through with ratification of the *Convention* and any law reforms necessary to comply with it.

“Lawful Access” is a term used to mean the interception of communications and search and seizure of information by police, regulators and security intelligence officials, made lawful by domestic legislation. In Canada, “lawful access” already exists under the *Criminal Code* and the *Competition Act* where, in most circumstances, the prerequisite for obtaining “access” is prior authorization from a judge. The “spin” which the Canadian government has put on its “Lawful Access” proposal is that these existing provisions must be updated in order to be effective tools in the computer age. Many crimes today, the argument goes, are perpetrated through, or with the use of, electronic technologies. The provisions in the *Criminal Code* were drafted 28 years ago with only telecommunications, radio and simple print technology in mind.

While superficially appealing, the argument does not justify the kind of amendments the

government is proposing. Under the current *Criminal Code*, law enforcement officials can already intercept e-mails and seize computers and other electronic equipment. To these powers, the government’s amendments would add the following troubling innovations.

First, they would make all providers of wireless, wireline and Internet services liable for ensuring their systems had the technical capability to provide interception of content data and the real-time collection of traffic data. This could require installing “Carnivore” type surveillance devices that would allow law enforcement officials to search for crime-related key words and language patterns in respect of targeted individuals throughout a system. It could also require service providers to disclose encryption keys and plain text. Failure to ensure interception capability would result in criminal penalties.

Second, the amendments would allow state authorities to obtain “production”, “assistance” and “data preservation” orders in respect of service providers, in addition to the interception and search and seizure orders already available in the *Criminal Code*.

“Production” orders would require service providers to locate, collect and deliver to state authorities any information stored in their system that was requested. The main criterion for obtaining a general production order would probably be the one in the current *Criminal Code* for obtaining interception authorization or a search warrant, that is, “reasonable grounds to believe that an offence against an act of Parliament has been or will be committed”. However, the government is proposing a *lower threshold* for obtaining a production order in respect of Internet “traffic”

information and subscriber and service provider information, drawing an analogy to the lower threshold under the current *Criminal Code* for obtaining access to telephone numbers. The analogy is arguably false since the disclosure of Internet traffic information would usually be more invasive of privacy than the disclosure of telephone numbers.

“Assistance” orders would require service providers to assist state authorities in any way necessary to carry out an authorized interception, or search and seizure. There is already a provision in the current *Criminal Code* concerning assistance by computer system owners in computer searches, so presumably the government has something more detailed, or more intrusive, in mind. For example, the government might be thinking that “assistance” orders for covert surveillance, production or seizure must include the kind of “gag” provisions against service providers that the *U.S. Patriot Act* contains in respect of library record searches.

Finally, “data preservation” orders would require service providers to store and save existing data that was specific to a transaction or client for as long as it took state authorities to obtain a “production” order or a warrant to seize the data. Obviously, the threshold to obtain a “preservation” order would be lower than that required to obtain either a “production” order or a warrant. While the government is not presently proposing that service providers be obligated to retain, *as a matter of course*, all data relating to all of their subscribers, there is fear that this kind of proposal could be “around the corner”. In its “Lawful Access” proposal, the government does suggest that service providers should be compelled by law to collect and retain the information necessary to create a permanent, national database of local service providers

and the name and contact information of their subscribers.

The proposed amendments, then, amount to more than a mere updating of current legislation to keep pace with changing technology. By allowing the police power of the state to harness the financial, technical and data resources of public institutions and the private sector, the amendments would exponentially expand the kind and quantity of information to which state authorities now have access. Currently, law enforcement agencies can only access what they themselves can pay to intercept or have the technical capability to intercept, and even this is subject to the encryption and storage practices of public institutions and private sector businesses. With the government’s proposed amendments, access could be limitless, and there would be none of the accountability traditionally exercised through law enforcement budgets. Under the amendments, the content of our e-mail and electronic documents, the identity and addresses of people we communicate with electronically, the Internet sites and pages we visit, the purchases we make online, our banking and credit card information, our library and video selections, our travel patterns, and our medical prescriptions and records could all be subject to easy, “cost-free”, key-word search and surveillance by law enforcement and security intelligence agencies. Privacy International, an NGO which is grappling with similar legislation now being passed in the U.K., has observed that “[c]ombined, this extraordinary array of data creates a comprehensive dossier on the contacts, friendships, interests, transactions, movements and personal information of almost everyone ...”.

Under the “Lawful Access” proposal, search and surveillance of electronic information

could be undertaken for offenses ranging from ill-defined “terrorist” activities to over 115 other offenses in the *Criminal Code* and various pieces of federal legislation, some as minor as “mischief” or the possession of tobacco on which duties have not been paid.

Moreover, it is possible the Canadian government will feel compelled to assist foreign signatories to the *Convention* in collecting or sharing information about persons living in Canada, *even when the activities alleged by the state in question do not constitute crimes in Canada*. As mentioned earlier, one of the main purposes of the *Convention on Cybercrime* is to provide mutual assistance between the law enforcement agencies of signatory states. But, disturbingly, the *Convention* fails to consistently make dual criminality a condition of mutual assistance. Under the current *Criminal Code*, surveillance can be carried out covertly for up to three years. Searches can also be carried out covertly, with notice being provided to the targeted person after the fact at a time determined by a judge.

The “chill” that such search, surveillance and data sharing could cast on freedom of expression in Canada is obvious. Persons who are dual nationals, or who travel to or through the territory of certain signatories to the *Convention* would have reason to feel especially “chilled”. So would activists in the anti-globalization, aboriginal, environmental, anti-war, animal rights and sovereigntist movements – all of which have been identified in a recent Canadian Security Intelligence Service (“CSIS”) report as containing terrorist elements. The nature of the Internet itself could be affected as a global vehicle for promoting democracy, online public activism, and the free exchange of ideas.

The implications for academic freedom are equally obvious. Academics use electronic technologies for most of their research and discourse. They are often at the forefront of controversial research and dissent in society. Many academics in Canada are foreign-born and many travel frequently to other countries. Finally, a large portion of the graduate student population in Canada comes from foreign, and in particular, Muslim countries.

There is a real danger that in the use of the powers being proposed in the “Lawful Access” document, law enforcement agencies, national security agencies and judges may engage in ethnic and religious profiling. Certainly, there will be political pressure to subject members of particular groups to surveillance on less than the “reasonable grounds” required by the *Criminal Code*, or on the basis of lower, vaguer standards proposed by the government for obtaining access to certain types of electronic information. And, if service providers are obliged to install “Carnivore” type technology on their systems, the potential for officials to abuse the warrant or interception power they have in respect of a specific individual, to conduct searches on groups of individuals identified by their ethnicity or religion, will be great.

In enlisting the aid of service providers, the government would also be placing interception devices and production operations into private hands. There is a parallel here to Bill C-32 in which the government is proposing to allow system providers to intercept private communications on their own behalf “for the purpose of managing [computer systems] for quality of service”, and to disclose the content of those

communications where it is “necessarily incidental” to the management or protection of the systems. As the Canadian Bar Association has noted, the criteria for interception in Bill C-32 are vague and open to expansive interpretation. Both the “Lawful Access” proposal and Bill C-32, therefore, raise a concern about the abuses that could result from putting search and surveillance power into the hands of private actors.

Universities, which provide the networks for their campuses, would be considered “service providers” by the government and would be caught by the amendments described above. For them, the cost of ensuring interception capability would be a significant burden, and one not easily passed on to their “consumers”. More importantly, as institutions which should be at arm’s length from the state, universities would arguably be made into agents of the state by the amendments. As institutions which should be serving as bulwarks for freedom of expression and the free exchange of ideas, they would find themselves inducted into what could become an apparatus akin to Orwell’s “Big Brother”.

Private corporations would also be acting as agents or partners of the state under the amendments raising a concern, perhaps, about the growing convergence of corporations and government in North America.

If the government’s “Lawful Access” proposal is implemented, there will be some checks and oversight mechanisms in place, but these are probably inadequate both to mitigate the effect of the legislation and to prevent specific abuses. Under s. 195 of the *Criminal Code*, the Solicitor General and each provincial Attorney General must make

a public report annually about the surveillance activities of their respective national security and law enforcement agencies. These reports may be couched in terms that are too vague to make officials accountable, however, and the Solicitor General has in fact failed to file reports for the last three years. CSIS is subject to independent review by the Security Intelligence Review Committee (“SIRC”), however, it is widely considered to be ineffectual. Judges, of course, would be there to ensure that the criteria in the *Criminal Code* for interception, warrant, production and preservation orders were met. However, as suggested earlier, judges may be subject to political pressures. Also, the thresholds for certain orders could be vague or meaninglessly low, and local judges would not have the national perspective required to perform true oversight. State actions could be challenged by individual litigants under the unreasonable search and seizure provisions of the *Charter* and various pieces of privacy legislation. However, most privacy legislation, by its own terms, would be trumped by the *Criminal Code*. As for *Charter* litigation, it would take many years for the courts to hammer out various issues and it is unlikely that the *Charter* would give courts scope to fully address the larger policy questions at stake.

*Should the police power of the state be allowed to harness the capacity of public institutions and the private sector in criminal and security intelligence investigations? Or does this create an unfair balance between the state and individuals? Is it a healthy alliance? What controls should be placed on data sharing with other*

*countries? Will the proposed regime curtail the use of helpful databases and technologies? Will it inhibit freedom of thought and expression? Is it a step toward the creation of a surveillance society? Will it, in fact, provide Canada with greater security?*

It would seem that the burden falls to ordinary Canadians to rigorously address these questions. At the moment, however, it is unclear whether they will have another opportunity to do so, before the government moves ahead with legislation.

"It was even conceivable that they watched everybody all the time. But at any rate, they could plug in your wire whenever they wanted to. You had to live – did live, from habit that became instinct – in the assumption that every sound you made was overheard." 1984, George Orwell

#### Total Information Awareness Program Unplugged

The U.S. Senate pulled funding from the Pentagon's Total Information Awareness program on July 17, 2003. The program, which had recently been renamed Terrorist Information Awareness to counter growing unease about its premise, was supposed to develop technology that would link and search every possible government and commercial database in the United States and abroad for suspicious patterns of travel and other activity, in order to identify individuals as terrorist security risks.

#### Congress Wakes Up to Library Searches

There is growing opposition in Congress to the *U.S. Patriot Act* provisions which allow the FBI to search bookstore and library records without search warrants or judicial oversight. During the week of July 21, 2003, 129 members of Congress supported a proposed amendment which would have deleted the provisions from the *Act*. The proposal was ruled out of order, however, probably due to the clause in the *Act* that provides it cannot be amended until its "sunset" clause takes effect.

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Paul Jones, Original Cartoon

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## AVIS

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