Intellectual Property & Academic Staff [a three part series]

This is the second installment of a three-part examination of intellectual property. The series commenced with an overview of intellectual property as a legal concept and an examination of the basic legal rights that academic staff enjoy with respect to it.

Part Two looks at the legal and political implications of the growing obsession of universities with intellectual property.

Part Two - Intellectual Property: A Growing Presence

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.

Ownership Rights.

Through collective bargaining, CAUT and its member associations have secured a range of intellectual property ownership rights for academic staff. These rights have guaranteed

a measure of simple financial justice, but more importantly, they have ensured that staff have control over the direction, integrity and use of their scholarly work.

These rights are now under attack from university administrations, the private sector and the federal government, all of whom have expressed a desire to strip individual academic staff of ownership in intellectual property and transfer it to various institutional interests[1]. As such, the starting point for academic staff in any consideration of intellectual property is the preservation of existing ownership rights.

Defending the University.

The immediate goal of protecting ownership rights, however, cannot be accomplished without confronting the underlying causes that have pushed the issue of intellectual property to the fore.

The first of these factors is the chronic under-funding of post-secondary education in Canada. This crisis has led university administrations inexorably to the empirically mistaken notion that financial salvation lies in universities owning and selling industrial product[2]. Until financial stability returns to universities, academic staff can expect continued assaults on their intellectual property rights.

The second factor underlying the new interest in intellectual property is the near religious belief held by some that universities must be run on corporate lines and exist for commercial purposes. This "business model" envisages universities devoid of collegial governance, academic freedom and the security of tenure. Not surprisingly, in institutions where academic staff exist only to produce product (whether material or human) for the commercial exploitation of others, individual intellectual property rights have no place.

Academic Staff Ownership - Necessary but not Sufficient.

If under-funding and corporatization are confronted at the bargaining table and in the political arena, the traditional intellectual property rights of academic staff, and their concomitant guarantees of scholarly independence, can be protected.

But simply defending these rights is not enough. This is because a trend towards the "intellectual propertyization" of all scholarly work, regardless of who owns it, poses an even greater threat to the university than the loss of individual intellectual property rights.

There is a belief, promulgated by Industry Canada among others, that in order to maximize economic efficiency, the fruits of all human labour, and indeed virtually everything in existence, must be treated as property. For these intellectual property maximalists, that which has no market value has no value at all. Given that the majority of academic work, from basic scientific research to the study of human society, has no immediate commercial application, this process of commodification and market

assessment represents an extraordinary danger to the university. Even in disciplines that create directly marketable applications, this approach is destructive for it cloaks research in commercial secrecy – secrecy that stifles the free flow of scholarly information upon which innovation depends[3].

Thus, the preservation of existing intellectual property ownership rights is a necessary, but not sufficient, part of the struggle to protect academic staff interests. Academic staff must also address the fact that the concept of intellectual property is being transformed from a shield that protects their rights into a sword wielded by others to destroy the university as a bastion of the unfettered search for knowledge.

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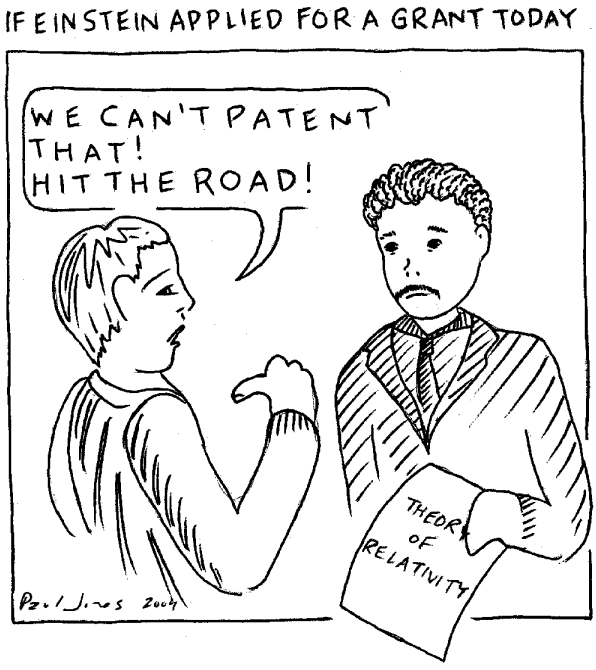
[1] See, for example, "Public Investments in University Research: Reaping the Benefits", Report of the Expert Panel on the Commercialization of University Research - "the Fortier Report", May 4, 1999.

[2] The Expert Panel's Report acknowledges, based on experience in the U.S., that "the revenues from commercializing research constitute a small addition to university budgets, generally below 1 percent."

[3] The history of the aviation industry in the U.S. provides a classic example of the sometimes debilitating impact of intellectual property law on commercialization. Although most of the early technology were invented in the U.S., commercial production of airplanes almost ground to a halt there amidst a flurry of patent litigation. As European airplane manufacturers rapidly outstripped their American counterparts, the American government forced the squabbling parties to suspend their patent litigation in an ultimately successful effort to force the sharing and implementation of ideas.

Part Three of this series will appear in the next issue of the CAUT Legal Review. This next installment will examine how academic staff can respond to the challenges presented by the explosive growth of intellectual property as a presence on university campuses.

All three parts of this series are available on-line at: http://www.caut.ca/english/member/papers/intellectualproperty.asp



La propriété intellectuelle et le corps universitaire [série en trois parties]

Ceci est la deuxième partie d'une série en trois parties qui traiteront du concept de la propriété intellectuelle. La série a commencé 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.

La deuxième partie s'intéresse aux incidences légales et politiques de l'obsession de plus en plus importante auquelle sont en proie les universités : la propriété intellectuelle.

Deuxième partie - La propriété intellectuelle : une présence de plus en plus prononcée

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.

Droits de propriété.

Lors des négociations collectives, l'ACPPU et ses associations membres ont obtenu une série de droits de propriété intellectuelle pour le corps universitaire. Ces droits ont garanti une mesure de simple justice financière mais, plus

important, ils ont donné aux professeures et professeurs la haute main sur l'orientation, l'intégrité et l'utilisation de leurs travaux savants.

Ces droits subissent maintenant les assauts des administrations universitaires, du secteur privé et du gouvernement fédéral qui ont tous exprimé le désir de dépouiller les membres du corps universitaire de leur droit de regard sur leur propriété intellectuelle et de le transférer à divers intérêts organisationnels [1]. Dans ces circonstances, pour le corps universitaire, tout examen de la propriété intellectuelle doit commencer par la sauvegarde de ces droits acquis.

À la défense de l'université.

Cependant, pour atteindre le but immédiat consistant à sauvegarder les droits de propriété, il faut s'attaquer aux facteurs sous-jacents qui ont poussé la question de la propriété intellectuelle à l'avant-scène.

Le premier de ces facteurs est le sous-financement chronique de l'enseignement postsecondaire au Canada. Cette crise a mené inexorablement les administrations universitaires à la notion erronée fondée sur des principes empiriques que le salut financier réside dans la possession et la vente de produits industriels par les universités [2]. Tant que les universités n'auront pas retrouvé leur stabilité financière, le corps universitaire peut s'attendre à ce que ses droits de propriété intellectuelle continuent à être assaillis.

Le deuxième facteur responsable du nouvel intérêt envers la propriété intellectuelle est la conviction presque religieuse qu'ont certains que les universités doivent être administrées comme des entreprises et que leur raison d'être est d'ordre commercial. Selon ce « modèle commercial », les universités sont dépourvues de la direction collégiale, de la liberté universitaire et de la sécurité qu'apporte la permanence. Il n'y a rien de surprenant que dans les établissements où la seule raison d'être du corps universitaire est de produire des produits ou des ressources humaines qui doivent être exploités par d'autres à des fins commerciales, il n'y ait pas de place pour les droits individuels de propriété intellectuelle.

Propriété du corps universitaire - Nécessaire mais insuffisante.

Il est possible de protéger les droits traditionnels de propriété intellectuelle du corps universitaire et leurs garanties parallèles touchant l'indépendance pour mener leurs activités savantes, en s'attaquant, à la table de négociation et dans l'arène politique, au sous-financement et à la transformation des universités en entreprises.

Il ne suffit pas simplement de défendre ces droits. En effet, la tendance à faire de tous les travaux savants des propriétés intellectuelles, quels qu'en soient les titulaires, présente une menace encore plus grande pour l'université que la perte des droits individuels de propriété intellectuelle.

Il existe une croyance, promue entre autres par Industrie Canada, que pour optimiser la

rentabilité économique, les fruits de tout travail humain, et même virtuellement de tout ce qui existe, doivent être traités comme une propriété. Pour ces extrémistes de la propriété intellectuelle, celle qui n'a pas de valeur marchande n'a aucune valeur. Étant donné que la majorité des travaux universitaires, de la recherche scientifique fondamentale à l'étude de la société humaine, n'a pas d'application commerciale immédiate, ce processus de réification et d'évaluation du marché représente un danger extraordinaire pour l'université. Même dans les disciplines qui créent des applications directement commercialisables, cette approche est destructive car elle enveloppe la recherche dans le manteau du secret commercial - secret qui étouffe la libre circulation de l'information savante dont l'innovation dépend [3].

Par conséquent, la préservation des droits actuels de propriété intellectuelle est un élément nécessaire, mais insuffisant de la lutte pour la protection des intérêts du corps universitaire. Celui-ci doit aussi tenir compte du fait que le concept de la propriété intellectuelle devient non plus un bouclier qui protège leurs droits mais une épée brandie par ceux qui veulent détruire l'université en tant que bastion de la recherche absolue du savoir.

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[1] Voir par exemple « Investissements publics dans la recherche universitaire : comment les faire fructifier », Rapport du Groupe d'experts sur la commercialisation des résultats de la recherche universitaire (rapport Fortier), 4 mai 1999.

[2] En se basant sur l'expérience américaine, le rapport du Groupe d'experts indique que « la commercialisation des résultats de cette activité contribue peu aux budgets universitaires (part généralement bien inférieure à 1 p. 100) ».

[3] L'histoire de l'industrie de l'aviation aux États-Unis fournit un exemple classique des retombées parfois débilitantes de la loi sur la propriété intellectuelle sur la commercialisation. Quoique la plupart des premières inventions technologiques aient été faites aux États-Unis, la production commerciale des avions s'est presque arrêtée à cause d'une multitude de litiges concernant les brevets. Étant donné que les fabricants européens d'avions prenaient rapidement les devants sur leurs homologues américains, le gouvernement américain a obligé les parties belligérantes à mettre leurs différends de côté et les a en fin de compte convaincues d'échanger des idées et de les mettre en œuvre.

La troisième partie de cette série paraîtra dans le prochain numéro de la Revue de droit de l'ACPPU. Cette suite examinera la façon dont le corps universitaire peut répondre aux défis que présente la croissance explosive de la propriété intellectuelle dans les universités.

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

THE AMERICAN DEBATE ON AFFIRMATIVE ACTION

Curt Levy on the implications of the latest U.S. Supreme Court decisions

Colleges and universities nationwide dodged a bullet in June when the (U.S.) Supreme Court's split decision permitted the limited use of race in admissions for another 25 years. But they would do well to cut the celebration short and begin planning now for the eventual phaseout of race-based admissions. Public opinion will demand it, voters and legislators may compel it, and continued litigation will necessitate it, long before the court's respite ends.

In striking down racial-admissions preferences at the University of Michigan's liberal-arts college in Gratz v. Bollinger while upholding its law school's race-based policies in Grutter v. Bollinger, the court found campus diversity compelling enough to justify some consideration of race. But the court subjected race-based admissions to new limits in time and scope.

Taken together, the twin decisions make it clear that race must be used in a "flexible, nonmechanical way" and cannot generally be a "decisive" factor. Instead, colleges must engage "in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." As Grutter stated, the "critical criteria" in such a review "are often individual qualities or experience not dependent upon race but sometimes associated with it." Yet higher-education institutions may not treat race as if it "automatically ensured a specific and identifiable contribution to a university's diversity."

Moreover, the Supreme Court required that colleges engage in "serious, good-faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." Such alternatives typically involve taking socioeconomic, educational, and other types of disadvantages into account, whether explicitly or through indirect mechanisms like percentage plans. The court, noting the "wide variety of alternative approaches," said each institution must "draw on the most promising aspects of these race-neutral alternatives" and must conduct "periodic reviews to determine whether racial preferences are still necessary" in order to "terminate its race-conscious admissions program as soon as practicable."

In addition, the justices called for "sunset provisions" and a 25-year overall time limit on the use of racial preferences to achieve diversity. While some have deemed that limit to be the court's hope rather than an essential part of its holding, that reading ignores the immediately preceding paragraphs, which emphasize that the grant of compelling-interest status to student diversity is conditional on that limit. The bottom line is that any higher-education institution still using race-based admissions 25 years from now will be doing so without the Supreme Court's sanction.

Now it's up to the nation's colleges and universities. If they recognize that the court considers racial admissions preferences "potentially so dangerous" and that it issued a limited reprieve rather than a ringing endorsement, the decisions will very likely be remembered as a road map for peace between the higher-education community and critics of race-based admissions. However, if Justice Ruth Bader Ginsburg's prediction in Gratz proves prophetic, and colleges view the Michigan decisions as merely an excuse for less "candor" and more "camouflage," the decisions will instead be a road map for bitter and costly litigation. Justice Antonin Scalia's opinion in Grutter identifies enough prospective issues to keep a small army of attorneys busy until retirement.

The early indications from academe are not encouraging. Colleges from Ann Arbor to Austin are celebrating the Michigan decisions, seemingly oblivious or indifferent to a holding which means that many of them have been violating the constitutional rights of applicants for decades. Colleges should be vowing to make the fundamental changes necessary to right that wrong – like broadening their definition of diversity – and promising to move toward race-neutral alternatives with all deliberate speed. Instead, most are reflexively insisting that they never used race in a mechanical or decisive manner, or are proclaiming that only minor tweaks will be necessary to comply with the court's new standards.

Such talk is particularly perplexing coming from large universities, where many thousands of applications make the mechanical use of race the norm, and from the nation's most selective colleges, where the magnitude of the racial bonus makes it often decisive. Perhaps some institutions are simply not yet informed about what the Michigan decisions require. Perhaps others are being disingenuous.

Take the University of Michigan, which, until June 23, contended that "the volume of applications ... make it impractical for the [undergraduate college] to use the [individualized] admissions system" upheld in Grutter. Now Michigan is telling the nation that it will have exactly such a system up and running at the undergraduate college by September. Maybe the college is hoping to get by with the sort of cosmetic changes it tried twice before, after its admissions policies first came under fire. But other universities should take note that those changes failed to satisfy the Supreme Court.

The lack of a bright line in the Michigan decisions may tempt other colleges to try to slide by with superficial alterations in their admissions policies. But, in fact, the murkiness of the decisions make fundamental changes all the more important. While it may be safe to maneuver close to a bright line, it's wise to stay far away from a fuzzy one, especially when crossing it invites years of costly litigation or the corrupting influence of deceit.

Similarly, higher-education institutions should

not be lulled into complacency by the court's arguably relaxed application of the Constitution's strict-scrutiny test in the Grutter decision. Other judges will probably take the court at its word that it was applying an "exacting standard" and will be less deferential to the "good faith" of a defendant college, with regard to both the consideration of race and the instituting of race-neutral alternatives. Given old habits and a line that's hard to pin down, it will be easy for institutions to slip – despite their best intentions – into race-based admissions practices that a judge could characterize as mechanical or decisive.

Among the colleges that choose, nonetheless, to continue using race-based admissions, a number of practices will make them particularly vulnerable to litigation brought by both public-interest law firms and private lawyers. Such practices include:

- The continued use of race in a mechanical manner, despite eliminating a formal point system. For example, a college may not assume that "a particular applicant, by virtue of race or ethnicity alone, is more valued than other applicants."
- Individualized review that is limited to a subset of applicants, who have been identified through a system that mechanically uses race.
- Failure to give nonminority applicants "the opportunity to highlight their own potential diversity contributions."
- The treatment of nonracial diversity factors as less important than race and ethnicity. In part, Michigan's undergraduate admissions policies were found to be unconstitutional because "the points available for other diversity contributions ... are capped at much lower levels."
- The admission, by a selective institution, of virtually all qualified minority applicants, thus indicating that race is being used as a "decisive" factor.
- A large disparity between the average grades and test scores of minority and nonminority admittees, where such a disparity can be explained only by a race-based, "two track" admissions standard.
- Reintroduction of race-based admissions by a state that successfully used race-neutral policies to promote diversity. Such a state cannot convincingly claim that a "serious, good-faith consideration of workable race-neutral alternatives" has revealed that "racial preferences are still necessary."

Litigation is not the only worry for colleges that continue to use race-based admissions. Perhaps their biggest concern should be public opinion. In recent years, poll after poll – by the Gallup Organization, NBC, Newsweek, and the Los Angeles Times, to name just a few sources – has shown that the overwhelming majority of Americans of all races oppose the use of race in admissions. For example, a national survey this year by The Chronicle found that only 3 percent of white people, 8 percent of Hispanic people, and 24 percent of black people strongly

support the use of racial preferences in college admissions. Similarly, a 2001 Washington Post poll found that 94 percent of white people and 86 percent of black people disagree that "race or ethnicity should be a factor when deciding who is ... admitted to college." That shift in public opinion is probably the greatest legacy of the Michigan cases, which ended the myth that race was being used as merely a tie-breaker and focused national attention on the success of race-neutral alternatives.

Although the nation's elite institutions – from General Motors to Harvard – lined up on Michigan's side and may well have influenced the Supreme Court, they clearly failed to persuade the American people. The result is a huge gulf between public and elite opinion, an inherently unstable situation reminiscent of a royal family that is blissfully unaware of how out of touch with the common people it has become. Equilibrium is restored only when change is forced upon the ruling elite – in this case, probably by state ballot initiatives, legislation, or the threat thereof.

Ballot initiatives like California's Proposition 209 and Washington State's I-200 will be the public's first line of attack. Such measures allow the voters to take the issue of racial preferences out of the hands of timid politicians. Just two weeks after the Michigan cases were decided, Ward Connerly – the principal figure behind Prop 209's passage – announced a campaign to put a similar initiative on the Michigan ballot. If ballot initiatives prove popular in a number of states, as appears likely, politicians will get the message. Legislative proposals to curb racial preferences will follow on the federal, state, and even local levels. That's exactly what resulted in Florida's abolition of race-based admissions. Republican lawmakers in other states and even in Congress may be motivated to move quickly rather than see antipreference initiatives, which increase minority turnout, on the November 2004 ballot.

Although few expect Congress to enact an outright ban on race-based admissions – for example, by amending Title VI of the Higher Education Act to more clearly prohibit all discrimination – smaller legislative or regulatory steps might prove very popular. For example, Congress could provide monetary incentives to colleges that use race-neutral alternatives. Or perhaps Congress could enact a mandatory timetable for phasing out race-based admissions, in order to put more teeth into the court's 25-year limit and sunset-provision requirement.

Similarly, Congress or the U.S. Department of Education could require colleges to file progress reports, documenting their "periodic reviews" and other "good faith" efforts to carry out race-neutral admissions. Finally, federal or state lawmakers could require transparency for race-based admissions policies, including statistics on admitted students' grades and test scores, categorized by race. What politician will want to explain why he opposes transparency or believes that racial preferences must continue beyond 2028?

Given the risk of litigation, the increasing opposition of the public, the flowering of ballot initiatives, and the possibility of state and federal legislation and regulation, the political, social, and financial costs of maintaining a race-based admissions system will surely climb. Although those costs will make race-neutral alternatives increasingly attractive, I do not underestimate the power of constituencies in the academy that find such alternatives ideologically repugnant. Nonetheless, with Gratz and Grutter decided, there is no longer any strategic reason for those in higher education to dismiss the success of race-neutral policies in California, Florida, Georgia, Texas, and Washington State. Thus, we can hope that colleges in other states will take seriously the Supreme Court's command to "draw on the most promising aspects of these race-neutral alternatives."

Prominent in the battle of statistics that surrounded the Michigan cases were conflicting figures about whether minority enrollment in those five states was up or down. However, through the clutter, one thing is clear: Even at the flagship universities and professional schools in those states, race-neutral alternatives were just as successful as race-based policies in achieving a critical mass of underrepresented minorities – defined by the University of Michigan in testimony as at least 10 percent. Those states have emphatically proved that racial preferences are not the only way to achieve the goal of racial diversity, and their experience should inspire other higher-education institutions to embrace, rather than resist, the inevitable phaseout of race-based admissions.

In many ways, it is an ideal time for colleges to pursue race-neutral alternatives. It is but a small step from individualized reviews, in which "the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it," to a system that eliminates racial preferences but reserves racial diversity by taking socioeconomic, educational, and other types of disadvantage into account. Such disadvantage-based preferences enjoy wide support in public-opinion polls, perhaps because they produce the kind of deep diversity that is utterly lacking at most of the nation's elite colleges and universities.

Higher-education institutions that begin to embrace alternatives now will enjoy not only that more-profound diversity, but also the luxury of making a gradual and carefully studied transition away from race-based admissions. Colleges and universities that resist change, on the other hand, will find themselves decades behind and scrambling to catch up as the court's 25-year reprieve runs out.

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Companies, directors face criminal code sanctions

New legislation creates duty to protect workers and public from corporate negligence

by Julius Melnitzer

The legislation creating a new Criminal Code duty to protect workers and the public; creates a mechanism to convict organizations, including corporations, criminally and creates what one lawyer calls "dramatic, sweeping sentencing provisions."

At press time, Bill C-45, An Act to Amend the Criminal Code, required only publication in the Canada Gazette to become law. It received Royal assent on Nov. 7.

"The bill puts companies, supervisors, managers, officers, and directors at additional risk because it enshrines occupational health and safety (OH&S) obligations and violations in the Criminal Code," says Cheryl Edwards of Toronto's Stringer Brisbin Humphrey.

For years, legal scholars and politicians have advocated a penal approach to dangerous workplaces and corporate liability for OH&S. The most important modern impetus behind the current legislation is found in the report on the Westray mine disaster, entitled "The Westray Story: a Predictable Path to Disaster."

The report, published in 1997, recommended that the federal government hold organizations, including corporations, partnerships, and charitable entities and their officers accountable for workplace safety and the negligence of their corporations.

Bill C-45 imposes a positive duty on any person or organization who does or has the authority to direct another person's work to take reasonable steps to prevent bodily harm to any person arising from that work. The duty applies broadly to supervisors, managers, officers, directors, and lead hands inside or outside the bargaining unit.

This duty currently exists under Ontario's Occupational Health and Safety Act, but its incorporation in the Criminal Code is nonetheless very significant.

"Violations will attract criminal sanctions, which means that those convicted or even

charged will have to deal with the stigma of arrest and trial and its impact on their business," Edwards says.

While violation of the duty is not in itself criminal negligence, behaviour that shows a "wanton or reckless disregard" for worker or public safety will be. The "public safety" provision is important because it extends liability where injury occurs to non-employees.

"Imagine a company or organization that fails to protect an uncovered stairwell at a construction project," Edwards says. "Let's say that a city building inspector and a supervisor escorting the inspector both fall through the stairwell, with one suffering critical injuries and the other fatal injuries."

This would attract provincial regulatory liability and fines probably in the range of hundreds of thousands of dollars.

It might also attract criminal sanctions, relating not only to the injuries to the worker, but also to the city inspector. The sanctions could be against either the corporation or an individual if the Crown were able to prove "wanton or reckless disregard" on the part of either.

Edwards posits the following scenario as one that might attract individual and corporate criminal negligence charges. In Edwards' example, the general manager of the project knows the stairwell is unprotected, but decides not to install guardrails or plywood protection. Workers complain to her and she responds. They both file documents. Later, the company's president admits to ignoring the situation to keep costs down.

The president and the general manager may face individual charges. These will be dealt with in accordance with ordinary criminal law procedure.

But Bill C-45 enacts a new mechanism to enable the conviction of corporations more readily. Under the legislation's terms, criminal activity exists when two conditions exist:

- When the conduct of any officer, director, partner, employee, agent, or even a contractor, or of a group of representatives breach the duty to take reasonable steps to prevent bodily harm; and
- If a senior officer - such as a CEO, CFO, a director, or other person who has an important operational or policy role - shows a marked departure from the expected standard of care.

"The drafters of Bill C-45 have put it that if those with 'real clout' fail to act, or insulate themselves from obtaining the knowledge to act, corporate criminal negligence convictions may follow," Edwards says.

The consequences of conviction for an individual are most serious and include:

- A maximum sentence of life imprisonment for criminal negligence causing death;
- A maximum of 10 years' imprisonment for criminal negligence causing bodily harm; and

•• Sentencing options ranging from an absolute discharge to the maximum penalty.

The consequences are equally grim for convicted corporations that face a maximum fine of $100,000 on summary conviction; a limitless fine on conviction by indictment; and probation orders that may include terms requiring restitution for losses, and orders requiring corporations publicize the conviction, sentence, and remedial measures taken.

Of some comfort is the fact that demonstrating due diligence, which tends to obviate the wanton and reckless elements of behaviour, will likely result in criminal charges not being laid or provide a defence to criminal prosecutions.

"It's important to remember that due diligence is not expressly a defence, but the proper exercise of due diligence by an individual or systemically should prevent criminal charges or at least criminal liability," says Edwards.

Still, the difficulty employers face is that they will not be able to tell whether an investigation that follows a very serious workplace accident is a regulatory investigation or a criminal one.

Edwards suggests that lawyers advise their clients to prepare for the proclamation of Bill C-45 by ensuring corporate safety programs reflect the new duty to the public and to workers who are not members of the bargaining unit.

"Bill C-45 heightens the need to review corporate due diligence, conduct training, and conduct due diligence audits," she says.

Proactive senior management strategies will also be necessary to avoid criminal charges.

"Bill C-45 effectively creates officer, director, and senior management duties in all Canadian jurisdictions," she says.

Finally, corporations should implement an accident response plan that deals with the prospect of parallel criminal and regulatory investigations and prosecution.

"It's important to protect corporate and individual interests by preserving evidence and to control the flow of information to the Ministry of Labour and the police so as to limit the dissemination of incorrect and negative information," says Edwards.

Supreme Court of Canada Bars Chronic Pain Exclusion from Worker Compensation Plans

by Cristin Schmitz

The Supreme Court has ruled that the wholesale exclusion of persons disabled by chronic pain from the usual workers' compensation scheme is an unjustified breach of equality rights.

Ruling 9-0 that such treatment is "clearly" discriminatory and violates s. 15(1) of the Charter, the Supreme Court struck down s. 10(b) of the Nova Scotia Workers' Compensation Act, and its regulations, which deny to those with chronic pain the usual benefits available to other injured workers. Workers with chronic pain are restricted to four weeks of limited benefits.

The court went on to suspend its declaration of invalidity for six months to give the Nova Scotia government time to come up with "an appropriate legislative response."

The present scheme harms the dignity of those suffering from chronic pain by reinforcing negative assumptions that it is not "real" and therefore does not warrant individual assessment or adequate compensation, wrote Justice Charles Gonthier.

"Chronic pain sufferers are thus deprived of recognition of the reality of their pain and impairment as well as of a chance to establish their eligibility for benefits on a footing equal with others. This message clearly indicates that, in the Nova Scotia Legislature's eyes, chronic pain sufferers are not equally valued as members of Canadian society."

In the wake of the high court's ruling, "if there is any legislation across the country where government has said, 'we are going to define a group of people by the nature of their disability, and exclude them without giving them the opportunity to be assessed under the same rules as everyone else,' then they are running the risk of running afoul of this decision," said Anne Clark who, with Kenneth LeBlanc of the Nova Scotia Workers' Advisers Program, represented workers Donald Martin and Ruth Laseur.

In another far-reaching holding, the court also "reappraised and restated as a clear set of guidelines" the rules it had established more than a decade ago in the trilogy of Douglas/Kwantlen Faculty Assn., Cuddy Chicks, and Tétreault-Gadoury. The trilogy set the rules for determining the key question of whether individual boards and tribunals have the jurisdiction to apply the Charter.

"Administrative tribunals which have jurisdiction - whether explicit or implied - to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the

constitutional validity of that provision," Justice Charles Gonthier wrote.

"This presumption may only be rebutted by showing that the legislature clearly intended to exclude Charter issues from the tribunal's authority over questions of law."

And in comments that are salutary for all those suffering hard-to-prove disabilities, Justice Gonthier emphasized that despite the current lack of objective findings to support diagnoses of chronic pain "there is no doubt that chronic pain patients are suffering and in distress and that the disability they experience is real."

Clark said, "for people with chronic pain this decision says you have the opportunity to prove that you have a real condition - that chronic pain isn't, by definition, some fake condition." She said the decision could also have ramifications for other medical disabilities, such as chronic stress, as well as outside the realm of workers' compensation, for example in personal injury or insurance cases.

"If I were representing someone on a case and the other side was saying 'Well this isn't a real disabling condition,' then I would drag out this case and say 'Look the Supreme Court acknowledges that this is a real disabling condition'," said Clark who noted there are 308 chronic pain workers' compensation cases pending in Nova Scotia at the appeal level. The workers' compensation schemes of Alberta, British Columbia, Quebec and Ontario all provide some compensation for chronic pain.

Clark's co-counsel Ken LeBlanc called the court's refusal to fixate solely on whether chronic pain can be physically demonstrated as a "paradigm shift" in the way workers' injuries are assessed. "I think it has ramifications beyond workers' compensation," he said.

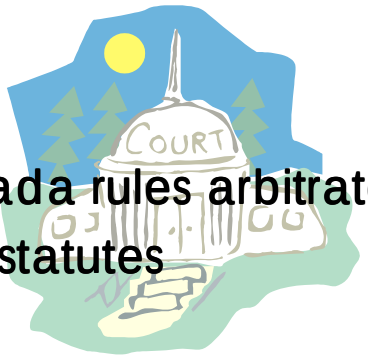
Cristin Schmitz is the Ottawa Bureau Chief for *The Lawyers Weekly*. A longer version of this article appeared in the October 17, 2003 issue [Vol.23, No.23]

Insurance Companies Slammed with $12 million in Punitive Damages

A jury in the U.S. has awarded more than $12 million in punitive damages against insurance companies that wrongfully denied a worker's compensation claim. The companies offered bonuses to claims adjusters who reduced pay outs on claims from one year to the next.

Parry Sound

The Supreme Court of Canada rules arbitrators must enforce human rights statutes



A recent decision by the Supreme Court of Canada, *Parry Sound v. Ontario Public Service Union*[1], has clarified that unions and employers cannot contract out of human rights and employment standards, and suggests that arbitrators have a duty to enforce these standards when interpreting collective agreements.

Prior to the *Parry Sound* decision, there was some uncertainty over whether arbitrators had the legal authority to amend collective agreements that conflicted with human rights and/or employment related statutes. The debate in Ontario centered on the interpretation of arbitral powers under Labour Relations Act. Section 48(12)(j) of the Act gives an arbitrator the power to "interpret and apply human rights and other employment-related statutes, despite any conflicts between those statutes and the terms of the collective agreement."[2]

In addressing whether employers and unions can contract out of human rights provisions, the *Parry Sound* decision sheds light on whether section 48 of the OLRA gives arbitrators the power to strike down discriminatory provisions of a collective agreement, or whether their authority only extends to interpreting collective agreements in light of human rights and employment statutes.

In 1998, Joanne O'Brien was fired from her job at the Parry Sound Social Services Administration Board. Mrs. O'Brien had just returned from her maternity leave only a few days before being discharged. Unfortunately for Mrs. O'Brien, because of her status as a probationary employee, the terms of her collective agreement prevented her from having any recourse against the employer through the grievance procedure. As a result, she soon found herself with no job, and even fewer options at her disposal.

Despite the restrictions cited in the collective agreement, Mrs. O'Brien decided to file a grievance against her employer alleging discrimination on the basis of her family status as a new mother. The employer, meanwhile, remained firm in its position that could act on its own discretion to discharge a probationary employee without any recourse to the grievance procedure.

An Arbitration Board ruled in favour of Mrs. O'Brien's claim against her employer. The Board found that arbitrators have the authority, and an obligation to import the substantive elements of the Human Rights Act and other employment related legislation into their interpretation of collective agreements.

The Board's ruling was followed by a series of appeals that eventually lead to a hearing before the Supreme Court of Canada. In a majority decision of 5-2 the Court upheld the Arbitration Board's ruling, and added this additional commentary. According to the Court, neither an employer, nor a union acting in good faith, can contract to exclude or circumvent human rights legislation or other employment related statutes.

The Supreme Court of Canada's ruling is destined to have serious implications on the development of collective agreements and the grievance arbitration process in the future. As author Kirsten Eliot explains, the Court's decision has endorsed "an increased public role for collective bargaining and grievance arbitration, based upon a statutory rather than contractual model of collective agreements."[3] Ultimately, this endorsement by the Court will give make it easier for arbitrators to protect against employment discrimination in the workplace.

Author John Jaffey also supports this assessment of the impact of the Court's decision. Jaffey believes that grievance arbitration boards will have a significant impact on encouraging compliance with human rights standards.[4] The accessibility, expertise, and inexpensive nature of the process will appeal to many aggrieved employees looking for recourse against human rights violations.[5]

The *Parry Sound* decision has also drawn some expected criticism. Justice Major in his dissent from the majority decision called it "a subversion of legislative intent."[6] Major argued that section 48 of the OLRA did not give arbitrators the power to assert their jurisdiction where the parties involved had explicitly agreed to exclude recourse to arbitration. He reasoned that, in the case at hand, while probationary employees were contractually barred from grieving human rights violations, they still had a right to file a claim under the statutory human rights regime if they wished to do so. In Justice Major's opinion, if the legislator had intended to adopt an expansive interpretation of arbitral power in this domain, it would have been clearly expressed in the wording of the OLRA legislation.

As a final thought, one must also question how the Court will reconcile the *Parry Sound* decision with its previous ruling in *Weber v. Ontario*.[7] In the Weber case, the Supreme Court of Canada recognized the exclusive jurisdiction of arbitrators to address legal issues that arise either explicitly or implicitly out of collective agreements.[8] With the adoption of the *Parry Sound* decision, the Court seems to suggest

that arbitrators can also claim jurisdiction over grievances that do not necessarily arise out of the provisions of a given collective agreement, but rather originate solely from statute.

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[1] *Parry Sound (District) Social Services Administration Board v. Ontario Public Services Employees Union, Local 324, [2003] S.C.J. No. 42(QL) [Parry]*

[2] Labour Relations Act, S.O. 1995, c.1, s. 48(12)(j).

[3] Kristin Eliot, "SCC says labour arbitrators must enforce relevant statutes" (2003) 23:23 Lawyers Weekly.

[4] John Jaffey, "Arbitrator should enforce Human Rights Code: SCC" (2003) 23:20 Lawyers Weekly.

[5] *Ibid.*

[6] *Parry Sound, supra* note 1.

[7] *Weber v. Ontario [1995][125 D.L.R. (4th) 583 (QL) [Weber]*.

[8] *Weber, supra* note 7.

Anthony Lashly is an articling student in the Legal Department of CAUT.

COMMUNITY OF INTERESTS

Nova Scotia Labour Board combines full-time and part-time bargaining units

A Nova Scotia labour relations tribunal has granted the Acadia University Faculty Association's application to combine its full-time and part-time academic staff bargaining units.

In issuing its decision the tribunal said it was satisfied that there was "sufficient community of interest between the two bargaining units to combine into one." The decision came last month after a three-day hearing before the Nova Scotia Labour Relations Board.

CAUT president Victor Catano said "the decision will have an impact on other organizing drives and labour board applications, and reinforces what CAUT has been saying all along: academic staff are stronger together."

The university had opposed the application, asserting the employees did "not have a community of interest."

In its ruling, the NSLRB held that "From the student perspective, the professorate assigns readings, gives lectures, conducts evaluation of performance in a variety of ways and provides feedback in different forms including final grades. While part-time faculty do not have formal research responsibilities, their teaching of credit courses gives them more in common with full-time faculty than have the librarians and instructors who are in the 'full-time' unit."

Furthermore, "The manner of remuneration of full-time faculty (salary with the full range of employment benefits) is different from the course stipends received by part-time instructors; however the full-time faculty who engage in overload teaching or give continuing or distance education courses are paid for that work on the same basis as part-time instructors.

"There are certainly common collective bargaining issues here."
The board also noted the similarities in academic qualifications, the fact that some faculty shift from full-time contract appointments to part-time instructor status, their frequent contact at the department level, and the application of senate regulations and departmental policy to all teaching work.

Faculty association president Janice Best said faculty were delighted at the decision.

"It just makes sense to have everyone negotiate together. We're confident that a single bargaining unit will be able to make gains for all AUFA members."

CAUT president Victor Catano said the decision will have an impact on other organizing drives and labour board applications, and reinforces what CAUT has been saying all along: "Academic staff are stronger together."

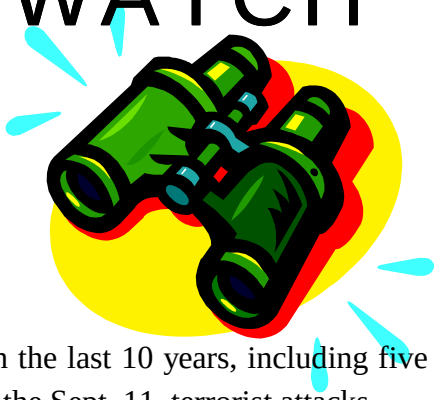
He noted single bargaining units make it more difficult for the administration to divide and conquer.

"Winning improvements for contract academic staff benefits all of us. Acadia's new arrangement will foster solidarity between members and give them a stronger voice at the table."

CIVIL *LIBERTIES* WATCH

Secret Trials

Eddie Greenspan says terrorists win when due process is subverted



There is a land where the government can arrest non-citizens, throw them in jail for an indefinite period of time, and then remove them from the country, all in virtual secrecy. This is a land where, for certain people, civil liberties and rights of due process don't exist. No, this is not China or Cuba. This is Canada -- a country I believed understood the transcendent importance of safeguarding civil liberties. But against those whom Ottawa secretly determines are a threat to national security, the government can act, and is now acting in alarming ways. Has Canada gone mad? Shades of Guantánamo Bay -- where the U.S. has imprisoned hundreds of suspected terrorists without trial -- colour the government and the judiciary.

The Immigration and Refugee Protection Act allows the immigration minister and solicitor general to sign a "security certificate" against a foreign visitor or an individual with permanent resident status, declaring that person "inadmissible" to Canada. The certificate, based on information provided by the Canadian Security Intelligence Service, has been used 27 times in the last 10 years, including five times since the Sept. 11 terrorist attacks.

The security concerns listed in the act are general and vague, and include "engaging in terrorism, or acts of violence that would or might endanger the lives or safety of persons in Canada," or simply being a "danger to the security of Canada." Under the certificate, a foreign visitor is immediately subject to arrest and can be held indefinitely without bail. For a person with permanent resident status, a Federal Court judge must start a review within 48 hours. If the judge finds the detention warranted, the permanent resident can be held without review for six months. Incredibly, neither the accused nor his lawyer is entitled to be present when the judge determines if further detention is warranted.

In both cases, by the seventh day of custody, a Federal Court judge must start to review the government's evidence. Again, neither the accused nor his lawyer is entitled to be present. The evidence can be hearsay, double hearsay, triple hearsay. It's the judge and government lawyers sitting together

making fundamental decisions about someone's liberty, without them being there to listen, object, question, protest or even to agree.

A summary of the evidence must eventually be presented to the accused, but even then the government can withhold any or all evidence if a judge rules that providing the information risks national security. In a subsequent hearing, the accused is given an opportunity to be heard, but this hearing is inherently unfair because the accused can only respond to the summary of the allegations. At this hearing, the judge does not determine whether the accused is actually a security threat or whether the secret evidence is reliable. The judge's only role is to assess whether the issuance of the certificate was "reasonable." Only three times has a certificate been overturned on review. In one case, a certificate against Mahmoud Jaballah, an Egyptian refugee claimant, was overturned in 2000. However, Jaballah was arrested the following summer under a second security certificate, and the father of six has been held in solitary confinement in Toronto's Metro West Detention Centre ever since.

The accused cannot appeal and can be quickly deported, even to a country where he may be tortured. Worse, the accused's lawyer is kept in the dark about the evidence. Bruce Engel is a thoughtful Ottawa lawyer doing his best to represent Mohamed Harkat, a 35-year-old Algerian refugee who has been held in protective custody since his arrest in the capital in December 2002 on suspicion of being an al-Qaeda operative. He says the summary of the evidence against his client is pitifully vague. What, he wonders, if the government has arrested the wrong person? How can the wrongfully accused defend themselves if they have no idea what the evidence is?

It's astounding that we are living under a government that, in defence of freedom and liberty, can keep someone not charged with any crime in solitary confinement for years based on secret information. It's terrible to contemplate that people can lose their livelihood based on information they cannot question. It's unthinkable that such people have absolutely no right of appeal or review, a glaring violation of a basic tenet of the rule of law: the right to appeal the decisions of a lower court. We are living in a time when the defeat of terrorism is on everyone's mind. But that doesn't mean we are supposed to simply trust the government to act wisely on correct information. The rule of law is the bedrock of our nation, not blind faith in the unchecked judgment of government officials. Any country that lives by a rule of "trust us, there is no need for due process," is totalitarian. We should be ashamed that there is a process in security cases that can be compared to the ignominious Star Chamber, a medieval English court that was dismantled by Parliament in 1641, but whose name survives to describe arbitrary, secretive proceedings.

The challenge is to figure out a way to deal with the threat of terrorism without losing the freedoms that make Canada the great nation it is. Everyone must be able to respond to their accusers, whether in the realm of a criminal trial or a security hearing. We must demand that persons threatened with loss of liberty, livelihood and possibly life, be provided with someone in this process who can protect them from false and unsupported allegations. Let the lawyer for the accused participate in the meetings with judge and government. Let a lawyer have some opportunity to effectively question the accusations. I shudder at the thought of those who have suffered wrongful convictions. It's terrifying that in ordinary criminal cases, following a trial by judge and jury, after a full opportunity to cross-examine one's accusers and question all the government's evidence, mistakes are still made.

How many mistakes could the government be making in security cases? Agents working for CSIS respond to tips. False tips in criminal cases can be uncovered through independent investigation and cross-examination. But with security issues shrouded in secrecy, there is virtually no way of knowing whether the tipster has run amok in the desperate fight against terrorism. It's not beyond the realm of possibility that a security certificate is issued based on information from corrupt government agents.

History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. When our nation allows fundamental freedoms to be sacrificed, we invariably come to regret it. Earl Warren, former chief justice of the U.S. Supreme Court, wrote over 35 years ago: "It would indeed be ironic if, in the name of national defence, we would sanction the subversion of one of those liberties which make the defence of our nation worthwhile."

In the global struggle against terrorism, Canadians are in possession of the ultimate weapon. It's the weapon of an unassailable idea -- individual rights, liberty and the dignity of the individual. It would be a tragic paradox if we should surrender any part of this heritage, for we should then have done to ourselves from within what we fear most from without. We must remain forever vigilant about any encroachment on personal freedom and individual liberty, of citizens and non-citizens alike.

Terrorism is an acute danger and if al-Qaeda is operating inside Canada, it's a genuine danger -- a genuine fifth column. In fact, the U.S. continues to gather intelligence indicating that Canada may be a haven for certain terrorist cells. We should not forget people like Ahmed Ressam, who was arrested crossing the U.S. border from Canada in December 1999 with explosive material that he admitted was intended for the destruction of the Los Angeles airport. But, Ressam's conviction came without jeopardizing the rule of law. I wholeheartedly support the "lock-them-up and throw-away-the-key" reaction. But I

say, first provide them with the kind of justice that makes Canada great. As Benjamin Franklin said: "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." We defeat our own ends if we adopt the techniques of totalitarianism. If we really believe in democracy, we must have faith enough to fight for its preservation with the tools of freedom.

Editor's note: In a recent cabinet order, the government has transferred the power to sign security certificates from the Immigration Minister and Solicitor General to the new Minister of Public Safety and National Preparedness.

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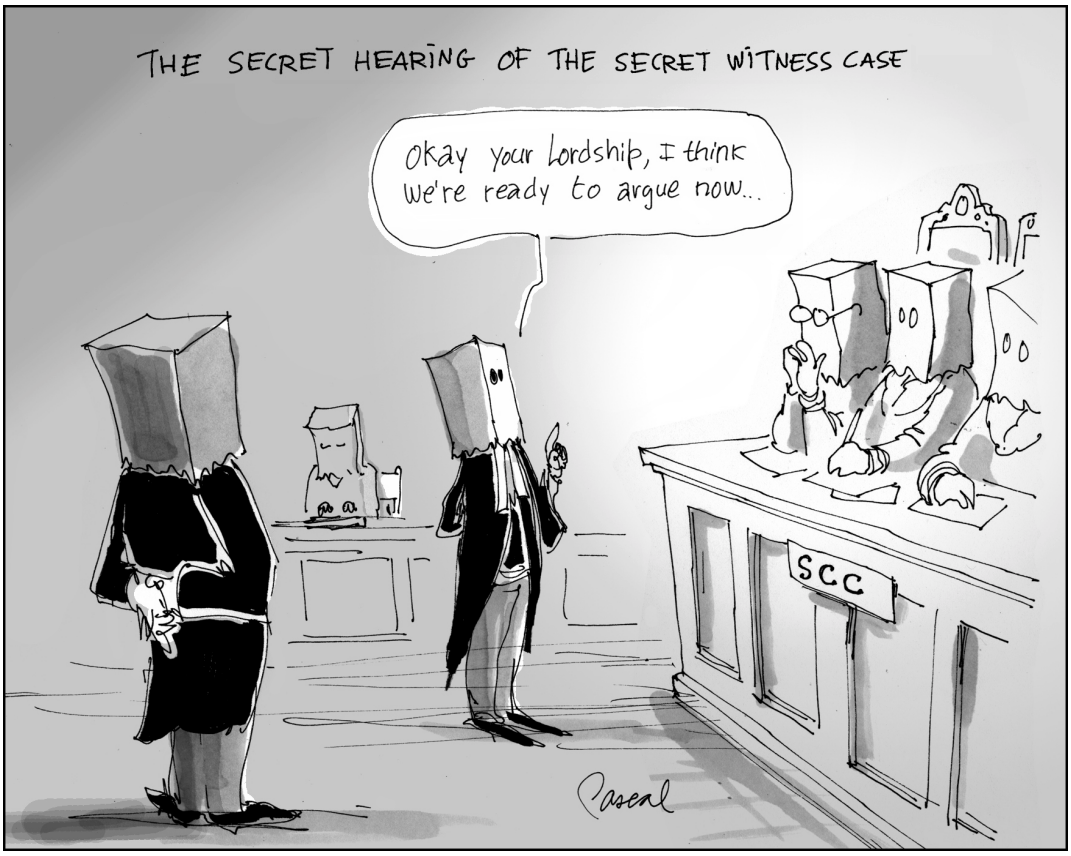

The cartoon is reproduced with the permission of the illustrator, Pascal Élie.
It appeared in the Dec. 15, 2003 issue of the *Law Times* (page 6).

A Public Inquiry for Maher Arar

What Canadians need to know

Following months of pressure from organizations like CAUT and individual Canadians across the country, the federal government finally decided in January to set up an independent committee of inquiry in the Maher Arar case. This was an important victory for Canadians who wanted to be reassured by their government that Canada was not a country content to accept second class treatment for certain of its citizens, or to trade its citizens' personal security for closer ties with the United States.

The critical issue at the moment, however, is what the new inquiry's Terms of Reference will be.

When Public Safety Minister Anne McLellan announced the inquiry on January 28, she said only that Mr. Justice O'Connor, the appointed chair, would be asked to look into why Mr. Arar was sent to Syria and to make recommendations about the creation of an independent review mechanism for the national security activities of the RCMP. The details of the inquiry's mandate, she said, would be worked out between her Department and Mr. Justice O'Connor over the next few days.

Clearly, however, Canadians need to know not just what happened to Mr. Arar, but how cases similar to his can be prevented in the future. For example:

1. Are the kind of information sharing practices Canada has entered into formally or informally with the United States since September 11th, 2001 appropriate, or do they endanger Canadians' personal security and constitutional rights?

Vitally, what standards of proof and reliability are adhered to by RCMP, CSIS, Customs, Immigration and other Canadian officials before they put people on an international "watchlist" or hand over information which could affect people's personal security? Are there any controls in existing information sharing agreements about the standards of proof and due process to which the receiving state must adhere?

What kinds of databases does the United States already have routine access to? (Canada Customs and Revenue's airline passenger database, which tracks the travel patterns of Canadians over a 6 year period? Canadian tax or passport databases? Databases linked to the new Permanent Resident Card?)

What controls are there on information sharing in the "integrated" Canadian-American units or initiatives that have been

set up since September 11, 2001 in policing, customs, and security intelligence? (For example, what controls will there be on a new Canada Border Service Agency program to assign "risk scores" to travellers crossing borders using computer programs that would interface with an existing American program?)

2. Has a culture developed since September 11, 2001 in which Canadian officials in the various departments and agencies charged with national security have become reckless about what happens to persons within the ambit of their power, or even complicit in the rendering of persons to countries where they face torture?

3. Should the Mounties be doing national security work at all? (Recall the McDonald Commission of the 1980s which took national security functions away from the RCMP and set up the Canadian Security Intelligence Service).

4. Does a proper structure of communication, control, and accountability exist between the various departments and agencies carrying out Canada's security agenda, Parliament, and the Prime Minister's Office?

Given that the United States has unequivocally stated that it will *continue* to send Canadians to third countries if it believes it is in its national interests to do so, it would be irresponsible of the Martin government not to probe these very important questions.

Editor's Note: Minister McLellan announced the Terms of Reference for the Arar inquiry on February 5, 2002. The Terms require Mr. Justice O'Connor to "investigate and report on the actions of Canadian officials in relation to Maher Arar, including ...

- the detention of Mr. Arar in the United States;
- the deportation of Mr. Arar to Syria via Jordan;
- the imprisonment and treatment of Mr. Arar in Syria;
- the return of Mr. Arar to Canada; and
- any other circumstance directly related to Mr. Arar that Justice O'Connor considers relevant to fulfilling his mandate.

Under the policy review of possible mechanisms for RCMP national security activities, Mr. Justice O'Connor is to examine domestic and international review models, to make recommendations on the creation of a new mechanism, and to consider how the recommended mechanism would interact with other Canadian review bodies.

The full Terms of Reference can be found at: http://www.psepc-sppcc.gc.ca/ publications/news/20040205_e.asp

CAUT has written several letters to Prime Minister Paul Martin, former Prime Minister Jean Chretien and Foreign Affairs Minister Bill Graham about the issues raised by the Arar case. These can be found on the CAUT website at: http://www.caut.ca