Law and Business Review of the Americas

Volume 16 | Number 1 Article 11

2010

Canada Update - Highlights of Major Legal News and Significant Court Cases from May 2009 through July 2009

Andrew C. Brown

CANADA UPDATE–HIGHLIGHTS OF MAJOR LEGAL NEWS AND SIGNIFICANT COURT CASES FROM MAY 2009 THROUGH JULY 2009

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I. SIGNIFICANT COURT DECISIONS

A. CANADIAN COURT CONVICTS RWANDAN OF GENOCIDE UNDER NEW LAW

ON May 22, 2009 a Montreal court convicted Desire Munyaneza on charges related to the 1994 Rwandan genocide. [1] Munyaneza, a 42 year-old Hutu, had entered Canada nearly a decade ago claiming refugee status.[2] Munyaneza's claim was rejected and he was arrested in Toronto in 2005.[3]

The court's decision garnered attention both in Canada and internationally not only because of the high-profile nature of the Rwandan genocide, but also because of the unique law that was used to bring Munyaneza to trial.[4] Enacted by Parliament in 2000, the Crimes Against Humanity and War Crimes Act (hereinafter "CAHWCA") made Canada the first nation to incorporate the obligations of the Rome Statute, which established the International Criminal Court (hereinafter "ICC").[5] The CAHWCA "provides for the prosecution of any individual present in Canada for any offence stated in the Act regardless of where the offence

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* Andrew C. Brown is a candidate for Juris Doctor at SMU Dedman School of Law in Dallas, Texas. He holds a Bachelor of Arts degree in Political Science from Baylor University.

1. Jacques Lemieux, *Canadian Court Convicts Rwandan of Genocide*, AGENCE FRANCE-PRESSE, May 23, 2009, *available at* http://newsinfo.inquirer.net/breakingnews/world/view/20090523-206702/Canadian-court-convicts-Rwandan-of-genocide
2. *Id.*
3. *Id.*
4. *See, e.g.*, Ian Austen, *Canadian Judge Convicts Rwandan in Genocide*, N.Y. TIMES, May 22, 2009, *available at* http://www.nytimes.com/2009/05/23/world/americas/23canada.html?_r=4&partner=rss&emc=rss; *Ruling Expected in Landmark Rwandan War Crimes Case*, CBC News, May 22, 2009, *available at* http://www.cbc.ca/canada/montreal/story/2009/05/21/montreal-rwanda-munyaneza-trial-war-crimes.html.
5. *Canada's Crimes Against Humanity and War Crimes Program*, Department of Justice Canada, http://www.justice.gc.ca/eng/pi/wc-cg/rlf-rcl.html; *see also, Canada's Crimes Against Humanity and War Crimes Act*, Foreign Affairs and International Trade Canada, http://www.international.gc.ca/court-cour/war-crimes-guerres.aspx?lang=eng.

occurred."[6] Offences stated in the Act include "genocide, crimes against humanity, war crimes, and breach of responsibility by military commanders and civilian superiors."[7] Thus, under the CAHWCA, individuals residing in Canada may be brought to trial in a Canadian court for acts that they committed in another country. Mr. Munyaneza was the first to be tried in Canada under the legislation.[8]

The more than 200-page opinion recounts the testimonies of the sixty-six witnesses called during the trial, including several eyewitnesses to the actions of the accused.[9] Many of these eyewitness testimonies provide graphic details about rapes and murders committed by the accused himself as well as by those under his authority.[10] In addition to the witnesses against Munyaneza, the defense called several witnesses who attempted to paint him as a dutiful son and businessman who had been falsely accused.[11] But, the judge noted that he lent little credibility to the testimonies of these witnesses who often contradicted themselves and, in some instances, seemed to be on a "mission to save the accused."[12]

The trial lasted nearly two-years and involved hearings in Canada, Africa, and Europe.[13] In the end, the judge (presiding without a jury) found Munyaneza guilty of seven counts related to crimes against humanity, war crimes, and genocide. [14] These included murder, the intentional infliction of serious bodily or mental harm, and acts of sexual violence. [15] Munyaneza will be sentenced on September 9, 2009, and faces a maximum of life imprisonment.[16]

B. Constitutionality of Compelling Medical Treatment for Minors

Should the government be permitted to compel medical treatment for a minor despite her refusal to accept the treatment on religious grounds? The Supreme Court of Canada wrestled with this problem in June 2009 and determined that, in some cases, it is proper for the government to exercise this authority.[17] Its decision, however, also recognizes the evolving nature of a child's transition into adulthood and proposes a sliding scale of scrutiny in which government's authority to compel medical

6. *See Canada's Crimes Against Humanity and War Crimes Program*, *supra* note 5.
7. *Id.*
8. *See* Austen, *supra* note 4.
9. R.C. Munyaneza, 2009 QCCS 2201 (Can.).
10. 2009 QCCS 2201, 56–90 (Can.).
11. 2009 QCCS 2201, 91–183 (Can.).
12. *See, e.g.*, 2009 QCCS 2201, 190 (Can.).
13. *See* Austen, *supra* note 4.
14. 2009 QCCS 2201, 10–27 (Can.).
15. *Id.*
16. *See* Austen, *supra* note 4.
17. *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] SCC 30 (Can.); *see also*, Daniel Del Gobbo, *A.C. v. Manitoba: Bioethics and the "Best Interests" of Mature Minors*, The Court, June 29, 2009, *available at* http://www.thecourt.ca/2009/06/29/ac-v-manitoba-defining-the-best-interests-of-mature-minors.

treatment for minors reduces as the child gains greater autonomy.[18]

The minor at issue, identified as "C" in the decision, is a Jehovah's Witness who was 14 years old at the time of the procedure.[19] C suffers from Crohn's disease, which had been causing lower gastrointestinal bleeding. [20] In order to control the bleeding, C's doctor recommended that C undergo a blood transfusion.[21] Because of her religious beliefs, however, C refused to undergo the transfusion.[22] The doctor, believing the condition was a serious threat to C's health and even her life, contacted the Director of Child and Family Services in Manitoba who took the child into protective custody.[23] Citing Section 25(8) of Manitoba's Child and Family Services Act, which authorizes the government to provide medical treatment for children under sixteen years of age when it deems to be in the child's best interests, the Director of Child and Family Services ordered the blood transfusion.[24] Following the procedure, C appealed the decision and challenged the constitutionality of Section 25(8) of the Child and Family Services Act on the grounds that it violated her freedom of religion as guaranteed by Canada's Charter of Rights and Freedoms.[25]

In holding the challenged section constitutional, the Court employed a sort of balancing test between the "individual's fundamental right to autonomous decision making" and the law's duty to protect children from harm.[26] Under this balancing test, the minor under sixteen is afforded "the right to demonstrate mature medical decisional capacity." [27] Writing for the Court, Justice Abella noted that "a careful and comprehensive evaluation of the maturity of the adolescent" would prevent mature adolescents from unfairly being deprived of their "medical decision making autonomy."[28] Thus, "the best interests standard is necessarily individualistic."[29]

In applying the best interests test, the minor's religious views are but one factor that the court will consider when determining whether she has the requisite maturity to make decisions regarding her medical care.[30] According to the majority, since the minor is entitled to present evidence (including evidence of religious beliefs) that they have sufficient maturity to make decisions about their medical care, Section 25(8) of the Child and Family Services Act does not violate the minor's right to exercise her

18. [2009] SCC 30, at 6.
19. [2009] SCC 30, at 4.
20. *Id.*
21. [2009] SCC 30, 4–5.
22. *Id.*
23. [2009] SCC 30, at 5.
24. *Id.*
25. *Id.*
26. [2009] SCC 30, at 6.
27. *Id.*
28. *Id.*
29. [2009] SCC 30, at 60.
30. [2009] SCC 30, at 7.

religious convictions.[31]

The dissent objected on the grounds that "forced medical procedures must be one of the most egregious violations of a person's physical and psychological integrity," and any such procedures should be viewed with a high level of suspicion. [32] While the dissent recognized the state's legitimate interest in protecting minors who are deemed to not have the capacity to make decisions regarding their own health and well-being, C had demonstrated her capacity in interviews with three psychiatrists at the hospital where the transfusion was to take place.[33] The government and courts cannot override this decision simply because they do not agree with the decision.[34] Because C had already demonstrated her capacity, yet was still compelled to get the blood transfusion by the court under Section 25(8), the dissent determined that the section should be held unconstitutional because it does not allow a person under 16 to establish that she or he understands the medical condition and the consequences of refusing treatment. The dissent found that, in such circumstances, the young person should have the right to refuse treatment despite what the applications judge finds to be in their best interests."[35]

C. Photo Requirement on Driver's Licenses Does Not Violate Freedom of Religion

In July 2009, the Canadian Supreme Court again dealt with the issue of religious freedom in *Alberta v. Hutterian Brethren of Wilson Colony*.[36] The Province of Alberta, in 2003, adopted a regulation mandating that all drivers' licenses include a photo of the license holder.[37] Prior to 2003, it was possible for individuals who objected to having their photograph taken on religious grounds to obtain an alternative license that does not include a photo.[38] The 2003 regulation, however, did away with that exemption.

Members of the Hutterian Brethren, a Christian religious sect closely related to the Amish and Mennonites, objected to this new regulation on religious freedom grounds.[39] According to Hutterian doctrine, the Second Commandment forbids members of the sect from having their photograph taken.[40] Although the Province attempted to work out an alternate plan to "lessen the impact of the universal photo requirement," it failed because it still required a photograph to be included in the Prov-

31. *Id.*
32. [2009] SCC 30, at 11.
33. *Id.*
34. *Id.*
35. [2009] SCC 30, at 12.
36. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] SCC 37 (Can.).
37. [2009] SCC 37, at 3–4.
38. [2009] SCC 37, at 3.
39. Hutterites.org, Religion, http://www.hutterites.org/religion.htm; [2009] SCC 37, at 4.
40. [2009] SCC 37, at 4.

ince's facial recognition databank.[41] Following the breakdown of negotiations, the Hutterian Brethren filed suit alleging that the universal photo requirement violated Sec. 2(a) of the Canadian Charter of Rights and Freedoms, which protects "freedom of conscience and religion" as fundamental rights.[42] The Province responded that the photo requirement for the databank was necessary to reduce the incidents of identity theft associated with drivers' licenses.[43]

The lower court held that the regulation did indeed infringe on the right of religious freedom and was not justified under the Charter of Rights and Freedoms.[44] Alberta appealed the decision to the Canadian Supreme Court, which allowed its appeal.[45] Writing for the majority, Justice McLachlin wrote that limiting incidents of identity theft "is clearly a goal of pressing and substantial importance, capable of justifying limits on rights."[46] In determining that the regulation did not run afoul of the Charter of Rights and Freedoms, the Court applied a proportionality test.[47] Under the test, the court first noted that the photo requirement is rationally connected to the legitimate objective of reducing incidents of identity theft.[48] The Court cited evidence offered by Alberta to show that "[w]ithout the photographs of all licence [sic] holders in the photo identification bank, the assurance of a one-to-one correspondence between individuals and issued licences [sic] is lost, and the possibility of driver's licence-based [sic] fraud would be increased."[49] Second, the Court stated that the photo requirement "minimally impairs" the right of religious freedom, but the alternative (allowing an exemption where certain individuals are not required to have their photo in the databank) "would significantly compromise the government's objective." [50] Additionally, the Court could find no less intrusive means than the photo requirement by which the goal of limiting identity theft could be accomplished. In essence, "the negative impact on the freedom of religion of Colony members who wish to obtain licenses does not outweigh the benefits associated with the universal photo requirement." [51]

Justice Abella, who wrote for the majority in *A.C. v. Manitoba*, dissented in this case and defended the guarantee of religious freedom against the challenged regulation. [52] In her dissent, Justice Abella cites the small population of Hutterites seeking to obtain drivers' licenses (about 250 individuals) and notes that compelling them to have their pho-

41. *Id.*
42. *Id.*; Canadian Charter of Rights and Freedoms, Constitution Act Part I, 1982, Ch. 2 (U.K.).
43. [2009] SCC 37, at 4.
44. *Id.*
45. *Id.*
46. [2009] SCC 37, at 5.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. [2009] SCC 37, at 17.
52. [2009] SCC 37, at 7.

tographs taken "is only marginally useful to the prevention of identity theft." [53] Additionally, she writes that an exemption to the photo requirement had existed for nearly thirty years and there is no evidence that the "integrity of the licensing system was harmed in any way" during this time.[54] Thus, because of the minimal impact that allowing an exemption for Hutterites would have on the government's objective and the dramatic impact that the regulation has on the constitutional rights of the group, Justice Abella argued that the regulation should have been overturned.[55] Another dissenting opinion, written by Justice LeBel, pointed out that in rural Alberta having a drivers' license is critically important.[56] Under the proportionality test, then, the negative impact to the Hutterites vastly outweighs the government's interest.[57]

II. SUMMARY OF LEGAL NEWS

A. Disclosure of Jurors' Private Information Raises Questions about the Use of Juries in Insurance Cases

An ongoing controversy in British Columbia has raised serious questions about the wisdom of using juries in insurance cases. Recently it was revealed that the Insurance Corporation of British Columbia (ICBC), a provincial Crown corporation that provides auto insurance and handles vehicle licensing and registration, had disclosed personal information about jurors to a lawyer that the corporation had hired to handle its motor vehicle claims cases.[58] The attorney, Kathleen Birney, admitted that once the jury had been selected in the case, her office sent a list of the juror's names to ICBC and requested their claims history.[59] Of the jurors on the list, one had an open claim and another had a previous claim.[60]

Currently, the ICBC and the Office of the Information and Privacy Commissioner for British Columbia are each conducting internal investigations into the information disclosure.[61] While the ICBC has apologized and has stated that it is taking steps to correct the problem, critics are calling for the province to do away with juries in accident claims cases.[62] Under the current system, the ICBC "insists on having jury trials for its claims because the corporation believes a jury award will be less than an

53. *Id.*
54. *Id.*
55. [2009] SCC 37, at 8.
56. [2009] SCC 37, at 10.
57. *Id.*
58. Louise Dickson, *Scrap Juries in ICBC Cases, Critics Say*, Times Colonist, May 24, 2009, *available at* http://www.timescolonist.com/news/Scrap+juries+ICBC+cases+critics/1625192/story.html; Insurance Company of British Columbia, About ICBC, http://www.icbc.com/about%20ICBC.
59. *Two More ICBC Jury Breaches are Found*, Canwest News Service, May 29, 2009, *available at* http://advicescene.com/news/2009/05/29/two-more-icbc-jury-breaches-are-found.php.
60. *Id.*
61. *Id.*
62. *See* Dickson, *supra* note 58.

award granted by a judge."[63] According to B.C. Supreme Court Justice Malcolm Macaulay, however, the disclosures cast serious doubt about the fairness of jury trials where ICBC is a party. [64] According to Justice Macaulay and other critics of the current system, there is a significant risk that the system, if not changed, will result in further miscarriages of justice.[65] Since ICBC has a virtual monopoly on motor vehicle insurance and claims in British Columbia, jurors would be more likely to avoid giving high awards out of fear that it would result in an increase to their premiums.[66] One reform that has been suggested to deal with this problem would be to allow the plaintiffs, rather than defendants, to decide whether or not they would like a jury trial.[67]

B. Ontario Jurors Given Secret Background Checks

British Columbia is not the only Canadian province dealing with jury scandals. In July 2009, it was revealed that Ontario police "conducted secret background checks on prospective jurors at the behest of prosecutors."[68] According to reports, Ontario prosecutors used these background checks to compile lists of prospective jurors that included information about juror's health, attitudes towards police, and even minor legal infractions. [69]

Ontario's privacy commissioner, Ann Cavoukian, has ordered an investigation and defense attorneys throughout the province have already begun making inquiries to find out if the background checks were used in particular cases.[70] The investigation has already resulted in at least three mistrials being declared, and defense attorneys predict that more appeals will be filed as the investigation reveals more about the extent of the practice.[71]

C. Defense Attorneys in Ontario Boycott Legal Aid Duties Due to Underfunding

On June 1, 2009, Ontario attorneys launched a boycott of the province's legal aid system because of the government's refusal to raise the tariff that provides compensation for attorneys who take legal aid cases.[72]

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63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. Peter Small, *Ontario Reveals Juries Given Secret Background Checks*, The Star, July 21, 2009, *available at* www.*thestar.com/news/ontario/article/669436.*
69. *Id.*
70. *Id.*
71. *Id.*; *See also*, *Mistrial Declared in Virgoe Case*, Innisfil Journal, July 20, 2009, *available at* http://www.innisfiljournal.com/innisfiljournal/article/141239 (Chronicling a wrongful death case in which a mistrial was declared related to the background checks).
72. Tracey Tyler, *Lawyers Throw Weight Behind Legal Aid Boycott*, The Star, June 14, 2009, *available at* http://www.thestar.com/news/ontario/article/650650.

Under the current system, Ontario attorneys are compensated between $77 and $98 per hour depending on their level of experience.[73] Marie Henein, vice-president of The Advocates' Society told the Toronto Star that the low compensation level results in only the least-experienced attorneys being willing to take legal aid cases.[74] Thus, low-income individuals often receive inferior representation. [75] Supporters of the boycott also argue that the long delays plaguing the criminal justice system as well as the high number of wrongful and overturned convictions are all symptoms of poor legal aid funding.[76]

In addition to The Advocates' Society, other groups that have signed on to the boycott include the Association in Defence of the Wrongfully Convicted, the Criminal Lawyers Association, a group of around fifty area law professors, and "virtually every defence [sic] lawyer with five years of experience in Toronto, Kingston, and Thunder Bay [. . .]."[77] As the boycott gathers strength, it has become commonplace for lawyers to turn down legal aid cases, including those that involve such serious offences as homicide and gang-related offenses.[78] Supporters of the boycott have stated that they do not see it ending until the government agrees to provide greater compensation to attorneys in legal aid cases. [79]

D. Canadian Privacy Officials Take on Facebook

In July 2009, the Canadian Privacy Commissioner ordered social networking giant, Facebook, to take greater action in protecting the private information of its users.[80] The order came after an investigation into whether the California-based company's privacy policies are in line with Canada's stringent privacy laws.[81] While Privacy Commissioner Jennifer Stoddart noted that "privacy issues are top of mind for Facebook," the investigation found several gaps that the company must address. [82] For example, the Privacy Commission found a need for the company to provide more complete information about its privacy practices, especially as it relates to how users can go about deleting their information from

73. *Id.*
74. *Id.*
75. *Id.*
76. Kirk Makin, *Law Professors Support Legal-Aid Boycott*, Globe and Mail, June 28, 2009, *available at* http://advicescene.com/news/2009/06/28/law-professors-support-legal-aid-boycott.php.
77. Kirk Makin, *Legal Aid Boycott Gathering Strength*, Globe and Mail, July 3, 2009, *available at* http://advicescene.com/news/2009/07/03/legal-aid-boycott-gathering-strength.php.
78. *Id.*
79. *Id.*
80. Gillian Shaw, *Canada's Privacy Watchdog Tells Facebook to Shape Up*, Vancouver Sun, July 17, 2009, *available at* http://www.vancouversun.com/news/Canada+privacy+watchdog+tells+Facebook+shape/1799304/story.html; Press Release, Office of the Privacy Commissioner of Canada, Facebook Needs to Improve Privacy Practices, Investigation Finds (July 16, 2009), *available at* http://www.priv.gc.ca/media/nr-c/2009/nr-c_090716_e.cfm.
81. *Id.*
82. *See* Press Release, *supra* note 80.

Facebook's servers.[83] Currently, when users deactivate their accounts, Facebook keeps their personal information on their servers indefinitely; a practice that the Privacy Commission says violates the Personal Information Protection and Electronic Documents Act.[84] Another area of "concern is the sharing of user's personal information with third-parties" that provide popular applications downloaded by users. [85] While Facebook's policies forbid third-parties from keeping user information that is not needed for the application to function, this policy is often difficult to enforce.[86]

Facebook has thirty days to address the breaches identified.[87] If it fails to comply with the order, the Privacy Commission has the option of obtaining a court order to compel compliance.[88] Facebook's Chief Privacy Officer, Chris Kelly, stated that the company is continually improving its privacy controls and believes them to be in compliance with Canadian law, which the company would be willing to establish if required to do so by the courts.[89] Given that nearly twelve million Canadians are Facebook users, Canadian legal experts believe that it is unlikely that the company will refuse to comply and risk a prolonged battle with the Canadian government.[90] The order, which is the first of its kind, has been welcomed by other nations, including the United States.[91]

E. British Columbia Announces Reforms to Civil and Family Courts

The provincial government of British Columbia recently announced significant reforms to its civil and family courts. [92] Made public in July 2009, these reforms had been in the works since 2004.[93] Attorney General Mike de Jong said that the provincial government decided to undertake the reforms because "for many people . . . access to justice has become unaffordable" in both time and cost.[94]

Among the reforms, which are primarily aimed at reducing court costs in order to make justice more accessible, are provisions that simplify pro-

83. *Id.*
84. *See* Shaw, *supra* note 80.
85. *Id.*
86. Karim Bardeesy, *Ottawa Takes on Social Media Giant for Violating Canada's Law*, Globe and Mail, July 17, 2009, *available at* http://advicescene.com/news/2009/07/17/ottawa-takes-on-social-media-giant-for-violating-canada-s-law.php.
87. *See* Shaw, *supra* note 80.
88. *Id.*
89. *Id.*
90. *Id.*
91. *See* Bardeesy, *supra* note 86.
92. *B.C. Civil, Family Courts Reformed*, CBC News, July 7, 2009, *available at* http://www.cbc.ca/canada/british-columbia/story/2009/07/07/bc-court-reforms.html.
93. *Id.*
94. *Id.*

cedures and encourage mediation.[95] One of the more interesting reforms provides that the government will "provide up to three days of trial time before litigants are required to pay court fees."[96] Additionally, litigants who agree to engage in mediation before proceeding to trial can have their filing and response fees waived.[97] Besides reforms aimed directly at reducing or eliminating costs, the new regulations also seek to improve access by reforming many procedural aspects of trial.[98] For example, the regulations will, in some cases, limit the amount of questioning of parties and exchange of non-essential documents during discovery.[99] William Everett, who chaired the Justice Review Task Force charged with promulgating the reforms, stated that he believes that "the new rules will pave the way to a better civil justice system in [British Columbia]."[100] However, some in the opposition party believe that more could be done. Leonard Krog, a member of the British Columbia Legislative Assembly, argued that if the government really wanted to improve access to justice, then it should have "restore[d] the dramatic cuts they made to legal aid funding."[101]

95. Press Release, British Columbia Ministry of Attorney General, *New Civil Rules Promote Access to Justice*, July 7, 2009, *available at* http://www2.news.gov.bc.ca/news_releases_2009-2013/2009AG0004-000082.htm.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *See, B.C. Civil, Family Courts Reformed*, *supra* note 92.

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