

# TRAVELLING BRIEF

## Report from Toronto

Some years ago I spent a few months living in Tokyo. To exercise my mind when not conducting English conversation classes (40 minute bursts of single syllable conversation in the present tense), I took an interest in Japanese Law. After reading, watching, and interviewing I enrolled in a course in Japanese mythology – it seemed a necessary step in any attempt to understand the basis of the Japanese legal system.

Comparative studies in law, to be useful rather than merely interesting, need to be extraordinarily detailed and comprehensive. So many allowances must be made for special, historical and cultural differences before relevant lessons can be learnt; so many precautions must be taken against oversimplistic comparisons between two countries' institutions, procedures, and principles.

Thus it is especially dangerous for an amateur observer – even a lawyer – to suggest that there is anything more than curiosity in looking at legal developments in apparently similar jurisdictions. The risks in taking the exercise too seriously are heightened when all that is being relied on are newspaper accounts.

With those reservations behind me, I offer a selection of legal new items I have gleaned from scanning the pages of Canada's national newspaper, *The Globe and Mail*. The items may be merely interesting, but I have selected them for the extent to which they relate to similar issues in Australia.

### Tobacco

An economist, in a report commissioned by a tobacco company, has concluded that there is a silver lining to the somewhat dark cloud of tobacco-related deaths: health costs are reduced as a result of 'the premature deaths of certain smokers . . . a person who dies of lung cancer at age 70 will not be hospitalized later with another disease' (1.9.94).

### DNA testing

The Canadian Department of Justice is considering the possibility of giving police the power to obtain samples of

body fluids and tissues for DNA testing when investigating crime. It is also considering establishing a database of DNA profiles of convicted people. At the moment DNA evidence is obtained by stealth and fortune, e.g. retrieving someone's used Kleenex tissue. In 1992 the Canadian privacy Commissioner sanctioned the use of DNA to establish a suspect's identity or to exonerate a person, but recommended against storing and cataloguing samples (1.9.94).

### Sex discrimination

In New York city, USA women are testing the strength of a State court ruling by travelling topless on the subway. The ruling was to the effect that arresting a topless woman for being topless is discriminatory. The transit police have said that they will only arrest a topless woman if some other offence occurs, such as smoking a cigarette (1.9.94).

### Interpreters

The Canadian Charter of Rights and Freedoms gives a party or witness a 'right to the assistance of an interpreter'. In the criminal case of Quoc Dung Tran, the Supreme Court has ruled that this right guarantees a translation of proceedings which is 'continuous, precise, impartial, competent and immediate' (2.9.94).

### Race discrimination

The federal Department of Canadian Heritage dismissed an aboriginal social development officer for incompetence in 1986. She claimed discrimination on the basis of race, relying in part on satisfactory assessments of her work. She succeeded in her claim to the Human Rights Tribunal, and was reinstated. An order that she be reinstated in another province – because of the bitterness in her previous workplace – was overturned on appeal. She reached a settlement on an amount of damages (2.9.94).

### Disabled refugee refused

A Somalian man, who is otherwise eligible for permanent resident status in

Canada, has been refused because he has 'a condition which could cause excessive demand on health or social services, and which is not likely to respond to treatment'. He works now as a government clerk, and is confined to a wheelchair. His wife and daughter have been guaranteed permanent residency.

The Canadian Department of Citizenship and Immigration will soon standardise, and make more strict, its 'health' criteria. A handbook will list prospective health and social welfare costs of illnesses and conditions. 'If the projected cost over five years of admitting the applicant is greater than what Statistics Canada calculates the average Canadian incurs in an equal period, the person will not be admitted to Canada'. The medical director of the Department says, 'if the model works . . . I think other countries will look at it in a very positive light' (2.9.94).

### Gun control and sentencing

At its annual convention the Canadian Police Association grappled with the big issues of gun control and sentencing. Stopping short of calling for registration of firearms, the police are seeking substantial minimum gaol sentences for weapon-related offences, and a ban on the ownership of many types of weapons. The police want open-ended sentences for 'high risk offenders', and lifelong parole for perpetrators of child sexual assault. They have also called for the reintroduction of capital punishment (3.9.94).

### Immigration review

Canada's Immigration and Refugee Board has apparently had a controversial short history: ' . . . reports of members mocking lawyers and their clients . . .'; ' . . . deportation orders were stayed for immigrants with lengthy criminal records . . .'; ' . . . government was attacked for appointing members whose ties to the political party were stronger than their experience . . .'

In a new round of appointments, the members are mostly lawyers, academics and people working in

human rights and multiculturalism. Immigration expert James Hathaway has criticised the appointment process, though not the appointees, and an opposition parliamentarian has said that the new appointments pander to the 'immigration industry' (3.9.94).

### White justice for aboriginal people

The Innu community, first nation people in Newfoundland, 'violently kicked out' the provincial court in December 1993, saying that 'the court imposes an alien justice that's not compatible with their beliefs'. Now the chief provincial court judge proposes flying in with the support of federal police (the Mounties) to recommence court sittings. The Innu have said that they will protest, and the judge's return has been delayed because of fears of a confrontation.

It is the Innu's view that the judicial system has ignored their desire to reform wrongdoers within their community; it is the government's view if the Innu receive the 'benefits of being Canadians, they must also accept the responsibility', including being 'subject to the rule of law' (7.9.94).

### Civil liberties

Since 1990, Toronto-Dominion, a major Canadian bank, has screened all new employees for use of cannabis, cocaine and heroin. The Human Rights Tribunal ruled recently that the practice was acceptable. The Canadian Civil Liberties Association is now lobbying the Human Rights Commission to appeal, saying that serious privacy and disability (drug dependency) issues are raised (6.9.94).

### Elderly abuse

The Ontario Network for the Prevention of Elder Abuse has commenced a fund-raising program to establish a safe house for men and women aged over 65. Space for the shelter is being provided by a major hospital, and funding is being sought for a range of health professionals to staff it. In a recent national survey 4% of respondents reported mistreatment. No resources exist for elderly men, and shelters for battered women face an enormous demand (6.9.94).

### Parental authority

The Canadian Criminal Code allows teachers and parents to use reasonable force to correct a child. A tourist from the US has been charged with assault after being seen in a car park spanking his five-year-old child's bare bottom.

### Presumption of innocence in a third trial

Mr Wade has twice been convicted of murder on the same charge - the first conviction was quashed for a misdirection to the jury, and the Ontario Court of Appeal has upheld an appeal against the conviction that was reached in the second trial. The court has ordered a third trial on the basis that the option for a manslaughter verdict had not been given to the jury.

The court's ruling is being appealed to the Supreme Court because the court directed that the third trial is to be limited to the issue of whether the offence that was committed was murder or manslaughter. The court said that it would 'offend the interests of justice to . . . allow the appellant a further opportunity to secure an acquittal by advancing a defence which has already been rejected by a properly instructed jury'. The appellant's lawyer says that to prevent the (third) jury from considering an acquittal before any evidence has been called would usurp the jury's function as a trier of fact and violate the accused's right to presumption of innocence (7.9.94).

### Censorship

A Vancouver gay and lesbian bookstore and the British Columbia Civil Liberties Association are together challenging Canada's regular seizure of printed material that is imported by the bookstore. The suit relies on the guarantees of freedom of expression and of equality that are in the Canadian Charter of Rights. The Department of Justice concedes that the seizures infringe rights of expression, but says that the infringement is 'reasonable' and 'justified'. On a similar issue, an Ontario judge has held that a criminal provision that prohibits printed material promoting the use of marijuana infringes the guarantee of freedom of expression.

Meanwhile an Ontario court is hearing an application by the Crown for the seizure and destruction of material alleged to be 'child pornography'. The

paintings and drawings are the work of a professional artist, created by him as art. The depictions of children include views of genitalia. The Crown is relying on psychiatric evidence that the pictures would be attractive to paedophiles; expert evidence for the artist suggests that the Criminal Code is so broad that Michaelangelo's David would constitute pornography (7,8 and 12.10.94).

### Parole reviews

The newly appointed chairman of Canada's National Parole Board has said that Board members will have their performance reviewed annually. The review criteria will be the same as those to be used in Board appointments, testing for maturity, emotional stability and analytical ability. The chairman was previously Deputy Commissioner of Corrective Services. His predecessor resigned amid concern about the release of violent offenders who committed further violent offences on release (7.10.94).

### Environmental protection

The Federal Government has proclaimed the Canadian *Environmental Assessment Act*. The Act performs a cumbersome environmental assessment process, and has been claimed as 'possibly the best environmental law in the world'. It applies to any project with any Federal Government involvement, whether by way of funding, management, support in kind or other interest. The Act will require comprehensive studies of projects likely to cause negative environmental effects, ranging from park development to energy projects and mining (7.10.94).

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