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Lorne MacLean: ruling may create 'maintenance junkies'

B.C. Court of Appeal finds impact of spouse's adultery grounds to maintain support

By **Cristin Schmitz**
Ottawa

A woman who says her ex-husband's adultery left her so devastated that she can't work should not lose her spousal support, the British Columbia Court of Appeal has ruled.

Justices Mary Southin, John Hall and Mary Newbury upheld a 2003 chamber judge's ruling that maintained a 2000 court order that Gary Leskun pay his former wife Sherry monthly support of \$2,250. Leskun, 49, ended their 20-year marriage in 1998 after starting an affair with his present wife, with whom he now has a baby. He asked the courts to cancel or reduce his support obligation on grounds his ex-wife, 57, has not made enough effort to get a job.

Leskun's counsel, Lorne MacLean of Vancouver's MacLean Family Law Group, said his client will seek leave to appeal to the Supreme Court of Canada on

grounds the ruling seemed to put "fault" back into no-fault divorce.

"This portion of the decision that allows a dependent spouse to refuse to become self-sufficient because of the payor spouse's misconduct during the marriage is arguably at odds with settled Canadian legal principles and in particular, the *Divorce Act*," MacLean told *The Lawyers Weekly*.

"Rarely does spousal misconduct have a direct relationship to capacity for self-sufficiency, and this is presumably why the *Divorce Act* goes to such lengths to exclude spousal conduct from consideration," he added. "Allowing conduct to justify a refusal to work does not do justice to either the dependent spouse or the payor spouse, and worse still has the potential for creating 'maintenance junkies' trapping angry spouses in a cycle of dependence."

see ADULTERY p.5

New police power compels production of clients' files

By **Cristin Schmitz**
Ottawa

Police and regulators now enjoy a sweeping new *Criminal Code* power to compel lawyers to produce — under threat of imprisonment and \$250,000 in fines — confidential client documents and computer data that investigators believe may furnish evidence of any and all suspected crimes or federal regulatory offences.

Enacted without the input of the organized Bar and after years of lobbying by police forces across the country, the new measure lets police ask a justice of the peace for a "production order" to compel innocent third parties to produce documents or data at the third parties' own expense.

Production orders are likely to be popular because the alternative — the general search warrant, an arguably more intrusive procedure — requires police to show up and expend their own resources to seize the information.

University of Ottawa law professor David Paciocco says the Code's new s. 487.012 could place lawyers in a position that conflicts with their duties of confidentiality and loyalty to their clients, and may well infringe the Charter right to be free from unreasonable search or seizure.

"This is certainly an innovation in the law that will trouble many," he told *The Lawyers Weekly*. "I think it's extremely intrusive."

"What we are seeing is regula-

tory initiatives leaking into criminal law, and the gap between regulation and criminal law narrowing. I think some of the initiatives that were taken in response to terrorism, such as compelling testimony at investigative hearings, have opened doors that weren't open before. What happens in these incidents, like terrorism or the corporate scandals, are exploited to expand the authority of the state and to increase state access to information."

Paciocco said the new law "co-opts" Canadians to become an arm of the state by forcing them to personally participate in, and even finance, police work.

see CODE p.7

Tough rules for U.S. biomedical wastes upheld by N.B. Court of Appeal

By **Chantelle MacDonald**
St. John's

The New Brunswick Court of Appeal has decided that the provincial environment minister's decision to attach conditions to a permit licensing incineration of biomedical waste from Maine deserves a high level of deference.

Since 1995, Mr. Shredding Waste Management (MSWM) in Moncton has held a licence to operate a medical waste incinerator. In 1999, the Minister of Environment and Local Government allowed MSWM to import biomedical waste from the Atlantic Provinces and Quebec. In 2000, the company sought permission to import biomedical waste from Maine. The minister approved the application, with a condition that emissions comply with standards for biomedical waste of 80 picograms or less.

The approved emission level complied with proposed standards of the Canada Wide Standards

(CWS) for control of dioxin and furan, highly dangerous contaminants slated for virtual elimination by all stakeholders. By the fall of 2000, the 80 picogram standard had been agreed to by provincial environment ministers as appropriate for new or expanding facilities, but existing facilities were given until 2006 to meet standard.

By New Brunswick statute, the Environment minister makes most of the important decisions under both the *Clean Air Act* and the *Clean Environment Act*.

After attempting to retrofit its existing facilities to meet the 80 picogram standard for the Maine wastes and determining that doing so would be prohibitively expensive, MSWM sought a variation of the condition so the tougher standard would be delayed until 2006. The minister refused, and after again failing in a bid to upgrade its equipment to reach the new standard, MSWM sought judicial review. When the reviewing judge

refused to interfere with the minister's decision, MSWM appealed.

Writing for a unanimous court, Chief Justice Alexandre Deschênes said that the reviewing judge had not erred either in his application of the "patently unreasonable" standard or in his refusal to supersede the minister's discretion.

"Here, the problem revolves around the Minister's adoption of a policy that requires a more exacting emission standard with respect to the incineration of biomedical waste from another country," the chief justice noted.

see BIOMEDICAL p.2

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Humpty Dumpty and the terrorists

Terrorism. Even the Supreme Court of Canada says it's generally a mug's game to try to define it.

In the country's leading case on the subject, *Suresh v. Canada* (2002), 208 D.L.R. (4th) 1, the court writes, *per curiam*, "One searches in vain for an authoritative definition of 'terrorism.' The *Immigration Act* does not define the term. Further, there is no single definition that is accepted internationally. The absence of an authoritative definition means that, at least at the margins, 'the term is open to politicized manipulation, conjecture, and polemical interpretation.'"

The quotation is from the factum of the Canadian Arab Federation, an intervenor in the litigation over whether Suresh's activities with the Tamil Tigers disqualified him as a refugee under the *Immigration Act*.

The court goes on to quote law and other academic journals for such propositions as "The term is somewhat 'Humpty Dumpty' — anything we choose it to be," and "The very word becomes a litmus test for dearly held beliefs, so that a brief conversation on terrorist matters with almost anyone reveals a special world view, an interpretation of the nature of man, and a glimpse into a desired future."

This does not stop the court from adopting a legal definition, which it qualifies as not "exhaustive," from Article 2(1) of the 1999 *International Convention for the Suppression of the Financing of Terrorism*:

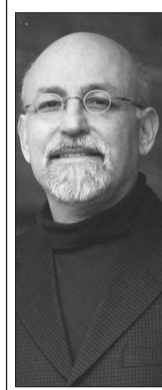
"Any ... act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."

The dispute in *Suresh* predated legislative responses to the terrorist attacks of September 11, 2001. *Criminal Code* section 83.01 now provides our legal definition of 'terrorism.' It includes acts or omissions intended to intimidate the public or a group, or to compel government and non-governmental bodies "to do or refrain from doing any act."

The definition excludes armed conflict that respects customary or conventional international law.

Of course, some would say it covers the U.S.-led invasion of

Iraq and the Bush administration's Humpty-Dumptyish attempts to skirt international law with weasel words such as "enemy combatants."



OFF THE RECORD

By Jeffrey Miller

And, as recent Canadian controversy over "terrorist" shows, in a culture that touts itself as multicultural, consensus on a definition is counterintuitive. There is, after all, no consensus on what "multicultural" itself means, and little attempt to distinguish it from cultural relativism, which hinders us from settling on a really Canadian definition of anything at all.

Reuters news service has objected, mildly, that CanWest Global sometimes substitutes "terrorist" where Reuters' wire stories use "gunman," "militant," and such. Reuters was roused to complain, it adds, only when the CBC phoned to dump the cat among the pigeons.

Then, Edward Greenspon, the editor-in-chief of *The Globe and Mail*, wrote that the CBC "instructs its reporters to avoid ... the term ['terrorist'] unless it is used by someone other than the reporter." The *Globe's* stylebook is more liberal, Greenspon suggests, stipulating "terrorist" for those who perpetrate or threaten violence "against the innocent public" for "political ends." The stylebook gives the examples of hijacking or bombing vehicles, "public buildings, etc." But of course it does not define "innocent public."

Among reasonable people, you would think this squabble would be instructive and calming. Just as the Canadian Jewish Congress is likely to have a different view of the matter than the National Council on Canada-Arab Relations (NCCAR), CanWest will differ from the CBC, which will differ from the *Globe*. This is how free speech works.

For that reason, Reuters has the right to ask that, if you edit their copy in some specified ways, you should please take their bylines off the story. But it is another thing for Mazen Chouaib, the NCCAR's director, to write on the *Globe's* op-ed

page that CanWest's editing of wire stories proves Parliament should "take a hard look" at CanWest regarding "the impact and effect of media concentration in this country."

Such a "hard look" could be

'Such a "hard look" could be construed as unconstitutional censorship of specific groups.'

construed as unconstitutional censorship of specific groups.

Just as "terrorist" can be prejudicial code for certain ethnic groups, the "media concentration" charge is sometimes euphemistic cipher for "Jews control the media."

Chouaib, in fact, begins his article with "When the late Israel Asper's CanWest Global Communications acquired a significant share of the Canadian media, many of us feared the worst — particularly on the issue of Middle East coverage."

Everyone in this country knows that Asper was Jewish and a conservative supporter of Israel. And, in Canada, it is Chouaib's perfect right to say so. The point, in fact, is that, just as he can complain of media concentration by friends of Israel — never mind all the news services with very different policies and views on the Middle East and "terrorism" — it is CanWest Global's right to define and use "terrorist" according to its own lights. The same goes for the *Globe*, the NCCAR, the CBC, Agence France Presse, Al-Jazeera, *Izvestia*, and everybody else, within the bounds of our law. In the current environment, dictating a definition is just that: dictatorial.

The public is well aware that CanWest is a conservative organization sympathetic to the U.S. worldview. Its use of "terrorism" is no surprise. If we insist on one definition, however, *Suresh* provides a basis for at least an attempt at consensus, from something approaching an objective perspective.

Jeffrey Miller's latest book is the courtroom drama mystery, *Murder at Osgoode Hall*. His other recent books include *Ardor in the Court! Sex and the Law and the essay collection, Where There's Life, There's Lawsuits, a finalist for the 2004 Arthur Ellis Award for best non-fiction book.* Web: jeffreymiller.ca. E-mail: jefmil@interlog.com.

Former wife termed 'bitter to the point of obsession'

ADULTERY

—continued from front page—

In an opinion endorsed by Justice Hall, Justice Southin wrote of the wife, "that emotionally she is bitter to the point of obsession with his misconduct and in consequence has been unable to make a new life. Her life is this litigation. Fortunately, most spouses do put the past behind them and, as the saying is, 'move on.'"

"Not without hesitation I have concluded that s. 15.2(5) [of the *Divorce Act*] does not prevent us from considering, when an issue arises under s. 15.2(6) concerning the failure of a spouse to achieve economic self-sufficiency, a failure resulting at least in part from the emotional devastation of misconduct by the other spouse."

In a separate concurring opinion, Justice Newbury protested that modern Canadian divorce leaves no room for misconduct to play a role in spousal support determinations. "In my view, Parliament's stricture against considering the misconduct of a spouse in relation to the marriage when the court is asked to make an order for spousal maintenance under s. 15 of the *Divorce Act* means that 'bitterness' does not supply an answer to the question [of why the dependent spouse had been unable to attain financial self-sufficiency], nor provide an excuse for a spouse who is able to work for remaining unemployed."

Sherry, who argued her own appeal, spent 34 years working for the TD Bank. She was earning \$45,000 when laid off in 1998, a month before Leskun left her.

She argued that the marriage breakup, a raft of deaths and illnesses in her close family, her age and a lingering back injury have

prevented her from working or finding a job.

Subsection 15.2(5) of the *Divorce Act* cautions judges deciding spousal support not to "take into consideration any misconduct of a spouse in relation to the marriage."

"Thus Parliament, in its wisdom or lack thereof, has said the court must give no weight to what the husband here did — that is carrying on behind his wife's back and, when it suited him, walking out on his wife of 20 years who had borne him a child and contributed substantially to his financial well-being," said Justice Southin.


She and Justice Hall went on to conclude, however, that the *Divorce Act* did not bar them from taking into account the role that Leskun's misconduct played in his ex-wife's failure to achieve financial self-sufficiency.

They also acknowledged that the wife's health and age at the time of the marriage breakdown, "and her family sorrows" played a role as well in the wife's failure to achieve self-sufficiency.

Concurring in the result, Justice Newbury said that after watching the wife argue her own appeal "I would have thought she was employable at least on a part-time basis in the banking industry."

The judge conceded, however, that the court could not ignore the wife's difficulties, such as her family and medical problems which were exacerbated by the marriage breakup. "For this reason, and not because of any self-imposed disability, I would reluctantly uphold the [support] order of the court below and dismiss the appeal."

Reasons: *Leskun v. Leskun*, [2004] B.C.J. No. 1597.




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