

# TRAVELLING BRIEF

## (Another) Report from Toronto

In my previous report (*Alt.LJ* October 1994) I made suitable noises about the dangers of comparative studies in law across societies, cultures and legal jurisdictions. I expand on that theme in an article on legal aid elsewhere in this issue.

So, the warning having been given, I offer some more insights into legal and policy developments in Canada. The accounts are drawn from my scanning of the pages of Canada's national newspaper, *The Globe and Mail*.

### Advice to mortgagors

A woman mortgaged her home to assist her daughter and son-in-law. The couple had been refused a loan by a bank, but the bank recommended the couple introduce a family member to it to apply for the loan. The couple then used the money in part to repay other loans to the bank. In the circumstances, the Ontario Court set aside the transaction on the basis that the bank did not make the obtaining of independent legal advice a condition of the loan. The woman had refused the bank manager's recommendation that she obtain independent advice, and had signed a waiver. That wasn't good enough, said Judge Lederman: 'A bank . . . cannot escape its responsibility by merely recommending independent legal advice. It must insist on it.' If the customer refuses, a waiver isn't enough — the bank must refuse the loan. (9.11.94)

### Domestic violence

Statistics in Winnipeg, Manitoba, show a threefold increase, from 1992 to 1993, in the number of domestic assault charges brought against women. A researcher says the figures highlight violence to husbands, creating a 'family problem' that transcends a 'his fault/her fault' analysis. A spokesperson for Winnipeg Child and Family Service says that the figures may be due in part to an increase in investigations resulting from bitter child custody battles, and to an increased incidence of social workers reporting mothers for striking children as discipline. (14.11.94)

### Cultural criminal defences

A Canadian government discussion paper has raised the possibility of cultural beliefs being raised as a defence in crimi-

nal matters. Criminal law is a federal responsibility in Canada. Specifically, the paper suggests that a 'person would be found not guilty for conduct that would otherwise be criminal when the person acted in accordance with his or her customs or beliefs.'

Concerns have been expressed that such a defence would allow practices such as female genital mutilation and polygamy. The Attorney-General has said he is opposed to the idea but has also said he is prepared to discuss aspects of it, such as whether a Sikh carrying a kirpan (ceremonial knife) has a defence to a concealed weapon charge. The proposal is not supported either by the Ontario Criminal Lawyers association or by the Canadian Human Rights Commission. (15.17.11.94)

### Aboriginal land

The Supreme Court of British Columbia has refused to prevent a housing development on an aboriginal burial ground. The Nanoose Indians have argued that the site should be respected in the same way that a non-native cemetery would be. The provincial government successfully argued that the area is an archaeological site, not a cemetery, and that it stands in the way of coastal development. (15.11.94)

### HIV and privacy

The Canadian AIDS Society (CAS) is appealing an order from the Ontario Court that allows the Canadian Red Cross to give to the government the names of blood donors who tested HIV positive before screening was introduced in 1985. The government maintains there is a statutory obligation on the Red Cross to advise the names of donors of blood 'with a contagious disease'; the CAS says that to do so is an invasion of privacy and not within any implied consent given by the donors. Although the case is being argued in part under the Canadian Charter of Rights and Freedoms, it is also said that there is a breach of a common law right to privacy. (15.11.94)

### Human rights and trade

A joint parliamentary committee has exhorted Canada to link foreign trade and aid issues to human rights issues. In fact,

the minority report says that the committee is not strong enough in making its point. These views are contrary to Canada's official line that linkage 'is not a fruitful path', and come at a time when the Prime Minister is in the middle of a trade tour of Asia. (16.11.94)

### Welfare and taxation reform

Canada's green paper on social reform has been attacked for targeting the poor for the sins of the rich. The parliamentary committee that is hearing submissions on the green paper was told in Victoria that the Canada's fiscal problem is one of revenue foregone in unpaid taxes. The poor, who would be affected by proposed cuts to welfare programs, are not responsible for this. Professor Phillips of the University of Victoria called for government to address the tax system at the same time that it looks at the welfare system. (16.11.94)

### Screening of employees

Canada will allow the police to co-operate with volunteer organisations and with childcare agencies in running a criminal record check on potential workers. The point of the exercise is said to be to screen for 'sex offenders'. (17.11.94)

### Gay hate-crime punishment

The Canadian Attorney-General is battling in Parliament, and with his own backbenchers, to save a clause in amendments to sentencing legislation. The clause allows for a harsher penalty to be imposed if a crime was motivated by prejudice or hatred which was based on the sexual orientation of the victim. The provision is said by critics to be the beginning of the entrenchment of gay rights in federal law — Canada's *Human Rights Act* does not explicitly address discrimination on the ground of sexual orientation, although the Supreme Court has found implicit protection in the words and intention of the Act. (17.11.94)

**Simon Rice**

*Simon Rice is a Sydney lawyer and a law teacher in the clinical program at Kingsford Legal Centre, UNSW. He is currently an academic visitor at Osgoode Hall Law School, York University, Toronto, Canada.*