Canadian Bar Association will litigate right to civil legal aid

By Dr. Melina Buckley

The Canadian Bar Association (CBA) is undertaking litigation in the public interest to remedy the inadequacy of civil legal aid across Canada. The decision to litigate comes after the CBA has expended many years of concerted lobbying efforts at the national and provincial levels without any significant improvement to civil legal aid to date.

Civil litigation often involves disputes over issues which relate to vital human interests in cases involving poverty law, immigration and refugee law, family law and other issues. There is no civil legal aid available at all in many situations that put at risk a person's basic needs and, where assistance is available, it is often highly limited. The impact on disadvantaged individuals can include: abandonment of rights or inadequate self-representation, often resulting in long term negative consequences; increased risks to safety; severe stress; impoverishment; and the denial of access to housing, food and other necessities of life. These litigants and those who never become litigants because they abandon their rights are often members of already disadvantaged and vulnerable groups which comprise poor people in Canadian society including: women, children, individuals with disabilities, Aboriginal persons and recent immigrants. It also puts substantial strain on the judicial system.

"There is no civil legal aid available at all in many situations that put at risk a person's basic needs and, where assistance is available, it is often highly limited."

The current Canadian jurisprudence on civil legal aid focuses on the right to publicly-funded counsel as a matter of judicial discretion in an individual case. This approach developed at common law, mainly in the criminal law sphere. Very little has changed since the advent of the *Charter*, with the right to legal aid being based on three criteria: the seriousness of the consequences of the legal proceeding, the complexity of the matter and the capacity of the individual requesting legal aid. This approach has been extended by the courts to a small number of civil legal matters, including to child apprehension hearings by the Supreme Court of Canada in its 1999 decision in *G.(J.) v. New Brunswick*.

The CBA's case will take a different tack, by shifting away from the narrow right to a fair hearing and toward the broader right to equal access to justice. There are a large number of persons who seek civil legal aid and the right to publicly-funded counsel across Canada every year but so far there has never been a systemic challenge. A systemic challenge brought by the CBA hopes to overcome the limitations of the current case law which places unrepresented individuals in the untenable position of making complex constitutional arguments and renders invisible the claimants who do not have the resources to even initiate an action when their vital interests are at stake.

The objective of the litigation is to win judicial recognition of the governments' obligation to establish and maintain a constitutional civil legal aid system. The claim will sound in fundamental constitutional principles such as the rule of law and the independence of the judiciary; international human rights law; and the *Charter* guarantees of the s. 7 right to life, liberty and security of the person and the s. 15 right to equality; as well as the guarantee of equal access to essential public services in s.36(1) of the *Constitution Act, 1982*.

The CBA legal team will be working closely with a diverse network of individuals and organizations who serve low-income Canadians to help develop the evidence required for this test case and to ensure that the litigation outcomes respond to the needs of these vulnerable people.

The CBA constitutional challenge will be launched in British Columbia in the near future.

Dr. Melina Buckley

Dr. Melina Buckley is a lawyer and legal policy consultant specializing in human rights, constitutional law, access to justice and dispute resolution. She is part of the four-member legal team representing the CBA in the legal aid test case.

How does the same-sex marriage Reference affect those opposed?

Religious groups should clearly articulate their policies and beliefs concerning marriage and ensure that the group's policies, by-laws and publications conform as closely as possible to legal requirements.

By Terrance S. Carter and Mervyn F. White, assisted by Anne-Marie Langan

The federal government has proposed legislation, to recognize the right of same-sex couples to marry across Canada and sent a Reference to the Supreme Court regarding the proposed legislation with four questions to be addressed. The Supreme Court's decision (*Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, handed down on Dec. 9, 2004) has several implications for churches and religious officials who are opposed to same-sex marriage. The Supreme Court of Canada answered the four questions as follows:

Is the proposed Act within the exclusive legislative authority of Parliament?

The Supreme Court concluded that the "Pith and Substance" of s.1 of the proposed Act is to define the legal capacity to marry and to ensure that "civil marriage as a legal institution is consistent with the *Charter*" and confirmed that Parliament is granted the authority to define marriage by virtue of s. 91 (26) of the *Constitution Act* which states that the federal government has the exclusive authority to legislate matters that have to do with "Marriage and Divorce", such as a same-sex couple's right to marry.

Conversely, s. 2 of the proposed Act was found to be *ultra vires* the powers of Parliament by virtue of the fact that s. 92(12) of the *Constitution Act* gives provinces exclusive jurisdiction over "the solemnization of marriage in the Province". As such, Parliament does not have the jurisdiction to create an exemption protecting religious officials from being required to solemnize marriages contrary to their religious beliefs in the proposed Act.

Does the proposed Act violate the *Charter*?

The court stated that "the mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another," and rejected the argument that the proposed Act infringes the guarantee of freedom of religion under s. 2(a) of the *Charter*.

Does the proposed Act provide protection for religious officials who do not believe in same-sex marriage?

The Supreme Court's response to this was as follows: "The performance of religious rites is a fundamental aspect of religious practice. It therefore seems clear that state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s. 2(a) of the *Charter*. It also seems apparent that, absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s. 1 of the *Charter*."

However, since the federal government has no constitutional authority to regulate the solemnization of marriage, the freedom of religious officials to not perform same-sex marriages if it is contrary to their beliefs can only be protected by provincial governments.

Is the definition of marriage as being between a man and a woman unconstitutional?

The court exercised its jurisdiction to not answer this question, as it would be "unwise and inappropriate" to do so, noting that this question has already been conclusively answered in the affirmative by the lower courts.

Section 2 of the proposed Act was an attempt by the federal government to address the concerns of religious groups and officials who are opposed to same sex marriage

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VIA Rail wins appeal of requirement to spend on wheelchair accessibility

By Thomas Claridge
Toronto

VIA Rail Canada Inc. has won an appeal against a ruling by the Canadian Transportation Agency ("Agency") that the rail passenger service says would require it to spend up to $110 million to make 139 new Renaissance coaches more wheelchair accessible.

Although three judges of the court all found that VIA should be granted a new hearing, they disagreed as to whether aspects of the ruling were patently unreasonable .

Writing for the majority, Justice Edgar Sexton held that it was patently unreasonable for the Agency to base its conclusions solely on the Renaissance cars rather than on the overall accessibility of VIA's fleet and to have made its final ruling before VIA could produce detailed estimates of the cost of the work and its impact on other travellers. Justice Robert Décary concurred.

Although agreeing that a new hearing was warranted, Justice John Evans held that the Agency's only error warranting the court's intervention "was its failure to afford a reasonable opportunity to VIA to address issues crucial to the ultimate determination" on an application by the Council of Canadians with Disabilities (CCD).

In its application, the CCD sought an order requiring VIA to take corrective measures to eliminate "undue" obstacles to the mobility of wheelchair-bound passengers. Toronto lawyer David Baker, the CCD's lead counsel, has said he will ask the Supreme Court of Canada to grant leave to appeal the decision.

Designed in Europe in 1990 for service to and from England through the Channel Tunnel, the coaches are narrower than standard North American coaches. A contract for the cars was halted in 1998, and on Dec. 1, 1990, VIA bought them for $139 million, about one-quarter of the estimated cost of having similar coaches built in North America.

> **"The bottom line is that we don't accept their figures in any respect."**

Four days later, the CCD asked the Agency to stay or delay the purchase on grounds the cars were not accessible to persons in wheelchairs and asked it to determine whether they contained "undue obstacles" to such persons' mobility.

It took nearly three years for the Agency to make its final ruling. Justice Sexton noted that except for a one-day hearing in April 2002, "the proceeding consisted entirely of letter submissions and responses by the parties and the Agency. Similarly, the Agency rendered most of its decisions on various issues by letter."

Noting at one point in the judgment that VIA is federally subsidized, Justice Sexton noted that s. 5 of the *Canadian Transportation Act* requires the Agency to strike a balance between accessibility and economics.

"Obviously, the cost of any improvement ordered is crucial. Similarly, the transportation service provider may be totally unable to fund the improvements. If the costs are excessive, the fares may have to be increased to a point where the average person cannot afford to travel."

One unusual aspect of the court's ruling was its criticism of the Agency's involvement in the appeal.

"The Agency filed a factum in this appeal and appeared to make oral argument," Justice Sexton wrote. "In its factum, the Agency addressed not only the questions of its jurisdiction and standard of review, which it was entitled to do, but also other issues relating to the facts and merits of VIA's position."

He noted that the factum included submissions that the Agency had "conducted a careful balancing of the undueness factors" and that its analyses "were appropriate and reasonable in the circumstances."

The factum ended: "In conclusion, the Agency respectfully submits that it recognizes the requirements of natural justice and fairness in its decision-making process and that VIA was not denied the opportunity to properly present its case before the Agency."

Justice Sexton said that from the excerpts cited, "it appears that the Agency has entered into the fray and become an adversary in this matter. This is to be regretted."

He noted that in *Northern Utilities v. City of Edmonton,* [1979] 1 S.C.R. 684, Justice Willard Estey said the Supreme Court's policy was "to limit the role of an administrative tribunal whose decision is at issue before the Court, even when the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction."

Justice Estey said "jurisdiction" did not include "the transgression of the authority of a tribunal by its failure to adhere to the rules of natural justice."

VIA's lead counsel, John Campion of Fasken Martineau DuMoulin LLP in Toronto, told *The Lawyers Weekly* that current estimates of the cost of the modifications required by the Agency's ruling were "between $60 million and $110 million."

Noting the complex nature of the British-built cars, he said the actual cost could not be determined until the cars' interiors were ripped open and the structures examined.

Campion portrayed the case as an attempt by the CCD to establish that the Agency's jurisdiction extends to examining whether any individual purchase by VIA or a Canadian airline contains an undue obstacle to mobility.

He noted that since the Renaissance cars came into service, no one has been denied access to them.

In a letter to the *Toronto Star* responding to an article on the court ruling, Malcolm Andrews, senior adviser to VIA Rail's Public Affairs department in Montreal, said VIA "has equipped all of its trains (including the Renaissance trains) with adjustable wheelchairs, which make movement from one part of the train to another possible, even through passageways that might be too narrow for regular wheelchairs."

He said that at the time the cars were built, they "met or exceeded all British and European standards for accessible transportation. The new trains include wider-than-standard exterior doorways for increased ease of boarding and detraining. In addition, for the first time ever on a Canadian passenger train, each train features a fully-accessible compartment with its own washroom facilities. And unlike some conventional long-distance trains, there are no interior stairways to act as barriers to movement within the train."

In confirming that he had instructions to seek leave to appeal, Baker told *The Lawyers Weekly* he sees the case as having significant implications for the transportation industry generally and VIA's actions as in breach of a commitment by federal Transport ministers to make all trains and airplanes wheelchair accessible.

The CDD lawyer also disputed VIA's cost estimates, noting that the Agency ruling merely required retrofits on 11 cars and that safety concerns will force VIA to move washrooms in the cars anyway. "The bottom line is that we don't accept their figures in any respect."

Reasons: *VIA Rail Canada Inc. v. Canada (Canadian Transportation Agency)*, [2005] F.C.J. No. 376.

Practical implications of decision still unclear

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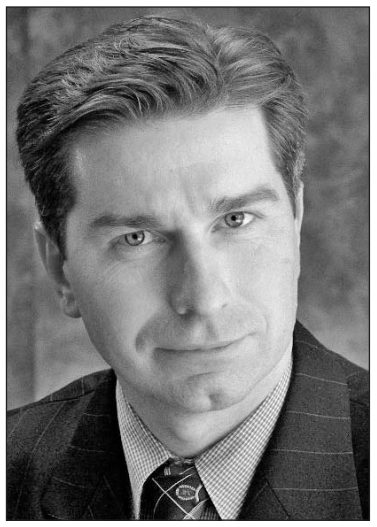
by including an explicit statement that the proposed Act would not affect the freedom of religious officials to refuse to perform marriages that are not in accordance with their religious beliefs. However, since it is within provincial jurisdiction to provide protection for clergy with respect to matters relating to the solemnization of marriage, the federal government cannot legally provide such an exemption and no protection can be afforded by the Act.

The court's finding that "the right to religious freedom enshrined in s. 2(a) of the *Charter* is expansive" is echoed in the recent Supreme Court of Canada decision *Syndicat Northcrest v. Amselem* ("Amselem") wherein the majority found that the s. 2(a) *Charter* right to freedom of religion includes the right to hold a particular opinion based on personal religious beliefs, and regardless of whether or not this belief is the official doctrine of your particular religion.

Presumably the expansive right to religious freedom should extend far enough to protect individuals or groups who are opposed to same-sex marriage from having to solemnize these marriages and from having to offer their facilities for purposes related to their solemnization.

While all of the practical implications of this decision are still unclear, a question that remains unanswered is whether marriage commissioners who are opposed to same-sex marriage on religious grounds can lose their license for refusing to perform a same-sex marriage ceremony.

Terrance S. Carter



Mervyn F. White

It is also impossible to tell what other practical effects the legislative recognition of same-sex marriages will have on religious groups who are opposed to same-sex marriage now that the Supreme Court has made it clear that such views run contrary to *Charter* values. Given these uncertainties, it would be prudent for religious groups to clearly articulate their policies and beliefs concerning marriage and to undergo a legal audit to ensure that the group's policies, by-laws and publications conform as closely as possible to legal requirements and are not unnecessarily discriminatory.

Terrance S. Carter practises with Carter & Associates and is Counsel to Fasken Martineau DuMoulin LLP on charitable matters. Mervyn F. White practises with Carter & Associates primarily in litigation including areas of charity, church and not-for-profit law, human rights and employment law. Anne-Marie Langan is a law student articling with Carter & Associates.