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Greg DelBigio, chair of the CBA's national criminal justice section, argued for publicly-funded counsel for individuals targeted under the anti-terror bill. Photo by Alistair Eagle

Bar calls for publicly-funded counsel for anti-terror targets

By Cristin Schmitz
Ottawa

A government bill that would reinstate preventive detention and investigative hearings for people who authorities reasonably believe have links to, or knowledge of, terrorist activity should create a right to court-appointed, state-funded counsel, argues the Canadian Bar Association (CBA).

"The presence of counsel is critical for the proper determination of issues such as whether or not a question [at an investigative hearing] is relevant, and whether or not an answer to a question would intrude upon issues such as privilege," explained Vancouver criminal lawyer Greg DelBigio, chair of the CBA's national criminal justice section.

The CBA, the British Columbia Civil Liberties Association (BCCLA) and the Canadian Muslim Lawyers Association (CMLA) appeared before the Senate's Anti-terrorism Committee Feb. 4 to urge the upper house to substantially change the proposed *Criminal Code* amendments before sending the bill on to the Commons for study and final approval.

Introduced in the Senate on October 23, 2007, Bill S-3 essentially revives now-expired measures first enacted in 2001 which

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Senior's forced retirement found to be constructive dismissal by B.C.'s top court

By Cristin Schmitz
Ottawa

In a case which counsel say may presage a new trend by older Canadians to sue for wrongful dismissal, British Columbia's top court has affirmed an award of constructive dismissal damages to a 66-year-old employee who felt pressured to retire because she couldn't master new computer skills demanded by her employer.

As companies shed their mandatory retirement policies, the Court of Appeal's Jan. 24 ruling represents good news for aging baby boomers who want or need to keep working past age 65, even as their desire or aptitude to acquire new job skills arguably declines. An Investors Group survey released this month found that 28 per cent of singles (most Canadians are single) plan to work past the traditional retirement ages of 60 to 65 because they need the income and access to health benefits. Women far outnumber men in this category.

In their oral ruling, Chief Justice Lance Finch and Justices Risa Levine and Edward Chiasson affirmed a damages award to Kathleen Fisher, 70, of 10 months' pay and insurance premiums, plus a $2,000 bonus for 2003, the year she reluctantly retired from her employment of 18 years with Lakeland Mills Ltd.

The Court of Appeal ruled the trial judge had "ample" objective evidence that the lumber exporter was fundamentally changing Fisher's secretarial and accounting job by asking her to add shipping clerk duties involving computer skills, and proposing also to shift her accounts payable responsibilities to someone else.

Justice Chiasson held that the "silence" of the company's president when Fisher complained to him that she believed her immediate superior was trying to force her out "was an affirmation that Ms. Fisher was obliged to take on the shipping duties or leave," Justice Chiasson held. "Those duties represented a significant change in her employment that the company was not entitled to impose unilaterally."

Lakeland's counsel Simon Margolis of Vancouver's Bull Housser & Tupper told *The Lawyers Weekly* he anticipates a growing number of wrongful dismissals actions by employees over age 65. "When there was mandatory retirement, employers would probably be more reluctant to make any changes, either by disciplining or letting go, a longstanding employee, even if there were [performance] issues, if [the employees] were getting close to retirement age, because change in a longstanding employee is costly and also disruptive for morale," Margolis remarked. "But now we are seeing employees working longer, and not retiring... so the issue is going to come to a head because employers are going to have to deal with these issues as

see FISHER p. 3

Law society report pushes for end to licensing course

By Thomas Claridge
Toronto

A "consultation report" by a Law Society of Upper Canada (LSUC) task force has recommended scrapping a four-week licensing course that two years ago replaced the law society's four-month-long Bar Admission Course (BAC).

The Licensing and Accreditation Task Force was appointed last spring with a mandate to make recommendations in three areas: the most effective means by which competency requirements for call to the Bar of Ontario could be achieved; the criteria for approving law degrees, and the impact of rising numbers of law graduates on the viability of the current licensing process.

The report was submitted to the law society's January Convocation, which approved its dissemination to the profession, law schools and legal organizations to obtain feedback on its findings concerning the licensing process and the related articling process.

Headed by former LSUC treasurer Vern Krishna, the four-member task force noted in its report that the current Skills and Professional Responsibility Program began as a five-week instructional program but was reduced by Convocation to a four-week instructional program in 2007 "after the candidate evaluations indicated a perceived repetitiveness within the learning modules."

At present, the candidates get 3.5 hours of instruction per day, for

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Differentiate militant dissent and serious threats

S-3

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would compel individuals who may have information about a terrorism offence to go before a judge and answer questions, and which authorize the imposition of recognizance with conditions, and preventative arrests, in order to avert potential terrorist attacks.

At press time, the Senate appeared poised to pass S-3 more or less intact, although there were signs that the Liberal-dominated red chamber would introduce some amendments to enhance protection for civil liberties.

"All indications point to the passage of the bill, regrettably," remarked Vancouver criminal lawyer Jason Gratl, president of the BCCLA which argues that S-3 should be scrapped since measures to ensure national security are already available under the *Criminal Code*, a stance also taken by the CMLA.

The necessity for the measures is particularly questionable since they were never used by police before they expired March 1, 2007 under a five-year "sunset" clause, he noted.

"If it is perceived that a bill must be passed," Gratl told *The Lawyers Weekly*, S-3 could be improved by confining the use of detention and investigative hearings to situations involving imminent threats, and requiring the collection of data about any use of the measures to ensure that individuals are not improperly targeted based on racial profiling.

Gratl urged the Senate committee to redefine "terrorist activity" much more narrowly to encompass only "contexts in which the essential integrity of Canada is threatened."

This would be "any action that is intended to, or can be reasonably foreseen, to cause death or serious bodily injury to persons not actively or directly involved in a dispute with the intention of intimidating a population or compelling a government or international organization to do or abstain from doing any act."

Gratl suggested that under S-3's broad definition of terrorist activity, a protest group planning, for example, to interfere with traffic in the corridor between Vancouver's airport and Whistler during the upcoming Olympics could be "subject to the incredible panoply" of antiterrorism measures, including wiretapping, preventive detention and investigative hearings.

"We need to stay mindful of the difference between militant dissent and serious threats to this country," Gratl argued.

DelBigio warned that there may be pressure from authorities in the future to expand the use of investigative hearings – which he called "a radical departure from the powers which have traditionally been available to criminal investigators in Canada" – beyond a terrorism context to ones such as as a sexual offences against children or organized crime.

The CBA also argued that S-3's requirement that persons summoned to investigative hearings produce to authorities "anything in their possession or control" that the presiding judge rules "will likely be relevant to the investigation of any terrorism offence" is too sweeping. Compelled production should be restricted to circumstances where there are "reasonable grounds to believe" the person has in his or her possession or control something relevant to a terrorism offence or the whereabouts of a suspect, said the group. The CBA group cautioned that the provision authorizing property seizures is vulnerable to attack under the *Charter's* s. 8 guarantee against unreasonable searches and seizures since the protections contained in the *Code*'s regular warrant and production order provisions are bypassed.

The CBA recommended also that S-3 be amended to bar the use of compelled evidence at subsequent extradition or immigration-related proceedings since the bill currently only gives use and derivative use immunity in subsequent criminal proceedings.

Nor does the bill include any safeguards against the transfer of the compelled information or seized property to agencies inside and outside Canada. "Canada should be cognizant of the risk of prosecution in a foreign country and the attendant risk of extradition or deportation to that country," the CBA admonished.

Immigration lawyer Yusra Siddiquee, who appeared for the CMLA, warned senators that S-3 increases the likelihood of "abuses and miscarriages of justice" such as those experienced by Canadian Maher Arar, who was deported by the U.S to torture in Syria based on erroneous information supplied by the RCMP.

Siddiquee said CMLA members who do *pro bono* work receive "very frequent" complaints from Muslims and Arabs that Canadian authorities are using the threat of investigative hearings to pressure people to give information about others.

"We hear regularly about individuals who are born and raised in Canada, who consider themselves as Canadian as anyone else walking on the street, being interviewed because of the mosques they may visit, the people they may associate with, the organizations in which they may participate, or some of the charities which they may support, charities that are not on any [national security] lists anywhere," Siddiquee said.

"We have heard from various sources that some agents and law enforcement officials misrepresent themselves and their authority under the generic label of 'the new terrorism laws' suggesting they have much more authority than they do in reality. In many cases, those in the community who are not familiar with the limited authority of national security agencies, the intricacies of national security legislation, or their own legal rights have unwittingly cooperated in investigations without being fully apprised of their own rights."

Yusra Siddiquee

First time Quebec court ruled on hidden cameras

CHIROPRACTOR

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do not fall within the competence of chiropractics.

Judge Wagner also ruled that the use of hidden camera in the television show was legitimate and in the public interest. Disclosure's television producer went to Girard's clinic, identified himself as a new patient, and proceeded to use a hidden camera to record Girard during the consultation.

Judge Wagner notes that in such cases the court must determine the objective of the exercise and the circumstances surrounding it before deciding whether it infringes one's private life as per the *Civil Code*'s s.35 and s.36 (which identifies acts that may be considered as invasions of the privacy of a person). "In this respect, the Court is of the opinion that the right to privacy calls for a just balance between other fundamental rights, such as the right to information," said Justice Wagner.

According to Landy, this is an "interesting decision in that respect because it is the first time that a Quebec Superior Court has ruled over the use of hidden cameras in the context of a journalistic inquiry."

Reasons: *Girard c. Canadian Broadcasting Corporation,* [2008] J.Q. no 67.

Quotes from judgment translated from French by author.

LETTERS TO THE EDITOR

Contributions can be e-mailed to: tlw@lexisnexis.ca

Re: "Law School Accreditation Needs update: LSUC" The Lawyers Weekly, Jan. 25

Dear Editors,

Your article states that "At present, Ontario's six law schools are those of the University of Toronto, York University (Osgoode Hall), the University of Western Ontario in London, Queen's University in Kingston and the University of Windsor. The last accredited was the Windsor faculty in 1968." The University of Ottawa is missing from the list which actually only refers to five universities. The University of Ottawa has had a faculty since at least 1957.

Sincerely,

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Ottawa