JUSTICE RESEARCH NOTES

Special Law Reform Research Edition

When the former Law Reform Commission of Canada (LRC) was disbanded in 1992 the Department of Justice was given special transitional funding to complete projects that were already well advanced by the Commission and, beyond this, to initiate a program of internal law reform research.

This special double issue of *Justice Research Notes* highlights the law reform research undertaken in 1992. The range of topics is vast, each addressing challenging issues on the relationship between law and our evolving society. A few law reform research projects are still in progress, and these will be summarized in future editions of *Justice Research Notes*.

Part One focuses on the issue of Multiculturalism and Justice. It includes a description of the developmental public legal education and information work sponsored by the Department during 1991 and 1992, which continued into 1993 with a report on public legal information for immigrant women subjected to wife assault. Part One also reports on a major review and synthesis of the LRC research on multiculturalism and justice, studies on hate propaganda and hate crime, recent research on multiculturalism and jury selection, barriers to legal education for first-generation immigrants, a cross-national review of complaint and redress mechanisms relating to racial discrimination, a description of the legal problems faced by recent immigrants in Vancouver, and an ethno-cultural profile of youth and adults in British Columbia's correctional facilities.

In Part Two we have grouped together a wide variety of law reform studies, including a critical assessment of the preliminary inquiry process, an assessment of the effectiveness of the 1985 drinking and driving legislative amendments, an examination of the competing and conflicting principles at play in state responses to youth crime, and an assessment of the potential of regulatory negotiation strategies in the context of the Canadian legal environment. We also include a report that was undertaken in support of the Regulatory Compliance Project.

As Part One makes clear, federal, provincial and territorial governments share a strong commitment to address the important issues of multiculturalism and justice, and to collaborate fully with one another to develop research-based information that can provide a strong empirical basis for policy development and law reform.

Dorothy Hepworth
Director, Research Section

No. 8 March 1994

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Department of Justice Canada Ministère de la Justice Canada

Canada

Part I – Multiculturalism and Justice

Research on Multiculturalism and Justice[1] by the Federal Department of Justice

by Ab Currie
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Concerns have recently been voiced about the treatment of ethnocultural minorities in the Canadian justice system. Minority advocacy groups have expressed concern over a range of issues relating to bias in the system.[2] As well, recent public opinion polls have revealed general public concern about unfair treatment of minorities by the system.[3] Indications such as these, plus a number of consultations carried out by the Department of Justice with ethnocultural community organizations and agencies that provide services to ethnocultural groups, suggest that issues relating to multiculturalism, race relations and the justice system need to be systematically reviewed and addressed on a priority basis.

Over the past several years the Department has been carrying out research and development activities on multiculturalism and justice. The research, consultations, and projects occur early in the policy process, and are aimed at identifying and clarifying issues. The earliest work was a focus group study aimed primarily at identifying barriers to public legal education and information.[4] Among the 12 focus groups included in this study were ones representing immigrant women, blacks, and Chinese. The respondents in the study articulated the need for public legal information in a wide variety of areas, and the lack of access to legal services such as legal aid. They expressed the need for community-based "storefront" delivery mechanisms in local neighbourhoods and community centres to provide legal information and services to minorities. A sense of alienation from and mistrust of the mainstream justice system came across from many focus group participants.

Soon after the completion of the focus group study, the Department of Justice sponsored a "round-table" discussion of justice issues and ethnocultural minorities,[5] organized and hosted by the Faculty of Law, University of Windsor. Held in October 1990, the round-table was attended by ethnic community representatives, academics and government officials. The conference report, which is available from the Department, contains recommendations for action and further research on a range of justice-related topics.

During 1991 and 1992 the Department supported a public legal education and information (PLEI) project carried out by the Law Courts Education Society in Vancouver. The purpose was to identify culturally based impediments experienced by recent immigrants

Justice Research Notes is produced by the Research and Statistics Directorate of the Department of Justice. Its purpose is to provide, in summary form, results of projects carried out under the Department's program of research into various areas of justice policy, as well as information and articles on other socio-legal matters.

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in accessing and relating effectively with the justice system. The developmental research and resulting PLEI programming focused mainly on the reluctance of immigrants to cooperate with, or seek the protection of, the Canadian justice system because of misunderstandings about the system that were rooted in experiences with the justice systems in countries of origin.

Recognizing that access to legal education and admission to the legal profession is an important aspect of the integration of minorities into the Canadian justice system, the Department of Justice in 1992 carried out a study of minority students in ten law schools in Canada.[6] The study addressed issues relating to the experiences of female, disabled, aboriginal, and visible minority law students. With respect to visible minority students, the results showed that minority groups are not underrepresented as law school students in comparison with their proportions in the general population. However, because of the small numbers in these groups, their numbers within law schools may be very small indeed, although still "representative" based on proportions in the population. Visible minority students reported discrimination in law school, and insensitivity in the content of curriculum.[7]

As the law students survey was being carried out, the Department began other research on the legal problems faced by members of immigrant and minority groups. There is a paucity of official data to indicate the nature and extent of justice problems faced by ethnic minorities. The study of clients of multicultural service agencies in Vancouver, which is described in a separate article in this issue of *Justice Research Notes*, was a first attempt to determine the nature and extent of such problems.

Research activity in multiculturalism and justice accelerated within the Department of Justice following the abolition of the Law Reform Commission of Canada in 1992. The Commission had begun a program of research to determine the extent of bias in the Canadian justice system against visible minorities and aboriginal people. The Commission completed its work on aboriginal people.[8] However, its work on ethnocultural minorities was in the preliminary stages at the time of abolition. The Department is carrying on research in this area. The articles included in this issue of *Justice Research Notes* refer to studies on hate-motivated crimes, jury selection, barriers to legal information, complaint and redress mechanisms, and the literature review, and represent the first in what will probably be a program of basic research and project evaluations.

One project that grew out of the work of the former Law Reform Commission – a study of research issues of importance to representatives of ethnocultural organizations in Canada – is not reported in this issue.[9] It is nearing completion and will be ready for release soon. This survey of the views of representatives of several hundred ethnocultural organizations is an important part of the current research series. It is, in effect, a research-style consultation with minority groups in Canada. It will form the basis for continuing consultation and dialogue with ethnocultural communities in Canada as the Department's policies take shape.

The article summarizing the report on public legal information materials, *More Than a Crime*, reflects one of the major policy and research orientations within the multiculturalism and justice initiative: the problems facing ethnocultural minority women. This will be the subject of continued research and development, and policy activity.

The policy research ongoing at the Department of Justice is being carried out in collaboration with policy researchers in provincial governments. The focus group study previously mentioned, and the study of barriers to legal

information among immigrants and the census of correctional facilities in British Columbia, both also discussed in this issue, were cooperative efforts involving the federal Department of Justice and the British Columbia Ministry of the Attorney General. This federal-provincial collaboration signals a commitment to develop a coherent and cooperative approach to issues in this area within a national framework. Not at all paradoxically, it also reflects a firm commitment to involve ethnocultural communities in the identification of issues and the development of solutions, as suggested in the article on the study of legal problems of clients of multicultural service agencies.

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[1] Within the policy and research framework of the Department of Justice Canada, aboriginal people are not included under the rubric of ethnocultural minority groups. However, the Department currently has a major program of policy development, including research and pilot project activity.

[2] Steven Lewis, Report to the Government of Ontario on race relations in the aftermath of the riots in Toronto, June, 1992.

[3] Law Enforcement and Race Relations in Canada, *The Reid Report*, Vol. 7, No. 7, July/August 1992.

[4] Gallup, Canada Inc., *Focus Groups on Public Legal Information Needs and Barriers to Access*, Department of Justice, Ottawa, 1990.

[5] Brian Etherington, W.A. Bogart, Maureen Irish, and George Stewart, *Preserving Identity by Having Many Identities: A Report on Multiculturalism and Access to Justice*, University of Windsor, 1991.

[6] Colin Meredith and Chantal Paquette, *Survey of Students at Ten Law Schools in Canada*, Department of Justice, Ottawa, 1992.

[7] See issue #6 of *Justice Research Notes* for a review of this study.

[8] Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice*, Report No. 34, Ottawa, 1993.

[9] Minority Advocacy Rights Council, *Gaps in Justice: A Study of Justice Issues of Importance to Ethnocultural and Visible Minority Communities*, Department of Justice, Ottawa, forthcoming 1994.

More Than a Crime: A Summary

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Every woman who is a victim or survivor of wife abuse needs information on her rights and responsibilities under the law. Immigrant women have additional information needs and barriers to accessing legal information. They need to know and understand important legal information on immigration law, deportation, sponsorship agreements, and so forth, if they decide to leave an abusive spouse. This information can be difficult for anyone to obtain. It is even more difficult when a woman cannot speak the majority language and is living in a foreign country. These are just some of the legal information needs of immigrant women examined in the report, *More Than a Crime*, commissioned by the Public Legal Education and Information (PLEI) Program.

In the report, the researcher describes the situation faced by many immigrant women who suffer wife abuse. One of the main reasons an immigrant woman will not report wife abuse is the threat of being deported. Research shows that the majority of women who come to Canada were sponsored by their spouses, which makes these women extremely vulnerable.

> More women than men enter Canada as sponsored immigrants. Abused women who have been sponsored by their husbands may avoid seeking help because they mistakenly believe they can lose their status as a landed immigrant.

In many cases, the abusive spouse may threaten the immigrant woman with deportation if she reports the abuse, or he may tell her that she will lose her status as a landed immigrant if the

Department of Citizenship and Immigration finds out she has left the relationship. And although the few PLEI materials available state very clearly that a woman who is a landed immigrant will *not* be deported if her relationship with her sponsor breaks down, government officials have confirmed that, in some cases, women have been deported despite being landed immigrants.

When a sponsored immigrant woman decides to leave an abusive spouse, she often runs into problems when she applies for social assistance. In situations of abuse, she must prove that the sponsorship relationship has broken down before she can receive financial assistance. The woman therefore must provide proof of abuse. This alone may discourage her from applying. The process itself also tends to take time, delaying access to much-needed benefits especially when children are involved. More research is needed on sponsorship breakdown in cases of domestic violence to provide alternatives to immigrant women who find themselves in this situation.

Language is often indicated as the largest barrier to legal information and services for an immigrant woman coming from a country where neither English nor French is spoken.

> Even if a woman's first language skills are excellent, it will take time for her to learn a new language to feel comfortable enough to ask for assistance. While learning a second language is difficult under the best of circumstances, the situation of many immigrant women can make the challenge insurmountable.

The researcher highlights the need for more PLEI materials written in immigrant women's first languages and in plain language, with the necessary cultural interpretation services to provide support to immigrant women when dealing with the justice and social service systems.

Many other issues and concerns are raised in the study that should be considered when developing legal information for immigrant women. The family, for example, is a fundamental value for many ethnocultural communities. A woman who speaks out against her husband may be viewed as a traitor, and she and her children may be ostracized by her community, leaving her further isolated. An immigrant woman's fear of betraying her family and being rejected by the community may leave her with no alternative, and compel her to stay in an abusive relationship.

The report concludes that there is no questioning the fact that more PLEI materials need to be developed for immigrant women who are victims of domestic violence. Service providers also need more information on the legal implications of a family breakdown. This information must be accessible and provided to immigrant women in their first language, and in plain language. The Department of Justice Canada is working towards this goal. Community consultations on a PLEI document on wife abuse aimed at immigrant women are currently taking place across Canada. A final report based on the information collected in these consultations will recommend what type of PLEI materials should be developed on wife assault to best meet the needs of immigrant women.

The report ends with a literature review of current PLEI materials and other sources of information for immigrant women.

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More Than A Crime: A Report on the Lack of Public Legal Information Materials for Immigrant Women who Are Subject to Wife Assault, by Joanne Godin. Department of Justice Canada, Working Document [WD1994-2e], 1994.

Beyond Hate Propaganda: The Symbolic Importance of Addressing Hate-motivated Crimes

by George Kiefl
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Events occurring in this country relating to hate-motivated crimes and activities of hate groups are astounding and disturbing to most Canadians. For instance, a recent media story reported the existence of a newly formed recording company, Resistance Records (see *Ottawa Citizen*, August 21, 1993: F1), which produces "hate rock" sold in Canada through a Detroit mailing address. While the production and distribution of these forms of hate material is disturbing to Canadians, other kinds of hate-motivated behaviour are also occurring.

The recent study of the justice issues of concern to ethnocultural groups in Canada, conducted by the Minority Advocacy Rights Council on behalf of the Department of Justice Canada (see the issue's introductory article on Multiculturalism and Justice by Ab Currie), identified "hate crimes" as a key issue. As is evident from the responses, however, for ethnocultural groups in Canada hate crimes include much more than the kind of hate propaganda exemplified above. The responses include concern about the existence and activities of hate groups, as well as acts of violence against people and property that are motivated by racism or hatred.

Currently, provisions exist in Canada's *Criminal Code* to combat hate propaganda. These provisions outlaw the advocacy or promotion of genocide, as well as communications that incite or promote hatred. Other forms of hate-motivated behaviour are not specifically addressed as such in the Code. The options, possibilities, and potential problems in addressing this apparent omission became the topic for a research project on hate-motivated crimes.

In producing the project's report, Glenn Gilmour undertook a review of legal and other literature to develop an understanding of approaches and options that may be appropriate in the Canadian legal context. He drew on a review of legal periodicals on the topic of racially motivated violence; information provided by reports from government organizations such as the British Home Office; reports from reform-minded organizations like the Australian Law Reform Commission; information and materials from private organizations such as the League for Human Rights of B'nai Brith; a selective examination of newspaper and magazine articles; and a review of the criminal law in certain foreign jurisdictions - the United States, England, Australia, New Zealand, France, Germany and Sweden - that addresses the topic at hand.

The behaviours in question - violent acts against persons or property such as vandalism and assault - are themselves criminal acts under "ordinary" crimes. The report argues that hate-motivated crimes are different from offences against property and persons that are not motivated by an underlying hatred against some identifiable group of people, and that the different impact of "crime" and "hate crime" on the victim is important.

In comparing a typical crime with a hate-motivated crime, there is a difference in the method of victim selection that is related to the offender's motivation in carrying out an offence.

In hate-motivated crimes, victims are selected on the basis of their membership, whether real or imagined, in some identifiable group. The effect on the victim is therefore different for the victim as well as for the group to which the victim belongs. This is echoed in the results of the study of ethnocultural organizations, where respondents indicated that hate crimes negatively impact people's sense of personal security: the victimization of people based not upon their actions or behaviours but upon their membership in a group engenders fear that impacts their sense of personal security and their ability to participate fully in society.

Based on these kinds of considerations, the report suggests that Canada needs to take some form of legislative action that would distinguish hate-motivated offences from typical *Criminal Code* offences. The author explores the possibilities for doing so through the criminal law. He does not venture so far as to make specific recommendations on how this should be undertaken; rather, he carefully delineates the options available for doing so, including a number of related measures such as the collection of national data on the incidence of hate-motivated crimes.

Two options offered in the report that have generated much discussion are the creation of a specific provision in the criminal law that would make hate-motivated behaviours a crime in themselves, and the provision of sentencing principles in the criminal law that identify hate motivation as an aggravating factor to be accounted for at sentencing. It may not be important which option is adopted, as long as one is implemented. That is, given Canada's multicultural heritage and the explicit policy of multiculturalism, it is important to symbolically recognize the difference between typical crimes and hate-motivated crimes, and to offer Canada's ethnocultural and visible minority communities the protection of the criminal justice system. Beyond the importance of this symbolic recognition, it is also argued that the law could have other beneficial effects through, for example, the educative function of law. Furthermore, given the impact of hate-motivated offences on people's sense of personal safety, the symbolic effect of a hate-motivated provision in the criminal law might have an important impact on people's sense of personal security and thereby have a positive impact on their ability to participate fully in Canadian society.

It would seem, then, that it is important to somehow address the gap in Canadian law, which recognizes some forms of hate crimes (i.e., hate propaganda) but not others (i.e., personal and property violence). How this is to be done is a policy issue, but the need for such an undertaking seems clear. However, it may well be that a criminal law amendment will have largely only a symbolic effect - which is not to downplay the importance of such an effect, but to indicate that the adoption of criminal law provisions in themselves may not have any great impact on the level or degree of hate-motivated crimes. Other avenues for addressing expressions of racist hatred likely will be needed to effectively reduce the amount of hate-motivated offences in this country. These range from educational programs to other legal options. Educational programs, for example, could be undertaken in schools to combat the recruitment of youth to organizations that espouse violence against minority groups. Other legal options could include the

use of civil remedies in cases of hate-motivated behaviour, so that the offended group could recoup monetary penalties from the offender and use the monies to promote respect, tolerance and acceptance, to provide restitution to the victim, or to improve safety and security for their community.

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Hate-Motivated Violence, by Glenn Gilmour. Department of Justice Canada, Working Document [WD1994-6e], 1994.

The Jury Selection Process in Canadian Criminal Cases: The Impact of Processes and Procedures on Representation as Justice System Participants

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At face value, representation and participation in the jury selection process may not seem to be a pressing issue. Racism and hate crimes, for example, may be viewed as more important or more pressing problems since they more directly affect people's day-to-day lives by limiting their ability to participate fully in society because of the direct impact of being victimized and by less direct effects such as fear of hatred and racism.

Participation in the justice system through jury duty, however, is an important element of full participation in any society. The justice system represents that locus where the society's values are expressed and defended, where the ideals of fairness, dignity and equal treatment are espoused and upheld, and where people may go to exercise or reaffirm their rights and achieve redress for wrongs they have suffered - all important elements of full participation in society.

The research report, *Multiculturalism, Representation and the Jury Selection Process in Canadian Criminal Cases* by David Pomerant, offers a thoughtful and careful examination of the jury selection process in Canada for criminal cases. The system is characterized as comprising a four-part process. The first three stages of the process fall within provincial jurisdiction and complete the out-of-court procedures employed in the selection of juries, while the fourth stage is a matter of federal jurisdiction and is played out in court. These four stages are: the assembly of source lists of persons who may be qualified to serve as jurors; a determination of those persons on the source list who are and are not qualified to serve as jurors; the selection, from among those qualified, of a panel of potential jurors to be summonsed to appear in court for selection as trial jurors; and the actual in-court selection of members of a criminal jury.

Based on a review of research, case law, legislation, and opinion, the author identifies a number of areas of concern with, and some possible reforms to, the jury selection process with respect to the participation and representation of ethnocultural and visible minorities in Canadian society.

The present system, relying on original source lists, may be biased in the first instance owing to a lack of representation in the lists from which the process begins. These lists - different provinces use different lists, such as electoral lists and hospital insurance lists - are not necessarily representative of the diverse community living in any province. In fact, they may systematically, even if inadvertently, exclude certain segments

of the population. Two related reforms are suggested: the adoption of a consistent approach across the country, and the development of clear criteria for representativeness that would include representation for racial, ethnic, visible, and cultural minorities.

There is also concern with the qualification, disqualification, and exemption of prospective jurors. Once the source list is drawn, provincial officials undertake to eliminate those people who may be on the list but who are (a) otherwise disqualified from jury service, and (b) exempted from service - there are automatic exemptions in legislation and people also may apply to be exempted. On one level, a consistent approach to qualification, disqualification and exemption is suggested, based on a clear statement of principle of representativeness. On another level, the report argues that juries could more nearly approximate a cross-section of the population if the categories of people qualified for jury selection were broadened, and the categories of people exempted from service were minimized. As well, it is suggested that there should be mechanisms whereby interested parties could verify their inclusion or exclusion, and individuals or groups could remedy their exclusion.

Once the source lists have been adjusted through exemptions and disqualifications, jury panels are randomly selected for the purpose of being summonsed to court for selection as actual jurors. The reliance on random selection, however, may not be the most appropriate means of ensuring representation of all members and segments of a diverse society. The technique of random selection is premised on the assumption of homogeneity in the population being sampled. If the assumption is appropriate, a random sample drawn from a homogeneous population should produce a representative sample. However, in a heterogeneous population, a random sample is likely to underrepresent those portions of the population that are, to begin with, relatively underrepresented. Assuming that representativeness is a worthy goal, the reliance on random selection as the method for summonsing qualified jurors is somewhat problematic. The adoption of other, more appropriate selection methods such as "cluster" or "stratified" sampling, which would help ensure that all elements of society are afforded a more realistic opportunity to be included in the jury selection process, is a possible solution to this problem.

The author also finds much concern with the in-court procedures surrounding "challenges". The "challenge to the array" allows participating lawyers to challenge the adequacy of those summonsed to court. The only grounds for challenge, however, are fraud, wilful misconduct or partiality on the part of the person charged with assembling the jury panel. This is a restriction against challenging systematic exclusion of groups of people, and this thereby precludes an open admission that the jury selection process may suffer from processual problems in attaining the stated goal of representation. The "challenge for cause" refers to the procedure whereby lawyers are given the opportunity to ask prospective jurors if they are in any way partial or otherwise unfit to stand as a juror. While this challenge would not appear to be problematic in itself, given that it is done in open court and that impartiality is a long-standing and important goal of the jury selection process, there are limitations on the kinds of questions that may be asked regarding things such as racial prejudice. The author suggests that public perceptions of the fairness of the process likely would be improved and the interests of minorities better served if the restrictions on questioning in challenge for cause were relaxed.

The "peremptory challenge" allows the lawyers present to by-pass a person called forward to

serve, without question or explanation for so doing. In an adversarial system where the aim is to best serve one's client, the reason for invoking the peremptory challenge may at times be other than the legal justification of attaining an impartial jury. It is not unreasonable to assume that there are times when members of ethnocultural and visible minorities could be peremptorily challenged for reasons beyond their impartiality. This kind of procedure, even if it only gives the impression of bias or discrimination in the selection of jurists, is problematic, and it is suggested that the abolition of the peremptory challenge be considered.

In summary, the concerns raised in this report about the current jury selection process in Canada give reason to believe that the process does not fully meet the enunciated goal of representation. On face value, there is some reason to believe that, however inadvertent, discrimination and bias against ethnocultural groups may play a role in the procedures and processes that govern the selection of criminal juries in Canada. How the jury selection process could be changed to more accurately reflect Canada's heterogeneous population is therefore an important question. In this regard, there are at least two general interpretations available for "representation" in the context of the jury selection process. These interpretations correspond to two locations within the process where one could look to find representation: the pre-court processes, and the courtroom jury itself.

Of these two choices, the report suggests that the proper goal would be to ensure full representation of all segments of society in the processes that create jury panels (i.e., the provincial procedures that culminate in the summonsing of groups of people for appearance in court), not in the actual make-up of trial juries. Efforts to achieve full representation in actual trial juries, according to this view, would amount to "engineering" the composition of juries, and this is problematic for a number of reasons. Engineering is contrary to the Supreme Court of Canada's position with respect to the dual goals of impartiality and representation. From this perspective, the goal of representation could be met through the pre-courtroom processes while the in-court stage would ensure impartiality, and impartiality might be compromised if in-court engineering were allowed to take place. It is also argued that, practically, such engineering would be difficult to accomplish and, given that challenges are an existing component of the system of jury selection, it would be impossible to guarantee that engineered juries would be the actual outcome of the process.

On the other hand, it has been suggested that representation should apply to actual juries and not just the sources of jury panels, and that engineering is an appropriate method of accomplishing this. Some would go further and suggest that the idea of representation should be taken to mean that the accused in any given case has the right to be tried by a jury composed, at least on a proportionate basis, of members of his or her particular ethnic group. Typically, this kind of approach is not suggested for all cases involving a criminal jury. Rather, it has been suggested for specific kinds of cases where, for example, there was racial motivation in the commission of a crime, or where the case involves actions on the part of justice system participants towards a member of an ethnocultural, visible or ethnic minority.

As initially suggested, it could be argued that representation and participation in the jury process is not as pressing or important a problem as hate crimes or racism. The jury selection process, however, is an important issue: in the selection of Canadian criminal juries, the process is in part premised on an assumption of homogeneity, as evidenced by the reliance on random

selection. The appropriateness of this assumption is questionable, given Canada's multicultural heritage and the increasing diversity of the population. As such, the jury selection process poses a significant problem: it helps demonstrate how institutional bias - however inadvertent, and however manifested in the law or the processes and procedures of justice - may adversely affect the ability of minority groups to participate fully in society's system of justice.

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Multiculturalism, Representation and the Jury Selection Process in Canadian Criminal Cases, by David Pomerant. Department of Justice Canada, Working Document [WD1994-7e], 1994.

Ethnocultural Minorities in B.C. Correctional Facilities

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In Canada, the United States and the United Kingdom, allegations of bias in the criminal justice system are not uncommon. These allegations may be directed at any point in the criminal justice process: jury selection; court personnel, prosecutors and judges; sentencing; alternatives to incarceration; and parole. Suggestions of bias are sometimes countered by claims that certain groups of people are simply more disposed to commit crimes. For example, reports of gang crime, involvement in prostitution, and other ethnocultural crime have received steady attention in the Canadian media over the last few years, and tend to support this view.

Charges of justice system bias range from allegations of overt racism to more subtle evidence of "adverse effects" discrimination - policies that are appropriate for one group (usually white, nonimmigrant males) but have adverse effects on others. Unfortunately, when evidence points to phenomena such as the overrepresentation of ethnic minorities in prisons, it is difficult to determine the root cause. Overrepresentation, when it occurs, may be the result of differential sentencing practices, but these in turn could result from factors operating at a number of prior discretion points in the criminal justice process: the bail/remand process, or even police practices that could lead to a higher level of attention being paid to activities in certain neighbourhoods or crimes committed by certain groups of people.

In short, high levels of incarceration of people from ethnocultural or visible minority groups may be caused by any number of factors, including racist stereotyping, or more subtle policies that fail to accommodate either the needs of diverse groups, or to take into account factors such as poverty or social power relations, which result in certain groups being more heavily involved in certain crimes. Little empirical research has been done in Canada on systemic bias at discretion points in the criminal justice system, so there is little basis for speculation.

Conversely, if the rate of incarceration of ethnocultural minorities reflects the proportion of the population as a whole, one may speculate that the foregoing factors either are not significant in the particular population or that they are counterbalanced by powerful contrary influences, such as the resources of the particular community, the presence of strong networks within it, or its "institutional completeness", which protect this population from the damage of racist stereotyping and noninclusive policies.

The research that is the subject of this review was conducted with funding support from the Department of Justice Canada and in collaboration

with Simon Fraser University and the John Howard Society of British Columbia. The Province of British Columbia gathers very limited statistics on the ethnocultural characteristics of its correctional facility population; this research was intended to address this gap in information. The specific objectives were to:

- ▲ develop an ethnocultural profile of British Columbia's adult prison and youth detention centre population;
- ▲ determine whether there are problems in the adult prisons and youth detention centres that are related to ethnicity; and
- ▲ identify options for addressing any problems that emerge.

A census was taken of all adult men, women, and juveniles incarcerated in B.C. correctional facilities at 6:00 a.m. on April 5, 1993. At that time, there were 1,952 people incarcerated. A sample of 519 inmates were interviewed, representing 26.6 percent of the total population. The major findings of the research include the following points.

- ▲ Most of the inmates were male (1,843 or 94.5 percent), and were born in Canada (1,703 or 87.2 percent), and of these approximately one half were born in British Columbia (992 or 50.8 percent).
- ▲ The majority of prisoners were Caucasian (72.5 percent), and the next largest category was aboriginal (18.9 percent versus 5.2 percent of the general population). Representation in the remaining ethnocultural categories was relatively low.
- ▲ The major categories of nonaboriginal ethnocultural inmates were Asian (3.1 percent of the inmate population), black (2.1 percent), Hispanic (1.8 percent), and Indo-Canadian (1.7 percent).
- ▲ Nonaboriginal ethnocultural groups (Asians, blacks, Indo-Canadians, and Hispanic people) are significantly underrepresented in B.C. correctional facilities. The 1991 census data indicate that these categories make up approximately 14 percent of the B.C. general population; however, only 8.2 percent of the incarcerated population were in these ethnocultural categories.
- ▲ The total representation of immigrant inmates was 12.8 percent, compared with 22.3 percent in the general population of British Columbia, indicating an underrepresentation of foreign-born inmates.
- ▲ Distribution of staff across ethnocultural categories was similar to distribution of inmates except for the aboriginal category, where there was a serious underrepresentation of aboriginal staff.

An underrepresentation of foreign-born and visible minority inmates may suggest a lack of systemic bias in the criminal justice system vis-à-vis these groups. However, underrepresentation could occur in spite of systemic bias: bias could occur at certain discretionary points and be corrected or reversed later in the criminal justice process. More research on discretionary points in the Canadian justice process is required in order to conclude that systemic bias is not a problem.

The results of the census suggest that there are no glaring injustices or other major problems of an ethnocultural nature within British Columbia's provincial correctional centres at this time. Programming for aboriginal inmates is quite extensive throughout British Columbia. Serious incidents related to racism or discrimination are very rare. This situation is a credit to correctional centre staff and management, most of whom seem to be doing their best under circumstances that are often very difficult.

Nevertheless, some existing and generally beneficial initiatives could be strengthened or expanded, and some new ideas explored, to eliminate some of the concerns expressed by inmates

and staff and to improve the current generally favourable situation. Program solutions emerging from this research could include increased attention to ethnocultural issues in the recruitment, hiring and training of staff in correctional facilities, and a review to determine whether the cultural needs - particularly religious needs - of nonaboriginal inmates are being adequately addressed.

The research suggests that most ethnocultural categories are underrepresented in British Columbia's correctional facilities. However, this finding must be interpreted cautiously, given the limitations of a one-day census. Furthermore, the population of correctional facilities is simply one indicator of the presence or absence of systemic bias. Additional research is needed to determine whether bias may be occurring at other discretionary points in the justice process.

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Census '93: The Report on the 1993 Census of Provincial Correctional Centres in British Columbia, by Robert M. Gordon and Jacquelyn Nelson. Ministry of the Attorney General of British Columbia, 1993.

Overcoming Barriers: Addressing the Legal Information Needs of Immigrants

by Sharon Bowles
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Immigrants face a variety of challenges in adapting to life in Canada - not the least of which is the need to develop an understanding of the political and legal systems of their new country. But for many newcomers, there are barriers to obtaining information about the law. These barriers may arise because of language difficulties, time constraints because of work and family obligations, or simply because of lack of knowledge about the availability and sources of legal information.

In 1992 the Department of Justice Canada and the British Columbia Ministry of the Attorney General undertook a research project to identify and address the barriers facing immigrant Canadians in seeking information on the law and the Canadian legal system. The research project, entitled *Discovering Barriers to Legal Education: First Generation Immigrants in Greater Vancouver*, was conducted by Dr. Brian Burtch and Kerri Reid of Simon Fraser University for the People's Law School of Vancouver. The research consisted of face-to-face interviews with 300 individuals from five immigrant communities. An equal number of male and female participants were drawn from the Punjabi, Chinese, Hispanic, Vietnamese, and Polish communities. For comparison purposes, one-half of those interviewed for the study had attended free law classes(FLCs) sponsored by the People's Law School, while the other half had not.

The survey collected information on a wide range of issues related to the legal information needs of the participants. It also involved the collection of socio-demographic information on the participants, including their years of residency in Canada, educational attainment, and occupational status.

Survey Findings

Although each of the immigrant groups identified common barriers to accessing legal information, there were significant differences among the five communities as to the degree to which each was perceived to be an obstacle. Vietnamese respondents, for example, more frequently cited child-rearing responsibilities and transportation costs as barriers to legal education than did Punjabi respondents. Polish and Hispanic respondents were more likely to identify the complexity of the law and lack of knowledge about sources of legal information as significant barriers than were their Punjabi counterparts.

Taken as a whole, the most frequently cited barriers were:

- lack of English-language skills;
- the complexity of the law and legal terminology;
- lack of knowledge about sources of legal information; and
- lack of time because of work and family responsibilities.

Study participants also provided a variety of suggestions on how to reduce barriers. They included:

- more free law classes on more topics and in more locations;
- class presentations in a variety of languages and more written materials in languages other than English and French;
- the provision of child-care services at classes;
- greater use of the ethnic media, including newspapers, TV and radio, both for the purpose of publicizing legal education events, and to provide legal information.

An additional noteworthy study finding was that involvement in public legal education activities may have a positive benefit, not only in terms of providing immigrants with legal information specific to their concerns, but also in assisting with the settlement and adaptation process. By providing knowledge of the new country's legal system, public legal education activities may help to reduce immigrants' feelings of isolation, and thus may prove to be empowering.

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Discovering Barriers to Legal Education: First Generation Immigrants in Greater Vancouver, by Brian Burtch and Kerri Reid. Department of Justice Canada, Working Document [WD1994-3e], 1994.

Complaint and Redress Mechanisms in Cases of Racial Discrimination: Problems, Concerns, and the Need for Improved Proactive Approaches

by George Kiefl
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The ability to affirm one's rights and achieve, in an open and public forum, redress for wrongs suffered, is an important aspect of a just and fair society. The adequacy of mechanisms and policies by which discrimination on the basis of race, or ethnic or national origin, can be assailed and remedied is the subject of *Complaint and Redress Mechanisms Relating to Racial Discrimination in Canada and Abroad* prepared by the University of Ottawa, Human Rights Research and Education Centre.

The report examines and evaluates a broad range of complaint and redress mechanisms in terms of their impact on discriminatory practices - processes ranging from human rights commissions to civil law remedies - and includes sections on the two specifically targeted problems of hate propaganda and labour legislation. The project involved a review of federal and certain provincial mechanisms, namely those of Nova Scotia, Quebec, Ontario and British Columbia; as well, other provincial and municipal policies and mechanisms were included where appropriate. Further, to provide context and comparison, the authors undertook a less extensive review of approaches adopted in other foreign jurisdictions: the United States, Sweden, Australia, the United Kingdom. Generally, each chapter of the report focuses on one specific mechanism in place to address racial discrimination.

Concerning federal and provincial human rights commissions, the researchers undertook a survey of available statistics on complaints and determined that very few racially related complaints are made under human rights legislation. Also included is an exploration of the grounds for this finding, as well as a review of studies into the effectiveness of commissions in addressing racial discrimination complaints.

The next chapter describes and analyzes trends in Canadian case law, including human rights and Charter cases, but excluding cases dealing with hate propaganda. This survey of trends includes, but is not limited to, a description and analysis of the range of remedies awarded by tribunals and courts. The following chapter deals with hate propaganda in a similar manner.

Tendencies in the area of private legal actions seeking compensation for discrimination are also reviewed. Here, it is noted that the Supreme Court has held that human rights commissions have exclusive jurisdiction over such actions in every province except Quebec, but also that certain exceptions have been made to this rule. Charter arguments that could be used to challenge this rule of exclusivity are also explored.

Current and potential methods for using alternative dispute resolution processes for resolving complaints of racial discrimination (and, of necessity, other types of human rights complaints) comprise a separate chapter.

Employment equity and how it works against discrimination in the workplace is also examined in detail. A historical overview of the development of employment equity initiatives is presented, as well as a detailed description and examination of employment equity legislation and policies adopted in federal, provincial and municipal jurisdictions.

Contract and subsidy compliance mechanisms also comprise a chapter of the report. These mechanisms are described, and an analysis is included of the antidiscrimination provisions in government contracts and subsidy agreements to discourage discrimination through the government's buying and spending power.

Also included is a chapter on federal and provincial employment standards legislation and policies. The focus here is on the adverse impact that these have on racial and ethnic minorities. Discrimination is often embedded in the assumptions and choices made in the legislation, and the remedies provided by the legislation itself usually do not adequately protect workers. Selected areas of concern include statutory holidays, hours of work, minimum wage, and termination of employment.

A separate chapter focuses on the role of ombudsmen in combatting racial discrimination, and on how human rights commissions and other products of federal and provincial legislation may be more effective in fighting such discrimination. In the chapter's conclusion, the two mechanisms are related by suggesting that ombudsmen offices could be an avenue through which multicultural legislation and policy could be made more effective.

Another chapter describes and analyzes Canadian Radio-Television and Telecommunications Commission licensing policies used to combat racism in broadcasting, and what effect such policies have on racial and ethnic minority broadcasting.

The final three chapters turn to approaches taken in other jurisdictions. Included are a chapter on civil remedies arising from private race discrimination suits in the United States; a discussion of the history and current status of the offence of group defamation in the United States; and a study of international (Australia, United Kingdom, Sweden, Netherlands, Germany, and France) criminal and civil law mechanisms aimed at combatting and eliminating racism.

Overview

The review of international approaches demonstrates that different countries have developed a variety of legislative structures and policy strategies to combat racism and racial incidents. There seem to be two different general approaches, depending on the degree of homogeneity of the country in question. Some countries are relatively homogeneous and the response to racist incidents in these countries has been, in large part, to focus on immigration rather than on the prevention of racial discrimination and the evolution of racist ideas. Others, including Canada, recognize themselves as countries of immigration and diversity, and their response has concentrated more on prevention of racist incidents through legislative measures and policies. However, the report shows that these measures have been ineffective: they have not substantially reduced the incidence of racial discrimination.

This ineffectiveness has arisen out of the history of the development of anti-racism mechanisms: while conceptions of the origins and problems of discrimination have changed, most of the mechanisms used to fight discrimination have not. When policies and programs were being developed, discrimination was viewed primarily as being grounded in individually based overtly discriminatory acts; current conceptions, however, de-emphasize overt discrimination and recognize covert, more institutionally based discrimination. The mechanisms developed to deal with overt discrimination generally call for individual complaints and a case-by-case treatment of complaints. This has led to backlog and slow processing of complaints, as well as

difficulties in addressing problems that are covert in nature. Furthermore, backlog, delay, and outdated remedies have discouraged victims from pursuing complaints, which further compounds the problem.

Even in light of some proactive changes, such as employment equity and compliance legislation, problems still remain with the Canadian antidiscrimination system. These are usually rooted in a lack of authority to enforce provisions of the legislation, or in a lack of awareness of its ultimate effects. Ultimately, the authors argue:

> An effective anti-discrimination system must be a concerted effort at all levels, and one that recognizes the lessons of the past. There is no one mechanism that can adequately address all the issues raised by a problem as multi-faceted as racism. There must be efficient individual redress systems, backed up with realistic burdens of proof and sufficiently onerous penalties to deter offenders. There must be ways to identify and address adverse effect discrimination in our current legislation. There must be effective systemic remedies that recognize the inequities of the past, and serve to offer a remedy for the future.

Furthermore, the authors point out that education is an essential element of any attempt to eliminate the harmful effects of discrimination. Educative efforts must be undertaken to counteract the underlying factors that lead to discrimination, and to increase public awareness about rights and remedies.

In summary, this report offers a comprehensive examination and description of a wide range of antidiscrimination complaint and redress mechanisms in Canada, and does so with reference to what is taking place in other jurisdictions. The overall evaluation of this loose system of antidiscrimination measures is not positive, but maintains a degree of careful optimism. The suggestion that education should play a central role in any effort to address racial and ethnic discrimination in this country highlights the need to take proactive measures in addressing problems faced by Canada's rich and diverse ethnocultural, racial, and visible minority communities.

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Complaint and Redress Mechanisms Relating to Racial Discrimination in Canada and Abroad, by the University of Ottawa, Human Rights Research and Education Centre. Department of Justice Canada, Working Document [WD1994-9e], 1994.

Multiculturalism and Justice: The Work of the Law Reform Commission and Beyond

by George Kiefl
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In 1992, the Law Reform Commission (LRC) of Canada was disbanded by the previous government. At that time, the Commission was working on a reference from then Minister of Justice Kim Campbell. The reference stipulated:

> It is desirable in the public interest that special priority be given by the Law Reform Commission to a study of the *Criminal Code* and related statutes and the extent to which they ensure that: a) aboriginal persons and b) persons in Canada who are members of cultural or religious minorities have equal access to justice, and are treated equitably and with respect.

The Commission had opted to address the reference in two stages, treating aboriginal and ethnocultural minority issues separately. A

report on the aboriginal aspect of the reference was completed and released (Report #34, *Aboriginal Peoples and Criminal Justice*), but work on the ethnocultural aspect was still in progress at the time of the Commission's demise. A variety of papers had been produced by and for the Commission in relation to the ethnocultural component of the reference, and these were transferred to the Department of Justice. These thirty-odd papers were in various stages of preparation, ranging from brief, preliminary descriptions to fairly well-developed drafts on specific issues. It was felt that policy and research needs would be served by reviewing, compiling, and organizing the LRC work in the area of multiculturalism and justice.

The report, *Review of Multiculturalism and Justice Issues: A Framework for Addressing Reform,* by Brian Etherington, offers a review and synthesis of LRC papers as well as other multiculturalism and justice reports produced through Department of Justice initiatives in this area. In producing the synthesis, he also drew upon studies and reports available from other sources such as academia and nongovernmental agencies. Following is a description of the report which was prepared for the Department of Justice Canada in 1993.

In reviewing the LRC documents, it became clear that the focus of these materials was on the criminal justice system - the direction laid out in the Minister's reference - rather than on the justice system more generally. The report is therefore also somewhat focused on criminal justice issues; but, as the author argues, such a focus represents a potentially harmful imbalance. First, it produces a juxtaposition between the problems experienced by minorities and the criminal justice system, which may create an association between ethnocultural groups and criminal behaviour. Second, such a focus may serve to downplay and minimize a variety of factors that have an impact on the lives of ethnocultural minorities, such as structural or systemic discrimination and racism.

With this in mind, the author argues that the most important shared finding from the many documents reviewed is that "members of many racial and ethnic minorities have strong perceptions that they are discriminated against by the criminal justice system." These kinds of perceptions, however, are supported largely by specific incidents rather than empirical evidence. The "crippling dearth" of research on ethnocultural minorities and the criminal justice system in Canada does not deny the existence of this perceived problem; rather, it makes for a weak knowledge base concerning the nature, extent, scope, and sources of discrimination and racism in the system. Without such knowledge it is difficult to address problems effectively, and a more empirical basis from which to develop strategies, policies and programs would therefore be recommended.

Beyond this overriding perception, the report turns to a development of recognized issues: research issues, issues relating to all aspects of the criminal justice system, and noncriminal justice issues. The research issues highlighted in the report include those relating to the need for empirical research regarding possible overrepresentation of minorities in the criminal justice system; problems arising from difficulties in proving racism or discrimination in the operation of various aspects of the justice system; and a discussion of the validity, merit, and potential problems of different research methodologies and forms and sources of data on the subject of multiculturalism and justice.

As noted, criminal justice system issues constitute the bulk of the report. The issues here are categorized under the rubrics of justice system procedure and administration, and substantive criminal law. The first deals with the impact of

the criminal justice system on members of minority groups as offenders and victims. Aspects discussed include: the police; the courts, including prosecution, defence and the judiciary; the jury selection process; and corrections. The main interest here is on points of discretion in the system and measures for obtaining more culturally sensitive and nondiscriminatory exercise of discretion within the criminal justice system.

The second categorization looks at issues arising from the substantive criminal law, the definition of what constitutes criminal behaviour and what may constitute a valid defence, justification or excuse against criminal responsibility. Within this category, two main types of issues are discussed: those that arise when cultural or religious practices are in conflict with Canadian criminal law (an example would be the practice of female genital mutilation), and those arising from the need to protect ethnocultural minorities from discriminatory, racist or violent behaviour on the part of others - such as hate propaganda and hate-motivated violence.

Concerning noncriminal justice issues, the report shifts its focus to the civil justice system, and acknowledges that many issues are substantially the same as those discussed with regard to the criminal justice system, but in a different context. The concerns continue to be with problems such as discrimination and racism, whether they be intentional, or systemic or institutional, as well as problems associated with "two-way ignorance" - the ignorance of members of the justice system regarding ethnocultural minorities, in tandem with ignorance on the part of members of minority communities about their legal rights and responsibilities, about the available avenues of complaint and redress, and about the law and the legal system generally. More specifically, the report looks at issues relating to family and custody law; employment discrimination and employment equity; dispute resolution; public legal education and information; the immigrant experience, including refugee determination; access to training, employment and social services; domestic workers; and, last but not least, youth.

Lastly, the report discusses the shortcomings of past approaches towards multiculturalism and justice issues. Basically, it argues that an overriding emphasis on race and ethnicity may not be the most fruitful means of understanding the issues or adequately addressing problems. The barriers to access to justice and equitable treatment for ethnocultural communities in Canada go beyond those of race and ethnicity. A multi-factor understanding and analysis is recommended - one that looks at and incorporates not only minority status derived from racial, ethnic or religious background, but also from other variables such as gender, age, and class. This would lead to a much better understanding of the problems (and their sources) experienced by newcomers and minorities in relating to the Canadian legal system and legal culture. Furthermore, some members of ethnocultural minority communities may be doubly or triply disadvantaged because of age, gender, or socio-economic status. The report urges the reader to take a wider view of the problems of multiculturalism and justice, and to appreciate the fact that many people who find themselves disadvantaged do so not only because of barriers encountered as members of a minority, but also for a variety of other reasons, and this often leads to compounded disadvantage.

The report is an important step in the development of the literature on multiculturalism and justice. It offers an enumeration and a synopsis of recognized issues that arise from the intersection of the two, and it develops these issues in a framework based largely on the divisions and functioning of the justice system in Canada. In this manner, the report serves both as

an excellent overall review of the issues, and as a reference work for those interested in specific areas of the law and the justice system. As well, the discussion of research issues and problems, and the argument for a more comprehensive, multi-factor approach to the topic of multiculturalism and justice, make the report a beneficial read for everyone interested in this often difficult and always important area of policy and research.

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Review of Multiculturalism and Justice Issues: A Framework for Addressing Reform, by Brian Etherington. Department of Justice Canada, Working Document [WD1994-8e], 1994.

Justice and Legal Problems Faced by Recent Immigrants in Vancouver: A Case for Linkages Between the Justice System and Ethnocultural Organizations

by Ab Currie, Chief, Access to Justice Research Unit, Research Section and George Kiefl, Research Officer, Access to Justice Research Unit, Research Section

Background

The nature of ethnic diversity in Canada continues to change as the proportion of immigrants in the total population, particularly in large cities, continues to increase. As the ethnocultural diversity of the country increases, the issue of integration into the society for the relatively large stream of newcomers is becoming a public policy issue of increased importance. The problem of integration into the host society is rarely discussed in terms of the justice system: integration is more commonly discussed in terms of employment, housing, education and training, or language acquisition, to take a few examples. However, the justice system is a key social institution. There are legal issues relating to most if not all other aspects of integration. Basic knowledge about the laws that affect our lives and of how the justice system operates, a knowledge of Canadian legal culture and how the system can be expected to react to certain offences such as impaired driving or family violence, the ability and the inclination to seek the protection of the justice system as a victim, the inclination to cooperate with the justice system as a witness or a jury member, a knowledge of one's rights and how to assert them - all are important tools for integrating into the new society. It could be said that integration into the justice system provides some of the tools necessary for integration with respect to other social institutions.

The justice system is a central social institution within society. Even though justice issues may not reflect the same immediate needs as housing and employment, the concept of justice carries powerful symbolic value. It represents the basic values of fairness, equality, and treatment with dignity by a powerful state and private organizations. This is particularly important in an era in which "rights consciousness" has emerged as an important aspect of our legal culture. For immigrants and minorities, the perception of fair and equitable treatment, and treatment with dignity, represents integration into the society; the absence of such perception represents alienation from the society and conflict between minorities and dominant groups. To the extent that this reasoning holds true, the justice system bears a major responsibility for promoting the integration of immigrants and minorities into the society

by assuring fair and equitable treatment and access to the protection of the law to all members of society.

There is a dearth of systematic data concerning the legal and justice-related problems of immigrants and members of minority groups. Therefore, it is difficult to gauge the nature and scope of the issues that appear to require solutions. The justice system does not routinely gather data on the ethnic origins of those with legal problems. To more clearly understand the nature of social-legal issues, and to minimize the risk of defining them as problems with potentially ill-defined solutions, it is necessary to develop this information using "stand-alone" research studies. This was the impetus for this study which was carried out by Richard Nann and Michael Goldberg.

Contacts by Department of Justice Canada officials with several multicultural service agencies during 1990 revealed that many clients of these agencies were seeking assistance with legal problems. This presented an opportunity to gather data that would provide an exploratory and descriptive view of the justice-related problems faced by immigrants and members of minority groups who are clients of these agencies.

Methodology

A study was conducted in collaboration with five of the major multicultural service agencies in the Greater Vancouver area. It had been learned through previous contacts with these organizations that many clients came to them for assistance with legal problems. The study employed the service transactions between agency workers and their clients to collect data on the clients, their legal problems, and services provided to them. Thirty-six agency workers from the five multicultural service organizations collected data for the project throughout February 1992. Service workers employed two research instruments to collect the data: a client profile sheet and an interview schedule.

A total of 4,516 client profiles were recorded. Basic information was collected on all clients who came into contact (either in person or by phone) with a participating service worker during the study period. The data collected included basic demographic information on each client's age, gender, ethnic background, legal status, last country of residence, time spent in Canada, and language use. As well, data were collected regarding the type of contact made by the client, whether the client had prior contact with the agency, the nature of the client's request and problem, and the service provided to the client to address his or her problem.

The interview schedule was used in face-to-face interviews with a sub-sample of clients selected from those who had indicated a legal or justice-related problem through the client profile portion of the study. The sub-sample was drawn by asking such clients if they would be willing to be interviewed. In all, 308 interviews were conducted. The interviews provided the opportunity to further probe the client's general knowledge and awareness of legal problems, legal processes and available legal services, and the reasons the client came to a multicultural agency rather than some other legal service agency for help. As well, data were gathered regarding the client's educational background, his or her command of the English language, and whether he or she had previous contact with the justice system in any capacity, such as a victim, defendant, or witness.

Summary of Findings

Following is a brief synopsis of the research results, focusing on the clientele of the multicultural service agencies, the legal problems encountered by them, and their reasons for approaching a multicultural services agency with legal problems.

Client Profile

The majority of the client group studied were of landed immigrant or refugee / refugee claimant status (68 percent). It is not surprising, therefore, that the majority of clients had been in Canada less than three years (57 percent). These findings were to be expected, however, given the nature of the participating service organizations: they primarily provide service to newcomers who find themselves in the often difficult process of settlement in, adjustment to, and integration into Canadian society.

One of the most striking results of the study was the wide diversity of the client population: clients reported a total of 67 different ethnic backgrounds. Eighty-four different countries were identified as the previous country of residence. Thirteen different languages were reported by clients as their first language.

The majority of clients in this study were between the ages of 25 and 60 (69 percent), while the smallest category was under 25 years of age (9 percent). The client group was fairly evenly split between males and females.

Profile of Legal Problems

The research revealed a very large proportion of clients who were in need of information or assistance with a legal or justice-related problem. Three quarters (75.6 percent) reported at least one problem with a legal aspect. This represented a total of 3,754 problems with a legal or justice aspect reported by the 4,516 clients studied. By extrapolation, more than 45,000 requests for some sort of legal or justice-related assistance would be made to these five multicultural service organizations alone over the course of one year.

The study also provided evidence on the types of legal and justice-related problems faced by the clients of these agencies. The majority of reported problems fell about equally under the categories of administrative law (46 percent) and civil law (45 percent). Relatively few legal problems fell under the criminal law category (9 percent).

Four types of problems were most frequently reported. The most commonly reported justice-related problem, falling under the category of civil law, related to immigration or refugee status (21.5 percent). This is perhaps not surprising, given that the participating service agencies deal primarily with immigrants and refugee / refugee claimants. The next most commonly reported problems, all falling under the category of administrative law, were difficulties with federally administered programs such as Unemployment Insurance (17.8 percent); problems with tax filing (15.6 percent); and problems with provincially administered programs such as Worker's Compensation (12.6 percent). Beyond these four main categories, no other recorded problem comprised more than 10 percent of total reported problems.

Services Provided

The most common service provided by the agency workers was the provision of public legal information, which assisted clients in understanding the legal aspects of their problems, and in obtaining further information or advice. The next most common service was referral to an outside agency, such as a legal-aid clinic, a tax clinic, a government department, or another voluntary social service agency. Less frequent services provided, but still common, were counselling and interpretation of documents.

Of all the services provided, referral to a legal-aid clinic could be taken to indicate some of the more serious legal problems presented to the participating service workers. In all, 141 clients were referred to a legal-aid service. In addition, 103 clients were referred to a legal-aid clinic operated by one of the participating multicultural service agencies. One agency, SUCCESS, serving a mainly Chinese clientele, operates a legal clinic staffed by articling law students. While these numbers represent a relatively small proportion of the overall caseload of legal problems for these agencies, over the course of a year a projected caseload of 3,000 problems would be referred to a legal-aid service by the five agencies.

Multicultural Service Agencies and the Provision of Justice Services

The study indicated that the multicultural service agencies devote considerable resources to addressing their clients' problems. Clients who were interviewed indicated language as the main reason for going to a multicultural service agency with their legal and justice-related problems. A majority of clients (60 percent) from every ethnocultural language group gave this as the main reason for their decision to attend a multicultural service agency rather than some other legal or justice agency.

Besides language, other frequent reasons for attending a multicultural service agency rather than a legal service were as follows: the clients did not know whom else to approach; they were not aware of a legal solution to the situation; they were not aware of legal services and processes; they were referred by another agency; they were not aware of an entitlement to legal assistance; they had a fear or distrust of mainstream authorities.

As well, it was reported that the informal "drop-in" approach of the agencies - which contrasts with the bureaucratic and formalized approach of many government departments and other nongovernment agencies - was an important factor in bringing problems to a multicultural service agency. The multi-service character of the agencies, as well as what could be described as a quality of membership in the constituency of the agency, creates a friendly "one-stop shop" atmosphere that seems to appeal to ethnocultural and minority clients who may not be fully aware of such things as available legal services and legal processes, and who may have some uneasiness with formal, bureaucratic agencies and systems.

A Case for Linkages Between the Justice System and Ethnocultural Community Organizations

The justice system is, typically, poorly equipped to deal effectively with legal problems that have complex social and cultural underlying factors. This may be especially true of justice problems of immigrants and minorities, who may experience a variety of psychological, cultural and linguistic barriers to access to justice that are not experienced by native-born Canadians. Community organizations such as the multicultural service agencies that cooperated in this study have experience in dealing with the legal problems of their clients. They generally understand the adjustment problems faced by immigrants and members of minority groups, problems that represent the context within which legal problems occur. Minority and immigrant persons in this study showed a strong preference for approaching a community organization rather than an agency of the justice system when faced with a problem.

This suggests that there is potential in exploring possible linkages between elements of the mainstream justice system and organizations that are representative of ethnocultural communities. There are resources within ethnocultural

communities that can be mobilized to identify and address the justice problems affecting the group and its members. Partnerships between the justice system and ethnocultural communities would allow the communities to participate in the processes that define problems and determine the most appropriate solutions. Better definitions of problems, and better designed solutions that are culturally appropriate, would allow the justice system to utilize and focus its own scarce resources more effectively. Some of these resources might be used to assist ethnocultural organizations already straining under attempts to respond to problems of community members - many of which, as this study shows, have legal aspects. Justice system / community partnerships might produce more effective and durable solutions to the problems facing ethnocultural communities. At another level, true partnership arrangements might address the alienation from the justice system that is sometimes expressed by minorities.

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The Legal Problems of Multicultural Canadians in Greater Vancouver, by Richard Nann and Michael Goldberg. Department of Justice Canada, Working Document [WD1993-1e], 1993.

Part II – Other Law Reform Research

Thinking About the Trial Process: Should the Preliminary Inquiry Be Changed?

by Tony Dittenhoffer
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When a person is charged with a serious offence under the *Criminal Code*, before going to trial there may first be a preliminary inquiry. This is a courtroom hearing that serves two main purposes: to determine whether there is enough evidence to put the accused person on trial, and to have the prosecution "disclose" evidence - that is, to provide the accused with the opportunity to understand the nature of the evidence against them. The preliminary inquiry was first established in English common law, and it was placed in Canada's *Criminal Code* in 1892.

Recently, observers have begun to question the role of the preliminary inquiry. There are concerns that in its present form, the inquiry may unnecessarily delay the criminal trial process, involve high costs, and impose a burden on victims and others who must participate as witnesses. Furthermore, a decision in 1991 by the Supreme Court of Canada has implications for the preliminary inquiry. In *R.* v. *Stinchcombe*, it was determined that the Crown must disclose all relevant evidence to persons accused of an indictable or hybrid offence - whether or not a preliminary inquiry is held. All attorneys general of the federal and provincial governments now have procedures for providing accused persons with early disclosure, and this has led to further questions about the utility of the preliminary inquiry.

A report by David Pomerant and Glenn Gilmour was designed to facilitate discussions concerning the preliminary inquiry. Following a detailed review of the functions and characteristics of the inquiry, the authors discuss the impact of recent developments in the criminal trial process, present available research information, and document relevant changes that have occurred in other countries (England, Australia, New Zealand, Scotland and the United States). They conclude their analysis by proposing various options for the future and outlining the advantages and disadvantages of each. These options range from retaining the present preliminary inquiry without any changes, to abolishing it altogether.

Interested readers are encouraged to review the full report and to consider which of the options offered - or perhaps whether some other option - is the most feasible and desirable.

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A Survey of the Preliminary Inquiry in Canada, by David Pomerant and Glenn Gilmour, Ottawa. Department of Justice Canada, Working Document [WD1993-10e], April, 1993.

Measuring for Compliance

by Shirley Riopelle Ouellet
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In 1987, the Department of Justice formed a linked initiative, the Regulatory Compliance Project, with the then Office of Privatization and Regulatory Affairs and federal departments administering regulatory legislation. The purpose of this joint undertaking is to improve the remedies, sanctions and procedures by which

individuals and corporations are encouraged to meet regulatory goals, or forced to comply with regulatory legislation, by ensuring that:

- more systematic use is made of the best methods, including the best legal tools, for achieving compliance through the least intrusive measures that are effective;
- a proper framework is in place for a uniform understanding about what constitutes a timely and appropriate response by enforcement officials to various forms of noncompliance; and
- the penal measures employed are adequate and effective for dealing with cases of serious noncompliance, or persistent breaches of regulatory standards, by individual and corporate offenders.

Developments in the Canadian regulatory field, changing societal and government priorities, major court decisions, and recent Charter challenges, have all given rise to increased pressure on regulatory departments to review their mandates and strategies.

While many departments have some practical experience in developing and using a variety of measures to achieve compliance, and although they appear to have generated considerable up-to-date information regarding the effectiveness and efficiency of various measures, there is an increasing need for departments to obtain and share information on compliance measures that do and do not work.

Further, in 1989, at a steering committee meeting of deputy ministers responsible for overseeing the work of the Regulatory Compliance Project, concern was expressed about over-reliance on impressionistic data relating to the use and effectiveness of selected compliance measures. It was suggested that empirical data and further impressionistic data were needed on the measures being used by selected federal and provincial government departments. As a result, Phase 1 of the Empirical Study of Compliance Measures was undertaken as a first step in addressing this need.

The purpose of Phase 1 was to determine the feasibility of undertaking a more in-depth study that would result in the collection and analysis of empirical and impressionistic data relating to compliance behaviour, and the effectiveness and efficiency of a range of compliance measures. The primary objectives of Phase 1 were to:

- identify and clarify the empirical issues relating to the use of compliance measures;
- identify gaps in knowledge;
- identify the strengths and weaknesses of various sources of empirical and impressionistic data for further research; and
- develop a workplan/blueprint that would outline further research to be undertaken in this area.

For purposes of the feasibility study, information was gathered from selected documentation on regulatory compliance, previous research studies conducted by the Department of Justice's Regulatory Compliance Project, and consultations with knowledgeable experts.

A Common Framework for Measuring Compliance

As a first step in identifying and discussing the various issues relevant to collecting data on compliance measures and behaviour, the researchers developed a common framework that would permit regulatory departments and agencies to describe, discuss and evaluate their programs. It is in the context of this "proposed analytical framework" that the authors examine and discuss the range of issues that must be

addressed when studying compliance behaviour and assessing the effectiveness and efficiency of specific compliance measures.

Further, the researchers believe that the proposed analytical framework provides a model or tool that government departments can use to identify, organize, and communicate three types of compliance information:

- the key factors and relationships in understanding, planning and assessing compliance activities;
- the types of qualitative and quantitative empirical information needed to provide accurate descriptions of those factors and relationships, and of the resulting levels and nature of compliance; and
- the types of key issues that need to be addressed further to support policy and operational decision-making in the compliance area.

The authors feel that this framework will enable departments to generate more comprehensive information, identify areas where additional theoretical and empirical research is needed, provide a common basis for the communication of information, identify the kinds of factors and linkages that should be considered in assessing the effectiveness and appropriateness of various compliance measures, and ensure that future assessments of compliance and regulatory behaviour are comprehensive in scope.

Factors Affecting Compliance Behaviour

Within the context of the analytical framework, the authors identify, examine and discuss a wide range of factors affecting compliance policies and programs that they feel must be explicitly considered in order to make an accurate assessment of which compliance measures work and, which ones do not. These factors are:

- threats created by noncompliance;
- the risk-creation process;
- the general environment;
- the legal environment;
- the internal environment of the regulating agency; and
- compliance and enforcement activities.

Threats Created by Noncompliance

Complete and accurate information concerning the threats created by noncompliance is of particular importance in measuring the direct impacts of noncompliance and compliance initiatives. However, to describe and understand these threats adequately, information must be gathered on the object of the threat and the impact of noncompliance, the certainty of the threat, the quantum of damage from the threat, whether the threat or harm was felt at one point in time or over a period, the degree of difficulty in measuring the threat, the profile of the victims or risk-bearers, the difficulty of determining the origin of the threat, the liability of government owing to nonenforcement, and the method by which any threat was detected and reported by second or third parties.

The Risk-creation Process

Specific components of the risk-creation process include risk-creating activities, specific noncompliance actions, and the characteristics of those regulated.

The General Environment

This includes the political, economic, and natural or physical environment in which the compliance measures are being used.

The Legal Environment

Components of this category include the general legislative environment, the judicial environment, specific legislation, regulations and case law.

The Internal Environment of the Regulating Agency

Components here include specific organizational policies, organizational structure, finance and resources, human resource management, communications and education, administrative support, technical support, and management information systems.

Compliance and Enforcement Activities

This category focuses on the operational tools through which compliance policies and programs have an impact on compliant and noncompliant behaviour of regulated parties. These activities include a range of measures, from least intrusive (i.e., maintaining relationships, education, warnings) to more severe measures such as stop orders, administrative penalties and prosecution.

The authors believe that by identifying some of the critical factors affecting compliance and enforcement activities, program personnel will be alerted to potential inadequacies, as well as strengths, in their own programs. Further, given the range of these factors, the analytical framework helps in organizing them into a comprehensive scheme.

Other Issues

In addition to identifying the factors that need to be addressed in measuring for compliance, the researchers identified a number of other issues that deserve further examination:[1]

- training for regulatory officers;
- interdepartmental communications and liaison;
- information systems to support compliance policy and operational decisions;
- exploration of additional compliance and enforcement options; and
- guidelines and methodologies for regulatory assessments and reviews.

Conclusion

The authors conclude that a number of themes have emerged concerning regulatory reform. Data suggest that government policy concerning regulation appears to have arrived at a new phase of regulatory reform. This phase requires programs to examine their activities and to ascertain when, and under what circumstances or for which kind of regulated behaviour, specific compliance measures are most appropriate and cost-effective.

The study findings suggest that various factors now require government to develop a more strategic use of both the deterrence/enforcement approach to regulation and the facilitative/compliance approach. There are several reasons for this:

- Increasing restraint on both government and industry resources means that regulatory programs must determine when and under what circumstances, or for what kind of regulated behaviour, a deterrence or compliance strategy is most appropriate and cost-effective.
- The public's views and expectations of government regulation are continuing to have an impact on federal policy, particularly in the environmental and health and safety areas.
- Technological developments have produced a need for increased expertise and professionalism within regulatory programs.
- Increasing experience with relatively new techniques such as alternative dispute resolution has paved the way for increasing emphasis on negotiation.

All this suggests that program developers and policymakers need to know what works and

what does not work, what measures are most cost-effective, and what other measures can be utilized.

While the proposed analytical framework may not be the only model or approach for collecting information on the compliance and enforcement activities of government regulatory departments, it does provide policymakers, program developers and researchers with one possible means of facilitating the collection of such information.

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[1] Some of these areas of concern have already been, or are being, addressed in part or in whole by other initiatives.

Empirical Compliance Project: Phase 1 Report, by Lee Axon, Robert Hann, Terry Burrell (The Research Group). Department of Justice Canada, Technical Report [TR1992-19e], August 1992.

Drinking and Driving Legislation: An Unexpected Finding

by Sherilyn Palmer
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In December 1985, amendments were introduced to the drinking and driving sections of the *Criminal Code*. Two new offences were added: impaired driving causing bodily harm, and impaired driving causing death, with maximum penalties of 10 and 14 years in prison, respectively. The minimum fine for impaired driving was increased from $50 to $300, and a mandatory three-month prohibition from driving was introduced. The amendments also enabled the taking of blood samples from injured drivers who could not provide a breath sample, and the definition of the offence was broadened to cover drivers of forms of transport other than motor vehicles.

In 1993, the Traffic Injury Research Foundation of Canada carried out a study for the Department of Justice to determine if the *Criminal Code* amendments have resulted in a reduction in the magnitude of drinking and driving in Canada, and whether the effect was more pronounced in some groups within the general population than in others.

The study utilized data on drinking-driving behaviour and its outcomes from a variety of sources, principally roadside surveys of night-time drivers, the Foundation's own fatality database, accident files in Ontario and British Columbia, and the files of the Canadian Centre for Justice Statistics. In addition, data from the United States Fatal Accident Reporting System were used for comparison purposes.

The fatality database, maintained by the Foundation since 1973, and under the current sponsorship of Transport Canada and the Canadian Council of Motor Transport Administrators, contains the results of tests for the presence and amount of alcohol performed on fatally injured drivers in seven provinces. Other information contained in the database includes age and sex of driver, type of vehicle, number of vehicles involved, and date and time of crash. The database, the Foundation notes, is "one of the most comprehensive and reliable in the world".

The resulting report, *Assessment of the Impact of the 1985 Amendments to the Drinking and Driving Sections of the Criminal Code of Canada*, states that although there was indeed a substantial and dramatic reduction in the incidence of drinking and driving in Canada through the 1980s, the study was unable to find any evidence that would attribute this decline specifically to the new legislation as the single

contributing factor. The period covered by the study was 1980 to 1991; a downward trend in drinking and driving was well established prior to the 1985 introduction of the amendments (a wealth of data confirms this). *This trend remained continuous throughout the decade* and was not unique only to Canada but evident in the United States as well. The legislation may very well have had an impact but it was impossible to isolate the numerous indicators that contributed to the overall decrease in impaired driving during the 1980s.

Primarily, the report concludes that the public was largely unaware of the new sanctions. The 1988 National Survey on Drinking and Driving revealed that only 57 percent of respondents knew that first-time offenders receive a mandatory licence suspension; similarly, only one-half were aware that any sort of fine is imposed on first-time offenders (to say nothing of a fine that had been increased by 600 percent three years previously). The survey also indicated that the public's knowledge of the new criminal offences (impaired driving causing bodily harm, and impaired driving causing death) and their penalties, was similarly limited.

The report speculates that the significant lack of public awareness about the new legislation stemmed from a pre-existing wave of public concern about impaired driving, sparked by a notable proliferation, in the early 1980s, of grass-roots movements and organizations such as MADD (Mothers Against Drunk Drivers):

> The public and institutional response to the call for action against impaired driving was remarkable and largely unprecedented. New enforcement programs were introduced with increased personnel and resources devoted to the problem. Server intervention and designated driver programs were adopted. Public information and education program efforts flourished. New, innovative programs for dealing with offenders were developed and implemented. In sum, drinking and driving became the focus of a tremendous amount of the public's attention. It became a very high-profile issue, not only in the media but in day-to-day conversation.

This extraordinary process, and the effect it had on the public, may stand as one of the few instances where a society took voluntary collective action to restrain its own destructive behaviour.

The report recommends several measures that could enhance the effectiveness of the 1985 legislation, based on some significant facts that emerged from the research:

▲ Inform the public about the law.

"The law cannot be an effective agent of change unless the public is aware of it."

▲ Increase efforts on the high-BAC driver.

"Drivers with very high blood alcohol content represent a significant part of the drinking-driving problem today ... the evidence ... suggests that recent reductions in the alcohol-crash problem have not occurred among this group ... drivers with low to moderate BACs have shown the most improvement."

▲ The use of short-term administrative licence suspensions needs to be investigated more carefully.

"(There is) convincing evidence that the police are increasing their use of short-term administrative licence suspensions ... to remove impaired drivers from the road. To the extent that (such) suspensions are being used in lieu of criminal charges, the practice may be undermining the effectiveness of the legislative amendments."

▲ Changing patterns of drinking and driving need to be examined more fully.

"... the relative magnitude of the drinking-driving problem on weekends has declined

dramatically and is now comparable to that on weekdays ... Traditionally, enforcement programs such as spot-checks have concentrated on weekends."

▲ Countermeasure efforts should concentrate on seasons other than winter.

"The year-end holiday season has become the traditional time for increased drinking-driving countermeasure activities. The statistics, however, clearly indicate that ... the peak season for drinking-driving problems is summer, with spring and fall close behind ... reallocating resources typically deployed during the winter season could help reduce the overall magnitude of the problem."

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Assessment of the Impact of the 1985 Amendments to the Drinking and Driving Sections of the Criminal Code of Canada, by D.J. Beirness, H.M. Simpson and D.R. Mayhew; Traffic Injury Research Foundation, Ottawa. Department of Justice Canada, Working Document [WD1993-7e], 1993.

Examining Canada's Juvenile Justice System

by Naomi Lee
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The *Young Offenders Act (YOA)*, proclaimed in force on April 2, 1984, was the result of more than 20 years of deliberation and debate on the reformation of the juvenile justice system. There had been little doubt of the need for reform: The *Juvenile Delinquents Act (JDA)*, which the *YOA* superseded, had been in effect since 1908 with no major changes.

The *YOA* was hailed as a revolution in Canadian juvenile justice. The child welfare philosophy of the *JDA* was replaced by an emphasis on the responsibility and accountability of young persons for their illegal actions, although it was recognized that young persons should not be held accountable in the same manner as adults or suffer the same consequences for their behaviour. And, among its many other reforms, the *YOA* accorded young persons special guarantees of their rights and freedoms, a matter that had seemed rather unnecessary to the child-welfare-oriented architects of the *JDA* at the turn of the century.

Although parts of the *YOA* were the subject of rather strong criticism in some quarters, the new legislation was widely accepted as a reasonable attempt to balance competing and conflicting principles and beliefs about effective approaches to youth justice.

Today, nearly a decade after the implementation of the *YOA*, perhaps no other federal law is the subject of so much public concern and controversy.

The public perceives that crime generally is increasing, that youth crime in particular is on the rise - and becoming more violent - and that the youth justice system is ineffective in responding to offenders.

The extent to which these perceptions are justified is an open question. National statistics, for example, are not very clear on these matters, and the media, which are the primary source of information about the justice system for most people, tend to focus exclusively on the most disturbing and tragic - but relatively rare - types of incidents, providing a less-than-balanced picture of the situation.

Public concern, however, is real and widespread. There is intense pressure for specific changes to the *YOA*, as well as considerable discord on fundamental philosophical issues related to youth and crime.

Many knowledgeable people working within the youth justice system, however, believe that attention should be focused on matters relating

to the administration of the Act and on improved programs for dealing with young offenders, rather than on fundamental shifts in philosophy and radical legislative changes.

In the report, *State Responses to Youth Crime: A Consideration of Principles*, the authors offer readers concerned with youth justice issues an opportunity to consider - or reconsider, as the case may be - the fundamental principles that guide and restrain a state's response to youth crime. While many current issues are discussed, it is not the objective of the report to provide a definitive analysis or to take sides on any particular issue. The author's purpose is to equip readers with basic information and an understanding of the relevance of fundamental principles to some of the controversy surrounding the youth justice system in Canada today. In effect, the report is primarily a balanced effort to provide readers with some necessary background and a context in which they may consider various young offender issues for themselves.

The first chapter outlines the constitutional context within which the development and implementation of youth justice legislation occurs in Canada. There is a brief explanation of how the criminal justice system operates in this country, and of the relevance of principles in the process of developing legislation. This, and an overview of the nature of youth crime, set the stage for the second chapter.

Chapter Two summarizes some internationally accepted principles that guide state involvement in the lives of children and adolescents, as reflected in the *United Nations Convention on the Rights of the Child*. This is followed by a discussion of the evolution of the concepts of childhood and adolescence as distinct stages of physical, emotional, social and moral development, and of the legal status of children, parents and the state. This chapter also includes an analysis of how courts and legislatures have recognized the unique status of children and adolescents. The discussion then focuses on some of the principles guiding substantive aspects of Canada's criminal justice system and on how the concepts have been modified to reflect the needs and capacities of children and youth. Chapter Two concludes with a discussion of some of the procedural aspects of the criminal justice system.

Chapter Three provides a brief history of Canada's juvenile justice system, describing the main features of the juvenile court under the *JDA* from 1908 to 1984, and explaining how changing perceptions of the relative importance of different principles influenced the process of reformation that led to the *YOA*.

The fourth chapter, entitled "Principles in Practice", includes a description of the current youth justice process under the *YOA* and an explication and assessment of the "Declaration of Principle". Several current issues - including, for example, the minimum and maximum age of young offenders, transfer to adult court, youth court sentences, publicity and privacy - are also discussed in some detail to illustrate the relevance of conflicting and competing principles.

The fifth and final chapter includes a discussion of some newly emerging approaches to the problem of responding to youth crime: "victims' rights", "getting tough", crime prevention and "community responsibility". The authors also offer a few tentative comments about some specific measures that might be taken to reshape youth justice in Canada, while stressing the need to improve knowledge and understanding of how the youth justice system is actually functioning.

It is suggested that despite our lack of knowledge on many important issues, the most effective measures for reducing the incidence of youth crime are likely to involve broad-based crime

prevention strategies, including programs for pre-school child care, improved education, child and adolescent mental health, labour force integration for youth, and so forth.

Although the authors do not believe that changing the *YOA* would likely have a major effect upon the level of youth crime, they believe that it is important to review this legislation "if only to be satisfied that it provides an appropriate balancing of societal objectives".

They remark, for example, that sentencing under the *YOA* - particularly of violent and repeat offenders - is probably the most controversial issue, and that it must be acknowledged that the *YOA* provides little real guidance to youth court judges: "Serious consideration should be given to a clearer articulation of guidelines for youth court sentencing."

State Responses to Youth Crime: A Consideration of Principles will be of interest to almost any reader concerned about Canada's youth justice system. Those close to the field will find it a useful reminder of the philosophical underpinning of the system and of how and why it has evolved to its present form. For others, it may also speak to a need for background information and a framework for appreciating and better participating in the ongoing debate on youth justice. As the authors remark:

> Any process of reforming our present youth justice system will be enhanced only if those involved appreciate the complex balancing of often competing principles and interests that has shaped our present laws, and are aware of the difficulties that will confront those seeking meaningful change.

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State Responses to Youth Crime: A Consideration of Principles, by Nicholas Bala, Joseph P. Hornick, M.L. (Marnie) McCall and Margaret E. Clarke. Department of Justice Canada, Working Document [WD1994-1e], 1994.

Reducing the Risk of Noncompliance

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Background

In April 1992, the Department of Justice established the Dispute Resolution Project to develop policies relating to the use of alternative dispute resolution. In so doing, the project has been examining the use of a range of techniques in a variety of areas. One technique studied is the use of regulatory negotiation (commonly referred to as "reg-neg") as a tool for reducing the risk of litigation resulting from noncompliance, and for increasing compliance levels, on the part of individuals and corporations subject to regulatory legislation.

Purpose of the Study

The purpose of the study was to determine what reg-neg is and how it has been instituted in other jurisdictions, and to discuss its potential application in Canada.

The resulting report, *Regulatory Negotiation: Issues and Applications*, combines a literature review with observations about reg-neg gained from practitioners' experiences in different regulatory sectors in Canada, as well as in other jurisdictions: the United States and Australia. Included as an appendix to the report is a brief overview of how the reg-neg process was applied in negotiations concerning the *Canadian Environmental Assessment Act*.

Regulatory Negotiation

Regulatory negotiation was developed in the United States in the 1980s and represents an innovative and compelling alternative to conventional methods of drafting regulations.

Reg-neg is identified by a series of major characteristics:

- no third party plays a significant role in the determination of outcome;
- its purpose is primarily to establish general rules that will influence behaviour (i.e., improved compliance); and
- it is intended as a supplement and alternative to conventional methods of rulemaking.

Regulatory negotiation has four critical features:

- it occurs at the front end of the regulatory process; that is, before the ministry or agency drafts its regulation;
- stakeholders meet face to face;
- decision-making is based on consensus, giving all participants equal influence over a decision; and
- there must be a high degree of certainty that the consensus reached will be respected and implemented. Decisions reached are, as far as possible, binding.

The purpose of reg-neg is to produce better regulation - politically, procedurally and substantively-by providing a means whereby parties with significant interests in a proposed regulation may have an opportunity to participate in the formulation of the regulation.

Benefits and Drawbacks

The research suggests that there are both benefits and drawbacks to the use of a regulatory negotiation process. Because of its consensus-based nature, the process provides an improved foundation for regulatory decision-making, as well as improved regulations. It reduces the need for litigation and results in earlier implementation and greater compliance. Using a reg-neg procedure can enhance the political validity of regulatory decision-making, create a more cooperative relationship between interests and the agency, and result in reduced time, money and effort.

However, reg-neg has a tendency to be resource intensive in the short term, and often obliges agencies to make adjustments to their internal procedures. It also requires a substantial investment of time and resources on the part of public-interest groups, who may have a limited capacity to sustain the effort required to participate in the process, particularly if they are involved in more than one negotiation. Because many stakeholders may be unfamiliar with it, reg-neg may have to overcome negative attitudes about what is involved in the process, including agency resistance to the idea. Last, but certainly not the least of its drawbacks, reg-neg risks failing to represent the public interest and is subject to manipulation by those who may be motivated to use the process for their own goals.

The Regulatory Negotiation Process

A review of the literature on reg-neg suggests that the process comprises four stages: assessment, pre-negotiation, negotiation, and closure and follow-up.

The assessment stage involves an evaluation of the appropriateness of using reg-neg on the basis of the nature of the subject matter, the number and nature of the issues involved, the time frame available for the development of the regulation, and the identification, availability and commitment of the affected interests.

The pre-negotiation stage is characterized by several activities, including a more in-depth

assessment of the appropriateness of reg-neg, preparation of the parties for negotiations, arrangements for the publication of the notice of intent to negotiate, selection of a mediator, and adjustments arising from the notice of intent.

The negotiation stage entails actual negotiations, of both a procedural and substantive nature.

The final stage of the process is closure and follow-up. This includes an assessment of the actual process as well as the monitoring and implementation of the agreement.

Voluntary Participation: Key to the Regulatory Negotiation Process

As is common in most consensus-based alternative dispute resolution processes, it is critical to the reg-neg process that participation be voluntary, and parties must feel motivated to participate. Further, such motivation is equally important for both nongovernment and government stakeholders. Nongovernment stakeholders are generally influenced by their "best alternatives to a negotiated agreement": if stakeholders perceive that they are better served through other means, such as lobbying, litigation, stalling, and so forth, they will be less likely to participate in the regulatory negotiation process.

The report suggests that government participation also may need to be encouraged, as some resistance to reg-neg may occur owing to a lack of information about and familiarity with the process, uncertainty about its legitimacy, and the need to undertake a number of internal changes to accommodate the procedure.

Should Regulatory Negotiation Be Legislated?

There are many arguments both for and against legislating for reg-neg. Those in favour feel that legislation will legitimize the reg-neg process, will formally encourage its use, will help to clarify questions of procedural law regarding its use, and will formalize agencies' authority for using reg-neg, as well as provide guidance about how to proceed with a reg-neg process.

Arguments against reg-neg legislation include a perception that legislating for its use could reduce its flexibility, upset the consensual balance required for reg-neg, and prematurely codify the process.

Other Applications of Regulatory Negotiation

While the research suggests that reg-neg may not be appropriate in every situation, it does constitute a preferred means of developing regulations, particularly in situations where significant interests are involved.

Further, although the reg-neg process has been developed particularly for the formulation of regulations, it is also suited to a number of other applications, including policy creation, setting standards, settling post-regulatory disputes, permitting and licensing, and ensuring compliance with regulations. The benefits resulting from the use of reg-neg in these other applications are similar to those that result from its use in the development of regulations. However, in such applications, it is equally imperative to ensure that the situations in which reg-neg is considered for use are selected carefully.

The Future of Regulatory Negotiation in Canada

While substantial experience with reg-neg exists in the United States, the process is relatively untried in Canada, apart from its use in some aspects of the negotiation process in areas other than rulemaking. Furthermore, because regulatory decision-making in Canada differs from that in the United States, there is a need to examine the process in terms of the peculiarities of Canadian procedures and orientations.

Recommendations from the Research

The report concludes with a series of recommendations relating to the need for educational initiatives concerning reg-neg; the need for incentives to enhance the reg-neg process (i.e., pilot projects, case studies, a supportive infrastructure); the need to discuss in greater detail the advantages and disadvantages of legislation; and the need for federal leadership to promote and encourage the use of reg-neg.

This study is an initial attempt to examine and discuss the process of regulatory negotiation and its potential application in Canada. As the report points out, our experience with reg-neg is limited.[1] If we are to give further and serious consideration to its use, additional research - such as the development of pilot projects and evaluations - will be necessary.

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[1] According to the author, negotiations relating to the *Canadian Environmental Assessment Act* undertaken by the Regulatory Advisory Committee (RAC) to the Minister of the Environment may represent the first Canadian attempt at regulatory negotiation.

Regulatory Negotiation: Issues and Applications, by Lee Axon and Robert Hann (The Hann Group). Department of Justice Canada, Working Document [WD1994-4e], 1994.

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☐ *Empirical Compliance Project: Phase 1 Report*, by Lee Axon, Robert Hann, Terry Burrell (The Research Group). Department of Justice Canada, Technical Report [TR1992-19e], August 1992.

☐ *Assessment of the Impact of the 1985 Amendments to the Drinking and Driving Sections of the Criminal Code of Canada*, by D.J. Beirness, H.M. Simpson and D.R. Mayhew (Traffic Injury Research Foundation, Ottawa). Department of Justice Canada, Working Document [WD1993-7e], 1993.

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☐ *Complaint and Redress Mechanisms Relating to Racial Discrimination in Canada and Abroad*, by University of Ottawa, Human Rights Research and Education Centre. Department of Justice Canada, Working Document [WD1994-9e], 1994.

☐ *State Responses to Youth Crime: A Consideration of Principles*, by Nicholas Bala, Joseph P. Hornick, M.L. (Marnie) McCall and Margaret E. Clarke. Department of Justice Canada, Working Document [WD1994-1e], 1994.

☐ *Regulatory Negotiation: Issues and Applications*, by Lee Axon and Robert Hann (The Hann Group). Department of Justice Canada, Working Document [WD1994-4e], 1994.

For further information concerning these or other departmental research documents, please contact the Research Section at: (613) 941-2266.

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The following report can be obtained by contacting the Ministry of the Attorney General of British Columbia.

Census '93: The Report on the 1993 Census of Provincial Correctional Centres in British Columbia, by Robert M. Gordon and Jacquelyn Nelson. Ministry of the Attroney General of British Columbia, 1993.

Notes

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