Comment — *Criminal Code*, section 159 — anal intercourse — sexual orientation discrimination

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Section 159 of the *Criminal Code*[1] creates the offence of anal intercourse and exemptions from that offence. Section 159 provides:

> 159. (1) Every person who engages in an act of anal intercourse is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.
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> (2) Subsection (1) does not apply to any act engaged in, in private, between
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> (a) husband and wife, or
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> any two persons, each of whom is eighteen years of age or more, both of whom consent to the act.
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> (3) For the purposes of subsection (2),
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> (a) an act shall be deemed not to have been engaged in in private if it is engaged in in a public place or if more than two persons take part or are present; and
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> (b) a person shall be deemed not to consent to an act
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> (i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations respecting the nature and quality of the act, or
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> (ii) if the court is satisfied beyond a reasonable doubt that that person could not have consented to the act by reason of mental disability.

In contrast, subject to exceptions concerning exploitative conduct, anyone 14 years of age or more, whether married or not, can lawfully engage in consensual vaginal, oral or any other form of sexual conduct. In

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[1] R.S.C. 1985, c. C-46.

particular, section 159 is exceptional in that it creates the only sexual offence in respect of which a young person, that is, someone 14 years of age or more but less than 18 years of age, who engages in consensual sexual conduct commits a criminal offence. Exploitative conduct involving a person who is in a position of trust or authority towards a young person or a person with a mental or physical disability or who is a person with whom the young person or person with a mental or physical disability is in a relationship of dependency is beyond the scope of this comment. I am concerned here only with non-exploitative sexual activity involving persons each of whom is 14 years of age or more and consents to the sexual activity.[2]

In 1995, the Ontario Court of Appeal held, in *R. v. M.(C.)*,[3] that section 159 was unconstitutional and of no force and effect. The Quebec Court of Appeal came to the same conclusion in 1998 in *R. v. Roy*,[4] as did the Alberta Court of Queen's Bench in 2002 in *R. v. Roth*.[5]

In *M.(C.)*, the male accused participated in a three-year sexual relationship with his fiancée's niece when he was in his mid-20s and beginning when she was 13. Their relationship ended a few months after the accused married his fiancée. The sexual activity had included oral, vaginal and anal intercourse. The trial judge found that the acts of anal intercourse had taken place when the complainant was 14 years of age or more, and that she had consented to them. The accused argued that section 159 violated the equality rights guaranteed by section 15 of the *Canadian Charter of Rights and Freedoms*,[6] on the grounds of age, marital status and sexual orientation. While the facts in this case obviously had nothing directly to do with sexual orientation discrimination, the Crown conceded that the accused had standing to challenge the constitutionality of section 159 on the ground of sexual orientation discrimination.[7] The accused succeeded at trial, the trial judge found him not guilty of anal intercourse, and the Ontario Court of Appeal unanimously affirmed this decision. Goodman and Catzman, JJ.A. accepted the Crown's concession that section 159 violated section 15 on the ground of age discrimination and stated that they did not consider it necessary to consider the other grounds

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[2] See generally, *ibid.*, ss. 150.1-153.1.

[3] (1995), 98 C.C.C.(3d) 481.

[4] (1998), 125 C.C.C. (3d) 442 (C.A.) [Roy].

[5] [2002] A.J. No. 159 (Q.B.) [Roth].

[6] Part I of the *Constitution Act, 1982*, being schedule B of the *Canada Act, 1982* (U.K.), c. 11. [Charter].

[7] *Supra* note 3 at 485, referring to *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. See also, *Roy*, *supra* note 4 at 452, referring to this aspect of *M.(C.)*; see generally with respect to standing, P.W. Hogg, *Constitutional Law of Canada (4th ed., looseleaf)* (Scarborough, Ontario: Thomson/Carswell, 1997), section 56.2(e) "Standing - Enforcing other people's rights".

of discrimination raised by the accused. Abella J.A., as she then was, reasoned more broadly and concluded that section 159 violated section 15 of the *Charter* on the grounds of age, marital status and sexual orientation. She emphasized, however, that "while all three grounds intersect in this case, the essence of the discrimination is sexual orientation, with age and marital status being tentacles of this form of discrimination."[8] She elaborated on this point as follows:

> The distinction found in s. 159 imposes a burden based on sexual orientation. It derives from statutory origins whose purpose was discriminatory — to prevent gay sex. ...
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> > In my view, s. 159 arbitrarily disadvantages gay men by denying to them until they are 18 a choice available at the age of 14 to those who are not gay, namely, their choice of sexual expression with a consenting partner to whom they are not married. Anal intercourse is a basic form of sexual expression for gay men. The prohibition of this form of sexual conduct found in s. 159 accordingly has an adverse impact on them. Unmarried, heterosexual adolescents 14 or over can participate in consensual intercourse without criminal penalties; gay adolescents cannot. It perpetuates rather than narrows the gap for an historically disadvantaged group — gay men — it does so arbitrarily and stereotypically and is, therefore, a discriminatory provision which infringes the guarantee of equality.
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> The grounds of age and marital status are also engaged, not only because s. 159 has a particularly disparate impact on how the consensual sexual choices of adolescent gay men are treated, but also because the exemption for "husband and wife" is clearly illusory for a gay couple. However, these grounds are inextricable from the conclusion that the violation of equality is based primarily on sexual orientation and, in my view, analytically offer no independent grounds upon which to found a s. 15 violation. The age and marital status grounds are triggered because they are aspects of how s. 159 disproportionately and arbitrarily disadvantages gay men; but absent their relationship to sexual orientation it is difficult to see how, on their own, they are violative of the equality guarantee. [9]

On the issue of justification under section 1 of the *Charter*, the Crown submitted that section 159 served the purpose of protecting young persons from engaging in a specific form of sexual activity, namely, anal intercourse, in respect of which there were increased risks of physical and psychological harm and, in particular, an increased risk of HIV-transmission. Abella J.A. rejected this argument and stated:

> The issue then comes down to this: is sending young persons to jail a reasonable

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[8] *Supra* note 3 at 484.
[9] *Ibid.* at 487-88.

> way for the state to protect them from any risks associated with consensual anal intercourse? ...
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> The health risks from unprotected anal intercourse are real and ought to be aggressively addressed. But, in my view, the measures chosen in s. 159 to protect young people from risk are arbitrary and unfair, compared to the measures used to protect against the health risks for individuals who prefer other forms of sexual conduct. There is no evidence that threatening to send an adolescent to jail will protect him (or her) from the risks of anal intercourse. I can see no rational connection between protecting someone from the potential of exercising sexual preferences and imprisoning that individual for exercising them. There is no proportionality between the articulated health objectives and the Draconian criminal means chosen to achieve them. [10]

Goodman and Catzman, JJ.A. agreed with Abella, J.A.'s section 1 reasoning to the extent that it applied to the conceded age discrimination.[11] As already indicated, the Ontario Court of Appeal unanimously held that section 159 was unconstitutional and of no force and effect. I mention that, three months before the Ontario Court of Appeal's decision in *M.(C.)*, section 159 had been held unconstitutional by the Federal Court, Trial Division, in the context of an immigration removal proceeding.[12] In her reasons in that case, Reed J. had reviewed detailed medical evidence concerning the risk of transmission of sexually transmitted diseases during anal intercourse and other forms of sexual activity.[13] Her decision was cited by Abella, J.A. in *M.(C.)*.[14]

In *Roy*, the male accused (whose age was not indicated) and a 16 year old male had engaged in anal intercourse. At the start of the accused's trial, the Crown acknowledged that the anal intercourse was consensual. The accused raised as his sole ground of defence the unconstitutionality of section 159, arguing that it violated sections 7 and 15 of the *Charter*. This defence was rejected and the accused was convicted of anal intercourse in October 1994. At the Quebec Court of Appeal the Crown consented to the quashing of the conviction in light of the Ontario Court of Appeal's May 1995 decision in *M.(C.)*, if the Quebec Court shared the Ontario Court's view that section 159 was unconstitutional. Indeed, both the Crown and the accused waived a hearing in the Quebec Court of Appeal and consented to the appeal being decided solely on the basis of the parties' appeal factums. LeBel J.A., as he then was, delivered the reasons of the Court, holding that section 159 violated section 15 of the

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[10] *Ibid.* at 490-91.

[11] *Ibid.* at 492.

[12] *Halm v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 331 (T.D.).

[13] *Ibid.* at paras. 65-73.

[14] *Supra* note 3 at 492.

Charter on the grounds of age, marital status and sexual orientation. Further, like Abella J.A. in *M.(C.)*, he reasoned that sexual orientation was the principal ground of discrimination and stated:

> Clearly, ... this ground seems .... to be the important one in the analysis of the constitutionality of the provision challenged under the guarantees of the right to equality, s. 159 produces discrimination on the basis of sexual orientation. By its effect on homosexuals, it prevents minor age homosexuals from engaging in normal sexual activities, consensual and in private, before the age of 18. Although one can argue that this legislative scheme applies to all unmarried young people, the effect of the legislation is much more prejudicial to homosexuals, for whom anal intercourse represents a regular sexual practice. For minor age heterosexuals, the most common practice remains obviously vaginal intercourse, which can be engaged in on consent as of 14 years of age. In other words, based on discrimination based on age, s. 159 denies minor age homosexuals freedom of choice and freedom of expression of their sexuality. [15]

Therefore, the Court was of the view that section 159 imposed a heavier burden on young gay men than young heterosexuals and perpetuated stereotypes and historical disadvantage suffered by them. At the section 1 stage of the analysis, the Crown submitted that section 159 was justified on the basis that it served to protect young people from physiological and psychological risks and, in particular, the risk of HIV-transmission. In reasoning similar to Abella J.A.'s in *M.(C.)*, LeBel J.A. rejected this submission:

> To impose imprisonment on consenting young people who engage in anal intercourse does not constitute a minimal infringement on the right to equality nor a reasonable means to obtain the objective of protecting young people and prevention set by Parliament. [16]

In the result, as already indicated, the Quebec Court of Appeal unanimously held that section 159 was unconstitutional and of no force and effect.

The Crown did not seek leave to appeal to the Supreme Court of Canada in either *M.(C.)* or *Roy*. Therefore, section 159 has been of no force and effect in Ontario since 1995 and in Quebec since 1998, and other convictions for anal intercourse entered before those respective dates have subsequently been quashed on appeal.[17] Unfortunately, some

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[15] *Supra* note 4 at 465-66 (translation).

[16] *Ibid.* at 470 (translation).

[17] See generally, *R. v. S.(A.)* (1998), 130 C.C.C.(3d) 320, 19 C.R.(5th) 393 (C.A.), application for leave to appeal dismissed [1998] S.C.C.A. No. 636; *R. v. Tassé* (1999), 140 C.C.C.(3d) 426 (Qc. C.A.); and *R. v. G.T.*, (2002) 161 C.C.C.(3d) 256 (C.A.).

counsel and judges were slow to learn about *M.(C.)* and *Roy*. For example, in one Ontario case, an accused was convicted six months after *M.(C.)* on a charge of anal intercourse and sentenced to four months imprisonment.[18] By 1997, however, one Ontario judge expressed the view that it was by then "well known" that section 159 had been held to be of no force and effect two years earlier in *M.(C.)*.[19] This was not an unreasonable view, given that *M.(C.)* had, for example, been reported in Quicklaw, the Ontario Reports, the Ontario Appeal Cases, the Canadian Criminal Cases, the Criminal Reports and the Canadian Rights Reporter and was noted in the two annotated versions of the *Criminal Code* most frequently used by criminal law practitioners, *Martin's Annual Criminal Code*[20] and *Tremeear's Criminal Code*.[21] Nevertheless, this view was proven wrong by subsequent cases. For example, in one Ontario case, an accused was found guilty in 1998 after a jury trial on a charge of engaging in anal intercourse in 1996.[22] Fortunately, the judge and counsel became aware of *M.(C.)*. before he was sentenced. The judge candidly stated that "unknown to any of us at the time of the Jury's verdict was the decision of the Court of Appeal in *Regina v. C.M.* [in 1995]."[23] A year later, in 1999 — that is, four years after the Ontario Court of Appeal's decision in *M.(C.)* — an accused in another Ontario case was convicted on a charge of engaging in anal intercourse, and that conviction was only quashed on appeal in 2002.[24] Most recently, in 2003 — by then, no less than eight years after *M.(C.)* — an accused in Ontario pleaded guilty to a charge of having engaged in anal intercourse sometime in 2002 or 2003.[25] It is almost amazing that all of Crown counsel, defence counsel and the judge appear to have been unaware of *M.(C)*.

Alberta and British Columbia, other than Ontario and Québec appear to be the only jurisdictions where the courts have expressly addressed the

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[18] *R. v. Bogue*, [1997] O.J. No. 1910 (C.A.). The Crown conceded that the conviction for anal intercourse had to be quashed in view of *M.(C.)*. By the time of the appeal the accused had fully served his sentence of imprisonment, however, he had also been charged with sexual assault. That charge had been stayed at trial, and the Court of Appeal held that the " proper disposition" of the appeal was to quash the conviction for anal intercourse, lift the conditional stay on the sexual assault charge, and enter a conviction for sexual assault.

[19] *R. v. Lanthier*, [1997] O.J. No. 4235 (Ct.J., Prov.Div.), at para. 27, per Renaud, Prov.J. This case did not involve a charge of anal intercourse.

[20] Published annually (Aurora, ON: Canada Law Book).

[21] Published annually (Toronto, ON: Carswell).

[22] *R. v. Charbonneau*, [1998] O.J. No. 5958 (Ct.J., Gen.Div.).

[23] *Ibid.* at para. 1, *per* McKinnon, J.

[24] *R. v. K.(C.P.)* (2002), 171 C.C.C.(3d) 173 (C.A.).

[25] *R. v. L.M.* [2003] O.J. No. 2212, 65 O.R.(3d) 158 (Ct.J.). The accused pleaded guilty to other charges as well and it is not possible from the report to determine the precise date when the anal intercourse was alleged to have occurred, however it was between October 2002 and January 2003.

constitutionality of section 159. In a 1989 decision of the Alberta Provincial Court, Youth Division, section 159 was upheld as constitutional,[26] and in 1998, the court indicated that it was "await[ing] further submissions from counsel" on the constitutionality of section 159.[27] Then, in 2002, the Alberta Court of Queen's Bench held, in *Roth*, that section 159 violated section 15 of the *Charter* on the grounds of age, marital status and sexual orientation. The facts in *Roth* were as follows: early in 1995, the male accused and a male friend met the female complainant in a bar and then the three of them went to her home. All three were adults. The accused's friend and the complainant soon engaged in vaginal intercourse. The accused then entered the room and penetrated the complainant anally, while his friend and the complainant were still in the process of vaginal intercourse. In 2001 the accused was charged with engaging in an act of anal intercourse contrary to section 159. The complainant testified at the preliminary inquiry that she had consented to the vaginal intercourse but did not consent to the anal intercourse. The defence alleged that she had consented to both. The accused was committed to stand trial, and then challenged the constitutionality of section 159, submitting that it violated sections 7 and 15 of the *Charter*. In her reasons for judgment, Veit J. explicitly adopted the reasoning in *M.(C.)* and *Roy,*[28] declaring section 159 of no force and effect. Interestingly, the Provincial Crown took no position on the constitutionality of section 159 and the Federal Crown did not even appear on the accused's application challenging the constitutionality of section 159. Veit J. observed in her reasons that "in this case it [was] obvious that Alberta prosecutors expected a declaration of invalidity in these proceedings," given the decisions in *M.(C.)* and *Roy*.[29] The Crown did not appeal from Veit J.'s order and the Alberta Crown Prosecutors' Office now takes her decision as having determined that prosecutions should no longer be undertaken under section 159.[30]

A 1986 British Columbia Supreme Court decision dismissed a constitutional challenge to the predecessor provision of section 159.[31] However, the reasoning in that case provides no assistance now since, in particular, section 15 of the *Charter* was not in force at the time the alleged offence took place. However, in 2001, the British Columbia Court of Appeal referred to *M.(C.)* and *Roy* in an *obiter* comment in a case not

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[26] *R. v. H.(D.)* (1989), 93 A.R. 110 (Prov.Ct., Y.Div.).

[27] *R. v. D.J.L.*, [1998] A.J. No. 1379 (Prov.Ct., Y.Div.), at para. 37, per Lipton, Prov.Ct.J. I have been unable to locate any report of further proceedings in this case.

[28] *Supra* note 5 at para. 19.

[29] *Ibid.* at para. 25.

[30] I am grateful to Charles P. Cobban, Alberta Crown Prosecutors' Office, Edmonton, who was counsel for the Crown in *Roth*, for providing me with this information.

[31] *R. v. Khadikin* (1986), 29 C.C.C.(3d) 154 (B.C.S.C.).

involving a charge of anal intercourse and stated, referring to *M.(C.)*, that the "reasons expressed in that case would be persuasive."[32]

Despite the rulings and reasoning in *M.(C.)*, *Roy* and *Roth*, Parliament has not yet either repealed or amended section 159 (although it is difficult to imagine how section 159 could be amended to meet constitutional muster consistent with the reasoning in those decisions). The fact that section 159 remains on the books creates two significant problems in addition to the real possibility, just illustrated, that counsel and judges may remain unaware of *M.(C.)*, *Roy* and *Roth*. The more obvious problem is that the law is different in different jurisdictions. Section 159 is clearly of no force and effect in Ontario and Quebec, is probably of no force and effect in Alberta — but in the absence of a ruling from the Alberta Court of Appeal on the matter I only say "probably" — yet remains in force in all other provinces and territories. Convictions for engaging in anal intercourse have in recent years been entered in several provinces and territories and other proceedings concerning admissibility, disclosure, or production in cases involving charges of engaging in anal intercourse have been reported, with courts making no reference to *M.(C.)*, *Roy* or *Roth*.[33] In fairness, I emphasize that all of those cases involved, or appear to have involved, either or both of an allegation of non-consensual anal intercourse or a complainant under 14 years of age.[34] However, the fact that the Crown seems not to be prosecuting persons who engage in consensual anal intercourse in which no participant was under 14 years of age obviously does not mean that it could not do so, if the anal intercourse involved someone under 18 years of age. Relying on the proper exercise of prosecutorial discretion is not a preferable means of enforcing young people's and, in particular, young gay men's constitutional right to equality consistent with the reasoning in *M.(C.)*, *Roy* and *Roth*.

The result of this confusing patchwork of differing law in different jurisdictions is that a young person 14 years of age or more may lawfully engage in consensual anal intercourse in Ontario or Quebec, probably may do so in Alberta, but elsewhere in the country there is the possibility that they and their sexual partner(s) may be charged with committing a

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[32] *R. v. G.G.*, [2001] B.C.J. No. 1483, 156 C.C.C.(3d) 497 (C.A.), at para. 51, per Saunders J.A.

[33] See, for example, *R. v. Sterling* (1995), 102 C.C.C.(3d) 481 (C.A.); *R. v. Weeseekase*, [1997] S.J. No. 790 (Q.B.); *R. v. S.E.G.*, [1998] Y.J. Nos. 72 and 76 (S.C.); *R. v. Morin* (1998), 173 Sask. R. 101 (Q.B.); *R. v. Van Schaik*, [1999] B.C.J. No. 415 (C.A.); *R. v. C.J.T.*, (2001) 239 N.B.R.(2d) 69 (Q.B.); and *R. v. J.M.S.*, [2003] N.S.J. No. 117 (Y.Ct.).

[34] I say "appear to have involved" since two of these cases — *R. v. S.E.J.*, *ibid.*, and *R. v. J.M.S.*, *ibid.* — which concerned pre-trial proceedings with respect to disclosure, production and admissibility of evidence, do not specifically indicate anything about the age of the complainant or whether the anal intercourse was consensual.

criminal offence and perhaps even face conviction. This is absurd. I submit that this differential treatment of young people and, in particular, young gay people itself violates section 15 of the *Charter*.[35]

The second and more insidious problem with leaving section 159 on the books is that it allows the possibility for improper use of section 159 in any jurisdiction. The egregious fact situation in a recent Ontario case, *Lucas v. Toronto Police Service Board*,[36] vividly illustrates the possible mischief. The plaintiff claimed damages, both in negligence and in respect of alleged *Charter* violations, and various declaratory relief against the Toronto Police Service Board, the Attorney General of Ontario, and the Attorney General of Canada in respect of having been arrested and charged with various offences, including a charge of anal intercourse. The Attorney General of Canada applied to strike part of the plaintiff's statement of claim concerning the failure of the federal government to repeal section 159 and the allegation that "[i]t was likely and foreseeable that the continued publication of s. 159 of the *Criminal Code* would subject gay men, including [the plaintiff], to arbitrary state action under the cloak of the colour of right provided by [the federal government's] failure to act to amend or to repeal s. 159."[37] For the purposes of the application, the facts alleged in the statement of claim were deemed to have been proven. The motions judge, Backhouse J. summarized the facts pleaded by the plaintiff as follows:

> The facts pleaded by the plaintiff relevant to this motion are that on June 24, 1998, at 6:30 a.m., the plaintiff was handcuffed by police officers, taken in a police car to the police station, photographed, fingerprinted, taken to court at College Park and then to the Don Jail, where he spent the night. The next afternoon, he was brought before a justice of the peace and charged with anal intercourse with a person under the age of 18 years, allegedly contrary to s. 159 of the *Criminal Code*, — and administering a drug or intoxicating liquor for the purpose of illicit sex contrary to s. 212(1)(i) of the *Criminal Code*. He was released on bail on June 25, 1998. The plaintiff was required to appear in court on several occasions to answer to the charges until on September 22, 1998 the charges were withdrawn. The anal intercourse charge was dropped because s. 159 had been struck down by the Ontario Court of Appeal in *R. v. M.(C.)*, [in 1995].

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[35] Consider, by analogy, the British Columbia Court of Appeal's concern with the "unequal application of the law as between Ontario and British Columbia" with respect to same-sex couples' right to marry, expressed in *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 228 D.L.R. (4th) 416 (C.A.), at para. 7, by the Court.

[36] (2000), O.J. No. 4326, 51 O.R.(3d) 783 (Sup.Ct.J.) [Lucas], appeal by defendant Attorney General of Canada allowed (2001) 54 O.R.(3d) 715 (Sup.Ct.J., Div.Ct.), application by plaintiff for leave to appeal to Ont.C.A. dismissed, September 10, 2001, and subsequent application for leave to appeal to S.C.C. dismissed, June 13, 2002; [2001] S.C.C.A. No. 649.

[37] *Ibid.* at para. 5.

> The charge of administering an intoxicating substance was also dropped because there was no longer any "illicit" sexual intercourse on which to base the charge.
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> The plaintiff was then charged in regard to the same incident with committing a sexual assault, although the complainant had not alleged a lack of consent. On the morning scheduled for the trial on the sexual assault charge, the Crown withdrew the remaining charge against the plaintiff. [38]

The test to be applied in determining whether any part of the statement of claim should be struck was whether it was "plain and obvious" that the statement of claim disclosed no reasonable cause of action.[39] Applying this test, Backhouse, J. stated:

> Canada submits that the plaintiff's claim for damages and declaratory relief is essentially seeking mandamus ordering Parliament to legislate, and thereby contravenes a fundamental principle of common law that the court will not intervene in the legislative process. In my view, this mischaracterizes the plaintiff's claim. The plaintiff submits that an award of damages should be available where there has been a *Charter* violation by virtue of resort to legislation after it has been declared to be unconstitutional. It is not plain and obvious to me that the prosecution by the Crown of an accused in respect of an offence which has been declared to violate the *Charter* is not also a breach of the *Charter* for which damages may be awarded. ...
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> Counsel for Canada submits that there is no duty on Parliament under the *Charter* owed to the plaintiff to repeal or amend its statutes. ...
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> If what counsel for Canada submits is correct, Canada need never amend the provision in question. The potential for arbitrary application of a law which remains on the books after it has been definitively determined to be unconstitutional is very real. The police can continue to arrest gay men and rely on the statutory shield which protects public officials acting under colour of right. The court is asked to consider whether an additional remedy is necessary to guarantee *Charter* rights where, after a final determination of a provision's unconstitutionality under the *Charter*, the state continues infringing a person's rights under that provision. It is not plain and obvious to me that refusing either to repeal or to amend the provision and continuing to publish the statute without indicating that it has been declared invalid in Ontario, knowing that innocent persons will likely suffer damages as a result, does not entitle an injured plaintiff to a remedy.
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> A novel claim of negligence in a statement of claim should not be struck for absence of reasonable cause unless it can be established that the claim is clearly unsustainable. The categories of negligence in which a duty of care is owed are not closed and the

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[38] *Ibid.* at paras. 2-3.

[39] *Ibid.* at para. 6, referring to *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

> plaintiff's claim should not be foreclosed on this ground. I note that it was neither submitted by Canada nor is it readily apparent that Canada's conduct is in pursuit of some legitimate government policy…
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> In the result, it is not "plain and obvious" to me that the statement of claim fails to disclose a reasonable cause of action. What is plain and obvious is that the plaintiff suffered damages in being arrested, detained, imprisoned and prosecuted in respect of an offence which had been struck down as offending the *Charter* three years earlier. [40]

In the end, Backhouse J. dismissed the Attorney General of Canada's application, who then appealed from her order to the Divisional Court. That Court held that Backhouse J. had correctly set out the appropriate test but that she had not correctly applied it. The Court's reasons stated:

> The essence of the respondent's claim, is that the appellant is strictly liable for the breach of the respondent's *Charter* rights, and, is also liable in negligence for failing to discharge a duty of care to the respondent. Under both approaches what constituted the appellant, Canada, a "contributor" to the *Charter* breach and what constitutes the failure of the appellant's duty of care is that s. 159 has been permitted by Canada to remain on the books notwithstanding a declaration of constitutional invalidity by the Court of Appeal in *R. v. M.(C.)*. ... To rephrase, the essence of the claim of the respondent is that by failing to repeal s. 159, the appellant is at once a contributor to the *Charter* breach and has also failed to discharge a duty of care to the respondent by providing a colour of right to police officers to enforce s. 159 of the *Criminal Code* which has been declared unconstitutional by the Court of Appeal. In our view, there is no cause of action against Canada either for *Charter* breach or in negligence because there was no duty in either case to legislate or to repeal. ...
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> The claim based on *Charter* breach, to the extent it is based on a failure to repeal s. 159 of the *Criminal Code* pursuant to a ruling by a provincial appellate court that the section is unconstitutional, is equally not justiciable and should have been struck by the motions judge. In the circumstances, the court cannot purport to impose a duty to repeal or amend legislation as this would constitute a fetter on the sovereignty of Parliament, which in our federal system of government has unfettered freedom to formulate, amend and repeal legislation. Moreover, the timing of any repeal must also be the prerogative of Canada.[41]

Thus, the Divisional Court allowed the Attorney General's appeal and struck parts of the plaintiff's statement of claim as requested. Both the Ontario Court of Appeal and the Supreme Court of Canada subsequently dismissed applications by the plaintiff for leave to appeal. *Lucas* is now cited as authority for the proposition that a government cannot be held

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[40] *Ibid.* at paras. 7, 8, 10-11 and 15.

[41] Lucas, Div.Ct., *supra* note 36 at paras. 7 and 10.

liable at the legislative decision-making level and, in particular, that a cause of action cannot be based on legislative action, or inaction, such as a failure to legislate or a failure to repeal legislation.[42] To date, the plaintiff's claims against the Toronto Police Service Board and the Attorney General of Ontario have neither been tried nor settled.

In summary, charges of engaging in anal intercourse contrary to section 159 are still laid and convictions entered, even though the section has been held unconstitutional by two provincial appellate courts, a trial court in another province, and the Federal Court, Trial Division; and a third provincial appellate court has indicated that it would agree with this holding. Further, section 159 has the potential to be the vehicle for shocking mischief such as that in *Lucas*. The offence of anal intercourse is simply a homophobic vestige of the past. As LeBel, J.A. commented in *Roy*, "[t]he trial judge appears to have found the best justification for the prohibition of anal intercourse in the fact of its antiquity."[43] The conclusion is obvious. The federal government should repeal section 159 of the *Criminal Code* without delay.

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[42] *Hislop v. Canada (Attorney General)*, [2002] O.J. No. 2799 (Sup.Ct.J.) at paras. 18-20; see also *Kimpton v. Canada (Attorney General)* (2002), 9 B.C.L.R.(4th) 139 (S.C.) at para. 61; and *Brogaard v. Canada (Attorney General)* (2002), 25 C.P.C.(5th) 323 (S.C.) at para. 50.

[43] *Supra* note 4 at 467 (translation).

Postscript: Recent Developments

Now, see also, *R v. Blake*, [2003] B.C.J. No. 2381 (C.A.) at paras. 21-24, where the Court accepted the Crown's concession that section 159 was unconstitutional; and, *Ligue catholique pour les droits de l'homme c. Hendricks*, [2004] J.Q. no 2593 (C.A.) at paras. 27-28, concerning the relevance of one provincial appellate court's decision that federal legislation is unconstitutional to the law in other provinces and territories.