The Law and Its Absurdities

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By: Gar Pardy

Charles Dickens would be proud. More than 150 years after his death there are still examples of the law being an “ass” as we strive to deal with the injustices and iniquities of our political and social systems.

When Beagle Bumble spoke his immortal words in *Oliver Twist*, they reflected Dickens’ frequent use of “the law” in many of his novels. In doing so, “the law” emerges as a character as unique as that of Oliver, Pip, Bumble, Fogg, Jarndyce and Tulkinghorn.

Dickens’ own experiences from an early age provided examples of the Victorian justice system where all transgressors, regardless of age, were locked away or transported to Australia on near-year-long

voyages. They were “beyond the seas for the term of [their] natural life.”

It was a surprise in late May this year, when the Federal Court of Appeal of Canada released a decision that in many ways reflected the arbitrariness and absurdities of the justice system reflected in the works of Dickens. In its May 31, 2023 decision, (Canada v. Boloh (1(a)) – bring our loved one’s home) the Court came to the unique conclusion that the “right” reflected in - *Charter of Rights and Freedoms* for a citizen of Canada “to enter Canada” does not carry the consequential right to be “returned to Canada.”

Some legal decisions are not for the fainthearted. The three judges involved in the May 31 decision provided an example of legal wordsmithing that overpowers the reader with sophistry eroding the very essence of the right “to enter Canada.”

The decision, in its twenty or so pages, eliminates responsibility for the government of Canada to assist Canadians in “returning” to Canada so that they may “enter” Canada. In doing so, the Appeal Court overturned a decision by another Federal Court which four months earlier, in January, found ample evidence to rule that the Canadian government had a responsibility not only in allowing Canadians to “enter” Canada but assisting in their “returning” as well.

The three Appeal Court judges laboriously and unconvincingly argued that the government of Canada had no such responsibility. In doing so, the Court decided there was a need to go beyond the text of the *Charter*, as, if they did not, their considerations would be “pure textualism.” Rather, the Appeal Court justices saw their function as interpreting the “scope and purpose” of the right or freedom in question by looking to its “philosophical and historical context” . . . of the right or freedom, the larger objects of the *Charter*, and where applicable the meaning and purpose of associated *Charter* rights. “Words, words, words,” as Eliza Doolittle sang.

The case in question involved the forty or so Canadians, along with thousands from other countries, who went to Iraq and Syria a decade or so ago in support of the International State of Iraq (ISI) organization. The organization, using various names, including Daesh, grew out of the demise of al-Qaeda in Iraq largely in the chaotic aftermath of the American 2003 invasion. Daesh spread from Iraq to neighbouring Syria in the midst of its civil war beginning in 2012 and, at its peak, dominated large swaths of territory in both countries. It collapsed as a significant force in the region following military interventions involving the affected countries, Syrian-Kurdish units, Turkey and the United States.

In its collapse, hundreds of the foreigners involved with Daesh were captured and detained, largely by Kurdish forces in northeast Syria. The Kurds, organized as the Autonomous Administration of North and East Syria (AANES), maintains an internationally unrecognized territory bordering Turkey, Syria and Iraq. It has made arrangements with numerous countries for the return of their citizens.

Canada was reluctant to take similar action for its citizens, but a year or so ago, it yielded to public pressure as well as criticism from UN officials, and agreed to repatriate a group of Canadian women and children. Nineteen were identified and approximately 14 returned. Three of the women, following

their return, were charged with involvement with a terrorist organization but released with special restrictions.

One case had Dickensian overtones. A Canadian mother of six children was not allowed to return as she represented a “security risk” to Canadians. However, her six Canadian children could return.

Detained Canadian men were ignored as well in the process with the result of another application to the Federal Court seeking a judicial decision ordering the government to facilitate the return of the four detained men so that they could exercise their right to enter Canada. A special issue of this journal, published earlier this year, canvassed the many dimensions of this deeply troubling situation.

In its January 20, 2023 decision the Federal Court reasonably decided that “Indeed, it is critical to appreciate that for many, if not most practical purposes, the subsection 6(1) right [to enter Canada] in today’s closely regulated global travel environment is one that by definition embraces and contemplates actions with implications outside Canada, not just at a point of entry.”

The Court of Appeal in overturning the Federal Court decision concluded that the “Government of Canada is not constitutionally obligated or otherwise obligated at law to repatriate the respondents." The Court of Appeal in recognizing its own unreasonableness then suggested that its decision “should not be taken to discourage the Government of Canada from making efforts on its own to bring about that result.”

In essence, the Court of Appeal decided that the right to enter Canada could only be exercised as and when a person arrived at a Canadian port of entry. The earlier Federal Court decision, reflecting the reality of today’s world, decided there was an obligation of the government to create the prior conditions necessary for the right to enter could be exercise.

An application for leave to appeal the Appeal Court’s decision to the Supreme Court of Canada is now underway. It seeks the early intervention of the Supreme Court in eliminating the Dickensian conclusions now curtailing one the most important rights in the Charter. Sometimes it is necessary to demonstrate that the “ass” is not always “the law” but those with the responsibility for its reasonable application.

Citation: Gar Pardy, "The Law and its Absurdities" (2023) 7 PKI Global Justice Journal 5.

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