

ImmQuest

"Qui bene interrogat bene docet" "He who questions well teaches well"

Editors-in-chief: Cecil L. Rotenberg Q.C. and Mario D. Bellissimo

ImmQuest One-on-One with a Regulator: John Ryan, Chair of CSIC

Telephone interview conducted on 27
February 2007

Aileen Farrol

Q. CSIC members were excited to hear the Federal Court's decision.¹ What does this decision mean to CSIC and its members today?

¹ *Law Society of Upper Canada v. Canada (Minister of Citizenship & Immigration)*, 2006 CarswellNat 4491, 2006 FC 1489, 13 December 2006.

Full story on page 2

U.S. War Resisters and the Legality of the Iraq War

Edward C. Corrigan, B.A., M.A., LL.B.

The entry of U.S. Army deserters into Canada who are refusing to fight in Iraq has brought into focus the legal issue of conscientious objection as a basis for making a claim for protection of

Full story on page 7

INSIDE

Focus - Regulators

- **ImmQuest One-on-One with a Regulator**1
An interview with John Ryan, Chair of CSIC
— *Aileen Farrol*
- **Practice Focus**1
U.S. War Resisters and the Legality of the Iraq War
— *Edward C. Corrigan*
- **Policy Changes Affecting Marriages between Same-Sex Couples**10
Changes to requirements for sponsorship applications
— *Camilla Jones*
- **Case Tracker**11
Cases you should know!
— *Mario D. Bellissimo*

Please send your questions to ImmQuest care of Mario D. Bellissimo at mdb@obr-immigration.com. If you have any questions you would like asked of either Citizenship and Immigration Canada or the Canada Border Services Agency send it along and we will ask on your behalf.

A. No. We have transparent standards of education and admission from coast to coast to coast. If you apply for CSIC membership you must meet our national standard. In our view a national patchwork of standards works against the interest of the consumer.

CSIC's national standards serve as one of the key reasons why our members are recognized as Authorized Representatives under the IRPR.

I think it is also important to note that all the Provincial Nominee Programs have also chosen to refer to the Authorized Representative regulations when dealing with paid representatives.

Q. Overall, what has been the greatest impact of regulation to date?

A. Well, we're here! We're happening! If you've been involved as long as I have in this single issue, you will know what an achievement this truly is! It has been an uphill battle.

Consultants said "please regulate us". We pushed the government to regulate us and finally regulation is here. The consumer now has a mechanism to choose a qualified counsel and has very tangible ways to seek redress.

Our profession now has transparent, meaningful education/competency standards that include mandatory continuing professional development, a mandatory E&O insurance program, a credible complaint/discipline mechanism and avenues whereby unregulated practitioners who prey upon their clients can be reported and prosecuted for doing so.

CSIC will continue to work to with our stakeholders to improve the system.

Q. Is there anything else you would like to add?

A. Yes, there are some new programs coming online to assist our members. The first initiative will be the creation of a "Peer Practice Review Panel (PPRP)". The panel will provide advice/interpretations on practice related issues faced by members under our Code of Professional Conduct. This advice can be sought by the member on an anonymous basis and is designed to assist our members in conforming to our rule of conduct.

The second initiative involves the creation of a process similar to an employee assistance program, whereby members will be able

to receive assistance and counselling with personal matters that could improve their ability to serve the best interests of their clients before the matter becomes one of discipline.

I hope I have helped your readers gain a better understanding of the Society and its efforts to deliver on its joint mandates of accreditation and consumer protection. I think it's fair to say that it is still very much a work in progress.

Mr. Ryan, on behalf of ImmQuest and all CSIC members, I thank you for taking the time to answer our questions. We look forward to our first conference in Toronto in May. See you there.

Aileen Farrol is a CSIC member, working under the mentorship of Cecil L. Rotenberg, Q.C. She can be contacted at: ajf@obr-immigration.com.

U.S. War Resisters and the Legality of the Iraq War

continued from page 1

Edward C. Corrigan, B.A., M.A., LL.B.

Canada as a Convention refugee.¹ It also raises political questions about our relationship with our powerful neighbour to the south.

If American "war resisters" who desert the U.S. Army are forced to return to the United States, they face court martial before a military tribunal and possibly years in prison. The death penalty remains on the books in the U.S. as a possible punishment for desertion during wartime. However, it is interesting to note that the court martial of 1st Lt. Ehren Watada for refusing to fight in Iraq ended in a mistrial.²

During the Vietnam War (1965-1973), more than 50,000 Americans came to Canada, refusing to participate in what they

¹ For a more extensive discussion of conscientious objection as a basis for making a refugee claim see Edward C. Corrigan, "Refusal to perform military service as a basis for refugee claims in Canada" 8 *Immigration Law Reports* (3d) 272-286.

² Scott Galindez and Geoffrey Millard, "Watada Court-Martial Ends in Mistrial" *truthout* | Report (7 February 2007).

felt was an immoral war. Canada accepted them into our country. At the time, Prime Minister Pierre Trudeau said: "Those who make a conscientious judgment that they must not participate in this war... have my complete sympathy, and indeed our political approach has been to give them access to Canada. Canada should be a refuge from militarism." Thirty years later, Canada is faced with the same moral and legal question: the question of giving refuge to those who refuse to fight in a U.S. led war.

In January 2004, Private 1st Class Jeremy Hinzman, a soldier in the 82nd Airborne Division, came to Canada seeking refugee status with his wife, Nga, and son, Liam. Hinzman had fought in Afghanistan and considers himself an American patriot. Private Hinzman said: "I signed up to defend my country, not carry out acts of aggression." He refused to fight in Iraq, a war he termed illegal.³

This issue "is being watched with interest by fellow servicemen on both sides of the border." According to reports, "[at] least 20 others have already applied for asylum and there are an estimated 400 in Canada out of more than 9,000 who have deserted since the conflict started in 2003."⁴

In December 2004, the Canadian government intervened in Hinzman's hearing before Canada's Immigration and Refugee Board, asserting that the legality of the war in Iraq had no relevance to his claim. The Board Member agreed that the legality of the war was not an issue in the claim for refugee protection.

After the Second World War, the Nuremberg Tribunal set out important principles of international law. Those principles established that soldiers have a moral duty, not a choice, to refuse to carry out illegal orders. It is the opinion of noted international law expert Francis Boyle that George W. Bush's war against Iraq is a war of aggression and constitutes a "Crime against Peace" as defined by the Nuremberg Charter (1945), the Nuremberg Judgment (1946), and the Nuremberg Principles (1950), as well as by paragraph 498 of U.S. Army Field Manual 27-10 (1956).⁵

After the massive human rights abuses in the Second World War and the persecution of the Jews, the International Military

Tribunal at Nuremberg described the waging of aggressive war as "essentially an evil thing ... [To] initiate a war of aggression ... is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."⁶

The chief prosecutor at the Nuremberg Tribunal and Associate United States Supreme Court Justice Robert Jackson wrote: "No political or economic situation can justify" the crime of aggression. Justice Jackson also said: "If certain acts in violation of treaties are crimes they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us."⁷

A war of aggression has been termed a "Crime against Peace" and is considered a war crime. Wars are only deemed legal under international law if they are acts of self defence or if they are expressly approved by the United Nations Security Council.

Arthur Schlesinger, Jr., the distinguished American historian and an advisor to President John F. Kennedy, made the following comment on the Bush doctrine of unilateral pre-emptive war: "Unilateral preventive war is neither legitimate nor moral. It is illegitimate and immoral."⁸ Schlesinger drew an analogy to the Japanese attack on Pearl Harbor:

One of the astonishing events of recent months is the presentation of preventive war as a legitimate and moral instrument of U.S. foreign policy. This has not always been the case. Dec. 7, 1941, on which day the Japanese launched a preventive strike against the U.S. Navy, has gone down in history as a date that will live in infamy. During the Cold War, advocates of preventive war were dismissed as a crowd of loonies. When Robert Kennedy called the notion of a preventive attack on the Cuban missile bases "Pearl Harbor in reverse," and added, "For 175 years we have not been that kind of country," he swung the ExCom — President Kennedy's special group of advisors — from an airstrike to a blockade.⁹

3 Jonathan Franklin, "U.S. soldier on frontline battle for refugee status" *The Guardian* (21 February 2004).

4 Duncan Campbell, "Soldiers flee to Canada to avoid Iraq duty" *The Guardian* (28 March 2006).

5 Francis A. Boyle, "US as Belligerent Occupant Iraq and the Laws of War" *CounterPunch* (22 December 2005).

6 Majorie Cohn, "Aggressive War: Supreme International Crime" by *truthout* | *Perspective* (9 November 2004).

7 Nicolas J. S. Davies, "The Crime of War: From Nuremberg to Fallujah. A review of current international law regarding wars of aggression" *Z Magazine* 18:2 (February 2005).

8 Arthur Schlesinger, Jr., "Unilateral Preventive War: Illegitimate And Immoral" *Los Angeles Times* (21 August 2002).

9 *Ibid.*

Schlesinger also made the following observation:

The policy of containment plus deterrence won the Cold War. After the collapse of the Soviet Union, everyone thanked heaven that the preventive-war loonies had never got into power in any major country.

Today, alas, they appear to be in power in the United States. Rebaptizing preventive war as preemptive war doesn't change its character. Preventive war is based on the proposition that it is possible to foretell with certainty what is to come.¹⁰

The rationale given by the Bush Administration for invading Iraq, namely that Saddam Hussein had links to the attacks on September 11, 2001¹¹ and had ties to Al Qaeda¹² have been proven to be false. In a poll conducted in September 2006 by Opinion Research Corporation for CNN, a sample of American adults was asked: "Do you think Saddam Hussein was personally involved in the 11 September terrorist attacks, or not?" Forty-three percent of those polled answered yes.¹³

The alleged Weapons of Mass Destruction have also proven to be non-existent.¹⁴ Virtually all of the "evidence" presented to support claims of the Bush administration for the invasion including the "Niger Yellow Cake Uranium"¹⁵ and "biological weapons trailers"¹⁶ have proven false or were outright fabrications.¹⁷

10 *Ibid.*

11 "Ten days after the September 11, 2001, terrorist attacks on the World Trade Center and the Pentagon, President Bush was told in a highly classified briefing that the U.S. intelligence community had no evidence linking the Iraqi regime of Saddam Hussein to the attacks and that there was scant credible evidence that Iraq had any significant collaborative ties with Al Qaeda, according to government records and current and former officials with firsthand knowledge of the matter." Murray Waas, "Bush Knew 9/21/01: No 9/11-Iraq Connection, They hid the evidence from the Hill" *National Journal* (22 November 2005).

12 "The CIA learned in late September 2002 from a high-level member of Saddam Hussein's inner circle that Iraq had no past or present contact with Osama bin Laden and that the Iraqi leader considered bin Laden an enemy of the Baghdad regime, according to a recent Senate Intelligence Committee report." Walter Pincus, "CIA Learned in '02 That Bin Laden Had No Iraq Ties, Report Says" *The Washington Post* (15 September 2006).

13 Adam Brookes, "The Senate Intelligence Committee has found no evidence of links between the regime of Saddam Hussein and al-Qaeda," *BBC News* (9 September 2006).

14 Alan Elsner, "Criticism Grows at U.S. Failure to Find Iraqi Weapons" *Reuters* (12 May 2003). "The White House has acknowledged for the first time that a key moment in post-war Iraq, the declaration by George Bush that 'we have found the weapons of mass destruction,' was based on intelligence known in Washington to be false," by Suzanne Goldenberg, "White House admits Iraq WMDs error" *The Guardian* (13 April 2006).

15 Seymour M. Hersh, "Who lied to whom?" *The New Yorker* (3 April 2003).

16 "Iraq's Mobile Laboratories" *New York Times* | Editorial (13 May 2003). "[T]he Washington Post yesterday reported that the Pentagon had sent nine U.S. and British weapons experts to Iraq to examine the trailers, who concluded they had nothing to do with biological weapons, and transmitted their finding to Washington on May 27, 2003." Suzanne Goldenberg, "White House admits Iraq WMDs error" *The Guardian* (13 April 2006).

17 Warren P. Strobel and John Walcott, "Memo: Bush made intel fit Iraq policy" *Knight Ridder* (5 June 2006). See also "The secret Downing Street memo [on the Iraq War]" *The Times of London* (1 May 2005).

The Senate Intelligence Committee has found no evidence of links between the regime of Saddam Hussein and al-Qaeda. ... In a report ... it also found that there was little or no evidence to support a raft of claims made by the U.S. intelligence community concerning Iraq's weapons of mass destruction.

The 400-page report was three years in the making, and is probably the definitive public account of the intelligence used to justify the invasion of Iraq.¹⁸

No one has been prosecuted for presenting this false information or for manufacturing fake evidence to support the drive to invade Iraq. However, the courts in Europe are increasingly recognizing that the invasion of Iraq was a criminal act.¹⁹

According to the U.N. High Commissioner for Human Rights Louise Arbour, the U.S. led war on terror has undermined the global ban on torture, weakening American moral authority on human rights worldwide. "The principle once believed to be unassailable — the inherent right to physical integrity and dignity of the person — is becoming a casualty of the so-called war on terror," Arbour said in a statement on Human Rights Day.

Arbour is a former Canadian Supreme Court Justice and a chief prosecutor for the U.N. war crimes court for the former Yugoslavia. She praised past U.S. leadership on expanding political and civil rights because it allowed the Americans "to lecture others about their performances." Arbour said, "[to] the extent that there's a perception that there is a withdrawal from the high-water mark of commitment to civil and political liberties, I think it makes it a lot more difficult for the United States to exercise that kind of moral leadership on all human rights issues."

The U.N. Commissioner of Human Rights "decried two practices in particular: holding prisoners in secret detention centers, which she said was a form of torture, and rendering suspects to third countries outside normal extradition procedures, that is, without independent oversight." Arbour said, "[there] are a lot of human rights that can be set aside in cases of emergency, lots of them, but not the right to life and not the protection against torture." The United States has denied using torture but it has avoided

18 Adam Brookes, "Iraq war justifications laid bare" *BBC News* (9 September 2006). See also Colin Brown and Andy McSmith, "Diplomat's suppressed document lays bare the lies behind Iraq war" *The Independent* (15 December 2006).

19 George Monbiot, "The courts are starting to accept that the war against Iraq is a crime" *The Guardian* (17 October 2006).

denying or confirming a Washington Post report that the CIA runs secret centres in Eastern Europe to interrogate terrorism suspects.²⁰

The United States has also come under heavy criticism for prisoner abuse and torture at the Abu Ghraib prison in Iraq²¹ and the Guantanamo Bay prison in Cuba.²² The heavy loss of civilian life and the conduct of U.S. troops has also been heavily criticized in the ongoing occupation of Iraq.²³ Even British Prime Minister Tony Blair has admitted that "Iraq is a disaster."²⁴

Jeremy Hinzman lost his "conscientious objection" refugee case at the Immigration and Refugee Board. He then applied to the Federal Court for a judicial review of the IRB decision rejecting his claim. However, the Federal Court upheld the negative decision but the case has been referred to the Federal Court of Appeal.

The key issue is whether or not the legality of the war is a relevant issue to the claim for protection. It will be interesting to see the decision of the Federal Court of Appeal. This legal question may ultimately be decided by the Supreme Court of Canada.

20 Daniel Trotta, "UN calls torture ban a casualty of war on terror" *Reuters* (7 December 2005).

21 Martin Lukacs, "There has never been an American army as violent and murderous as the one in Iraq—Pulitzer-winning investigative journalist Seymour Hersh slams Bush at McGill address" *The McGill Daily* (31 October 2006). See also "Beyond Abu Ghraib: detention and torture in Iraq" *Amnesty International* (6 March 2006).

22 "USA: Close Guantanamo - symbol of injustice" *Amnesty International* (1 January 2007).

23 David Brown, "Study Claims Iraq's 'Excess' Death Toll Has Reached 655,000" *Washington Post* (10 October 2006).

24 Tim Shipman, "Iraq Is a 'Disaster' Admits Blair" *The Daily Mail* (17 November 2006).

Policy Changes Affecting Marriages between Same-Sex Couples

Camilla Jones

On January 24, 2007, the Conservative government quietly removed one of the last legal restrictions against same-sex couples by allowing same-sex couples married outside of Canada to be fully recognized as spouses for immigration purposes.

Regulation 2 of *Immigration and Refugee Protection Regulations* states that marriage "in respect of a marriage that took place outside Canada, means a marriage that is valid both under the laws

of the jurisdiction where it took place and under Canadian law."¹ This definition is applicable to all classes of persons whether they are, or hope to become, a permanent resident or temporary resident, and regardless of whether the marriage is between opposite or same-sex couples.

In June 2004, the Liberal government of Canada introduced a policy for same-sex couples that differed from the treatment of opposite sex couples. The policy recognized same-sex marriages for immigration purposes, only if the marriage was performed in Canada, and of course if one of the spouses was a Canadian citizen or permanent resident. It also clearly stated: "If you married outside Canada, you cannot apply to sponsor your same-sex partner as a spouse." Opposite sex marriages did not face the same restriction.

On July 20, 2005, the *Civil Marriage Act*² came into force. This act legalized marriages between persons of the same-sex which occurred in any of the provinces or territories of Canada. The following requirements remain valid. Canadian citizens and permanent residents can apply to sponsor their same-sex partner as a spouse if they were issued a marriage certificate by a Canadian province or territory on or after the following dates:

Quebec (on or after March 19, 2004)

Ontario (on or after June 10, 2003)

British Columbia (on or after July 8, 2003)

Yukon (on or after July 14, 2004)

Manitoba (on or after September 16, 2004)

Nova Scotia (on or after September 24, 2004)

Saskatchewan (on or after November 5, 2004)

Newfoundland (on or after December 21, 2004)

New Brunswick (on or after July 4, 2005)

All other provinces or territories (on or after July 20, 2005)

On January 24, 2007, NDP Member of Parliament Bill Siksay, a member of Parliament's Standing Committee for Citizenship and Immigration, put forward a motion to end this policy regarding sponsorship applications. Citizenship and Immigration Minister Diane Finley responded to the committee's motion in a letter on January 24, 2007, saying that her department "has moved to annul the interim policy on same-sex marriage." As a result, same-sex marriages legally performed in Canada and in foreign jurisdictions are now recognized for all

1 SOR/2002-227, s. 2.

2 S.C. 2005, c. 33.