



Beyond Borders
Au-delà des frontières

ECPAT CANADA

CANADA'S GLOBAL VOICE AGAINST CHILD SEXUAL EXPLOITATION

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JUSTICE DENIED: THE DISTURBING CASE OF ERNEST FENWICK MACINTOSH

In 2010, Ernest Fenwick MacIntosh, a self-admitted and previously convicted sex offender, was convicted in a Nova Scotia court of multiple child sexual abuse offences that took place in the 1970s. The charges had been split into two groups of victims and separate trials ensued.

To the dismay of the alleged victims, on December 8, 2011, the Nova Scotia Court of Appeal judicially stayed all charges against MacIntosh on the basis that his right to a trial within a reasonable period of time had been infringed.

Had the state actors done their jobs, there would have been no issue about MacIntosh's right to be tried within a reasonable period of time. He would have been tried, convicted and sentenced on the merits.

Series of delays

In January and February 1995 the first two victims in this case made complaints to the police and in December 1995 charges were laid against MacIntosh. A warrant was issued for his arrest in February 1996. The police were well aware that MacIntosh had long left Nova Scotia and was residing in India.

Between August 1996 and September 1997 the authorities took no action. It was not until September 1997 that the Crown Attorney's Office began the process of seeking MacIntosh's extradition. Further, in 1997 MacIntosh's passport was denied renewal because of the outstanding charges. In April 1998 MacIntosh engaged counsel, who on his behalf successfully addressed this issue and started a vigorous campaign of requesting disclosure in order to prepare a defence against the charges.

It is important to note that despite MacIntosh knowing there was a warrant for his arrest, he chose to stay in India thus avoiding the charges facing him in Canada.

Shockingly, it would take another nine years for the formal request for extradition to be forwarded to the Government of India. MacIntosh was arrested in India in April 2007 and returned to Canada within two months. He remained in custody until April 2008 and by January 2011 both his trials were completed. He had applied unsuccessfully to have his charges permanently stayed for a denial of his right to be tried within a reasonable period.

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continued next page

Nova Scotia Court of Appeal

MacIntosh appealed to the Nova Scotia Court of Appeal who heard his appeal on June 8, 2011. On December 8, six months later, its decision was released judicially staying (ending) the prosecution of MacIntosh on the basis that his right to a trial within a reasonable period of time had been breached.

Both the trial judge and the Nova Scotia Court of Appeal considered MacIntosh's application on the basis of a violation of his rights by analyzing the delay in two broad categories: the laying of the charges until extradition (1995-2007) and extradition to trial (2007-2010). There is no doubt that the overall delay from the time the charge was laid was substantial and warranted an inquiry into the reasons for the delay and the apportionment of responsibility.

The trial judge had found that MacIntosh was aware of the charges he faced in Canada yet he chose to remain in India. He thereby evaded the Canadian judicial process and could not seek to have this time counted as against the Crown. The Nova Scotia Court of Appeal disagreed with this finding holding that the Crown has a duty to bring an accused person to Court and that an accused person has no duty to bring him or herself to Court.

There can simply be no plausible explanation for these significant delays. When MacIntosh told authorities he would not return, they ought to have immediately initiated the extradition process and forced MacIntosh back to Canada. However, it is a trite proposition of law that an accused has no duty to bring himself to Court.

MacIntosh was finally returned to Canada in June 2007. By this time, the investigation into all the charges had been complete for years. However, again for undisclosed reasons, video and audio taped statements by the complainants as well as the affidavit of one of the complainants were not made available to the defence until May 2008. These important materials had been in the Crown's possession since at least August 2002. It is clear that the Crown's failure to disclose these critical materials froze this case in its tracks and the Crown bears ultimate responsibility for this delay.

However, the Crown's inexcusable conduct does not necessarily rationalize a stay. Rather, the Court must still engage in the balancing process by weighing the prejudice suffered by an accused against the societal interest in bringing an accused to stand trial on its merits.

The seriousness of the charges is an important aspect of this balancing process. The fact that MacIntosh is a convicted sex offender ought to have been considered.

The Future

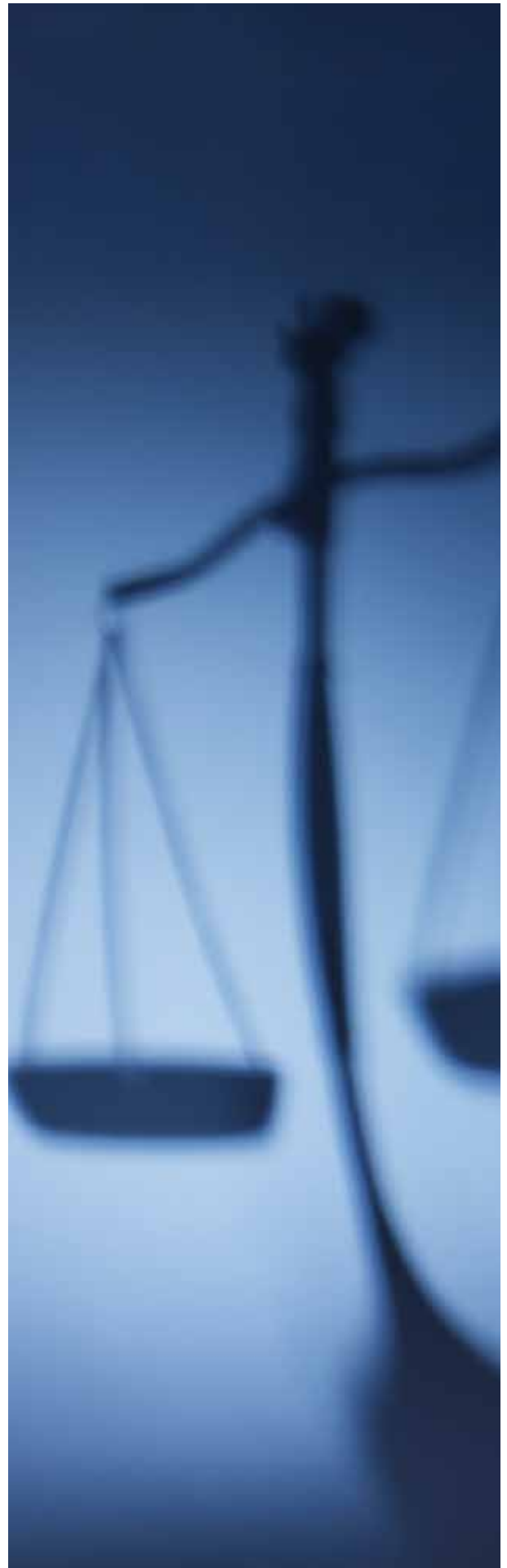
One hopes the Attorney General of Nova Scotia will seek leave to appeal this case to the Supreme Court of Canada.

The right to a trial within a reasonable period of time is not a new concept. Every prosecutor in this country knows the clock starts ticking once a charge is laid. The delays by the prosecutors in this case were inexcusable and entirely avoidable.

Had the prosecutors done their job, MacIntosh would be rightfully in jail. More important, the courageous victims who had the strength to come forward after years of suffering in silence may have been comforted by bearing witness to some semblance of justice. Sadly, justice has been denied.

Jonathan Rosenthal (LL.B, J.D.) is a criminal defence counsel and a professor adjunct at Osgoode Hall Law School. He acts a legal spokesperson for Beyond Borders ECPAT Canada.

A longer version of this article appears on the publications page of beyondborders.org.



NEWS IN BRIEF

Transat continues its commitment to raising awareness

In partnership with Beyond Borders ECPAT Canada, Transat continues to raise awareness and educate its staff and customers about child sex tourism. This advertorial recently appeared in the tour operator's agents guide.

“As a leading tour operator, Transat considers it its duty to help fight child sex tourism,” says Jean-Marc Eustache, president and CEO of Transat A.T. Inc. “In collaboration with Beyond Borders, we have taken the initiative of informing our employees — especially our front-line teams — as well as the travelling public about this worldwide phenomenon.”



Resolve research day



Board member, Arly Ackerstream (left) and volunteer, Karyn Stone (right), represented Beyond Borders at the annual RESOLVE Research Day October 17. RESOLVE coordinates and supports research aimed at ending violence, especially violence towards women and girls. Board member, Bev Wiebe also attended.

ECPAT general assembly

ECPAT International held its national assembly in Paris, France in November. The assembly is an opportunity for ECPAT representatives and affiliates from around the world to share their work and ideas with each other. Two hundred participants from 75 countries attended including representatives from Beyond Borders ECPAT Canada.

The assembly also included confirming ECPAT board positions for the next three-year term. Beyond Borders president, Rosalind Prober, ended her second and final term on the board while long time Beyond Borders board member, David Matas was appointed to his first three year term. Board members are limited to serving two terms.

Man-to-Man campaign

The Man-to-Man campaign is entering phase 3 of development. Beyond Borders has partnered with long time ally, The Canadian Centre for Child Protection, to embark on a targeted advertising campaign in various Canadian markets to promote the initiative. Look for phase 3 in early spring.

In other news, a team of Beyond Borders board members and volunteers had the opportunity to meet with Man-to-Man celebrity Paul Brandt when his tour came through Winnipeg in November.

Brandt explained that the impetus for his involvement in the issue of child sexual exploitation came from his visits to shelters for children in Cambodia. He was astonished and moved to meet children as young as 6 and 8 years old who had been trafficked for sexual purposes.



NEWS IN BRIEF

B.C. rules to uphold polygamy laws

Chief Justice Robert Bauman of the British Columbia Supreme Court, in answering a reference question put to the Court by the Government of British Columbia, held on November 24 that the Criminal Code prohibition against polygamy was constitutional where the accused was an adult.

Beyond Borders ECPAT Canada intervened in the reference, represented by senior legal counsel, David Matas. Matas argued in favour of the constitutionality of the law on the basis that polygamy facilitates child sexual abuse.

The appeal period for this decision expired December 23 without an appeal. The British Columbia Government has the power to refer the question answered by the Supreme Court to the British Columbia Court of Appeal, but has made no decision in this regard. The Government of Canada has the power to refer the question to the Supreme Court of Canada, but again has made no decision yet whether to do so. Neither government is subject to any deadline to make this decision.

While a reference to a higher Court would be more authoritative than a decision by the Supreme Court of British Columbia, it is unnecessary, in my view," says Matas. Further, he states that the reference reasoning is persuasive. "Because it is directed to the Criminal Code, it is relevant across Canada. A reference to another court would prolong uncertainty in the application of the law against polygamy. That law should be applied now."

BEYOND BORDERS MEDIA AWARDS – HIGHLIGHTS

It was another successful year for the 9th annual Beyond Borders Media Awards.



Beyond Borders co-founder, Mark E. Hecht delivers keynote.



Print award-winner (English), Daphne Bramham (Vancouver Sun), could not attend but sent along moving video acceptance.



Print award-winner (French) Kathleen Frenette (Journal de Québec) accepts her award.



Linden McIntyre accepts the English Electronic award for "Betrayal" (CBC's the fifth estate).



Media Awards Judge David Kilgour accepts the Electronic (French) award for Raymonde Provencher (Macumba Films).



Student (English) award-winner, Lisa Mayor (Lakehead University) accepts her award.

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