IMMUNITY FROM CROSS EXAMINATION:

If we look back at history, Judiciary of different time, considering certain documents as immune from cross examination may be found as reason for injustice and court orders against truth.

A. Galileo Trial (1633). (Pages 3 – 4)

Most famous case in this regards may be Galileo Trial by Rome Court in 1633. During 1600s Galileo brought new thoughts about universe and produced evidences for his thinking. But his findings contradicted religious thoughts regarding universe. Judiciary of that time under the influence of Religion refused to cross examine Religious thoughts, dismissed Galileo evidences as Illusions and put one of the greatest scientist of humanity into prison and house arrest.

B. Canada (1900s). (Pages 5 – 8)

In Canada during late 1800s and early 1900s laws like “Chinese head Tax and Exclusion Act”, “Dominion Election Act” which were based on racial segregation were passed. Though some immigrant tried to challenge these acts in Canadian Courts, Canadian and British Judiciary of that day unable to identify itself independently from racist concepts of those days, failed to uphold immigrants rights in these issues.

C. Present Day. (Pages 9 – 10)

Nowadays immunity from cross examination may be enjoyed by financial statements and affidavits of major financial institutions. In Madoff scandal where Bernard Madoff through a Ponzi Scheme defraud several thousands people, warning were given almost 8 years earlier. But Security and Exchange Commission of America (may because under the influence of Market Fundamentalism) refused to cross examine his financial statements and affidavits and let the mistake to grow up to several billions.

D. My Case.

In my case I believe Judiciary of Canada (Ontario) may have made mistakes at different levels. First Toronto Police Services (or Criminal Judicial System of Ontario.) failed to initiate a full criminal investigation into my complaint. Though I submitted enough evidences (all are TD Canada Trust bank statements and Credit reports which were beyond my control or any other party related to me.) to suspect a commission of crime in accounts managed in my name they failed to take any action on that evidences. Civil Court failed to accept my evidences and arguments. In Civil Court when TD Canada Trust submitted misleading information and edited evidences, despite my objection Civil Court accepted those evidences. These mistakes made me to argue my case into a small corner available in Judicial system. This may be an evident that in modern age major financial institutions becoming immune from any cross examination of their statements and affidavits and such financial institutions immune from any fraud investigations.

E. Claim of Miscarriage of Justice. (Pages 11 – 16)

Though I have right to appeal some of the court orders in the civil case I am unable to do so for following reasons.

a. I do not have enough money to continue the civil proceeding.
b. I found extremely difficult to obtain necessary legal advice.
c. Ontario Judiciary has necessarily or unnecessarily created a question that when there is evidence to suspect a commission of crime in a bank or by a bank; whether it is responsibility of criminal section or civil section to investigate and bring justice to the victims. I believe finding an answer for this question beyond my resources and responsibility. I am calling for a public enquiry to find answer to this question and to determine whether any serious ethical failures have happened in delivering justice for me.

I believe it is very unfortunate that documentary evidence to suspect commission of crime is filed with Ontario Judiciary (Civil and Criminal) but every body trying to dismiss the evidences and my claims as delusions but willing to make decisions (judicial and medical) based on misleading information submitted by the bank. I experienced more trauma when asked for justice than the one created by the fraud itself.

In total I claim I am a victim of mistake some thing similar to Walkerton (Ontario) E-Coli disaster. My Questions for Ontario (also Canada) Judiciary are following. When a person (victim) came up to the judiciary and complaint he is a victim of fraud and produce some documents as evidences;

a. How Judiciary should evaluate such evidences?
b. If the suspected fraud is in a bank or by a bank, which section of a judiciary should deal the issue?
c. If the initial evaluation of evidences confirms that there is reason to suspect commission of crime, then what are the measures in judiciary to collect more evidences from suspected criminals?
d. If suspected criminal is a bank, then is there any change in procedure to collect more evidences?

Whether our judiciary has a well defined procedure for above situation, and followed such procedure in my case? Or as in Walkerton case our Judiciary also a department runs in grandparenting licensing system which tries to make decisions (or Judgments) by concealing evidences and misleading public.

The Trial of Galileo

Excerpts from Article by Doug Linder (2002)

Galileo Galilei was born in 1564. From an early age, Galileo showed his scientific skills. At age nineteen, he discovered the isochronism of the pendulum. By age twenty-two, he had invented the hydrostatic balance. By age twenty-five, Galileo assumed his first lectureship, at the University of Pisa. Within a few more years, Galileo earned a reputation throughout Europe as a scientist and superb lecturer. Eventually, he would be recognized as the father of experimental physics. **Galileo's motto might have been "follow knowledge wherever it leads us."**

At the University of Padua he began to develop a strong interest in Copernican theory. In 1543, Nicolaus Copernicus published *Revolutions of the Celestial Orbs*, a treatise that put forth his revolutionary idea that the Sun was at the center of the universe and that the Earth--rotating on an axis--orbited around the sun once a year. Copernicus' theory was a challenge to the accepted notion contained in the natural philosophy that the sun and all the stars revolved around a stationary Earth.

Galileo's discovery of the telescope in 1609 enabled him to confirm his beliefs in the Copernican system and emboldened him to make public arguments in its favor. Through a telescope, Galileo saw the Milky Way, the valleys and mountains of the moon, and--especially relevant to his thinking about the Copernican system--four moons orbiting around Jupiter like a miniature planetary system. Galileo began talking about his observations at dinner parties and in public debates in Florence, where he has taken up a new post.

The Admonition and False Injunction of 1616

In 1613, just as Galileo published his *Letters on the Solar Spots*, an openly Copernican writing, the first attack came from a Dominican friar and professor of ecclesiastical history in Florence, Father Lorini. Preaching on All Soul's Day, Lorini said that Copernican doctrine violated Scripture, which clearly places Earth, and not the Sun at the center of the universe.

Galileo responded to criticism of his Copernican views in a December 1613 *Letter to Castelli*. In his letter, Galileo argued that the Scripture--although truth itself--must be understood sometimes in a figurative sense. A reference, for example, to "the hand of God" is not meant to be interpreted as referring to a five-fingered appendage, but rather to His presence in human lives. Given that the Bible should not be interpreted literally in every case. Galileo hoped that his *Letter to Castelli* might foster a reconciliation of faith and science, but it only served to increase the heat. His enemies accused him of attacking Scripture and meddling in theological affairs. One among them, Father Lorini, raised the stakes for the battle when, on February 7, 1615, he sent to the Roman Inquisition a modified copy of Galileo's *Letter to Castelli*. He attached his own comments to his submission:

When depositions in the Galileo matter concluded, the Commissary-General forwarded two propositions of Galileo to eleven theologians (called "Qualifiers") for their evaluation: (1) The Sun is the center of the world and immovable of local motion, and (2) The Earth is not the center of the world, nor immovable, but moves according to the whole of itself, also with a diurnal motion. Four days later, the Qualifiers unanimously declared both propositions to be "foolish and absurd" and "formally heretical."

At the palace, the usual residence of Lord Cardinal Bellarmine, the said Galileo, having been summoned and being present before the said Lord Cardinal, was...warned of the error of the aforesaid opinion and admonished to abandon it.

The Trial of 1633

In 1623, Galileo received some hopeful news: Cardinal Maffeo Barberini had been elected Pope. Unlike the dull and mean-tempered Pope Paul V, the new Pope Urban VIII held a generally positive view of the arts and science. Writing from Rome, the Pope's private secretary, Secretary of the Briefs Ciampoli, urged Galileo to resume publication of his ideas. On December 24, 1629, Galileo had completed work on his 500-page *Dialogue.*

Reading the book for the first time, chief licenser in Rome Riccardi came to see the book as less hypothetical--and therefore more problematic--than he expected it to be. After dragging for more than 2 years finally Riccardi gave the green light. The first copy of Galileo's *Dialogue Concerning the Two Chief World Systems* came off the press in February 1632. The book, which quickly sold out, soon became the talk of the literary public.

By late summer, Galileo's hopes turned to fears when he learned that orders had come from Rome to suspend publication of his book. The Pope seemed especially embittered by Galileo's decision to put the Pope's own argument concerning the tides into the mouth of the simple-minded Simplico--an attempt, as he saw it, to ridicule him. The Pope swung the machinery of the Church into motion. He appointed a special commission to investigate the Galileo matter.

Galileo, too, became angry. His noble goal of spreading scientific awareness to the public was being frustrated by a narrow-minded bureaucracy intent on preserving its own power. He believed he had done no wrong. He had been authorized to write about Copernicanism, had followed the required form, revised his work to meet censors' objections, and obtained a license.

Inquisitor of Florence showed up at Galileo's house with a summons to present himself to the Holy Office in Rome. In April 1633 Galileo officially surrendered to the Holy Office and faced Father Firenzuola, the Commissary-General of the Inquisition, and his assistants. Firenzuola informed Galileo that for the duration of the proceedings against him he would be imprisoned in the Inquisition building.

When the trial by ten cardinals moved to its conclusion, Several of the ten cardinals apparently pushed for Galileo's incarceration in prison, while those more supportive of Galileo argued that--with changes--the Dialogue ought to continue to be allowed to circulate. In the end, a majority of the cardinals--rejecting much of the Commissary's agreement with Galileo--demanded Galileo "even with the threat of torture...abjure in a plenary assembly of the Congregation of the Holy Office...[and] then be condemned to imprisonment at the pleasure of the Holy Congregation." Moreover, the cardinals declared, the Dialogue "is to be prohibited."

The grand play ran its course, with the Pope insisting upon a formal sentence, a tough examination of Galileo, public abjuration, and "formal prison." Galileo was forced to appear once again for formal questioning about his true feelings concerning the Copernican system. Galileo obliged, so as not to risk being branded a heretic, testifying that "I held, as I still hold, as most true and indisputable, the opinion of Ptolemy, that is to say, the stability of the Earth and the motion of the Sun." Galileo's renunciation of Copernicanism ended with the words, "I affirm, therefore, on my conscience, that I do not now hold the condemned opinion and have not held it since the decision of authorities....I am here in your hands--do with me what you please."

On the morning of June 22, 1633, Galileo, dressed in the white shirt of penitence, entered the large hall of the Inquisition building. He knelt and listened to his sentence: "Whereas you, Galileo, the son of the late Vincenzo Galilei, Florentine, aged seventy years, were in the year 1615 denounced to this Holy Office for holding as true the false doctrine....." The reading continued for seventeen paragraphs:

And, so that you will be more cautious in future, and an example for others to abstain from delinquencies of this sort, we order that the book *Dialogue of Galileo Galilei* be prohibited by public edict. We condemn you to formal imprisonment in this Holy Office at our pleasure.

As a salutary penance we impose on you to recite the seven penitential psalms once a week for the next three years. And we reserve to ourselves the power of moderating, commuting, or taking off, the whole or part of the said penalties and penances.

This we say, pronounce, sentence, declare, order and reserve by this or any other better manner or form that we reasonably can or shall think of. So we the undersigned Cardinals pronounce.

Seven of the ten cardinals signed the sentence.

Following the reading of the sentence, Galileo knelt to recite his abjuration:

....[D]esiring to remove from the minds of your Eminences, and of all faithful Christians, this strong suspicion, reasonably conceived against me, with sincere heart and unfeigned faith I abjure, curse, and detest the aforesaid errors and heresies, and generally every other error and sect whatsoever contrary to the said Holy Church; and I swear that in the future I will never again say or assert, verbally or in writing, anything that might furnish occasion for a similar suspicion regarding me....

I, the said Galileo Galilei, have abjured, sworn, promised, and bound myself as above; and in witness of the truth thereof I have with my own hand subscribed the present document of my abjuration, and recited it word for word at Rome, in the Convent of Minerva, this twenty-second day of June, 1633.

I, Galileo Galilei, have abjured as above with my own hand.

Two days later, Galileo was released to the custody of the Florentine ambassador. Niccolini described his charge as "extremely downcast over his punishment." After six days in the custody of Niccolini, custody of Galileo transferred to Archbishop Piccolomini in Sienna. In late 1633, Galileo received permission to move into his own small farmhouse in Arcetri, where he would grow blind and, in 1642, die.

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given effect to their lien (1), afterwards made an additional order and inquiry similar to those made in this case. The grounds upon which this addition to the original decree was made do not appear; nor does it appear what were the grounds on which any member was held to have incurred liability, nor, indeed, whether any member had incurred such liability. This case does not, therefore, assist their Lordships on the present occasion.

The question now to be decided may be regarded as not yet covered by authority; and a choice must be made between either ignoring the essential features of a club or holding that the general rule established in *Hardoon* v. *Belilios* (2) is inapplicable to such a body of persons. Their Lordships feel no difficulty in making this choice. The trustees of a club are the last persons to demand that the fundamental conditions on which their cestuis que trustent have become such shall be completely ignored.

The appellant in this case is not, in their Lordships' opinion, under any legal or equitable obligation to pay or contribute anything towards the indemnity of the plaintiffs; but he has offered to do so, and the plaintiffs are not satisfied with his offer. Their endeavour to obtain more is to be regretted, and cannot succeed. [This may seem hard on the trustees; but they have only themselves to blame for their own imprudence in not seeing to their own safety.] A decision in their favour would not only be hard on the members of the club, but would be inconsistent with the terms on which they became members.

Their Lordships will, therefore, humbly advise His Majesty to set aside the certificate of the master and to reverse the orders of March 5, 1900, and July 23, 1900, with costs.

The respondents will pay the costs of the appeal.

Solicitor for appellant: *George Slade.*

Solicitors for respondents: *Kimbers & Boatman.*

(1) L. R. Ir. 1 Ch. 143. (2) [1901] A. C. 118.

J. C. 1902

J. C.* 1902 July 4; Dec. 17.

[PRIVY COUNCIL.]

CUNNINGHAM AND ATTORNEY-GENERAL FOR BRITISH COLUMBIA . . } APPELLANTS;

AND

TOMEY HOMMA AND ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

British North America Act, s. 91, sub-s. 25; s. 92, sub-s. 1—Naturalization and Aliens—British Columbia Provincial Elections Act, s. 8—Powers of Provincial Legislature—Privileges conferred or withheld after Naturalization.

Sect. 91, sub-s. 25, of the British North America Act, 1867, reserves to the exclusive jurisdiction of the Dominion Parliament the subject of naturalization—that is, the right to determine how it shall be constituted.

The provincial legislature has the right to determine, under s. 92, sub-s. 1, what privileges, as distinguished from necessary consequences, shall be attached to it.

Accordingly, the British Columbia Provincial Elections Act (1897, c. 67), s. 8, which provides that no Japanese, whether naturalized or not, shall be entitled to vote, is not ultra vires.

APPEAL from an order of the above Supreme Court (March 9, 1901) affirming an order of the Chief Justice, sitting as county court judge (Nov. 30, 1900), which reversed the decision of the collector of voters, and ordered that the name of Tomey Homma be placed on the register of voters for the Vancouver electoral district.

In October, 1900, the said T. Homma, a native of the Japanese empire, not born of British parents, but a naturalized British subject, by notice given in the prescribed manner to the appellant, made the application now in question.

By the Provincial Elections Act of British Columbia (Revised Statutes of British Columbia, 1897, c. 67) it is enacted (amongst other things) as follows:—

"3. The following terms shall in this Act have the

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

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meanings hereinafter assigned to them unless there is something in the context repugnant to such construction, that is to say—"

* * * * *

"The expression 'Chinaman' shall mean any native of the Chinese empire or its dependencies not born of British parents, and shall include any person of the Chinese race naturalized or not.

"The expression 'Japanese' shall mean any native of the Japanese empire or its dependencies not born of British parents, and shall include any person of the Japanese race naturalized or not.

"The expression 'Indian' shall mean any person of pure Indian blood."

* * * * *

"7. Every male of the full age of twenty-one years, not being disqualified by this Act or by any other law in force in this province, being entitled within this province to the privileges of a natural-born British subject, having resided in this province for twelve months, and in the electoral district in which he claims to vote for two months of that period immediately previous to sending in his claim to vote, as hereinafter mentioned, and being duly registered as an elector under the provisions of this Act, shall be entitled to vote at any election: provided that no person shall be entitled to be registered or to vote as aforesaid who shall have been convicted of any treason, felony, or other infamous offence, unless he shall have received a free or conditional pardon for such offence, or have undergone the sentence passed upon him for such offence.

"8. No Chinaman, Japanese, or Indian shall have his name placed on the register of voters for any electoral district, or be entitled to vote at any election. Any collector of voters who shall insert the name of any Chinaman, Japanese, or Indian in any such register shall, upon summary conviction thereof before any justice of the peace, be liable to a penalty not exceeding $50."

By the Provincial Elections Act Amendment Act, 1899

(Statutes of British Columbia, 1899, c. 25), it is enacted (amongst other things) as follows:—

"3. Section 7 of said chapter 67 is hereby amended by striking out the word 'twelve' in the fourth line thereof and substituting therefor the word 'six,' and by striking out the words 'two months' in the fifth line thereof and substituting therefor the words 'one month,' and by adding thereto as sub-s. 2 thereof the words following:—

"2. No judge of the Supreme or County Court, no sheriff or deputy sheriff, no employee of the provincial government who is in receipt of salary of at least $300 per annum, no sailor, marine, or soldier on full pay in the Imperial service, and no officer in the Imperial service on full pay, shall be entitled to have his name placed upon the register of voters for any electoral riding. This sub-section shall not apply to Ministers of the Crown, Mr. Speaker, members of the Legislative Assembly, or school teachers."

On October 19, 1900, the appellant, in obedience to s. 8 of the said Provincial Elections Act, disallowed the claim of Tomey Homma.

The County Court and the Supreme Court held that s. 8 of the Provincial Elections Act of British Columbia related to a matter, namely, "naturalization," which, by virtue of the British North America Act, 1867, s. 91, was within the exclusive legislative authority of the Parliament of Canada, and not within the jurisdiction of the legislature of British Columbia.

Robinson, K.C., and *C. A. Russell, K.C.*, for the appellants, the Attorney-General for the province having been joined as an intervenor with the collector, contended that the orders of the County and Supreme Courts were wrong, and should be reversed. They contended that it should be declared that Homma was not entitled to be placed on the register of voters. Sect. 8 referred to was not within the exclusive legislative authority of the Dominion. It does not relate to any matter declared by s. 91 of the British North America Act, 1867, to belong to the Dominion jurisdiction. See particularly sub-s. 25,

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which relates to naturalization and aliens—that is, to the mode in which naturalization is to be conferred, not to the rights which may or may not follow according to the electoral law of the district. That is a matter which is within the exclusive competence of the provincial legislature, being within the classes of subjects assigned to it by s. 92: see sub-s. 1. It is the provincial, and not the Dominion, legislature which has power to regulate the electoral law of the province, and to decide whether the respondent, naturalized by force of the Dominion Act, shall have a right to vote at the elections of members to serve in the provincial legislature. Such a right is not inherent in the respondent either as British born or as a naturalized British subject. It is a right and privilege which belongs only to those classes of British subjects upon whom the provincial legislature has conferred it. Reference was made to *Union Colliery Co.* v. *Bryden* (1); *Fielding* v. *Thomas*. (2)

Blake, K.C., for the respondent (*Newcombe, K.C.*, and *Loehnis*, with him, for the Attorney-General for the Dominion), contended that s. 8 in question is in respect of the respondent ultra vires of the provincial legislature. It trenches on the subject of aliens and naturalization. It attempts to impose on naturalized aliens of the Japanese race, on the score of their alien origin alone, a perpetual exclusion from the electoral franchise. It does so in spite of their being entitled within the province to all the privileges of natural-born British subjects, and in spite of their fulfilling all the conditions under which natural-born British subjects are entitled to the franchise. It thus nullifies, as it were, the Dominion legislation on the subject. Provincial legislatures are limited to matters of local as distinguished from Imperial concern. This legislation is calculated to create difficulties between the British and Japanese nations; but at the same time it cannot be checked by Imperial authority, which has a veto on Dominion but not provincial legislation: see British North America Act, 1867, ss. 56, 90. The Act should be so construed as to maintain to the full all limitations on provincial power in respect of matters

(1) [1899] A. C. 580, 586. (2) [1896] A. C. 600.

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affecting Imperial relations, and to retain them within the exclusive power of the Dominion.

Robinson, K.C., replied.

Dec. 17. The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. In this case a naturalized Japanese claims to be placed upon the register of voters for the electoral district of Vancouver City, and the objection which is made to his claim is that by the electoral law of the province it is enacted that no Japanese, whether naturalized or not, shall have his name placed on the register of voters or shall be entitled to vote. Application was made to the proper officer to enter the applicant's name on the register, but he refused to do so upon the ground that the enactment in question prohibited its being done. This refusal was overruled by the Chief Justice sitting in the county court, and the appeal from his decision to the Supreme Court of British Columbia was disallowed. The present appeal is from the decision of the Supreme Court.

There is no doubt that, if it is within the capacity of the province to enact the electoral law, the claimant is disqualified by the express language of the statute; but it is contended that the 91st and 92nd sections of the British North America Act have deprived the province of the power of making any such provision as to disqualify a naturalized Japanese from electoral privileges. It is maintained that s. 91, sub-s. 25, enacts that the whole subject of naturalization is reserved to the exclusive jurisdiction of the Dominion, while the Naturalization Act of Canada enacts that a naturalized alien shall within Canada be entitled to all political and other rights, powers, and privileges to which a natural-born British subject is entitled in Canada. To this it is replied that, by s. 92, sub-s. 1, the constitution of the province and any amendment of it are placed under the exclusive control of the provincial legislature. The question which their Lordships have to determine is which of these two views is the right one, and, in determining that question, the policy or impolicy of such an enactment as that which excludes a particular race from

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the franchise is not a topic which their Lordships are entitled to consider.

The first observation which arises is that the enactment, supposed to be ultra vires and to be impeached upon the ground of its dealing with alienage and naturalization, has not necessarily anything to do with either. A child of Japanese parentage born in Vancouver City is a natural-born subject of the King, and would be equally excluded from the possession of the franchise. The extent to which naturalization will confer privileges has varied both in this country and elsewhere. From the time of William III. down to Queen Victoria no naturalization was permitted which did not exclude the alien naturalized from sitting in Parliament or in the Privy Council.

In Lawrence's Wheaton, p. 903 (2nd annotated ed. 1863), it is said that "though (in the United States) the power of naturalization be nominally exclusive in the Federal Government, its operation in the most important particulars, especially as to the right of suffrage, is made to depend on the local constitution and laws." The term "political rights" used in the Canadian Naturalization Act is, as Walkem J. very justly says, a very wide phrase, and their Lordships concur in his observation that, whatever it means, it cannot be held to give necessarily a right to the suffrage in all or any of the provinces. In the history of this country the right to the franchise has been granted and withheld on a great number of grounds, conspicuously upon grounds of religious faith, yet no one has ever suggested that a person excluded from the franchise was not under allegiance to the Sovereign.

Could it be suggested that the province of British Columbia could not exclude an alien from the franchise in that province? Yet, if the mere mention of alienage in the enactment could make the law ultra vires, such a construction of s. 91, sub-s. 25, would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to

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what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

This, indeed, seems to have been the opinion of the learned judges below; but they were under the impression that they were precluded from acting on their own judgment by the decision of this Board in the case of *Union Colliery Co.* v. *Bryden*. (1) That case depended upon totally different grounds. This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province. It is obvious that such a decision can have no relation to the question whether any naturalized person has an inherent right to the suffrage within the province in which he resides.

For these reasons their Lordships will humbly advise His Majesty that the order of the Chief Justice in the county court and the order of the Supreme Court ought to be reversed, except so far as the respondent, Tomey Homma, is entitled to his costs under those orders. Having regard to the terms of the Order in Council giving special leave to appeal, their Lordships direct the appellants to pay the costs of Tomey Homma in this appeal, but that otherwise the parties shall pay their own costs.

Solicitors for appellants: *Gard, Rook & Winterbotham.*
Solicitor for respondent Homma: *S. V. Blake.*
Solicitors for Attorney-General for the Dominion: *Charles Russell & Co.*

(1) [1899] A. C. 587.

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A Madoff Whistle-Blower Tells His Story

Harry Markopolos testifies before a House Financial Services Subcommittee on "Assessing the Madoff Ponzi Scheme and Regulatory Failures" on February 4, 2009.
Jason Reed / Reuters

Harry Markopolos, the man who knew too much about Bernie Madoff, appeared in public on Wednesday, and this time the Securities and Exchange Commission (SEC) was listening. In front of the House Financial Services Committee hearing, the former investment manager told how his nine years of repeated warnings to SEC enforcement officials went ignored and how they dismissed his detailed "red flag" reports. Markopolos also told the committee that tomorrow he will be turning over evidence to the SEC of another major Ponzi scheme, a $1 billion "mini-Madoff." It's expected that the SEC will pay closer attention to him this time. (Read "Bernie Madoff's Victims: Why Some Have No Recourse.")

The whistle-blower said in written and oral testimony that he and his associates did their best "to stop the most complex and sinister fraud in American history," but that no one at the SEC cared. With SEC's top enforcement brass in the back of the hearing room, House committee members, including Pennsylvania Representative Paul E. Kanjorski, chairman of the Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, listened to by far the most damning explanation of how the government missed Madoff's crime for decades.

The hearing was the committee's second in a series to help guide the most substantial rewrite of the laws governing the U.S. financial markets since the Great Depression. Ultimately, Markopolos asked the committee to "restructure" the SEC, calling it "nonfunctional" and "harmful to our nation's reputation as a financial leader."

Markopolos, who said that he feared for the safety of his family's life prior to Madoff's arrest, read parts from his nearly 60-page written description of the SEC's "investigative ineptitude" and "financial illiteracy." At the start of his oral statement, Markopolos injected a bit of metaphorical humor into his charge, describing the SEC as a regulatory agency that "roars like a mouse and fights like a flea." With the sober, academic look of an accountant, the former investment manager for Rampart Investment Management in Boston (he is currently an independent certified fraud examiner) detailed Madoff's phony split-strike conversion strategies and oddly "unsophisticated portfolio management." Markopolos said Madoff's "math never made sense" and his "return stream never resembled any known financial instrument or strategy."

Markopolos said Madoff was earning 82% of the S&P 500's return with less than 22% of the risk, but his returns only had a 6% correlation when Markopolos expected "something like a 50%" correlation. "If your returns are coming from the S&P 100 stock index, you better at least resemble that stock's performance," he said. He also compiled statistics from S&P 100 index options and from the Chicago Board Options Exchange as reported in financial media. "There were not enough index options in existence for Madoff to be managing the split strike conversion strategy he purported to be running," he said. But the biggest tip-off of a fraud was that Madoff reported his fund was down only three months out of 87, whereras the S&P 500 was down 28 months during the same period.

Markopolos described the crooked returns as "the equivalent of Major League Baseball player batting .966 and no one suspecting a cheat." In the hearing, he used his arm to show the straight upward growth of Madoff's funds, up 45 degrees without any down ticks. "This was the first sign that this was a fraud," Markopolos said.

The independent investigator said Madoff's fraudulent fund was in the $3 billion to $7 billion range in 2000, then a year later grew to near $20 billion, and then eventually to its reported $50 billion in late 2008. He said there were at least 14 feeder funds. Madoff's greatest talent, the witness indicated, was his use of a "hook" or lure to play "hard to get" and the false security of exclusivity, a hallmark of a Ponzi scheme.

In a story that seemed part financial doctoral thesis and part financial thriller, Markopolos told of his years of toil on the Madoff case, with often "disastrous meetings" with SEC enforcement chiefs. It was in 2005 when Markopolos wrote his now famous and lengthy report detailing Madoff's giant Ponzi scheme and pointing out 29 red flags. He sent it to the SEC, and nothing happened. But when he finally met the SEC's Boston branch chief, Mike Garrity, who had a willingness to "think outside the box," he felt some hope.

Garrity, he said, understood Madoff's impossible returns, but the problem was location: Madoff was not in the New England region. Were jurisdiction not a problem, "he would have had an inspection team inside Madoff's operation the very next day," Markopolos said. Ed Manion, a 15-year SEC-certified financial analyst, also urged Markopolos to continue his investigation. Manion, he said, was the "only one who understood [Madoff's] threat to the public."

Unfortunately, Markopolos said, his report was sent down to the SEC's New York branch chief Meaghan Cheung, whom he said "never grasped" the concepts "nor was the slightest bit interested in asking questions."

At that point, Markopolos decided to go to the press. He told the committee he went to a reporter at the *Wall Street Journal,* John Wilke, but the editors never approved an investigative piece, so things went back to the SEC's Cheung, and there it stopped. "It is a sickening thought," but if the SEC or the *Wall Street Journal* "would have picked up the phone and spent one hour contacting the leads" provided, Markopolos said, Madoff would have been stopped in 2006, and "untold billions" would have been saved.

Interestingly, Markopolos said he never went to the Financial Industry Regulatory Authority (FINRA), a nongovernmental regulator that oversees 5,000 brokerages, out of fear for his safety: "Bernie Madoff was chairman of their predecessor organization and his brother Peter was former vice chairman." Those links to Madoff, he felt, could have exposed him to harm, especially since a lot of feeder fund money "was coming from Russia and South America."

FINRA was created in July 2007 through the consolidation of NASD and the member regulation, enforcement and arbitration functions of the New York Stock Exchange. The former chairman of FINRA, Mary Schapiro, is now the new head of the SEC, selected by President Obama and approved by the Senate Banking Committee last month.

In the second half of his testimony, both oral and written, Markopolos outlined his recommendations for fixing the SEC. Markopolos said that "right now investors are afraid." He cited investor fears of banks, insurance companies, brokerage firms, credit rating agencies, investment manager, and the country's regulatory agencies, including the Federal Reserve and the Treasury. In a backhanded compliment, Markopolos said the SEC is a "bad regulator, but the best of a very sorry lot," though at one point he also suggested that it might be better to disband it or merge it with another agency. The bigger fix, he said, was to create one "super regulatory agency" and one national banking regulator, thereby filling regulatory gaps and duplication.

Robert Chew is a former investor with Madoff via a feeder fund. He lives in Colorado.

Part One: A Summary

Report of the Walkerton Inquiry:

The Events of May 2000 and Related Issues

The Honourable Dennis R. O'Connor

7 The Role of the Walkerton Public Utilities Commission Operators

Two serious failures on the part of the Walkerton PUC operators directly contributed to the outbreak in May 2000. The first was an operational problem: the failure to take chlorine residual measurements in the Walkerton water system daily. As I stated above, had the PUC operators manually tested the chlorine residual at Well 5 on May 13 or on the days following, as they should have done, they should have been able to take the necessary steps to protect the community. It is very likely that daily testing of chlorine residuals would have significantly reduced the scope of the outbreak.

The second failure relates to the manner in which the PUC operators responded to the outbreak in May 2000. This failure is primarily attributable to Stan Koebel. When Mr. Koebel learned from test results for the samples collected on May 15 that there was a high level of contamination in the system, he did not disclose those results to the health unit staff who were investigating the illnesses in the community. On the contrary, starting on May 19, he actively misled health unit staff by assuring them that the water was safe. Had Stan Koebel been forthcoming about the adverse results or about the fact that Well 7 had operated for over four days that week without a chlorinator, the health unit would have issued a boil water advisory on May 19 at the latest, and a minimum of 300 to 400 illnesses would probably have been prevented.

The two persons who were responsible for the actual operation of the water system were Stan and Frank Koebel. Stan Koebel had been the general manager of the PUC since 1988. In May 2000, he held a class 3 water operator's licence, which he had received through a grandparenting process. At the Inquiry, Stan Koebel accepted responsibility for his failures and apologized to the people of Walkerton. I believe he was sincere.

The evidence showed that under the supervision of Mr. Koebel, the Walkerton PUC engaged in a host of improper operating practices, including misstating the locations at which samples for microbiological testing were taken, operating wells without chlorination, making false entries in daily operating sheets, failing to measure chlorine residuals daily, failing to adequately chlorinate the water, and submitting false annual reports to the MOE. Mr. Koebel knew that these practices were improper and contrary to MOE guidelines and directives. There is no excuse for any of these practices.

Although Stan Koebel knew that these practices were improper and contrary to the directives of the MOE, he did not intentionally set out to put his fellow residents at risk. A number of factors help to explain, though not to excuse, the extraordinary manner in which the Walkerton PUC was operated under his direction. Many of the improper practices had been going on for years before he was general manager. Further, he and the other PUC employees believed that the untreated water in Walkerton was safe: indeed, they themselves often drank it at the well sites. On occasion, Mr. Koebel was pressured by local residents to decrease the amount of chlorine injected into the water. Those residents objected to the taste of chlorinated water. Moreover, on various occasions, he received mixed messages from the MOE about the importance of several of its own requirements. Although Mr. Koebel knew how to operate the water system mechanically, he lacked a full appreciation of the health risks associated with a failure to properly operate the system and of the importance of following the MOE requirements for proper treatment and monitoring.

None of these factors, however, explain Stan Koebel's failure to report the test results from the May 15 samples to the health unit and others when asked about the water, particularly given that he knew of the illnesses in the community. It must have been clear to him that each of these questioners was unaware of those results. I am satisfied that he withheld information about the adverse results because he wanted to conceal the fact that Well 7 had been operated without chlorination for two extended periods in May 2000.[16] He knew that doing so was wrong. He went so far as to have the daily operating sheet for Well 7 altered in order to mislead the MOE. In withholding information from the health unit, Mr. Koebel put the residents of Walkerton at greater risk. When he withheld the information, Mr. Koebel probably did not appreciate the seriousness of the health risks involved and did not understand that deaths could result. He did, however, know that people were becoming sick, and there is no excuse for his not having informed the health unit of the adverse results at the earliest opportunity.

Frank Koebel had been foreman of the PUC since 1988. He was the operator who, on May 13 and May 14, went to Well 5, failed to measure chlorine residuals, and made false entries in the daily operating sheet. As was the case with his brother, Frank Koebel also deeply regretted his role in these events.

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[16] In addition to the period of May 15 to May 19 referred to above, Well 7 had also been operated without chlorination from May 3 to May 9.

Most of the comments I have made about Stan Koebel apply equally to Frank Koebel, with one exception: Frank Koebel was not involved in failing to disclose the May 15 results to the health unit. Yet on his brother's instructions, he did alter the daily operating sheet for Well 7 on May 22 or May 23 in an effort to conceal from the MOE the fact that Well 7 had operated without a chlorinator.

As I point out above, the contamination of the system could have been prevented by the use of continuous monitors at Well 5. Stan and Frank Koebel lacked the training and expertise to identify the vulnerability of Well 5 and to understand the resulting need for continuous chlorine residual and turbidity monitors. The MOE took no steps to inform them of the requirements for continuous monitoring or to require training that would have addressed that issue. It was the MOE, in its role as regulator and overseer of municipal water systems, that should have required the installation of continuous monitors. Its failure to require continuous monitors at Well 5 was not in any way related to the improper operating practices of the Walkerton operators. I will discuss this failure of the MOE below.

8 The Role of the Walkerton Public Utilities Commissioners

The Walkerton PUC commissioners were responsible for establishing and controlling the policies under which the PUC operated. The general manager and staff were responsible for administering these policies in operating the water facility. The commissioners were not aware of the operators' improper chlorination and monitoring practices. Also, while Well 5's vulnerability had been noted when it was approved in the late 1970s, those who served as commissioners in the decade leading up to the tragedy were unaware of Well 5's clear and continuing vulnerability to contamination and the resulting need for continuous monitors.

The evidence showed that the commissioners concerned themselves primarily with the financial side of the PUC's operations and had very little knowledge about matters relating to water safety and the operation of the system. Inappropriately, they relied almost totally on Stan Koebel in these areas.

In May 1998, the commissioners received a copy of an MOE inspection report that indicated serious problems with the manner in which the Walkerton water system was being operated. The report stated that *E. coli*, an indicator of

unsafe drinking water quality, had been present in a significant number of treated water samples. Among other things, the report emphasized the need to maintain an adequate chlorine residual. It also pointed out other problems: the PUC had only recently begun to measure chlorine residuals in the distribution system, was not complying with the minimum bacteriological sampling requirements, and was not maintaining proper training records.

In response, the commissioners did nothing. They did not ask for an explanation from Mr. Koebel: rather, they accepted his word that he would correct the deficient practices, and they never followed up to ensure that he did. As it turns out, Mr. Koebel did not maintain adequate chlorine residuals, as he had said he would, and did not monitor residuals as often as would have been necessary to ensure their adequacy. In my view, it was reasonable to expect the commissioners to have done more.

The commissioners should have had enough knowledge to ask the appropriate questions and to follow up on the answers that were given. However, if they did not feel qualified to address these issues, they could have contracted with an independent consultant to help them evaluate the manner in which Stan Koebel was operating the system and to assure themselves that the serious concerns about water safety raised in the report were addressed.

Without excusing the role played by the commissioners, it is important to note that, like Stan and Frank Koebel, they did not intend to put the residents of Walkerton at risk. They believed that the water was safe. They were distraught about the events of May 2000. Moreover, it appears from PUC records that they performed their duties in much the same way as their predecessors had. That approach seems to have been inherent in the culture at the Walkerton PUC.

Even if the commissioners had properly fulfilled their roles, it is not clear that Mr. Koebel would have changed the PUC's improper practices. However, it is possible that he would have brought the chlorination and monitoring practices into line, in which case it is very probable that the scope of the outbreak in May 2000 would have been significantly reduced. Thus, the failure of those who were commissioners in 1998 to properly respond to the MOE inspection report represented a lost opportunity to reduce the scope of the outbreak.

11.4 Operator Certification and Training

Stan and Frank Koebel had extensive experience in operating the Walkerton water system, but they lacked knowledge in two very important areas. They did not appreciate either the seriousness of the health risks arising from contaminated drinking water or the seriousness of their failure to treat and monitor the water properly. They mistakenly believed that the untreated water supplying the Walkerton wells was safe.

Managing a municipal water system involves enormous responsibility. Competent management entails knowing more than how to operate the system mechanically or what to do under normal circumstances. Competence must also include an appreciation of the nature of the risks to water safety and an understanding of how protective measures, like chlorination and chlorine residual and turbidity monitoring, work to protect water safety. Stan and Frank Koebel did not have this knowledge. In that sense, they were not qualified to hold their respective positions within the Walkerton PUC.

Stan and Frank Koebel were certified as class 3 water operators at the time of the outbreak. They had obtained their certification through a "grandparenting" scheme based solely on their experience. They were not required to take a training course or to pass any examinations in order to be certified. Nonetheless, I conclude that at the time when mandatory certification was introduced, it was not unreasonable for the government to make use of grandparenting, provided that adequate mandatory training requirements existed for grandparented operators.

After the introduction of mandatory certification in 1993, the MOE required 40 hours of training a year for each certified operator. Stan and Frank Koebel did not take the required amount of training, and the training they did take did not adequately address drinking water safety. I am satisfied that the 40-hour requirement should have been more focused on drinking water safety issues and, in the case of Walkerton, more strictly enforced.

It is difficult to say whether Stan and Frank Koebel would have altered their improper practices if they had received appropriate training. However, I can say that proper training would have reduced the likelihood that they would have continued their improper practices.