

The Globe and Mail (Canada)
July 21, 1992 Tuesday

FIFTH COLUMN
LAW AND SOCIETY

Bryan Schwartz looks at statutes that can rise from the dead when legislatures fail to clean up their acts

"THERE ought to be a law," goes the saying. Very often, there is. Even if there is nothing recent on the books, the annals of the law may contain some antique but unrepealed statute. It may be based on the social conditions and values of the distant past; it may have gone unenforced for years; it may come as a harsh surprise to the people affected by it. But unless it has been formally repealed or modified, a Rip van Statute can be dusted off and sent into action. At least, that is the general theory of our legal system.

In Canada, we have many orders of government - including federal, provincial and municipal – churning out rules and restrictions. New laws may be added to old ones, rather than supplanting them. We have to find some ways to prevent increasing overregulation, and to dispose of outworn statutes.

The best medicine is preventive. Lawmakers should make increasing use of "sunset clauses": provisions that limit the life of a law to a certain number of years. As the deadline approaches, lawmakers are invited to review how the law has worked in practice, and decide whether it should be reinstated, modified, replaced, or simply allowed to die.

A useful remedial approach is for government to conduct systematic reviews of the "books" to see what obsolete statutes can be removed. The operation must be conducted with some care; once you brush off the dust, some of the "oldies" have a little gold left in them.

IN 1979, the British Columbia Legislature enacted the Obsolete Statutes Repeal Act. It eliminated a raft of outdated laws. Unfortunately, by oversight, it also eliminated a law that had established a major private insurance company - which was still very much alive and doing business. The gaffe was discovered almost immediately, and the legislature was recalled to pass the Repeal of the Obsolete Statutes Repeal Act. (A year later, the legislature re-enacted most of the original statute. It missed the opportunity to title the legislation "An Act to Repeal the Repeal of the Obsolete Statutes Repeal Act.")

If legislatures have not cleaned up their acts, people may end up in court arguing about them. Judges can then try their creativity in avoiding the effects of obsolete statutes. Now that the Charter of Rights and Freedoms is in force, it may be possible to find that the substance of the old law violates one of its principles, such as freedom of expression.

The courts should consider another possibility: that the very process of invoking an old and obscure law can violate the Charter. Everyone is guaranteed the right not to be deprived of life, liberty or security of the person "except in accordance with the principles of fundamental justice." One such principle is that people should have reasonable warning of what the law is. It can be fundamentally unfair to nail people with outdated statutes. "Fundamental fairness" and "the equal protection of the law" under the Charter

might also be violated by the discriminatory aspects of hauling out old laws; is it right for the authorities to refrain for years from enforcing a law, and then suddenly use it to punish the "offender" of their choice?

The common law could also be used to resist obsolete statutes. People charged with offences can plead that they did not have a guilty state of mind. Ignorance should be considered a legitimate excuse if a law is so obscure and antiquated that a reasonable person would be unaware of its existence.

There is another option. Both in the criminal and civil context, our judges could develop something like the Roman law doctrine of "desuetude." It held that courts are not obliged to apply statutes that have gone unenforced for a very long time. Judges could work out criteria for applying their new doctrine of "void for obsolescence." They could look at factors such as: the age of the law, the extent to which it has actually been enforced, its consistency with modern legal and social developments, and the extent to which its application would come as a sudden and unfair surprise to an ordinary person.

Sometimes you should pour old wine into new bottles; but sometimes, you should just wash it down the sink.

Bryan Schwartz is a professor of law at the University of Manitoba.