

OFF THE RECORD

By Jeffrey Miller

It wouldn't be spring without Off the Record's jeremiad on noise, brought to you this year – to the usual accompaniment of leaf blowers, bobcats, chainsaws, lawnmowers, cement trucks, asphalt scrapers, jackhammers, boom boxes, Harleys and all the other season's greetings – from Lohsa, Germany.

Rico Gabel is a farmer there, a town northeast of Dresden. Gabel raises ostriches, at least when the neighbours don't spoil the mood. Apparently ostriches don't like to make whoopee to the strains of "Hot Blooded," or even "The 1812 Overture" and Handel's "Royal Fireworks Suite." Fireworks throw them off their game, Gabel claims, even six months after the offending pyrotechnics have ended.

In his case, the trouble started (the farmer says) in December 2005, when three teenagers decided to celebrate the season with firecrackers. The noise rendered Gabel's stud ostrich, Gustav, impotent for six months. And by spring Gustav's incapacity, says

The earth moved for Gustav the ostrich

Gabel, cost him chicks worth \$7,560, the amount he is now suing for in court.

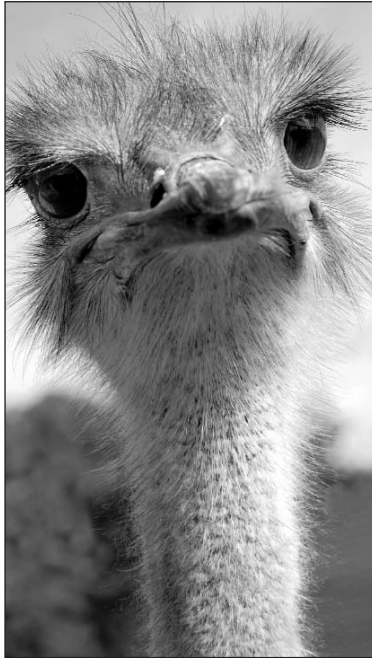
The story has enjoyed worldwide play as "news lite." And sure enough, it conjoins elements of funny ha-ha and funny peculiar. It has an ostrich. It has sex. It has an ostrich not having sex...

But is Off the Record laughing? If it is, you can't hear it above the leaf blowers, bobcats, chainsaws, et al. And though ducks, not ostriches, are the funniest animal – according to Richard Wiseman, the British psychologist who supposedly found the world's funniest joke five years back* – our solemnity has deeper roots. We are distracted by the question: If we're going trendy green again (yes, we've done this before, with the same passion and sanctimony, 20 years ago, just before SUVs became the rage, and 20 years before that, too, on the first Earth Day before they invented disposable cameras, designer water and throw-away washcloths), why is it just about air pollution this time? What about the water? What about landfill? What, indeed, about noise?

Yes, yes, the kids in Lohsa didn't mean it. They were just being kids. But when considering the ostrich file in the nuisance drawer, Off the Record can't help

recalling the minks case from first year Torts. Then, too, we have read the case of the squawking macaws of Taghum, British Columbia.

I don't know if *Grandel v. Mason* ([1953] 1 S.C.R. 459) still features in Justice Linden's casebook on torts. I do recall that the



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plaintiff bred minks and had warned the local highway department that road construction could harm his business, possibly killing

his minks and their kittens. The construction crews disobeyed orders not to work too closely to the mink operation until after whelping season. Minks and kittens died. *Held*, 3:2: The highway department and construction company were liable in both nuisance and negligence.

The macaws case of Taghum, in the Kootenays, concerns noise by birds.

In the early 1980s, Albert Krafczyk smuggled four macaws into Canada from Mexico. He was on welfare but intended to set himself up in a macaw breeding business. By 1990 he had 31 macaws and a permit from the municipality to build an aviary. But as Krafczyk's flock had grown, the neighbours, including neighbours across a busy highway nearby, were going loony with the noise. They said it was interrupting their sleep and making them ill. They sued in nuisance.

In the seven years Krafczyk had been building the macaw "business," he had sold one bird. He pleaded, however, two complete defences to nuisance: the building permit for the aviary amounted to statutory authority – a licence – to commit the nuisance; and the complaining neighbours were abnormally ("morbidly") sensitive to the squawking.

Justice Melnick found for the plaintiffs.

A permit to build an aviary did not amount to statutory authority to inflict macaw squawking on the landscape, the judge held. As to the character of the neighbourhood: in rural British Columbia, even where there was a busy highway, reverberating air brakes on trucks, and a vehicle repair business, no one expected to be awakened at dawn by parrots.

Ostrich farming, on the other hand, might be abnormally sensitive under nuisance law. And if Germany recognizes such a defence, farmer Gabel's only hope could be in negligence. Our *Grandel* confounds the two causes of action, but it is true that under both the defendant must use reasonable care on an objective standard. Still, it is unlikely that the ordinary construction worker on the Clapham omnibus, or even the teenaged rowdy on the Autobahn Express, would be familiar with the challenges of ostrich farming. Yet if Gabel's neighbours knew of the sensitivity of ostriches at breeding time, they shouldn't have been getting their rockets off.

*See my Nov. 12, 2004 column.

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Disagreed that powers could undermine impartiality

COSGROVE

–continued from p. 1–

intervener Canadian Superior Courts Judges Association and the national and Ontario associations for criminal lawyers, is trying to shut down the inquiry at the preliminary stage by attacking its jurisdiction under the *Judges Act*.

The judge argued s. 63(1) threatens judicial independence by giving the attorneys general, who are the major players in the courts, the power to automatically trigger discipline hearings. This special power is open to abuse by vengeful attorneys general who are unhappy that a judge has ruled against them, contend Justice Cosgrove and the associations of judges and defence counsel. They note that the bad publicity of an inquiry can permanently tarnish a judge's credibility and reputation, even if the attorney general's complaint is found to be baseless and the judge is eventually exonerated.

Bryant complained that Justice Cosgrove tarnished public confidence in the administration of justice by allegedly showing anti-Crown bias in making 150 unfounded claims of police and prosecutorial misconduct during a 22-month murder trial in which the judge ultimately stayed proceedings. The Ontario Court of Appeal was highly critical of Justice Cosgrove's ruling, which it

reversed.

The Federal Court of Appeal concluded that there are sufficient protections for judicial independence and fairness to the individual judge in the s. 63(1) procedure.

It rejected arguments that the attorneys general's special powers could undermine judges' impartiality, as well as give rise to a perception among accused in criminal cases and the public that the attorney general can punish any judge who dares to question or condemn actions taken by the Crown.

These arguments failed "to take into account the constitutional principle that an attorney general must not exercise the power under s. 63(1) in order to 'hurt the judge', and the presumption that the attorney general will not act improperly," Justice Sharlow reasoned. "It also disregards the fact that a complaint against a judge that is obviously unmeritorious, however it is made or by whom, is unlikely to cause lasting damage. If it is unmeritorious it is likely to be dismissed, either summarily or after an inquiry."

As for the possible damage from bad publicity, Justice Sharlow noted this risk is present even with complaints that go through the usual screening process since all complainants are free to publicize their grievances.

The differences between the special and ordinary complaint procedures are thus "trivial" on that score.

At press time Justice Cosgrove's counsel Chris Paliare of Toronto's Paliare Roland said "the chances are very good that we will seek leave to appeal." Paliare said he was "very disappointed" with the appeal court's failure to even address, let alone come to grips with, the reasons for judgment of the court below.

Paliare pointed out that all professions, including doctors, dentists and lawyers, require professional misconduct complaints to go through a preliminary screening process before a public discipline hearing. "I say it's an even greater requirement for a judge given the nature of what it is we ask them to do and their inability to defend themselves in a public way."

But federal Department of Justice senior general counsel Donald Rennie said the judgment makes it very clear that attorneys general do, and are expected to act, in the public interest. "The real theme [of the judgment] is that the public interest in an independent judiciary is a shared responsibility," Rennie explained. "Everybody has a stake in that: judges, attorneys general, lawyers. It's not just the domain of judges to discipline judges."

Cross-border pursuit no option

LESLIE

–continued from p. 2–

crop eradication does nothing "but piss the hell out of the local former *mujahideen*, who may have been neutral, but now you have taken all livelihood away from him and his family, so you have this grizzled combat veteran [who fought Russia's occupation] who has put away his rifle for the last decade who now will have no choice but to pick it up again because unpleasant elements one valley over will hire him to protect their crops after his has just been destroyed," Leslie explained.

Yet crop eradication does send a signal to higher-level drug lords that poppy production should not be expanded, he acknowledged.

"I am not saying the Senlis idea is bad," he continued. But if poppies are licensed "what will prevent all crops in Afghanistan dis-

appearing in a puff of smoke, and all fields being turned over to the production of opiates?" he asked. "What will prevent the warlords, who will then, at least in the short-term be cut out of the loop because the funding and control will pass to this [poppy] control board, using night letters [to threaten farmers], or their gangs of thugs to rob the farmers or coerce them into handing over a certain percentage of their crops to the drug lords?"

"I don't have an answer," Leslie admitted, noting that the Senlis plan might lead to two streams of opiates: licit and illicit.

He pointed also to ongoing problems associated with shutting down drug production labs, which are increasingly being built just over the Afghan border in one of the six neighbouring countries. Cross-border pursuit is "not an option," the general stressed.

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