Not nice to expose letter, man

OFF THE RECORD

JEFFREY MILLER

Why is blackmail illegal? This allegedly nice question — nice in the sense that it is a teaser for fine legal minds — has arisen again because of the David Letterman affair.

The host of "Late Night" on CBS recently complained to police that a producer for the network's "48 Hours Mystery" gave Letterman's limousine driver a screenplay treatment, photographs and a diary detailing Letterman's sexual relationships with members of his staff. Police say the producer demanded US$2-million, which Letterman — working with detectives — provided by way of a rubber cheque.

This has revived an old barstool, and Bar-Bench, debate, in more or less the form of a syllogism: If someone has a nasty secret, it's not unlawful to reveal it. Then, too, it's not unlawful to accept money not to reveal it. So, why is it unlawful to *ask for* the money not to spill?

The debate has a little more gravitas, but only just, in jurisdictions that make a distinction between extortion and blackmail. In these places, extortion involves a threat to perpetrate a crime against someone; blackmail entails a threat to do something that is lawful minus the threat, like take money from the person to keep *schtum*. *Black's Law Dictionary* makes no such distinction. With its accustomed equanimity, neither does Canadian law.

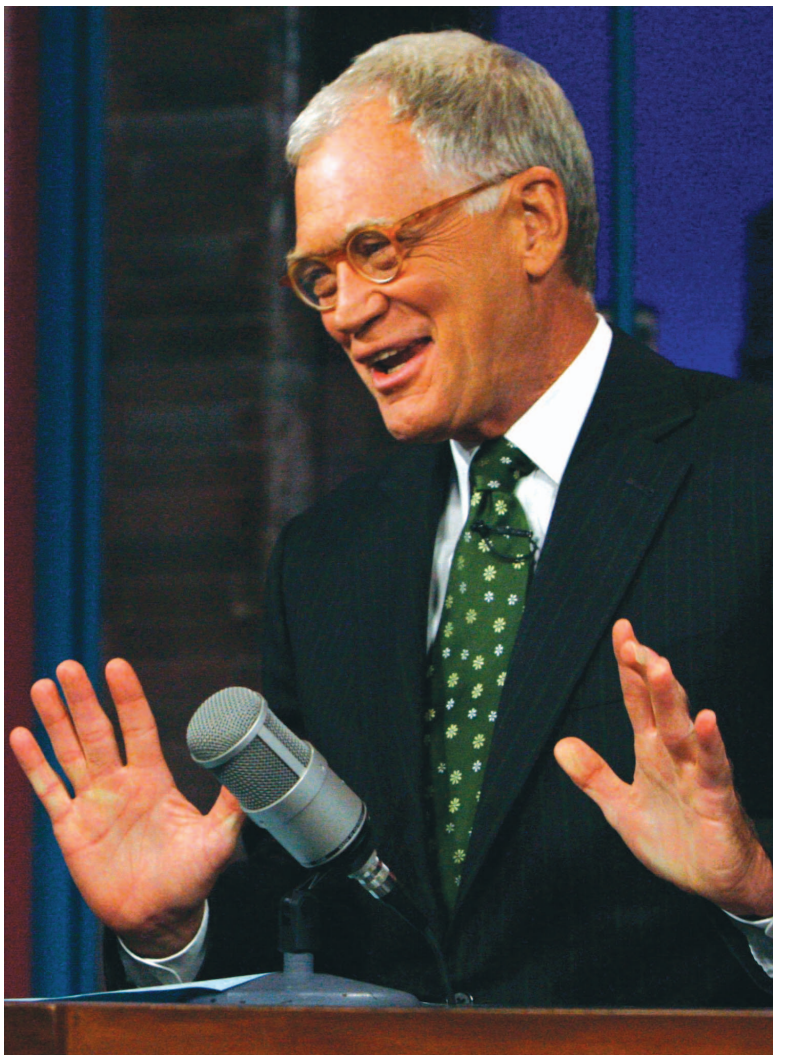
Section 346(1) of Canada's *Criminal Code* provides that one commits extortion when that person, "without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence, induces or attempts to induce any person... to do anything or cause anything to be done."

Subsection (2) adds: "A threat to institute civil proceedings is not a threat for the purposes of this section." So if you say to someone, "Pay what you owe or I'll sue," the police cannot charge you under this section. Which is probably a good thing, if you're a lawyer.

But you don't need a law degree to see the difference between the scenario as painted by Letterman and, say, the following. The producer invites Letterman to lunch. "Hey, Dave, a little birdie tells me you've been bonking certain members of your staff, including X, Y and Z. I was just thinkin': If that went public, that wouldn't be so great for you, would it? Particularly as you were in a long-term relationship at the time, with the chickadee you married." Letterman: "What'll it take for you to keep that under the baseball cap you're wearing backwards?"

Sure enough, the latter scenario still constitutes blackmail in the colloquial sense, but legally it's a contract, or a plea bargain. The legal distinction between "What if I paid you?" and "Pay me or else" is no "nicer" or complex than many such distinctions at law. Consider, for example, that theft includes taking money that belongs to others with the intention of permanently depriving them of it. But so far, no one has charged certain executives with daylight robbery, never mind the taxpayer bailout-money they paid themselves in bonuses that wouldn't pass the smell test in a pig barn.

It's true, though, that under old British law "blackmail" described just doing business, albeit sometimes in a manner we today call extortionate. From at least the 11th century, "mail" meant "rent" or "payment," and has survived as such in Scots law. Bell's *Dictionary of the Law of Scotland*, 1861, gives, "Mails and Duties are the rents of an estate, whether in money or grain; hence an action for the rents of an estate... is termed an action of mails and duties." Lawful rents paid in goods or services were blackmail (*reditis nigri*), as distinct from white rents (*reditis albi* or *blanches firmes*), which the debtor paid in silver. Then again — and here is the origin of our current usage — blackmail was also what you paid Scottish chieftains, of the *Braveheart* sort, to leave you and yours alone.



CHARLES DHARAPAK/THE ASSOCIATED PRESS

A Scottish statute of 1567, under James VI, describes "Diverse subjects of the Inland... paying them blackmail and permitting them to rob, harry, and oppress their Neighbours." "Extortion," which subsumes this usage (from Latin for "to twist out"), dates from the 14th century but probably was not employed much in law until some 300 years later.

Then, too, the world of poetic justice provides solid authority for the view that blackmail is obviously a crime. In "The Adventure of Charles Augustus Milverton," Sherlock Holmes witnesses a

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Environmental principles should help, not hinder, alternative energy initiatives

OPINION

DIANNE SAXE

A recent challenge to wind power shows both the irony of using environmental legislation to block environmental initiatives, and how individual concerns over wind power can overshadow the greater good of investing in alternative energy.

A Big Island resident, Ian Hanna, launched a judicial review application in October to block wind energy approvals under the new *Green Energy Act*. Hanna argues that it is contrary to the precautionary principle to allow wind energy development in Ontario without further study of its alleged health effects. He claims that the new renewable energy approvals regulation is therefore contrary to the Ministry of the Environment's Statement of Environmental Values (SEV) under the *Environmental Bill of Rights, 1993* (EBR) and should be struck down.

Hanna is supported by Dr. Robert McMurtry who claims that noise and low frequency sound are adversely affecting the health of 100 people in Ontario. He wants all wind generation shut down, but doesn't say what source of power he prefers.

From an administrative law point of view, I cannot see how Hanna's application can succeed. For one thing, it is not well-founded in the wording of the EBR itself. First, the SEV provisions of the EBR only apply to designated individual ministers, *not* to the Lieutenant Governor in Council, the body that adopts all regulations:

> Hanna's lawsuit strikes me as a misuse of the precautionary principle...

"7. .. the minister shall prepare a draft ministry statement of environmental values that,

(a) explains how the purposes of this Act [which are to protect the environment, provide its sustainability and protect the right to a healthful environment by the means provided under the EBR] are to be applied when decisions that might significantly affect the environment are made in the ministry; and

(b) explains how consideration of the purposes of this Act should be integrated with other considerations, including social, economic and scientific considerations…

11. The minister shall take

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Saxe

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every reasonable step to ensure that the ministry statement of environmental values is *considered* whenever decisions that might significantly affect the environment are made *in the ministry*. (emphasis added)"

Regulations are not adopted "by" a minister or "in" any ministry.

Even if the LGIC were somehow subject to the Ministry of the Environment (MOE)'s SEV, Hanna will not be able to prove that the EBR has been breached. A minister must only "consider", not conform to, an SEV. The MOE should have no trouble proving that it *considered* the health concerns of anti-wind activists, who were extremely vocal during public hearings before the *Green Energy Act* was passed. These concerns are reflected in the very regulations under attack, which authorize, but do not require, the MOE to issue wind energy approvals. The regulation mandates very large setbacks for wind projects, precisely because of concerns such as those of Hanna. The approvals branch can attach other conditions, or refuse a particular project altogether.

I expect the courts will recognize that they should leave the legislature to balance the harms caused by each form of electrical generation — a classic political decision. More fundamentally, Hanna's lawsuit strikes me as a misuse of the precautionary principle, the SEV and of the EBR as a whole. A precautionary approach does not require governments to have complete certainty before acting — that would doom them to immobility. The point of the precautionary approach is to provoke governments to take action on emerging risks based on strong evidence, even if it falls short of scientific certainty:

"It is a policy consideration that provides that where there is a risk of serious or irreversible environmental damage, one should err on the side of caution even when there is not full scientific certainty with respect to the risk: *114957 Canada Ltée (Spraytech Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 at para 31 (S.C.C.)." [*Lake Waseosa Ratepayers' Association v. Pieper*]

The precautionary principle, the SEV and the EBR require us to do more than focus on turbines. They demand our acknowledgement that all sources of power cause serious environmental damage; of these, the greatest risk is from burning fossil fuels. While we may not have full scientific certainty about the climate crisis, we should err on the side of caution and slash our greenhouse gas emissions. That is what the *Green Energy Act* is for. And wind energy is the quickest, most economical way of generating additional renewable power in our province.

Dislike of noise from wind turbines has to be balanced against the huge environmental and health costs of generating power from coal, oil and even natural gas. Fortunately, the U.S. National Research Council has just released a major report doing just that. *Hidden Costs of Energy: Unpriced Consequences of Energy Production and Use* (www.nap.edu) was commissioned by the U.S. Congress. It estimates the "hidden" costs of U.S. energy production and use at over $120 billion per year. This reflects the damage of major air pollutants — sulfur dioxide, nitrogen oxides, ozone and particulate matter – on human health, grain crops and timber yields, buildings and recreation. These costs are not included in the price of energy, but are borne by the public as a whole. The actual costs are much higher than this: this estimate does not include climate change, harm to ecosystems, health effects of toxics such as mercury and wars to control oil.

Almost all of this damage comes from burning fossil fuels. According to the NRC, wind causes some damage to human health and the environment, but a small fraction of the damage caused by equivalent amounts of power from coal, oil or natural gas.

Hanna is not the first NIMBY to invoke the precautionary principle to fight infrastructure in his neighbourhood. For example, the long battle over high voltage power lines was reframed as the precautionary principle by the unsuccessful plaintiffs in *Tsawwassen Residents Against Higher Voltage Overhead Lines Society v. BC Transmission Corporation, BC Hydro and Power Authority and Attorney General of BC*. Hanna is likely to do no better. But if he does succeed in slowing wind development in Ontario, he will have done far more harm than good. ■

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We want to hear from you! Email us at: tlw@lexisnexis.ca