November/December 2011

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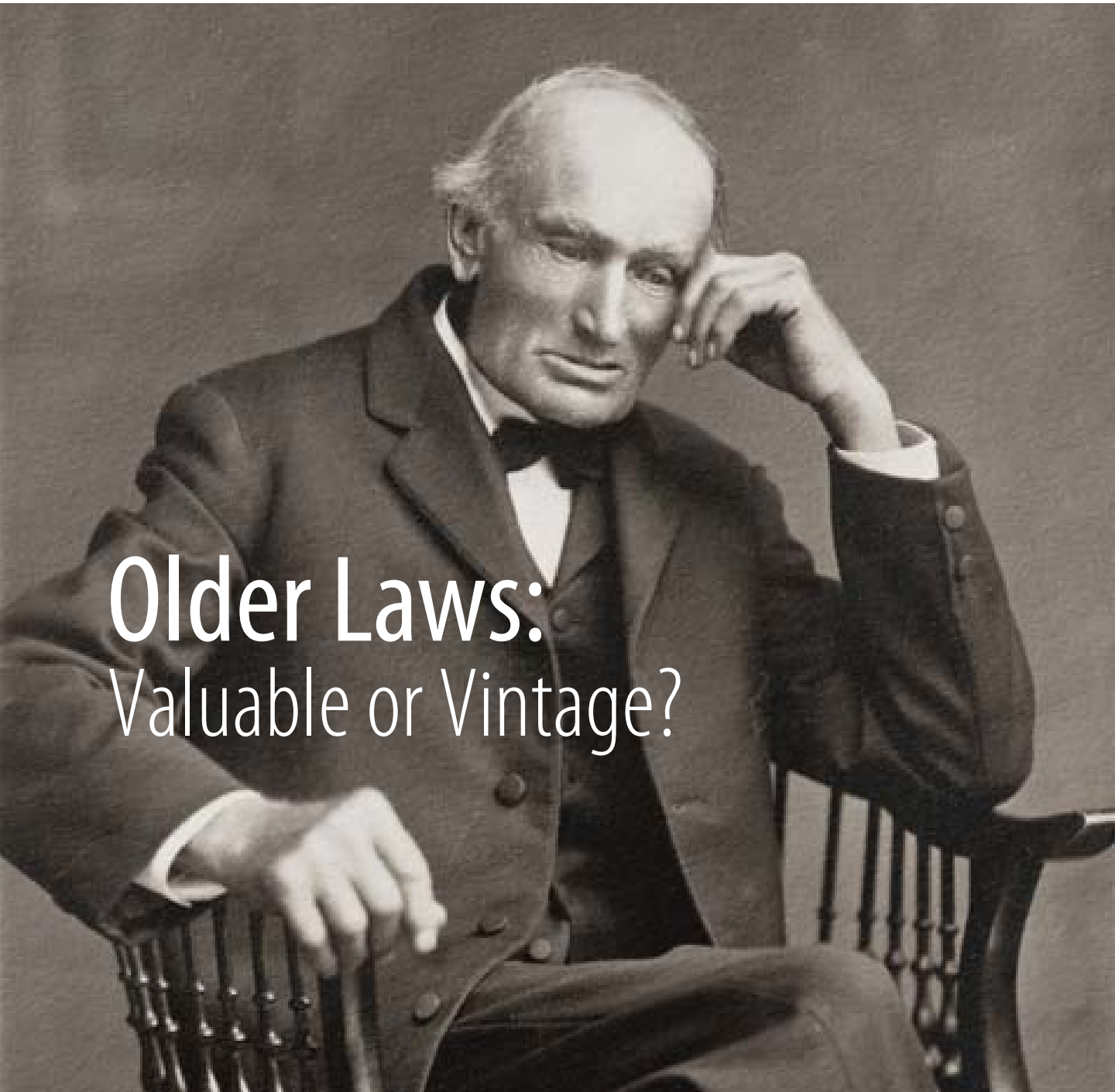
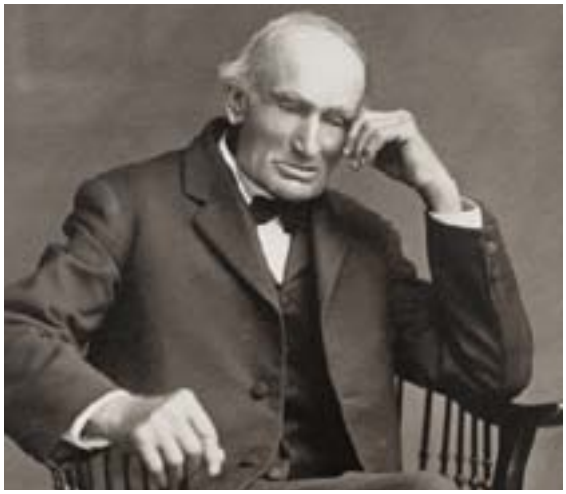


Older Laws:
Valuable or Vintage?



Canada's *Criminal Code* was first enacted in 1892, but some of its provisions have their origins in much earlier times. Some are still useful today, some could use some updated language, and some are past their "best before" date!

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Feature: Older Criminal Laws: Valuable or Vintage?

Special Report: Aboriginal Youth

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David Langtry

Changes in the law should help native youth

In convocation ceremonies this month, beaming young faces reflect Canada's rich demographic fabric. With one exception: aboriginal youth.

Aboriginal kids on reserves are six times less likely to graduate from high school than the rest of our population. There's a better chance of ending up in jail.

I believe the *Canadian Human Rights Act* can and should be pivotal in changing this.

The Act was created to end racial and other discrimination once commonplace in our society. Excluding people living under the *Indian Act* from this law since 1977 was an injustice. That's now changed. As of this month, people governed by the *Indian Act* are entitled to the same human-rights protections as everyone else.

Chronic disparities in funding for health, education and social services for more than 700,000 first nations people are the product of entrenched discriminatory policies. But the discriminatory thrust of such policies can be challenged now, under the *Human Rights Act*.

Disparities in essential services to first nations people are well documented.

In her final report as Auditor General, Sheila Fraser again noted her profound disappointment that, "despite federal action in response to our recommendations over the years, a disproportionate number of first nations people still lack the most basic services that other Canadians take for granted. In a country as rich as Canada, this disparity is unacceptable."

The Canada – First Nations Joint Action Plan, recently announced by the federal government and native leaders, promises new thinking. Since human-rights law is something new in the equation, it could help break with the past. Now we will see whether our human-rights law has the same power to bring positive change to natives as it has to the rest of society.

As of June 18, 2011, people can file complaints against first nations governments as well as the federal government if they believe they have been discriminated against in relation to services that affect their daily lives. This should translate into an onus on first nations governments to ensure better accommodation of people with disabilities, for example, or to provide recourse for those denied the right to vote in band council elections on the basis of race, gender, sexual orientation or family status.

Similarly, it puts an onus on the federal government to ensure that funding for essential services such as health, education and child welfare is equal to the levels of funding available off reserve. On this issue hinges the question of whether the *Human Rights Act* can be a catalyst for real change.

Chronic disparities in funding for health, education and social services for more than 700,000 first nations people are the product of entrenched discriminatory policies. But the discriminatory thrust of such policies can be challenged now, under the *Human Rights Act*.

It's all coming to a head in a case before the courts. The First Nations Child and Family Caring Society of Canada and the Assembly of First Nations maintain that disparities in funding for child welfare services, which the federal government is required to provide on reserves, constitute discriminatory treatment. Simply put, the federal government puts up less money than the provinces and territories; on reserves, this translates into higher rates of foster care and poorer prospects of surviving a troubled childhood.

Ottawa disagrees. The Attorney General of Canada says the *Human Rights Act* does not apply to federal government funding for services. The Canadian Human Rights Commission opposes such a limitation on our jurisdiction, and we are saying so in court.

If the Attorney-General succeeds, the federal government would get sweeping immunity from human-rights law. Complaints about access to clean water, health and education would be turned away before they are even heard.

This is critical for aboriginal youth – close to half a million strong, the fastest growing segment of Canada's population. Even when a young aboriginal person can get into university, there's often no money for it. Not only is this unfair and discriminatory, it's a collective failure that may ultimately hurt Canada's competitive advantage in tomorrow's global economy. No one will forgive our failure. The *Canadian Human Rights Act* can make a difference for aboriginal youth, if we don't stand in the way.

David Langtry is acting chief commissioner of the Canadian Human Rights Commission.
This article first appeared in the *Globe and Mail* on June 24, 2011, and is reprinted with the author's permission.

Teresa Mitchell

1. Insight into Insite

The Supreme Court of Canada has ordered the federal Minister of Health to stop attempts to shut down Vancouver's Insite clinic. The clinic, in a rundown part of downtown Vancouver, allows drug addicts to self-inject under medical supervision. The ruling orders the government to exempt medical staff and users from drug prosecution. Madame Justice Beverley McLachlin wrote the unanimous decision of the Court. She noted that the scientific evidence is clear: that addiction is not a moral failing, as the government argued, but a grave illness, and that "Insite has saved lives and improved health". The Court ruled that shutting down the clinic violated the s. 7 *Charter* guarantee of life, liberty and the security of the person" and that the government's actions were "arbitrary and grossly disproportionate. The Court issued a direct order to the Minister of Health to cease its refusal to exempt both personnel and users at the clinic. Observers note that this decision will probably pave the way for new clinics similar to Insite to open in Canada.

http://scc.lexum.org/en/2011/2011scc44/2011scc44.html

Canada (Attorney General) v. PHS Community Services Society 2011 SCC 44

2. Is Spanking Child Abuse?

In a two-to-one decision, the New Brunswick Court of Appeal has ordered a new trial for a father convicted of assault under the *Criminal Code* for spanking his six-year-old son. The trial judge heard two very different stories about the event that led to the charges. The father claimed to have struck his misbehaving son two or three times on the buttocks through the child's clothing. A witness claimed to have heard the child scream: "you're beating me senseless" as he was struck at least a dozen times. No bruising or marks were found on the child when he was examined by social workers 8 hours later. The trial judge convicted the parent, stating, "No spanking should go on and on to the point that strangers pick up the phone and call the police." Two Appeal Court judges ruled that the trial judge used a subjective standard and did not adequately explain her reasons. The *Criminal Code* allows force to be used to correct a child as long as it is reasonable in the circumstances.

S.S.v. R., 2011 NBCA 75 (CanLII)

http://canlii.ca/s/6lalt

3. Throwing an Elephant Out of Court

Edmonton's famous Lucy the Elephant won't get her day in court. Zoocheck Canada and People for the Ethical Treatment of Animals (PETA) asked for a declaration that the City of Edmonton was in breach of the *Animal Protection Act*, arguing that her health, isolation, and Edmonton's severe climate caused her to be an animal in distress. A chamber's judge struck out the

motion, declaring that it was an abuse of process, and the claimants, as private entities, had no standing to ask the court for the declaration, and could not ask the court for a criminal law penalty through a civil procedure. The Alberta Court of Appeal, in a two-to-one decision, agreed that the suit was an abuse of process. It concurred that civil courts should not be used for criminal purposes and that the standard of proof is different: balance of probabilities in civil court; beyond a reasonable doubt in criminal court. Justice Slatter wrote: "It is not appropriate to expect the courts to take over the animal husbandry of the animals at the City zoo through the ability to issue declarations on points of law." Chief Justice Fraser wrote a dissenting opinion. She wrote, "Lucy's case raises serious issues not only about how society treats sentient animals… but also about the right of the people in a democracy to ensure that the government itself is not above the law."

Reece v. Edmonton (City) 2011 ABCA 238 (CanLII)

www.canlii.org/en/ab/abca/doc/2011/2011abca238/2011abca238.html

4. The Castle Doctrine

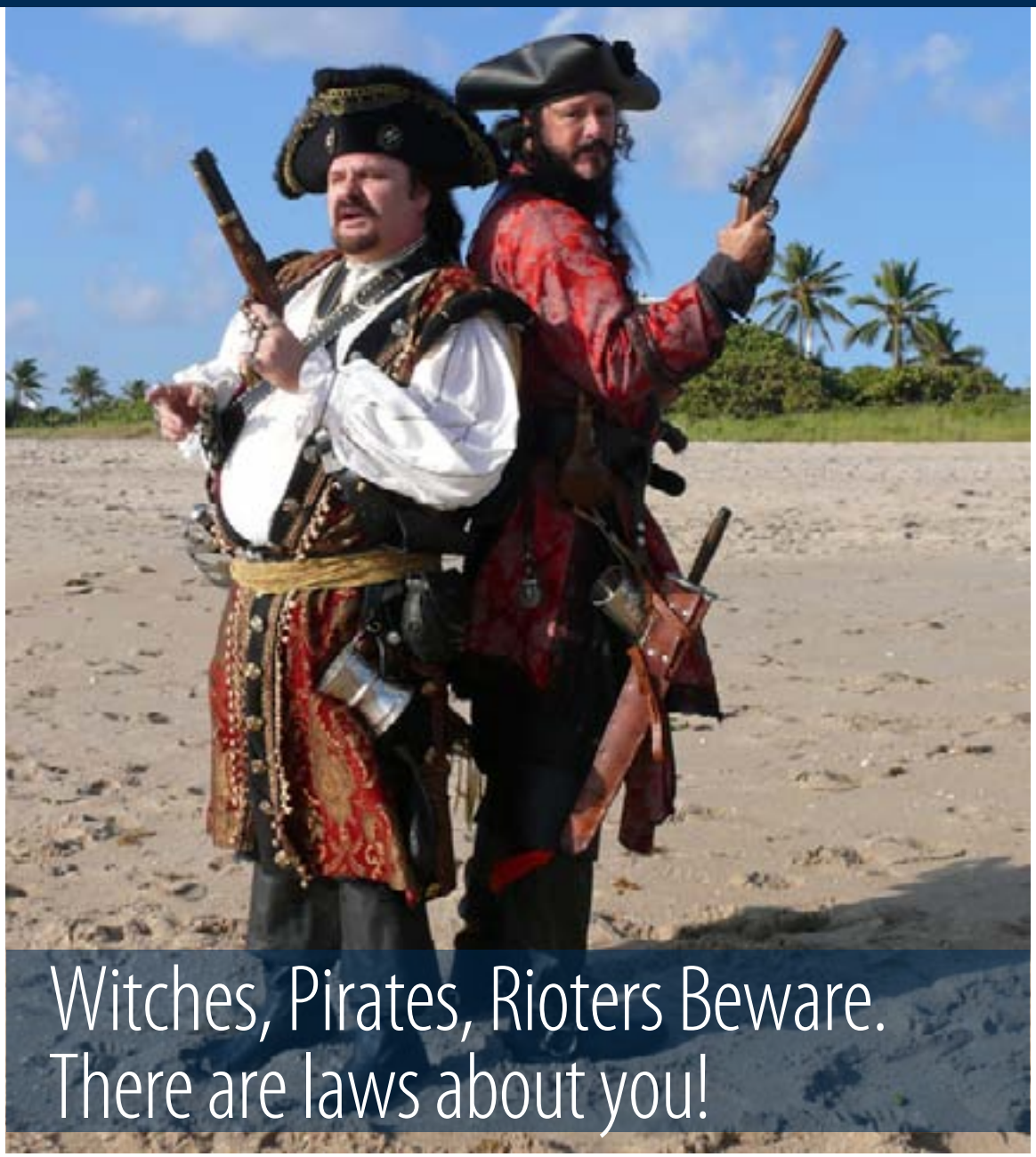
An Ontario man appealed his conviction for manslaughter after killing an assailant who attacked him in his home. The defendant argued self-defence, which has three elements: an unlawful assault; a reasonable apprehension of death or grievous bodily harm; and a reasonable belief that it was necessary to cause death or harm to the assailant in order to avoid harm. Criminal law usually holds that injuring another should always be a matter of last resort and that retreat must be considered. However, different considerations apply when a person is attacked in their own home. This is the old maxim: "A man's home is his castle". The Ontario Court of Appeal noted that the law recognizes that in a claim of self-defence, extraordinary circumstances exist when a person is on his or her own property. In such a case, case law suggests that an accused does not need to consider fleeing from home when attacked there. In this case, the Court of Appeal ruled that the trial judge made a mistake in instructing the jury that the accused's failure to flee his home was a factor to be considered in assessing the reasonableness of his claim of self-defence. It allowed the appeal and ordered a new trial.

R. v. Forde, 2011 ONCA 592 (CanLII)

www.canlii.org/en/on/onca/doc/2011/2011onca592/2011onca592.html

5. Breaking Legal Ground in China

For the first time ever, an accused has been tried in China for a murder committed in Canada. The accused, Ang Li, and his girlfriend Amanda Zhao, his alleged victim, were exchange students living in Burnaby, B.C. He fled to China and was charged in his absence with murder. China refused to return him to Canada to face trial, arguing that both the accused and the victim were Chinese citizens. In order to secure a trial, the Canadian government surrendered jurisdiction to China. The RCMP provided evidence at the two-day trial, on the condition that Mr. Li would not be executed if found guilty. To date, no verdict has been returned.



Witches, Pirates, Rioters Beware. There are laws about you!

Charles Davison

The *Criminal Code* contains a number of unusual offences which, at first look, seem antiquated in modern society. Some of these are rarely, if ever, used and most are probably unnecessary in the sense that the wrongs they attempt to address are covered by more general – and more frequently invoked – provisions of the law. Others, however "old-fashioned" in concept or wording, may still be necessary and applicable in some situations.

Perhaps the most unusual example of an offence which is likely outdated and unnecessary is that which addresses the practices of witchcraft and fortune-telling. Section 365 of the *Criminal Code* describes the offence of fraudulently "pretending" to practice witchcraft, sorcery, enchantment or conjuration; telling fortunes, and attempting to locate stolen or lost property by using "skill in or knowledge of an occult or crafty science…". From almost as early as biblical times it was against the law in Great Britain to actually *be* a witch or to practice magic. Ultimately, in the 1730s lawmakers in Great Britain removed the legal prohibitions against witchcraft on the basis that no sensible Christian person would actually believe in such things. It replaced them with laws against *pretending* to be a witch or to engage in such rituals as "palmistry" and other forms of fortune-telling and occult practices. Punishment for witchcraft was, at one time, "burning" but with the change in offence, the penalty for pretending to be a witch became imprisonment for up to one year and time spent in the pillory.

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The first Canadian *Criminal Code*, enacted in 1892, continued the prohibition which remains in our law to this day, against *pretending* to be a witch or sorcerer. But, as it is presently worded, the section leaves open some interesting possibilities. As one legal commentator has pointed out, *actual* accused witches would have available to them the defence that they are not "pretending" to practice the craft but rather, are *actually* doing so. Insofar as we no longer believe in such matters, the defence of "honest but mistaken belief" would be available to an accused who genuinely thinks he or she has special powers and abilities. The offence is only committed if the practice is undertaken "fraudulently" which the law usually defines as involving the intentional and dishonest putting of another person's interests at risk.

Furthermore, it is only an offence to engage in fortune telling for a price; doing this for free is not a criminal offence. And finally, while it was once an offence to (supposedly) commune with the spirits of the dead, this no longer the case. As the Ontario Court of Appeal pointed out in a 1920 decision, what is now Section 365 only renders it a criminal act to pretend to rely upon one's "skill in or knowledge of an occult or crafty science" for the purpose of locating stolen or lost property. The holding of séances and similar ceremonies is no longer against the law unless the accused is doing so in a dishonest way, for the purpose of fraudulently depriving another person of their money or other valuables and in support of efforts to find or locate lost or stolen property.

Prosecutions under this provision of the *Criminal Code* have become very rare (although the Supreme Court of Canada had occasion to consider the section as recently as 1987) and would likely be very difficult in present-day Canada in light of the provisions of the *Canadian Charter of Rights and Freedoms.* Section 2(b) assures everyone of the right to "freedom of conscience and religion"

and Section 27 directs courts and others to interpret the *Charter* consistently with our multicultural heritage. Therefore, accused persons charged with violating Section 365 by taking part or indulging in a practice which is not accepted as legitimate in Canadian society would be able to argue that their actions and beliefs are protected by the *Charter*. If a court found that they were genuine in those beliefs and practices, they would likely be acquitted (as long as the activities were not being engaged in for fraudulent purposes).

Another criminal offence which remains in our law although it is likely outdated is the prohibition against challenging or provoking another person into a duel (Section 71; the section also prohibits accepting a challenge to duel). Section 71 does not make it a crime to actually engage in a duel but, in all likelihood, a number of other criminal charges would be laid against someone who actually participates. These would include "possession of a weapon for a purpose dangerous to the public peace" contrary to Section 88 (and a number of firearms offences if a gun was used); and, where injury or death has ensued, an appropriate assault or homicide charge (murder or manslaughter).

Laws that deal with the occurrence and suppression of riots are another example of prohibitions which may seem archaic but which, unfortunately, continue to have use in our society. All of Canada was ashamed and embarrassed by the riotous conduct of hundreds of people in Vancouver in the spring of 2011 when the Canucks lost the Stanley Cup playoffs, but this is not, of course, the first example of such behaviour in recent times. Many large cities in Canada, including Edmonton and Montreal, have seen similar rampages. Our present *Criminal Code* has a hierarchy of offences which mirror those of bygone times that address such turmoil.

The three related offences of "unlawful assembly", "rout" and "riot" have their origins in the common law, although legislation was passed to prohibit these crimes as early as the reign of Edward VI. Of these three, "rout" is no longer an offence known to law: this was the crime committed if an "unlawful assembly" moved to another location to carry out its intention to commit a "riot". In 1714 an effort was made to clarify and consolidate the law with the passage of the *Riot Act*. It contained the words of a proclamation which was to be read out loud in the presence of the rioters ordering them to disperse in the name of the King or Queen of the day (the law changes to match the gender of the current ruler) giving rise, of course, to the common saying of "reading the *Riot Act*." Like the early formulations of the law, our present *Criminal Code* sets out the words which are to be read by a judge, mayor or sheriff (or the warden of a prison or penitentiary if that is where the riot is taking place). Those present are warned that they may be imprisoned for life if they do not immediately and peaceably return to their homes or resume their other lawful business. The proclamation is to be read after approaching the rioters "as near as

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is safe"; after commanding silence; and "in a loud voice…". At the end of the formal proclamation the words "God Save the Queen" must be uttered.

A decision made in 1830 stressed the necessity of reading the proclamation properly and entirely, including the final words. After the proclamation is read, anyone who fails to disperse within 30 minutes may be liable for imprisonment for up to life, while the ordinary offence of "rioting" (that is, before or without the proclamation being read) carries a maximum punishment of only two years imprisonment. But according to the 1830 ruling, leaving out the final words "God Save the Queen" meant the proclamation was not effective and the higher penalty would not follow.

Laws that deal with the occurrence and suppression of riots are another example of prohibitions which may seem archaic but which, unfortunately, continue to have use in our society.

(Earlier versions of the law required dispersal within an hour of the reading of the proclamation; failure to do so was considered treasonous and the penalty for treason was often death. Over time, the penalty was reduced slightly, to penal servitude for life, or for not less than three years, or imprisonment for up to two years, sometimes with hard labour.)

Other provisions of the *Criminal Code* which might appear to be relics of bygone times but for which (based upon relatively recent events) there may still be some need, include Section 49, which makes it an offence to "alarm Her Majesty". In 1981 a man fired an imitation pistol towards the Queen as she took part in the annual Trooping the Colour ceremony in London. In 1982 another man snuck into her bed chamber in Buckingham Palace, where he awoke the Queen and talked to her until the arrival of her (rather embarrassed) security officers. Had these events taken place in Canada they would likely have supported charges under Section 49, and other, more general offence sections of the *Code*. Earlier versions of this offence listed specific prohibited acts, but now this section is drafted broadly, to cover any act done "with intent to alarm Her Majesty…". The maximum penalty used to be seven years imprisonment and whipping once, twice or thrice as might be directed by the sentencing court. Now, the maximum punishment is imprisonment for up to 14 years.

Similarly, Section 51 makes it an offence to commit any violent act intended to intimidate Parliament or a provincial or territorial legislative body. This, too, is a provision which is very rarely invoked, but in 1989 a man was charged with committing this offence. He hijacked a Greyhound bus in Montreal and forced the driver to drive onto the lawn of Parliament Hill, where the bus became stuck in mud. After standing trial, he was acquitted of this and some other offences. He was, however, found guilty of "unlawful confinement" and "using a weapon in the commission of an offence" and sentenced to six years imprisonment.

Other provisions of the *Criminal Code* which might appear (at least at first glance) to be relics of bygone times but for which (based upon relatively recent events) there may still be some need, include Section 49, which makes it an offence to "alarm Her Majesty".

These are just a few examples of some of the criminal offences still included in our laws which may or may not perform a useful function. Others include the prohibitions of piracy, unlawful drilling, possessing or discharging "a stink or stench bomb" and the spreading of false news. While it may appear unusual, or even amusing, that in modern-day Canada these crimes would remain in our laws, it does not take much imagination to realize that there may still be a need for some of these prohibitions. In some parts of the world, piracy is still an on-going problem, for example, and, in recent years, prosecutions have taken place in Canada arising from attempts to organize armed terrorist cells to attack a number of government institutions in Ottawa and Toronto. Releasing a "stink bomb" is a form of mischief (the unlawful interference with other persons' enjoyment and use of property). And, in these days of on-line news and information sharing, spreading of false news for nefarious purposes is also not beyond the realm of possibility.

These are just a few examples of some of the criminal offences still included in our laws which may or may not perform a useful function. Others include the prohibitions upon piracy, unlawful drilling, possessing or discharging "a stink or stench bomb" and the spreading of false news.

Thus, while some of our criminal offences may no longer be necessary – and thankfully, are not commonplace – it nonetheless may not be appropriate for many of these prohibitions to be removed from our law books despite their ancient origins.

Charles Davison is a lawyer practising in Edmonton, Alberta.

Three Forgotten Reasons to Mind Your Manners in Canada

Peter Bowal and Kelsey Horvat

> *"To wander through the present [Criminal] Code is to stare into the faces of the ghosts of all the social evils thought, at one time, to threaten the very fabric of Canadian Society."*
> *V. H. Del Buono, "Toward a New Criminal Code for Canada, 1986*

This article describes three largely forgotten and rarely prosecuted crimes in the *Criminal Code* of Canada. They were enacted in the late 1800s or so, during a more socially conservative time. All three remain the most serious form of crimes (indictable), and contain broad, archaic wording which

makes their criminal application and enforcement difficult as well as controversial today. Arguably dormant and obsolete in practice, all three occasionally re-assert themselves. Blasphemous libel, defamatory libel, and corrupting children are three crimes which seem to not fit with our current age and conceptions of what is criminal and what is not. Yet each remains on the books.

Blasphemous Libel

Blasphemy has been a crime in Quebec since the 1600s, prior to the *Criminal Code* and the import of the common law system into Canada. Early on, the crime was a mechanism for social control. It was used to restrain verbal altercations, rather than protecting the church from blasphemy. Records show blasphemy prosecutions in only 15 instances from 1665 to 1752. Punishments for criminal blasphemy were modest, usually a fine or a period of public humiliation.[1]

What is interesting here is that the "matter published," the essence of the indictable crime, may be completely true. It is the publication itself by "caus[ing it] to be read or seen" (s. 299) any matter "that is likely to injure the reputation of any person" that constitutes the crime, unless the accused can prove that the matter is true and the publication was for the public benefit (s. 311).

There were a few cases of blasphemy in Ontario up to Confederation, although none appeared to progress to sentencing. This may have been due to the difficulty of proving verbal blasphemy. Eventually, blasphemy became more concerned with not *what* was said but *how* it was said. One could argue against religion as long as one did so in a nice way! The crime of blasphemous libel (written as opposed to verbal) was first introduced into the *Criminal Code* in 1892. Today, section 296 of the *Criminal Code* reads as follows:

> 296. (1) Every one who publishes a blasphemous libel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
>
> (2) It is a question of fact whether or not any matter that is published is a blasphemous libel.
>
> (3) No person should be convicted of an offence under this section for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion upon a religious subject.

The crime has been prosecuted five times, all between 1901 and 1935. Four prosecutions ended in conviction, with three fines and one 60-day jail term.[2]

There is no guidance in the *Criminal Code* or in any judicial interpretations as to what "publishes," "decent language" or "a religious subject" mean, or generally, what constitutes blasphemous libel. This may explain why no one has been charged with this crime since 1935.

In 1978 a temporary injunction was placed against the book *Les Fees Ont Soif* (*The Fairies are Thirsty*) after backlash from religious groups. The crime of blasphemous libel was apparently a factor in the judge's decision.[3]

In 1980, the Canadian distributor for the Monty Python film, *Life of Brian,* was charged with blasphemous libel. The charge was later dropped.[4] A poem in a controversial book, funded by the Alberta government was also criticized as being criminally blasphemous in the late 1990s.[5] Recently, as Great Britain was repealing its blasphemous libel law, the existing Canadian crime was the subject of public criticism.[6]

S.296 (3) of the *Criminal Code* attempts to preserve free expression. Today any prosecution for blasphemous libel in our contemporary, pluralistic society would meet with, and not likely survive, a freedom of expression challenge under the *Charter of Rights and Freedoms.*

Defamatory Libel

Defamatory libel dates back to 1275 in England, and sought to prevent false rumours which could escalate into a disturbance. Since few people were literate, defamation referred mainly to speech.[7] Libels increased with the invention of the printing press and developed into a common law crime in the 1600s.

Defamatory libel found its way into the first version of the *Criminal Code* in 1892. Today, it is spread over 20 sections in the *Code* (sections 297 through 317) and enjoys more legal definition than blasphemous libel. The definition of defamatory libel in section 298 is the most important:

> 298. (1) A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.
>
> (2) A defamatory libel may be expressed directly or by insinuation or irony
>
> (a) in words legibly marked on any substance; or
>
> (b) by any object signifying a defamatory libel otherwise than by words.

What is interesting here is that the "matter published," the essence of the indictable crime, may be completely true. It is the publication itself by "caus[ing it] to be read or seen" (s. 299) any matter "that is likely to injure the reputation of any person" that constitutes the crime, unless the accused can prove that the matter is true and the publication was for the public benefit (s. 311). If the accused publisher knows the statement is false (virtually impossible to prove beyond a reasonable doubt), the sentence can lead to a jail sentence up to five years (s. 300), or up to two years if the publisher did not know the statement was false or if the statement was not false (s. 301). Newspapers and other distribution outlets are particularly vulnerable.

Numerous amendments have since softened the crime. One may avoid conviction if one, on reasonable grounds, believes the defamatory matter to be true and it "is relevant to any subject of public interest" (s. 309), was a "fair comment" (s. 310) or was "in good faith for the purpose of seeking remedy or redress for a private or public wrong" (s. 315).

Police and prosecutors, despite the crime remaining on the books, leave defamatory libel to be dealt with by the tort of defamation in civil court.

The crime of defamatory libel has rarely been prosecuted in Canada, perhaps because libel is only tenuously (and mostly historically) a criminal matter. Crimes are reserved for the most serious public wrongs. Defamatory libel attacks the reputation of a specific *person*; which is difficult to view as a *public* wrong. The federal Law Reform Commission noted that this violated the principle of crime as last resort – that crimes should exist and be prosecuted in only the most serious cases.

The idea that mere defamatory words can lead to jail in Canada today seems unwarranted in a liberal democratic society which places high value on free speech. Police and prosecutors, despite the crime remaining on the books, leave defamatory libel to be dealt with by the tort of defamation in civil court.

In *R v. Lucas,* the Supreme Court of Canada in 1998 dealt with a Saskatchewan couple charged with carrying signs containing defamatory remarks about a police officer outside his headquarters. The Court did not strike down the crime, but shaped it to require the Crown to prove that the accused knew the written material was a false "grave insult," intended to defame, and seen by third parties. The couple was acquitted. This rare charge of criminal libel was brought and prosecuted through the Supreme Court of Canada to protect the reputation of a police officer.

It also criticized the crime of defamatory libel for "redundancy and confusion, excessive detail, legal fictions, gaps, uncertainty, and inconsistency." The *mens rea* (intent) for the crime is unclear. Freedom of expression and other *Charter* rights may be violated by this crime. The Law Reform Commission recommended its repeal. There are defences to the tort of defamatory libel that are not available for the crime, so that tort law suffices for defamation claims.

Corrupting Children

The third quirky crime highlighted in this article is not a libel, but is instead a corruption.

First legislated in 1918, section 172 of the *Criminal Code* prohibits endangering the morals of children in a home where one "participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice." The section states:

> 172 (1) Every one who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
>
> (3) For the purposes of this section, "child" means a person who is or appears to be under the age of eighteen years.

The lowest threshold to criminal liability under s. 172 is "any … form of vice [which] renders the home an unfit place for the child to be in." Vices and 'unfitness of place' are not readily defined and include both passive and active behaviour – such as drug use. It might also include persistent name-

calling, uncleanliness, profane language, laziness and neglect, loud music, insalubrious visitors parading through the house, raised parental voices, smoking, madcap religious instruction, too much television or other screen time, and poor nutrition.

Even in relatively permissive societies, it seems trite that children should not be exposed to "habitual drunkenness" and "adultery or sexual immorality." Yet the practical outworking of this crime is not easy. Morals are relative and ever-changing. Today, criminal prohibitions against prostitution and polygamy are currently being tested in the courts. Alcoholism is characterized as a legal disability justifying reasonable accommodation. Many parents today are not married to each other. Much of what used to be considered "adultery or sexual immorality" is taking place nightly in the bedrooms of the nation. It is not socially scorned today, much less viewed as criminal behaviour.

However, the corruption of children, at least in the abstract, remains a (politically) sensitive subject, which is why this crime endures. In the 1997 Ontario case of *R. v. L.E.,* the accused, charged under section 172(1) for engaging in sexually immoral activity, challenged the crime under the *Charter* section 7. The judge, dismissing his appeal, stated

> Citizens who want to partake in otherwise legal activities should be free to do so, but if the said conduct may adversely affect the children in their own home so as to corrupt the morals of the children, then I feel that citizens can be prescribed by a law for the greater good of a free and democratic society.

Provincial child protection departments throughout Canada have for decades possessed both the mandate and authority to intervene to protect children. Other than in extreme cases, most "vices" will never be reported to authorities. This explains why a charge of this crime cannot proceed without the consent of the Attorney General, "a recognized society for the protection of children or by an officer of a juvenile court." The language setting out the crime of endangering the morals of children is too vague and outdated to interest prosecutors.

Conclusion

These three crimes, having once occupied an important role in social control and categorized as among the most serious, have since lost their effectiveness. They are largely unknown, and so grounded in a long bygone era that they serve no deterrent purpose today.

Non-specific language broadly targeting behaviour viewed as unobjectionable in contemporary society, and probably not criminal in the sense of public wrong, means that these three crimes will rarely (if at all) be prosecuted any more. If they are, they may meet up with a newer social construct – the *Charter of Rights*.

Notes

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3 "Judge Orders Copies of Play Withdrawn" *The Globe and Mail* (5 December 1978) at p. 18.

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5 K. Torrance, "Hold Your Nose and Pay" *Alberta Report* (15 September 1997) at p. 10.

6 D. Driver, "Pakistan Turmoil Should Scare Us All" *National Post* (17 January 2011) at p. A13.

7 R.E. Brown, *The Law of Defamation in Canada* (Toronto: Carswell, 2009).

8 "Net Libel Charge is First in Canada" *The Gazette* (26 May 1999) at p. A10.

9 "Posters Draw Police Attention" *Pentiction Western News* (19 January 2010) at p. 8.

10 H. Keyserlingk, "The High Price of Defamatory Libel" *The Record* (19 April 2000) at p. 2.

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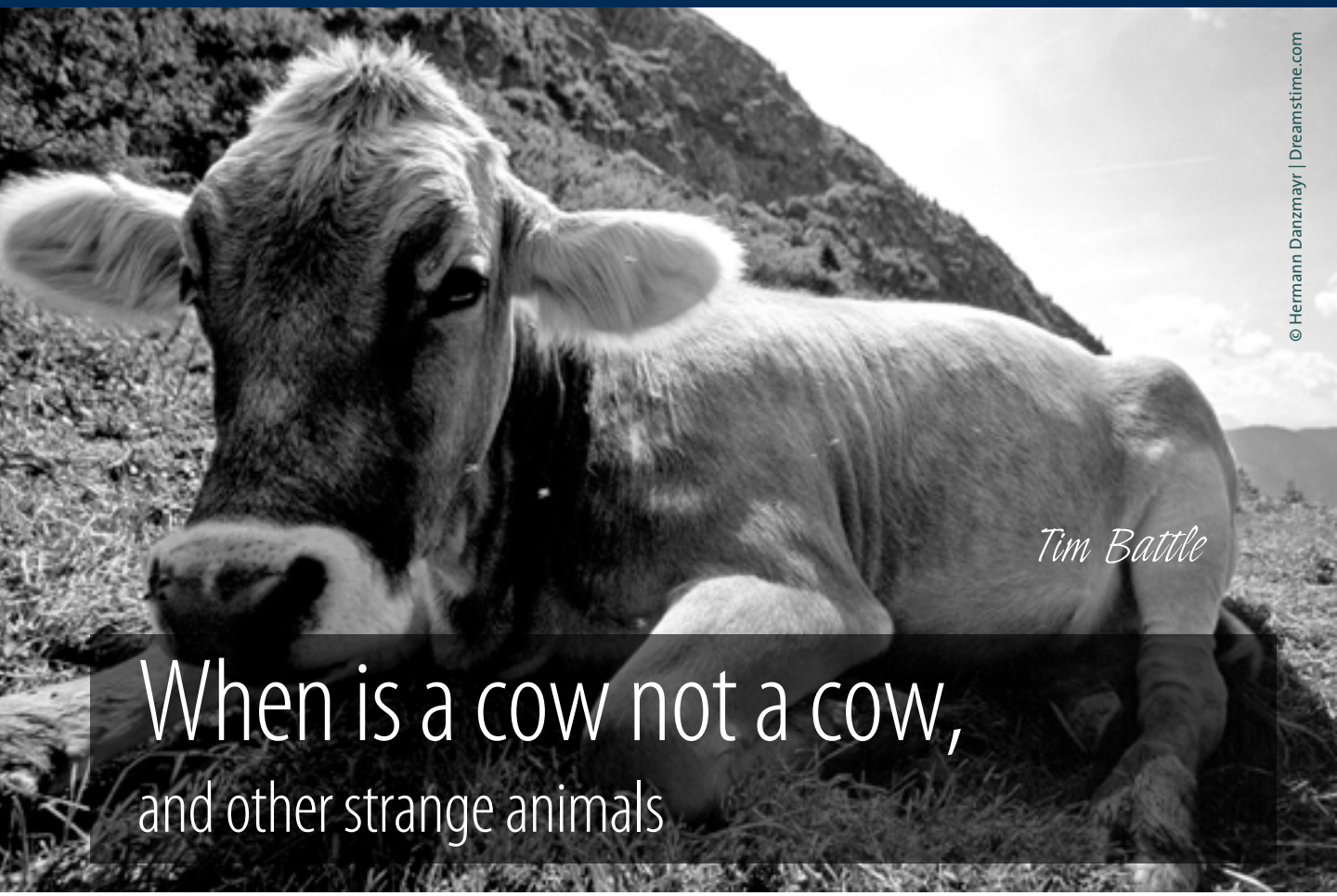

Tim Battle

When is a cow not a cow,
and other strange animals

Anyone perusing the Cruelty to Animals sections of the *Criminal Code of Canada* (the *Code*) will come across a few oddities, and wonder if their understanding of basic taxonomy is correct. In fact, the *Criminal Code* reflects an antique snapshot of a world that existed long ago. The English language, and our understanding of animals, has evolved more readily than the snail's pace of the law; in fact, we have leap-frogged over it to the point that – if it weren't for the Internet – we would need a century-old dictionary to decipher the law.

First off, looking at section 444 which deals with cattle, it appears at first glance to be rather straightforward – after all, cattle are cattle, aren't they? Well, if you leave it at that, then sure. But if you trotted back to section 2 to see how the *Criminal Code* defines cattle, you would find this:

> *"cattle" means neat cattle or an animal of the bovine species by whatever technical or familiar name it is known, and includes any horse, mule, ass, pig, sheep or goat;*

Huh? Neat cattle? Are they only talking about well-groomed bulls or cows that make their beds with hospital corners? No, "neat cattle" is a now-extinct phrase that refers to domestic livestock. This phrase also exists in other jurisdictions, and in 2001 the Kansas Attorney General noted that

"neat cattle does not refer to cattle that dress nicely, but rather to domesticated straight-backed animals of the bovine genus" (http://asci.uvm.edu/equine/law/cases/car/ksag_2001-54.htm).

Huh? Neat cattle? Are they only talking about well-groomed bulls or cows that make their beds with hospital corners? No, "neat cattle" is a now-extinct phrase that refers to domestic livestock.

In other words, cattle are defined as cattle, which can further be defined as bovines – which means, well, cattle. The *Criminal Code* also confirms that cattle are bovine animals. That should be as clear as the mud they sometimes lie in. But look at the rest of the definition: "cattle" also includes horses, mules, asses, pigs, sheep and goats. So does this mean that equines and porcines are also bovines? And if Dickens' Mr. Bumble is correct and the law is indeed an ass, then does the law also say moo?

Moving on to section 445 which deals with animals other than cattle, you notice that "other animals" are identified as "dogs, birds or animals that are not cattle... ." Now, you might believe that dogs and birds are already included in the category of animals. It appears that back in the horse and buggy days, when this part of the *Criminal Code* was written (1892 to be exact), society's understanding of animals may not have been so clear. It appears the sentiment was "better safe than sorry."

But wait. The rest of the animal sections (446 and 447) make numerous references to "animals or birds." This is also true in section 264.1, which makes it a crime to threaten someone's animals – or birds for that matter. In fact, these sections never mention animals without also mentioning birds. This is somewhat consistent with 445, except for one thing: who let the dogs out? If dogs needed special mention in section 445, why not also in these other sections?

So to sum up this logic puzzle – as defined in the *Criminal Code*:

- Birds are not animals;
- Horses, pigs and sheep are cattle;
- Dogs may or may not be animals – but they are definitely not birds.

These and other oddities with respect to the animal cruelty sections point to the urgent need to update the laws to reflect today's realities. Despite Parliament's numerous attempts since 1999 to get the *Code* revised, the legislation has never made it through both houses and received Royal Assent. There was a small amendment made (mostly to the penalty sections) in 2008 after a couple of high-profile animal cruelty cases prompted a public outcry. However, the change was piecemeal and resulted in some other peculiarities – such as leaving the definition of animal undefined (the proposed amendments would have excluded people from the definition of animal). A well-thought-out amendment would bring a more comprehensive approach – and use the words and scientific understanding of the current age.

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Uncommon Oaths

Tracy McLean

Have you ever heard of the chicken oath?

Generally speaking, when going to court as a witness, people are prepared to raise their right hands and swear an oath on a holy book to tell the truth. But this isn't the only way to do it.

A century ago, the chicken oath was used primarily by those of Chinese descent in British Columbia. The oath involved the witness signing his name on a piece of paper, followed by a ceremony outside the court in which a rooster's head was chopped off on a block and the paper oath was set on fire.

For example, according to the article "The King's Oath or Chicken Oath", in 1895 a grocer on Vancouver Island, Simon Leiser & Co., submitted an invoice to the local government for several chickens and a knife supplied to an H.A. Simpson for a trial at Union, B.C. The government declined to pay the bill because Mr. Simpson was acting on behalf of the plaintiffs.

A 1965 article in *The Advocate* states that "[c]olourful rituals ought not to come as a surprise since the *Oaths Act* of 1888 gives wide scope allowing witnesses to take the Oath in any form and with such rites as bind their own conscience."

Other non-Christian Chinese oaths consisted of the candle oath (whereby the witness holds their hand over a lit candle while swearing the oath and then extinguishes the flame), the saucer oath (when the witness breaks a saucer and then swears to tell the truth) and the paper oath (the witness signs their name to a piece of paper and then burns it).

"Indeed counsel in one case expressed relief that a particular Chinese witness felt bound by the saucer method. Some Chinese, he pointed out, require a white cockerel to be slaughtered in court. But even saucers can cause problems. When 20 Chinese turned up as witnesses at an East London county court the proceedings had to be held up while the court usher scoured local crockery shops."

"Colonial Magistrates used to encounter many strange customs .... [I]n North Kenya some tribes used to bite skin from a live dog and say 'as I bite this dog, so may I be eaten if I lie.' A Masai presented the court with cooked rice decked with seven yellow solanum berries. In Tanganyika a member of the Akimbu tribe once held a deadly puff adder before his face saying, 'If I am going to tell lies may this snake kill me.' The snake did not. Nevertheless, the tribesman lied heartily and was jaoled for perjury."

A Little History

According to *Donkers v. Kovach*, State of Michigan, Court of Appeals, File No. 270311, December 18, 2007 (p.6), the origin of raising the right hand dates back to Roman times. The penalty for perjury was a brand on the right hand. Thus, if one was taking an oath, one would be required to raise the right hand to show that s/he had not been convicted of perjury in the past.

In England in the Middle Ages, a religious oath was used to exclude non-Christians from participating in the English legal and business communities. Eventually, however, the English legal system began to accommodate these differences by allowing non-Christians to swear on a sacred text to any Higher Being which they believed would bring divine punishment if they committed perjury.

For additional information on oaths, affirmation and declarations relating to specific religious protocols, try the U.K.'s Equal Treatment Bench Book, chapter 3.2: Oaths, Affirmations, and Declarations (p.3-9 to 3-18).

The current oaths used in Canada are essentially the same as those historically used in Britain.

Discrimination?

J. de Villiers, in his article "Oath or Affirmation? Or Neither?", argues "[I]n practice in our courts (at least in matters under the jurisdiction of the federal Parliament) it is assumed that witnesses will take the oath in conformity with Anglican ritual unless they expressly elect either to take an oath in conformity with some other religion or to affirm." ...

"It is left to the witness to express spontaneously the wish to swear in some other manner or to affirm. The practice assumes that an oath is preferred over an affirmation and that the Anglican oath is the preferred form of oath. Thus it discriminates against Quakers and other non-Anglican religious people as well as agnostics and atheists."

However, the *B.C. Evidence Act*, RSBC 1996, c 124, sections 21 to 22 discusses the validity of the oath regardless of absence or difference of religious belief, as well as oaths administered by uplifted hand.

Photo of judge, magistrates and witnesses involved in the Nanaimo Mining Riots Court Case swearing a chicken oath Photographer: Nanaimo District Museum Photograph Collection

Still Relevant?

As recently as 1993 in *R. v. B. (K.G.)*, the Supreme Court of Canada said: “There remain compelling reasons to prefer statements made under oath, solemn affirmation or solemn declaration. While the oath will not motivate all witnesses to tell the truth (as is indicated by the witnesses' perjury in this case), its administration may serve to impress on more honest witnesses the seriousness and significance of their statements, especially where they incriminate another person in a criminal investigation.”

Cases

There are records of several cases where the chicken oath was administered in Canada:

- *R v Wooey,* (1902) 9 B.C.R. 569, 8 C.C.C. 25. In the course of a murder trial, it was proposed that a witness swear the paper oath. C. Wilson, a Vancouver lawyer acting for the defendant, believed that the chicken oath would be more binding on the witness's conscience. After questioning the interpreters involved, the court then instructed the witness to be sworn using the chicken oath.
- The Nanaimo Mining Riots Court Case, October 1914.
- *R. v. Wong*, (1925) 36 BCR 120, 44 CCC 133. According to *The Canadian Holy War: A Story of Clans, Tongs, Murder, and Bigotry* by I. Macdonald & B. O'Keefe, p. 68-9, the chicken oath was administered during the trial for the 1924 murder of Janet Smith in Vancouver B.C.
- *R. v. Wong,* September 1930, Brantford Ontario. According to an article by H. Ibbotson in the *Brantford Expositor*, one of the highlights of this murder case was the administration of the chicken oath to various witnesses during the preliminary hearing and the trial.

Resources

"The Art of Swearing a Resounding Oath". *The Advocate* (1965) 23:95. (available in Vancouver and regional courthouse libraries)

"The Chinese Oath" by P.S. Lampman in 3 Can. L. Rev. 24 (1904). This article was published in *British Columbia History*, the Journal of the British Columbia Historical Federation in 2003. (available in Hein Online)

"The King's Oath or Chicken Oath" by R. Greene (p. 38-9) *BC Historical News*, v. 36, no. 4, Fall 2003.

"Oath or Affirmation? Or Neither?" by J. de Villiers, *The Advocate*, (2009) 67: 199-207 (available in Vancouver and regional courthouse libraries)

"Oaths and Affirmations," by H. Rees. *Fillmore Riley Report* 48 (Spring 2000).

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Infanticide: Such a Sad and Sorry Crime

Teresa Mitchell

The Ontario Court of Appeal recently released a decision that dealt with the offence, and the partial defence, of infanticide. Infanticide has been part of the criminal law of Canada for over 60 years but no appellate court in Canada had ever before reviewed the infanticide provisions in the *Criminal Code of* Canada.

In the case of *R. v. L.B.,* www.canlii.org/en/on/onca/doc/2011/2011onca153/2011onca153.html the question before the Court was: is infanticide both an offence and a partial defence to a murder charge, or is it exclusively an offence that may, in some cases, be an *included* offence in a charge of murder to be considered if, *and only if*, the Crown fails to prove murder?

The partial defence of infanticide to murder has its roots in English law. Infanticide was created because English juries had a strong aversion to convicting mothers who killed their newborn babies of murder, for which, under the law at the time, they would face the death penalty. The English *Infanticide Act*, 1922 set out a connection between mothers who kill their newborns and mental disturbance attributed to giving birth. It provided that mothers convicted under this *Act* should receive a sentence that would be the same as if the conviction was for manslaughter, thus circumventing the death penalty.

Canada enacted its first infanticide law in 1948. As the Ontario Court of Appeal noted: "Like their English counterparts, Canadian juries were reluctant to brand mothers as murderers, many of whom were very young, emotionally distraught, and in dire social and economic circumstances at the time of the homicide. As in the United Kingdom, the death penalty was mandatory for all murders in Canada in 1948."

Canada enacted its first infanticide law in 1948. As the Ontario Court of Appeal noted: "Like their English counterparts, Canadian juries were reluctant to brand mothers as murderers, many of whom were very young, emotionally distraught, and in dire social and economic circumstances at the time of the homicide. As in the United Kingdom, the death penalty was mandatory for all murders in Canada in 1948."

Like the English law, the Canadian law tied the offence of infanticide to an imbalance of the mother's mind because of giving birth. However, unlike the English law, the Canadian statute did not require that the sentence be the same as for manslaughter. Instead, it set out a maximum penalty of three years. The Ontario Court of Appeal decided that the wording of the 1948 *Act* made infanticide not only a stand-alone offence, but also a partial defence to a murder charge. In other words, if an act of culpable homicide (murder) fell within the definition of infanticide, it was deemed not to be murder or manslaughter, but was deemed to be the offence of infanticide.

However, in 1954 a number of amendments were made to the offence of infanticide in a comprehensive overhaul of the *Criminal Code* . The changes included:

- increasing the penalty from three to five years;
- the removal of the words: "shall be deemed not to have committed murder or manslaughter";
- defining "newly born child" as a child under one year of age;
- adding breast-feeding as a second source of mental disturbance that could support the offence of infanticide.

The most important of these amendments, and the one that led to this court challenge by the Crown in the *R. v. L.B.* case, was that the new definition of infanticide removed the phrase "shall be deemed not to have committed murder or manslaughter". Its removal prompted the Appeal Court to ask whether the amendments of 1954 meant that Parliament at that time intended to remove infanticide as a partial defence to murder (even though it did not specifically say that).

Justice Doherty, writing the decision for the Appeal panel, noted that the panel had reviewed the parliamentary debates when the amendments were introduced, as well as secondary sources such

as the Introduction to that year's *Criminal Code*. He further noted that the creation of infanticide happened in 1948, only six years before the amendments. He concluded: "The 1953-54 Criminal Code did not alter the tripartite division of culpable homicide into murder, manslaughter and infanticide created by the infanticide amendments in 1948. … Treating infanticide as a partial defence to murder is consistent with the distinction drawn between infanticide and murder by Parliament. It allows juries to draw that distinction in cases where mothers are charged with murdering their children and evidence brings the homicide within the very narrow factual confines of infanticide. Eliminating infanticide as a partial defence effectively allows the Crown to remove the distinction between infanticide and murder through the exercise of its charging discretion." The Court ruled: "Infanticide was initially, and still is, both a stand alone indictable offence and a partial defence to a charge of murder".

In the Alberta case, a jury had found the mother guilty of second-degree murder. The Alberta Court of Appeal took the unusual step of overturning a jury verdict.

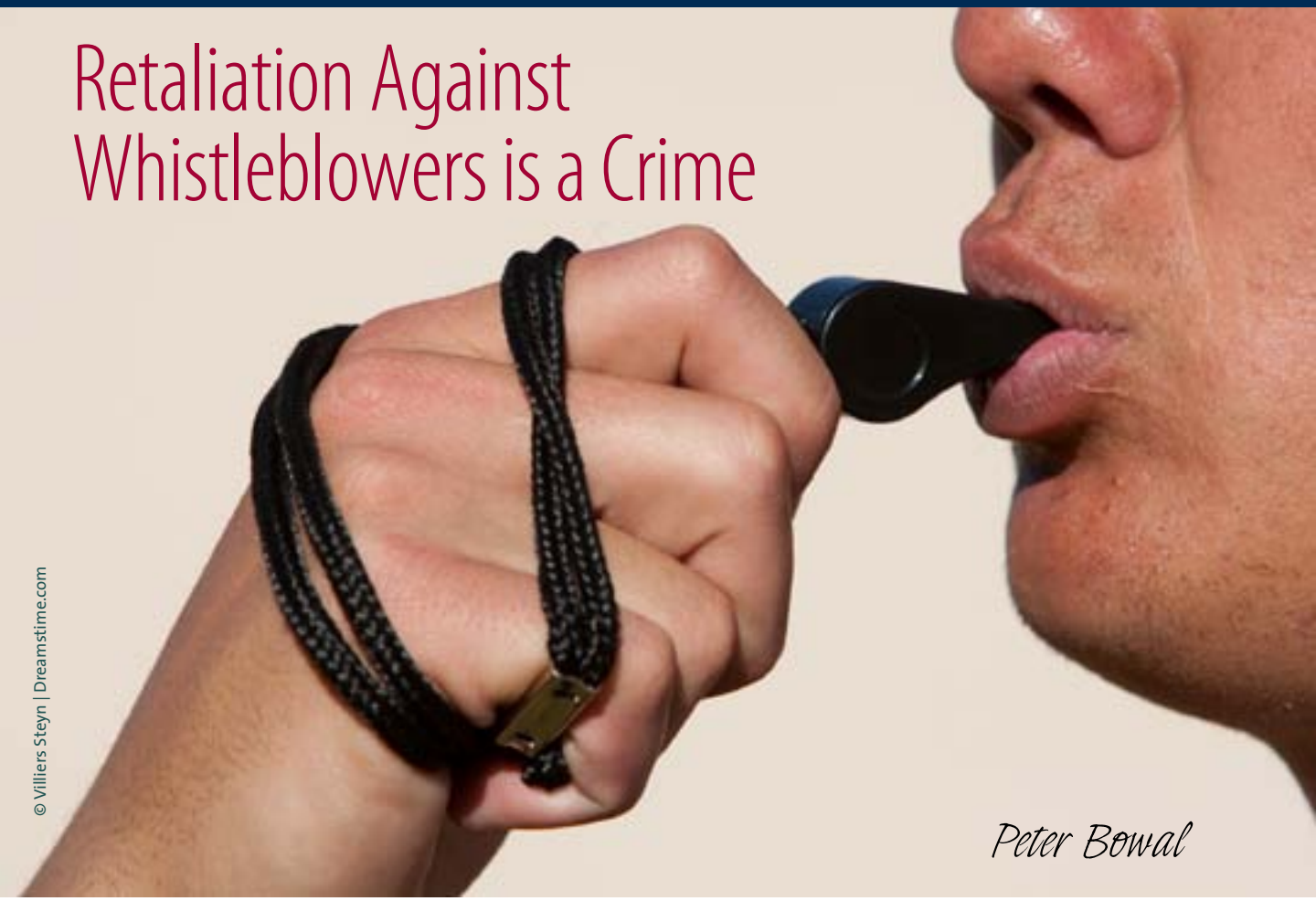
Cases of infanticide are rare in Canada. However, shortly after the Ontario decision in *R. v. L.B.,* the Alberta Court of Appeal dealt with an appeal of a conviction of a young mother for second-degree murder. In the case of *R. v. Effert*, 2011 ABCA 143CANLII www.canlii.org/en/ab/abca/doc/2011/2011abca134/2011abca134.html, the Alberta Court referred to the Ontario decision, and quoted it with approval. It stated: "Infanticide is a partial defence to murder, and where the facts support both a conviction for murder and infanticide, the jury should be instructed to enter a verdict of guilty of infanticide: *R.v. L.B*, 2011 ONCA 153 at paras.97-9. The burden is on the Crown to prove that the partial defence of infanticide does not apply; to obtain a conviction for murder, the Crown must prove that there is no reasonable doubt that the accused did not kill the child 'by reason of her mind being disturbed.'"

In the Alberta case, a jury had found the mother guilty of second-degree murder. The Alberta Court of Appeal took the unusual step of overturning a jury verdict. It noted that the jury chose to disregard the evidence of two psychiatrists about the state of mind of the mother. The Appeal Court ruled that even if the jury had doubts about the experts' testimony, it should have been left with at least a reasonable doubt about the state of the mother's mind. The Court wrote: "Viewing the matter 'through the lens of judicial experience' it is impossible to say that there was not at least a reasonable doubt present on this record. That conclusion would mean the jury found the opinions of both experts were so seriously flawed that they should be given virtually no weight at all."

The Alberta Court of Appeal overturned the verdict of second-degree murder and replaced it with a conviction of infanticide. A crime first defined almost 100 years ago in England remains in Canadian criminal law today.

Teresa Mitchell is the editor of LawNow magazine, published by the Legal Resource Centre in Edmonton, Alberta.

Retaliation Against Whistleblowers is a Crime



Peter Bowal

Introduction

In the aftermath of several large, well-publicized corporate frauds on the North American financial markets, and several embarrassing public sector abuses in Canada, such as the sponsorship scandal – which some say could have been forestalled or moderated by timely and bold insider reporting to authorities – the Canadian government enacted 425.1 of the *Criminal Code* of Canada.

This injunction not to retaliate applies to all employers and employees in Canada, not just those in the federal public service, and it is enforced by the strong arm of the criminal law. The crime became effective on September 15, 2004. It is a quirky crime only because it surprisingly criminalizes employer retaliation against whistleblowing employees – an act which historically has not come close to being a crime – as an outgrowth of American law. Moreover, it seems to be a dead letter. There has never been a prosecution for this crime, much less a conviction.

The Criminalization of Business Misconduct

Criminal law figures most prominently in the public consciousness.[1] What is the purpose of criminal law? In the 1949 *Margarine Reference* case, the Supreme Court of Canada said that, in addition to a prohibition and penal sanction, criminal legislation must "serve a public purpose..."

It said that public purposes include "public peace, order, security, health, morality … these are the ordinary though not exclusive ends served by the law." Criminal law contemplates conduct harmful to an individual or to the public.

But historically, Canadian businesses have ultimately been governed by administrative law and regulation, enforced by administrative offences and penalties. These regulatory offences are less serious, and penalties are less harsh, than the category of wrongs known as crimes. Now, however, the federal government, responsible for all criminal law across the country, is criminalizing more business misbehaviour.

In the 1997 case of *R. v. Hydro-Quebec*, the Supreme Court of Canada considered whether the regulatory nature of the *Canadian Environmental Protection Act* was criminal. The Court upheld the legislation on the basis that it was intended to safeguard the public against the "public evil" of pollution. In *R. v. Cuerrier,* Cory J. found that there was "no prerequisite that any harm must actually have resulted." A "significant risk" of harm suffices for an act to be criminal.

The crimes in the *Criminal Code* Part V ("Offences Tending to Corrupt Morals") and Part X ("Fraudulent Transactions Relating to Contracts and Trade") have increased. Bill C-45, a remedial response to the Westray Mine disaster, came into force in 2004 (S. 217(1) *An Act to Amend the Criminal Code* (Criminal Liability of Organzations)). It now criminalizes breaches of what used to be provincial regulatory occupational health and safety standards in the workplace. In the last five years, more business misconduct has been elevated from the status of mere regulatory offences to criminal offences.

Regulatory Offences of Retaliating Against Employee Whistleblowers

Government regulators are unable to monitor and detect every instance of business wrongdoing. They depend on insiders within the company, and competitors, to detect and report violations of the law. Whistleblowers may be a valuable and inexpensive resource in law enforcement. To facilitate employees to come forward to assist federal and provincial regulators, they must be protected from reprisals for their reporting offences and other wrongdoing.

The principal method of protecting whistleblowers to date in Canada has been the insertion of provisions in some federal and provincial laws, which outlaw retaliation against insiders who make a complaint, or who co-operate with a regulatory investigation. This is done on a statute-specific basis for a narrow range of activities such as human rights, labour and occupational health and safety.

An example is 74(1)(a) of Saskatchewan's *Labour Standards Act* (R.S.S.1978, amended 1994) which reads:

> 74(1) No employer shall discharge or threaten to discharge or in any manner discriminate against an employee because the employee:
>
> (a) has reported or proposed to report to a lawful authority any activity that is or is likely to result in an offence pursuant to an Act or an Act of the Parliament of Canada …

This Act prohibits employers from retaliating against employees who obey the law, refuse to break the law, report breaches of the law, co-operate in an investigation or give evidence in proceedings.

Sarbanes-Oxley Origins

The 2002 Sarbanes-Oxley legislative package (SOX) was a comprehensive reaction to U.S. business scandals that many say could have been prevented by strong whistleblower protections. SOX Section 1107 protects whistleblowers, even those who are not employees, by charging a felony against one who, with intent to retaliate, takes any action harmful to any person for providing truthful information to a law enforcement officer about the possible commission of any federal offence.

It is a quirky crime only because it surprisingly criminalizes employer retaliation against whistleblowing employees – an act which historically has not come close to being a crime – as an outgrowth of American law. Moreover, it seems to be a dead letter. There has never been a prosecution for this crime, much less a conviction.

The Canadian Response: Section 425.1 of the Criminal Code

Section 425.1 of the *Criminal Code* imported SOX section 1107 into Canada. It creates a criminal penalty of up to five years imprisonment for any employer who retaliates against a whistleblower. The provision reads:

> *Threats and retaliation against employees*
>
> **425.1** (1) No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so,
>
> (*a*) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or
>
> (*b*) with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (*a*) to a person whose duties include the enforcement of federal or provincial law.
>
> *Punishment*
>
> (2) Any one who contravenes subsection (1) is guilty of
>
> (*a*) an indictable offence and liable to imprisonment for a term not exceeding five years; or
>
> (*b*) an offence punishable on summary conviction.

Analysis of Section 425.1

Who is Bound to Comply?

Section 425.1 places the direct burden of non-retaliation on three different categories of person:

- the employer (often the corporate entity or partnership),
- a person acting on behalf of an employer (including managers, subsidiaries of a parent corporation, and trustees), and
- a person in a position of authority in respect of the employee. Accordingly, issues of whether a supervisor was authorized to retaliate in any instance are avoided because all of them have direct compliance responsibility.

An important feature of this provision is its national scope. It applies to all employers in Canada. All other anti-retaliation legislation to date has been provincially-limited or activity-limited. All employers in Canada, public and private sector, for profit and not-for-profit, are bound.

Who Receives Protection?

Section 425.1 only protects those individuals who blow the whistle in their capacity as employees. Independent contractors, who technically are not employees, may have not protection from this crime.

Action Proscribed (*Actus Reus*)

These three categories of persons must not take nor threaten any "disciplinary measure against, demote, terminate or otherwise adversely affect the employment" of a whistleblowing employee. The prohibited action is any discipline and the lowest culpability threshold is "adversely affecting the [whistleblower's] employment." Theoretically, even shunning the whistleblower might be culpable.

Purpose of the Discipline (*Mens Rea*)

To convict an employer of this crime of retaliation, the Crown must establish beyond a reasonable doubt that the discipline was applied with the intent to discourage the employee from blowing the whistle (pre-emptive intent) or to retaliate for already having blown the whistle (punitive intent). There remain many possible opportunities for lawful discipline against employees. Employer motives for discipline may be mixed or ambiguous – and difficult to prove beyond a reasonable doubt.

All reductions of employment status are *prima facie* suspect when they occur against the employee reasonably soon after the whistleblowing has come to the attention of the employer or supervisor. Yet, proof of intent of retaliation beyond a reasonable doubt will be the main obstacle to prosecution.

However, the wrongdoing threshold for s. 425.1 to apply is high: the employer must be breaking the law. In some ways, this pre-supposes – perhaps unrealistically – that the average employee will know the law broadly and deeply enough to accurately determine when an offence has occurred.

What Wrongdoing?

There are many levels of wrongdoing that employees might witness and report. These include crimes and regulatory offences, abuse of power and trust, serious financial misappropriation or waste, breach of ethics, or the violation of the organization's own internal policies, rules and procedures. However, the wrongdoing threshold for s. 425.1 to apply is high: the employer must be breaking the law. In some ways, this pre-supposes – perhaps unrealistically – that the average employee will know the law broadly and deeply enough to accurately determine when an offence has occurred.

If an employee observes merely unethical (versus illegal) behaviour, breaches of the employer's own policies, manifest unfairness or an abuse of power, gross mismanagement of financial resources, or if the employee merely dissents in how the business in operated in some respect – these are matters over which the employer may retaliate.

To What Measure of Certainty of Wrongdoing?

Employees may *suspect* wrongdoing but they must determine whether that wrongdoing would constitute a federal or provincial offence. Whistleblowers are lay persons, rarely educated in the law. They are not likely to know the details of what constitutes an offence, evidence or standards of proof. How certain must they be before they can report to the regulators with impunity? The *Criminal Code* says that the employee must "believe" that an offence has been, or is being, committed, a subjective standard. The courts may imply a reasonableness requirement to the belief, looking at objective evidence to establish reasonable and probable grounds. The belief is not merely in the *wrongdoing*, but in an *offence:* the employee must relate the wrongdoing to an offence.

Past or Present Offences are Reportable

The *Criminal Code* refers to an offence that "has been or is being committed." Disclosures of prospective offences are not protected. Disclosure may be useful for regulators even where a past offence is statute-barred to prosecution.

External Whistleblowing Only Protected

An employee will only be protected from retaliation if the employee provides the information of wrongdoing "to a person whose duties include the enforcement of federal or provincial law." This includes police officers and regulators who are empowered to take enforcement action, although not necessarily with respect to the particular offence that is being reported.

What rationales support favouring external reporting to a law enforcement official?

- Efficacy – if there is a violation of the law, it is thought most effective to take it to someone who can objectively deal with it in the public interest.
- External reports are documented to assist the Crown in achieving its evidentiary burden, including the use of s. 425.1.
- External reporting may preserve evidence: when employees complain internally, there is a risk that management might destroy evidence of wrongdoing.

- If concerned employees only raise the complaint with organizational supervisors, they will not receive the protection of s. 425.1. It is not a crime to retaliate against the employee in such a case. Accordingly, this provision encourages external reporting in preference to internal up-the-ladder reporting of wrongdoing, a feature that is unlikely to be in the organization's best interests.
- A well-meaning and loyal employee who reports concerns inside the organization for these reasons will not be protected under this criminal legislation. This is an important practical point for whistleblowing employees to keep in mind – while they may believe that it is in the best interests of the employer to receive their reports of wrongdoing, they will lose their protection from retaliation if they report internally.
- Research shows that retaliation against external whistleblowers tends to be more extreme, because managers tend to view external whistleblowers as disloyal. They are therefore in need of greater protection.

Employees must be careful to report what they believe to be offences with only pure motives on their part. A countervailing criminal offence of public mischief is reserved for those who, with intent to mislead, cause a peace officer to investigate.

Motives and Public Mischief

Employees must be careful to report what they believe to be offences with only pure motives on their part. A countervailing criminal offence of public mischief is reserved for those who, with intent to mislead, cause a peace officer to investigate. Not all regulators will be "peace officers" like police, but there may be other legal sanctions in legislation and at common law (eg. malicious prosecution) for filing frivolous and vexatious reports, such as S. 140 of the *Criminal Code*.

The punishment under s.140 is the same as that under s.425.1. Therefore, vengeful competitors or former employees who file false accusations could be subject to these penalties. If someone purposely misleads a federal or provincial agency the shield of s.425.1 will not be available.

Sanctions

The sanctions imposed against a retaliating employer will depend on whether the prosecution follows summary or an indictable procedure. A summary conviction is less serious and the offender can be sentenced to a maximum six months imprisonment and/or fined $2000. A summary offence will be heard by a provincial court judge and the charge must be laid within six months of the offence.

An indictable offence is more serious under the *Criminal Code* and there are more procedural issues than with a summary offence. A person convicted of this indictable offence is liable to imprisonment for up to five years.

Conclusion

Employees who seek to report wrongdoing which they observe in the course of their employment have always risked retaliation from their employers, especially if they have reported outside the organization. Historically, employees in Canada have owed a duty of good faith and loyalty to the employer. Now this duty must be reconciled with a new crime: retaliation by any employer against whistleblowing employees in specific circumstances.

How well does this new offence under the *Criminal Code* operate? Its potential criminal deterrent effects on employers are limited. Some problems include:

- employees are unlikely to know federal and provincial regulatory legislation well enough to know when their employers are offending, and how to report to law enforcement authorities. Most employees "would rather walk than talk";
- the new law provides no incentive for whistleblowers to come forward;
- the proof of retaliation, motivated only by employer criminal bad faith, all beyond a reasonable doubt will always be a challenge;
- employers are not prohibited from disciplining employees in all instances; and
- the effectiveness of s. 425.1 will depend on the willingness of the Crown to enforce this law and to see retaliation against legitimate whistleblowers as a serious crime. Will the police and the Crown view this sort of employer response as criminal behaviour?

All these factors severely constrain 425.1 from becoming meaningful whistleblower protection. No prosecutions have been brought to date. The crime may lie dormant on the books until another major public or corporate scandal cries out for action.

All these factors severely constrain 425.1 from becoming meaningful whistleblower protection. No prosecutions have been brought to date. The crime may lie dormant on the books until another major public or corporate scandal cries out for action.

However, the spectre of jail and fines may deter employers from disciplining the whistleblowing employee who reports employer misconduct under any federal and provincial legislation. To the extent that employers are slow to retaliate against conscience-bound whistleblowers, the objectives of this crime may yet be met.

Notes

1 The carefully staged "perp walk" for the evening news and newspaper front pages reminds us how effective a deterrent the criminal process can be for managers, and how business malfeasance has mainstreamed into the public criminal justice administration process.

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Incarcerating Aboriginal Youth: Some Issues

John Edmond

Few areas of the law are so laden with emotion, ideology and conflicting prescriptions for near-utopia than the criminal law as it relates to Aboriginal people. Culture has been lost. Residential schools separated families and were more often than not a deliberate instrument of deculturation. Many reserve communities have little or no economic base; families are often dysfunctional. As the Supreme Court wrote in *R. v. Gladue* in 1999,

> The background factors which figure prominently in the causation of crime by aboriginal offenders are by now well known. Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration.

Factors that lead to Aboriginal persons being charged with criminal offences may be exacerbated by circumstances in the courtroom: inadequate or no legal representation, and often, a tendency on the part of an Aboriginal accused to consider him or herself guilty only because of the charge.

The result is the well-known over-representation of Aboriginal offenders in Canadian prisons and penitentiaries. The Correctional Service of Canada reports, "As of the end of March 2009, Aboriginal people comprised 17.3 per cent of federally sentenced offenders, while the Aboriginal population is 2.7 per cent of the Canadian adult population." This is over-representation by a factor of more than six.

Criminologists have identified youth as one of the strongest risk factors for delinquent or criminal behaviour. On this assumption alone, a higher crime rate can be expected among the Aboriginal population taken as a whole, by virtue of the lower median age.

As for Aboriginal people generally, so for Aboriginal youth. Family and community circumstances, coupled with trial conditions, lead to a high rate of Aboriginal youth incarceration. Fetal alcohol syndrome is frequently cited as a factor in Aboriginal youth offences. According to the 2006 Census, six per cent of all youth 12 to 17 years old in Canada self-identified as Aboriginal, yet they comprised 36 per cent of youth admitted to sentenced custody in 2008/2009 – again a factor of six.

Nevertheless, in keeping with the national decline in crime generally, youth incarceration rates overall have fallen in recent years. Over 2004-09 (the latest statistics available), the number of 12-17 year-olds in custody fell by 30 per cent. While this encouraging statistic will no doubt be brought to an abrupt end with the new tough-on-crime legislation, it is indicative of a clear trend.

The Aboriginal population is younger than the general population as result of a birth rate almost twice that of non-Aboriginals. Almost half of the Aboriginal population is 24 or younger, compared to less than a third of the non-Aboriginal population. Criminologists have identified youth as one of the strongest risk factors for delinquent or criminal behaviour. On this assumption alone, a higher crime rate can be expected among the Aboriginal population taken as a whole, by virtue of the lower median age.

Over-representation is especially true of Aboriginal females, when comparing Aboriginals and non-Aboriginals. Aboriginal females account for a significantly larger proportion of youth in sentenced custody: in 2008-09, 44 per cent of incarcerated females were Aboriginal, but only one-third of males. The over-representation of females was more than seven times.

What is to be done? The courts are expressly directed by the *Criminal Code* to "take into consideration" as a sentencing principle, that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders." The Supreme Court in *Gladue* found this to be a remedial provision intended to address in particular the "problem of the disproportionate incarceration of aboriginal peoples." The Court made it clear that this is not an automatic "avoid-jail" card for Aboriginal offenders; rather it is a direction to judges to give weight to "The unique systemic or

background factors which may have played a part in bringing the particular aboriginal offender before the courts," and to "The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection." The Court continued, "Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing." The principle of "community-based sanctions" is of great importance, the Court emphasized.

As a means to that end, "sentencing circles," first advocated by Yukon Judge Barry Stuart for First Nations in the mid-90s, have been hailed as a practical way to empower communities to deal with their own. Following, usually, a guilty plea, the offender's sentence is decided by a circle of his or her peers from the community. Advocates such as Judge Stuart say that this changes attitudes, rebuilds relationships, resolves differences, and generally improves community well-being.

Not all commentators are convinced. Sentencing circles are viewed by some as substituting judicial colonialism for state and cultural colonialism. As Jane Dickson-Gilmore and the late Carol La Prairie explain in their definitive work, *Will the Circle be Unbroken?*, "not only does the circle promise to fill the holes in traditional culture left by colonialism, the promise is made by powerful and influential outsiders – again, usually judges – [who offer participation that] will fix much … of what ails the community." They are critical of the "circle" as a pan-Indian motif when the evidence is otherwise. The Iroquois, for example, have no "particular cultural reference point for the circle," and would likely prefer "a seating arrangement that replicates the [traditional] clan-based structure."

But the objections transcend seating geometry. There is no guarantee that the community will have the physical or social resources to ensure that a sentence to be served in the community is carried out and not simply neglected. More broadly, fairness, both across the board and to victims, is at stake; unlike the courts, circles provide no assurance of consistency in sentencing. Wide disparities in sentences for similar offences are hardly consistent with principles of justice, and, indeed, contravene a *Criminal Code* principle. In the wider world, while reconciliation is much to be desired, decisions on punishment are not left to the popular will. In that regard, the Supreme Court expressed confidence in Aboriginal values, asserting in *Gladue* that "priority [is] given in aboriginal cultures to a restorative approach to sentencing," but no evidence is referred to for this.

In response to criticisms, appeal courts have laid down strict criteria for the use of circles, including a clear absence of coercion. But it remains unclear that community biases can be eliminated. For example, it is reported that, though sexual abuse cases are not infrequent in the Northwest Territories, no Dogrib man has ever been convicted of sexual assault by a Dogrib jury.

The practicality of the Supreme Court's emphasis on community-based sanctions seems to be put in some doubt as

> The courts are expressly directed by the *Criminal Code* to "take into consideration" as a sentencing principle, that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders."

a result of the investigations and analysis of not only Dickson-Gilmore and La Prairie, but numerous criminologists and sociologists who share their concerns.

Another aspect of Aboriginal justice that appears to have received less academic attention is the assumption, codified by inference in the *Criminal Code*, that the backgrounds of Aboriginal offenders are more deserving of judicial scrutiny than those of non-Aboriginal offenders of similarly dysfunctional social and family backgrounds. Without suggesting any conclusion on the question, and recognizing that loss of culture is, of course, of major significance, it might be worthwhile to research whether, on some measure of dysfunctionality, the difficulties experienced by socially and economically disadvantaged Aboriginal people are consistently greater than those of similarly disadvantaged non-Aboriginals.

In any case, over-representation is not, in the final analysis, to be solved within the justice system. Offenders have been convicted because they have offended. Biases in the justice system cannot alone account for the great disparity that exists. Only when the social and economic inequities under which Aboriginal people labour are largely removed – presumably by a combination of incentives and their own efforts – will over-representation no longer be an issue.

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Finally, it is worth pointing out that the government's widely vilified crime bill's restriction of judicial discretion (sure to be law by the time this article is published), will almost certainly have the perverse effect of increasing over-representation of Aboriginal persons in custody. The bill imposes more custodial sentences and reduces judicial sentencing discretion. Aboriginal offenders who in the past would have avoided custody by virtue of judicial discretion will no longer receive the benefit of it for offences that now require mandatory jail time. A quotation from *Gladue* is apt: Noting Canada's leadership in many fields including "progressive social policy and human rights," the Court wryly observed, " Unfortunately, our country is also distinguished as being a world leader in putting people in prison."

John Edmond is an Ottawa lawyer with an interest in public and constitutional law.

The Martin Aboriginal Education Initiative

Introduction

According to the 2006 Canada Census, there were more than one million Aboriginal people in Canada. The Aboriginal population is growing much more rapidly than the non-Aboriginal population.

When compared to non-Aboriginal Canadians, Aboriginal Canadians have a lower education as well as a lower standard of living. Specifically:

- High school dropout rate: 60% of Aboriginal students on-reserve and 43% of Aboriginal students off reserve have dropped out of high school, compared to 9.5% of non-Aboriginal Canadians;
- University degrees: 7% of First Nations, 9% of Metis and 4% of Inuit people have a university degree compared to 23% of non-Aboriginal Canadians;
- Incarceration: in 2007/2008, Aboriginal adults accounted for 22% of prison admissions although they represent only 3% of the Canadian population; and
- Homicides: 17% of victims of homicide and 23% of those accused of committing a homicide between 1997 and 2004 were Aboriginals.

Education is critical to improving the social and economic strength of Aboriginal people to a level enjoyed by other Canadians.

Background

The Martin Aboriginal Education Initiative (MAEI) was established in 2008 in order to initiate a variety of educational projects designed to provide Aboriginal Canadians with the opportunities they need to succeed. MAEI brings together Aboriginal organizations, the business community, post-secondary institutions, First Nation schools and provincially-funded school boards to implement programs to support Aboriginal students. Its goal is to support initiatives that improve education at the elementary and secondary school levels for Aboriginal Canadians. MAEI believes that the development of knowledge and skills will provide Aboriginal youth with an incentive to continue their education.

The goal of the Grade 11 and 12 Aboriginal Youth Entrepreneurship Program is to encourage Aboriginal youth to stay in school where they can develop the attitudes, knowledge and skills necessary to achieve success in secondary school, post-secondary education or training, the workplace and daily life.

Projects are chosen in discussion with the pertinent Aboriginal leadership, provincial and territorial education authorities, and local business communities.

These are some of the projects currently being undertaken by the MAEI.

1. Aboriginal Youth Entrepreneurship Project

The goal of the Grade 11 and 12 Aboriginal Youth Entrepreneurship Program is to encourage Aboriginal youth to stay in school where they can develop the attitudes, knowledge and skills necessary to achieve success in secondary school, post-secondary education or training, the workplace and daily life. Students are given entrepreneurial experience and the opportunity for business ownership.

The curriculum is based on Ontario Senior Business Studies curriculum, supplemented by material developed by the Network for Teaching Entrepreneurship (NFTE). NFTE has been in existence for over 25 years and its program is used in 14 countries, including the United States, Great Britain, Ireland, Belgium, and Israel.

MAEI's Aboriginal Youth Entrepreneurship Program includes Aboriginal content, including case studies, teaching strategies and examples of successful Canadian Aboriginal business leaders.

Using innovative hands-on activities, guest speakers, and business mentors, Aboriginal students learn how to create a product or service-based business. Funding is provided for students who wish to start each micro-business and using the services of local banks, students open and maintain accounts, and must comply with all required record keeping and other accountability measures.

Students are mentored by established business people, including Aboriginal business owners, throughout the planning and implementation process.

The program is designed to improve students' proficiency in Business Mathematics, English, Accounting, Marketing, and Information and Communications Technology, while supporting

the acquisition of leadership skills. Teaching strategies include classroom instruction, simulations, competitions, guest speakers, field trips to businesses and mentoring. The program is closely monitored and the success is determined through both quantitative and qualitative measures.

Since existing teaching materials did not support the teaching of the program, it was clear to MAEI that new and innovative Aboriginal-focused textbook and teachers' resources were needed. It is important that Aboriginal students see themselves reflected in the textbooks and other materials they use in school. For this reason, MAEI collaborated with Nelson Education Ltd. to develop Aboriginal teacher and student resource materials. The authors of these materials are Aboriginal teachers who have taught the Grades 11 and 12 programs. These secondary school teaching and learning materials are the first of their kind in Canada and will be implemented in the 2011-2012 school year.

2. Accounting Mentoring Pilot Project

The Canadian Institute of Chartered Accountants is partnering with MAEI and school boards to mentor Aboriginal youth who have an aptitude or an interest in an accounting career. The goal of the Accounting Mentoring Project is to encourage Aboriginal youth to complete high school and pursue careers in accounting.

Aboriginal secondary school students are identified by their teachers. With parents' permission, participating accounting firms will mentor these students. The accounting firms work with the students over several years in various activities including job shadowing, co-operating education placements, summer employment, scholarships/bursaries and opportunities to article. It is expected that colleges and universities will also support these young people as they pursue their post-secondary studies.

The MAEI anticipates that in the future, pilot projects will be sponsored across Canada and that this will lead to a national project.

3. Banking Mentoring

A parallel mentoring program to the Accounting Mentoring Project was started in Edmonton and Winnipeg in the 2010-11 school year in partnership with Scotiabank.

4. Promising Practices in Aboriginal Education Website

MAEI launched the Promising Practices in Aboriginal Education website www.maei-ppw.ca in December, 2009. The purpose of the website is to foster the exchange of promising classroom practices and research. The site enables the on-going collection and publicizing of curriculum materials, classroom practices, relevant policies and research related to successful practices in Aboriginal education. Its focus is elementary and secondary

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education, as well as Early Childhood Education, and parent/community engagement. Educators, researchers and others use the site to enhance and share learning opportunities and to improve educational success for Aboriginal students.

An advisory Group has been established and the site is updated monthly. An announcement about the launch of the site was sent to First Nations schools, Aboriginal organizations, universities, provincially-funded school boards, teachers' organizations, ministries of education, and other interested groups and individuals.

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5. Model Schools

The success gap between Aboriginal and non-Aboriginal Canadians has deep roots, most of which begin in early childhood. Because of this, improving the quality of education provided by elementary schools on reserve must be a priority. MAEI has initiated two elementary model school projects in partnership with Chippewas of Kettle and Stony Point First Nation and Walpole Island First Nations in Southwestern Ontario.

The goal of the two projects is to accelerate improvement in literacy and numeracy in band-operated schools. The gains students make should serve as a catalyst for action by the wider Aboriginal leadership, the corporate community and by governments leading to similar programs in First Nation elementary schools across Canada. The five-year projects were implemented in the 2009 school year. The programs are based on the curriculum and teaching strategies that originated in Ontario's "at-risk" elementary schools, including:

- providing extensive, targeted professional development to assist teachers to enhance their teaching and assessment strategies;
- using data to track students' achievement levels;
- funding lead teachers who have training about the best practices and most effective techniques;
- ensuring classroom teachers are given individual support, appropriate classroom resources, teaching guides and diagnostic tools to help them develop effective reading and writing, and numeracy strategies;
- assisting all teachers to use common assessment strategies;
- on-going assessment of students in order to guide teachers and identify required interventions;
- developing a school improvement team that meets regularly to review school data and plan next steps;
- hiring external experts to visit the school for a few days a month to assist the principal and teachers; and
- planning for parent involvement and community engagement.

The Margaret and Wallace McCain Family Foundation has joined MAEI to support an early years component at Chippewas of Kettle and Stony Point First Nation. The focus will be programming for young children prenatal to six years and their families. Both projects will receive advice and support from the Ontario Institute for Studies in Education at the University of Toronto (OISE/UT) and the University of Western Ontario. MAEI hopes that these literacy and numeracy projects will become models to be embraced elsewhere.

In February 2011, Free the Children and MAEI sponsored a campaign to highlight issues related to Aboriginal education in Canada. The purpose was to raise awareness among Canadian children, youth and their teachers about the many obstacles facing Aboriginal education.

6. Partnerships

Free the Children

In February 2011, Free the Children and MAEI sponsored a campaign to highlight issues related to Aboriginal education in Canada. The purpose was to raise awareness among Canadian children, youth and their teachers about the many obstacles facing Aboriginal education. The two organizations plan to develop a five-year program to raise further awareness about these obstacles, with teachers and students in elementary and secondary schools across Canada, and to suggest avenues of direct action. This program will begin in the 2011-12 school year.

Ashoka Canada

MAEI is partnering with Ashoka Canada, the McConnell Foundation, the Counselling Foundation, the Royal Bank of Canada, the Trillium Foundation, the Donner Foundation, the Vancouver Foundation, and others to plan an initiative to find innovative and culturally appropriate strategies that promote excellence in education for First Nations, Inuit and Métis students across Canada. This project will be launching in September, 2011.

For more information about the MAEI and its work, please contact Administration Director Lucie Santoro at 514.982.3911 or email her at lsantoro@mai-iam.ca.

The information contained in this article has been adapted from the MAEI website at www.maei-ieam.ca and is reprinted with permission.

Some Reflections on Growing Up as an Aboriginal Youth

Troy Donovan Hunter

It was winter 1998 when I had the privilege of working directly with four or five Aboriginal youth at risk. My job was to bring them to the Elders within our Ktunaxa communities in the Canadian Rockies and that included both Canada and the United States. We photographed and interviewed the Elders. I asked the questions and shot the pictures but the youth had to listen in on the interviews and then afterwards, they were to transcribe the audio so we could use the stories and pictures to publish a book. Many of the pictures show the youth interacting somewhat with the Elders and it was a learning experience for all of us. These were all adolescent teen boys on the verge of entering their adult lives. I lived with these kids for five months and two of them were my own nephews. That is the way it is in Indian country: we are all related.

So, I had to teach them life skills such as cooking, laundry, housework, paperwork, and generally looking after themselves. It was an interesting time for me personally because that summer I had gotten married and had started a new life. I guess if a person has a good skill set, they are in demand. I knew a lot about photography and computers and must have been a shoe-in for the job, even though I was a high school dropout. Nevertheless, I was selected to live with these boys and to try to pass something on to them from the Elders through a form of osmosis.

In retrospect, I wonder if that time in our lives had any impact and if they remember the stories of the Elders .

In retrospect, I wonder if that time in our lives had any impact and if they remember the stories of the Elders. It wasn't easy as I would have rather been living on Vancouver Island with my wife as a newlywed couple. But because I was a struggling artist with little education under my belt, I was grateful to have a job that allowed me to become closer to the Elders, engage in a photography project and teach some boys a thing or two about life. I felt like a counselor but without the training to deal with youth at risk. I was barely past being a youth at risk myself. My challenges included:

- having my favourite cologne go missing and no-one fessing up to it;
- having a complete interview tape go missing (taken from the one youth that actually fell asleep during the interview, not naming any names!); and
- having to sit in a city slammer (jail cell) to try to talk some sense into a youth; telling him that crime is a one way street that usually ends up in some miserable place such as the notorious downtown Eastside of Vancouver, also known as Skid Row.

Well, fast forward to 2011 and I find myself a school trustee, a law graduate and someone more experienced in life's curves. Whatever became of those boys? They have moved on in life, each with their own stories. Some have become fathers, while others went back to school and found suitable career paths. I was so impressed by one of them, co-incidentally my nephew. He was so proud to tell me how he got all his worker safety certificates and that he had sent out a couple of hundred resumes to the oil fields. After all his perseverance he landed a job near Red Deer, Alberta working in the oil and gas industry. Another one of those boys went from being a gamer listening to what I loathe so much, punk rock, to a computer techie with a full-time job working for an Aboriginal government office, even though he still listens to punk!

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Many of those Elders are gone now. Those stories they told were about their youth: what they did when they were young; how old they were when they left home; and where they went when they got out of the Indian residential schools. It was, at times, painful to hear their sad stories but those are the ones you hope resonate in the minds of the youth so that they have a better

understanding of our common history, and have at least a bit of knowledge of their backgrounds and why Aboriginal people have the problems they have.

All these things that had an impact on Aboriginal youth some forty, fifty, sixty years ago have created a rippling in Indian Country. There is this thing called inter-generational effects and that is part of the story that explains so much about Aboriginal peoples' perspectives on life. But, it is only part of the story and there are many layers that go deep into things such as colonialism, racism, poverty, addictions, abuse, and on and on. All of these layers are like the skin of an onion that covers the core.

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When I look at the high school graduation rate of Aboriginal students , I see about a 50 percent average, which seems to be fairly consistent over time and space with these kids on Turtle Island, a.k.a. North America. Some studies, such as the Harvard University *Study on American Indian Economic Development* cite success factors such as introducing aboriginal culture as much as possible in the business environment and, with regard to education:

- maintaining Indian control over Indian education with respect to the curriculum and what is taught; and
- maintaining Indian control over those who teach and administer education to Indian kids.

I believe that the solutions to increasing Aboriginal education attainment levels are much deeper than culture, curriculum and control and are rooted in changing societal norms and keeping a check on peer pressure. I know this because when I was a youth, at the age of ten years old, members of my family introduced me to drugs and it was a normal practice in the home I grew up in. There were always people coming and going and alcohol was prevalent at home but as a child, I didn't know that my home, my life was completely abnormal. I knew I was aboriginal and that many of my friends who were not lived completely different lifestyles than my own. So, I had an idea about what was "normal" but had no power to change anything. It's not up to the child to change how a home should be. That is the parent's role and frankly, our parents, our aunts and uncles, and their friends, were all too involved in their own lives as people walking on the black road using drugs, drinking alcohol, partying and living a care-free lifestyle.

These problems continue today; the very same problems that I faced as an Aboriginal youth and luckily, I saw the light. I associated too much pain with the black road and had lost my father and step-father to that lifestyle. Unfortunately, many people in the Aboriginal community find it very difficult to remove themselves from their addictions or abuses.

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Human beings are naturally gregarious communal people. Aboriginal youth tend to move in crowds to the flavour of the month. Don't get me wrong, not all Aboriginal youth are the

same. There are about 50 percent who complete high school and move on into life with a decent basic education. However, that statistic is very sad when compared to the mainstream, which makes Aboriginal students look like losers when it comes to public education.

The problem is that education is the key to employment and without it, there is more poverty, more reliance on the government and this is a dependency trap elaborated upon by the highly successful Aboriginal lawyer, Calvin Helin in his book, *Dances with Dependency.*

In the end, I hope for our aboriginal youth that they will carry the torch with pride and responsibility. For it is they who in turn must pass it on to their offspring and it is they who will have made a lifetime of choices.

I tend to notice that, like myself, youth seem to "get it" when they are about early to mid-twenties. For some, it's too late and they've been corrupted to the core or have fallen into prostitution, addictions or other problems and it is a long steep journey to climb out of hell. Like the crabs-in-the-bucket syndrome where jealousy dictates that when a crab tries to climb out, another crab pulls them down, there is lateral violence and it is so prevalent in Aboriginal communities. It's a myriad of problems and they are all laced with a drug called denial. Sometimes, for those that recognize they have a problem, it might be too late to fix.

The reality is that deep down inside each person is the core that is their spirit. Sometimes, people listen to their spirit and they get their life back on track. Maybe if they spent a bit more time with the Elders listening to their stories, or maybe if they spent a night in a jail cell, maybe if mom and dad stopped drinking, maybe if they found their passion such as photography, or maybe if someone gave them a helping hand up by giving them a chance to make it in the oil fields, or maybe if they turned their love of technology into a career, then they could be better achievers. Maybe for now the answer is not one single answer but a combination of everything.

In the end, I hope for our aboriginal youth that they will carry the torch with pride and responsibility. For it is they who in turn must pass it on to their offspring and it is they who will have made a lifetime of choices. Perhaps when they become Elders, they can look back and say: "We lived and learned and we want to tell you, our grandchildren, about our lives when we were young so that when you face your challenges, that you will do so from a place of knowing, in order that we can finally rest with peace of mind, because we know you will make the right choices in life."

Until that time comes, we as adults must carry the torch and we must try to carry it and pass it on as best as we can. Aboriginal people often end a prayer or an address to a large gathering by stating, "All My Relations." This acknowledges that we are all related and we must all care for each other. "All My Relations!"

Troy Donovan Hunter is a member of the Ktunaxa First Nation. He received his law degree in 2010 and will be called to the Bar of B.C. in 2012. He is also seeking a second term as a school board trustee for Nicola Similkameen School District #58.

Refining Our Vision: First Nations Peoples in Canada

Rob Normey

Canadian theatre now has a rich body of work by Aboriginal writers on a wide variety of themes and subjects which touch the lives of their communities and cultures. In the anthology of Native plays entitled *Staging Coyote's Dream*, Monique Mojica and Rick Knowles talk about their title as something invoking a dream world, a realm of intangible reality in which the ethereal and the material co-exist and are co-extensive.

Coyote is an embodiment of the Trickster figure so central to many First Nations cultures and might also be called, variously, Nanabush, Raven or Rabbit. The use of the Coyote figure, or simply his inspiration, can give permission to Native playwrights to examine aspects of their current experiences which might well be devalued and invalidated in the wider society.

The concept of the Trickster figure might have inspired Daniel David Moses to write *Almighty Voice and His Wife*. This amazing postmodern exploration of the impact of the white gaze on First Nations peoples exemplifies the calling forth of Coyote through ritual to create a rather magical

experience. A lens is directed at a particular historical event to enable the audience to grasp not only what the characters, Almighty Voice, and his wife, White Girl, have meant to First Nations but also how their mythical sides can be used to consider the manner in which "white society" stereotypes members of the various First Nations.

In speaking of Trickster figures, it's important to note that they are a vibrant means of opening up the Native worldview. At the same time, they shouldn't be seen as offering some kind of complete understanding of Aboriginal cultures on their own. So as Moses tartly points out, we need to do more than play "Spot the Trickster." As the playwright says, if spotting the Trickster prepares you for Native Literature, then spotting the Fool is all you need to know about Shakespeare.

Coyote is an embodiment of the Trickster figure so central to many First Nations cultures and might also be called, variously, Nanabush, Raven or Rabbit. The use of the Coyote figure, or simply his inspiration, can give permission to Native playwrights to examine aspects of their current experiences which might well be devalued and invalidated in the wider society.

Moses' play *Almighty Voice and His Wife* takes two historical figures and transforms them into larger than life characters who provoke an understanding of how First Nations peoples have come to be viewed in the aftermath of "white" dominance and control. Moses also uses the notion of minstrel performance, particularly in Act Two. *The Encyclopedia of Saskatchewan* tells us that Almighty Voice was born in 1875 near Duck Lake and grew up on the One Arrow Reserve. Here, he heard stories of his grandfather, One Arrow, who had resisted taking up his reserve until 1879. Almighty Voice was said to have slaughtered a government cow in 1895. One of the arresting officers apparently told him (jokingly – some joke!) that he would be hung for such a crime. The Indian warrior took the statement seriously and escaped from jail that very night. Attempts were made to recapture him but they all failed. On October 29, 1895 NWMP Officer Colebrook caught up with him and, during efforts to arrest Almighty Voice, was shot and killed. A bounty was then placed on his head. The fugitive was eventually hunted down in the Minichas Hills, just a few miles from the reserve. An exchange of gunfire occurred, including rounds from a field gun, and Almighty Voice and two other Natives were killed.

Moses' play is a dark, wickedly funny take on what the warrior and his wife, White Girl, have come to mean for later generations. It is funny and sad and has rightly been called a deceptively simple little play. The author has described the couple as two of his series of "ghost" characters and they are flamboyantly theatrical in nature.

The drama plays off the fact that Almighty Voice's escape and his life on the run are understood quite differently by Aboriginal peoples and other Canadians. Mainstream writers see him as the

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victim of a misunderstanding. On the other hand, the Cree communities of Saskatchewan have viewed him over the decades as a symbol of resistance.

In his essay "How My Ghosts Got Pale Faces," Moses provides other critical observations about how consideration of this epic tale leads to an awareness of how much stereotypical thinking occurs in mainstream accounts of the lives of Natives. We certainly are offered in this play a stark account of the descent from proud hunters of the buffalo and other game to individuals confined to "prisons of grass" to use Howard Adams' phrase. The events taking place are in the immediate aftermath of the failed Riel Rebellion and the harsh repression that ensued. Moses presents us with an angle that history *per se* cannot provide. We are prompted to view the Native couple not as defeated victims but as fascinating Bonnie and Clyde or James Dean-style rebels. We are also made to see the glorious absurdities of the mindset of his pursuers. The most startling method of doing so is to turn the tables, so to speak, on the original minstrel shows that toured the West in the 19th century and permit Aboriginal actors to perform as whites in white face. Scenes are announced in minstrel style, with placards which cheekily comment on the action.

The drama plays off the fact that Almighty Voice's escape and his life on the run are understood quite differently by Aboriginal peoples and other Canadians. Mainstream writers see him as the victim of a misunderstanding. On the other hand, the Cree communities of Saskatchewan have viewed him over the decades as a symbol of resistance.

The play also manages to mock the ways in which the dominant white society imposed its religion and culture on a Native society that, believe it or not, had its own rich history. Hence, White Girl becomes Marrie or Crazy Marrie to Almighty Voice and she asks him to call her by her "white" name. He becomes the wryly inappropriate "John Baptist" so as to enable the Indian agent to recognize him for treaty payment purposes. The Natives make great sport in return, mocking the "glasseyed god" of their oppressors.

Later, Almighty Voice is asked to become a showbiz Indian and, as Ghost, is required to develop a magic act and become "The Vanishing Indian." The distortions of history – at least, official history – further marginalize First Nations communities.

In *Only Drunks and Children Tell The Truth*, Drew Hayden Taylor examines a contemporary relationship between two sisters, one of whom, Janice, has been adopted out of a First Nations community and now lives in Toronto as an entertainment lawyer. Her sister, Barb and two others have left Otter Lake, a reserve somewhere in Northern Ontario, to stake a claim on Janice's allegiances. The play deals with what Native peoples call the "scoop up" involving adoption into non-aboriginal families.

The play is less harsh than might be expected. With its lighter touch, it explores in a sophisticated fashion the ways in which Natives as individuals resist the forces that elevate mainstream ways of thinking and acting over those of First Nations. Humour is employed to reverse any number of stereotypes. So, Rodney, the joker, describes the big city of Toronto in this fashion: "It's a nice place to visit but I wouldn't want to put a land claim on it." While Janice as a middle class lawyer, alone

and rather cocooned in her apartment in downtown Toronto, comes in for her fair share of ridicule, the play doesn't present the situation in black and white terms where one way of life is all good and one all bad.

As well, *Only Drunks and Children* offers a fresh perspective by relating the ways in which the Aboriginal characters themselves adapt and use for their own purposes the dominant white discourse and cultural emblems. We see Rodney mimicking the television star Ricky Ricardo of *I Love Lucy* fame, saying "…was it rough in the club tonight. Where's my bongos?" Rodney's brother Tonto displays great ingenuity in tracking down "extra-caffeinated" coffee to replace the rather tame coffee Janice has available at her apartment.

Hayden Taylor gains considerable mileage in affirming the value of retaining ties to one's Native roots through use of his tale of Amelia Earhart. Supposedly, the famed flyer landed in Otter Lake and is doing just fine, away from all the fame and trivial publicity, living with her new-found extended family on the reserve. Janice the lawyer can't initially help herself and endeavours to become Earhart's lawyer and agent to mazimize her profit potential, only to be told that people who are members of Otter Lake have no intention of betraying the wishes of their famous new member. In this conceit the Trickster figure might be said to have inspired Hayden Taylor as well in his exploration of limited perceptions of contemporary Native life. More than anything, the play celebrates the priceless bonds that members of a First Nation develop. As Barb says of Rodney, "He's a goof, but he's my goof."

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Drinking and Driving: Just Don't!

Phil Lister Q.C.

After a pleasant evening of socializing you are surprised when the flashing red light of a police car pulls you over. After a few brief words, the officer demands a breath sample. "He thinks I'm drunk!" you realize. What are your rights? What are his? (or in this day, increasingly but slowly, hers?)

It used to be that impaired driving (the Canadian term; driving under the influence – DUI is an Americanism) wasn't taken seriously as a "real" criminal offence. It was naughty but not a real crime like theft or assault. Boys will be boys!

No more! That perception vanished, as statistics increasingly showed that an impaired driver was the underlying cause of most fatal car accidents. Aided by publicity from groups like MADD (Mothers Against Drunk Driving, representing the families of auto fatalities) public perception has turned around. Drunk driving is now seen as just as great a threat to innocent life and limb as walking around with a loaded gun – in this case a gun made of 2,000 pounds of metal. It's as real a crime as robbery or rape. Responding to this public pressure – and the cost of hospitalizing and institutionalizing the victims – governments have continually increased police powers and technology to detect and prosecute these offences. All this runs through your mind in a moment.

"I'm not drunk," you think. Sorry, that's pretty much irrelevant, I have to tell you. So what are your rights at this moment? In a word – few.

If police officers "suspect" (a weaker word than "believe") reasonably that you have alcohol in your body, they can demand that you give a breath sample in a Roadside Approved Screening Device (ASD), previously called an ALERT machine. Note the words used – "suspect" and "in your body." They don't even have to suspect that you are or may be impaired, just that you have alcohol in your body. And, that you operated a motor vehicle within the last three hours. So, despite some recent PR hype that we need to introduce random breath screening, we pretty much have that already. The change would be minimal even if implemented by Parliament.

"I'll call a lawyer," you think. Sorry, at this stage the courts have ruled (*R. v. Therens*) that the roadside pull-over is such a brief interference with your liberty that your *Charter* right to counsel isn't triggered.

"Why would they come to suspect that?" you ask. Just observing how you speak, whether you slur your words, whether your eyes are bloodshot, or whether your movements to produce your documents are unsteady can start to give the police grounds to "suspect." And at a trial six or seven months later, how does your lawyer prove that the officer, in his or her suspicious heart of hearts, didn't suspect that you had alcohol in your system? Unless you can prove that the officer or a reasonable person in his shoes, couldn't reasonably have had that suspicion, you generally don't have a good excuse for refusing to provide the sample, and the penalty is the same as for impaired driving itself.

"I'll call a lawyer," you think. Sorry, at this stage the courts have ruled (*R. v. Therens*) that the roadside pull-over is such a brief interference with your liberty that your *Charter* right to counsel isn't triggered. If you don't provide the sample immediately you have refused to blow and it doesn't matter if you weren't the driver, weren't impaired, weren't even drinking (or using drugs, all the offence definitions talk about being impaired by alcohol *or a drug*) – you have committed the offence of refusal and will get the same punishment.

So, the machine is usually brought to the scene by another officer fairly quickly, as the police are obliged to administer the test "forthwith". This is one of the few defences your lawyer may argue at your eventual trial for refusal, if you have declined to provide a sample. If you do blow and register a "fail", now what happens? In previous years the officer might ask you to perform physical tests (finger to nose, walk a straight line) but nowadays this is rare. If they do, you may have the right to refuse to do physical tests, but the way you speak, your refusal, and the odour on your breath can give the officer a reason to suspect you have (or have had) alcohol in your system. So now what?

Providing the ASD sample and failing is not, in itself, an offence. But it gives the police the right to demand a breathalyzer sample and take you to the police station. You do have the right to call a lawyer at this stage (and in private!) and the police will give you a bit of assistance in finding one at a late hour. Then you will be presented to the breathalyzer machine and its operator will demand you provide a sample of your breath. To make this demand, the police must believe (not just "suspect") that your ability to operate a motor vehicle is impaired, or that you have more than 80 milligrams of alcohol in every 100 millilitres of your blood, and they must have reasonable grounds

for that belief. Reasonable grounds include failing the ASD, or the officer's observations about you or your driving pattern. You don't have to be drunk: even a little bit of impairment of your faculties is enough to be "impaired". This all must be done without delay, one of the few mandatory duties the police have in this scenario. One of the few defences to a charge of refusing to provide a breathalyzer sample may be the unavailability of a machine after you have called a lawyer for advice or refused to give a breath sample.

Providing the ASD sample and failing is not, in itself, an offence. But it gives the police the right to demand a breathalyzer sample and take you to the station.

And again, the penalties for refusing to provide this sample without reasonable grounds are the same as refusing to provide the ASD, which is the same as blowing over 80, or impaired driving itself.

Let's go back to that call to the lawyer for advice. The one you are allowed to make at the station when receiving a breathalyzer demand. As a lawyer, I sometimes get these calls. They are a problem for me. What do I tell the client who calls (usually at 2 a.m.)? If I say "don't blow," I am counseling an offence. If I say "do blow" then the client usually ends up being charged and thinks me a fool for having told him to give the police grounds to charge him. I have never understood what the courts think I can provide to the client in such a call. I guess it's just the *Charter* principle that we don't like people in this country to just disappear into police custody, as happens in some countries, even for just an hour. If you are taken in, you get to call out. The politicians and the judges are happy, and what to say to the caller is the lawyer's problem.

Once you have given the breathalyzer sample, whatever the result, you will be given papers showing your result (the ASD just says pass or fail, but the breathalyzer gives you a number, x milligrams of alcohol per 100 millilitres of blood), and any court papers or summons that result. You need to make arrangements for someone to pick you up and for someone to move your car from where it was left. Your driver's licence is suspended (a) for 24 hours and then (b) for 90 days, starting in 21 days.

You now go to a lawyer and then go to court. The first court date is about a month away and if you plead not guilty your trial is a few more months down the road.

And what happens? If you plead guilty, or a judge finds you guilty of any of these offences (blowing over 80, impaired driving, refusing either demand) you get a minimum $1,000 fine, a one year licence prohibition and a lot more insurance costs for the next five years. If it's a second offence, or someone was hurt, recent changes to the law make it almost inevitable that you will go to jail for a while. If there was an accident, your insurance company can refuse to pay for repairs to your vehicle.

So what's the bottom line here? Don't drink and drive! That's my free legal advice to all you dear readers. A taxi ride is a lot cheaper and more sensible. And don't say "oh, I'm okay, I only had a couple." If you are impaired then the first skill you lose is the ability to accurately self-assess. You probably AREN'T okay. Just don't.

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Charities now have a roadmap for working with domestic non-charities

Peter Broder

Regular readers of this column know that there is a scarcity of Canadian case law on the definition of charity and many other aspects of what it is legally permissible for registered charities to do. One area where charities have long faced uncertainty in their operation is in working with domestic intermediaries.

The courts have, over the years, considered a number of cases dealing with charities furthering their purposes through relationships with overseas organizations. Domestically, however, there was a dearth of jurisprudence on what a charity ought to do if it wanted to advance its objects through, or in conjunction with, a non-charitable party within Canada. Given our relatively static definition of charity this was particularly unfortunate. In the past, charities asking the Canada Revenue Agency (CRA) Charities Directorate about this issue were routinely referred to the guidance dealing with foreign intermediaries and told that they should apply the same principles when working within Canada.

Added to this context, the importance of conducting domestic work appropriately became even more heightened when provisions were added to the *Income Tax Act* (*ITA*) recently, explicitly

prohibiting the making of gifts to "non-qualified donees" (groups that were not registered charities or entities afforded status akin to registered charities under the *ITA*) and providing for possible revocation of the registration of charities that made such gifts.

In June, CRA stepped into the vacuum and provided comprehensive guidance on charities working with domestic intermediaries. That guidance, *Using an Intermediary to Carry out a Charity's Activities within Canada*, is available at: www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/ntrmdry-eng.html . While this guidance is still derived from case law related to foreign activities, it is written for charities dealing with domestic intermediaries and addresses some questions likely to arise specifically in the Canadian context.

The guidance discusses several avenues for working with non-charities to advance an organization's purposes. It also highlights the impropriety of "lending" one's charitable number to a non-charity – a practice that, although often well-intentioned, remains a frequent and serious violation of the *Income Tax Act* and puts numerous charities at risk of revocation every year. As well, it explains that a registered charity cannot be a "conduit" that accepts donations that are subsequently funnelled to an organization without charitable status.

That said, a charity need not be hamstrung by how it carries out its charitable work. It is acceptable, and sometimes more efficient than acting independently, for a charity to work with others to advance its objects. Groups may lack the internal capacity or expertise to accomplish work in a certain area, and it is legitimate for them to seek out other organizations to assist with such work.

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The guidance even gives an example of when it might be appropriate for a charity to engage with a for-profit entity to fulfil its mandate. Whether working with a non-profit organization, co-operative, for-profit or other non-charitable body (in *ITA* parlance a "non-qualified donee"), however, the law requires that the charity demonstrably show that it has sufficient direction and control to ensure any resources it provides are used exclusively for furthering the charitable purposes it is constituted to advance.

In some circumstances, in light of the nature of the resources provided and the circumstances under which they are provided, CRA will generally accept that they are dedicated to charitable ends: for example, supplies of a medical, scholastic or religious character are apt to be used to further a recognized charitable purpose even if they are transferred to a non-charitable organization.

CRA's expectation in such circumstances is that the receiving organization understands and agrees to use the property for charitable purposes and that it is reasonable that the supplying charity have a "strong expectation" that the goods will be used for charitable ends.

Where the character of the goods does not necessarily suggest use for charitable ends, the guidance lays out various methods whereby the charity can ensure direction and control. These

include: use of agents; entering into joint ventures; working with cooperatives; and contracting. In assessing the acceptability of a charity engaging with a non-charity, CRA looks for documentation of the ways the charity is managing and/or overseeing use of the resources and whether the charity has the ability to cancel or withdraw its support if the project or activity ceases to advance the purpose(s) for which it was provided.

Helpfully, the guidance recognizes the need for the mechanism for exercising direction and control to be proportionate to the resources that are being made available.

Another positive feature of the guidance is an acknowledgement that often, work with intermediaries is both a means to deliver charitable services and a means to develop capacity within the organization with which the charity is working. This is an issue that has not been fully canvassed in the case law, and CRA is to be commended for providing a framework within the guidance for dealing with a practical difficulty often faced by groups undertaking this type of activity.

An appendix to the guidance indicates that, in any capacity-building activity, the charity must still further its purposes, maintain adequate direction and control over use of its resources and continue to satisfy the public benefit test that is an essential element of any charitable purpose. It cautions that capacity-building may result in impermissible private benefit. But, if any private benefit can be kept incidental, it also notes that capacity-building can be acceptable where it is furthering a recognized charitable purpose, such as relief of poverty or advancement of education.

Other appendices outline what CRA generally expects where the relationship between the charity and non-charity is a joint venture or written agreement.

All in all, in the absence of further case law, this guidance provides a reasonable and useful roadmap for charities wanting to work with other groups who may not be qualified donees to accomplish their mandates within Canada. If charities heed the advice it offers, a good deal of the inadvertent non-compliance currently occurring in this area should be avoided.

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Why Canada Should Carefully Consider the Consequences of Re-Introducing Anti-terrorism Measures

Linda McKay-Panos

In a recent interview with the CBC, Prime Minister Harper indicated that the federal government will be re-introducing anti-terrorism measures, such as preventive arrest and the ability to force individuals to testify at "investigative hearings" if they are suspected of having knowledge of terrorist activities. Even Prime Minister Harper admitted that these provisions, when in force, were used rarely. Yet, he believes that they are needed. Indeed, the previous provisions included a three-year review and a five-year sunset clause as a way to protect Canadian civil liberties. However, Public Safety Minister Vic Toews indicated that the current government was not inclined to include these safeguards (Jane Taber, "Tories disinclined to subject anti-terrorism measures to sunset clause" *Globe and Mail*, *Ottawa Notebook* September 13, 2011 Online: www.theglobeandmail.com/news/politics/ottawa-notebook/tories-disinclined-to-subject-anti-terror-measures-to-sunset-clause/article2164415/)

Preventive arrest and investigative hearings are two provisions introduced to Canadian law in the wake of the terrorist attacks on 9-11. These, together with other provisions, such as anti-terrorism legislation, have demonstrated the tension between protecting our security and at the same time maintaining civil liberties and the rule of law.

After Bill C-36 the *Anti-Terrorism Act ("ATA")* was introduced in Parliament in 2001, there was much debate about its provisions, and in response, a five-year sunset clause was attached to the new powers of preventive arrest and investigative hearings. In addition, Parliament was to conduct a comprehensive review of the legislation after three years. The review was not complete when the five year sunset clause came due, so Parliament voted not to renew preventive arrest and investigative hearing provisions (Kent Roach, "Better Late than Never? The Canadian Parliamentary Review of

the Anti-Terrorism Act" 13(5) IRPP *Choices* September 2007 ("Roach")). In addition to the review released by Parliament in 2007, much has been written and published about the *ATA,* and many interest groups expressed concerns about the legislation, some of which were taken into account by the government, when the *ATA* was originally passed.

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The *ATA* provided for the expansion of police powers by allowing a preventive arrest when there were reasonable grounds to believe that a "terrorist activity" was going to be carried out and a reasonable suspicion that detention or the imposition of conditions on a specific person was necessary to prevent the carrying out of the terrorist act (*Criminal Code,* RSC 1985, c C-46, s 83.3) This provision provided for detention of the person for a maximum of 72 hours, and also for his or her earlier release by a judge. Once a person had been arrested under this provision, a judge could require the person to enter into a recognizance (bond or promise to appear) or peace bond for up to one year. Breach of the bond is punishable by up to two years in prison and refusal to agree to a peace bond punishable by up to one year in prison. Thus, a person suspected of intending to carry out a terrorist activity could be arrested without a warrant and subjected to imprisonment without ever being charged or convicted of a crime.

The Solicitor General was required to prepare an annual report on the use of this provision (83.31), but the reports revealed that it had not been used.(Roach, at p 6). Other concerns expressed about this and other *ATA* provisions were the potentially wide interpretation to be given to "terrorist activity" and whether Parliament could define it in a "principled and workable manner" (Roach, at p 5).

Second, the investigative hearing provisions (ss 83.28 and 83.29) allowed a peace officer to apply *ex parte* (without notice to the other side) to a judge to gather information "for purposes of an investigation of a terrorism offence." Judges were authorized to order the examination of a material witness who may possess information with respect to a terrorist offence that had been, or may be, committed. The material witness could not refuse to answer on the grounds of self-incrimination, but was protected from the use of his or her statements in future proceedings (s 83.28(10)). The questions were to be supervised by a judge and the questioned person had the right to counsel.

Investigative hearings were applied to be used once – during the Air India trial. The application for an investigative hearing was held in secret without notice to the accused in the trial or the media. The person who was to testify challenged the constitutionality of the investigative hearing procedure. A majority of the Supreme Court of Canada upheld the constitutionality of the proceedings because the compelled evidence could not be used against the person, except if he or she committed perjury: *Re Application Under s 83.28 of the Criminal Code,* [2004] 2 SCR 248. Two dissenting judges held that investigative hearings would violate the institutional independence of the judiciary because they

required judges to preside over police investigations. These judges and a third dissenting judge also held that the use of an investigative hearing in the middle of the Air India trial constituted an abuse of process because the prosecution was trying to gain an unfair advantage (Roach, at p 6).

The *Vancouver Sun* also applied for access to the proceedings. In *Re Vancouver Sun*, [2004] 3 SCR 332, a majority of the Supreme Court of Canada held that the presumption in favour of open courts applied to investigative hearings.

In its *House of Commons Committee Interim Report on Preventive Arrests and Investigative Hearings* (October 2006) ("Committee"), all members of the Committee agreed that investigative hearings should be extended to December 31, 2011, subject to the recommendations that these hearings should only be held when there is a reason to believe that there was "imminent peril that a terrorist offence would be committed" (Roach, at p 8). This would have also prevented the use of investigative hearings for past acts of terrorism (such as the Air India bombing in 1985). However, the SCC in the *Re Application Under s 83.28 of the Criminal Code* case had indicated that investigative hearings could be applied to past acts of terrorism without violating the rule against retroactive offences (Roach, at p 9).

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A majority of the Committee recommended that preventive arrests should be renewed subject to some minor amendments, but the dissenting members were concerned that they could be used to label a person as terrorist on the basis of a reasonable suspicion. They pointed to the case of Maher Arar and the October 1970 detentions as pertinent examples for their concerns (Roach, at p 9).

Interestingly the report did not comment on why Canadian officials had not used these provisions, nor why they believed they should be retained (Roach, at p 9).

On February 9, 2007, as the sunset provisions were very close to expiring, the minority Conservative government introduced a motion to extend preventive arrests and investigative hearings for three years (Roach, at p 10). This motion was defeated on February 27, 2007. A special Senate Committee had released a comprehensive report on February 22, 2007 (*Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-Terrorism Act*), which recommended a three-year extension of the provisions, but this was too late to have an impact on the debates in Parliament (Roach, at p 10). This Committee also noted that it was difficult to make a definitive judgment as to the need for either preventive arrests or investigative hearings, because there had been no reports of the use of either of them.

The Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness made 60 recommendations in a 137 page report (*Rights, Limits, Security: A Comprehensive Review of the Anti-Terrorism Act and Related Issues*). The report featured a dissenting opinion issued by two Members of Parliament. Kent Roach notes:

- neither committee examined the case for reforming preventive arrests, such has been done in Australia regarding detention conditions and whether the detainee can be interrogated during the 72 hours of detention;
- the reports do not examine comparable legislation in other jurisdictions, such as Britain, and its effects;
- there is no sustained discussion in the reports that the proposed investigative hearing in the Air India matter was never held (even though investigative hearings themselves had been upheld by the SCC); and
- the reports do not address how investigative hearings induce reluctant witnesses to co-operate or how they protect such witnesses.

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In its response issued July 2007, the government indicated that it intended to re-introduce these provisions. It did not, however, discuss its reasons for re-introducing investigative hearings or preventive arrests. And, it indicated that it would not be inclined to include similar review and sunset provisions (Roach, at p 26 and 28).

Now that we have a majority government in place, it has indicated that it will re-introduce these two provisions (without sunset or review provisions). Hopefully, there will be a thorough debate around why these are needed (including a discussion about why they were not used when available before). Also, it is hoped the debate will focus on the potential abuses and the civil liberties concerns. Finally, the debate needs to be framed in the context of the sometimes delicate tension between civil liberties and security. It is perhaps understandable that in the wake of 9-11 these provisions were introduced in 2001. Now that some time has passed, perhaps the debate will be principled and unemotional.

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Dismissing High Earners is High Risk

Peter Bowal and
Jane Ballegooyen

Introduction

In the last employment law column, we profiled the dismissal-for-cause decision of *Poliquin v. Devon Canada Corporation* (2009 ABCA 216). In that case, the supervisor's firing was upheld by the Alberta Court of Appeal, on the basis that the employee had violated the workplace Code of Conduct regarding computer use and taking benefits from the employer's suppliers. The Court accepted these admitted facts to be transgressions for which firing was clearly an appropriate legal response.

Yet, the definition of cause for firing is rarely so clear. To illustrate that point, this column highlights another recent dismissal case, *Merrill Lynch v. Soost* (2009 ABQB 591) where arguably the grounds for firing were even stronger and more numerous – and the economic stakes frighteningly higher due to the authority and role of the employee – but the same Alberta courts at the same time found no sufficient legal cause to fire. The wrongful dismissal damages were considerable.

The *Soost* case is a powerful reminder for employers to have a plan in place to carefully manage dismissals. One can never rely upon a judge later agreeing on the seriousness of employee non-compliance with internal policies and procedures.

The High Earning Employee

It is not often that a high earning financial advisor's employment dismissal suit against his employer plays out in public. These straight commission earners effectively operate fast-paced mini-firms on high levels of client loyalty, yet within the institutional frameworks of national brokerage houses. With strong track records of financial performance and bulging books of client business, they have uncommon bargaining power to negotiate and optimize the terms of their employment. They can afford lawyers to protect their interests up front.

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Soost

Kurt Soost rose from Vice-President at RBC Dominion Securities Inc. to Senior Vice President and Director of Merrill Lynch Canada in Calgary when the companies merged. In only seven years in the industry, Soost and his team served an enviable asset base of loyal clients, and he earned substantial commissions.

After seven years of combined experience at both merged companies, he was fired for what Merrill Lynch thought was sufficient legal cause on numerous instances of non-compliance with internal employer or industry rules. Soost's team was given a week off with pay, his clients were assigned to other financial advisors and letters were sent to them advising that Soost was no longer employed at Merrill Lynch.

Soost was fired in 2001 when he was 33 years old. He found a new (lesser) job within three weeks but his income took a hit because many of his former clients did not follow him given the manner in which they were notified and reassigned. Soost was only able to transfer $10 million of his $150 million book of business to his new firm. Despite his best efforts, he could no longer maintain his performance and earnings. He sued Merrill Lynch for damages arising out of his wrongful dismissal.

Legal Cause for Dismissal?

Over the last 15 years, judges have been increasingly reluctant to find conduct of employees sufficiently egregious to justify their immediate termination. This is partly due to the recognition that all work presents strains on workers which entitles them to the occasional bad day. Moreover, employers are expected to engage in progressive discipline of wayward workers, starting with warnings, reprimands and suspensions, accompanied by performance management plans, counselling and other support.

It is not surprising, then, that the employer asserted some seven grounds for Soost's dismissal, which singly or cumulatively it claimed justified summary termination. The Table below sets out each of these employer grounds and the trial judge's response.

Employer Ground	Judicial Response
Soost failed to get approval for his private placement activities	Obligation lacked clarity and employer previously enforced this only inconsistently
Soost failed to make full disclosure as he was repeatedly requested to do, once the breach of this policy was brought to his attention	Soost did not have reasonable opportunity to comply before he was fired
Soost did not make appropriate disclosure of his outside interests	other employees also failed to do that
Soost did not comply with employer mandates, especially where he solicited clients to purchase certain shares after having been specifically prohibited by Merrill Lynch from doing so	Merrill Lynch had warned Soost that he would only lose his commissions for this, not his job
Soost's inappropriate use of margin accounts	serious but insufficient cause to justify firing
Unlicenced staff under Soost's direction were not adequately supervised on at least one occasion while Soost was out of town	insufficient cause to justify firing
Soost's questionable contact with other investment dealers and his criticism of another corporation's research	allegations of improper discretionary trading were not sufficiently proven

Overall, the trial judge concluded that the employer, Merrill Lynch, did not establish sufficient legal cause for Soost's firing. According to the 'all cause or no cause' principle, Soost was entitled to damages for wrongful dismissal.

This outcome came as a surprise to some who remember Nick Leeson, the rogue trader who single-handedly brought down 233-year-old Barings Bank, Britain's oldest merchant bank, within two years. In 2007, Jerome Kerviel lost $8 billion for Société Général by unauthorized trades.

This is not to say, of course, that Soost was a Leeson or Kerviel, but financial institutions and brokerage houses might have sound business reasons – if not legal duties – to strictly monitor their brokers' practices and insist upon precise, detailed compliance with protocols. With industry regulation, the extraordinary high financial stakes and the history of massive institutional failures that can occur with a few non-compliant trades, one might expect a judge to defer more to the employer's judgment in such matters.

Honda damages will be awarded only where the circumstances attending the dismissal are unduly unfair or insensitive, not for the actual dismissal decision itself. The Court of Appeal said damages will not be given "for the mere fact of an employee's dismissal, or for the stigma that that dismissal brings."

Damages Awarded

The trial judge awarded Soost money damages in two categories. The first was loss of income at the upper end – one year – which in this case amounted to $600,000. This amount was paid and never appealed.

The second category related to the harsh manner in which Soost was dismissed. This is called *Honda* damages (from the Supreme Court of Canada's 2009 decision in *Honda Canada Inc. v. Keays*). Under this category, Soost was awarded the value of his business, which was $1.6 million. The reasons? Merrill Lynch had originally pursued Soost because he was a successful financial advisor with a healthy business that he would bring with him. By summarily dismissing Soost, the judge said Merrill Lynch knew (or should have known) Soost would suffer significant injury to his reputation in the industry. His ability to retain his old clients and to attract new ones would be impaired. Merrill Lynch ought to have been more sensitive to Soost's loss of business that would likely ensue when it fired him.

Appellate Decisions

Merrill Lynch chose not to appeal the wrongful dismissal ruling or the $600,000 pay in lieu of one year notice decisions. It only appealed the *Honda* damages of $1.6 million. In 2010, three judges of the Alberta Court of Appeal (2010 ABCA 251) unanimously disagreed with the trial judge on this issue. They found no bad faith by Merrill Lynch in dismissing Soost and overturned the $1.6 million *Honda* damages.

Honda damages will be awarded only where the circumstances attending the dismissal are unduly unfair or insensitive, not for the actual dismissal decision itself. The Court of Appeal said damages will ***not*** be given "for the mere fact of an employee's dismissal, or for the stigma that that dismissal brings." An employer's honest belief that it possesses sufficient grounds to fire an employee will not attract *Honda* damages, even if the court ultimately concludes that sufficient cause for firing was absent.

Soost's appeal on this question to the Supreme Court of Canada was denied leave in April 2011. He has since started his own investment banking firm.

Over the last 15 years, judges have been increasingly reluctant to find conduct of employees sufficiently egregious to justify their immediate termination. This is partly due to the recognition that all work presents strains on workers which entitles them to the occasional bad day. Moreover, employers are expected to engage in progressive discipline of wayward workers, starting with warnings, reprimands and suspensions, accompanied by performance management plans, counselling and other support.

Conclusion

Firing an employee for cause is a major risk on the part of the employer, especially where high-performing, high-income professional employees are involved. The legal doctrine of *cause* for firing an employee may be alive for the most egregious safety-sensitive scenarios, or secretly taking benefits from the employer or its contractors, or viewing and storing pornographic images on corporate-owned computers (*Poliquin*).

For less obvious cases of wrongdoing, such as the *Soost* facts, it is best for employers to give working notice or pay in lieu. At the end of this case, the employer probably wished it had offered him a severance package instead of firing him. It spent an exorbitant amount on legal fees. It lost a decade managing this case in the courts. And Merrill Lynch aired its "dirty laundry" ultimately in a losing cause.

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The Spousal Support Advisory Guidelines

Part Three – Exceptions and More

Rosemarie Boll

To construct the best possible claim using the Spousal Support Advisory Guidelines (SSAGs), by now you have:

- confirmed you are entitled to spousal support;
- ensured you are using the right formula (With/Without Child Support);
- determined both parties' incomes;
- calculated the range of spousal support (high and low amounts and duration);
- determined the location in the range, using the factors in Section 9; and
- considered whether you want to restructure (trade off amount against duration).

What next? There are still four SSAG sections:

Section 11 – Ceilings and Floors

Should the SSAGs apply at all? At very high and low incomes, the formulas become unrealistic. The ceiling is $350,000. It is not a *cap* – it is a point where judges usually move away from the formula and focus on other factors. The ceiling varies from place to place – for example, in rural areas, it is generally between $150,000 and $250,000. At the $20,000 floor, spousal support might push the payor into poverty, and it is rarely ordered.

Section 12 – Exceptions

Is your case exceptional? When the formula calculations are unsatisfactory and restructuring does not resolve the issues, look at Section 12. It lets you rework the numbers in certain circumstances.

12.1 Compelling Financial Circumstances in the Interim Period

It may be impossible to adjust the household finances quickly. The payor may have to cover large fixed debts (e.g. a mortgage). It is one of the most common exceptions used in lower-income short marriages, or when property has not yet been divided. It is a short-term adjustment – once a house has been sold, a spouse has moved, or debts have been refinanced, the support can be re-adjusted to the formula amounts.

12.2 Debt Payment

These are not ordinary debts. This exemption applies only when:

- the total family debts exceed the total family assets, or the payor has a negative net worth;
- they are "family debts"; and
- the payments are "excessive or unusually high."

This is also a short-term adjustment while the parties sort out their finances.

12.3 Prior Support Obligations

The law's general policy is **"**first family first.**"** An obligation to pay support for prior children or a prior spouse will lower the support for a subsequent spouse.

12.4 Illness and Disability

Providing for an ill or disabled spouse is challenging, particularly when the condition is permanent. The recipient can argue for a larger sum, a longer time, or both.

12.5 The Compensatory Exception In Short Marriages Without Children

A spouse who gave up something for the marriage may need compensation for the economic loss. For example, the claimant:

- gave up a job and became a secondary earner to accommodate the other spouses' job;
- gave up a job or business to move across the country to marry; OR
- worked to put the payor through a post-secondary or professional program.

The parties then separated before the working spouse was able to enjoy any of the benefits of the other's enhanced earning capacity.

12.6 Property Division and Re-apportionment of Property

This exception applies only in British Columbia, where the law permits an unequal division of property to meet a support obligation.

12.7 Basic Needs/Hardship: "Without Child Support" and "Custodial Payor" Formulas

This exception applies in cases of need, after shorter marriages, where the recipient has little or no income.

Child support takes priority over spousal support. When there are three or four children or large section 7 expenses, there may be little left over for spousal support.

12.8 Non-Taxable Payor Income

Legitimate non-taxable income includes disability payments, workers' compensation, income of an aboriginal person on a reserve, and some overseas jobs. The payor cannot deduct the support, yet the recipient must still pay the income tax. The parties can adjust the amount to balance their needs.

12.9 Non-Primary Parent to Fulfil Parenting Role under the "Custodial Payor" Formula

This narrow exception applies when:

- the non-custodial parent also plays a significant role in the child's post-separation care and upbringing;
- the marriage is short and the child is young; and
- the payor might not be able to meet the demands of parenting if also required to pay full spousal support.

12.10 Special Needs of Child

The duration and/or the amount may have to be extended to ensure the primary parent can meet the child's special needs.

12.11 Section 15.3: Small Amounts, Inadequate Compensation under the "With Child Support" Formula

Child support takes priority over spousal support. When there are three or four children or large section 7 expenses, there may be little left over for spousal support. To compensate the recipient, the payments may have to extend past the usual time limits.

Section 13 Self-Sufficiency

Section 15.2(6)(d) of the *Divorce Act* says spousal support should, "**in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.**" Payors often argue that recipients must do more to make their own way in the world. The SSAGs encourage this, and Section 13 gives the payor the arguments and tools: Entitlement, Imputing Income, Using the Ranges, Restructuring, Time Limits, Review Orders, and Incentives. Section 13 recognises that a recipient's needs can change over time (for example, as children become older), creating opportunities for greater self-sufficiency.

Section 14 Variation, Review, Remarriage, Second Families, Quebec Law

Sometimes the SSAGs apply on review and variation applications. They do not apply where there is a post-separation increase in the payor's income, re-partnering / remarriage, or a second family. These are left to discretionary, case-by-case determinations.

Quebec courts apply the SSAGs according to their own rules.

Conclusion

If you have worked your way through all the sections, you will have a good idea what the SSAGs are all about. Final words of caution:

- The SSAGS are only advisory – judges accept them more in some provinces than others. Judges in the same court will also have different views on whether or how to apply them.
- Never rely just on the SSAGs – be sure to have ready all of your personal and financial information, whether you are at trial or in a pre-trial motion. Be prepared to argue the traditional way.

Nailing down spousal support has never been easy. Judges exercise discretion in every case. Before you head to court, check the reported cases to see how the SSAGs are developing in your province. The SSAGs are complex and do not resolve all of the issues. Hopefully, with continued judicial use and regular monitoring by the federal Department of Justice, they will improve and bring more certainty and predictability to the calculation of spousal support.

1 The Spousal Support Advisory Guidelines 2008 www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/pdf/SSAG_eng.pdf

2 The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/tool-util/topic-theme/ug_a1-gu_a1/index.html

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