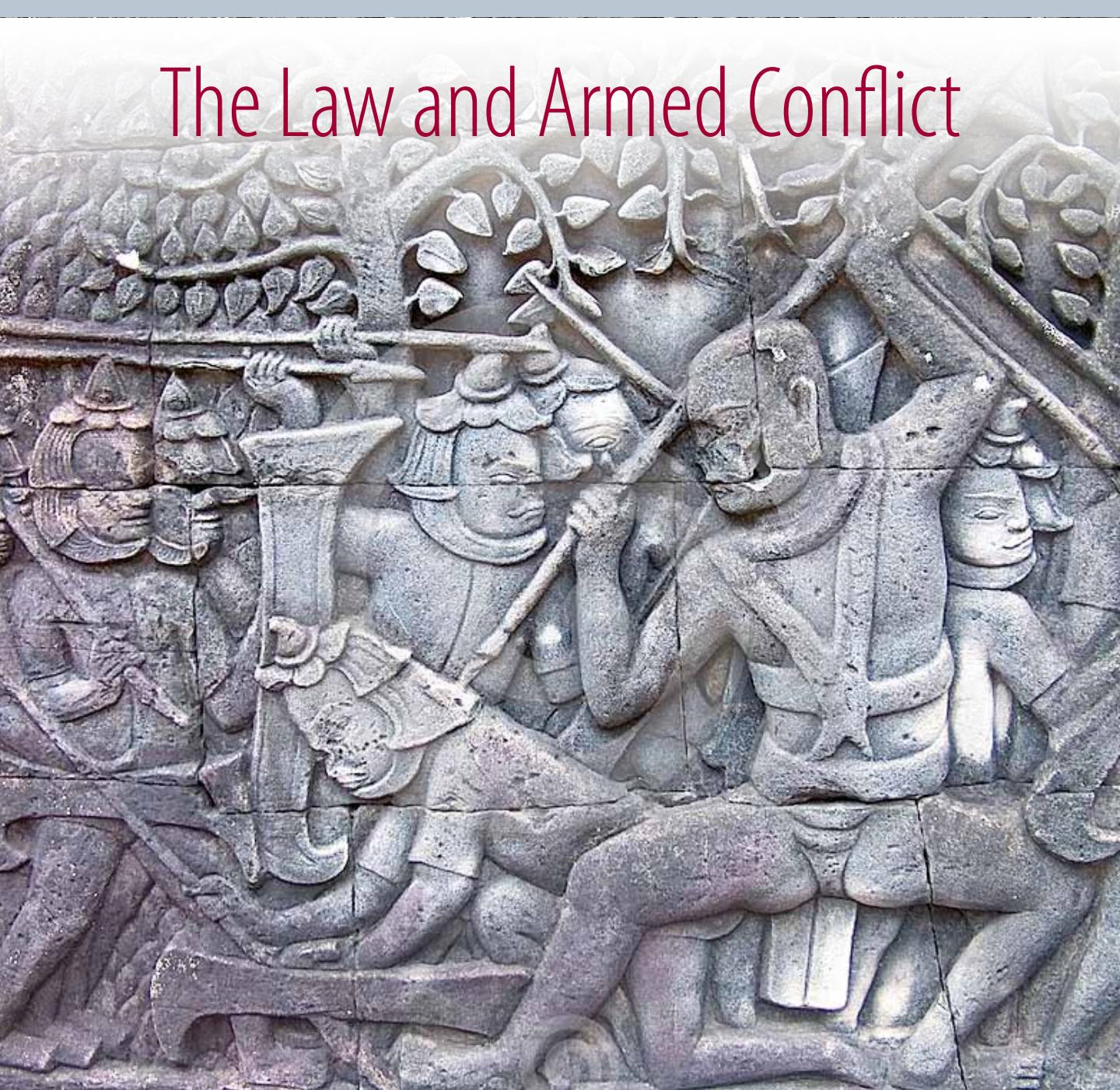


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# LAWNOW

Relating law to life in Canada

## The Law and Armed Conflict





Is there a role for law in armed conflict? The two seem utterly incompatible, and yet law does play a role: before, during and after the conflict has ended.

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## Corrections

### Vol.34 #2 – November/December 2009

The title given the Aboriginal Law Column written by John Edmond was misleading. Section 35 is in Part II of the *Constitution Act 1982*, “Rights of the Aboriginal Peoples of Canada” and is not part of the *Canadian Charter of Rights and Freedoms* as the title implies. **LAWNOW** regrets the error.

### Vol.34 #5 – May/June 2010

Due to an editing error, the article entitled *Stolen Art: Righting the Past Wrongs* by Connie L. Mah mistakenly stated that an estimated \$650 million worth of religious items and art was stolen from European Jews by the Nazis. The correct figure is \$650 thousand. **LAWNOW** regrets the error.



# Killing bin Laden necessary, jubilation is not

*Robert Sibley*

On the same day American soldiers killed Osama bin Laden in Pakistan, a 12-year-old Afghan boy killed four people and wounded a dozen others when he blew himself up in a suicide bombing in eastern Afghanistan.

There may be no direct connection between the two events, but, in a certain sense, they are linked. And because they are, I couldn't vicariously join those who celebrated the killing of the al-Qaida leader.

Certainly, I felt some grim satisfaction in knowing the mastermind of the 2001 terrorist attacks on the United States received the fate he deserved. Bin Laden's death provides a modicum of justice to all those who died in the World Trade Center, the Pentagon and that farm field near Shanksville, Pennsylvania.

Yet, as the Sunday night news reports showed the flag-waving, chanting crowds gathering at the White House gates and Ground Zero in New York, I imagined a scenario that undercut any pleasure I might have taken in bin Laden's demise.

At about the same time U.S. Special Forces prepared for their daring raid on the terrorist's compound in Abbottabad, that young boy, a bomb vest wrapped around his narrow chest, walked into a dusty, crowded marketplace in Paktika province near the Pakistan border. He was being used as a weapon in the Taliban's spring offensive to drive western armies out of Afghanistan.

Maybe it's just coincidental that these two events occurred on the same day, but it seems if it hadn't been for bin Laden, that little boy wouldn't have become an expendable pawn in the Islamist war against the West.

I know nothing of the boy's life except that he would have been two years old when bin Laden sent his operatives against the United States. How does a two-year-old become a 12-year-old killer? What kind of education – or lack of education – must the boy have received to make him psychologically amenable to martyrdom? What kind of mentality must a man possess to use children as weapons?

Bin Laden clearly possessed just such a mind. Justified by a religiously inspired ideology that sanctifies terrorism as the means to establish a theological dictatorship, he had no qualms about sending gullible young men to hijack airliners, blow up trains or bomb subways and nightclubs.

Because of him, the United States invaded Afghanistan and Iraq, resulting in the deaths of hundreds of thousands of Muslims. Directly or indirectly, bin Laden is responsible for all those deaths, whether it's the 6,000 American soldiers who've died in the "war on terror" or a little Afghan boy.

Small wonder, then, that thousands responded to news of bin Laden's death with jubilation. Wrapped in flags, they sang the Star Spangled Banner and God Bless America and chanted "USA! USA! USA!" But their evident patriotism was marred by the unseemly exultation of killing. Cheered on by the image-hungry media, they used words like "joy" and "pleasure" to describe their feelings about bin Laden's demise.

I wanted to applaud the patriotic impulse. Bin Laden's death is a significant symbolic victory for the United States, and a vindication of the counter-terrorism campaign initiated by former president George W. Bush and carried forward by President Barack Obama.

But as I watched the crowds, images of other celebrations crossed my mind. Mobs of Syrians dancing in the streets of Damascus after the September 11 attacks; a Palestinian crowd parading in Gaza a few weeks ago after terrorists slaughtered an Israeli family in their beds; Somalis shrieking in hysterical joy as the body of an American soldier was dragged through the streets of Mogadishu after U.S. helicopters were shot down in that city in 1993.

Were these young Americans behaving that much differently in their surrender to crowd consciousness?

Bin Laden's death came almost exactly 66 years after the death of another evil man. Adolf Hitler died in his bombed out Berlin bunker on April 30, 1945. I can't imagine my grandparents or parents feeling joy when they heard he was dead. Relief, yes. But joy, no.

Has the violence, fear and anxiety fomented by a decade of terrorism psychologically corrupted western societies so much that we now need the collective catharsis of cheering the death of enemies?

Bin Laden was without question an enemy of the West, particularly the United States. He had no qualms about killing those who would thwart his dream of restoring a pre-modern Islamic caliphate.

Sometimes it is necessary to kill such enemies. But you don't party hearty afterward.

As westerners supposedly rooted in the Judaic-Christian notion of the inherent dignity of the individual, we should not respond to the death of even those individuals who make themselves our enemies with unthinking exultation. Indeed, if we, as westerners, celebrate death, then bin Laden will have scored a posthumous victory. He will have infected us with his own sickness.

To take joy in the killing of others, even enemies, betrays a nihilistic mentality that embraces death over life. It is such a mentality that sends little boys into the streets with bombs strapped to their chests.

Has the violence, fear and anxiety fomented by a decade of terrorism psychologically corrupted western societies so much that we now need the collective catharsis of cheering the death of enemies?

Robert Sibley is a senior writer with the *Ottawa Citizen*. This column was first published in the *Ottawa Citizen* and is reprinted with the permission of the author.



# Another Ancient Defence Receives Scrutiny

*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](http://www.canlii.org/en/on/onca/doc/2011/2011onca153/2011onca153.html) the Crown Prosecutor argued on appeal that a strict interpretation of the wording of the *Criminal Code* section creating the offence of infanticide did not allow for the use of infanticide as a partial defence to a charge of murder. 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. Like the defence of provocation, the offence of 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."

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, 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.

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."

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."

The Court ruled: “Infanticide was initially, and still is, both a stand alone indictable offence and a partial defence to a charge of murder”.

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 143 CANLII

[www.canlii.org/en/ab/abca/doc/2011/2011abca134/2011abca134.html](http://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.

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



## History of War Crimes

*Charles Davison*

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hile the concept of “war crimes” has become a fairly commonplace one in the last decade or two, the idea that there should be some sort of “law” or a body of rules which govern the conduct of armed conflict has a surprisingly long history.

There are two areas or levels of development of the law in this area. The first concerns the conduct of nation-states and the decisions they make to launch and carry out a war with another entity. The second concerns the rules to be followed and responsibilities shouldered by the individuals who take part in the conflict at various levels, from the footsoldier on the ground all the way up to top military commanders and political leaders who send their nations into conflict.

Exploration of the first area of concern – the rules and laws which govern national decisions to go to war – invokes considerations of political philosophy and moral values and judgments.

Some writers suggest that the records of ancient Greece and Rome contain examples of punishments imposed upon warriors who were considered to have breached the laws of war. From very early times, the doctrine of “just war” proposed by such ancient scholars and thinkers as St. Augustine and Grotius permitted one government or nation to attack another for various reasons which were considered “just” at the time. The difficulty with such concepts was that the “justness” of the cause was measured, for the most part, according to the views and assessment of the attacking state. And there existed no way to punish a state or government which was considered to have breached this doctrine by launching an “unjust” – and thus, “illegal” – war against another country.

By the middle ages, the rules of war seem to have been bound up in the various codes of chivalry by which knights – who were the main participants in most conflicts of the time – were expected to govern themselves. The case of Peter von Hagenbach is often cited as being the earliest

and most clearly established example of a truly international war crimes trial. He was a Germanic knight who ruled parts of Burgundy in the 1400s. After his troops committed atrocities in putting down a rebellion by towns in the Upper Rhine region, he was tried by a tribunal of the Holy Roman Empire and ultimately found guilty and beheaded. As commander of the troops in question, he was convicted of permitting crimes which he, as a knight, ought to have prevented.

With the rise of the doctrine of almost absolute state sovereignty in the 17<sup>th</sup> and 18<sup>th</sup> centuries, governments were even less inclined to examine the decisions and actions of warring parties. Sovereign nation states were effectively permitted to make war upon any other entity, including other countries, without much, if any, restriction or limitation. Efforts to formally codify the laws of war began at the very end of the 19<sup>th</sup> century and in the opening years of the 20<sup>th</sup>. Protection from attack came mainly by entering treaties and forming alliances in an effort to deter aggression by others. The failure of this approach led ultimately to the protracted conflict which became known as the First World War.

In the aftermath of the First World War, the treaties entered with Germany and Turkey purported to establish a tribunal for the holding of trials of German and Turkish soldiers who were accused of war crimes, but ultimately only a small handful of individuals were ever dealt with through this route.

After four long and terrible years of devastation and the destruction of much of Western Europe which ended in 1918, various international statesmen began to consider other means by which they hoped to prevent similar conflagrations in the future. One of these was a 1919 agreement, under the auspices of the League of Nations, which would commit all members to refrain from launching wars except for certain, specific reasons: self defence; the rescue of nationals held in another state; and reprisals for injuries suffered at the hands of the state being attacked. Nine years later, the Kellogg-Briand Pact attempted to completely outlaw all aggressive war and to limit the use of force to situations of self-defence.

Such efforts to ban or outlaw warfare were not successful, however, and in the fall of 1939 Europe found itself once again embroiled in another large-scale destructive conflict. In 1941 Japan attacked the United States at Pearl Harbour (as well as British forces in places like Hong Kong), and the conflict became truly global in magnitude. When the Second World War finally ended in 1945, statesmen once again committed themselves to trying to ban future conflicts. They gathered in San Francisco to draft the United Nations *Charter*, the opening words of which commit humanity “to save[ing] succeeding generations from the scourge of war...”. Within the *Charter*, member states committed themselves to using peaceful means to resolve their disputes and to refrain from the threat

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or use of force against one another, except for reasons consistent with the *Charter* itself. The main reasons permitted are where the use of force is authorized by the Security Council of the United Nations, or where this is necessary in self defence after a state has itself been attacked.

When it comes to the question of individual responsibilities for war crimes, the years since the end of the Second World War have seen significant change and development of laws intended to hold culprits accountable for decisions they have made and actions they have taken or permitted which have been contrary to the accepted body of rules governing the conduct of armed conflicts.

The movement to hold individuals accountable for their actions and decisions in causing and pursuing war between nations only actually began to gain momentum towards the end of the Second World War. Although the British were at first in favour of summarily executing any German leaders who might be captured – and thus, avoiding the prospects of war crimes trials completely – in 1943 the Allies proclaimed an intention to prosecute and try members of the Nazi government in Germany once the conflict was ended. This led ultimately to the Nuremberg and Tokyo trials of 22 German and a number of Japanese leaders for crimes against peace, war crimes, and crimes against humanity in relation to the commencement of the war, steps taken in the course of the war, and atrocities such as the Holocaust.

At least a few individual soldiers were also tried for war crimes following the end of hostilities as well. One of these – Kurt Meyer – was tried upon charges which arose from orders he had given for the shooting of captured Allied (including Canadian) soldiers following the D-Day landings in 1944. He was found guilty and was sentenced to death but the penalty was eventually commuted to life imprisonment (at least partly because Allied commanders had also, from time to time, issued orders to their troops that they were not to take prisoners in certain situations). Meyer served approximately 10 years of his sentence, including five years in Dorchester

Penitentiary in New Brunswick. He was later transferred back to Germany and was released from prison in 1954. It is said that after his release he went on to work as a distributor for a brewery in Germany and that one of his main customers was a nearby Canadian army mess serving members of our forces stationed there in the years after the end of the war.

After 1945 it is possible to track a much more direct and obvious connection to later developments in this area. What came to be known as “the Nuremberg principles” went on to form the basis for the laws later applied by the *ad hoc* tribunals hearing trials as a result of crimes committed in the former Yugoslavia and Rwanda and ultimately, the 1998 *Rome Statute* which established the International Criminal Court (ICC).

In addition to the Nuremberg Principles, the other primary source of laws applied by the ICC are the four 1949 *Geneva Conventions*. Three of the *Conventions* actually have their roots in

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earlier agreements dating back to 1864 (in relation to treatment of wounded and sick soldiers); 1906 (treatment of wounded and sick sailors); and 1929 (in relation to the treatment of prisoners of war). In 1949, with the memories and experiences of World War II fresh in mind, nations gathered once again in Geneva to revise and expand the first three *Conventions* and then to also agree upon a fourth, relating to the protection of civilians in a time of war. The *Conventions* contain specific rules and definitions of offences in each of their respective subject-areas, many (if not most) of which have now been incorporated into the statute of the ICC. These give the Court jurisdiction to look into and take steps regarding alleged violations of these laws of war.

The ICC has now taken its place as a permanent arm of the United Nations whose role is to investigate and prosecute alleged war crimes (and crimes against humanity) wherever they occur. Thus far, the ICC has commenced proceedings against individuals accused of committing war crimes or crimes against humanity in the former Yugoslavia, the Democratic Republic of Congo, Uganda, and the Sudan, to name only a few. Investigations are on-going in relation to incidents and situations in Kenya and Libya.

On both the national and individual levels, efforts to regulate the conduct of warfare remain controversial and dynamic. On-going issues include the influence of global politics and alliances and a need to ensure that prosecutions for violations of the laws of war do not degenerate into so-called “victor’s justice”. As well, not all governments and nations have submitted themselves and their troops to the jurisdiction of bodies such as the International Criminal Court (the most significant countries who have refused are probably the United States and China).

Nonetheless, the recent efforts to codify the body of international laws and conventions represent important steps toward preserving impartiality and even-handedness in order to ensure the relevant rules are observed by all – and that violations are addressed with some degree of consistency and uniformity. Humanity’s historical experience seems to suggest that achieving our dreams of global peace remains an elusive goal. Efforts to regulate the conduct of war may be the only available alternative in our on-going quest to limit the damage and destruction and torment of innocents until the day comes when armed conflict becomes a thing of the past.

The movement to hold individuals accountable for their actions and decisions in causing and pursuing war between nations only actually began to gain momentum towards the end of the Second World War.

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Charles Davison is a lawyer practising criminal law in Edmonton, Alberta, and a past president of the Edmonton Criminal Trial Lawyers’ Association.



## Post-Conflict Elections

An analysis of problems in elections in emerging or recovering nations

Kuchis (nomads) at registration of voters in Balk

*Michael Clegg, Q.C.*

Canada held a parliamentary general election early in May. Whatever one may think of the campaign and the result, it was as usual, a free and fair election by international standards and there was no significant suspicion of fraud. Canadians do not generally doubt the accuracy of the result of elections at home.

There are many countries around the world that have recently been war zones and are now trying to establish some level of peace and re-establish the rule of law and democracy. This article discusses the issues on which the public confidence in election results depends and, in particular, how the provisions of the law and good audit and dispute resolution systems can assist.

After conflict, there is often pressure to organize elections at an early stage as a sign of progress towards re-establishing some form of democracy. However, even if elections are planned and delivered in technically sound ways, they are often almost destroyed by a small proportion of the population that has no interest in the will of the majority, but only a strong desire to win. They exclude no options from their strategy to this end.

From a secure and stable base, Canada has a significant presence in post-conflict development, including election support and providing advisers to give technical assistance. Many Canadians work overseas in the various divisions of the United Nations and in NGOs (non-governmental organizations that may be non-profit or for-profit). Some of these are Canadian-based but most NGOs are based in the U.S., the E.U. or elsewhere. These advisers provide expertise in establishing a legal framework, election preparation, civic education, staff training, procurement, election operations, logistics, information technology and security.

Printing companies in Canada are often contracted to supply ballots, forms and other special election documents; Canadian companies also supply election equipment such as ballot boxes. Canada is also a donor for election financing; Canadian tax dollars go to fund many election activities.

As a minor diversion from the main theme of this article, it is useful to briefly address the current concern over allegations of waste and loss of aid money. Although it has proved to be difficult to prevent serious losses to corruption and waste in funding for some types of projects, particularly those involving construction and highly delegated services, this is rarely the case with elections. In this case, it is usual for equipment to be provided directly to the user rather than cash, and its custody and use tracked carefully. In procurement, the bidding, awarding of contracts and delivery of materials are carefully controlled. Nothing is perfect, but it is difficult to divert election funding to improper use because of this high level of control. Further, donor nations do not release funds until they are satisfied that proper systems are in place to ensure a very high level of control, transparency and accountability. Canadian diplomats are known to be particularly attentive in this function.

### What causes dissatisfaction with election outcomes in developing countries?

Across the world, elections seem to happen almost every day and many, particularly in post-conflict nations, seem beset with problems. Why is it often so difficult to deliver an election that satisfies the voters? There are, of course, many reasons and some, but not all, may be addressed by the law through the creation of a strong legal framework and a pragmatic and robust system of dispute resolution.

From a secure and stable base, Canada has a significant presence in post-conflict development, including election support and providing advisers to give technical assistance. Many Canadians work overseas in the various divisions of the United Nations and in NGOs (non-governmental organizations that may be non-profit or for-profit).



Local lawyers review the complaints in East Timor, 2007

There are various causes of dissatisfaction with election outcomes, particularly in post-conflict and post-authoritarian countries. These will be discussed broadly with a focus on what the law can do to help.

Elections in new democracies are a focus of hope, energy and emotion because they are a rare and often a long-awaited chance for the people to choose leaders or express opinions. They can have very significant consequences; they can bestow great power or take away great power. Candidates have high hopes of winning and have difficulty accepting defeat. If they lose, their supporters are disappointed, worried and looking for reasons. The simple fact that the winner was more popular is rarely acceptable.

In new and post-conflict states in particular, problems also arise because voters expect that an election will solve all their problems, clearly a far too high expectation. Elections are only a start. In such countries, the consequences of losing are often far more serious than they are in a mature democracy. Jobs<sup>1</sup> and protection are at stake. Voters believe they must win for economic or even physical survival and may use extreme measures to win.

Therefore, the planning stage must address a critical question: will the population accept the result? If losing voters and candidates doubt the integrity of an election, they are not likely to accept the result. Against a background of great hope and dramatic consequences, an election result that is not trusted may well cause serious civil unrest.

What causes these doubts? It may indeed be that the election was defective. However the voters whose candidates lost may have had unrealistic expectations of success, either because of poor understanding of the process, or from exaggerated reports of the support their candidate enjoyed. Often, populations are divided by religion or ethnicity and these divisions are grouped geographically. If your local papers all support X and you know that all your neighbours and friends voted for X, it is easy to extend this to an assumption that X has wide national support, which may be quite unrealistic. Then, when X is defeated, the loss seems unbelievable, so the supporters assume fraud.<sup>2</sup>

Doubt may also be triggered by losing candidates' claims that they lost because of fraud, which is a common excuse.<sup>3</sup> Voters may have witnessed or heard reports of actual fraud, which sometimes become exaggerated. Voters often notice signs of significant imbalance in election advertising and dishonesty in campaign statements, both of which cause a low opinion of the process.

Suspicion can often arise because of delays in announcing results. "What are they doing there? Fixing the results?" Clearly the answer is to issue the results quickly.

In addition, there may be a lack of trust in the systems established by law to detect and correct fraud, determine complaints about violations of the rules and produce a result based on honest votes.

These factors all combine to cause distrust to develop.



Painted trucks loaded with election supplies

## Civic Education

All of these doubts may be reduced by a better understanding of the system, providing it is a good system; hence the importance of civic education.

Before and between elections there are opportunities to talk to the people about how their elections will work. There is sometimes a willingness to include this information in senior school curricula, as there is a significant potential for students to inform their families.

Civic education can explain the system and the way it is designed to ensure fairness and the secrecy of the ballot. It can address the reality that half or even more of the voters who cast a ballot may do so for a losing candidate. It can explain that the law can make undetected fraud difficult, but cannot actually stop fraud. However, it can also show how a careful audit, a good dispute resolution system and criminal prosecutions will bring justice and correct a high proportion of the fraud committed in an election.<sup>4</sup>



Re-checking the ballots at HQ East Timor in 2007

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## The Role of the Law

There are three main stages where the legal aspect of election design makes a contribution:

- firstly, creating and drafting a logical, appropriate and robust election system;
- secondly, providing for a thorough and professional post election audit of results; and
- thirdly, establishing a good system to deal with disputes, with adequate sanction powers.

These are essential elements to deliver and demonstrate justice and an accurate result.

As to the first, the process must be designed to be fair and transparent, and mitigate fraud by built-in safeguards and security of documents. It must be clear that, although law cannot prevent fraud, the system ensures that most fraud will be detected<sup>5</sup> and thus can be portrayed as ineffective. As to the second, the audit must be well-designed, thorough and well-observed. Regarding the third, the election dispute resolution system itself must be independent, robust, transparent and rapid. It must be clear that fraud and other offences will be detected and that there are significant consequences for the offenders and for candidates who were complicit.

## The Electoral System and an Independent Electoral Commission

The first step is to select and define the electoral system that will give the country the best representation. Some nations choose a single member constituency system such as exists in Canada, the United States and the United Kingdom, but most have some form of proportional representation. Here, the role of an international adviser is to explain the options, the advantages and disadvantages of each and to help the new democracy make an informed choice.

There must be an electoral law that establishes an independent body to plan and administer the elections free of political influence. This is often guaranteed in the constitution and is commonly referred to as an “election commission”. The law must prescribe the electoral system and establish sufficient fraud mitigation elements, or empower the commission to establish them.

The commission will usually carry out a post-election audit process, where unlikely results and results from areas known to have had problems can be examined. This will typically include a power and duty for the election commission to exclude ballot boxes from the final count if there is credible evidence that they are seriously corrupted by fraud. This is quite separate from the dispute resolution system and is carried out regardless of whether complaints have been filed.

## The electoral dispute resolution processes

The law must establish a robust and pragmatic dispute resolution system that will enable fraud to be detected and corrected and the offenders to be punished. The disputes include challenges to a candidate's qualifications and complaints that violations occurred in the campaign, election finance, or the voting and counting stages. The process has to be rapid to avoid delay in the final result, transparent to ensure trust and have enough sanction power to present a message of justice to voters and deterrence to would-be offenders. Any appearance of impunity is extremely harmful.

Criminal courts are not well suited to dealing with most election disputes. They have complex procedural requirements that envisage many days, weeks or months spent on a trial.

A special tribunal or commission is often established to ensure speed, priority and expertise. If some of the same persons are appointed to a dispute resolution commission for subsequent elections, the level of expertise grows. It is common for all or several of these commissioners to have legal or judicial experience. In some cases, at least in the early years, the dispute resolution body may have international legal advisers involved in the analysis of disputes and often others as voting members of the commission.

Because of the obvious need to deliver a result in a short time after polling day, ten days to three weeks is often the objective. The law generally gives an electoral dispute resolution commission powers to assess fines, make remedial orders, such as recounts or voiding votes and, typically, it also has the power to disqualify a candidate for serious violations. With a good staff, such a commission

Suspicion can often arise because of delays in announcing results.  
“What are they doing there?  
Fixing the results?” Clearly the answer is to issue the results quickly.

can often investigate and determine many complaints in a short time, generally by prioritizing those that could, if upheld, affect the result, which is often a small proportion of all complaints.<sup>6</sup> Following this, and even after results are announced, the commission can deal with complaints about those who are not candidates, such as voters, supporters and election officials, that might result in punishment, but not affect the vote count.

### Criminal Offences Arising in Elections

A special electoral dispute commission does not usually have power to apply severe personal punishment, such as imprisonment, but it can segregate false votes. Such a commission usually then has the power to refer cases that appear to include evidence that a crime was committed to the state prosecutor for investigation and possible criminal prosecution. Then the criminal investigation and prosecution can proceed, and deal with offences such as assault, theft, forgery and other serious crimes.

A special electoral dispute commission does not usually have power to apply severe personal punishment, such as imprisonment, but it can segregate false votes. Such a commission usually then has the power to refer cases that appear to include evidence that a crime was committed to the state prosecutor for investigation and possible criminal prosecution.

### Conclusion

In a case where the electoral dispute resolution commission and the criminal courts work well together, there is a reasonably quick resolution of disputes that affect the result. This facilitates a timely announcement of results, and an early signal that disputes that affect the election have been dealt with, the results corrected, and that violators have been punished. An announcement that cases have also been sent for prosecution adds to this a message that violations and criminal offences will be prosecuted, that there are consequences of violations and that there is no impunity.

Both the audit carried out by the election commission and the dispute resolution process are very difficult and enormously stressful tasks. They can also be dangerous, as the audit and electoral dispute process can change a result. Commissioners have been threatened by candidates, crowds of supporters and even by governments.<sup>7</sup>

However, they are critical functions, as it is well recognized that images of corruption and an impression of impunity in an election leads to cynicism. Cynicism leads to apathy and voter apathy is a most serious condition and very difficult to reverse.

Civic education may be effective to address the doubts that voters may have about the validity of election results. The roles of an effective audit and a rapid and credible system to deal with violations are major contributors to a general acceptance of election results.

Perceptions of uncorrected fraud and corruption and impunity can impair or destroy the efforts made to build a democratic system. Considering that these efforts, in many cases, have been made at the cost of many lives and substantial financial support, processes to deal with this are vital.

## Notes

1. Often, too many jobs are in the gift of political winners. This facilitates corruption and stimulates election fraud and violence.
2. The recent Nigerian election may be an example.
3. This year, there has been a re-examination of the results of Afghanistan's 2010 parliamentary election results. The process seems to be against both the Constitution and the electoral law, carried out without expertise or outside observation, and based on allegations from losing candidates, who were encouraged to bring forward claims of error and fraud long after the final results were announced by the proper authority.
4. In the Afghanistan parliamentary election in 2010, over a million fraudulent votes were voided and over 30 otherwise winning candidates were disqualified because of complicity in fraud.
5. There are many ways in which fraud may be detected, both from the reported results and from an examination of the ballot box itself.
6. An effective process was first adopted in the 2005 Iraq elections. As complaints are received they immediately go through a stage of "triage" by a small expert group which identifies whether the complaint could, if true, affect the result. Those with this character are flagged and dealt with first.
7. The Commissioners of the Afghanistan Electoral Complaints Commission and of the Independent Election Commission and their senior advisers are, at the time of writing, under indictment for corruption and abuse of power, after the results of the 2010 parliamentary election showed that many of President Karzai's supporters were not elected.

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## One Boy Left Behind: The Ethical Challenges of Liberating Child Soldiers in the Democratic Republic of Congo

The author facilitating a focus group discussion with former child soldiers

*Carl Conradi*

C

hild soldier. The very concept should offend one's deepest sensibilities. A young boy or girl – sometimes as young as 8 or 9 years old – forced into a brutal life of carrying material and supplies, espionage, sexual slavery and murder. Sometimes these children are kidnapped by roving militias who are on the lookout for violent, impressionable recruits who are below suspicion. Other times, they are pushed into soldiery by their parents, who may see recruitment as a means of acquiring an income, buying the rest of the family's safety, or naively guaranteeing a better life for the child. Regardless, the ensuing months or years are an excruciating loss of opportunity and childhood; and according to UNICEF, there are approximately 300,000 children suffering such an existence worldwide.

In the spring of 2009, I had the great honour of spending three months in the Democratic Republic of Congo (DRC), working with the non-governmental organization Search for Common Ground on behalf of Lt. Gen. (Ret.) Roméo Dallaire's Child Soldiers Initiative. My task was to assess communication strategies that were being employed in South Kivu province by various local and international actors, so as to advertise the country's disarmament, demobilization and reintegration (DDR) program to child soldiers in the field.

The project was vital. The Democratic Republic of Congo has long been a locus of child soldiery and in the wake of the country's second civil war, an estimated 70,000 children were in need of DDR services. A further 7,000 boys and girls had been retained by the DRC's various armed forces – including the *Forces Armées de la République Démocratique du Congo* (FARDC), the DRC's national army – and more were being recruited every week by the notorious *Forces Démocratiques de la Libération du Rwanda* (FDLR), a militia made up of former Rwandan génocidaires.

At one point, about halfway through my contract, I was given a privileged opportunity to join a day-long mission coordinated by the United Nations Mission in Congo (MONUC, now known as MONUSCO). Our assignment was to drive to a nearby FARDC field camp, controlled by the 10<sup>th</sup> Region, where two alleged underage combatants were being held. While our two child protection officers verified these soldiers' ages, I would interview the camp's colonel, so as to assess his willingness to abide by international child protection standards. It proved to be the most fascinating and revealing experience I had during my stay in the DRC.

As we drove north from the South Kivu capital of Bukavu, I asked the small MONUC child protection team how they worked to disseminate information regarding child soldiery and the DDR process. I was told that MONUC strives to hold as many field workshops as possible, in which senior military figures are given explicit facts regarding international conventions on

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Former child soldiers and other vulnerable children performing as a dance troupe

children's rights. They are also told what the legal punishment is for denying children the basic entitlement of security.

Indeed, there are myriad agreements that enshrine the international community's obligation to protect children from underage soldiery. Article 38 of the 1989 *United Nations Convention on the Rights of the Child* demands that, "State parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities."

The subsequent *Optional Protocol on the Involvement of Children in Armed Conflict*, which came into force in 2002, raises the age of legal recruitment to 18. The DRC ratified this protocol on 11 November 2001.

Crucially, Article 8.2.26 of the *Rome Statute*, which governs the actions of the International Criminal Court (ICC), defines the employment of children under the age of 15 in armed conflict as a war crime. In fact, the ICC's very first trial, *The Prosecution vs. Thomas Lubanga Dyilo*, concerned the alleged use of child soldiers by a former Congolese warlord.

Interestingly, however, the United Nations Mission in Congo child protection officers noted that such a legalistic approach to instructing military leadership can occasionally backfire. In such cases, commanders are so frightened by the prospect of international legal action that they refuse all future visits from MONUC. When this happens, the general strategy is to appeal to a commander's credibility, stating that if he does not abide by the international community's various treaties, he will lose face in the eyes of other officers and the greater civilian community. Needless to say, MONUC is obliged to walk a very thin line in terms of its communication strategy.

When we arrived at the FARDC camp, I immediately felt out of place. The camp was essentially a small village of canvas tents, strategically perched on top of a hill and within running distance of a thick forest. Dozens of soldiers wandered about in their camouflaged fatigues, carrying automatic rifles or rocket-propelled grenade launchers. Women – who had either come from a nearby village or who followed the troops to each new encampment – cooked food over open fires with their babies secured firmly to their backs. Meanwhile, I was wearing leather shoes, dress pants and a long-sleeved shirt. It was utterly incongruous and surreal.

We immediately set to work. I walked over to the camp colonel's tent, where I found him seated on a rickety wooden bench, wearing only camouflage pants and an undershirt. I was surprised to find that he was congenial and deeply sympathetic to MONUC's cause. Whether this sympathy was genuine is a completely different question; MONUC's Department of Peacekeeping Operations (UNDPKO) recently told the FARDC that it would refuse to co-ordinate over offensives against the FDLR until every last child in the national army had been demobilized.

Of course, the FARDC does not have an official policy of recruiting minors. The main reason why children can still be found in the national army is because of the highly disorganized DDR

The other soldier, however, had been proven to be about 15 or 16 years old. He was, therefore, a child combatant. But when the child protection officer tried to take the young boy with him, an aggressive junior commander intervened.

process that followed the DRC's second civil war. As there were so many hundreds of thousands of rebels to disarm, many child soldiers slipped through the cracks, only to be unintentionally reintegrated into the new national army. In the DRC, this process of military reintegration is called *brassage*.

Curiously, it could be argued that UNDPKO's stance at the time was actually generating more child soldiers than it was rescuing. While the FARDC continued to fight ineffectively against the FRDC – without the support of UNDPKO – more children were being abducted by the FRDC every week. It was a serious ethical quandary.

Back in the camp, the colonel continued to regale me with his legal knowledge of international child protection treaties, no doubt keen to impress his willingness to co-operate with MONUC. Indeed, on several occasions, he stated unequivocally that if a child soldier were to be found in his camp, MONUC would be free to part with them immediately.

All of a sudden, a shouting match erupted on the far side of the camp. A few minutes later, one of the two MONUC child protection officers arrived at the colonel's tent, followed by an irate-looking junior commander. According to the child protection officer, one of our two alleged child soldiers was of legal age. His assessment – which included both a physical and an interview – determined the man to be about 19 years old.

The other soldier, however, had been proven to be about 15 or 16 years old. He was, therefore, a child combatant. But when the child protection officer tried to take the young boy with him, an aggressive junior commander intervened.

"You cannot take this man without the authorization of his direct superior," said the junior commander (who was not the boy's superior). "His commander is currently on a mission and won't be back for another week. And I swear to you, if you try to leave with this soldier, I will succeed in keeping him. And tonight, I will beat the living shit out of him."

It was a terrible and extremely tense moment – one that even seemed to hold the possibility of immediate violence. The presiding colonel had witnessed the junior commander's entire outburst, and the MONUC officers and I were desperate to hear his response.

We were to be disappointed.

Maddeningly, because of how co-operative he had seemed up until this point, the colonel turned to us and said that we would have to come back to collect the child in a week's time. In spite of the fact that the colonel greatly outranked this minor commander, he was unwilling to intervene.

We were astonished. The situation had become an ethical nightmare. We could either forcibly attempt to leave with the child (which might have resulted in the boy being beaten), or we could

The situation had become an ethical nightmare. We could either forcibly attempt to leave with the child (which might have resulted in the boy being beaten), or we could relent and leave the child in the custody of the 10th Region, with no real guarantee that he would still be around when we returned.



The author facilitating a focus group discussion on child soldiering with FARDC officers

relent and leave the child in the custody of the 10th Region, with no real guarantee that he would still be around when we returned.

In the end, we received the colonel's word that the boy would still be present at the camp in a week's time and that he would personally oversee his release. We had no choice but to leave the child behind.

The junior commander smiled in vindication, while the boy we had hoped to rescue stood trembling in a uniform that was eerily well-tailored to his tiny stature. It was clear how much he had hoped for our intervention. Looking into his eyes, trying to imagine all of the carnage and suffering he had experienced, I couldn't help but feel utterly ashamed.

Minutes before we expected to return to Bukavu, however, one of the child protection officers was approached by another young-looking soldier – this time dressed in camouflage fatigues that appeared about two sizes too big. He claimed to be a child combatant and expressed a desire to be rescued.

Behind our white UN Land Rover, the child protection officer performed a quick assessment and determined the boy to be about 15 years of age. In great haste and without the attention of the belligerent junior commander, we negotiated the boy's release with the camp colonel. This, of course, just added to the mystery of his fickle co-operation.

We then watched the camouflage-dressed boy disappear behind a truck, only to reappear in a baggy pair of jeans and a white tee-shirt. It in no way compensated for the fact that we were leaving another desperate child behind, but bearing witness to that transformation was one of the most unforgettable moments of my life.

On the way home, we had the opportunity to ask the 15-year-old boy about his life. According to his memory, he had been abducted into a militia at the age of 11 and later underwent *brassage* so as to become a soldier in the FARDC. He didn't know whether his parents or siblings were still alive, but he was happy to be a civilian once again and expressed his desire to become a mechanic.

I later learned, however, that the boy was to be reintegrated into a community that had no need of a mechanic. This disillusionment – being told that as a civilian, one can be anything one wants to be, only to later learn that this isn't true – actually leads to relatively high rates of recidivism amongst child soldiers. It felt very uncomfortable knowing that the first promise we had made to this youth would be so quickly broken, even if out of economic necessity.

I then asked the boy what he wanted most now that he was a civilian again. He first looked down at his bare feet and said, "Shoes." Then he smiled and said, "A Coke." Feeling like I had suddenly been cast in one of the most bizarre commercials for Coca-Cola of all time, I bought the boy a pop and he was happy.

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Later that day, while talking with some colleagues at Search for Common Ground, I was able to solve the mystery of the fickle colonel. Apparently, the junior commander who had been causing trouble for us was a reintegrated Mai-Mai militiaman (the Mai-Mai being a disparate “protection” force made up of various community-based militias), while our colonel was a long-standing member of the FARDC. Because of this difference in history, had the colonel contradicted the wishes of the junior commander, he would have risked tearing away the stitches of his own newly reintegrated camp.

This was a fascinating and utterly new revelation; the idea that the DRC’s haphazard disarmament, demobilization and reintegration process – in which not enough is done to break down loyalty structures amongst former militiamen, nor to encourage loyalty to the new FARDC structure – has contributed to the ongoing problem of child soldier.

I left the Democratic Republic of Congo at the end of June 2009, without ever having learned what happened to the boy that we managed to save – whether he successfully completed the youth DDR program or if he disappeared back into the bush, disillusioned with what is a fundamentally good but severely underfunded initiative.

Nor did I ever learn what happened to the 15-year-old boy we had been forced to leave in the custody the 10<sup>th</sup> Region. Was he rescued by MONUC a week later or did he slip through the cracks yet again? Could it be that this child, who had stared at me with such yearning to be set free, remained suited in his well-tailored uniform? Will he celebrate his 18<sup>th</sup> birthday later this year, in the unforgiving forests of eastern DRC, with an automatic rifle strapped to his back and two more years of combat etched onto his face?

Indeed, there are days where I feel the only souvenir I have from my time in South Kivu is a collection of memories that illuminate the profound ethical dilemmas associated with abolishing child soldier. It is extraordinarily challenging work, in spite of the moral objective being so good and crystal clear.

Unfortunately, the phenomenon of child soldier continues relatively unabated, in the Democratic Republic of Congo and beyond. It will remain an unchallenged crime until the international community chooses to tackle it with vigour, improved funding and a genuine desire to assist in the untangling of these aforementioned dilemmas.

The International Criminal Court’s trial concerning Thomas Lubanga Dyilo is ongoing, with the evidence phase having concluded on 18 April 2011.

If you wish to learn more about the worldwide problem of child soldier, please visit the Child Soldiers Initiative at [www.childsoldiersinitiative.org](http://www.childsoldiersinitiative.org).

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## It Takes a Village to Raise a Child, but the Village Has Let Down Omar Khadr

Linda McKay-Panos

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The *United Nations Convention on the Rights of the Child* (CRC) is one of the most widely ratified international documents. While Somalia and the United States have not ratified the CRC, the United States has ratified the Optional Protocols to the CRC – one which addresses children in armed conflict, and the other which addresses child pornography, child prostitution and child trafficking. Several provisions of the CRC or the Optional Protocols applied to Omar Khadr (“Khadr”), yet it seems that time after time several states and individuals failed to take into account that he was a child, and therefore failed him.

First, Khadr was let down by his parents. While a Canadian citizen, born in Toronto, Ontario in 1986, he was raised in an atmosphere of religious and political extremism that was hostile to Western values. At an early age, Khadr was exposed to Al Qaeda’s (Osama bin Laden’s) training camp for a month. His brothers and father were supporters of Al Qaeda. His father, Ahmed Said Khadr, was known as an Al Qaeda financier and died in gun violence in Pakistan in 2003.

Khadr was certainly not raised in an environment that was in his best interest. Exposure to and involvement in this extreme atmosphere as a “captive” child could be considered a form of child abuse. In 2009, child welfare authorities in Winnipeg applied for guardianship of a boy and a girl whose parents were accused of teaching them that people of colour and other minorities deserved to

die (CBC online: “Parents accused of racist teachings begin court battle for children” [www.cbc.ca/news/canada/manitoba/story/2009/05/25/mb-swastika-parents-winnipeg.html](http://www.cbc.ca/news/canada/manitoba/story/2009/05/25/mb-swastika-parents-winnipeg.html)). In the Winnipeg case, the government agency argued that it was worried about the psychological impact on the children of teaching them hatred. (In addition, there were allegations of drug and alcohol abuse, criminal behaviour, domestic violence and mental health issues.) While there is no evidence that Ontario officials knew that Khadr was in an unhealthy (life-threatening) situation, when he was seized by officials in Afghanistan he was a 15-year-old Canadian citizen. It could be argued that Khadr’s second let-down occurred when, as a child in need of protection, child welfare officials never addressed his situation.

Third, Khadr was clearly let down by the way officials treated him after he was initially arrested. The facts surrounding the arrest are unclear and controversial. Originally, the United States (U.S.) military stated that on July 27, 2002, they approached a compound in Ayub Kheil near Khost, Afghanistan, where they suspected Al Qaeda had an operations base (*United States of America v Omar Ahmed Khadr: Motion for Reconsideration* (8 June 2007) at para. 51 (online: [www.scotusblog.com/archives/Khadr%20reconsider%20motion.pdf](http://www.scotusblog.com/archives/Khadr%20reconsider%20motion.pdf))). Khadr was at the compound with members of an Al Qaeda explosives cell, when the U.S. forces surrounded the compound, requesting the occupants to surrender. They refused. The U.S. next sent two members of the Afghan Military into the compound to negotiate with the occupants, and they were shot and killed. Next, a four-hour fight between the U.S. forces and the Al Qaeda explosives cell ensued (*United States of America v Omar Ahmed Khadr: Stipulation of Facts* (13 October 2010) at para. 36 (online: <http://media.thestar.topscms.com/acrobat/58/bf/c615afaa4bc7b36425db6ed2f488.pdf>)). The fighting ended when the U.S. called in two Apache attack helicopters, two A-10 Warhogs and two F18s, which bombed the compound severely. Next, the U.S. forces entered the compound and heard a noise from behind a wall, which sounded like a gunshot. A large explosion mortally wounded Sgt. First Class Christopher Speer, who succumbed to his injuries several days later.

The official version of events indicates that Khadr threw the grenade over the wall that killed Sgt. Speer, and then U.S. forces began shooting, and engaged Khadr, who was shot twice in the torso (*United States of America v Omar Ahmed Khadr: Stipulation of Facts* (13 October 2010) at para. 44 (online: <http://media.thestar.topscms.com/acrobat/58/bf/c615afaa4bc7b36425db6ed2f488.pdf>)). Khadr was assumed to be the one who threw the grenade because he was the only person alive inside the compound after the four-hour fight. At Khadr’s trial in August 2010, Sgt.-Major D testified that he “believed that there were at least two people in the alley” [from where the grenade originated] who were hostile towards the U.S. In addition, D testified that he shot dead the first person he encountered, who was armed with an AK-47 assault rifle. D then spotted an unarmed person facing away from the fight, cowering against some brush. He shot this person twice in the back; the person was Khadr. It is possible that the first person was the one who threw the grenade (CP24 News “Omar Shot twice in back by special forces soldier” (13 October 2010) online: [www.cp24.com/servlet/an/local/CTVNews/20100812/100812\\_khadar/20100812/?hub=CP24Home](http://www.cp24.com/servlet/an/local/CTVNews/20100812/100812_khadar/20100812/?hub=CP24Home)).

Khadr, who was 15 years old, had been injured in the bombings and was also shot twice. However, he did survive. While the U.S. *Stipulation of Facts Agreement*, dated October 13, 2010 and signed by Omar Khadr, contradicts the evidence provided by Sgt. Major D during the August 2010 trial, it is not disputed that Khadr was 15 years old at the time he was arrested by the U.S., was detained for three months at Baghram Airbase Afghanistan, where he turned 16 on September 19, 2002, and then transferred by the U.S. to Guantánamo Bay on October 31, 2002, where he spent the next several years (Melissa A. Jamison, "The Sins of the Father: Punishing Children in the War on Terror" (2008) 29 University of La Verne Law Review 88 at 90).

So, the third betrayal of Omar Khadr occurred when the U.S. forces arrested and detained a 15-year-old Canadian citizen. No consideration was given to the fact that Khadr was a child. Under Article 1 of the CRC, any person under the age of 18 is considered a child unless he or she attains maturity under the applicable law. Article 38(2) contains a blanket prohibition against the recruitment by states of children under age 15. *Optional Protocol on the Involvement of Children in Armed Conflict*, Article 4(1), prohibits non-state actors (e.g., Al-Qaeda) from recruiting and using children under the age of 18. Under Article 4(2), states are required to take the necessary measures to prevent and punish those non-state actors who violate Article 4(1). It seems that the only person punished in this situation was Khadr. There is little indication that Canadian officials attempted to challenge Khadr's detention or request his repatriation to Canada during this time (University of Ottawa, Faculty of Law "Repatriation of Omar Khadr to be Tried Under Canadian Law" *Brief Submitted to the Senate Standing Committee on Human Rights* 2008 at page ii; online:

<http://aix1.uottawa.ca/~cforsece/other/khadrrepatriation.pdf> ("Repatriation").)

The fourth let-down of Khadr was actually a collection of major failures of the United States officials. First, Article 37 of the CRC dictates that imprisonment of a child should only be used as a last resort and only for the shortest period of time appropriate. However, Khadr was held in Guantánamo Bay without officially being charged with an offence for over four years (Human Rights Watch, "The Omar Khadr Case: A Teenager Imprisoned at Guantánamo" (June 1, 2007) online: [www.hrw.org/en/reports/2007/06/01/omar-khadr-case](http://www.hrw.org/en/reports/2007/06/01/omar-khadr-case) ("Human Rights Watch")). While the United States is not a party to the CRC, this treatment of Khadr would seem to be contrary to all notions of universal human rights. The U.S. based its authority to detain Khadr on an Order issued by President George W. Bush on November 13, 2001: "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism". Under this Order, Khadr's detainee status was reviewed on September 7, 2004, and he was designated as an "enemy combatant". While the *Geneva Conventions* provide that people taken prisoner during a conflict are entitled to treatment and status as prisoners-of-war, which prohibits them from being tried for any acts during conflict unless these are "war crimes", the United States took the position that Khadr was an Al-Qaeda detainee and thus did not qualify as a prisoner

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of war (and therefore not afforded any PoW rights) (Human Rights Watch). Thus, the U.S. opined that Khadr could be detained for four years without formally being charged. On June 26, 2009, the United States Supreme Court released the decision in *Hamdan v Rumsfeld*, 126 SCt 2749, in which it struck down the Military Commission Order and held that the regime was contrary to Article 3 of the Third *Geneva Convention*. This Article requires prisoners in Guantánamo Bay to be tried by a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples” (Art. 3).

Eventually, in 2007, Khadr was officially accused by the U.S. of murder and attempted murder in violation of laws of war, conspiracy, providing material support for terrorism and spying (Repatriation, at page 76). During the time Omar Khadr was being detained at Guantánamo Bay he was held with the adult population and, for the most part, was held in Camp Five of the Camp Delta Facility, which is considered to be maximum security (Repatriation, at page 38). Two law professors who represented Khadr on U.S. *habeas corpus* proceedings (Richard Wilson and Muneer Ahmad) stated that he was severely abused physically and mentally throughout his detention (Repatriation, at page 39). For example, Khadr was subjected to the “frequent flier program”, an extreme form of sleep deprivation, which assisted the interrogators in obtaining information (*Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para. 20). In addition, he had not been afforded any juvenile rights or access to legal counsel. Clearly, the U.S. officials treated Omar Khadr in terribly offensive ways, and to say that they let him down during this time is a vast understatement.

Canadian officials also let down Khadr in 2003 and 2004. Canadian agents from the Security Intelligence Service (CSIS) and the Foreign Intelligence Division of the Department of Foreign Affairs and Trade (DFAIT) questioned Khadr about the charges that were pending against him. These officials knew that Khadr had not been treated as a child soldier; nor had he been afforded any legal counsel. They also knew about some of the ill treatment he had received during his detention. Nevertheless, the officials interrogated Khadr, and shared the information gleaned from the interrogation with U.S. officials. This resulted in even worse treatment of Khadr (*Factum of Omar Khadr*, SCC, (9 October 2009) at para. 43 online: [www.law.utoronto.ca/documents/Mackin/KhadrfactuminSCC.DOC](http://www.law.utoronto.ca/documents/Mackin/KhadrfactuminSCC.DOC)).

Khadr's questioning by the Canadian officials was also the subject of litigation brought in Canada to seek (among other remedies) Khadr's repatriation to Canada (see: *Canada (Prime Minister) v Khadr*, 2010 SCC 3; *Canada (Justice) v Khadr*, 2008 SCC 28). The Supreme Court of Canada indicated that Canada had actively participated in a process that was contrary to international law and deprived him of his right to life, liberty and security of the person under the *Canadian Charter of Rights and Freedoms*. The SCC noted, however, that ordering the Canadian

While the *Geneva Conventions* provide that people taken prisoner during a conflict are entitled to treatment and status as prisoners-of-war, which prohibits them from being tried for any acts during conflict unless these are “war crimes”, the United States took the position that Khadr was an Al-Qaeda detainee and thus did not qualify as a prisoner of war.

government to request Khadr's repatriation would overstep the constitutional powers of the executive branch of the government. Thus, the Court said that it would leave it to the government to decide how best to respond to the situation. The Canadian government did not request Khadr's repatriation (Kirk Makin, "Ignoring Supreme Court's Khadr ruling, Ottawa won't request repatriation" *Globe and Mail* (3 February 2010) online: [www.theglobeandmail.com/news/politics/ignoring-supreme-courts-khadr-ruling-ottawa-wont-request-repatriation/article1455515](http://www.theglobeandmail.com/news/politics/ignoring-supreme-courts-khadr-ruling-ottawa-wont-request-repatriation/article1455515)).

Finally, the way that Khadr's situation has been "resolved" is evidence of a sixth major failure of the village. By refusing to ask for Khadr's repatriation, Canada left him to face trial at Guantánamo Bay. Khadr's lawyers had serious concerns about the procedural fairness and outcome of the trials. When it looked like Khadr would be sentenced to at least 40 years in prison, his lawyers advised him to plead guilty in exchange for an eight-year sentence that could be partially served in Canada. There are indicators that the Canadian government said that it would allow the United States to transfer Khadr to Canada after he completes at least one additional year in U.S. custody (CBC, "Canada Aware of Khadr Plea Deal" (31 October 2010) online: [www.cbc.ca/news/canada/story/2010/10/31/us-canada-khadr-deal.html](http://www.cbc.ca/news/canada/story/2010/10/31/us-canada-khadr-deal.html)).

While this catalogue of human rights failures is overwhelming, there have been individuals and groups who have made efforts to support Khadr throughout his ordeal. For example, his Canadian lawyers, Dennis Edney and Nathan Whitling, have worked tirelessly and at great emotional and personal financial cost to assist Khadr. Other groups such as Lawyers Against the War, Human Rights Watch and Amnesty International have worked to draw attention to Khadr's situation. Hopefully, these efforts (and others not mentioned here) will provide Khadr with some hope that the village has not abandoned him entirely and have left him with some dignity and hope for the future.

Canadian officials also let down Khadr in 2003 and 2004. Canadian agents from the Security Intelligence Service (CSIS) and the Foreign Intelligence Division of the Department of Foreign Affairs and Trade (DFAIT) questioned Khadr about the charges that were pending against him.

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## Constitutionally Protected Minority Official Language Rights in Canada\*

*Carole Aippersbach*

### Introduction

Whether we are born in Canada or move here later in life, we learn that this is a bilingual country. We also learn that minority official language speakers (the French language minority outside of Québec, and the English language minority inside Québec) have “rights” and that these rights are sometimes protected by Canada’s constitutional framework

\* This article pertains to constitutionally-protected French language minority rights outside of Québec. The issue of English language minority rights inside Québec will not be addressed in any detail.

(including the *Canadian Charter of Rights and Freedoms*). But where did these rights come from? Why do we have them? What exactly are these rights and when exactly can we use them? Are these rights always constitutionally protected, and, if not, what are the differences between the various kinds of rights? Are there times when an official language minority issue is not a question of “rights”?

## The Larger Framework

The structure of our bilingualism, and more specifically of our constitutionally-protected minority language rights, stems from our history. Canadian law recognizes that both the English and the French communities, and therefore, languages, played an important role in the founding of the federation now known as Canada. It recognizes that language is a fundamental aspect of individual identity and an expression of community and culture. Canada’s bilingual character is also a fundamental aspect of Canadian national identity. It is a reference for national pride and patriotism. Like the flag and the national anthem, our bilingual composition portrays the national personality. Minority language protections ensure that all of these aspects of Canadian identity will be preserved.

It is these governmental commitments to the importance and equality of the English and French languages that have led to the bilingualism we know and enjoy today. Unlike some other countries, Canadian bilingualism is not one wherein most people in the country speak both languages fluently. Instead, Canadian bilingualism reflects the reality that there are a large number of people who speak one language, and a large number of people who speak another (in Québec alone, there are almost 8 million French-speakers). This bilingualism is then echoed in the language-related rules and programs that are in place. The result: Canada has two official languages and numerous legal protections for minority official language rights (the French language minority outside of Québec, and the English language minority inside Québec).

The rules around our constitutionally-protected minority language rights, including who gets to decide what, are complicated, and equally steeped in history. To understand the greater picture, we must step back for a moment.

The basic rules that dictate which level of government can make laws in a particular sector are set out in sections 91 (federal) and 92 (provincial) of the *Constitution Act, 1867* (“CA 1867”, formerly known as the *British North America Act* or “BNA Act”). Under the CA 1867, the word “language” itself does not appear in any of the lists in either s.91 or s.92. Instead, the authority to make laws about language is tied to each particular non-language subject matter. As a result, there is no single and complete power to make laws that are only about language, and powers over language are divided between federal and the provincial/territorial governments. Furthermore, the federal government

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has transferred some of its powers to the territorial governments in Nunavut, the Northwest Territories and Yukon.

The result is a set of federal language laws, and a set of language laws (or no language law) for each province/territory: an extensive mélange of laws, some of which continue to be examined, debated and challenged in Canadian courts.

Given the above, it is important to understand what kind of language rights there are, or are not. In a nutshell, language rights appear in various kinds of law, and the kind of rights or protections that they give depends on the nature of the law, or lack thereof.



Photo by Carole Aippersbach

### Overarching Legislation / the Constitutional Framework

The most permanent commitment to bilingualism comes from the language rights that are enshrined in the *Canadian Charter of Rights and Freedoms* (the *Charter*), section 133 of CA 1867 and section 23 of the *Manitoba Act*, 1870. In short, these rights guarantee, under certain conditions, the use, protection and development of minority languages in certain sectors: education, governmental communications and services, legislation and publications, and judicial rights. These rights are essentially permanent; as they are difficult to alter (there is high standard for changes to the *Charter* and to other constitutional documents). However, as will be discussed below, although they affect people across Canada, and except in matters of minority language education rights, these rights are limited to federal government, and the governments of Québec, Manitoba, and New Brunswick (the only officially bilingual province).

### Federal Laws

Alongside the *Charter* and other constitutional protections, the federal government has passed additional laws about language rights. One example is the *Official Languages Act*. Again, however, this kind of legislation applies only to the federal government. Another example is section 530 of the *Criminal Code of Canada*, which outlines the minority official language rights of an accused in criminal proceedings before a court. These laws can be seen as one way the federal parliament puts constitutional minority language rights into action.

### Provincial Laws

Due to its bilingual status, the government of New Brunswick has also passed additional language laws that work alongside the *Charter*. The laws of other provinces /territories contain some language rights, but they are generally less extensive. The exact nature of these “rights” varies. Some provinces/territories have created laws that grant rights and protections. If there is such a law, then a person can complain to a court if those laws are not respected. Examples are Manitoba and Ontario.

Other provinces, however, have not created such language laws. Instead, they have merely directed some government departments and service providers to communicate and offer services in the minority official language. In such instances, official minority language communication and services provided by provincial or private organizations are a matter of policy, not of right.

### Municipal Bylaws

Municipalities also vary in terms of their minority-language laws, protections and policies. Most municipalities are created by the province/territory in which the municipality is located. Some municipalities have passed by-laws and established practices that recognize minority official language speakers; some have not. Since the *CA 1982* makes New Brunswick bilingual, the result is that all New Brunswick municipalities are bilingual. Municipalities such as Winnipeg and Ottawa also have extensive minority-language rights, services, and policies. Even smaller municipalities, especially if they were founded by speakers of the minority language, may be quite bilingual.

Section 20 of the *Charter* states that, under certain conditions, any member of the public in Canada has the right to communicate, in either official language, with an office or institution of the federal government.

### The Constitutionally-Protected Rights

As noted, the clearest and most permanent language rights are those enshrined in the documents of Canada's constitutional framework. These rights can be divided into the following four general categories.

#### Minority Official Language Education Rights

Under section 23 of the *Charter*, Canadian citizens who are in an official language minority in their province/territory have the right for their children to be educated in the minority language. However, the *Charter* adds some criteria. For example, in all provinces/territories except Québec, the eligibility criteria are: that the first language of the parent is French and that he or she still understands French, or that the parent had his/her primary education in Canada in French. In addition, once one child is enrolled in French school, all the other children in that family may access French-language education. However, there can still be variations from place to place, in exactly how this right is fulfilled. Sometimes, a sufficient number of minority language children may result in a French-language school being built in a particular area. Other times it may only result in French-language instruction within a larger English-language school, or in a right for the children to be transported by bus to a French-language school in another area.

#### Government Services and Communications

Section 20 of the *Charter* states that, under certain conditions, any member of the public in Canada has the right to communicate, in either official language, with an office or institution of the

federal government. It also states that any member of the public in Canada has the right to communicate, in either official language, with an office or institution of the government of New Brunswick (there are no conditions for this right). It is important to note, however, the limitations contained within the exact wording of these rights:

- minority language speakers do not have a constitutional right to *any and all* governmental services and communications in their language: only the federal government and the government of New Brunswick. Minority official languages services and communications may still be available to them (for example, because a provincial/territorial law or policy allows for it), but it is not a matter of “right” protected by the Constitution.
- There are conditions. For example, in English-speaking provinces/territories, French services must be made available: where there is “significant demand”, or where the “nature of the office” makes it “reasonable” to offer the service in French. If neither of these conditions are met, even federal government services may not be available in French. Both of these conditions are matters that are continually under evolution and reassessment.

... all federal laws (and regulations) exist in both languages. So, too, do the laws of New Brunswick, Manitoba, Nunavut and the Northwest Territories. Furthermore, for some of these jurisdictions, even the journals, order papers, notice and minutes, and Hansard records are kept in both official languages.

#### Legislation and other Governmental Publications

In keeping with the above, all federal laws (and regulations) exist in both languages. So, too, do the laws of New Brunswick, Manitoba, Nunavut and the Northwest Territories. Furthermore, for some of these jurisdictions, even the journals, order papers, notice and minutes, and Hansard records are kept in both official languages. In general, these same jurisdictions also publish other information in both languages (including their websites and general information print publications).

Again, however, this is not necessarily true of all other provinces and territories. Some jurisdictions have chosen – either as a matter of provincial/territorial law or a matter of policy – to publish some or all of their laws in both languages (such as Newfoundland and Nova Scotia). In others, for example, British Columbia, laws are only available in English. The same is true for municipalities (for example, Ottawa and Winnipeg have all laws available in both languages).

The publication of court decisions also follows a similar pattern. The federal courts and the Supreme Court of Canada publish all decisions in both official languages. On the other hand, not all criminal trials result in decisions being issued in both languages. In fact, most don’t. It depends on the language of the proceedings and/or the importance of, or general public interest about, the issue (sometimes, such as when the trial was in French, the decision may be published only in French). Similarly, decisions resulting from non-criminal provincial/territorial proceedings may or may not be available in both official languages, depending on the language laws of the province/territory.

### Judicial Rights

Judicial language rights pertain to the possibility for an individual to use either French or English in the judicial system, especially court processes. Section 133 of the *CA 1867* guarantees these language rights in any court established by Parliament (the federal government) and the courts of Québec. Section 23 of the *Manitoba Act 1870* and section 19 of the *Canadian Charter of Rights and Freedoms* guarantees similar language rights in Manitoba and New Brunswick, respectively. The courts of the other provinces/territories are not bound by any such constitutional provision, and the provincial/territorial governments have the authority to regulate language rights in respect of courts and tribunals in the province/territory and civil matters, except where the *Criminal Code*, which is federal legislation, says differently.

You can choose to have your criminal trial in French, no matter what your mother tongue, and even if you understand English. In addition every accused must be informed of the possibility of having his/her trial in French.

Criminal law (governed by the *Criminal Code* of Canada) is in the jurisdiction of the federal government. Therefore, even though criminal trials do not take place in a federal court (they take place in the courts run by the provinces/territories), due to the powers retained by the federal government and the bilingual requirements on the federal government, there is the possibility of having a criminal trial (including the preliminary inquiry) in French. French-speaking judges are available. You can choose to have your criminal trial in French, no matter what your mother tongue, and even if you understand English. In addition, every accused must be informed of the possibility of having his/her trial in French. If a French trial is chosen, the Crown prosecutor assigned to the case must speak French, the accused has the possibility of obtaining a translation of the information and indictment (the documents that list the charges against the accused person) upon request, and a jury, if there is one, can be formed of French-speakers. Lastly, the decision may be granted in French even if not all of the proceedings were conducted in French (however, a substantial amount must have been in French).

### Conclusion

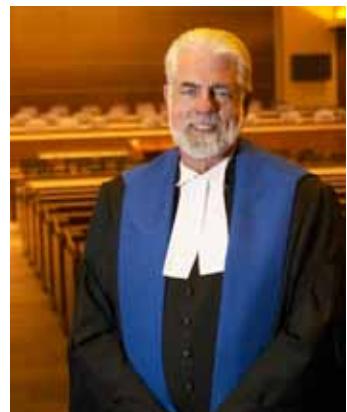
Constitutionally-protected minority official-language rights are multi-tiered and quite complex. And they are not yet done their development: throughout the country there are cases before the courts asking for further clarification of these rights. As with all aspects of our constitutional framework, these rights are living, breathing entities. Despite their complexity, however, it is important that citizens understand these rights, especially if they, or their loved ones, are trying to assert them.\*\*

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\*\* more detailed information about these rights and how to assert them is available at: Canadian Legal FAQs [www.law-faqs.org](http://www.law-faqs.org)

# Conflict: What's Language Got to Do With It?\*

*Assistant Chief Judge  
Victor T. Tousignant*



**L**anguage encourages or inhibits conflict. It's as simple as that. Simple to say, but harder perhaps to truly comprehend.

The purpose of this article is to remind, comment and encourage. The reminder is that the terminology we use impacts the course of events. The comment consists of practical suggestions. The encouragement is to not lose sight of the fact that we have responsibility for our choice of words, and to not use words mindlessly.

My primary goal is to prompt the reader to think about the role of language in conflict, and to provide suggestions for minimizing conflict, particularly in family law cases.

\* Editor's Note. Assistant Chief Judge wrote this article for lawyers and judges; however his practical and wise suggestions for less aggressive language as a means to reduce conflict are useful for everyone.

My modest hope is that you will glean a few practical tips and in that way beneficially impact the practice of family law if only for each individual. In the grand scheme of things, it would be satisfying but not surprising if numerous small changes were to have a ripple effect and be imitated by others.

## The Impact of Terminology on the Course of Events

You find yourself in the middle of a nasty custody dispute. You've tried to settle but don't seem to be getting anywhere. The letters back and forth have an edge. You used to get along with the other lawyer but communication is now difficult. Your client is not happy. Your stomach churns at the mere thought of the file.

It can even happen on a collaborative file. You've explored interests to the best of your ability. You've explored options. You're at a roadblock.

How did you get here? Maybe language helped you get here and maybe it hurt your settlement prospects.

So how do we avoid conflict? There are decisions each lawyer makes which mitigate or exacerbate conflict. Many of those decisions involve the choice of terminology. Here are my top suggestions for reducing conflict through choice of words:

### Introduce softer words and concepts

The words "custody" and "access" are hot-button terms. Avoid using them, particularly early on. Terms such as "parenting schedule", "parenting decisions" and "parenting time" are less threatening concepts, particularly for the non-residential parent. Instead of starting out with the standard list of "issues to be resolved", speak about your role in assisting in "re-structuring the family" and that "we need to talk about what your family will look like, as it goes through this transition".

### Avoid descriptors from the former regime

If you are proceeding under or using terms in the *Family Law Act*, resist using the old descriptors. Avoid speaking about one parent having "primary parenting time". The words "primary residence" has been around for a while, and has started to take on some of the same hot-button connotations as the term "custody". The critical thing about parenting time is that a court order may say a number of things about various responsibilities, but what is divided is just "parenting time". This means that neither parent's time is of a different or better quality than the other parent's time with the child. We need to put final death to the word "visit" as it applies to a parent, as it minimizes that parent's role. We should encourage the language that causes parents to be seen as equal parents who might just have different specific responsibilities or unequal time on their schedules with the child.

So how do we avoid conflict?

There are decisions each lawyer makes which mitigate or exacerbate conflict. Many of those decisions involve the choice of terminology. Here are my top suggestions for reducing conflict through choice of words.

### Apply labels last, if at all

What is important is what the family will look like as it goes forward in two homes. Try to sort that out before applying labels, if apply them you must. Compare “The parties shall have joint custody of the children. The children shall reside with the Applicant, who shall have primary care and control of them. The Respondent shall have access on alternating weekends ... ” with “The children shall ordinarily reside with the mother. The father shall have parenting time on alternating weekends. The parties shall each continue to exercise the responsibility of guardians.” The latter contains no labels, but describes the same parenting arrangement.

### Start with softer words

It's not enough simply to introduce the softer terms during your first interview. What does your advertising or web site say? What does your client intake form say? It does less good to introduce softer words during your first interview if on the intake form the list of “issues” starts with “custody” and “access”. Instead of referring on a file opening checklist which the client completes to “Issues to be resolved”, try “What needs to be sorted out”.

Re-phrase “Custody” read “Parenting”. You’ll have lots of time to describe things in legal terms later.

The children win and the children lose depending on their parents’ actions. The parents should not think of themselves winning or losing the case. A child should not have reason to state that “Dad lost”.

### Reframe, reframe, reframe

Learn and practice the art of reframing. If a parent vents that “That so-called father of theirs says he wants to see my kids but only when it suits him ... ” resist the temptation to concur. Try instead “O.K. So consistency is important to you. Why don’t we leave our minds open about dad’s parenting time, but stress that it’s got to be consistent?” If you are asked “How much access do I have to give him?” don’t launch into “Well, the standard regime is every other. .. ” Instead focus on what involvement would be best for the children.

### Dig, dig, dig

What is it the client really wants and why? A classic example is the client who is adamant she won’t ever agree to joint custody. After digging into what is important to her, it becomes apparent that she equates joint custody with a 50/50 parenting arrangement. You dig further and discover that she knows of a couple who agreed to a 50/50 arrangement and the kids are now a disaster. Excavate further and you uncover that those parents were meth heads, and the children were deeply troubled well before the separation.

### Avoid win-lose language

The children win and the children lose depending on their parents’ actions. The parents should not think of themselves winning or losing the case. A child should not have reason to state that “Dad lost”. Use the polite word “successful” in addressing costs.

**Do not denigrate the “ex” or a new partner**

A client once reported that his wife had reported to him that her lawyer had referred to my client’s love interest as “the bimbo”. Use language and demeanor that suggests that both parties are reasonably intelligent human beings who can be reasoned with and should be respected.

**Refer to your friend as “opposite counsel” rather than “opposing counsel”**

Recognize that this small change can make a significant difference. The word “opposing” connotes opposition to everything. The word “opposite” simply connotes that the lawyer is your counterpart.

**Demonstrate respect for the other side**

This goes beyond not denigrating. It means referring to the client and lawyer on the other side with respect. Saying that “I received a letter from Mr. Jones” sounds better than saying “I received a letter from Jones”.

**Never say “With all due respect”**

This is one of the most disrespectful phrases that can be said. If you really respected your friend you would not minimize his or her opinion but instead debate vigorously.

**Soften labels in your affidavits**

Why not refer to “Mr. Smith” or “Sam” instead of repeatedly referring to “The Respondent”? The former certainly make it easier for the Judge to keep track of the players, add a human element, and therefore lower the conflict coefficient. Judges and lawyers should use neutral and respectful language when speaking about children, thus removing the adversarial context, wherever possible. Parents or significant caregivers should be described by name, or by their roles or relationships with the children (mother, father, birth father, stepparent, grandfather), rather than their adversarial positions in litigation or pleadings status under the Rules of Court or Statute (Claimant, Respondent, Defendant, Plaintiff). Children should be referred to by name.

**Buck the adversarial nature of litigation**

Courts by necessity are adversarial in the common law tradition. Concepts like win/lose, right/wrong are built into the system. Any language that perceives difference as an opportunity for growth, an opportunity to learn about another, and facilitates such growth, and the consequent understanding and acceptance of another is going to contribute to peace in society.

**Avoid use of street language, whether in Court or not**

Descriptions such as “She is a drunk, a hooker and she uses crack” are out of order. We have bigger vocabularies and can use more formal language that gets the point across in a more productive manner.

### Avoid sweeping generalizations

These are never accurate (incongruity intended). Avoid sweeping generalizations such as “He never picks the kids up on time.”

### Model the behaviour you preach

Judges and lawyers should interact in a way that provides a pattern for the clients as to how to behave as opposed to how not to behave.

### Judges, respect both genders

During legal education sessions, one occasionally hears hoots of derision aimed at the male segment of the population. Judges and lawyers alike should guard against gender bias. The following is an extensive quote from a lawyer:

I must confess to having developed sensitivity to what appears to be a slightly obvious gender bias with some members of our Courts against men. I have had occasion to see Judges making assumptions about men’s motivation in seeking more time with children as financially motivated, where there was no suggestion even by the mother that such was the case. I have seen Judges denigrate men for not having higher paying jobs, even though they were earning significantly more than the mother, without any appreciable difference in their education or job skill levels.

As an example, I recently was involved in a matter where the father obtained a bilateral custody [assessment] in his favor, [recommending he have] primary care. The mother sought a second opinion. We co-operated, and that report came out in favour of the mother. After reviewing the alternatives, the father agreed to the mother having primary care. However, there was a disagreement regarding costs. Rather than run a trial on the whole issue, the father agreed to resolution of the custody issue, and simply went to a hearing on the costs issue. The decision of the Judge includes this comment:

Nothing in family law practice suggests that a father such as this is a better and more deserving custodial parent, nor are there any facts in this case to support such a conclusion. Common sense might suggest that given the age of the child and the circumstances of these parents, the mother may well have some inherent advantages over the father when a contest such as this arises. Despite that view the mother was forced to defend, what might otherwise be perceived as common sense, through a series of court applications. There was little merit to the father’s applications and they were not directed at any issue save and except his apparent consuming need to ensure a 50/50 split of the child’s time.

Judges and lawyers should use neutral and respectful language when speaking about children, thus removing the adversarial context, wherever possible.

With all respect, these comments ignore the reality of a favorable bilateral custody assessment in first instance by the father, and made it, in the writer's opinion, patently obvious that this Justice felt that this father, seeking a strong part in his child's life, was taking a position "of little merit".

While as a group, men have been the author of their own misfortune in many respects, I feel very strongly that if we wish to create a system which shows respect for persons of each gender, we need to be sensitive not to use language which is indicative of any stereotypes, against men or women. In the absence of a factual basis, we should not assume men are motivated out of greed. Where gender is not relevant, we should use the neutral - i.e. why refer to a father or a mother, when we can say "parent"?

Courts by necessity are adversarial in the common law tradition. Concepts like win/lose, right/wrong are built into the system. Any language that perceives difference as an opportunity for growth, an opportunity to learn about another, and facilitates such growth, and the consequent understanding and acceptance of another is going to contribute to peace in society.

I think we, as family lawyers, are guilty of watching the emperor parading nakedly down the street, yet, we say nothing. We all know that there is a real perception of bias, yet we take no steps to address it affirmatively. Particularly in custody matters, which cut at the core of who we are as parents to our children, I think it is important that men receive acknowledgement as real contributors to their children's lives, as having something valuable and vital to give to their children beyond a portion of their paycheck. That isn't to suggest men should have custody more often. In fact, I think in most cases children are primarily connected to their mother. However, the language of the process could go a long way to assuring that fathers who have a great part of their heart taken away with the loss of primary care of their children are shown some greater sensitivity to that loss, and respect for what it takes to deal with it.

At a LESA seminar a couple years ago, a certain [Judge] was present while a highly respected local psychologist explained why fathers are important to their children. More than a few lawyers I was sitting with were shocked and appalled by a question by [that Judge] to the effect of "so how much 'magic time' with the father do we have to allow?" The question, the demeanor and the attitude making it completely evident what [the Judge] thought of the importance of fathers to their children.

If the court wants to have respect of all litigants, and more importantly, wants to avoid continued bitterness and animosity between parents once resolution occurs, I think it could go a long way to taking some modest steps to articulate respect and understanding for all parents, not just the female ones.

**Judges, don't preach**

Judges, it's fine to encourage parties to settle, but don't preach or chastise them or their lawyers. Leave stern admonishment, insult and finger-wagging to Judge Judy. Give folks credit. If they could settle, they would. That being said, it may be that words of encouragement, or a reminder of the unpredictable nature of trial and costs awards may be enough of a nudge to get everyone back to the negotiating table.

**Judges, be respectful**

If, despite their best efforts, the parties can't settle, and end up in trial before you, show respect. The lawyers have enough to think about without worrying about you barking or being impatient with them. The unsuccessful party is already down enough. They don't deserve to be kicked again by your perhaps well-intentioned but hurtful remarks.

Assistant Chief Judge Victor T.  
Tousignant, Provincial Court of Alberta, Family and Youth Divisions .

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# Access to Justice, Public Interest and Language Rights

*Linda McKay-Panos*

The Supreme Court of Canada recently released *R v Caron*, 2011 SCC 5, which brings together issues of access to justice, language rights and the public interest. The subject matter of the case may appear somewhat dry (whether Mr. Caron could be awarded interim costs for a public interest case before the Alberta Provincial Court). However, this case has potentially significant implications, especially for persons in minority groups.

Mr. Caron was charged with a traffic violation (making an unsafe left turn) and appeared in Alberta Provincial Court. At trial, he challenged the constitutionality of Alberta's failure to enact laws in both English and French. Caron's language rights challenge was originally funded by the Court Challenges Program ("CCP"), a federal program that provided funding for important court cases that advanced language and equality rights under the Constitution. However, the CCP was cancelled in 2006, and Caron could not continue to finance the litigation himself. Because he had launched a constitutional challenge, this involved complex issues, such as the validity of Alberta's *Languages Act*, RSA 2000, c L-6 in light of the *North-West Territories Act*, RSC 1886, c 50, the *Alberta Act*, SC 1905, c 3, existing case law, and unwritten principles of constitutional law (e.g., the protection of

minorities). The original CCP funding was based on making a two-week constitutional argument in Provincial Court in early March, 2006. However, the Alberta Crown sought an adjournment in order to call expert evidence, and while Caron applied for further funding, the CCP had been discontinued and Caron was not able to afford a lawyer, nor to obtain legal aid funding. (It is interesting to note that in response to litigation launched by the Fédération des communautés francophones et acadienne, the federal government reinstated the CCP in 2008 for language rights cases.)

Caron's trial resumed in late 2006, and 30 days were devoted to the Crown's evidence, with an additional three weeks of evidence called by the defence. In November 2006, Judge Wendon of the Alberta Provincial Court ordered the Crown to pay Caron's legal fees and expert witness expenses for the trial continuation, but the Alberta Court of Queen's Bench (Justice R.P. Marceau) quashed this decision (see *R v Caron*, 2007 ABQB 262). Nevertheless, Justice Marceau agreed that the Crown had unconscionably delayed Caron's trial by not appointing counsel in a timely way, which infringed Caron's rights under s. 11(d) of the *Canadian Charter of Rights and Freedoms* ("Charter"). Thus, he upheld the remedy under *Charter* s. 24(1) that addressed the untimely delay by requiring the Crown to reimburse Caron for costs associated with the delay (\$15,949.65). Justice Marceau also held that the Provincial Court had improperly ordered state-funded counsel and expenses under the *Charter*, because the underlying charge was not serious. Justice Marceau relied on an Alberta Court of Appeal decision in *R v Rain*, 1998 ABCA 315 to make this decision. Justice Marceau found that the provincial court also did not have the jurisdiction to order interim costs in the public interest under the SCC decisions of *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 ("Okanagan") and *Little Sisters Book and Art Emporium v Canada*, [2007] 1 SCR 38. Finally, Justice Marceau said that an application for interim costs in a Provincial Court matter could be made directly to the Court of Queen's Bench.

Following the advice given in the ruling of Justice Marceau, Caron applied to the Court of Queen's Bench and was granted an order for interim costs by Justice V.O. Ouellette with respect to expert fees on May 16, 2007 and legal fees on October 19, 2007 (*R v Caron*, 2007 ABQB 632 ("Caron, ABQB").

With regard to Caron's claim for interim costs in the provincial court matter, the precedents indicate that litigation may be funded in very exceptional cases where "it would be contrary to the interests of justice" to deny the application (*Caron*, ABQB at para. 27) and where it is necessary to "mitigate severe inequality between litigants" (*Caron*, ABQB at para. 31). In Caron's case, Justice Ouellette first dealt with two preliminary issues:

- Can one obtain an interim costs award in a quasi-criminal case? and
- Does the Court of Queen's Bench have inherent jurisdiction to order interim costs in cases that are before the Provincial Court?

Mr. Caron was charged with a traffic violation (making an unsafe left turn) and appeared in Alberta Provincial Court. At trial, he challenged the constitutionality of Alberta's failure to enact laws in both English and French.

Justice Ouellette held that the fact that the case was quasi-criminal did not prevent an order for interim costs; the issue was whether the case was a public interest matter that was “special enough to rise to the level where the unusual measure of ordering costs would be appropriate” (*Caron* ABQB, para. 9). Since the real issue at stake was the validity of all of Alberta’s written laws, it was the type of issue that could be a public interest matter and attract an order for interim costs.

Second, Justice Ouellette looked at applicable Alberta statutes (e.g., *Judicature Act*, RSA 2000, c J-2), case law and scholarly opinion and found that the Court of Queen’s Bench had the power to provide assistance to lower courts (e.g., Provincial Court) if that court “does not have equivalent jurisdiction” (*Caron* ABQB, para.

25). Since the Provincial Court did not have the jurisdiction to grant interim costs, the Court of Queen’s Bench did.

Next, Justice Ouellette looked at the criteria from *Okanagan* to see if interim costs can be awarded in public interest cases. They are:

- the party seeking interim costs cannot afford the litigation and there are no other realistic options for litigating the issues;
- the claim is *prima facie* meritorious, and it would be contrary to the interests of justice that it not proceed for financial reasons; and
- the issues must be novel and of public importance.

Applying these criteria to the *Caron* case, Justice Ouellette held that Caron could not afford to completely fund the litigation. Second, the language rights claim appeared to be meritorious as it included legal issues that had not been previously resolved and that the issue of language rights was of sufficient public importance. Justice Ouellette awarded Caron \$91,046.29 in legal fees and disbursements to cover his costs at Provincial Court.

The Crown appealed this case to the Alberta Court of Appeal (*R v Caron*, 2009 ABCA 34). The Alberta Court of Appeal (Justices Keith Ritter, Constance Hunt and Patricia Rowbotham) dismissed the Crown’s appeal, affirming that unconstitutional laws can be challenged in quasi-criminal proceedings, and that interim costs can be ordered in this type of case. The Court of Appeal also agreed that the Court of Queen’s Bench could order interim costs in the circumstances. With respect to the three criteria for granting interim costs from *Okanagan*, the Court of Appeal agreed that the imbalance of resources between the Crown and Caron to litigate the case could result in the case not being fully litigated, and the issue could arise again in the future and have to be re-argued. Second, the claim was *prima facie* meritorious, as by that time Caron had actually succeeded on his claim at provincial court (see: *R c Caron*, 2008 ABPC 232). Finally, although Caron would personally benefit if there was a successful language rights argument in the case, the case could eventually be

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argued before the Supreme Court of Canada and have precedential value that would allow other citizens to rely on it to enforce their language rights. Thus, it was of significant public importance.

Finally, the costs matter arrived at the Supreme Court of Canada, where the Court upheld the decision of the Alberta Court of Appeal. The SCC's decision was unanimous, with a majority judgment written by Justice Ian Binnie, and a concurring judgment by Justice Rosalie Abella. A number of public interest groups, including the Canadian Civil Liberties Association, intervened in the case because they were concerned about further restrictions on interim costs awards in public interest cases.

The Supreme Court of Canada held that lower courts should be permitted to make advance cost orders if (1) the litigation would not be able to proceed if the order were not made; (2) the claim to be adjudicated is meritorious on its face; and (3) the issues raised are greater than the individual interest of the particular litigant, are of public importance and have not been resolved in earlier cases.

Currently, there is concern by lawyers, judges, litigants and public interest groups that increasing numbers of people who have public interest issues are unable to adequately fund their cases, and hence suffer significant lack of access to justice. The Caron case signals a movement towards alleviating that problem, at least in the situation involving official language minority communities. Caron has been said to be an “evolutionary step, but not a revolution” in the area of the exercise of the court’s discretion regarding the award of interim costs (see: J. Koshan, *Interim Costs and Access to Justice at the Supreme Court of Canada* online: <http://ablawg.ca/2011/02/16/interim-costs-and-access-to-justice-at-the-supreme-court-of-canada>). Another important step in the evolution would be the overall reinstatement of the Court Challenges Program. In addition, while it may be particularly worrisome in cases where individuals are unable to exercise their constitutional rights because of lack of funding, there are also cases where private litigants cannot access justice due to lack of funds. This critical situation must also be addressed.

(Around the same time, Mr. Caron launched a complaint to the Alberta Human Rights Commission about language-based discrimination in his former employment with the City of Edmonton. Justice Veit of the Court of Queen’s Bench ordered that the Alberta government pay for interpreter services during a judicial review hearing of the human rights complaint, stating that Caron’s “receptive English is rudimentary, his expressive English is virtually non-existent and the hearing process is relatively complicated” (*Caron v Alberta Human Rights and Citizenship Commission*, 2007 ABQB 525, para. 1. The matter of interpreter services is under appeal to the ABCA, see: *Caron v Alberta (Human Rights and Citizenship Commission)*, 2008 ABCA 272)).

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## 49 A Famous Case Revisited: Eugenics and Leilani Muir

**Peter Bowal and Kelsey Pecson**

"The circumstances of Ms Muir's sterilization were so high-handed and so contemptuous of the statutory authority to effect sterilization, and were undertaken in an atmosphere that so little respected Ms Muir's human dignity that the community's and the court's sense of decency is offended."

Justice Joanne Veit  
Court of Queen's Bench of Alberta



## 60 Aboriginal Law: First Nations Water

**John Edmond**

Kashechewan, the isolated Cree community on the Albany River in northern Ontario is named for the place "where the water flows fast". Unhappily though, in 2005 the water did not flow clean.



## 53 Family Law: What you don't know Can Hurt You

**Rosemarie Boll**

Just as Canada's landscape varies from coast to coast, so do unmarried couples' property rights – and most people don't know what they are. Most people assume they are the same as if they were married. Not so.



## 66 Employment Law: Minimum or Reasonable Notice of Termination

**Peter Bowal and Kimberly Bowal**

Minimum employment standards legislation cannot be bargained away. If the employer gets it wrong and stipulates a notice period below the statutory minimum in an employment contract, a court will toss it out as null and void.



## 57 Not-For-Profit Law: Budget Features Challenging Charity Rules Changes

**Peter Broder**

The March 2011 Budget, which is expected to be re-introduced with the Conservative victory in the May 2<sup>nd</sup> election, featured several important changes to federal regulation of charities and other organizations eligible to issue tax receipts.



## 72 Online Law: "Big C" Conflict

**Marilyn Doyle**

The body of law that aims to deal with issues arising from "big C" Conflict is called International Humanitarian Law (IHL).



This column profiles a famous Canadian case from the past that holds considerable public and human interest and explains what became of the parties and why it matters today.

## Eugenics and Leilani Muir

*Peter Bowal and Kelsey Pecson*

### Introduction

Well into the 1950s, western industrial societies feared that mentally disabled persons would both exhibit little sexual restraint and give birth to (many) mentally disabled offspring. Many jurisdictions enacted legislation for state-imposed sexual sterilization of some of these people. Alberta and British Columbia were two such jurisdictions to do so, in 1928 and 1933 respectively, in a context of moral and civic duty. The United States Supreme Court had written in 1927, in response to a constitutional challenge to similar American legislation, “it is better for all the world if, instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.”

The Alberta legislation was amended in 1937 to enlarge the category of characteristics for which sterilization was appropriate and consent unnecessary. A further amendment in 1942 added diagnoses of syphilis, epilepsy and, though not expressly stipulated in the Act, other conditions believed to be genetically inheritable such as alcoholism, prostitution and sexual promiscuity.

In the 44 years of its existence, 4,785 Albertans were seen and approved for sterilization by the Eugenics Board. By the time the Act was repealed in 1972, the Board sterilized 2,822 individuals. One of these was Leilani Muir. She was sterilized in 1959 at the age of 14 after producing an IQ score of 64. This was six years after her mother committed her to the Provincial Training School for Mental Defectives in Red Deer. She did not learn about the sterilization until around 1980.

She sued the Government of Alberta in 1995, well after the individuals directly involved in her sterilization, including her mother, were dead. Despite the legislation and procedure enjoying massive

public support in 1959, the Alberta government conceded the limitations issue and liability and allowed the compensation issue to be decided by a female judge of similar age to Muir [*Muir v. Alberta*, 1996 CanLII 7287 (QB)].

### The Judicial Decision and its Effect

Eight years before Muir came to court, D.L.W. sued Alberta on the same grounds that she had been sexually sterilized under the authority of the same Act and Eugenics Board when she was a ward of the Department of Child Welfare. D.L.W. was born with cerebral palsy and was in the care of foster parents when she was brought to the same Red Deer institution for the sterilization in 1964.

Although D.L.W. waited only 23 years in comparison to Muir's 36 years, the Alberta government asked the court to dismiss the action because it was brought too late. A procedural motion in 1992 failed to resolve the case in the public domain. D.L.W. either settled her claim with the government or abandoned it.

The decision by the Government of Alberta to waive the limitations defence rendered the *Muir* case extraordinary in that it was decided 36 years later, in a values context and with notions of defendant culpability far outside that which existed at the time the event took place. The *Charter of Rights and Freedoms* had been enacted in 1982. The terms "moron" and "mental defective" in clinical use in 1959 were outdated by 1995, and pain and suffering damage caps had become law. The very idea of state-sponsored sexual sterilization was unimaginably repugnant in 1995.

Justice Veit of the Alberta Court of Queen's Bench in Edmonton reviewed the law at the time of the sterilization and as it was in 1996 when she rendered her decision, to answer both *how* Muir would be compensated and *what* she would be compensated for. The Judge said, "The circumstances of Ms Muir's sterilization were so high-handed and so contemptuous of the statutory authority to effect sterilization, and were undertaken in an atmosphere that so little respected Ms Muir's human dignity that the community's, and the court's sense of decency is offended."

Muir claimed for pain and suffering, aggravated damages and punitive damages relating to the confinement and the sterilization. Justice Veit granted a 1996 present value, with interest, of \$740,780 in total. Neither side launched an appeal for higher court review, a reality which set the *Muir* case up as a strong precedent for other sterilization victims who were still alive.

By March 1998, some 958 people brought claims against the Alberta government for their sterilization and confinement under the Act. On March 10, 1998, Premier Klein introduced Bill 26, the *Institutional Confinement and Sexual Sterilization Compensation Act* which was aimed at invoking section 33 of the *Charter*, the notwithstanding clause, to preclude large and indeterminate public liability for this historical event. Should today's taxpayers have to pay for what government did 40 years ago? Everyone personally involved in the *Muir* case had died before she sued. However, public protest led to the abandonment of this bill soon after it was introduced and the Alberta government negotiated with other claimants.

In the 44 years of its existence, 4,785 Albertans were seen and approved for sterilization by the Eugenics Board. By the time the Act was repealed in 1972, the Board sterilized 2,822 individuals. One of these was Leilani Muir.

Six hundred and thirty-five claimants each received approximately \$100,000 by the end of 1998, and in 1999, the Alberta government created a settlement panel and appointed a judge to arbitrate individual claims and settlements. By November of 1999, 248 other sterilization victims reached a settlement totaling \$82 million.

### What are some other effects of the *Muir* decision?

While *Muir* has been cited in about a dozen other judicial decisions across Canada, it is such an unusual case that most of its value as a precedent has been in relation to determining pain and suffering damages. In a nearly identical case, *D.E. v. BC* (2005 BCCA 134), by a two-to-one decision, the British Columbia Court of Appeal found that nine sterilized plaintiffs were not barred by time to bring their action against three successive hospital superintendents. The Plaintiffs sued the superintendents for abusing their public offices under similar legislation because they recommended these plaintiffs for surgery. There is no public record of whether a trial later took place or whether the case was settled or abandoned.

Forced sexual sterilization of incapacitated persons continues today but only under extreme restrictions. In a similar case from British Columbia, parents applied to have a hysterectomy on their ten-year-old severely mentally disabled girl, to alleviate a physical condition. The Court of Appeal found the girl could not “appreciate the loss of her uterus or the menstrual function” and the procedure was approved as being in her best physical health interests (*K. v. Be*, 1985 BCSC 691). It was not a contraception case as such, although sterilization was an outcome of the medical intervention.

One year later, in the *Eve* case, Justice LaForest said, “It is difficult to imagine a case in which non-therapeutic sterilization could possibly be of benefit to the person on behalf of whom a Court purports to act, let alone one in which that procedure is necessary in his or her best interest.” ([1986] 2 S.C.R. 388). Eve, in her 20s, was extremely mentally delayed and unable to communicate. Yet she was an affectionate person who could be attracted by and to men.

She became close to a mentally disabled man and her mother feared it would lead to unintentional pregnancy, in which case she would inevitably have to raise the child since neither of the two would be emotionally or financially capable of doing so. Eve’s mother was a widow almost 60-years-old. She applied to court in Prince Edward Island for authority for Eve to be sterilized under the *Mental Health Act*. The Supreme Court of Canada observed that Eve’s sterilization was not to improve her health or a medical condition but for the convenience of her mother, and it unanimously denied authority for the sterilization.

Given the strides in human rights and legal recognition of human dignity, general programs of involuntary sterilization

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of mentally disabled persons in Canada ended in the early 1970s. Social engineering of this kind and on this scale has been condemned. Eugenics is seen as a flawed science. Improper assessments and diagnoses made during this program suggest that many of those sterilized were not “defective” in modern understanding. The desire to produce high quality children is not greater than individual rights and interests.

Many articles, books and graduate theses have been developed out of this history, in part to ensure that it is not repeated. Today sterilizations can still be authorized in individual cases but only after intense judicial scrutiny and under specific provisions of guardianship, child welfare, public trustee, mental health and dependent adult legislation.

### Leilani Muir Now

When she started her lawsuit against the Alberta government, Muir was 50 years old and employed as a restaurant server in Victoria, B.C. Shortly after her trial, she participated in a documentary entitled *The Sexual Sterilization of Leilani Muir*. The film detailed her life, the eugenics movement and the Alberta *Sexual Sterilization Act*. Today at 66, Muir speaks publicly of this history from her home in southern Alberta and is working on a book about her case.

Many articles, books and graduate theses have been developed out of this history, in part to ensure that it is not repeated. Today sterilizations can still be authorized in individual cases but only after intense judicial scrutiny and under specific provisions of guardianship, child welfare, public trustee, mental health and dependent adult legislation.

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# What You Don't Know Can Hurt You: Unmarried Couples and Ownership Assumptions

Rosemarie Boll

Just as Canada's landscape varies from coast to coast, so do unmarried couples' property rights – and most people don't know what they are. Many people assume they are the same as if they were married. Not so. Fortunately, in February 2011, the Supreme Court of Canada released the long-awaited decision in *Kerr v. Baranow*,<sup>1</sup> which issued a new roadmap to help common-law couples in most provinces understand their property rights.

Historically, there were two main ways to make a property claim after a common-law relationship ended. The first, called a 'resulting trust,' involved proving a 'common intention' about the property. This meant the couple *intended* that they would both have an interest in the property, even if it was in the name of only one of them. In the *Kerr* case, the Supreme Court did away with this type of "common intention" resulting trust.

The second way was the unjust enrichment/constructive trust remedy. Although it has existed for many years, the *Kerr* case clarified its application in common-law relationships.

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<sup>1</sup> *Kerr v. Baranow* [2011] S.C.J. No. 10 This article is a simplified summary of several complex legal issues.

A successful unjust enrichment claim requires the plaintiff to prove three things:

1. That the defendant was 'enriched' (made wealthier) by something the plaintiff contributed or made possible. Contributions can be money, assets, or services. Services can include labour, household chores, child care, and so on.
2. The plaintiff gave up something, or went without something, which could be specifically linked to those contributions or services, and
3. both these things happened without a valid legal reason. Examples of valid legal reasons are: the plaintiff intended to give the defendant a gift, the plaintiff was required by a contract (such as a cohabitation agreement) to do something, or the plaintiff was required by common-law or statute to do something. By recognizing these valid legal reasons, courts show respect for the freedom of the parties to order their own affairs.

The defendant can oppose the claim, by saying:

- there was no enrichment – for example, everything was lost when the parties went bankrupt, or
- the plaintiff wasn't deprived of anything – for example, the relationship was short and both parties were in the same situations at the end as in the beginning, or their contributions to the relationship had been about equal,
- there was a recognized legal reason (a valid contract, a gift, and so on as above), or
- there was some other reason that made it fair:
  - both parties mutually benefitted, or
  - both parties reasonably or legitimately expected that the defendant would keep the enrichment.

The Court called this type of relationship a 'joint family venture.' There must be a clear link between the plaintiff's contributions and the accumulation of wealth. This happens when the parties are working collaboratively toward common goals – sustaining their relationship, strengthening their well-being, and improving their family life. The wealth they create is the fruit of this domestic and financial relationship and should be shared (although not necessarily equally).

Whether or not the joint family venture exists is a question of fact, and the plaintiff must have enough evidence to prove it. The plaintiff can rely on evidence of:

#### Mutual Effort:

They pooled their effort and teamwork:

- they jointly contributed to a common pool;
- they used their funds entirely for family purposes;
- one partner took on all or a greater proportion of domestic labour; and
- together, they prioritized the overall welfare of the family over their individual interests.

**Economic integration:**

They were interdependent and integrated. They had:

- joint bank accounts, or
- a mutual savings pool.

**Actual Intent (inferred by their conduct):**

They conducted themselves like a joint family venture:

- they accepted their relationship as equivalent to married;
- they publicly held themselves out as married;
- they held property in joint tenancy;
- they both accepted the view that their wealth will be shared;
- there was little concern over accounting for the money spent for joint expenses: household expenses, renovations, taxes, insurance; and
- they had plans to distribute their property on death – for example, they had Wills naming each other as beneficiaries.

**Priority of Family:**

They had an understanding or assumption about a shared future:

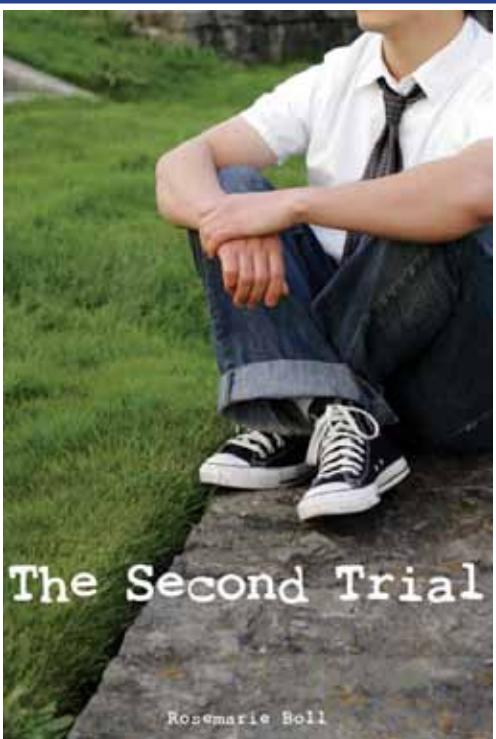
- one person left the workplace for a time to raise children;
- they relocated for the benefit of other partner's career;
- one person sacrificed career or educational advancement for the benefit of the family; and
- one person was under-employed in order to obtain or maintain family and financial balance.

If the plaintiff is successful in proving a joint family venture, then a court will usually give a money judgment – but how much? The Supreme Court made it clear that the plaintiff would *not* be treated like hired help, with a fee-for-services assessment of the claim. It was not to be just a payment back of the amount of money or value of labour the plaintiff put in. That type of minute-by-minute accounting would be impractical, demeaning, and inconsistent with the parties' reasonable expectations. Instead, the claim would be assessed on a 'value survived' approach – how much did the couple's wealth increase during the relationship? In the *Kerr* case, the plaintiff spent four years raising their children and running the household. During this time, their assets increased by \$1.3 million. The plaintiff received 50 percent.

If the plaintiff is successful in proving a joint family venture, then a court will usually give a money judgment – but how much? The Supreme Court made it clear that the plaintiff would not be treated like hired help, with a fee-for-services assessment of the claim. It was not to be just a payment back of the amount of money or value of labour the plaintiff put in.

The *Kerr* case will benefit plaintiffs by clarifying the evidence they need to prove their cases, and by more fairly distributing the accumulated wealth. However, the only sure-fire way to ensure that both parties' intentions are clear and mutually understood is to have a cohabitation agreement. There is no better way to prove a joint family venture than a contract which says that's exactly what it is.

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Rosemarie Boll has been practicing family law for over 20 years and has written extensively on the legal system and how it affects families. She works for the Family Law Office of Legal Aid Alberta.

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# Budget features challenging charity rule changes

*Peter Broder*

The March 2011 Budget, which is expected to be re-introduced with the Conservative victory in the May 2<sup>nd</sup> election, featured several important changes to federal regulation of charities and other organizations eligible to issue tax receipts. The changes extend the powers of the Canada Revenue Agency (CRA) in a number of areas. While the new measures will give CRA the tools to deal with potential abuses, they will also mean a lot more red tape for both organizations and the regulator.

Perhaps the most significant change is introduction of a provision mandating CRA to refuse or revoke registration, or suspend tax-receipting privileges of an entity based on the past conduct of a director or like official of the organization. The legislation allows CRA to consider directors' records of criminal offences involving financial dishonesty (such as tax evasion, theft or fraud) or offences "relevant to the operation" of the organization in making regulatory decisions. It also lets CRA consider past conduct related to non-compliance with the federal regulatory regime governing registered charities or amateur athletic associations, or involvement in illicit gifting arrangements or tax shelters.

Other than under anti-terrorism legislation, CRA's authority over charities generally relates to assessment of a group's purposes, rather than the characteristics of those running the organization. While in the past CRA has sometimes used the nature of a group's proposed or actual activities, or information about the members of its governing body as a means of determining that it does not have

*bona fide* and/or exclusively charitable purposes, it has never had the power to act solely on the basis of past director conduct. The new measure will change that.

Since the *Income Tax Act (ITA)* charity registration regime relies on the common law definition of charity, which gauges the charitability of an entity based solely on its purposes, this marks a major deviation from the historical approach to federal charities regulation. It may be a forerunner to CRA getting involved in overseeing other aspects of charities in future. However, since jurisdiction over charities is divided between the federal and provincial governments – with operational aspects of charities regulated provincially – it is not clear that the new provision is constitutional. The new law could result in a judicial challenge to the limits of CRA's authority.

Even more immediately problematic is the breadth of the provision. Although there is undoubtedly merit (not to mention wide public support) for keeping fraudsters and thieves away from charities, barring anyone who has committed an offence relevant to the organization is open-ended and could include any number of things. The phrase “relevant to the operation of a charity or association” is not defined in the draft legislation released in March, so it will be up to CRA, as the regulator, to determine what it is meant to cover.

As written, the provision potentially poses difficulties for, among others, self-help groups working with addicts or inmates. It is also unclear how CRA will treat directors with a history of a regulatory offence violation, such as breaches of occupational health and safety rules, where the violation might pertain to the work of the organization.

The Budget documentation suggests that this measure is not intended to impose an additional due diligence requirement on entities to do background checks on potential directors. However, in practice it is not clear how this can be avoided, since organizational bylaws may not contemplate a process for removing directors once a problem has been identified. So it will be highly advisable for organizations to keep such people off their boards in the first place.

The provisions also address other issues about which there has been growing concern among charity regulators for some time. As some Registered Canadian Amateur Associations (RCAAs) have been involved in donation tax shelter schemes in recent years, the Budget provisions introduce a requirement that these organizations be constituted and operate exclusively for “the promotion of amateur athletics in Canada on a nation-wide basis”. Previously they had to have this as their primary rather than exclusive purpose.

The proposed legislation would subject RCAAs to the same Intermediate Sanction regime that applies to registered charities under the *ITA*. Again, the intention behind this measure is sound, but raises capacity issues for CRA, which – apparently for resource reasons – has not made significant use of the Intermediate Sanctions since they were put in place in 2004.

Perhaps the most significant change is introduction of a provision mandating CRA to refuse or revoke registration, or suspend tax-receipting privileges of an entity based on the past conduct of a director or like official of the organization.

A third element of changes is the introduction of new rules for Qualified Donees (QDs). QDs are entities – such as RCAAAs, Canadian governments and municipalities, as well as certain overseas charities and agencies – which are eligible to issue tax receipts even though they are not registered charities under the *ITA*. The Budget contemplated that publicly accessible lists of all QDs be created, so potential donors can know what organizations are eligible to issue official tax receipts.

Also proposed was that all QDs be subject to the same receipting rules and books and record requirements as registered charities. The measure would make QDs not adhering to these rules subject to sanctions similar to those applied to registered charities. Without rejecting the value of creating a more seamless and transparent system for treatment of QDs, this initiative will result in a massive new area of responsibility for CRA.

Short of imposing a matching receipting system for charitable donations, it isn't clear how CRA can effectively exercise oversight of the diverse and far-flung entities currently eligible to be QDs. Even that wouldn't address compliance with the Books and Records provisions. And, leaving aside issues of finding non-compliance, enforcement of sanctions against QDs raises a host of jurisdictional and other issues.

Let's hope that, if these measures do re-appear, their nuances are a bit better thought through than they were in March. Especially in the face of expected cutbacks to both government and the sector, this is no time for regulatory overreach.

Although there is undoubtedly merit (not to mention wide public support) for keeping fraudsters and thieves away from charities, barring anyone who has committed an offence relevant to the organization is open-ended and could include any number of things.

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# First Nations Water: Is Regulation the Answer?

*John Edmond*

Kashechewan, the isolated Cree community on the Albany River in northern Ontario, is named for the place “where the water flows fast.” Unhappily, though, in 2005 the water did not flow clean. E. coli had been discovered in the water supply, and over 800 residents needed medical attention for water-related disease. On October 25, the Ontario Minister of Aboriginal Affairs ordered them evacuated. They were taken to Cochrane, Timmins, and other northern centres. There had been a boil-water advisory since 2003, even though the treatment plant was then less than six years old. The plant staff, lacking training, were apparently oblivious to a plugged chlorine injector. For six months prior to the evacuation, Indian Affairs had flown in bottled water. Soon after the evacuation, the federal government promised to relocate the community to higher ground, and build a new treatment plant there. This has yet to happen, but the Kashechewan water system has been made to function.

Kashechewan’s story was only the most notorious of many. In 2001, a survey conducted by the Ontario Clean Water Agency identified 62 First Nations in the province with severe water supply problems. It later described Kashechewan as “a Walkerton in waiting.” Phil Fontaine, then National Chief of the Assembly of First Nations, stated that over 100 First Nation communities in Canada were living under permanent boil-water advisories.

Indian reserves, by virtue of s. 91(24) of the *Constitution Act, 1867*, are under federal jurisdiction. Provincial regulatory water regimes do not apply, and there is no corresponding federal regime. Coincidentally, just prior to the crisis in Kashechewan, the federal Commissioner of the Environment and Sustainable Development in the Office of the Auditor General of Canada had devoted Chapter 5 of her 2005 report to “Drinking Water in First Nations Communities.” She wrote, “When it comes to the safety of drinking water, residents of First Nations communities do not benefit from a level of protection comparable with that of people living off reserves.” She elaborated,

There is no statute or regulation requiring the monitoring of the quality and safety of drinking water in First Nations communities. Health Canada relies on its staff and on First Nations to sample and test drinking water quality. Regular tests at the frequency recommended under the Guidelines for Canadian Drinking Water Quality are not carried out in most First Nations. When the results of these tests are reported to Health Canada, they are not properly recorded; nor are they systematically shared with Indian and Northern Affairs Canada.

Indian Affairs' response in March 2006 was to announce a "Plan of Action for Drinking Water in First Nations Communities," the stated objective of which was "to ensure that all First Nation reserves have access to safe drinking water." In May, the Ministers of Indian Affairs, Health, and the Environment, together with National Chief Fontaine, announced "the creation of a panel of experts that will examine and provide options on the establishment of a regulatory framework to ensure safe drinking water in First Nations communities." A three-member Expert Panel on Safe Drinking Water for First Nations, chaired by former Deputy Minister of Indian Affairs and environmental policy expert Dr. Harry Swain, was convened. It conducted hearings across the country, and reported in November 2006.

The Panel concluded that neither existing federal statutes nor provincial regimes on their own would provide an adequate base for the safe water regulatory framework that was needed. A new federal statute was needed. There were three possible approaches: The statute could itself set out uniform standards; it could simply adopt by reference the regime of the province in which the community was located, or it could enshrine customary law as developed by the community. By "customary law," the Panel apparently envisaged, not a body of existing law, but rather "First Nations working together to develop a base of customary law upon which to construct a regulatory regime." The Panel's preference was for uniform federal standards, yet allowing for "regional flexibility." It concluded that referencing provincial regimes by federal legislation "appears to be the weaker option owing to gaps and variations in those regimes, the complexity of involving another level of government, and the lower acceptability to many First Nations." Complexity and uncertainty also argued against the customary law option. Moreover, regulation is not the whole answer; as Dr. Swain pointed out, "... if we want to see the completion of what has been a fairly considerable national effort to get good water on Indian reserves, then we should worry about the basic resources and then about a regulatory regime." Priorities were a concern; the Panel expressed misgivings at the risk of "diverting" of resources needed to build capacity into "regulatory frameworks and compliance costs."

The Senate decided to wade in. The Standing Committee on Aboriginal Peoples deliberated, and in May 2007 issued a Report entitled "Safe Drinking Water for First Nations." The first of its

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two recommendations was that Indian Affairs conduct an audit of water system facilities and a needs assessment of First Nations communities relative to water. As to regulations, the Committee was critical of Indian Affairs' intention to adopt the Expert Panel's weaker option, adoption by reference of provincial regimes. The Assembly of First Nations protested, "Where First Nations really object is having someone from the province coming onto a First Nation jurisdiction and saying that they will now be enforcing a provincial law. This is a bone of contention that our leadership would have a hard time accepting given this approach." Indian Affairs itself acknowledged, "Much of the provincial legislation currently in place does not necessarily cover some of the issues that we run into in First Nations communities, such as cisterns or water that is trucked in by vehicles and many of the smaller systems." These criticisms led to its second recommendation, that Indian Affairs "undertake a comprehensive consultation process with First Nations communities and organizations regarding legislative options, including those set out in reports of the Expert Panel on Safe Drinking Water and the Assembly of First Nations, with a view to collaboratively developing such legislation." The Committee's conclusion was two-fold, echoing the views of the Panel: Legislation is required, but is only part of the answer; "sustained investment" in both infrastructure and training "is absolutely essential to ensure First Nations people on-reserve enjoy safe drinking water."

In response, Indian Affairs and Health Canada jointly announced a \$330 million "First Nations Water and Wastewater Action Plan" in April 2008. These departments, with Environment Canada, are responsible for Indian reserve water; respectively, for funding and oversight, drinking water quality, and effluent discharge standards. First Nations communities are directly responsible for the design, construction, operation and maintenance of their water systems, and are expected to assume 20% of the costs.

The Action Plan, extended in 2010, is to conclude in 2012. Under the Plan, the national assessment of water and wastewater systems in First Nation communities called for by the Senate Committee is being conducted in all jurisdictions but Nunavut, involving inspection of 1,300 facilities located in 607 First Nation communities. Recommendations are expected to clarify standards by revising the existing drinking water protocol and developing additional protocols for wastewater and small systems.

In the absence of a legislated regulatory regime, two principal documents govern the construction and operation of on-reserve water systems. Already in place from March 2006, the "Design Guidelines for First Nations Water Works" are extremely detailed, constituting essentially a complete code for subjects from feasibility through design and distribution systems. According to

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an Indian Affairs spokesperson, they were largely based on Ontario standards, and were intended to capture best practices, with flexibility to provide for differing situations. These were followed in April 2010 by the *Protocol for Centralised Drinking Water Systems in First Nations Communities*. This provides broad guidance for the roles and responsibilities of “stakeholders,” as well as dealing with “System Design” including code requirements. In the absence of legislation, the *Protocol* requires that “Buildings and infrastructure should comply with the more stringent of either the applicable provincial or federal regulation or codes of practice for all building trades.”

It needs to be asked whether the Commissioner of the Environment and Sustainable Development’s emphasis on the necessity of regulation has led to an undue preoccupation with that solution. Regulation itself is an unlikely panacea; the fiscal and human factors are equally if not more important. Indeed, even without a legislated regime, observance of the Guidelines and the *Protocol*, together with a focus on operational competency, might well put an end to Kashechewans. After all, their system was new; the failure was in its operation: the community simply didn’t seem to know how to run the system. This observation by the Expert Panel is telling:

The most insistent theme we heard from First Nations was that the core problem was inadequacy of resources: mainly in terms of funding to run water and sewage systems, and in many places in terms of long waiting lists for capital funding. To a lesser degree, a shortage of trained people to run systems was a concern, as was the need for better understanding of water system governance at the Chief and Council level.

Since the mid-1990s, Indian Affairs has supported a “Circuit Rider Training Program” by which qualified operators train community system operators on-site, giving hands-on training on the community’s actual equipment. This practical approach is arguably more effective than the passage of regulations. No regulation would have unplugged Kashechewan’s plugged chlorine injector.

In any case, for the longer term, the government proposed a new statute, Bill S-11, the *Safe Drinking Water for First Nations Act*. On May 26, 2010, the bill was introduced in the Senate, reflecting the interest of the Standing Senate Committee on Aboriginal Peoples in the topic. It received second reading in December, but has since died with the dissolution of Parliament in March. This was a government bill, so with the re-election of a Conservative government we can expect the revival of this or a very similar bill in the new Parliament.

The Assembly of First Nations’ 2010 General Assembly demanded that discussion on the bill “be suspended until the estimated full economic impacts ... are identified and presented to Parliament.” In a March 2011 report to First Nation Leaders, National Chief Atleo summarized Chiefs’ concerns:

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- lack of a meaningful role or recognition for First Nations in developing regulations;
- potential interference with constitutionally entrenched Aboriginal and Treaty rights;
- lack of financial provisions in the bill [in fact, money bills must originate in the House of Commons], and general lack of resources; and
- possible transfer of liability to First Nations without corresponding resource commitment.

We cannot know how much will be changed in any new bill in response to these points. The degree of attention paid to the AFN's concerns by a new majority government will be an indicator of its attitude to Aboriginal issues generally. However, if S-11 is to remain the model, it is useful to consider its provisions. The bill achieves flexibility by generality; it is a framework that may be clad with a wide choice of regulations. It offers the possibility of each of the Expert Panel's options: uniform federal standards, adoption by reference of each provincial regime, or enshrining of the community's customary law. Because the bill is drafted as a bare vehicle for future regulations, all options are available. The substance will be contained in the regulations themselves, which may be drafted to suit individual circumstances province-by-province or even First Nation-by-First Nation.

This flexibility is described in the Summary of the bill, which reads as follows:

This enactment addresses health and safety issues on reserve lands and certain other lands by providing for regulations to govern drinking water and waste water treatment in first nations communities. Regulations could be made on a province-by-province basis to mirror existing provincial regulatory regimes, with adaptations to address the circumstances of first nations living on those lands.

Regulations *could* be made in that manner, but need not be. The regulation-making power in the bill is very broad, permitting the Governor-in-Council, on the recommendation of the Minister of Indian Affairs, to "make regulations applicable on first nation lands governing the provision of drinking water and the disposal of waste water." Provincial regulations *may* be made to apply, and may be made to apply only to specific First Nations, or specific First Nations may be exempted. Since, however, the Governor-in-Council is not confined to adopting provincial regulations, the Expert Panel's other options, namely federal standards independent of the provincial ones, and customary standards tailored to particular circumstances of a First Nation, while not expressly mentioned, remain available.

One provision in the bill has attracted criticism from the National Aboriginal Law Section of the Canadian Bar Association. Paragraph 4(1)(r) permits the regulations to "provide for ... the extent to which the regulations may abrogate or derogate from [the] aboriginal and treaty rights" of s. 35 of the *Constitution Act, 1982*. The Section asks, "can Parliament use its legislative power ... to abrogate or derogate unilaterally from [s. 35] rights?" The Section then answers its own question by acknowledging that the justification test set out by the Supreme Court in *R. v. Sparrow* (1990) permits regulation of a s. 35 right. It points out, "There is no mention of the *Sparrow* test in Bill S-11"; however, constitutional protections apply whether mentioned or not. Statutes do not name judicial decisions, but they apply nonetheless. It is by no means clear what issue is contemplated

by this provision; at the same time alarmism is misplaced; that which is unconstitutional will be so found by the courts.

If any new bill is to respond in substance to AFN criticisms, significant delay for consultation can be expected. Even without revision, the provisions of the *Safe Drinking Water for First Nations Act* (if that remains its name) will await proclamation by the Governor-in-Council (i.e., the government will decide when each provision will have effect). Where regulations provide the content of bills, proclamation is typically deferred until the regulations are ready. The Indian Affairs spokesperson was not optimistic about the speed with which this will occur, citing the need for consultation and for development of regulations adapted to suit a wide variety of circumstances. It seems that it will be some time yet before the Commissioner of the Environment and Sustainable Development's concern is addressed, that "no statute or regulation requiring the monitoring of the quality and safety of drinking water in First Nations communities" exists. Provided regulation-making does not absorb all of the available energy, this may not be a bad thing; as the Expert Panel wrote, "The obstacle is seen as inadequate resources, not lack of regulation."

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



# Minimum or Reasonable Notice of Termination?

*Peter Bowal and  
Kimberly Bowal*

## Marek and Gilles

In 1978 Marek and Gilles started work as salesmen for an Ontario car dealership (HOJ), on an ongoing, indefinite basis. By 1985 they had both been promoted to managerial positions and were earning close to \$200,000 (in today's terms) in total compensation which included commissions, allowances, bonuses and salaries. Then, early in 1985, Marek voluntarily signed an "employment contract update" in the following form:

*Termination – Employer may terminate employment at any time without notice for cause.*

*Otherwise, Employer may terminate employment on giving Employee 0 week's notice or salary ...*

Gilles voluntarily signed the same update, except his entitled him to two weeks notice or salary. Six months later both men were dismissed without cause. The employer realized its error and voluntarily paid them each for four weeks as required by the provincial *Employment Standards Act*. This amounted to between \$5300 and \$6400.

What would you do, if anything, if you were Marek and Gilles? Would you sue the employer for wrongful dismissal? Or, would you consider the four weeks pay received as satisfactory, since it was the legislative minimum?

## Minimum or Reasonable Notice for Termination of Employment?

All employees can be summarily dismissed (fired) for serious misconduct. That is a topic on its own, but in this article we merely observe that the courts have raised the bar on misconduct. It is more difficult today for employers to justify firing a worker, especially if the misconduct was a one-time event, if it was not wilful, if it could be related to a disability or other human right protection in any way, and if progressive discipline was not first attempted.

So, even where there is serious misconduct (cause) and always where there is none, dismissals of ongoing employees – that is, without fixed terms of employment – are achieved by giving the employee reasonable working notice of termination or, where the employer is willing to let (or require) the worker leave immediately, to pay salary and benefits for that same notice period. Most wrongful dismissal lawsuits are about the *length of this notice period*, whether worked or paid out. Employees sue because they think that a judge will grant them longer notice.

That there are so many wrongful dismissal lawsuits on the issue of length of notice should be surprising. There are statutes and thousands of judicial decisions over decades and clear principles to guide employers on calculating length of notice.

The first level of compliance is the *minimum notice of termination*. Any notice below what is minimally prescribed will always end in the employer paying notice damages. This minimum notice is set out in provincial employment standards legislation. It is tied directly to length of service. The longer one has worked for an employer, the longer (to a maximum of a few months notice) the notice entitlement. As we saw with Marek and Gilles, the employer was minimally required to give each of them four weeks of working notice or pay in lieu.

Starting dates and termination dates are easy information points for employers to access in order to calculate the service period for each employee. It is simple to take that service period and plug it into the statutory grid to determine the legal minimum notice period. No human resource department of any employer should get this wrong.

Since the minimum notice determination is so simple, it constitutes an excellent strategy for employers of indefinite employees. When someone is hired, the employment contract might state something like, “both employer and employee agree that the employee’s entitlement to reasonable notice of termination without cause shall be as set out in the (applicable provincial) employment standards legislation.”

Minimum employment standards legislation cannot be bargained away. If the employer gets it wrong and stipulates a notice period below the statutory minimum in an employment contract, a court will toss it out as null and void.

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This practice of converting the notice floor to a notice ceiling, while only as generous as the legislators made it, bears a huge human resources and risk-management advantage: certainty. Everyone knows to what notice the departing employee is entitled (which is the stuff of most lawsuits). If the employer wishes to be more generous and, in fact, give more notice or pay in lieu upon actual dismissal, it is free (but not required) to do that. It would be hard to envision a successful wrongful dismissal case where the employer actually gave more notice than legally required and promised in the contract.

The other category of notice is *reasonable notice*, or common law notice. This is invariably more generous than statutorily-prescribed minimum notice. If the employer and employee do not limit the notice entitlement to the statutorily-prescribed minimum notice (they rarely do), reasonable notice becomes the default principle – the common law notice period will automatically apply.

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The courts have listed several criteria to determine common law notice. Some say there is a generally-accepted benchmark of one month of notice for every year worked, applicable between about four and fourteen years, but this has not been officially endorsed. What constitutes reasonable notice will vary with the circumstances of any particular case. The most common list of factors is from the 1960 case of *Bardal v. The Globe and Mail*:

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

## The Legal Issue for Marek and Gilles

These workers' employment contracts stated that they were entitled to less notice than the floor set out in the *Employment Standards Act*. They were paid for the minimum legislative amount of notice upon dismissal. How could they do better than that?

The Ontario *Employment Standards Act* stated that "no employer ... and no employee ... shall contract out of or waive an employment standard and any such contracting out or waiver is void."

Marek and Gilles sued for wrongful dismissal. Their case went all the way to the Supreme Court of Canada [*Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986]. Would the Court respect the implied intentions of the employer and these employees from their contract and actions, which embraced the minimum legislated notice period? By inserting notice period terms in the contract, did both parties consider and evaluate the notice issue and evince a clear intention not to provide for significantly longer common law notice periods? Or, would the Court disregard all expressed intentions of the parties (including what might have been a mistake or oversight on the part of the employer), pronounce their notice clause illegal under the legislation and uphold common law notice requirements as if the parties never thought about or discussed notice?

The difference would be between one month of notice or more than seven months of notice, plus legal fees through three levels of court proceedings, which would amount to several factors more than the damages at stake.

## Outcome

The Supreme Court of Canada drew the distinction between these two different kinds of legal notice, and asked "is an employee entitled to reasonable notice of dismissal, or to the minimum statutory notice period? The answer to this question is of considerable importance to employees."

The Court observed the employer's original restriction on notice fell below the legal minimum:

At least on their face, the two contracts at issue in this case represent attempts to contract out of the minimum notice periods required by the Act. ... of what significance is an attempt to contract out of the minimum notice requirements of the Act?

It then briefly outlined the origins of reasonable notice at common law (references deleted):

The history of the common law principle that a contract for employment for an indefinite period is terminable only if reasonable notice is given is a long and interesting one, going back at least to 1562 and the *Statute of Artificers* ... [which] prohibited employers from dismissing their servants unless sufficient cause had been shown before two justices of the peace. By the middle of the nineteenth century, however, English courts were beginning to imply a term into contracts of employment that the contract could be terminated without cause provided that reasonable notice was given. Although it was initially necessary to prove the incorporation of a custom of termination on reasonable notice into the contract in each particular case, the English courts gradually came to accept reasonable notice as a contractual term to be implied in the absence of evidence to the contrary. In Canada, it

has been established since at least 1936 that employment contracts for an indefinite period require the employer, absent express contractual language to the contrary, to give reasonable notice of an intention to terminate the contract if the dismissal is without cause.

The Supreme Court of Canada decided in favour of Marek and Gilles. The judges struck down the contract clause about notice under the Act. They went on to add that the parties' expressed intention cannot be supported if contracts fail to comply with the minimum standards. In other words, if they were null and void as falling below the legal minimum, these struck clauses were not even admissible as evidence to show the parties' intentions:

the Act sets out what the provincial legislature deems to be fair minimum notice periods. One of the purposes of the Act is to ensure that employees who are discharged are discharged fairly. In the present case, the employer attempted to contract with its employees for notice periods which were less than what the legislature had deemed to be fair minimum notice periods. Given that the employer has attempted, whether deliberately or not, to frustrate the intention of the legislature, it would indeed be perverse to allow the employer to avail itself of legislative provisions intended to protect employees, so as to deny the employees their common law right to reasonable notice.

The Court sought to send a strong message to employers for ignoring minimum statutory protections:

If the only sanction which employers potentially face for failure to comply with the minimum notice periods prescribed by the Act is an order that they minimally comply with the Act, employers will have little incentive to make contracts with their employees that comply with the Act. ... most individual employees are unaware of their legal rights, or unwilling or unable to go to the trouble and expense of having them vindicated.

Employers can rely on the fact that many employees will not challenge contractual notice provisions which are in fact contrary to employment standards legislation. Employers such as the present respondent can contract with their employees for notice periods below the statutory minimum, knowing that only those individual employees who take legal action after they are dismissed will in fact receive the protection of the minimum statutory notice provisions.

Nor, the Supreme Court of Canada concluded, is it too much to ask well-resourced and sophisticated employers to ensure that they properly comply with the law:

[T]his approach provides protection for employees in a manner that does not disproportionately burden employers. ... an employer can readily make contracts with

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his or her employees which referentially incorporate the minimum notice periods set out in the Act ... Such contractual notice provisions would be sufficient to displace the presumption that the contract is terminable without cause only on reasonable notice.

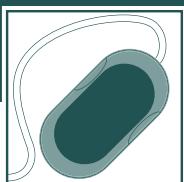
## Conclusion

Employers may legally contract with their ongoing employees to guarantee only the minimum legislative benefits (convert the floor to the ceiling), but they must be careful not to stipulate a lower level of entitlement than which the law prescribes. The Supreme Court of Canada, in *Machtinger* used this case to send the message that it will advance the interests of employees. In many ways, this was a minor, technical, perhaps even accidental error by the employer which it was readily willing to correct by its good faith actions to pay these employees their full legal entitlement.

The judges, nevertheless, consider employees like Marek and Gilles generally less powerful than their employers to enforce their rights. Where explicit minimum compliance with the law is not too much to expect of employers, even a minor written technical breach of the law can have serious consequences for the stronger party. The case also illustrated the primacy of what is written (express terms) over what is intended or suggested by one's actions (implied).

Another important practical lesson point that all employers will be held accountable for not only knowing the law as it relates to the employment relationship, but also where they, in any way, try to improperly deprive employees of their rights.

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# “Big C” Conflict on the Web

*Marilyn Doyle*

Conflict is an integral part of life. Whether between family members, neighbors, people in the workplace or children at school, conflict is familiar to all of us. We could call this “small c” conflict, the conflict we experience in daily life. Many wise teachers have said that until we can learn to effectively deal with interpersonal conflict, world peace will elude us. On the global stage we see “big C” Conflict: armed conflict between nations, between civil war combatants, or between states and so-called non-state belligerents. The body of law that aims to deal with issues arising from “big C” Conflict is called International Humanitarian Law (IHL).

IHL has been defined by the International Committee of the Red Cross (ICRC) as: “a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict.” (Source: Legal Fact Sheet: What is international humanitarian law? [www.icrc.org/eng/resources/documents/legal-fact-sheet/humanitarian-law-factsheet.htm](http://www.icrc.org/eng/resources/documents/legal-fact-sheet/humanitarian-law-factsheet.htm))

The International Committee of the Red Cross (ICRC; [www.icrc.org/eng/index.jsp](http://www.icrc.org/eng/index.jsp)) has been described as the single most important online site for research in IHL. The site, which is available in six languages, has one whole section devoted to “War and Law”. As well, they have an extensive resource centre of publications and films, photos, maps and databases with both “browse by category” and search functions. Their 44-page booklet, “International humanitarian law: answers to your questions” ([www.icrc.org/eng/resources/documents/publication/p0703.htm](http://www.icrc.org/eng/resources/documents/publication/p0703.htm)) provides an introduction to international humanitarian law that is accessible to all readers interested in both the origins and the modern-day application of the law.

For teachers of young people between the ages of 13 and 18, the ICRC has developed an education program with a variety of activities that introduce the basic rules of international humanitarian law. "Exploring Humanitarian Law" (<http://www.ehl.icrc.org/index.php>) aims to teach the values underpinning IHL, such as respect for life and human dignity, and to explore the ethical and humanitarian issues that arise during armed conflict.

For more advanced students, teachers, practitioners and researchers, the American Society of International Law has produced a Guide to Electronic Resources for International Law that includes a section devoted to IHL (<http://www.asil.org/ihl1.cfm>). This is an annotated list of online resources that begins with an introduction describing the parameters of the subject area. Coverage is extensive, including: Geneva Law (covering the treatment of PoWs, detainees, civilians, and humanitarian aid workers), Hague Law (involving regulation of weaponry and the selection of military targets), Primary Sources (Treaties, Case Law, Customary Law, Military Manuals), Leading Institutions, Protection of Cultural Property, Occupation, Military Sites, Secondary Sources (Treatises, Bibliographies, Journals and Yearbooks), Reference and Current Awareness (Research Guides, Institutes and IHL Links, Blogs), Related Topics (Environment, Human Rights and IHL, Refugees, Child Soldiers, Mercenaries and Private Military Companies, Humanitarian Intervention) and the new emerging issues of Drones, Robots and Cyberwarfare.

A central institution related to IHL is the International Criminal Court (ICC). Based in The Hague in the Netherlands, the ICC is the first ever permanent international court and has jurisdiction to prosecute individuals responsible for the most serious crimes of international concern: genocide, crimes against humanity and war crimes. In the "About the Court" section of its website (<http://www.icc-cpi.int/Menus/ICC/About+the+Court/>) a series of FAQs explains the work of the Court. Their Legal Tools Project provides the general public with free access to a virtual library on international criminal law and justice comprised of over 44,000 documents and legal digests. Additionally, criminal jurisdictions, counsel and NGOs that work on core international crimes cases may obtain access to four specialized legal research and reference tools.

For those who like to take advantage of the audiovisual capabilities of the Internet, the following two resources may be of particular interest.

Firstly, the International Human Rights Law Video Library (<http://www.lawvideolibrary.com/hr/index.htm>) has video holdings of interviews with leading commentators and practitioners in the field of international human rights law (for example, an interview with the President of the International Criminal Court), as well as video clips of visits to sites throughout the world relevant to issues of human rights. It is one of the resources of the Human Rights Centre at Queen's University Belfast.

Secondly, the United Nations Audiovisual Library of International Law (<http://untreaty.un.org/cod/avl/index.html>) features a "Lecture Series" on virtually every subject of international law given by leading international law scholars and practitioners from different countries and legal systems. There is also a "Historic Archives" section and a "Research Library" of documents, scholarly writings and research guides.

Blogs are useful for learning about current issues and keeping up with conversations in any field, and IHL is no exception. Here are five examples; their blog rolls will undoubtedly lead you to more. Opinio Juris (<http://opiniojuris.org>) is a forum for informed discussion and lively debate about international law and international relations. Their team of authors holds a wide range of views from across the political spectrum and brings a range of experience from their pre-academic careers in government, private legal practice and the NGO community. Anthony Clark Arend (<http://anthonyclarkarend.com>), Professor of Government and Foreign Service at Georgetown University in Washington, D.C., writes commentary and analysis at the intersection of international law and politics. IntLawGrrls (<http://intlawgrrls.blogspot.com>) is written by women who teach and work in international law, policy and practice. UNDispatch ([www.dispatch.com](http://www.dispatch.com)) is a site providing commentary and coverage on the UN and UN-related issues, with contributions coming from a roster of freelancers. ASIL Insights ([www.asil.org/insights.cfm](http://www.asil.org/insights.cfm)), from the American Society of International Law, provides decision-makers, the general public, and members of the legal profession around the world with brief, balanced accounts and analyses of significant legal developments and newsworthy events involving international law. Insights are accessible, objective non-advocacy pieces written by academics and practitioners to keep the general public informed on international law.

Through these online resources, you can learn about how international humanitarian law serves to contain the effects of “Big C” Conflict as it wreaks havoc around the world.

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