May/June 2018

Dead Hand

International Treaties

Sexual Harassment

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Ghosts in the Legal Machine

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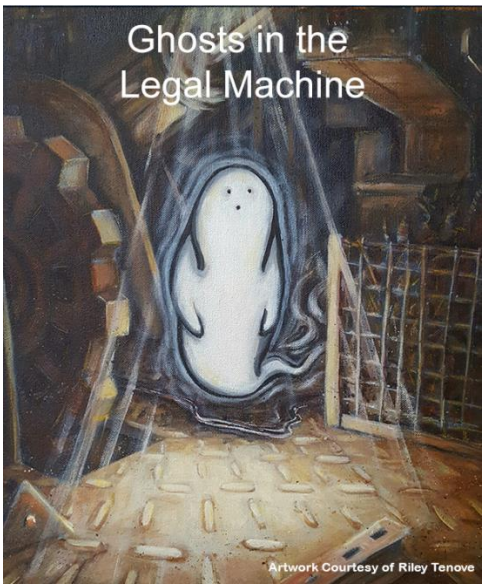

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“Ghosts” in the Criminal Code

By Charles Davison

One of the most highly publicized criminal trials in recent Alberta history ended in the fall of 2016 with a degree of judicial embarrassment. Having broken new ground by allowing the live broadcasting of his decision in the case, the trial judge mistakenly found Travis Vader guilty of the murders of Lyle and Marie McCann using a section of the Criminal Code which had been declared unconstitutional by the Supreme Court of Canada 26 years earlier. Once his error was pointed out by the lawyers, the judge corrected himself and ultimately found Vader guilty of the lesser offences of manslaughter.

This situation gives rise to a number of lingering questions. How could an error such as this be made? How many other situations exist where Parliament has left unconstitutional laws “on the books”, so to speak?

To answer those questions, some background about the legislative and judicial processes involved must be considered.

Parliament is responsible for making our federal laws. Our elected officials in government decide on what policies should be turned into law. Parliament debates and considers the government’s proposals in the course of deciding whether to pass the legislation advanced before it. Once both Houses of Parliament agree and a bill is passed into law, the Governor General gives her assent and the law becomes effective. From the earliest days of Confederation, the criminal law has been within Parliament’s jurisdiction: Parliament decides what acts are to be considered crimes, and what principles govern the enforcement and application of our criminal laws. For the most part, these rules and procedures are outlined in the Criminal Code of Canada.

However, our courts also have a role to play in overseeing the proper enactment and enforcement of Canadian laws. Since Confederation in 1867, judges have been called

upon to review legislation to ensure it is valid. At first, this power was limited to ensuring that laws had been enacted by the proper legislature; that Parliament and the provincial legislatures only enacted laws within their respective areas of jurisdiction, and that neither level of law-maker intruded improperly into an area reserved for the other. As time went by, however, somewhat more substantive reviews of legislation began to take place, until, in 1982 with the passage of the Constitution Act, 1982 – including the Canadian Charter of Rights and Freedoms – courts were given the authority to strike down any law found to be contrary to the basic rights and freedoms of Canadians. Section 24 of the Charter allows individuals who feel their constitutional rights and freedoms have been infringed or denied to apply to a court for a remedy which is "appropriate and just in the circumstances". In addition, Section 52 of the Constitution Act, 1982 states that any law which is contrary to the constitution is "of no force and effect" to the extent of that non-compliance.

In many situations since 1982, when the courts have declared a law to be "of no force and effect" due to not being consistent with the constitution, our lawmakers have acted responsibly by either repealing the law in question or amending it in an effort to bring the offending part(s) into compliance with the constitution. However, for reasons known only to themselves, our elected officials have not always moved to "clean up" legislation which has been struck down, and that brings us to the Vader case and the events of 2016.

Murder is usually defined as the intentional causing of the death of another human being. To be found guilty of murder, an accused must be proven by the Crown to have had the specific intent to kill (or to have deliberately caused such serious bodily harm that death was likely to result, and to have then been reckless about whether the injured person died). However, pursuant to Section 230(a) of the Criminal Code where death takes place while another offence is occurring (or as the culprit attempts to escape once having committed the other offence), the culprit would also be guilty of murder regardless of his actual specific intention (or lack thereof). The other offences in question included robbery, breaking and entering, sexual assault, hijacking an aircraft, kidnapping and hostage taking, prison escape, and arson. In other words, if during a bank robbery or a kidnapping the criminal hurt someone either for the purpose of committing the offence or for making an escape, that person's resulting death would be considered murder regardless of whether or not the robber or kidnapper actually intended that the injured person die.

However, in 1990 the Supreme Court of Canada declared Section 230(a) to be unconstitutional. It is one of the principles of fundamental justice (enshrined in Section 7 of the Charter of Rights), the Court held, that only persons who specifically intend to

kill be found guilty and punished for murder. The stigma and the sentence (mandatory life imprisonment) are both so severe that a finding of murder should only be made where the accused person has been proven to have the actual, specific intent to kill. Anything less than that, and a lesser finding – and conviction for a lesser offence – would be the proper outcome.

Unfortunately, however, Parliament did not see fit to act in response to the Supreme Court's ruling. It neither sought to amend Section 230(a) of the Criminal Code in an effort to ensure Charter compliance, nor did it repeal the provision completely. It simply kept Section 230(a) in the Criminal Code, untouched, despite the Court's declaration that it was invalid (interestingly, a similar, related part of Section 230 was declared unconstitutional in 1987; Parliament then repealed that provision in 1991). Thus, in 2016 when the trial judge was considering the case of Travis Vader, he erroneously considered that Section 230(a) provided a means by which he would find Vader guilty of murder. On the evidence before him he concluded that the deaths of the McCann's had taken place as Vader committed a robbery (the unlawful taking of their property while using or threatening violence) against them. He then relied upon Section 230(a) to make the finding that Travis Vader was guilty of murder of both of the McCann's. (As noted at the outset, once his error was pointed out, and after lawyers on both sides of the case had made further arguments about what should be done in that situation, he rendered a new decision, finding Vader guilty of manslaughter in relation to both deceased.)

Another, "high profile" example of a legal "ghost" which, despite a Supreme Court declaration of invalidity, remains part of the Criminal Code, is the section governing abortions. Section 288 of the Code makes abortions illegal, but provides for exceptions where a therapeutic abortion committee has voted to allow a woman to have an abortion for reasons relating to her own health concerns. However, in 1988 the Supreme Court of Canada struck down this section on the basis that the state – in the form of such committees or otherwise – had no business interfering in what women decided to do with their own bodies. Section 7 of the Charter guarantees to all persons the protection of their bodily integrity subject only to limitations which are consistent with the principles of fundamental justice. A majority of judges on the Supreme Court held that it was an unacceptable intrusion into the equality and personal rights of women for the state to dictate when an individual would be required to carry a fetus to full term, and when an abortion would be allowed. As a result of the declaration of invalidity, access to abortion in Canada was widened immensely, with the growth of free-standing abortion clinics where the procedure is carried out as requested by individual women in private consultation with their personal doctors.

However, despite the 1988 Court ruling, Section 288 remains part of the Criminal Code. In this case, it is perhaps easier to guess about why politicians have not acted: for some, the issue of abortion remains a highly charged, emotional issue, and to remove even an outdated and invalid law purporting to prohibit the procedure likely risks opening too much of a debate for the tastes of most elected officials. The easier, least controversial route is to simply leave things as they are – in other words, allowing the legal absurdity of having an unconstitutional, invalid law remain part of the legislation – and thus avoid the clamoring of interest groups and protestors who might get in the way of any particular politician's – or party's – re-election hopes.

Further examples of provisions which remain part of the Criminal Code despite having been struck down by the Supreme Court is in the area of mandatory minimum sentences. Our highest court has recently declared at least two to be unconstitutional (other courts across the country have made rulings against other provisions as well, but only the Supreme Court of Canada makes decisions which govern the application and administration of the law nationwide). In the first case, in 2015, the Court considered the three year mandatory penitentiary sentence for anyone caught in possession of certain firearms without being licensed and having a registration certificate for the weapon. In the second, in 2016, the Court addressed a one year mandatory minimum jail sentence for anyone convicted of drug trafficking if they had already been convicted of a similar offence within the previous 10 years. In both situations, the Supreme Court held, the mandatory minimums were unconstitutional for possibly imposing punishments which would be "cruel and unusual" (contrary to Section 12 of the Charter of Rights) in at least some cases which might come before the courts from time to time. In the firearms case, the Court noted that the mandatory minimum covered situations as minor as an otherwise law-abiding gun owner who might forget to renew a license or firearms registration. In the drug case, the one year jail sentence would include the situation of a drug addict who simply shares a small amount of her own narcotics with a fellow user out of generosity or compassion. To be clear, the Court did not say such offences should go unpunished; rather the long mandatory jail sentences at least in such hypothetical situations would, it held, shock the conscience of the public, and accordingly, it struck down those sentencing provisions as being contrary to the constitution.

In the case of the mandatory minimum sentencing provisions, the explanation for Parliament's inaction may be how recently the court decisions were made. The consideration, drafting, debating, amending, and ultimately, passage of legislation in Parliament is a slow, time-consuming process at the best of times. It is therefore perhaps not surprising that in this situation, only two or three years since the Supreme Court rulings, Parliament has not yet acted in response. That said, there is no political

benefit to be gained, and much political risk, to be seen as being “soft on crime”; even the repeal of an invalid (but harsh) sentencing provision might therefore be too risky for some politicians. The current Liberal government was elected, after all, on a platform which included reviewing and legislating upon its predecessor’s enactment of many mandatory minimum sentences of imprisonment but we still, almost three years later, have yet to see any legislative action in this direction.

The three examples discussed herein are likely the most prominent illustrations of Parliament’s inaction after findings of invalidity by our highest court. Scattered through the Criminal Code are occasional other examples of similar “zombie” laws. Most would likely be seen as somewhat less serious or significant as the three cases discussed, but all are equally problematic. As the Vader case demonstrated, despite years of education and experience, judges remain as human as the rest of us, and thus, as capable of error as anyone else. As happened in that case, a judge may mistakenly rely upon a provision of law which has already been struck down, where Parliament has left the invalid provision in its legislation.

Parliament owes all of us a duty to keep its legislation current, and this includes acting in a timely fashion to remove or amend provisions of law which have been struck down by the courts. In March, 2017, the government finally introduced legislation before Parliament to address – by repealing – a number of Criminal Code provisions struck down some time ago, including the murder and abortion provisions discussed in this article. However, this is an on-going concern and the efforts of our Parliamentarians must similarly be constant in order not to allow similar situations – where the written laws of Parliament continue to include provisions long ago declared unconstitutional – to develop again in the future.

Ghost Consultants and Canada's Immigration System

By Kari Schroeder

If there's one thing most people – regardless of political stripe – can agree on, it's that 'crooked' consultants are incredibly problematic for Canada's immigration system. Stories abound in the media of unsuspecting immigrants paying thousands of dollars to an unauthorized consultant, only to arrive in Canada to find that the job or college program they were promised does not exist. Newcomers have been counselled to lie or forge documents to enter Canada, or the consultant does that for them without their knowledge. These vulnerable immigrants will often then turn to an immigration lawyer to fix the harm done by these unauthorized immigration representatives. But sometimes it is too late; even the most qualified lawyer cannot reverse the damage and save the person's immigration status. It is likely impossible to count how many vulnerable people have been exploited by these fraudulent activities.

By law, to provide immigration advice as a non-lawyer, one must become licensed as a consultant through the Immigration Consultants of Canada Regulatory Council (ICCRC). The ICCRC is a federally regulated body launched in 2011 to crack down on unauthorized consultants. It sets down rules for consultant conduct and has the power to enact disciplinary measures. However, as a regulatory body, its mandate is limited to the regulation of its own members. It is not authorized to deal with those individuals who are only posing as consultants. In other words, even though the purpose of the ICCRC was to put a stop to the unauthorized provision of immigration services, it was given no real power to do so. Further, members of the ICCRC are not subject to the same strict regulatory rules and oversight as lawyers, even though they engage in the same work for similar and in some cases higher fees. The ICCRC's own guidelines only dictate that fees must be 'fair and reasonable.'

To be fair, there are licensed immigration consultants who do provide legitimate services. Unfortunately, their reputation has been significantly damaged by the

unauthorized work of ghost consultants, particularly those whose cases hit the media. Take some recent examples, such as Alfredo Arrojado, a well-known and respected member of the Filipino community in Winnipeg. A former commissioner with the Manitoba Human Rights Commission, he has been charged with working as an unlicensed immigration consultant, allegedly receiving over $90,000 in fees over the past decade. In another well-known case, a BC man named Xun (Sunny) Wang was convicted in 2015, after taking $10 million in fees to file fraudulent immigration applications. In that case, 800 of his former clients' cases are under review by government authorities. Those people face potential deportation to China. During the height of the Syrian refugee crisis, hundreds of lawyers across the country filed refugee sponsorship applications for Syrian people on a pro bono basis, which seemed to reflect an agreement within the legal community that it was simply the right thing to do. It was later revealed, however, that some consultants were charging refugees fleeing this conflict thousands of dollars to process their applications to come to Canada. In at least one case, the consultant frequently required the refugees to repay the cost of their resettlement funds, which is not only unethical but contrary to immigration law.

Despite the existence of the ICCRC, unauthorized consultants continue to operate in several communities across Canada. It is clear that drastic changes are needed. To that end, the federal government recently formed a committee that was tasked with reviewing the situation and making recommendations for how to overhaul the industry. After weeks of hearings, the committee made 21 recommendations in a report titled "Starting Again: Improving Government Oversight of Immigration Consultants." The recommendations include the following:

- Disbanding the ICCRC entirely in exchange for a new body with an expanded mandate to crack down on unauthorized work.
- More rigorous training for licenced consultants and a blacklist for 'bad' practitioners.
- Increased funding for settlement agencies to better assist newcomers, and more funding to Canada Border Services Agency to enhance resources for investigation and enforcement.
- Significantly raise awareness in foreign markets about unauthorized agents.
- Improve Immigration, Refugees and Citizenship Canada's call centre to provide more in depth information in languages most commonly used by prospective immigrants.

Immigration Minister Ahmed Hussen has indicated that he will review the recommendations and provide a response, but no commitments have been made so far.

While many of the recommendations appear sound, it does beg the question – what will the new regulatory body do that is any different from the ICCRC? If regulation has not worked in the past, will anything change in the future, even with more robust oversight? In its response to the committee's recommendations, the Canadian Bar Association's immigration section has posed these questions. The CBA's position is that despite seven years of ICCRC oversight, the incidents of unauthorized consultant misconduct have not changed substantially. In the opinion of the CBA, "there continue to be serious questions about whether immigration consultants are capable of self-regulation, even with significantly revamped oversight." The CBA recommends that only lawyers be permitted to provide immigration services. It suggests that lawyers could potentially supervise consultants who work as "specialized non-lawyer staff" in law firms, or enter into partnerships with consultants. In any scenario, the CBA's recommendation is that for all immigration services, lawyers maintain control over the entirety of the file and ensure compliance with law society rules.

Is there a place in the world of immigration advising for a regulated, trained consultant? For many, it may come down to a question of dollars and cents. Even if the warning stories in the media have raised some awareness about this issue, the fact remains that many newcomers continue to turn to an immigration consultant instead of a lawyer, due to the belief that a consultant charges much lower fees. In some cases, they may. However, this is not always reflected in practice, as there is no way to regulate how much a licensed consultant charges for services. Further, many clients eventually end up seeking the services of a lawyer, in the end paying double or triple the cost of what may have been required initially.

At the very least, lawyer oversight should be mandatory. There are many complex immigration applications that consultants, even regulated, are simply not trained to do. It is doubtful that a person would seek the services of anyone but a lawyer when facing criminal charges, a hostile marital breakdown or a pending commercial contract. Navigating a person through the process of legally entering and remaining in Canada also requires the work of a legally trained professional.

Loosening the “Dead Hand”: Conditions on Gifts in Wills

By Mandy England

One of the most well-known (if creepy-sounding) metaphors in estates law is the “dead hand”—an attempt by the deceased to continue to control their property after they have died. Estate planning can be difficult, as it can make people face questions that require them to envision themselves as no longer being part of their loved ones’ lives. Perhaps understandably, it can sometimes be difficult for some people to accept that their influence over their loved ones, and over their hard-earned property, might come to an end.

There are times when some continued control is appropriate and useful. For example, a parent might want to set up a trust in her will for her minor children. Often, a parent setting up such a trust will want to delay large payments of money until after the child reaches the age of majority so that the child does not receive a large windfall while he is still relatively young. A parent may hold off on the final payment until the child is in his twenties or thirties. It is also typical to allow the trustee to make smaller payments in the interim, and perhaps to set restrictions on those, such as limiting them to payments for health, education, and support.

However, there are other times that the type of control the testator, the person making the will, wants to apply is more problematic. The testator might want to insert a condition on a gift: that the beneficiary (the person receiving the gift) will only receive it if he acts in a certain way, or conversely that the beneficiary will not receive it if he acts in a certain way. Drafting a will that contains such conditions on gifts can be tricky, as sometimes the law will intervene to loosen the grip of the “dead hand” and find such clauses to be ineffective.

Public Policy

Conditions can be found to be void for public policy reasons. These are conditions that the courts will not enforce because doing so would so be contrary to public values that there could be some social harm in allowing those conditions to be enforced. However, there are limits to the extent to which the courts will apply public policy considerations to private testamentary dispositions, which are gifts of property made in a will. Such circumstances are rare, as such intervention is always balanced against the equally important principle of testamentary freedom and the ability of a property owner to deal with that property in the will as he or she sees fit.

Even though courts strive to protect testamentary freedom, some conditions will fall clearly outside of social values. For example, conditions that would require someone to commit a crime before being entitled to an inheritance will be unenforceable, and the beneficiary would simply receive the gift as though there were no condition. Requiring your child to leave their spouse, who you never liked, before receiving their inheritance will be void for public policy for interfering with a marriage. Similarly, a clause trying to prevent someone from entering into a marriage would be void as well.

If the gift is being left for a public purpose, like funding a scholarship at a university, then conditions on who can benefit from the gift will also be viewed through a public policy lens, although each would be determined on a case-by-case basis. Scholarships frequently have guidelines for who can be chosen as a recipient, and the donor often chooses some of his or her own personal characteristics: perhaps that the winner should be from the same province, or should be a female. However, if the conditions on who can receive the scholarship are clearly set up to be discriminatory, such as a requirement that it cannot be awarded to someone of a certain race or sexual orientation, those conditions are very likely to be found to be void for public policy.

Conditions Subsequent

Another time that a condition on a testamentary gift might not be enforced is if it is a “condition subsequent”—a condition that is sought to be imposed after the gift is already received. This is in contrast to a “condition precedent”, which is a condition that must be fulfilled before the gift is received. If the testator leaves someone a gift absolutely, rather than putting it into a trust, but then tries to impose terms upon what the beneficiary is to do with the gift after they receive it, those terms won’t be enforceable.

For example, suppose the testator makes the following gift to a child who has shown a tendency for get-rich-quick schemes: “I leave $100,000.00 to my son, provided that this money is to be invested conservatively by him.” The latter term would not be enforceable as a “condition subsequent”, and would serve as no more than a

recommendation or preference expressed by the testator. (It is also likely to be found to be too uncertain to enforce, as “investing conservatively” surely means something different to the son than it did to the testator.)

In Terrorem

Another clause that is often asked about is a “no contest” clause. Sometimes, the testator might want to include a clause to the effect of, “If you challenge this will in any way, you will be disinherited.” For example, if the testator has one child who is estranged and intends to treat that child differently than her siblings, then the testator might also be interested in including a clause like this to prevent the estranged child from bringing a will challenge that would be costly and emotionally draining for the other siblings.

A clause like that invokes the in terrorem doctrine: if a threat is imposed for the purpose of preventing the beneficiary from challenging the will, and is otherwise an “idle” threat, then the clause is treated as being void for public policy. The simple clause that a beneficiary receives nothing if he challenges the will would be considered an “idle” threat, as it is simply inserted to prevent the will challenge, and a breach of the condition would forfeit the challenger’s inheritance.

However, the law has developed such that a similar clause that is not “idle” could be enforceable. Inserting a gift-over to specify how the property will be disposed of will prevent the threat from being merely “idle”. A gift-over specifies who else would receive that property, if the first person named as a beneficiary does not receive it. The reason that inserting a gift-over is seen to make a difference is because it elevates the threat from being “idle” and inserted just to coerce the beneficiary to act in a certain way, to being a condition that also possibly fixes a benefit on another person.

Even if a “no contest” clause contains a gift over, it can still be found to be void for public policy. Such a clause cannot try to oust the jurisdiction of the courts entirely, or it would be found to be void. The testator cannot prevent a challenge to the validity of the will for reasons such as undue influence, or prevent interpretive assistance where the will is genuinely unclear. Further, if the testator has dependants, such as a spouse or minor children, those dependants have a right under the Wills and Succession Act to bring a claim for support if they are not adequately provided for under the will. Let’s say that the testator leaves his second wife $10,000.00, divides the rest of his sizeable estate between his adult children, and seeks to preclude his wife from challenging this distribution of his assets. Inserting a “no contest” clause, even if otherwise well-drafted, would not be enforceable to prevent a claim by the wife for support under the dependant relief regime, as it is against public policy to allow someone to avoid their support

obligations (indeed, the very reason dependent relief legislation is there is in case a testator tries to avoid those obligations).

All of which is to say, if a testator would like to include a “no contest” clause, it will take some careful consideration as to whether such a clause could address the testator’s concern, and even if it could, some careful drafting to ensure that it is not found to be void.

Conclusion

The law favours giving people testamentary freedom, and thus generally allowing people to do what they want in their wills. In a properly drafted will, the testator’s concerns and desires can usually be carried out properly and reasonably, such as through a carefully drafted clause or through a trust. However, where the testator’s wishes are clearly contrary to public policy and would not be enforceable for the reasons outlined above, the court will find limits on their ability to try to exercise control after they are gone. For anyone wanting to insert restrictions on a gift in a will, it is important to seek advice about how that might be done. Otherwise, the actual legacy of their “dead hand” may be expensive court applications that find their wishes unenforceable.

The “Drop-Dead” Rule in Civil Litigation

By Cole Lebebvre and John MacKay

Lawyers are required to navigate a myriad of potential issues for their clients during the course of litigation. Clients rely on their lawyers not only to handle highly complex questions of law, but also to address the procedures required to bring their matters before the courts. While these rules of procedure are typically quite routine, they can still cause serious issues for the unprepared.

This articles addresses one such procedural rule: the “drop dead rule”. It will cover what the drop dead rule is and the court’s evolving interpretations of what is required of a litigant who wishes to avoid having the otherwise valid claim dismissed for delay.

First, what is a drop dead rule? The rule exists to ensure that claims are dealt with in a timely manner. This desire for prompt resolution is reflected in Alberta’s Rules of Court, which include two means for the court to dismiss a claim in the event of delay: (1) a discretionary rule, and (2) a mandatory “drop dead” rule. The latter, officially known as “Dismissal for Long Delay”, currently reads as follows:

> *4.33(2) If 3 or more years have passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant, unless […]*

The informal name is quite appropriate; if 3 or more years pass without a significant advance then, on application of the opposing party, the action drops dead.

As such, it is very clear that all one must do to avoid dismissal of one’s court case under the drop dead rule is significantly advance the action at least once every 3 years. If at this point you are asking, “what constitutes a significant advance?” you’re not alone; lawyers find themselves asking this question primarily in two scenarios. The first is when they feel that the action they are defending against has been inactive for quite

some time and they start to wonder if they can get it dismissed. The second scenario could not exist without the first – a lawyer begins to consider this question, quite possibly in a panic, when they are served with an application to have their client's action dismissed pursuant to the rule. Notably, this rule is mandatory as it requires such an action be dismissed instead of simply allowing dismissal. Regardless of the injustice you may have suffered, your case is dead in its tracks.

So what is a significant advance? Courts have considered the meaning of the drop dead rule, but unfortunately, the rule has not always appeared as it does now. While the exact wording has changed, the basic concept has not: after the passing of an amount of time, on application, the court must dismiss an action which has not be sufficiently advanced. However, in the past it was not a "significant advance" that was required, but instead a "material advance." While these phrases appear similar, their interpretations differ.

In 2000, while considering the older version of the drop dead rule, the Alberta Court of Appeal in Morasch v Alberta, 2000 ABCA 24 determined that a completed mandatory procedural step was always an advance towards trial that, even if not material in the strictest sense, would still satisfy the drop dead rule. That is to say, any step that the Rules of Court required was enough to prevent dismissal under the rule. This meant, for example, if the Rules required that an Affidavit of Records be served, then doing so would restart the 3 (or as the case was at the time, 5) year clock. There was no need for the court to "inquire whether the step actually caused the action to advance. The completion of the required step [was] sufficient, in and of itself […]". Things that were not procedural steps could also materially advance the action towards trial, but a determination by the court would be required to determine if the advance was material or not.

However, the Rules of Court changed in 2010 and so too did the approach to applying those rules. This is in large due to a shift in the approach to civil litigation taken by the courts. It is no longer the case that the ultimate goal is to bring an action to trial, but instead to bring it to resolution more broadly, according to the Alberta Court of Appeal and the Supreme Court of Canada.

This new approach is called the Functional Approach, and it better keeps to the foundational principles of the new Rules of Court. While before, mandatory procedural steps would qualify regardless of their effect, now a functional analysis is required to determine if the action was advances significantly.

According to the Alberta Court of Appeal, to perform such an analysis the court "inquires whether the advance in an action moves the lawsuit forward in an essential way considering its nature, value, importance and quality." Whether or not a particular action taken by a party is a significant advance is now always a contextual question; does the action move this specific action towards resolution? Put more simply, it's not about what steps you take, but rather the effect those steps cause: substance over form.

As a result, even steps that are mandatory might not be a significant advance. In the past, an Affidavit of Records, where required, would always constitute a material advance. Now it is necessary to consider the contents of such an Affidavit. Gone are the days when an irresponsible lawyer could save the action by taking a procedurally required, but essentially meaningless step.

It's not all positives though. While the Functional Approach is more in line with the modern principle of civil litigation, the necessity to perform such an analysis can be a burden. The old format of accepting all mandatory steps meant that there was certainty – one could be certain that their actions constituted a material advance. Now, the analysis is heavily based on the individual facts of a given action. A step taken in the course of one litigation may significantly advance the action, but the exact same step in a different case may not.

Many factors must be considered in determining if the step taken in the particular action is a significant advance. For instance, the genuineness and timing of the step are even relevant. If a litigant has every opportunity to take a step, but instead chooses to wait until the 11th hour to do so, the court will take this into consideration when determining if the effect of the step was a significant advance.

Ultimately, clients depend on their lawyers to effectively prosecute their claims and to dispose of actions against them that drag on unreasonably. While not as glamorous as argument on the merits, the answers to questions of procedure are powerful tools toward obtaining favourable outcomes.

Speaking to the Dead: Repealing Laws Against Pretending to Practice Witchcraft

By Kristy Isert

For years, the Criminal Code has been in need of an overhaul.

As the cornerstone of criminal law in Canada, the Criminal Code, is a large piece of federal legislation officially called An Act respecting the Criminal Law that includes the majority of Canada's criminal offences, procedures, and punishments. It has been described by provocative and brilliant Osgoode Hall Law Professor Alan Young as "a patchwork quilt of ancient common-law offences, procedural rules, trivial infractions and contemporary offences created in response to a perceived social crisis" or simply – the "bible". The Criminal Code is intended to be an easy one-stop-shop representing the line where behaviours cross over from acceptable to unacceptable; where unacceptable behaviour warrants punishment by the state which in turn is supposed to discourages these behaviours, bringing the life lesson full circle. In theory, the Criminal Code acts as a guide for our conduct, advising which behaviours must be avoided.

When the criminal law was first incorporated into one piece of legislation in 1892, it copied a significant portion of proposed English law that went before the United Kingdom House of Commons in 1878 but was never passed. Despite several amendments to the Criminal Code over the years, which created new offences to address modern social problems like impaired driving for example, much of the original criminal law has remained. Of course, the world looks very different than it did in 1878 or even 1892 and laws that were created during those times may not make sense anymore. As such, even despite numerous amendments, the Criminal Code could use, at least, moderate work with some legal experts calling for its complete revision.

On June 6, 2017, Bill C-51 was introduced to amend the Criminal Code in several ways. One of which is by repealing outdated sections that are no longer needed because the social problem they sought to address no longer exists or the social problem can be

addressed by another broader provision of the Criminal Code. On December 12, 2017, Bill C-51 received first reading of the Senate. By the end of March 2018, the law still had not been passed, as it continued debate at second reading of the Senate.

One of the outdated sections of the Criminal Code that would be repealed by Bill C-51 is the law against Pretending to Practice Witchcraft, etc under section 365 of the Criminal Code:

> *365. Every one who fraudulently*
>
> *(a) pretends to exercise or to use any kind of witchcraft, sorcery, enchantment or conjuration,*
>
> *(b) undertakes, for a consideration, to tell fortunes, or*
>
> *(c) pretends from his skill in or knowledge of an occult or crafty science to discover where or in what manner anything that is supposed to have been stolen or lost may be found,*
>
> *Is guilty of an offence punishable on summary conviction.*

The origins of section 365 can be traced back to the laws of Great Britain where witchcraft had originally been prohibited outright. The law was later rewritten to prohibit pretending to practice witchcraft which oddly leaves actually practicing witchcraft legal in Canada today. Besides problematically singling out of a particular belief system, the witchcraft provisions have been used to largely target minority cultures and religions. Despite the many years where section 365 of the Criminal Code received very little use (the last reported conviction under section 365 was in Quebec in 1993), charges have been recently lain under this provision to address a growing issue.

In 2009, Vishwantee Persaud was charged with pretending to practice witchcraft after telling a a man that she was from a family of witches and following a tarot card reading, that she was embodying the spirit of his deceased sister and would assist him with his business. The victim provided Persaud with more than $27,000 for unnecessary medical treatments and various business ventures. In August 2010, Persaud plead guilty to four counts of fraud and received a sentence of time served in consideration of the nine months she has already spent in pre-trial custody.

In 2012, Gustavo Valencia Gomez was charged with pretending to practice witchcraft, fraud and possession of the proceeds of a crime after accepting $23,000 to treat an ill

woman who believed she suffered from a curse. The treatments involved bloody egg yolks, lemon oil, and worms. In February 2013, all charges against Gomez were dropped after he returned the $23,000 to his victims.

In February 2017, Murali Muthyalu (AKA “Master Raghav”) advertised astrology and psychic services through the Sri Gayatri Astrological Center. He accepted $101,000 to exorcise an evil spirit from a client’s ill family member. Muthyalu was charged with pretending to practice witchcraft, extortion and fraud. In April 2017, he pled guilty to one count of fraud and was ordered to pay $67,100 in restitution.

Tragically, the victims were preyed upon for their vulnerability and desperation. These examples illustrate the fact that section 365 is not needed to prosecute fraudulent witchcraft-related behaviours. These behaviors can continue to be prosecuted under the general fraud provision of the Criminal Code. As such, repeal of section 365 by Bill C-51 will do very little from a practical perspective. In fact, as a hybrid offence, the general fraud provisions have the potential to result in a greater punishment as opposed to section 365 which is a summary conviction offense potentially punishable by a maximum fine of $5,000 and/or six months in prison.

You might find yourself asking – so what? If repealing section 365 the Criminal Code has no practical impact, what is the point? Are lawyers just making work for themselves, fumbling around in legal jargon? While skeptics might say yes, one must remember that the Criminal Code is only valuable if it accurately reflects the current state of the law and the joint expectations of the public and state such that it can guide the actions of the people. The intent of including all standards of conduct in one piece of legislation, was to create a tool that the public could use to guide their conduct. Or as Alan Young would say – “At least, that’s the dream.”

In its current state, Young stated that the Criminal Code is “an abysmal failure” at guiding conduct, it “has a chaotic structure, vague prohibitions and numerous gaps.” It cannot function as a guide for conduct because regular people cannot understand the rules. In addition to the present challenges, new technologies, experiences, and advancements are changing our perception of the world. Just as the world is not static, neither can the law be. As the public’s ideas about right and wrong shift, our law needs to also shift to reflect changing expectations. In the perfect world, shifting expectations would result in simultaneous changes to the law. In reality, changes to the law often occur many years later.

The Government of Canada has been very clear in its intention – the Criminal Code should only be used when all other methods of achieving social control are insufficient

or inappropriate. Section 365 of the Criminal Code is not needed to achieve social control. It is a lasting oddity, outdated and unnecessary. Similarly, repeal of section 365 is not necessary, and we could continue to largely ignore it. But this approach is what got us into this position in the first place; any steps towards cleaning up the ghosts in the legal machine is a good thing.

Tax Treaties

By Hugh Neilson

The Canadian income tax system can be complex by itself. The complexities expand significantly where the tax systems of other countries are also relevant. Most nations have a network of “Income Tax Conventions”, more often referred to as “Tax Treaties”, to govern the interaction of their tax systems with those of other nations.

But this is Law Now – relating law to life in Canada. Don’t tax treaties really only impact huge, publicly traded multinational corporations? What impact do they have on an average Canadian?

The short answer is “more than you might think”!

Income from Other Countries

Canada is a nation of immigrants. People are more mobile in general in the 21st century than before. Financial planners advise that an investment portfolio needs exposure to foreign markets. Many Canadians have income from foreign countries and rely on one or more treaties in respect of their income tax exposure.

As a general rule, the country from which income is derived, the “source country” has the first right to tax it – most treaties start with this presumption. However, the treaties often cap the tax which can be charged by that source country, and sometimes modify the rules in other ways.

Investment Income

Virtually all tax treaties limit the tax which the source country can collect on investment income. While Canada, as the source country, typically permits the other country’s tax to reduce the Canadian tax otherwise payable on such income, the maximum credit is normally 15%. Treaties typically limit the other country’s tax at, or below, this 15% level.

Many treaties go further and exempt income on investments held by a tax-exempt retirement vehicle from tax in the other country. This allows Canadian pension funds

and Registered Retirement Savings Plans to diversify their portfolios internationally without attracting taxation by the foreign jurisdiction (and vice versa).

Pensions

Treaties also commonly limit foreign tax applied to pensions benefits, again often at a 15% rate.

Many treaties also address amounts which would not be taxable in the source country and require Canada, as the other country, to similarly exempt such receipts from tax. Typically, non-taxable benefits sourced from Canada also will not be taxable in the other country as well.

The treaties often address social security benefits. For example, under our treaty with the United States, 15% of U.S. social security benefits received by a Canadian resident are exempt from Canadian tax, reflecting the United States' tax system, which taxes only a portion of these benefits. Under the treaty, the United States treats Canadian social security benefits, such as the Canada Pension Plan or Old Age Security, in the same manner as U.S. social security, and also exempts any benefits which would be tax-free in Canada from U.S. taxation.

Employment Income

Typically, the income of an individual employed outside Canada is taxable in the foreign jurisdiction. However, this is sometimes modified by a treaty, especially for employees whose services in the other country are limited.

An additional concern often arising for international employees is the potential exposure to the social security systems of both countries. This is not addressed in the treaties, but social security agreements are often negotiated to better co-ordinate the two nation's systems for international workers. Canada has entered into social security agreements with over 50 other countries at this time.

Business Income

Treaties also govern how business income is taxed. Often treaties require that the level of business presence in the other country is increased before the other country may impose taxation. This can simplify the tax situation of residents of one country carrying on limited business activities in the other.

Not Taxable in Canada?

For Canadian tax purposes, treaties override domestic tax law. It is not uncommon for something subject to Canadian taxation under the Income Tax Act to be exempt from

tax under the treaty. This does not mean such items can be ignored for Canadian income tax purposes, however.

Rather, such amounts are required to be reported as income, and a deduction is then claimed in computing taxable income (at Line 256 of a personal income tax return). As a consequence, this tax-exempt income is still included in the computation of "Net Income" and can impact eligibility for various social programs, as well as some other calculations under the Canadian income tax system.

Foreign countries often require filings to assert treaty benefits, with penalties and/or loss of treaty benefits resulting where such filings are not undertaken.

Information Exchange

Discussions of income earned in foreign jurisdictions commonly turns to tax evasion – illegally hiding income offshore. In addition to provisions governing cross-border taxation, treaties typically include provisions on exchange of information. These provisions typically permit the tax administration of the two countries to obtain information from each other's records. Under some treaties, the countries can also undertake collections activities on each other's behalf.

In recent years, Canada (like many other nations) has expanded its treaty network with a new form of international agreement called Tax Information Exchange Agreements ("TIEAs"). Unlike the treaties discussed above, these TIEAs do not typically modify either nation's taxation powers, as they are normally negotiated with countries lacking income taxes. They allow each nation access to financial information from the other, intended to be used to detect and challenge tax avoidance and evasion.

At the time of writing, the Department of Finance listed 23 such agreements in force, two signed but awaiting implementation, and five more under negotiation. Two examples of existing TIEAs are Panama (effective December 6, 2013) and the Isle of Man (effective December 20, 2011). Both countries have received recent media coverage in respect of alleged tax abuses.

Canada, like many countries, has devoted significant resources in recent years to expand investigation of international transactions believed to avoid Canadian taxation. Access to other nations' financial information facilitates such investigations.

Concerns have been raised, however, over the extent to which pursuit of tax enforcement should be allowed to compromise the right to privacy. The United States,

in particular, has taken aggressive steps to access foreign information, resulting in an expanded TIEA between Canada and the United States implemented in 2014.

Negotiation of Treaties

While treaties are negotiated independently by the two countries participating, the Organization for Economic Cooperation and Development ("OECD") suggests standard treaty provisions. Many countries prefer different approaches, so treaties tend to differ in phrasing and in substance, although generally following a common organizational structure.

The OECD has been working to update its standard treaty methodologies to better reflect the modern electronic economy. The present model of business taxation was developed to address mail order businesses a century ago. Its evolution into the internet age is far from complete, a source of concern to many nations.

Treaties are renegotiated at irregular intervals. Those relying on treaty provisions are wise to review the treaty's status annually to ensure it is unchanged. Issues also arise when the tax system in the foreign country is amended, as some treaty provisions depend on the tax treatment of income items in the foreign jurisdiction.

For example, changes to the taxation of social security pensions in Germany significantly changed the income tax obligations of Canadian recipients, both in Germany and in Canada under the Treaty, a matter which has been evolving since 2005 and enjoys its own page on the Canada Revenue Agency ("CRA") website.
Applying the Treaties

Tax matters can be complex at the best of times. An international border can increase complexity dramatically. While treaties are intended to simplify tax matters, "simple" is a relative term, especially in tax matters.

A review of the relevant treaty is important for any Canadian receiving income from a foreign nation. Often, accessing treaty benefits requires filings in the foreign country. For example, many investors have been surprised to receive documents required to assert residency in Canada, and access treaty benefits, commonly for investments in United States securities.

Most investment firms have systems for identifying and accessing treaty benefits on portfolio investments. Failure to complete these forms can result in excessive taxes being withheld by the foreign investee. Recovery of the excess typically requires filings in the foreign jurisdiction, often carrying costs (whether time and research, or

professional fees) disproportionate to the taxes at stake, so double taxation often results.

The CRA commonly reviews claims for foreign taxes on Canadian tax returns, and denies tax relief (credits or deductions) for taxes in excess of the treaty limits.

It is prudent to obtain expert advice prior to committing to income-earning activity in the foreign country to obtain an understanding of the income tax requirements, identify all required filings and avoid unexpected tax costs. Often, this requires coordination of advice from Canadian and foreign advisors. As neither the complexities nor the costs scale down for seemingly minor activities, it is not uncommon for Canadians to decide against pursuing an opportunity or, worse, to later discover that the costs of tax compliance outstrip the benefits of the activity.

As with most tax matters, a proactive approach is strongly advised.

NAFTA in a Nutshell

By Tahira Manji

NAFTA. It's one of the most important agreements in place on the continent. But what's all the fuss about and why has it become such a buzzword?

Since 2016, US President Donald Trump has brought it up regularly, calling for a complete overhaul of the deal, arguing that it's the "worst trade deal maybe ever signed anywhere, but certainly ever signed in this country."

This position has forced Canada and Mexico to come to the table, although with a more tempered attitude, in an effort to modernize the deal.

So here we are, 23 years later, renegotiating arguably one of the most vital agreements amongst the three nations.

But what is NAFTA anyway?

For starters, the North American Free Trade Agreement (NAFTA) is a trade deal between Canada, the United States, and Mexico that first came into effect in 1994. It was signed by Canadian Prime Minister Brian Mulroney, Mexican President Carlos Salinas, and U.S. President George H.W. Bush. NAFTA replaced the Canada-US Trade Agreement, which was signed in 1988. The primary aim of the deal was to govern the exchange of goods and services traded between the three nations by removing most tariffs (taxes) on trade. It also applies to cross-border investment, government contract bids, and dispute resolution procedures.

The rationale in forming the agreement was to encourage trade between the three countries by boosting economic growth by lowering taxes, making goods cheaper, and creating more jobs. And it worked: overall trade among all three countries increased from $290 billion in 1993 to $1.1 trillion in 2016. To put it in context, this trade has resulted in the NAFTA partners representing 28% of the world's gross domestic product in 2016, even though the three countries form only 7% of the world's population.

So why the need for renegotiation?

In short, because of President Trump. The renegotiation of NAFTA was a cornerstone of his presidential campaign and he continues to promise to either make a better agreement or kill the whole thing.

He is not, however, the first American politician to push for reform. Since its inception, there has been American criticism of the deal. Ross Perot, business magnate and former presidential candidate, claimed NAFTA would produce a "giant sucking sound [of jobs] going south" and that America has "wrecked the country with these kind of deals."

From an American perspective, NAFTA did make it easier for US companies to move their businesses to Mexico, where labour is cheaper. The Economic Policy Institute estimates that NAFTA caused 700,000 jobs to move south. However, it is important to note that these manufacturing jobs have been in decline since the 1950s for speculated reasons that include automation and globalization, as many jobs moved to Asia.

On top of that, since NAFTA was signed, while US trade with Mexico and Canada has increased by 470%, the US trade deficit with Canada and Mexico has also increased. While many have argued that this type of deficit is not necessarily a bad thing, Trump has stated that reduction of this deficit is a priority.

While all three countries have taken this renegotiation as an opportunity to push their own improvements forward, the US has taken the most rigid approach, which is in line with Trump's policies.

Some of the proposed changes would impact Canadian industry heavily, and favour American interest.

Increase in American auto manufacturing

Under the current NAFTA rules, vehicles with 62.5% North American content can travel duty-free. The US has proposed that this be increased to 85%, and of that 50% must be American content. This would help the American automobile industry, but at the direct

cost of Canadian auto manufacturers and the Ontario economy. It is estimated that 65% of the province's exports to the US are from the automotive industry.

Removal of agricultural quotas

Trump has also called for the termination of quotas for Canadian dairy, poultry, and eggs. Currently, farmers must obtain a permit or "quota" to determine the amount of dairy products they can produce and sell to processing plants in Canada. This is commonly known as "supply management".

Trump believes the supply management system is unfair as it prevents American companies from flooding the Canadian market. This would severely impact the livelihood of Canadian farmers, who would lose jobs and market competitiveness.

Sunset clause

Both Canada and Mexico have objected strongly to the idea of a sunset clause, which would put a five-year expiry stamp on NAFTA. The countries would have to renew the agreement every five years, greatly reducing its value in the first place as there is always the possibility of one country backing out at the renewal period.

What's next?

Canada, the United States, and Mexico will continue to meet over the coming months in an attempt to come to a consensus on what the new NAFTA will look like. Creative solutions and compromise will be required from all parties in order for this agreement to be saved. Prime Minister Justin Trudeau recently stated, "We will not be pushed into accepting any old deal, and no deal might very well be better for Canada than a bad deal."

Dealing with US Debts in a Canadian Bankruptcy

By J. Doug Hoyes

Given the many Canadians who have business, assets, work or winter in the United States ("US"), it is not uncommon for someone in Canada to owe money to a US lender. If you went to school in the US, you may even have US student debt. How US debts are treated in a bankruptcy if you cannot repay those debts depends on how deeply your other financial arrangements may be tied to the US.

Difference Between US Debt and Canadian Debt

First, we need to understand the difference between a US debt and a Canadian debt in US dollars. If you shop in the US frequently, you may visit your local Canadian bank and apply for a US dollar credit card to use while there. Charges you make on that card are billed in US dollars, and you may even pay them from a Canadian US dollar bank account. In this case, your debt may be in US dollars, but it is a Canadian debt.

Now, let's say that you vacation in Florida for 5 months every year, so you decide to apply for a US department store card there. In this case your US credit card, say from Macy's or Target, is issued by a US lender. Any charges, and balances you carry, on that credit card are US debts. In other words, a US debt is not based on the currency of the debt. A US debt is one issued in the US by a US lending institution.

If you default on a US debt, your account will likely be referred to a collection agency in the US. It is likely they will attempt to collect through phone calls and notices. However, it is very difficult to pursue collection if you are living in Canada. To take stronger action like garnisheeing your wages or freezing a Canadian bank account, they would have to sue you to obtain a judgement in Canadian court. If the debt is large enough, a US creditor or collection agency may be willing to do this, however given the cost, it is unlikely to happen for small debts.

Can US creditors still pursue me if I file for bankruptcy in Canada?

If you file insolvency in Canada, you are granted a stay of proceedings against creditor actions in Canada. Filing a bankruptcy or proposal in Canada means creditors can no longer pursue you for US debts in Canada for that debt. Technically your US debts are included in a bankruptcy or consumer proposal however the debt is only discharged in Canada.

A Canadian Licensed Insolvency Trustee is only licensed to file insolvencies in Canada.

Things get a little more complicated if you have assets in the US or earn income such as wages in the US. In this case, your US creditor can still pursue legal action to collect against your US assets or your US income. It may be necessary, then, to file insolvency in both countries. To file bankruptcy in the US, you must work with a US bankruptcy lawyer. A Canadian Licensed Insolvency Trustee is only licensed to file insolvencies in Canada.

How are Credit Ratings Impacted in Both Countries?

The credit reporting system is not shared between Canada and the US. While Equifax may exist in both countries, they do not share reporting information. Your Canadian bankruptcy or proposal will appear on your Canadian credit report. If you fail to pay US creditors, the default will appear on your US credit report. If you file bankruptcy in the US, this will also only appear on your US credit report.

In summary, if you have cross-border financial arrangements and debts in both countries, you may want to seek the advice of both a US and Canadian insolvency professional.

Why the UN's declaration on Indigenous rights has been slow to implement in Canada

By Stefan Labbé

While a decision on Indigenous participation at the United Nations General Assembly was postponed in Geneva [in July 2017] , some groups in Canada point to a number of ways to move forward on the issue at home.

Independent Indigenous participation at the United Nations General Assembly — a critical application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) — was thrown into uncertainty [earlier in July 2017] after several member states insisted they should be the ones to decide who is "Indigenous."

"Those states — India, China, Russia, Indonesia, Bangladesh, to name a few — are deeply concerned about this because they each have a group they don't want to have an independent voice on the world stage," Sheryl Lightfoot, a Vancouver-based expert on global Indigenous rights, told OpenCanada from the UN's annual Expert Mechanism on the Rights of Indigenous Peoples held in Geneva [in July 2017].

Speaking on behalf of a coalition of Canadian Indigenous and human rights groups — including Amnesty International, the B.C. Assembly of First Nations and the Grand Council of the Crees — Grand Chief Wilton Littlechild chided the opposing bloc for not providing any legal justification for their decision.

“There continues to be an erroneous presumption, by some states, that they each can determine which peoples are Indigenous within their respective states,” Littlechild told the session during its final days.

Opposition to Indigenous enhanced participation contradicts several international agreements, including UNDRIP.

“It’s a challenge to the right of self-identification,” said Paul Joffe, an attorney who represented the Grand Council of the Crees (Eeyou Istchee) in Geneva. ”That’s the way it’s been throughout history: you deny someone their status in order to deny them their rights.”

As implementation of UNDRIP faces a backlash at the international level, Canada has also been struggling to find its footing with what it means at home. And while various groups have been asking for movement on the file since its adoption in 2007, wider awareness of the declaration in Canada has only come about with the focus on reconciliation in recent years.

With that in mind, here’s a primer on what you need to know.

What Is UNDRIP?

After over 20 years of negotiation, the UN adopted the landmark declaration in 2007. The document spells out the minimum individual and collective rights of Indigenous people and covers everything from access to natural resources and land, to self-government and the right to give free, prior and informed consent on any decisions that affect Indigenous lives.

The declaration draws on decades of international human rights law and establishes that the inherent rights of Indigenous peoples are human rights. While the UN declaration doesn’t exist in a legal vacuum — it draws on human rights covenants signed back in the 1970s — it does chart an important Indigenous context for human rights, said Joffe.

When Canada’s Truth and Reconciliation Commission called on all levels of government to implement the declaration in 2014, it sent out a clear message that it should act as a framework for reconciliation with Indigenous people in Canada.

A Troubled Start

Under the Harper government, Ottawa initially rejected the UN declaration along with Australia, New Zealand and the United States. By 2010, the federal government had endorsed UNDRIP as “aspirational” but failed to implement its recommendations.

While Canadian courts have increasingly used international law to interpret and broaden domestic law — including the Charter of Rights and Freedoms — the Harper government said it feared the declaration would lead to an Indigenous “veto” incompatible with Canada’s Constitution and treaty obligations.

While mention of a “veto” does not appear in the declaration, the controversy swirls around the interpretation of “free, prior and informed consent.”

“The obsession with the veto really misses the forest for the trees,” said Brenda Gunn, a fellow with the Centre for International Governance Innovation and a leading Canadian legal expert who has worked to interpret the UN declaration for government, business and Indigenous peoples.

“The government should never be approaching Indigenous peoples with a yes or no question. It’s actually about building new relationships: having Indigenous peoples involved at the very beginning in any project or process where their rights might be affected and sitting there as true partners in helping guide the decision-making process where their views and concerns are heard, taken into account and addressed.”

Public Support, Private Doubt

When the Trudeau government was elected in late 2015, it vowed to reset its relationship with Indigenous people. The government expressed some initial hesitation in backing the declaration. Publicly, that position has changed: Indigenous Affairs Minister Carolyn Bennett announced at the UN in April that the government was officially retracting Canada’s objections to the parts of the declaration that spelled out the right to free, prior and informed consent.

But behind closed doors, many have questioned whether the government is genuine in its commitment to the declaration. In May, Quebec MP Romeo Saganash revealed an email exchange in which Indigenous Affairs deputy minister Hélène Laurendeau told her senior advisor that the government “may not consult specifically on UNDRIP.”

Saganash berated the Liberal government as a “double-headed beast speaking lies out of one mouth and their sleazy intentions out of the other.”

But Lightfoot said the internal dissent should come as no surprise. “The civil service wants to maintain status quo. To them, any sort of big change sounds like a threat. And what UNDRIP does is ask for a whole lot of change. Essentially, it’s asking for a decolonization of the entire system. So there’s some pushback obviously,” she said.

That’s a big problem for the Trudeau government, said Joffe, which after nine years of conservative rule, is facing a bureaucracy instilled with the culture of the former government.

“The bureaucracy is the same bureaucracy. It might change gradually, but it’s one that gives the same Harper perspectives to a large degree,” he said. “They resist government policy.”

Reconciliation with Indigenous people is not something that can be wrapped up in a generation, let alone a single term of government. Without a legislative framework for collaboration, any change in government could bring everything to a halt.

That’s why, in April, Saganash introduced Bill C-262, legislation that is meant to harmonize the UNDRIP with Canadian law. Parliament hasn’t voted on the bill, and earlier this month Trudeau avoided giving it his full support, citing concerns that adopting the declaration word for word would ignore existing Canadian law.

“Indigenous organizations want to hold their nose to the fire a little bit because it’s a lot of talk and not a lot of action,” said Lightfoot. “In law and policy, not much has changed. The speeches are very nice. Thank you. The meetings are very nice. Thank you. But there needs to be movement on a national action plan.”

Resetting The Courts

Gunn is pushing for more radical action through the courts, where she said over 25 years of decisions have limited the scope of section 35 of the 1982 Constitution Act. That’s the part that provides protection to Indigenous treaty rights, including rights to natural resources, land and self-government.

“Implementing the UN declaration is not about fitting the square peg of the UN declaration and all the rights into the existing round hole of section 35 — carving it away to fit in,” she said. “It can’t just be about maintaining the status quo.”

“It has to be about starting a new relationship and actually carving space out within the existing legal landscape to recognize indigenous rights understood according to their own legal traditions.”

For Gunn, implementing the UN declaration will require setting aside some of the earlier court decisions and dreaming much bigger. In a recent report, Gunn and her co-authors lay out what that dream might look like under an UNDRIP framework. By braiding international, Canadian and Indigenous legal systems, Gunn argues that we have a chance to "reset the current relationship between Indigenous peoples and the Crown, moving it toward a nation-to-nation relationship."

Radically reinterpreting existing law isn't without precedent. In 2013, the Supreme Court struck down several prostitution laws, and in 2015 the judges overturned laws that prohibited physician-assisted death.

"We're at a really exciting time now where we have political will to start implementing the UN declaration," said Gunn.

Falling Short On Implementation

As the UN session wrapped up in Geneva [earlier in July 2017], enhanced Indigenous participation was left in limbo — closed door negotiations are expected to continue at UN headquarters in New York, with a "non-resolution" expected to go to the General Assembly in September.

"That is very disappointing for those that wanted action on this now," said Lightfoot, who said enhanced participation won't likely have a chance of passing at the General Assembly for a couple of years. "The upside is that the bloc of states was not able to diminish existing Indigenous rights in the process."

Speaking on behalf of the coalition of Indigenous and human rights groups, Kenneth Deer challenged the Canadian government to live up to its promises and raised the curtain on the agenda for next year's session in Geneva.

"Major development projects continue to be approved without meeting the global criteria for sustainable development or the standard of free, prior and informed consent," said Deer.

Until that next meeting, Indigenous groups continue to draw on UNDRIP to negotiate reconciliation here in Canada.

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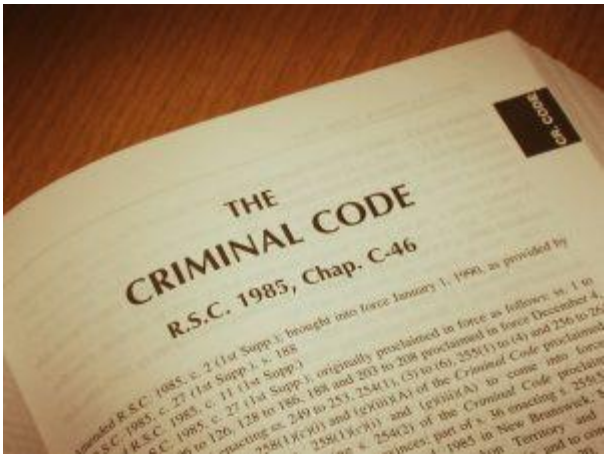
Understanding the Connections Between International Law and Canadian Criminal Law

By Charles Davison



Criminal law usually addresses only incidents and issues arising within our borders, between persons in Canada. However, especially in today's global world, there are a number of ways in which Canada's position internationally – including treaties and agreements made with other countries and organizations – impacts Canadian criminal law. In this article, I will discuss:

- international treaties which might directly impact private individuals within (or with a connection to) Canada;
- our agreements on the world stage which define our obligations in the realm of international criminal law; and
- the impact of international conventions and treaties upon our own laws at home.

The Impact of International Treaties on Private Individuals

"Extradition" is probably the international aspect of criminal law that most people have heard of. Extradition is the process by which a fugitive from the courts of one nation may be removed from another and returned to face allegations in the first. In Canada, we have an Extradition Act which governs the extradition of persons to and from this country and various states listed in the legislation. The other states named in the Extradition Act are mostly other Commonwealth countries, as well as some of the international criminal tribunals such as the International Criminal Court. We have also entered into separate extradition treaties with a number of other governments.

In most situations, extradition of someone from Canada to another country is possible where the offence giving rise to the foreign request is relatively serious and would also be a crime if committed in Canada. The process involves both our federal government

officials and our courts: the Minister of Justice commences the process and brings the matter before a judge, who considers whether the legal test for extradition is satisfied. If the court finds in favour of extradition, the case is sent back to the Minister for the final decision about whether Canada will surrender the individual. Among other considerations, the Minister takes into account the fairness of the judicial process in the other country and the nature of the penalty if the individual is found guilty. In particular, the Minister considers whether the death penalty might be imposed and whether torture or inhumane prison conditions might be involved. If such factors exist, the Minister can refuse to extradite, or can allow extradition only upon receiving assurances from the other country that the death penalty and torture will not be imposed and conditions of confinement will be humane. If extradition is allowed, arrangements are then made to physically remove the person from Canada and transfer him into the custody of the foreign authorities to be dealt with according to law.

A similar process also exists in situations when Canada requests the return of someone in another country to fact justice here. Our government sends the surrender request to the foreign government which processes it in accordance with their laws. If extradition takes place, the fugitive is brought back to Canada to face prosecution in this country. Perhaps the best-known recent extradition case is that of Luka Magnotta, a Canadian who fled to Germany after killing and dismembering another man in Ottawa. He was extradited from Germany back to Canada (he did not oppose this) and was ultimately tried and convicted for murder, and imprisoned accordingly.

Another series of international treaties which directly impact the rights of individuals are our agreements with a number of countries to allow persons imprisoned in a foreign land to be returned to finish their sentences in their homelands. The best known example of this is the Canada-United States treaty, but we have also entered into similar agreements with a number of other nations, including Morocco, Argentina, France, Peru and Thailand. The agreements are reciprocal, which means that Canadians imprisoned in such a country can apply to be transferred to Canada to complete their sentences, and foreign nationals of such a nation can apply to our government to be allowed to return home to complete their punishment. In the treaties, the governments agree to respect and enforce the decisions and sentences originally imposed. The purpose of the treaties is not to allow offenders to avoid or reduce the punishments imposed for wrong-doing, but to allow them the chance to serve their sentences closer to home in an effort to demonstrate humane compassion and mercy.

Most Canadians know of the case of Omar Khadr, the young Canadian man who was held by the United States for many years in the military complex at Guantanamo Bay, Cuba, before being sentenced for offences to which he pleaded guilty. After being

sentenced, Mr. Khadr requested, and was ultimately allowed, to be returned to Canada to finish serving his sentence in this country (he was later granted release on bail pending the conclusion of his various appeals and other legal proceedings).

International Agreements that Govern Our Obligations in International Criminal Law

Canada has also entered into international agreements which outline aspects of international criminal law, mainly governing the laws of war and other armed conflict. In 2000 Canadian law was changed to incorporate and implement our obligations arising upon our adopting the Rome Statute of the International Criminal Court. (This largely formalized and codified what had until then been traditional or conventional international law.) As part of our commitments, Parliament enacted the Crimes against Humanity and War Crimes Act, which now spells out the offences in question: genocide, war crimes, and crimes against humanity – all of these are given detailed definitions in the Rome Statute, and are now adopted into Canadian law. Procedures for the prosecution of offences committed both within and outside of Canada are outlined, and such issues as the responsibility of military commanders and the limitations upon the "defence of superior orders" are clearly defined. A further section of our law also addresses the situations of persons who attempt to interfere with the course of international justice by committing crimes against the process itself (bribery of court officials, lying and fabricating evidence, intimidating witnesses, etc.).

Pursuant to our laws and international commitments, the legislation applies not only to Canadians who are alleged to have committed an international criminal act, but also to any alleged war criminal who is found in Canada. Furthermore, the legislation gives Canadian court's jurisdiction over matters if the victims are Canadian or a citizen of one of our allies. Finally, persons who are alleged to have committed genocide or a war crime and who are citizens of states, or employed by a state, which is engaged in armed conflict against Canada are also subject to prosecution in our courts.

Prosecutions in Canada under this legislation are very rare; in fact, it seems there has thus far been only two, both involving Rwandans who allegedly took part in the 1994 genocide in that country. In 2009, Désiré Munyaneza was convicted in Quebec for crimes defined in this Act and was sentenced to life imprisonment. In 2013, an Ontario court acquitted Jacques Mungwarere because the judge could not be sure the evidence called against him was sufficiently reliable. A number of other cases which might have been brought under the Crimes against Humanity and War Crimes Act have been prosecuted instead under our Criminal Code, which contains provisions also applicable in situations which could amount to war crimes or crimes against humanity.

Impact of International Agreements and Treaties on Canada's Laws

Finally, our international agreements and treaties also can impact the interpretation, application and enforcement of domestic legislation in our own courts and judicial proceedings. Generally, courts interpret Canadian laws in a way which is consistent with our international agreements and treaties.

This is principle is followed mainly in the area of human rights. Shortly after the enactment of the Canadian Charter of Rights and Freedoms in 1982, the courts began to look to international human rights declarations and conventions for guidance in interpreting and giving effect to that new part of our constitution. In one of its first, and most important, decisions about the Charter, the Supreme Court of Canada was called upon to consider what are "the principles of fundamental justice". Section 7 of the Charter protects the "life, liberty and security of person" in Canada, and says that individuals may only be deprived of those interests "in accordance with the principles of fundamental justice". The Court decided that those principles can be determined from the bedrock values underlying our court and judicial systems, including those values which find expression in international agreements and conventions on human rights. If a right or freedom – or similar legal interest – is recognized in international agreements and treaties which Canada has signed or entered, it is more likely to also be considered to be within the realm of the "principles of fundamental justice" when it comes to reviewing Canadian laws for compliance with Section 7 of the Charter of Rights.

From that general proposition, the Court has frequently turned to international human rights treaties and agreements in interpreting the meaning and scope of particular rights and liberties in Canadian law. In 1986, for example, when discussing the meaning and impact of the constitutional enshrinement of the presumption of innocence, the Supreme Court of Canada noted its inclusion in the 1948 Universal Declaration of Human Rights, and in the 1966 International Covenant on Civil and Political Rights. Similarly, when reviewing the constitutionality of some of Canada's laws against hate speech, the Supreme Court cited various international instruments and agreements in support of its conclusion that restricting and punishing racist and discriminatory commentary is a sufficiently important societal objective as to justify the restriction and limitation of a core fundamental freedom (the freedom of speech protected by s. 2 of the Charter). Other areas in which international human rights agreements have been mentioned and referred to are as diverse as labour rights (including the right to strike); the rights of accused persons in criminal proceedings to have the assistance of an interpreter; and the freedom of religion.

International human rights treaties have also been referred to in interpreting more "ordinary" legislation (that is, not only our constitutional laws), sometimes as a result of Parliament's own direction that this should occur. For example, in enacting our Immigration and Refugee Protection Act, Parliament specifically directed that it should be interpreted in a way which best "complies with international human rights instruments to which Canada is signatory". Similarly, in the Preamble to the Youth Criminal Justice Act Parliament specifically noted that "Canada is a party to the United Nations Convention on the Rights of the Child". In such situations – and in many others as well – the courts have looked to those international treaties and agreements to interpret and give meaning to the terms of Canadian laws.

Canada's international agreements and treaties significantly impact individuals, our actions on the global arena and our laws at home. This strong relationship between Canada's laws and international agreements reflects our position on the world stage, and the international influences on everyday life for members of Canadian society.

BenchPress – Vol 42-5

By Aaida Peerani

1. Free the Beer Case

New Brunswick's *Liquor Control Act* limits the amount of alcohol that someone can purchase from another Canadian province and bring back to New Brunswick. In October 2012, Gerard Comeau was charged for trying to bring back 354 bottles of beer and three bottles of liquor, which greatly exceeded the permitted limit. His car was under surveillance for cross-border liquor transport and was intercepted on his way back into New Brunswick.

Mr. Comeau argued that the provincial law is unenforceable and that it violates Section 121 the Constitution Act, 1867 which states:

> *Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.*

At trial, the judge agreed that the provincial law was unenforceable because it created a trade barrier that is not permitted under the Constitution as noted above. The New Brunswick Court of Appeal denied the attorney general of New Brunswick leave to appeal. However, this decision was appealed to the Supreme Court of Canada, which allowed the appeal. The SCC found that the *Liquor Control Act* does not violate the Constitution and is valid law.

In a 9-1 decision, the SCC found that the law's primary purpose was not to restrict trade, but to allow the production, movement, sale and use of alcohol to be supervised within New Brunswick. While Mr. Comeau was originally fined $292.50, the SCC also found that he had to pay the costs of the SCC application, which will surely cost him a lot more than the fine.

R v. Comeau, 2018 SCC 15

2. Legal Aid Ontario on the Hook for Costs for the First Time

For the first time in its history, Legal Aid Ontario has been ordered to pay costs in losing a case it funded. The costs amounted to approximately $385,000.

In *Hunt v. Worrod,* Legal Aid Ontario represented a woman, Kathleen Ann Worrod, against a man named Kim Kevin Hunt and his court-appointed guardians – his two sons.

In June 2011, Mr. Hunt, who was 50 years old at the time, suffered severe and permanent brain injury after an ATV accident. On August 2011, the Office of the Public Guardian and Trustee became Mr. Hunt's statutory guardian after finding that Mr. Hunt was not capable of managing property. He was released home in October 2011 to his two sons after they had received significant training to care for him. The day before he was released, his sons applied to become their father's guardians. Their application was granted sometime later.

Three days after he arrived home from the hospital, Ms. Worrod's uncle picked up Mr. Hunt when his sons were not at home. They did not bring Mr. Hunt's medication, nor did they tell anyone that he was picked up. Ms. Worrod and Mr. Hunt were previously in a relationship and lived together in the same home, but separated after signing a separation agreement. Ms. Worrod's alcoholism and disorderly conduct, which cost Kim at least $25,000 is said to have been the reason for their separation. In the separation agreement. Mr. Hunt paid out Ms. Worrod for her share in the home they shared.

On the same day that Mr. Hunt was picked up, Ms. Worrod had arranged a wedding with only her family present, and with a marriage official who had met with Ms. Worrod and Mr. Hunt for 20 minutes before their wedding. Also, on the same day, his sons were finally able to reach Mr. Hunt by cellphone. He told them that he was going to price out a foundation job (even though he was a landscaper prior to the accident, not a builder and never constructed foundations). Later that day, the police located Mr. Hunt by tracking his credit card purchases, which included a hotel room booking, and took him back to his sons. Even after this incident, the sons invited Ms. Worrod to be involved in caring for Mr. Hunt, but for the two appointments arranged with medical professionals, she came late to the first appointment and did not attend for the second one. Still, Ms. Worrod argued in the case that Mr. Hunt was capable of consenting to the marriage and that, therefore, she is entitled to interest in the home owned by Mr. Hunt, his assets, and his future disability payments.

The Judge found that Mr. Hunt did not have capacity to enter the marriage because:

- he did not understand the nature of the marriage contract and duties flowing from it; and
- he was unable to manage himself and his affairs.

At the time Ms. Worrod and Mr. Hunt got married, he needed 24 hour care, had difficulty walking and remembering things, and could not make decisions or solve problems. The evidence of his condition came from several medical professionals, family members and

friends of both Mr. Hunt and Ms. Worrod, and individuals such as the marriage officiant and a police officer who had previously charged Ms. Worrod for driving while intoxicated.

The Judge also ordered that all contact between Mr. Hunt and Ms. Worrod be prohibited, based on information from the medical professionals who indicated that Mr. Hunt's health was impacted by her.

The Judge, however, wasn't done. He noted that Legal Aid Ontario's support of Ms. Worrod was an abuse of process that wasted judicial resources and hurt the public interest. He found that Mr. Hunt's family had to spend hundreds of thousands of dollars needlessly. Ms. Worrod did not pay anything for the $25,000 it cost Legal Aid Ontario to support her case. However, Mr. Hunt and his guardians had to pay for specialized lawyers who did the "heavy lifting" of proving the case.

The Judge called the case "meritless", something that he said Legal Aid Ontario would have known prior to trial. For example, Legal Aid Ontario would have known that Mr. Hunt was a "vulnerable person", because when they put a lien on Mr. Hunt's home, the Office of the Public Guardian and Trustee had already registered a certificate on title giving it the sole authority to transfer or sell Mr. Hunt's home. Legal Aid Ontario also paid for an expert report which showed that Mr. Hunt was intellectually incapable for making independent decisions.

The costs of the case, that Legal Aid Ontario and Ms. Worrod would have to share is $385,000. The Court noted that although these costs were reasonable, Ms. Worrod would be unlikely to pay because she works at a Tim Horton's and has no assets. A news report noted that the Judge called this a "predatory marriage".

Hunt v. Worrod, 2017 ONSC 7397

3. Fido's Folly

The Alberta Court of Appeal ("ABCA") heard an appeal from a woman, Karen Stefanyk who sued Sobeys, First Capital (Eastview) Corporation, and a dog owner for an injury outside a Sobeys store.

Ms. Stefanyk argued that while she was walking on a sidewalk beside a Sobeys, which Sobeys did not own, a dog that was tied to a bicycle rack startled her. The dog had lunged at her, while still tied, causing her to step back and trip over the edge of the sidewalk. She stated that some Sobeys garbage containers had blocked the dog's presence so she did not see him. She suffered injuries to her head, back and wrists.

The case was dismissed at Masters Chambers. Ms. Stefanyk appealed at Justice Chambers, where the parties wanted the case to proceed by summary judgment. This is where a decision is made based on the documents and not a trial. Justice Chambers decided that a trial was necessary. At the ABCA, the Court decided that a summary judgement could be made, because there were no significant issues of credibility or facts in dispute. Second the ABCA found that Sobeys was an occupier of the sidewalk because even though Sobeys did not own the sidewalk, it had some control over it.

However, the ABCA also decided that Sobeys was not negligent because it was not directly responsible for the dog, the dog did not cause any other problems for Sobeys to anticipate its behaviour, and Sobeys is not expected to ban all dogs from its premises. As a result, the action was dismissed.

Stefanyk v Sobeys Capital Incorporated, 2018 ABCA 125

4. Rent and Renovictions in Vancouver

The cost of renting or purchasing a home in Vancouver is known to be unaffordable for many locals. In one case at the British Columbia Supreme Court ("BCSC"), a tenant, won a case against her landlord, Aarti Investments Inc., for trying to evict her to obtain higher rents. The BCSC overturned the decision of the Residential Tenancy Branch ("RTB").

Ms. Baumann has been living in the same one bedroom apartment building for 17 years. In December 2014, several other tenants wrote a letter to the landlord about maintenance and repair issues. About six months later, the landlord applied to increase the rent for all tenants. Ms. Baumann's rent would have increased 64% from $730 to $1200.

The landlord stated that the rent was increased to conduct renovations. Several tradespeople inspected Ms. Baumann's suite and found numerous issues. Shortly after, the landlord's insurance company advised that if certain issues were not address, the landlord's insurance coverage would be lost.

In July 2017, the landlord sent Ms. Baumann a two-month eviction notice on the grounds that it had all the permits and approvals to renovate or repair the unit. They needed the unit to be vacant to do the renovations. These are being called "renovictions".

Ms. Baumann challenged their argument by stating that not all the permits for the proposed work were obtained by the time of her eviction, and therefore, vacant possession was not necessary. She also argued that the two-month eviction notice was not in good faith and that the landlord wants to end the current tenancies, including hers, to increase rents in the property. At the RTB, Ms. Baumann lost her argument.

The BCSC found the decision of the RTB was “openly, evidently, and clearly unreasonable”. The Court sent the matter back to the RTB for reconsideration.

The Court noted that the RTB did not consider Ms. Baumann’s compromise to move out of the premises during the repairs and pay for that expense herself. The Court found that terminating the tenancy is permitted where it is the only way to ensure the repairs occur. The Court also found that the Evict Notice should not have been issued because permits for only some, not all, of the work were obtained.

Baumann v. Aarti Investments Ltd., 2018 BCSC 636

5. Lifetime Registry of Repeat Sex Offenders in Ontario

In this case, the Ontario Court of Appeal was requested to consider whether a Criminal Code law, which requires a sex offender convicted in Ontario to be registered for life with the Province of Ontario, is constitutional. The sex offender in this case, Richard Long, was convicted of three sexual assaults that occurred on the same day to the same woman who was hired through a program for people with learning disabilities. He was the victim’s employer. Long put his hand under the woman’s bra to touch her breast for about a minute and then left. He returned to touch her breast again and started kissing her. Finally, when she went to the basement at her place of work to get something, he undid her shirt and kiss her again. After that day, the victim never returned to work.

At trial, Long argued that the woman consented. However, because she had disabilities, she could not consent. In addition, he preyed on her as he was in a position of trust as her employer, he was found guilty. The trial judge sentenced him to serve 9- days, probation for 2 years and be registered as a sex offender for life.

Long appealed the decision to the summary conviction appeal judge. All of his claims were dismissed. Long then appealed to the ONCA, on the grounds that the sex offender registration violates his *Charter* rights. The ONCA found that the provision was not arbitrary, overbroad or grossly disproportionate. In doing so, the Court provided many reasons. Some but not all include:

- It helps police services investigate crimes of a sexual nature;
- Ensures public safety by registering for sex offenders who have convicted more than offence and are at an higher risk of re-offending
- Long can apply to terminate the order (and therefore, the registration) after 20 years
- The fact that Mr. Long committed three offences on the same day to the same person shows that he was persistent and impulsive, which means he has a higher risk of re-offending
- The lifetime registration only has a modest impact on Long's liberty.

In the end, the ONCA dismissed Mr. Long's Appeal.

R v. Long, 2018 ONCA 282

New & Updated Resources at CPLEA

By Aaida Peerani

LawNow has created a Department called New Resources at CPLEA, which is now a permanent addition to each issue. Each post will highlight what's new, updated/revised or popular at CPLEA. All resources are free and available for download. We hope that this will raise awareness of the many resources that CPLEA produces to further our commitment to public legal education in Alberta. For a listing of all CPLEA resources go to: www.cplea.ca/publications

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Domestic Violence Toolkit for Landlords

This toolkit has been designed for landlords, property managers and anyone else who works on-site or has access to residential rental units.

The kit includes:

- information on how to help prevent domestic violence;
- what to do if it does happen;
- a list of services tenants can call for help;
- a list of agencies to contact for more information about domestic violence; and
- a list of resources that will help you learn more about domestic violence.

The Toolkit is available on the following websites: www.cplea.ca, www.landlordandtenant.org, and www.willownet.ca

Being a Guarantor

Being a guarantor is a big responsibility and can have serious consequences. This recently updated booklet published by the Centre for Public Legal Education Alberta addresses how important it is to understand exactly what you are getting yourself into and what the impact of signing the agreement may be.

Click here to view “Being a Guarantor”.

For a listing of all CPLEA publications see: www.cplea.ca/publications/

No Legal Training, No Problem! Go Forth and Represent your Family in Provincial Court for Free

By Melody Izadi

Access to Justice is always a live and relevant issue: people with limited financial means are at risk to not having legal representation compared to those who can easily afford it. Legal Aid alleviates some financial pressure off impoverished accused in Criminal Court, however, unless the Crown is seeking a jail sentence, it is nearly impossible to have assistance from Legal Aid to fund a defence. That means an accused must represent themselves, or, pay out of pocket for a lawyer. And if paying out of pocket for a lawyer is not possible, the accused has no other choice but to defend themselves against the power and resources of the State and Police.

However, Legal Aid does not assist those that are accused of offences under the Provincial Offences Act, like careless driving. So an accused must represent themselves or hire a lawyer or paralegal to assist them by paying out of pocket. Thankfully, in a well-reasoned decision, the Ontario Court of Appeal in R. v. Allahyar 138 O.R. (3d) 233 has held that family members or friends, can represent the defendant in Provincial Court (with regards to Part I offences under the Provincial Offences Act) despite the fact that the individual does not have any legal training whatsoever:

> *Questions of competence must be addressed having regard to the context. Specialized training is not necessarily required before an unpaid family member or friend can represent an accused or defendant in a provincial offence appeal before the O.C.J. Attending court can be difficult and intimidating for an accused at any level of court. Having a friend or family member attend and assist can be invaluable and is consistent with ensuring access to justice.*

Mr. Allahyar's mother tongue was not English, and the Court found that his brother-in-law, Mr. Miazad was competent and diligent in assisting Mr. Allahyar in all of the court proceedings. Mr. Allahyar was charged with speeding contrary to Highway Traffic Act,

and ultimately, the Court of Appeal stayed the charges against Mr. Allahyar in it's decision (he was not convicted).

At the first level of appeal after the Provincial Court, the Ontario Court of Justice, the appeal judge explicitly cited concerns about non-legally trained individuals litigating in court and stated:

> *I'm not going to hear the matter with Mr. Miazad as agent for the appellant. At an appeal level, one would hope that [at] a minimum there's an agent and that's not Miazad's situation. I'm becoming more and more concerned about individuals representing individuals in criminal or quasi-criminal or Provincial Offences Act matters that aren't properly trained. It's inappropriate, in my view, for the court to permit Mr. Miazad to represent the applicant on this appeal.*

However, the Court of Appeal held that the appeal judge made an error in law when he disqualified Mr. Miazad from representing Mr. Allahyar because he failed to consider if the proper administration of justice was protected when Mr. Allahyar's choice of representative was prohibited.

While the Court of Appeal still holds that each case must be assessed on a case-by-case basis, the decision serves as an important consideration of access to justice issues that are prevalent in all levels of court, even for speeding tickets. While the flood gates are not open for any and all family members or friends to assist a defendant, the Court of Appeal has strongly endorsed the possibility of non-legally trained representation for individuals charged under Part I of the Provincial Offences Act. This decision gives everyone who's charged a notable alternative to traditional legal representation.

Many lawyers will express concern about a free and fair market for services rendered (because, despite the stigma, we have to make a living too). However, the critics that argue against an option for defendants to be represented by non-legally trained individuals fail to realize that many people simply cannot afford to hire a lawyer under any circumstance. In addition, lawyers' and even some paralegals' fees often total more than what an individual would be fined for pleading guilty to a Part I Provincial Offences Act offence at the outset— which of course fails to make sense to many people who have limited financial means. When it comes to legal representation and when an individual's rights', well-being, life and freedoms are at issue, the impact of access to justice on the capitalist market should be of little concern to all. Simply put, when justice prevails, we are all winners.

Who Makes the Law of Work in Canada?

By Peter Bowal

Introduction

Canada is a large country with several levels of government and different law-making authorities. Constitutionally, Canada is a federal country, which means it is organized under two levels of government: national and provincial. It is also jointly governed by legislatures and courts. This article attempts to answer the basic question of who makes the law of work in Canada.

The use of the term “law of work” is intended to be broadly encompassing. Technically, labour law is the unionized collective dimension of work law and employment law generally refers to individual employees who are not covered by a collective agreement.

Moreover, there is an array of work-related legislation at both levels of government that regulates matters such as minimum employment standards, workers’ compensation, taxation, privacy, labour relations, pensions and benefits, occupational health and safety, and human rights. When this is combined with the judge-made common law principles affecting employment relationships, we are left with the expansive conception that today is known as “the law of work”.

Federal Versus Provincial Control Over Work

Where a country – such as the United Kingdom – is structured under only one level of government, the law of work is just one of the full range of subject matters for law-making by a sovereign state. So in the United Kingdom, Westminster enacts the law on every aspect of life that it chooses to regulate, and for the whole country. It delegates some local law-making authority to cities and borough councils, but all plenary power and jurisdiction is found at one national level of government.

Federalism describes countries operating under two levels of government. From the beginning, the Canada’s Constitution assigned to each of these levels of government the power to legislate in respect of certain subjects. For example, the federal level might have power over national defence and the post office. The provincial or state level might

have power over roads and schools. There may be some overlap or concurrent jurisdiction such as criminal law, environment and taxation.

In Canada, the law of work is definitively located in the provincial domain. Some 94% of all Canadian workers are under provincial law and jurisdiction. The remaining 6% of workers, about 900,000 in number, work for about 18,000 federally regulated industries and businesses. These include federal Crown corporations, the federal public service, and First Nations. It embraces employers in telecommunications, railways, roads, pipelines and bridges that cross a provincial or international border, aeronautics, banking and shipping. Even among this cluster, by far most federally regulated employees work in the federal public service across the country.

Accordingly, the Canadian Human Rights Act and the Canada Labour Code – which regulates industrial relations, occupational health and safety and wages, hours and holidays – apply only to this 6% of people who work for a federally-regulated industry. That explains why, by way of illustration, the federally-regulated flight attendant will enjoy different equality protections and union processes than the provincially-regulated school teacher. It explains why the letter carrier employed by Canada Post will deliver the mail on the provincial holidays that do not exist at the federal level (eg. Family Day and Heritage Day) and will rest on a federal holiday that is not a provincial holiday (such as Boxing Day).

Therefore, most workers in Canada, about 94%, will be covered by provincial law. While the provincial level of government is the same, provincial laws, such as minimum wages, leaves and payroll taxes, are similar but not the same across the country. Employers must apply provincial statutory variations according to where the workers are located.

Employment insurance was found to be under provincial jurisdiction in the Unemployment Insurance Reference, a decision of the English Privy Council in 1937. Three years later, the provinces unanimously agreed to delegate power over employment insurance to the federal government by inserting it as section 91(2A) to the list of federal powers in the Constitution Act, 1867.

The Charter of Rights and Freedoms contains rights to expression, conscience, religious beliefs, association, equality and others. These rights have been applied to work in the public sector. All government-related employers across Canada are bound to ensure these rights are granted to their workers.

By way of comparison, Canada's allocation of legislative jurisdiction over work to the provinces is consistent to the approach in the United States where most workers are regulated at the state level. In Australia, however, the federal government exercises most of the legislative jurisdiction over workers.

Statutory Regulation Versus Common Law Regulation

We have just seen that, in Canada, the provincial governments have primary legislative authority over the work relationship. While these provincial governments have diligently legislated in respect of the work relationship, they choose not to – and cannot possibly – regulate every aspect of work.

The gaps in regulation of work are filled by the judges. In addition to interpreting and applying legislation, judges create and develop common law principles where there is no legislation. They apply these principles to the facts of the cases that come through the courts. For example, they set out the principles and tests of whether a work scenario such as the Uber driver is an employment (contract of services) or an independent contract (contract for services) where the rights and obligations of the parties are very different.

The judges determine the principles of cause for dismissal, reasonable notice of dismissal where there is no cause, what constitutes bargaining in bad faith, the interpretation and enforceability of non-competition agreements, and what is sufficient mitigation of damages on the part of a dismissed employee. They consider whether the standards of progressive discipline have been met, whether a worker was constructively dismissed, and whether the duty to accommodate a worker has been met – to name some of the common law principles that supplement the legislative regulation of the work relationship.

The common law of work is developed by the judges where no legislation exists. It is a large body of law – found in judicial decisions over the years – that compares to statutory regulation in importance. Where a new work element emerges, such as the growth of unpaid internships, judges invariably will be faced with conflicts between parties. To answer these disputes, judges will turn to any applicable legislation. If there is none, they will craft their own workable principle(s) which will become part of the common law. If the legislature is not content with these common law principles, it can over-ride them with its own legislation but it must do so in a way that complies with the Charter of Rights.

Enforcement of Family Law Orders When Parents Live in Different Places: Part 1

By Sarah Dargatz

Generally, Alberta court orders are only enforceable in Alberta. And, generally, Alberta judges can only grant family law orders about people who reside in Alberta. However, families are mobile and many relocate from province to province or even from country to country. Therefore, Alberta has entered into agreements with the other Canadian provinces and territories, and with many other countries, to recognize, enforce, and change each other's family law orders. Agreements or orders that have effect across political boundaries are usually referred to as "interjurisdictional".

In Part 1, we will discuss the Interjurisdictional Support Orders Act. In the following Part 2, the Extra-Provincial Enforcement of Custody Orders Act and the Hague Convention will be explored.

The Interjurisdictional Support Orders Act ("ISOA") applies to situations where one party lives in Alberta, the other party lives in a "reciprocating jurisdiction" and a child support or partner/spousal support order is sought.

The "reciprocating jurisdictions" are provinces, states, or countries that have matching legislation and will follow the same process as in Alberta. These include all the provinces and territories of Canada, the United States of America, Australia, the United Kingdom, and several others. A list of these regions is set out in a schedule to the accompanying Regulations.

Let's use an example where a parent, who lives in Alberta, wants to bring an application for child support order against the other parent, who lives in Ontario. To bring an application for a new order or vary an existing support order, the parent who lives in Alberta would bring the application to court in Alberta using the required forms. (Depending on the rules of the reciprocating jurisdiction, an Alberta judge may make a provisional order, meaning the order is not actually effective until it is confirmed.) The application (and the provisional order, if one is granted) is then sent to the court in

Ontario. The Ontario court will contact the other parent and let them know an application has been made. A judge in Ontario will review the application, take evidence from the other parent and will either grant a support order, grant an interim support order, confirm the provisional order granted in Alberta, refuse to grant or confirm the support order, or send it back to Alberta more evidence.

The same process applies, in reverse, for applications that are brought in a reciprocating jurisdiction and forwarded to Alberta for confirmation.

This process allows parties to address support issues without having to agree on a jurisdiction or to travel. The process can be quite slow and can take several months, or even over a year, to resolve. If a party wants to deal with a support issue quickly, they have the option to simply agree to bring the application in the other party's home jurisdiction. In our example, the parent who wants support could hire a lawyer in Ontario and have them bring the application there.

A similar process to vary the child support terms of a Divorce Judgment where parties live in different provinces is set out in sections 18-20.1 of the Divorce Act of Canada. In this case, a judge will grant a provisional order in the province where the person applying to change the support order lives. The provisional order will then be sent to the province where the parent who is responding to the change lives to be confirmed, confirmed with a variation, or refused to be confirmed.

The Alberta Government's website has detailed instructions on how to make an application under the ISOA.

Alberta will also enforce support orders granted in reciprocating jurisdictions and vice versa. Extra-provincial or foreign orders can be registered with a clerk of the court and then sent to the Maintenance Enforcement Program. The enforcement programs of both jurisdictions will cooperate to ensure support is paid.

If one party believes a foreign order should not be enforced in Alberta, they can apply to the court for a determination. The court may not allow the registration if the judge believes:

- the other party did not have proper notice or a reasonable opportunity to be heard in the foreign court when the order was made;
- if the foreign order is contrary to public policy in Alberta; or
- the foreign court did not have the jurisdiction to grant the order.

In cases where the other party lives in a country that is not a reciprocating jurisdiction, a party who wants to obtain or enforce support order should seek legal advice from a lawyer in that country who will likely have to bring a court application in that country.

Omar Khadr.1

By Peter Bowal

"That when a government violates a Canadian, any Canadian's fundamental rights, and allows them to be tortured, there are consequences and we all must pay . . . the question is what the Government of Canada did or didn't do and that as a deterrent, as taking responsibility, and that as actually avoiding what could have been a $40-million payout at the end of the day was why we made that decision [to pay Omar Khadr $10.5 million]."

PM Justin Trudeau, response at public meeting, January 9, 2018

Introduction

In early July 2017, the Government of Canada announced a settlement payment of $10.5 million and apology to accused murderer and terrorist Omar Khadr. In Parliament, the Prime Minister defended the payment and apology on the basis "that a Canadian government violated a Canadian's fundamental rights."

Many Canadians wondered what rights of Khadr were violated that would warrant a $10.5 (or $40) million pay day.

There are actually several Khadr judicial decisions from the Supreme Court of Canada. This article describes the first decision where the question was a threshold one: whether Khadr actually enjoyed rights under the Charter of Rights and Freedoms. The next article will refer to the follow-up judicial decision.

Facts

The specific international obligation in issue here was the 1949 Geneva Convention. It allows prisoners to challenge their detention (habeas corpus). Prisoners at Guantanamo Bay were not permitted to do this, which corrupted the entire process.

The whole Khadr story is long and detailed. Only the basic context is necessary here. Canadian-born Khadr was accused of killing an American soldier in Afghanistan. He

was captured and imprisoned at Guantanamo Bay by the United States in July 2002. The next year, Canadian intelligence officials interviewed Khadr in custody about the charges and shared the information with the Americans. In themselves, the interviews and sharing probably amounted to nothing.

After Khadr was formally charged by the Americans in late 2005, he asked the Canadian government for its videotape and other records of these interviews. The principle is called disclosure and is based on the 1991 case called Stinchcombe, which has been recently discussed in this LawNow column. Canada refused to give Khadr disclosure. This was not disclosure of evidence that could catch Khadr by surprise or complicate (or assist) his defence. It was a request for the physical record of evidence of which he was well aware.

Unusual Case

Now, this was a highly atypical case. Khadr's connection to Canada was tenuous. He and his family had spent much time outside of Canada. He was a child fighting against the American coalition. He had killed an American which he admitted to, and then later denied. He was in American custody in sovereign foreign territory, charged with serious American crimes and he was being processed by American authorities. His loyalties to Canada were unknown. Canada had obligations under international law to co-operate with international coalition partners in terrorism investigations.

The Stinchcombe duty of disclosure applied to prosecutions under Canadian law. No one knew how it could apply in a case such as this one. Khadr had been present at the interviews so it could not be said that he did not know what he was asked and answered. Still, he was young at the time. A record of what he told the Canadian interviewers was hardly thought to be the most critically precious evidence with which to defend himself against the American crimes. Indeed, the unusual disclosure request to receive the record of his own questioning might be considered a technical ploy.

The reach of the Charter of Rights was not clearly established in Canadian law at this point. Normally, one had to be on Canadian territory to assert Charter rights, and Canadian authorities operating outside of Canada were thought not to be bound by the Charter. In the 2007 case of Hape, the Supreme Court of Canada held that Canadian agents investigating money laundering in the Carribean were not bound by the Charter. This was consistent with both the American position and international law that prevents countries from enforcing their domestic laws extraterritorially. Another principle of "comity" calls on Canadian officials to follow the laws and procedures of the foreign country in which they are operating.

The trial judge agreed with the Crown that disclosure was not required in this case.

The Supreme Court of Canada Decision

In an uncharacteristically terse decision, the Supreme Court concluded that Khadr was entitled to Charter protection, and his right to "life, liberty and security of the person" was denied because he had not received videos and transcripts of his interrogations by Canadian officials. There was no analysis how the failure to disclose had any impact on Khadr's liberty.

There are actually several Khadr judicial decisions from the Supreme Court of Canada. The Court said this case was an exception to Hape because, well, Canada should have known better than to trust the Americans at Guantanamo Bay. Canada should have known that the Americans were acting "contrary to Canada's international obligations", which preserve a higher, more noble platform "of international law and fundamental human rights" [para 18].

The specific international obligation in issue here was the 1949 Geneva Convention. It allows prisoners to challenge their detention (habeas corpus). Prisoners at Guantanamo Bay were not permitted to do this, which corrupted the entire process.

To put it another way, "if Canada was participating in a process that was violative of Canada's binding obligations under international law, the Charter applies to the extent of that participation" [para 19]. When Canada passed the transcripts and video footage to the US, it violated its international human rights obligations. As a consequence, the Charter applied to protect Khadr and he had been improperly denied this nominal disclosure under his section 7 right to liberty.

If Canada had not interviewed Khadr in the first place, there would have been no records to disclose, no participation in an international law-flawed process, no application of the Charter of Rights to Khadr, and no Charter breach in his case.

Conclusion

Many Canadians wondered what rights of Khadr were violated that would warrant a $10.5 (or $40) million pay day.

As it did in 2001 when it refused the extradition of Canadians accused of multiple murders on American soil unless Canadian and international sensibilities against the death penalty were first indulged, the Supreme Court of Canada has claimed moral superiority. It has again whacked American law and its legal system under American territorial jurisdiction.

The case for Stinchcombe disclosure of the interview records to Khadr here is arguably feeble in several ways. The consequences of this nominal breach would ordinarily be in the order of negligible to nominal to minimal. It is not a loss of anything in the order of $10.5 million.

The door, however, was thrown open by the Supreme Court of Canada. From Ottawa, Khadr was granted Charter protection to his cell in Guantanamo Bay.

Surely he can identify and assert some other Charter claim?

Sexual Harassment and Sexual Assault in the Workplace: Is this Something New?

By Linda McKay-Panos

There has been a great deal of attention in the media lately about allegations of sexual assault and sexual harassment in the workplace. The current "#MeToo Movement" was thought to have started after public accusations of sexual misconduct by former American film producer Harvey Weinstein. The hashtag #MeToo actually developed from the term "Me Too" coined by American civil rights activist, Tarana Burke, who had used the term since 2006 to raise awareness about sexual abuse and sexual assault in. In October 2017, when after allegations were made against Harvey Weinstein, actress Alyssa Milano encouraged social media users to tweet #MeToo (or its equivalent in other languages) widely in order to raise awareness about the prevalence of sexual harassment and sexual assault.

The #MeToo Movement in the United States has been followed by allegations against public figures in many countries, including Canada. For example, Michel Brûlé, a mayoral candidate for Plateau-Mont-Royal, Quebec, dropped out of an election due to several allegations of sexual abuse made by women. In January 2018, allegations of sexual misconduct ended the tenure of Progressive Conservative leaders in Ontario and Nova Scotia. This was followed by Federal Minister Kent Hehr's resignation from the Federal Cabinet amid allegations of sexual harassment that had occurred during his time in office in Alberta's provincial legislature. All of the current attention in media and social media is focused on public figures who are accused of sexual harassment and/or sexual assault and not on every day figures.

Are sexual harassment and sexual assault in the workplace a new phenomena? Hardly. These are not just experienced in public life or in Hollywood. They occur in all workplaces. Sexual harassment was first legally recognized as a form of gender (sex) discrimination under human rights law in the Supreme Court of Canada decision of Janzen v Platy Enterprises Ltd., [1989] 1 SCR 1252. Further, sexual assault (or a similar offence) has been a crime since Canada incorporated British law into our own Criminal Code in 1892 (Criminal Code, SC 1892, c29). This is not to say that the crime

of sexual assault has not needed to be amended to reflect feminist and other concerns. For example, in the 1980s, the offence of “rape” (a man having sexual intercourse with a woman who was not his wife) was changed significantly to the broader “sexual assault”, and no longer excluded males or wives as potential victims of the crime of sexual assault.

What has long been a struggle for all people experiencing both sexual assault and sexual harassment is that many victims do not report the crime or the discrimination (sexual harassment) to their supervisors, human rights bodies or the police. There are many good reasons for this, which desperately need to be addressed. Statistics Canada noted in 2014 that sexual assault is “one of the most underreported crimes” in a report by Shana Conroy and Adam Cotter. Their report shows that in 2014, for example, there were approximately 636,000 self-reported incidents of sexual assault in Canada—compared to 20,735 police-reported incidents of sexual assault in the same time period.

There has been research that indicates that the reasons for underreporting sexual assault include (Conroy and Cotter):

- Shame, guilt and stigma of sexual victimization;
- Normalization of inappropriate and unwanted sexual behaviour; and
- The perception that sexual violence does not warrant reporting.

Clearly, the vast majority of sexual assault victims are women and nearly half of all sexual assault incidents are women aged 15 to 24, according to the Conroy and Cotter report. Also, more than one in five Aboriginal women report(s) being sexually assaulted. Conroy and Cotter also found that the risk of sexual assault is also increased for people with mental disabilities or mental health issues, those who have substance abuse issues, those who are single, people who are performing activities, such as work, socializing, meetings etc. in the evening, students on campuses, people who are not heterosexual, and people who experienced childhood abuse, homelessness and stalking. These are often the most vulnerable people in our society. Frequently their abusers are NOT public figures or famous personalities.

Sexual harassment is also underreported. A 2017 Insights West Survey of sexual harassment in Canada reported that 50% of working women in Canada say that they have experienced some form of sexual harassment over their careers. Yet, only 28% of working women in Canada, who endured behaviour that had placed a condition of a sexual nature on their employment or any opportunity they might have on their future career, reported this to a superior or to the human resources department (2017 Insights West).

The reasons noted in the 2017 Insights West report for not reporting sexual harassment include:

- Thinking it wasn't important enough to bother reporting (41%);
- The idea that they would be perceived as trouble makers (34%);
- Believing that their employer would not do anything about what had happened (30%);
- Believing that the employer would dismiss their complaint as being unimportant (30%);
- Feeling too embarrassed (30%); and
- Fearing retaliation from the person who behaved that way (27%).

Sexual harassment addresses a broader range of behaviours than does sexual assault. Sexual assault requires intentional physical contact of a sexual nature that is not consented to. Sexual harassment can include physical contact but also includes any unwanted sexual attention (per the SCC in Janzen v Platy Enterprises Ltd.). Incidents of sexual harassment experienced by Canadian working women reported in the 2017 Insights West survey include:

- Unwanted sexual comments, conversation or innuendo from a co-worker (37%) or from a boss/manager/superior (24%).
- Unwanted physical touching, cornering or patting from a co-worker (33%) or from a boss/manager/superior (20%).
- Cat-calls, whistles, or being referred to using derogatory or demeaning sexual terms from a co-worker (28%) or from a boss/manager/superior (19%).
- Unwanted pressure for dates with a co-worker (23%) or from a boss/manager/superior (14%).
- Presence of pornography, or other sexually graphic images at work (18%).
- Unwanted pressure for sexual activity from a co-worker (17%) or from a boss/manager/superior (14%).

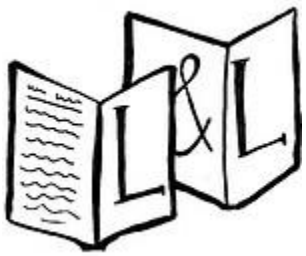
Not addressing these behaviours can cost employers money (e.g., they are legally responsible for sexual harassment that occurs in their workplaces, especially if they fail to address it appropriately) and can create a poisoned work environment that affects productivity.

Sexual assault and sexual harassment are serious issues. They have existed for a long time and since the number of women in the workplace has steadily increased, alarming numbers of people experience sexual harassment and sexual assault. It seems that

allegations of sexual harassment and sexual assault made against people in public life, those who are movie stars or who are otherwise famous are now gaining attention and resulting in some serious consequences for the alleged perpetrators. However, will people without the power of media scrutiny, those who fear retribution or lack of support from their employers, or those who hear about the often nasty public ordeal faced by women who come forward to complain about sexual assault, be assisted at all by the #MeToo movement?

Breaking the Code, and then Breaking the Spirit

By Rob Normey



Last month marked the 20th anniversary of the landmark Canadian Charter of Rights and Freedoms case, (Delwyn) Vriend v. Alberta. There was some fine reporting in the Edmonton Journal and elsewhere on the case, including where Delwyn Vriend is now and what his experiences have been in the struggle to see gay rights entrenched in Alberta's human rights legislation. Readers will gain an appreciation of what a long and arduous struggle is entailed in raising a Charter challenge, involving decisions by three levels of court, over a period of many years, culminating in Vriend in a ringing affirmation of the existence of gay and lesbian rights under s. 15 – the equality rights provision. The decision also removed any doubts about the positive duty to include protection for these rights in a human rights statute.

In 1990, about the time that Delwyn Vriend's legal journey was just getting started, I attended the Citadel Theatre's production of Breaking the Code, by Hugh Whitmore. It was directed by Bob Baker and rarely have I seen such a searing drama on an Edmonton stage. It was based on the life of the brilliant British compute scientist and pioneer, Alan Turing. The play can be viewed on DVD or on the web and is well worth watching or reading.

The play was first presented in 1986 in London by the Theatre Royal and starred Derek Jacobi as Turing and Isobel Dean as his mother, Sara. The BBC later produced a version for television, again starring Jacobi. In 1986 and again here in Edmonton in 1990, it was surely the case that most of us knew very little about Alan Turing. He was truly a mystery in British society on several levels. First, we learned during the production that he was the computer scientist with the key responsibility for decoding the German Enigma Code in the heroic days of World War II when the fate of the free world hung in the balance. Turing and his team were absolutely essential to the Allied war effort and their work saved countless lives. His work, though, would have gone largely unrecognized during his lifetime. His tragic death followed two years after his conviction for homosexual offences.

The play is one of the relatively rare examples of a successful modern tragedy. As Aristotle has so helpfully explained, tragedy is essentially the art form whereby an elevated figure is brought low by a series of events, shaped by an archenemy, which bring about his or her downfall. It is evident from the plots of Classical and Shakespearean tragedy that the figures are leaders of their societies, possessing many virtues but at least one significant flaw. Further, we are made aware that the eventual destruction of the hero foreshadows some major harm to the society in which they rule or otherwise play a leading role. The challenge for modern tragedy in the Western world is for the playwright to embed within the dramatic action a citizen in contemporary democracies who possesses rare qualities without in fact displaying the obvious heroic grandeur of an Oedipus Rex or a Cleopatra.

Turing is no doubt an unconventional “hero”, but as the play progresses we learn of his brilliant work as a computer scientist in World War II, who possesses the determination and spirit of critical inquiry that enable him to achieve remarkable breakthroughs. Yet like his classical counterparts, the quiet but compelling man has a deep flaw. It is quite likely linked to his autism – he simply must tell the truth and seems to think little of the consequences. The central scenes occur in the local police station in Manchester in the north of England where he has gone to report a robbery that took place at his home. He naively indicates that he is in a homosexual relationship. The officer is unwilling to drop the matter – the interviewee has admitted to committing a criminal offence. As one can imagine, British society was particularly hypocritical in many respects in its treatment of homosexuality. A number of writers, politicians, lawyers and other professional men were in fact gay but were extremely discreet. Others who committed their acts in places where the police might locate them were not only charged, but faced serious consequences – jail time and loss of employment and reputation. Indeed, in the very era when the play is set, the Home Secretary was specifically directing that police forces across Britain vigorously enforce the law.

At trial, there is little counsel can do for his unfortunate client. His client has admitted his guilt and to avoid jail, Turing is provided with the option of taking chemicals to end all sexual desire – that is, of accepting chemical castration. The worried man accepts the offer but is shown drifting further and further into despair.

Another element of Turing’s life that is interwoven into the drama is his involvement with the British Secret Service. His stellar war record has led to offers to do some part-time work in peacetime. A by-the-book intelligence officer interviews Turing at various points and we see the continuing dangers that Turing’s unfortunate propensity to tell the truth, the whole truth, has created. It becomes clear that his actions and travel arrangements

will be carefully monitored and attempts to travel to the Continent freely will be reviewed and quite likely denied.

The play ends with one final scene after Turing's shocking death – as Ross, the investigating officer, meets with the hero's mother, Sara. She poignantly recalls the incredible efforts he made to attend university and excel there, as prelude to a marvelous career. A debate follows as to whether or not he did in fact commit suicide, which I note as an aside, remained a criminal offence at the time.

Whitmore's play successfully dramatizes this mysterious hero's life and layers the investigation with dialogue revealing the unique quality of his mind and its ability to work through to the last possibility the prospects for establishing the truth of his theories.

English law has gradually moved toward equal treatment of gay men. In 2013, after a petition was delivered to the government, a posthumous pardon was issued for Turing. A further petition, which gathered 640,000 signatures, was launched in 2015, calling for a much wider pardon for all gay men who had been unjustly convicted. The British government responded with the "Turing Law" which was enacted in 2017. Pardons are extended to all gay men who had convictions for gross indecency and related offences as a result of consensual acts with those over 16. Commenting specifically on the pardon for the great Bletchley Park code breaker, Turing's great niece Rachel Barnes stated on a televised program: "[He] so, so deserves this. To think that this man who cracked the enigma code and saved countless of millions of lives during World War Two and to think of the treatments that he went through …in 1952 is still unbelievable to us." She also emphasized that it is vital to think about her great uncle as a man who achieved much in his life, rather than simply as a gay man who was victimized.

It is appropriate here to invoke the statement attributed to Martin Luther King, that "the arc of the moral universe is long, but bends toward justice." We do have to stop every once and a while to reflect on the capacity of societies like Britain's and Canada's to progress towards greater equality and understanding, even if in the cases of men like Turing and, in recent times, Delwyn Vriend, it takes much longer than we would think possible.

Sexual and Other Harassment and Fiduciary Duty

By Peter Broder

Fiduciary duty is a common law concept. Essentially it requires directors of corporations, and like officials of certain other types of entities, to act in the best interest of their organization. It also obliges them to act with care and loyalty. The notion of fiduciary duty, or aspects of it are sometimes reflected or entrenched in statute. However, determining whether the particulars of fiduciary obligations have been met in a specific circumstance falls to the Courts. So elements of fiduciary duty evolve over time.

In the recent spate of sexual harassment allegations, typically initiated on social media and known as the “#MeToo” movement, criminal charges have or are being brought in some instances. Perhaps more commonly though, lawsuits have been launched against alleged perpetrators, the organizations where the incidents occurred and/or their boards or other governing bodies. Given the widespread publicity that has attended the movement, it is hard to argue against the average person being aware of the issue and of the prevalence of misbehaviour.

Organizations themselves may be at risk of having to pay damages under the doctrine of vicarious liability, which potentially imposes liability on an employer, or other principal, for improper conduct by its employee or agent. That is a subject for another column, other than to note that in Canada organizations have, in some situations, been held accountable for sexual misconduct by those they have hired or contracted.

Which brings us to board or director personal liability and back to fiduciary duty. Currently there is little, if any, case law on the relationship between the adoption of harassment policy and fiduciary liability. The jurisprudence in this area is still evolving.

Except for the smallest non-profit groups, most boards or board members do not actively involve themselves in the day-to-day operations of their organizations. Rather they establish a policy framework within which the group carries out its mission. In that

context, they can still be held personally accountable. Adequately managing the risks faced by an organization is broadly part of fiduciary duty.

In the wake of the countless revelations involving sexual or physical abuse of vulnerable individuals in educational, religious, social service and recreational institutions or groups in the last fifty years or so, it has become best practice for organizations to adopt screening policies for vetting potential employees or volunteers. Doing a police or other background check on individuals will not necessarily weed out every possible wrongdoer. Even so, entrenching a practice of methodically inquiring about someone's past conduct or dealings with the criminal justice system is a way of showing that the board and directors have turned their minds to the issue and taken steps to reduce the risk of engaging with someone apt to conduct him- or herself inappropriately.

Having good policy and processes is not a full defense for boards and directors having acted with due care in fulfilling fiduciary duty, and a Court could still find liability. However, it does show awareness of a potential problem, and that steps have been taken to lessen risk. It lays the groundwork for an argument that the directors and board exercised due diligence.

Likewise with the issue of sexual harassment. In the current context, directors should advocate for boards to adopt an organizational sexual harassment policy. Or – where one exists – thoroughly reviewing it. Showing that this issue is recognized as a potential problem area, and that measures have been taken to try to deal with it, is evidence that the directors and board exercised the required care in their organizational decisions. If there is a harassment allegation that results in legal action, Courts will be less likely to find that the actions of the directors were inadequate or erroneous where a policy is in place.

The personnel models for voluntary sector organizations vary widely. So there is no one-size-fits-all solution in terms of the substance of a policy. However, in drafting a policy there are some common considerations that should be taken into account.

Factors to think about include those set out below:

- the policy should include all types of harassment, and not just sexual harassment;
- the policy should recognize that sexual or other harassment is not gender-specific, and that anyone can be subject to it;
- the policy should safeguard the rights of all parties, and be structured to be as fair as possible even beyond legal obligations. In this regard, thought should be

given to not having processes that may result in unnecessary embarrassment or humiliation;

- the policy should provide for confidentiality and privacy protections, and the decisions to withhold or release information need to be in accordance with applicable law;
- the policy should contemplate situations where the person accused may be in a governance role or be the senior staff person or a supervisor, and provide for processes to deal with these circumstances. In this regard, thought should also be given to providing checks and balances against possible retribution; and
- disciplinary action contemplated in the policy needs to be in accordance with applicable law.

As with a screening policy, having a good policy on harassment will not absolutely protect boards and directors from liability, but it does show the matter has been considered and efforts have been made to deal with the risk of misconduct. In the current environment, that may be a small step, but it is one worth taking.