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Practical Law

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Teresa Mitchell

1. The Nut of the Case

A North Dakota man who ate a piece of caramel apple cheesecake in a Melfort, Saskatchewan restaurant sued the hotel and his server when he reacted to a walnut in the dessert. He had twice asked his server if the cheesecake contained nuts and was assured that it did not. It did. Brian Martin experienced an extreme allergic reaction and was afraid he was going to die. The emergency room physician, wishing to be honest, said that death was a possibility. After 4 hours of extreme allergic reaction, he was stabilized, was transferred to intensive care, and kept in hospital overnight. The next day he was able to fly home. Justice Grant Currie of the Saskatchewan Court of Queen's Bench wrote: "Ms. Geddes' (the server) representation, that the cheesecake did not contain nuts, was untrue, inaccurate and misleading. Ms. Geddes acted negligently in making the misrepresentation." The Judge further found that the hotel was vicariously liable to Mr. Martin for her actions. He awarded Mr. Martin $25,000 in damages plus costs.

Martin v. Interbooks Ltd., 2011SKQB 251 www.canlii.org.en.sask/skqb/doc/2011/2011skqb251/22011skqb251.html

2. Tobacco Companies alone in their fight

The Supreme Court of Canada has rejected an attempt by tobacco companies to drag the federal government into the litigation surrounding smokers who got sick from using tobacco products. An Ontario class action case covers smokers who are using consumer protection laws to argue that they were misled by claims that mild or light cigarettes were less harmful. A British Columbia case focuses on billions of dollars on health care costs for treating smoking-related illnesses. The tobacco companies argued that if they were held liable, then the government of Canada should be liable too for negligent misrepresentation, negligent design, failure to warn, and for its responsibility as manufacturers and suppliers under business and consumer protection laws. In both cases, the Supreme Court of Canada rejected the arguments. It ruled that there were no specific interactions by the government with either consumers or tobacco companies that would lead to a duty of care. The Court also ruled that: "Core government policy decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. The representations in this case were part and parcel of a government policy, adopted at the highest level in the Canadian government and developed out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease, to encourage people who

continued to smoke to switch to low-tar cigarettes." As for health care costs, the Court ruled that even if the Government of Canada breached its duty to consumers, that would not make it liable to the provinces for health care costs.

R. v. Imperial Tobacco Ltd., 2011 SCC 42; http://scc.lexum.org/en/2011/2011scc42/2011scc42.html

3. A Life or Death Decision

The family of Hassan Rasouli disagreed with the decision of his doctors that he should be removed from life support and provided with palliative care. His family maintain hope that he will recover; his doctors say he is in a permanent vegetative state. Under the provincial *Health Care Consent Act,* the doctors need the consent of the patient's wife, who is his substitute decision-maker, to withdraw life support and move him to palliative care. She has refused consent. A trial judge sided with the family, and the doctors appealed to the Ontario Court of Appeal. The Court of Appeal made a distinction between withholding life support measures right from the outset and withdrawing them after doctors consider them to be medically useless. The judges ruled that the withdrawal of life support and the introduction of palliative care is a treatment package that requires the decision-maker's consent. If consent is withheld, then doctors may refer the case to the Consent and Capacity Board of Ontario. The Court described this process as providing doctors with "a safety valve in cases where the patient has not expressed a prior wish…" The Judges also noted that perhaps this process "involves policy considerations that come within the legislature's purview and are best left to the legislature to sort out."

… the rationale for duress is quite different. It is a plea for absolution where the accused's actions are considered blameworthy but forgivable as the accused's only reasonable avenue of escape was to commit the crime. In other words, the defence of duress is rooted in compassion.

Rasouli v. Sunnybrook Health Sciences Centre, 2011 ONCA 482 (CanLII)
www.canlii.org.en/on/onca.doc/2011/2011onca482.html

4. Living in a State of Terror

The Nova Scotia Court of Appeal has issued a decision that allows for the use of duress as a defence for abused women. Nicole Ryan negotiated with an undercover police officer to try to arrange for the murder of her abusive husband. She had endured years of horrific treatment at the hands of her spouse, and feared for her life and the life of her child. She was charged with counseling to commit murder, claimed the defence of duress, and was acquitted. The Crown appealed, stating that the defence of duress was not available to her. Women facing such charges in the past have argued self-defence. The Court of Appeal upheld Ms Ryan's acquittal. It noted: "…self-defence is a plea for justification, where the accused is seen as blameless…On the other hand, the rationale for duress is quite different. It is a plea for absolution where the accused's actions are considered blameworthy but forgivable as the accused's only reasonable avenue of escape was to commit the crime. In other words,

the defence of duress is rooted in compassion. It involves excusing a wrongdoing in circumstances where the accused is left with no other alternative. Therefore, unlike self-defence, it is not the type of action society would support, let alone applaud." The Court acknowledged that on the surface, Ms Ryan had alternatives short of arranging his murder, "But, below the surface, we see a victim of abuse, who, at the time of the 'crime', appeared to have been living in a state of terror." The Court stated: "Ms Ryan was compelled to take the action she did by normal human instincts and self-preservation. It would be inappropriate, under these circumstances, to attribute criminal conduct to her."
R. v. Ryan, 2011 NSCA 30 (CanLII) www.canlii.org.en/ns/nsca/doc/2011/2011nsca30/2011nsca30.html

Bankruptcy: The End or the Beginning?

C. J. Shaw, Q.C.

Introduction

I hope this short article will be helpful to someone who is trying to deal honestly with overwhelming personal indebtedness and who has a genuine desire to make a fresh start financially.

Briefly noted are two of the changes to Canada's *Bankruptcy and Insolvency Act* (*BIA*) applicable to individuals since July 7, 2008. The topics are:

- a slightly more lenient handling of government student loans and
- broader protection for registered retirement savings plans (RRSP). Both relate to a lifetime's most laudable endeavours – getting an education and planning for retirement.

Briefly noted also are two of the changes to the *BIA* applicable to individuals as of September 18, 2009:

- the automatic discharge from bankruptcy for individuals has been changed, and
- an exception was created to deal with certain personal income tax debtors who become bankrupt.

These modifications are intended to prevent abuse of the bankruptcy law.

A fundamental purpose of the *BIA* and the personal bankruptcy process is the financial rehabilitation of the honest but unfortunate debtor.

Make a Proposal or Go Bankrupt

The *BIA* requires the debtor to be advised of the merits and consequences of the options available to resolve financial difficulties, including making a proposal to creditors, rather than voluntarily going into bankruptcy. This advising is the duty of a licensed trustee in bankruptcy.

The *BIA* enables a person (an insolvent debtor who is an individual) to make a formal proposal to his or her creditors to settle debts and avoid (the stigma of) bankruptcy. Proposals under the *BIA* are either general or consumer. Since 1992, the streamlined process of a consumer proposal is available to a person where total debts do not exceed $250,000 (increased from $75,000 as of September 18, 2009) excluding mortgages against a principal residence. A successful proposal settles the debts on the terms set out in the proposal.

Bankruptcy involves a liquidation of the bankrupt's available assets (if any) and distribution of the proceeds by the trustee of the bankrupt's estate to the creditors. A discharge from bankruptcy releases the bankrupt from the unsecured debts existing when the bankruptcy began except for certain specified claims. A controversial exception since 1997 is that unpaid government student loans continue to exist after bankruptcy until paid or released by the bankruptcy court.

Government Student Loans

Unpaid loans under the *Canada Student Loans Act*, the *Canada Student Financial Assistance Act*, or similar provincial laws are problematic because of several economic, moral, and social factors. The subject is frustrating for students, governments, bankruptcy court, and our society.

A post-secondary (or other advanced) education is an appreciating asset attainable by capable students and, where necessary, by accessing affordable financing. Government-provided financial assistance is typically for lower-income students. It is unique financing because the most essential lending criterion is the financial need (not the future creditworthiness) of the student. The adage that the best borrower from a lender perspective is someone who does not need to borrow the money cannot be applied in the marketplace for government student loans.

The reality is that most college and university graduates do repay their student loans. Be that as it may, an alarming number of government student loans in Canada are not being repaid.

Before restricting most Crown claims in a bankruptcy to either the legislated deemed trusts or unsecured status since 1992, government student loans as Crown claims had preferred status (ranking ahead of unsecured creditors). The government student

Society embraces optimism and forgets pain. Historically (mid-1500s to present), changes to bankruptcy legislation when the economy was strong made the process more rigorous for debtors and changes made during an economic downturn were more lenient for rehabilitation of debtors.

loan administrators routinely objected to a bankrupt's discharge because any additional funds recovered were not shared with unsecured creditors. This did not solve the chronic problem of unpaid student loans.

In 1997, the *BIA* was changed to discourage going bankrupt to avoid repaying a student loan. Government student loans became one of the debts not released by a discharge from bankruptcy when the bankruptcy occurred while the debtor was a student or within two years (changed to 10 years in mid-1998) of ceasing to be a student. The bankrupt could be discharged from bankruptcy with the student loan still owing. Ten years after ceasing to be a student, the debtor could apply to the bankruptcy court seeking a release of the student loan debt. This is known as "the hardship provision."

A government MP speaking in the House of Commons in May 1997 explained the rationale for making that change to the *BIA*: "Students who receive financial assistance from taxpayers owe it to society and to future generations of students to reimburse the loans they have received. At the same time, however, the governments and bankruptcy laws have to recognize that some students may find themselves in a hardship situation. This is reflected in the legislation by limiting the period during which student loan debt would be non-dischargeable."

The court will likely respond more negatively where the timing of the bankruptcy was to avoid the student loan debt and the student loan was a significant part of the bankrupt's total indebtedness. The bankruptcy court cannot ignore or condone misuse of publicly funded student loans.

Since July 7, 2008, government student loans are excluded from the claims released by a discharge from bankruptcy when the bankruptcy occurred while the bankrupt was a student or within the seven years (reduced from 10 years) after the bankrupt ceased to be a student. This change applies to a bankrupt who was not yet discharged as of July 7, 2008 or a person who became bankrupt on or after July 7, 2008. The applicable federal or provincial student loan legislation determines when the person ceased to be a full-time or part-time student. The *BIA* also stipulates that five years after ceasing to be a student (reduced from 10 years), the bankrupt (or an already discharged bankrupt) may apply to the bankruptcy court requesting the restriction on the release of the student loan debt be removed. The bankrupt must show that he or she "has acted in good faith in connection with the bankrupt's liabilities under the debt; and … has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the debt." Some "good faith" indicators which a bankruptcy court may consider are:

- was the money used for the purposes of the loan?
- did the bankrupt complete the educational program?
- was economic benefit derived from the education?
- have reasonable efforts been made to repay the loan?
- was the availability of interest relief and remission used to reduce the burden of the loan?
- what was the timing of the bankruptcy?
- was the student loan a significant portion of the bankrupt's total indebtedness?

The bankruptcy court will respond favourably to the request for release from a government student loan debt when the answer to each of the first five questions is yes. The court will likely respond more negatively where the timing of the bankruptcy was to avoid the student loan debt and the student loan was a significant part of the bankrupt's total indebtedness. The bankruptcy court cannot ignore or condone misuse of publicly funded student loans.

A non-government student loan is ordinarily released by a discharge from bankruptcy.

Registered Retirement Savings Plans

The registered retirement savings plan (RRSP) was conceived as a tax deferral device. It also encourages saving for retirement. The contributions, being property of the contributor, were available to his or her creditors, subject to any exemption found in provincial law. The property of the bankrupt available to creditors under the *BIA* specifically excludes property exempt from execution or seizure under law (federal or provincial) applicable in a province. By legislation, some pensions (and pension benefits) are exempt from the claims of employee's creditors.

Employer-sponsored pensions for employees are diminished or non-existent. RRSPs are personally-sponsored defined contribution self-directed pension plans. A registered retirement income fund (RRIF) provides an income during a person's retirement.

For many years, Alberta's *Insurance Act* has protected from creditors annuity products of insurance companies that comply with the required designation of a specified family member as beneficiary. An annuity with an insurance element can qualify as an RRSP under federal income tax law. In Alberta, this discriminated among RRSPs being an exempt or non-exempt asset of a debtor based upon the supplier of the product. Effective October 1, 2009 under Alberta's *Civil Enforcement Act*, contributions in an RRSP and in an RRIF, as those plans are defined in Canada's *Income Tax Act,* are protected from creditors, but a payment out of a registered plan to a plan holder is not exempt. These provincial laws apply in a bankruptcy.

The *BIA* now also protects registered retirement savings from creditors. Effective July 7, 2008, contributions in an RRSP and in an RRIF, as those plans are defined in Canada's *Income Tax Act,* are protected from the bankrupt's creditors. Contributions made before July 7, 2008 are protected. There is presently no maximum amount limit. However, under the *BIA*, contributions made to RRSPs or RRIFs in the 12 months prior to bankruptcy are not protected.

The Alberta *Insurance Act*, where applicable, and the Alberta *Civil Enforcement Act* exempt all contributions in an RRSP and in an RRIF including any made in the 12-month period preceding a bankruptcy. A trustee in bankruptcy or creditors could challenge a large contribution made by an insolvent debtor.

The RRSP and RRIF exemption under the *BIA* is for persons who became bankrupt on or after July 7, 2008. The right to an exemption is determined as of the date of the bankruptcy.

The *BIA* now also protects registered retirement savings from creditors. Effective July 7, 2008, contributions in an RRSP and in an RRIF, as those plans are defined in Canada's *Income Tax Act*, are protected from the bankrupt's creditors. Contributions made before July 7, 2008 are protected.

Although an RRSP and an RRIF are exempt, the bankruptcy court may consider the amount of the RRSP or the RRIF in deciding what payments the bankrupt should make as a condition of discharge from bankruptcy.

There have been too many tax-driven personal bankruptcies. Some individuals have achieved the nefarious reputation of having had multiple personal income tax-driven bankruptcies. As of September 18, 2009, the *BIA* addresses the problem of chronic personal income tax debtors who go bankrupt solely or primarily to wipe out personal income tax debt.

Automatic Discharge from Bankruptcy

Prior to September 18, 2009, all first-time bankrupt individuals were eligible for an automatic discharge from bankruptcy after nine months in bankruptcy unless the trustee, a creditor, or the Superintendent of Bankruptcy gives notice of an opposition to the automatic discharge. Since September 18, 2009, except for the personal income tax debtors mentioned below, an automatic discharge may be available to first-time and second-time bankrupt individuals. The timing of the automatic discharge depends on whether or not there is surplus income. Surplus income is the portion of a bankrupt individual's total income that exceeds what is necessary for the bankrupt to maintain a reasonable standard of living based on the applicable standards set by the Superintendant and by the bankrupt's trustee.

- A first-time bankrupt individual, where there is no opposition and no surplus income payable to the trustee for the bankrupt's estate, will be automatically discharged after nine months in bankruptcy.
- A first-time bankrupt, where there is no opposition filed and with surplus income payable to the trustee, is only eligible for an automatic discharge after 21 months.
- A second-time bankrupt, where there is no opposition filed and no surplus income payable, is only eligible for an automatic discharge after 24 months.
- A second-time bankrupt, where there is no opposition filed and with surplus income payable, is only eligible for an automatic discharge after 36 months.

The obligation to pay surplus income to the trustee ceases when the bankrupt would have been automatically discharged from bankruptcy had the opposition not been filed. The new automatic discharge provisions only apply to personal bankruptcies that start on or after September 18, 2009. First-time and second-time bankrupts may apply to the bankruptcy court for an earlier discharge.

Personal Income Tax Debtors

There have been too many tax-driven personal bankruptcies. Some individuals have achieved the nefarious reputation of having had multiple personal income tax-driven bankruptcies. As of September 18, 2009, the *BIA* addresses the problem of chronic personal income tax debtors who go bankrupt solely or primarily to wipe out personal income tax debt.

A bankrupt with $200,000 or more of personal income tax debt representing 75% or more of the total unsecured proven claims against the bankrupt is not eligible for an automatic discharge from bankruptcy. "Personal income tax debt"means personal income tax payable under the *Income Tax Act* or similar tax payable under any provincial legislation including any interest, penalties, or fines. A personal income tax debtor who is a first-time bankrupt may apply to the bankruptcy court for a discharge after nine months in bankruptcy if the bankrupt has not had to pay any surplus income to the trustee. Otherwise the bankrupt must wait 21 months before seeking a discharge. Such a personal income tax debtor, who is a second-time bankrupt with no surplus income, is not eligible to apply for a discharge until 24 months after the date of the bankruptcy. A second-time bankrupt with surplus income payable to the trustee must wait 36 months before being eligible to apply for a discharge. All other personal income tax debtors who are more repetitive bankrupts must wait 36 months after the date of bankruptcy before being eligible to apply to the bankruptcy court for a discharge. The bankruptcy court can refuse the discharge, suspend the discharge, or grant a conditional discharge. An absolute discharge is not available to these personal income tax debtors.

Bankruptcy must not operate as a clearinghouse for repeat bankrupts and excessive personal income tax debt. Protecting the integrity of the bankruptcy system is the top priority.

Conclusion

Society embraces optimism and forgets pain. Historically (mid-1500s to present), changes to bankruptcy legislation when the economy was strong made the process more rigorous for debtors and changes made during an economic downturn were more lenient for rehabilitation of debtors.

Canada's present bankruptcy law for government student loan debt is a work-in-progress. The personal bankruptcy playing field is more level for RRSPs and RRIFs going forward.

Bankruptcy must not operate as a clearinghouse for repeat bankrupts and excessive personal income tax debt. Protecting the integrity of the bankruptcy system is the top priority.

These topics and many more must be discussed thoroughly and candidly with a licenced trustee in bankruptcy when a person is contemplating the debtor relief provided for in the *BIA*.

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Before the Work Begins: The Top Five Legal Mistakes in Starting a Small Business

Carole Aippersbach

So you want to start a small business? You have your business plan at the ready, you can get a start-up loan with an interest rate that is at an all-time low, and your determination is at an all-time high. You are ready to go. Ironically, now – during this flurry of energy, excitement, and enthusiasm – is the time when you should slow down and become careful and contemplative. The decisions you make could have an enormous impact on whether your business succeeds or fails. Legal mistakes are amongst the most deadly. Knowing some of the pitfalls to avoid can make all the difference.

Mistake #1. Choosing the Wrong Ownership

Choosing an ownership structure is one of the most important decisions you will make. Your decision should be based on a careful consideration of the specific needs of both your business and yourself as well as a thorough understanding of your options and how these options relate to your needs.

There are three general business structures: sole proprietorship, partnership and corporation. Each has different and important implications for matters such as liability, risk, taxation, and succession. In deciding which of these options will suit you best, you should consider the following questions.

While you can protect yourself against lawsuits by buying business liability insurance, this won't help you with business debts. You could potentially lose everything you own if the business debts are not paid.

What are the risks involved in your proposed business?

Some businesses are more financially risky than others. Are you building houses or selling office supplies? In a sole proprietorship, you, the business owner, can be held personally liable for the debts and obligations of the business. This includes loans, taxes, money owed to suppliers and landlords, and any judgments against the business. This risk can even extend to liabilities resulting from acts or omissions by employees. While you can protect yourself against lawsuits by buying business liability insurance, this won't help you with business debts. You could potentially lose everything you own if the business debts are not paid. For the case of partnershps, because partners can make commitments that bind the entire business (without even consulting you first), your liability may be even greater than in a sole proprietorship.

A corporation, on the other hand, has limited liability. This means that *normally* no shareholder can be held personally liable for the debts, obligations, or acts of the corporation. However, in certain limited circumstances, a judge can look behind the corporation and hold one or more shareholders liable (this is known as "piercing the corporate veil"). For example, this may happen if a shareholder personally guarantees a debt, or if the corporation is a sham company used for nefarious purposes. The limited liability advantage can also be undermined if one or more of the shareholders sign any personal guarantees.

How much start-up capital do you have?

Do you have all you need or will you need investors? Sole proprietorships and partnerships have lower start-up costs as you do not incur the costs of setting up a corporation. In addition, sole proprietorships and partnerships are easy to form; there is no long list of statutory requirements as there is for a corporation.

How do you plan on obtaining any additional capital?

Investors won't usually invest in sole proprietorships. For partnerships, there are more potential sources of investment capital (for example, through the concept of the limited partnership), but

many investors prefer shares in a corporation. Before accepting any additional capital from a new partner, you will want to ensure that this partner is suitable and that the addition of this new partner conforms to the partnership agreement. For a corporation, it is easier to raise capital because investors know that they will not be held personally liable for business debts. A corporation also has many avenues to raise money, such as selling current shares, or creating new types of shares, such as preferred shares, with different voting or profit rights.

What are your expected profits and losses in the first few years?

Will you need to deduct losses from other income? Sole proprietorships and partnerships offer numerous personal tax advantages, because, as an owner, you can deduct business losses from your other income. In addition, it is the owners that benefit from all of the profits. In a corporation the profits and losses belong to the company and have to be distributed accordingly.

Are you the kind of person who wants to be in full control of all decision-making?

In a sole proprietorship, you are in control of all decision-making. Any future sale, transfer, or dissolution of the business is entirely at your discretion. In partnerships and corporations there can be a broader management base. This can lead to divided authority and the potential development of conflict between partners or shareholders.

Can you adapt to many formal business requirements?

In sole proprietorships and partnerships, there are few formal business requirements. However, partnerships do require an operating agreement, and this creates slightly more record-keeping than a sole proprietorship. In contrast, corporations are very closely regulated. Corporate record-keeping is extensive and can be complex.

Do you want or need statutory name protection?

If name protection is important to you, you may wish to incorporate your business. Part of the process of incorporation is ensuring that the name you choose is not the same as, or too similar to, other corporate names in the jurisdiction. The same protection will be offered to your corporation once it is set up. In general, there is no such automatic name protection for sole proprietorships and partnerships. You can find exact details about other name protection options (such as the registration of trade names) in provincial business name legislation.

A good business property insurance policy should cover matters such as equipment and machinery; office furniture (including computers and accessories); inventory and supplies; company cars; and employees' personal property kept at the business site.

What are your plans for the business should something happen to you?

Sole proprietorships and partnerships lack continuity of business in your absence. The business has no separate existence, so you will need to make a succession plan through a Power of

Attorney, a Personal Directive, and a Will. A corporation, on the other hand, as a separate legal entity, does not depend on the continued existence or membership of any of its shareholders, directors, or officers.

Mistake #2. Not Having an Operating Agreement (Partnerships and Corporations)

An "Operating Agreement" is a contract between the founders of the business. This includes people involved in the management, people who provide capital, and people who do both. This agreement sets out operative issues in advance such as who does what, when they do it, and how they do it. This ensures that everyone knows what needs to be done, and, as a result, the cost of solving problems will be kept to a minimum.

The types of issues often addressed in an operating agreement include:

- how much time and effort each person contributes;
- what each person's responsibilities are;
- how much capital each person contributes;
- what happens if the business needs more capital;
- what happens when a person leaves the business;
- what happens when a person dies; and
- any additional details imperative for, or unique to, the business.

Operating agreements are often over-looked. This is especially true in cases where the business partners are related or are friends. In such instances, the partners enter into the transaction assuming the best of one another and not anticipating the number of things that can go wrong over the life of a business. However, the consequences of not having an operating agreement usually emerge quite quickly. What happens when expected capital is not provided? What happens when a married partner gets divorced? What happens when partners disagree? These kinds of issues arise frequently and can get very messy very quickly. They can destroy both business and personal relationships.

Just as important as having an operating agreement is understanding it. It needs to be clearly drafted, and everyone who signs it needs to know what is in it. Failure to understand the terms of the operating agreement is one of the most common causes of in-house disputes and partnership conflicts. When a dispute arises, the operating agreement will be *the* decisive document in settling the dispute – its creation and comprehension are critical.

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Mistake #3. The Contents of Leases

When you start a small business, you will need to consider where that business will be located. If your business is not a home-based one, this may be the first time you have had to deal with a commercial lease. Although such leases generally favour the landlord, there is some room for negotiation, and you should take advantage of that opportunity.

As a starting point, it is important to understand that business leases are *not* like residential rentals. With a residence, rent is usually restricted to a set monthly price, which may or may not include utilities. The landlord is responsible for repairs, and the terms of the *Residential Tenancies Act* help protect the rights of tenants. With business leases, on the other hand, there are often many other costs beyond the base monthly rent; for example, common area maintenance costs, the costs of certain repairs, and possible personal guarantees.

A second consideration: put everything in writing. Make certain that everything that you discussed and agreed upon (especially if they are changes to a previous draft) is included in the written agreement. No matter what the promise, if it is not included in the lease, it will likely be excluded by a clause that says something like "this lease is the entire agreement between the parties."

It is imperative that you read the lease *very* carefully, watch for errors, and ensure that you understand the terms to which you are agreeing. A thorough understanding of the lease clauses will help you avoid surprise costs (which could sink your business). The following are a few examples of the clauses that could cause trouble if they are wrong or misunderstood.

Parties

An error in identification can have serious repercussions. For example, if you are forming a corporation and you list your personal, not corporate name, you may become personally responsible.

Premises

This includes the address, the unit number, and any additional space not included in the base units (such as access to storage rooms, conference rooms, parking, and kitchen facilities). Base charges are often calculated by the square foot – be sure to confirm all measurements.

Term

This describes the length of the lease. Some leases specify the starting and ending dates. Other leases start as of the date the landlord finishes the building adjustments that you requested, or the date the lease is signed. You may have financial responsibilities even if you have not yet taken possession. Be sure you know and agree to the date that your responsibilities will start.

Use

These provisions limit how you are allowed use the space. The limitations can be as broad as what business you will conduct or as narrow as what specific services or products you will offer. In general, the fewer such restrictions, the better for you.

Rent

In commercial leases, rent is often far more than a base monthly amount. Make sure you understand which parts of the landlord's operating costs will be passed on to you.

Non-disturbance

This clause ensures that if the landlord sells the building, your lease will be honoured by the purchaser. Without such a clause, you might find yourself without business premises. If this clause is not in the landlord's standard lease, you may want to consider negotiating for it.

With any luck, your business will thrive. After the expiry of your lease, you may wish to stay in your current location. In anticipation of such a possibility, you may want to negotiate renewal options at the outset.

Assignment

An assignment occurs when someone takes over a lease (one of the parties is replaced by a third party). Leases generally require the consent of the landlord for an assignment. Some even provide specific requirements in order for the landlord to consent. Take note of any such requirements so that you can determine if you can meet them and so that you know what you need to do when the time comes. Also note whether you will remain liable for the lease after you have assigned it.

Maintenance

Such a clause concerns your duty to care for the rented space. Some of the maintenance costs will be yours – be sure you know which ones and that you can live with the proposed arrangement.

Insurance

Insurance is available to cover the risks of leasing commercial space. Sometimes a lease requires certain kinds of insurance as well as certain minimum dollar limits. Be sure you know and understand these clauses before you arrange for insurance coverage and before you move into, and start using, the business premises.

Renewals

With any luck, your business will thrive. After the expiry of your lease, you may wish to stay in your current location. In anticipation of such a possibility, you may want to negotiate renewal options at the outset. Options include an automatic renewal (if you want it); a right of refusal (meaning the landlord must offer the space to you first); a fixing of the future rent for that renewal; and a formula for the determination of that rent.

Mistake #4. Not Being Adequately Insured

New businesses often have insufficient insurance. In deciding what kind and how much insurance to secure, a new business owner should carefully examine the needs of the business. Here is a summary of the most common forms of insurance coverage.

Property Insurance

It is always a good idea to purchase enough property insurance to cover your business' assets. Even if you form a corporation, which protects your personal assets from business liabilities, you still risk losing your business if disaster strikes. A good business property insurance policy should cover matters such as equipment and machinery; office furniture (including computers and accessories); inventory and supplies; company cars; and employees' personal property kept at the business site.

You also need to understand which types of losses are covered. The kinds of things to look for include fire, explosions, storms, smoke, riots, vandalism, theft, sprinkler leaks, floods, broken windows, falling objects, water damage, and loss of business income. If you have a lease, check for leasehold insurance. This protects you if your lease is cancelled and you have to rent elsewhere at a higher rent. Many of these things are not covered under a basic policy – a fact that surprises many business owners.

Also note that some items are specifically excluded. This, too, can be surprising. For example, in some areas where earthquakes are common, damage from earthquakes is specifically excluded from basic policies. If you want to have that kind of coverage you must obtain separate coverage. While the premiums for such additional policies are more expensive, they may be worth it if your business faces multiple or unusual risks.

If, on the other hand, you have a home-based business, your home-owner's policy may be voided entirely if you run a business from home. If that is the case, you will need to upgrade your insurance policy.

Be sure you understand the limits of your policy. These include maximum coverage in certain circumstances, any deductibles or co-payments required, and how the insurance company pays claims. For example, "guaranteed replacement cost" insurance will reimburse you what it costs you to replace the property. If your computer equipment is destroyed, this type of coverage will pay you as much as you'll need to replace it. This is very different from insurance that only provides the "actual cash value" (which is often depreciated) of the damaged property.

Lastly, keep in mind that the location of your business may affect your insurance needs. If you have a business lease, your lease may require that you obtain a specific amount or type of property coverage. Be sure to check your lease *before* you purchase a policy. If, on the other hand, you have a home-based business, your home-owner's policy may be voided entirely if you run a business from home. If that is the case, you will need to upgrade your insurance policy.

Liability Insurance

Liability insurance covers your legal liability resulting from injuries to, or property damage of, a third party.

There are several types to consider, for example:

- general liability, which covers damages that your business must pay to someone who is injured on your property;
- product liability, which protects you from lawsuits by customers who claim to be hurt by a product you produced and/or provided; and
- auto liability, which covers damage to vehicles in a business-related accident. This, however, may *not* include damage which occurs when your employee was using his or her personal vehicle for business purposes. You may need to have your employees change their personal auto insurance policies.

Not all policies cover all of these kinds of liability insurance. Be sure to consider your needs and read carefully!

Most business operations are required to have workers' compensation coverage. If a worker is injured or contracts an occupational disease while on the job, the WCB covers the worker's medical and wage-loss costs.

Professional Liability

This kind of insurance protects you from liability arising from negligence committed while rendering professional services. This is also known as Errors & Omissions insurance. It is not available for all professional activities. As a business owner, you should ensure you know whether such insurance is available (or required) for your employees.

Workers' Compensation Board (WCB)

Most business operations are required to have workers' compensation coverage. If a worker is injured or contracts an occupational disease while on the job, the WCB covers the worker's medical and wage-loss costs. Employers who are uncertain about their need to register for compensation coverage should contact their provincial WCB for information.

Directors and Officers (D&O) Insurance

This kind of insurance is for businesses that are incorporated. In general, the recovery of any damages incurred by the corporation will be limited to corporate resources, but this is not always the case. Sometimes, courts will allow plaintiffs to receive damages directly from corporate officers or directors. In general, D&O insurance provides coverage against the wrongful acts committed by directors and officers (but it can also include officers and senior management staff). Specifically, if such an insured person is found to have committed a wrongful act and, as a result, must pay damages to an injured party, those damages will be covered by the insurance (this is known as "indemnification").

So what is a "wrongful act"? Generally, the term "wrongful act" includes actual or alleged errors, mistakes, or omissions that occur in the discharge of duties; misleading statements; and neglect or

breach of fiduciary duty. However, wrongful acts generally do not include criminal activities such as false arrest, or civil matters such as libel, slander, and infringement of a copyright or trademark.

It is important to carefully read and understand exactly who is insured (and who is not), deductibles and exclusions, and any coverage limits. For example, there are often limits on general coverage (both per claim and the total allowed annually) and defence costs (a promise to indemnify may not be a promise to defend).

Mistake #5. Not Getting a Lawyer for your Business

As the owner of a business, you would likely never try to do all of your own accounting, computer support, and cleaning – you would probably hire someone. After all, you are there to run the *business* part of your endeavour – that is what you know, that is what you do well, and that is why you started your business. When it comes to legal matters, however, many small business owners seem to think differently (at least at the outset). Despite the complexity, intricacy, and sheer volume of detail involved in legal matters, numerous business owners try to do their own legal work.

The other four mistakes are only the tip of the iceberg when it comes to some of the legal matters faced by small business owners. Every business has its own set of issues to consider: contract law, agency law, employment law, human rights law, intellectual property, corporate & commercial law, tax law, zoning law … just to name a few.

As a business owner, you need some basic understanding of the law. There is, however, a difference between having a basic understanding of the most common issues and having a thorough knowledge of every possible legal matter that will affect your business. Lawyers have been trained to find the information for you. Let them help.

Final Words

Starting a small business is always risky. It takes significant effort and forethought. As part of this process, small businesses may make mistakes about legal matters. This happens all the time and can never be completely avoided. That said, some mistakes can be disastrous. Your business may end up incurring substantial expenses that could have been avoided with good legal planning. Dare to be prudent!

Carole Aippersbach is a lawyer with the Legal Resource Centre in Edmonton, Alberta.

Internet Sales Contracts

Service Alberta

Electronic commerce done over the Internet bypasses provincial, territorial and national borders, making it difficult to regulate. Online transactions often involve consumers and sellers who are in different jurisdictions. A number of Canadian provinces and U.S. states have developed agreements to help one another enforce consumer protection legislation. However, this kind of interjurisdictional arrangement becomes difficult when buyers and sellers are from different continents or draw from different legal traditions.

Alberta's *Internet Sales Contract Regulation* – under the province's *Fair Trading Act* – came into effect October 15, 2001. The regulation illustrates the principles of the harmonized

interjurisdicitional template developed by the Consumer Measures Committee (a group of federal, provincial and territorial officials responsible for consumer protection legislation in Canada's various jurisdictions.)

The template provides a harmonized standard for Internet sales contract legislation throughout Canada. Currently, seven provinces – Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Quebec and Saskatchewan – include Internet agreements within their consumer protection legislation. Other jurisdictions will modify their laws and regulations according to their individual priorities.

Application of Alberta's Internet Sales Contract Regulation

Alberta's regulation applies:

- to a consumer transaction for goods/services over $50
- if a supplier or consumer is a resident of Alberta
- if the offer or acceptance is made in or is sent from Alberta.

Some types of businesses are exempt from the regulation. For example, the regulation does not apply to businesses selling cut flowers or food products that are perishable at the time of delivery to the consumer. The regulation also does not apply if the consumer is buying from a private individual rather than a business.

The regulation requires the Internet seller to give the consumer the following information:

- the business name, address and telephone number
- a description of the goods or services
- an itemized list of the price of goods or services and any associated costs payable by the consumer including taxes and shipping charges
- a description of any additional charges that may apply to the contract such as customs duties and brokerage fees whose amounts cannot reasonably be determined by the supplier
- the currency in which the amount owing is payable
- the terms, conditions and method of payment
- the supplier's cancellation, return, exchange and refund policies, if any
- the delivery date and delivery arrangements
- any other limitations or conditions that may apply.

This information must be prominently displayed on the seller's website. It must be clear and understandable, and the consumer must be able to retain and print the information.

Currently, seven provinces – Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Quebec and Saskatchewan – include Internet agreements within their consumer protection legislation. Other jurisdictions will modify their laws and regulations according to their individual priorities.

Internet sellers are required to give consumers the opportunity to accept or decline the contract and to correct errors immediately before entering into it.

Once a consumer has agreed to purchase the goods or service, the company must provide a copy of the contract in writing or in electronic form within 15 days after the agreement was entered into. The contract must include the information originally disclosed to the consumer as well as the consumer's name and the date the contract was entered into.

This information must be prominently displayed on the seller's website. It must be clear and understandable, and the consumer must be able to retain and print the information. Internet sellers are required to give consumers the opportunity to accept or decline the contract and to correct errors immediately before entering into it.

Cancelling the contract

Alberta's regulation allows consumers to cancel an Internet sales contract within seven days after the consumer receives a copy from the Internet seller if:

- the disclosure requirements were not met
- the consumer was not given an opportunity to accept or decline the contract or to correct errors immediately before entering into it.

As well, consumers may cancel the contract within 30 days after entering into it if:

- they do not receive a copy of the contract by mail, email, facsimile or some other method or they are unable to download or print a copy of the contract within 15 days after entering into it
- the copy of the contract does not contain the required disclosure information.

In addition to the cancellation rights related to contents and receipt of the contract, consumers may cancel the contract if they do not receive the goods or services within 30 days of the date specified in the contract. However, if the company attempts to deliver the goods or services and the consumer refuses to accept them or if they are notified of delivery and no one is there to receive them, this 30-day cancellation right does not apply.

Consumers may cancel travel, transportation or accommodation services immediately if those services do not begin on the promised date, unless the consumer and supplier have agreed – in writing or in electronic form – to an amended start date.

If a consumer exercises the right to cancel the contract, the business must return the money paid under the contract within 15 days from the date of cancellation. If the purchase was by credit card and the consumer properly cancelled the contract, but did not receive a refund from the Internet seller within the required 15 days, the credit card company must cancel or reverse the charges.

The credit card company must acknowledge a consumer's request within 30 days of receiving it. If the request meets the requirements for cancellation, the credit card company is required to reverse the charges and any associated interest or other charges within two complete billing cycles or 90 days (whichever comes first).

Cautions for consumers

- If the business fails to refund the money after being given proper notice and the consumer paid by a method other than credit card (e.g. money order, cheque), taking legal action to recover the debt may be very difficult if the seller is in another jurisdiction.
- Consumers need to be cautious about providing personal information when shopping on the Internet. Reputable businesses will have a privacy policy and will post it online.
- Security of credit card information provided over the Internet is a major concern for many consumers. Before giving a credit card number or other financial information to a business, consumers should make sure that the merchant has a secure transaction system.
- New technologies allow old scams to spread further and more quickly than ever before. In addition to skepticism about vague promises, exaggerated claims and hidden fees, consumers need to be cautious about email address or post office box numbers that make it hard to find the seller's actual location.

If the purchase was by credit card and the consumer properly cancelled the contract, but did not receive a refund from the Internet seller within the required 15 days, the credit card company must cancel or reverse the charges.

Harmonized legislation

The harmonized template is not intended to regulate the Internet. Rather it focuses on rules for Internet sales contracts between businesses and consumers. The template covers key elements of information disclosure, contract formation and cancellation rights for consumers. In addition, the template provides for credit card chargebacks if a supplier fails to provide a refund to a consumer after the consumer has cancelled his Internet sales contract.

The template does not override any provisions of existing provincial or territorial consumer protection legislation. Each province and territory retains the right to enhance the requirements of the legislation, or to make any changes required to fit within that jurisdiction's legislative framework.

This article was prepared by Consumer Awareness, Research and Education (C.A.R.E.)/Service Alberta, in Edmonton, Alberta.

Insurance Policies

How to Read Them and What to Look For (It's all fine print!)

Jim McCartney

Insurance is costly, but necessary in some cases and advisable in others. Vehicles on a highway must be insured and mortgage companies demand that the mortgaged house or condo be insured against damage. Landlords insist that tenants carry insurance and few of us will take a long trip out of the country without travel and medical insurance. Even people who have no need of an insurance policy themselves may at some point have a claim against someone who is covered by insurance. What those policies say and mean is important.

If you can bring yourself to do it, sit down and read the policies that you have – you may find you have coverage you hadn't imagined and that you have obligations you didn't know about!

The Declarations Page

Every policy has a Declarations Page that, literally, declares what the policy covers, how much it will pay for a loss, what the deductible (if any) is, and what the premium is for each portion of the coverage. The various headings, such as "Third Party Liability" and "Pollution Liability Exclusion" refer directly to policy sections and indicate whether and what coverage is provided.

While a home insurance policy Declarations Page might show that there is Comprehensive Personal Liability coverage with a limit of $1,000,000, it does not show any coverage details. For that, you have to look at the body of the policy. Sometimes insurers, agents or brokers send out only the Declarations Page and you have to ask for the complete policy wording. You should ask – it's important.

Automobile Insurance

Insurance is mandatory throughout North America on all vehicles operated on a highway. If you think you know what a highway is, get this: the Alberta *Traffic Safety Act* defines a highway as

> "any thoroughfare, street, road, trail, avenue, parkway, driveway, viaduct, lane, alley, square, bridge, causeway, trestleway, or other place , or any part of any of them, whether publicly or privately owned, that the public is ordinarily entitled or permitted to use for the passage or parking of vehicles and includes 'a sidewalk (and adjacent boulevard), a ditch (if it is adjacent to and parallel with a roadway) and, if the highway is fenced, all the land between the fences or the fence and the edge of the road."!

Auto policies have three sections. Sections A and B are mandatory, while Section C is optional.

- **Section A** provides "third party liability" coverage and insures owners and drivers against claims by others. The minimum required coverage is $200,000 but most people should and do carry much higher limits.
- **Section B** provides no-fault accident benefits. These benefits are available to the owner, driver and passengers in an insured vehicle who are injured in an accident regardless of who caused the accident. Coverage includes death benefits and funeral costs, disability benefits for people who are totally disabled, and payment for certain treatment and medical expenses.

Tip: These benefits are available from your insurer regardless of fault. Even if you fail to claim them, they will be deducted from what is paid to you by the person who caused the accident. Claim them.

- **Section C** provides coverage for direct and accidental loss of or damage to your own vehicle, regardless of fault. It has four subsections. Subsection 1, called "all perils" is rarely used.
  - Subsection 2 covers collision with virtually any object including, I'm not kidding, "the surface of the ground".

- Subsection 3, called "comprehensive" covers any peril other than what is covered by subsection 2!
- Subsection 4 includes coverage for loss caused by "missiles, falling or flying objects, fire, theft, explosion, earthquake, windstorm, hail, rising water, malicious mischief, and riot or civil commotion." This is the subsection that caused Alberta insurers to lose millions of dollars in a couple of serious Calgary hailstorms many years ago. The provincial government cancelled its cloud seeding program a year or two before those hailstorms. After those storms, the auto and home insurers started and funded their own cloud-seeding program. It seems to be working.

Tip: Section C is subject to deductibles – amounts you must pay before the insurer pays anything.They are negotiable, but lower deductibles have higher premiums. Find the right balance for your own risk tolerance.

Basic coverage is often supplemented or restricted by "endorsements". A common one is the **Deletion of Glass Endorsement** that eliminates coverage for cracked windshields caused by standard driving hazards.

Insurers include the optional **Family Protection Endorsement and Supplement** for a modest premium. It protects against the risk of being injured by an inadequately insured driver. In Alberta all endorsements must be approved by the Superintendant of Insurance. This particular form is standard across Canada. For example, assume A's policy has a $1,000,000 limit and he is injured by driver B who has a $200,000 limit and A's injuries are assessed at $500,000. A would recover $200,000 from B's insurer and then $300,000 from his own insurer. However, if A's limit was also just $200,000, his own insurer pays nothing. A's insurer only pays if A's limit is higher than B's.

Tip: When you claim under Section A, your interests and your insurer's interests are substantially the same – to reduce the extent and dollar value of the claim against you. When you claim under Sections B and C your interests are not the same as your insurer's interests – you might want to seek legal advice.

Other common automobile policy endorsements include:

- **Loss of Use Endorsement**: covers the cost of a rental vehicle while your own is being repaired. You must have coverage under Section C to purchase this endorsement.
- **Limited Waiver of Depreciation**: limits the depreciation of your vehicle if it is written off within 24 months of purchase and you are the original purchaser. Leased or rented vehicles are not covered.
- **Legal Liability for Damage to Non-Owned Vehicles**: allows you to extend your Section C coverage to include a rental vehicle.

Exclusions

Every policy contains some exclusions. These specifically exclude coverage for certain things and in certain circumstances. Some are specific to certain coverage sections of the policy and others apply to the whole policy. You should read them. For example, coverage is excluded when the vehicle is rented or leased to another person. So, don't go on an extended trip and rent your vehicle to a friend without first sorting out the insurance implications.

Statutory Conditions

Certain terms are prescribed by the *Insurance Act*. They include prohibitions against driving while the operator's licence is suspended, using the vehicle for "illicit or prohibited trade or transportation", or engaging in "any race or speed test". Might this prohibition include carrying liquor across a provincial border?

The Statutory Conditions also provide that the time within which a claim may be made against the insurer is one year. Most other limitation periods are two years.

Disputes

A dispute resolution procedure is available to consumers with home, automobile or business insurance: the General Insurance OmbudService (See www.giocanada. org/whosgio.html). The GIO provides free adjudication or mediation services and can be accessed after unsuccessful attempts to resolve the dispute directly with the insurer and before any court action is started. The GIO also has Consumer Assistance Officers who will work with you to see how your problem might be resolved and may even help in an informal conciliation process with the insurer.

Conclusion

This is important and complex stuff. Your agent should be able to answer any questions you have and may even be able to provide a summary of the various policy provisions written in non-technical language. Some of the optional coverages may also be included in a homeowners or travel insurance policy or as a benefit attached to premium credit cards. You may have more coverage options than you think.

Consider your risk. If you cause injury to someone, will you have enough insurance to pay the claim and repair or replace your vehicle, or will you put your savings, investments and home at risk? It costs very little to obtain more than the minimum coverage required by law.

Jim McCartney, LL.B., C.Med., C.Arb., is a Calgary arbitrator and mediator.

Five Things Every Tenant Should Know

Rochelle Johannson

So you've found a nice place to rent and you're excited about moving into your new home? There are some common things that every tenant should do in order to make sure that the renting process flows smoothly.

1. You should have a written lease.

You should always have a written lease with your landlord. The written lease provides you with proof of what you and your landlord both agreed to do. A verbal lease does not offer as much protection to you, and the law will apply to your relationship with your landlord regardless of the form of the lease. It is a common misunderstanding that if there is a verbal lease, then the tenant does not have to provide the proper notice period to end the tenancy. This is not the case. The law will usually apply to both verbal and written leases, so even if your lease is an oral one, you will still have to obey the law and provide a proper notice period to your landlord.

What if your landlord refuses to enter into a written lease? You may want to question whether you want to live somewhere without written protection of your tenancy. We are, after all, talking about your home. You can remind your landlord that the lease protects them too. If you decide to move in anyway, then you should confirm your understanding of the agreement with your landlord in writing. After you make an oral agreement, then you follow the discussion up with a written confirmation of the agreement. Get your landlord's email address, and then write an email to your landlord, including all of the specifics of the agreement, and ask them to confirm if your understanding of the agreement is correct. Having written confirmation of a verbal lease is not as good as having a full written lease, but at least this way you have something to fall back on.

Do not just find a lease on the Internet! In Canada, residential tenancy law is different in each province.

Do not just find a lease on the Internet! In Canada, residential tenancy law is different in each province. Each province has a government department that will oversee its law, so you should contact that department to find out where you can get forms, or it will be able to refer you to another organization in that province that develops forms.

2. You should *understand* your lease.

As much as we all know that we should read every line in a contract before we sign it, the reality is that we often just skim it, or don't read it at all. The harsh truth is that a lease is a contract, and you need to *understand* the lease and what it is you are agreeing to by entering into it. If you don't even know what you are supposed to do ("What? I was supposed to clean the sidewalk? I didn't know that!"), then chances are you are going to do something that you weren't supposed to and there can be serious legal consequences for breaching a lease. The importance of the lease cannot be overstated; this contract is about having somewhere to live, it's about your home, and your family's home.

If you and your landlord agree that something is important to you, or to both of you, then you should insert this as a term in your lease. If you know that you are going to hang a lot of pictures on the wall, then insert a term stating that any nail holes will be considered reasonable wear and tear, and then you can have the peace of mind of knowing that you will not run into trouble with having your security deposit returned.

There are some common problems that tenants can run into by not reading and understanding the lease.

1. Application fees

   Some provinces allow a landlord to charge an application fee. You would pay this when you put in your application for approval to become a tenant, and if you move in, then it will usually form part of your security deposit. You need to know what happens if you don't move in, or if you are not approved by the landlord. Does the landlord get to keep this money? In some provinces, yes, the landlord gets to keep the money, even though you aren't actually moving in.

2. Lease break fees or re-rental fees
   Some provinces allow the landlord to charge a re-rental fee, or a lease break fee, if you move out without providing the proper amount of notice. These fees can equal one month's rent, or more.

3. You should know what kind of lease you have.

In general, there are two types of tenancies: periodic and fixed term. You need to know what kind of tenancy you have because there are different rules that you must follow in order to end either of these kinds of tenancies. It's not enough to know when you pay the rent, because you could pay the rent once a month in a periodic tenancy as well as in a fixed term tenancy.

Periodic tenancies continually renew themselves, unless you or your landlord gives notice that you want to end it. The tenancy exists for a *period of time* (for example, from the first of the month to the last day of the month) and then continually renews itself. Periodic leases are commonly monthly or weekly.

A fixed term tenancy will have the end date specified within the lease itself, and the lease will end on that date. In other words, the lease is only for a specified (fixed) period of time. The rent can be paid monthly, weekly, or whenever you and the landlord agree it should be paid. You should look at your lease to find out if there is an end date right in the lease; if there is an end date, then you have a fixed term tenancy.

4. You should know how to end the tenancy and what can happen if you don't follow the rules.

You need to know how to end the lease properly, or, if you can't end the lease properly, then you need to know what could potentially happen to you, and your security deposit. How a lease ends depends on the reason why the tenant is leaving (did the landlord do something wrong? Or does the tenant just want to leave?) and what kind of lease the tenant has (fixed term or periodic?).

You need to know how to end a lease properly, or, if you can't end the lease properly, then you need to know what could potentially happen to you, and your security deposit.

Usually, if you have a fixed term tenancy, then you cannot end the tenancy early without your landlord's permission. If you do not get your landlord's permission to end the tenancy early, then your landlord can collect the rent from you until a new tenant moves in, or can charge you a lease break fee, or can keep your security deposit. If you have a periodic lease, then you should find out how long a notice period you have to give your landlord, and you should always give your landlord written notice to end the tenancy.

5. You should know the rules about return of the security deposit.

Your landlord can keep a portion or all of your security deposit if you owe any money to the landlord for unpaid obligations (for example, unpaid rent) or if there is damage done to the unit

that is beyond normal wear and tear. Normal wear and tear means the damage that occurs to the premises even though you take care of and maintain the premises. An example to think about: if you are a tenant that moves into a brand new place, then despite how well you take care of the place, the property will never be in as good of condition as it was before you moved in.

Sometimes you will not be able to agree with your landlord about what damage is okay and what damage is not okay. One way that some provinces have tried to help with this problem is to make a requirement that the landlord and the tenant conduct an inspection of the property when the tenant moves in, and to write down the condition of the property at that time. Then, when the tenant is moving out, they should conduct another inspection and write down the condition of the property at that time. By having the two inspections, the landlord and the tenant both know what was wrong with the place when the tenant moved in, and then they can compare the condition when the tenant moves out, to see if the property is in any worse condition. The written reports then become the evidence in order for the landlord to make a deduction from the security deposit.

If you know what your landlord is expecting of you, and what your rights and obligations are, then you can feel more secure in your home and truly enjoy living there. A written lease can give you this peace of mind.

Rochelle Johannson is a lawyer and Co-ordinator of the Residential Tenancies Information Program with the Legal Resource Centre in Edmonton, Alberta.

The Employment Code of Conduct – That Can't Get Me Fired, Can It?

Peter Bowal and Ariel Prence

It is important to situate a document like the Code of Conduct in the larger workplace context. Employers have the right to set the ethical, professional and operational standards for their workplaces. Doing so not only falls within an employer's management rights, it also constitutes an integral component of corporate good governance. The workplace is not an employee's home; and employees have no reasonable expectation of privacy in their workplace computers.

Poliquin v. Devon Canada Corporation, 2009 ABCA 216

Introduction

Many employees today use their workplace computers for some personal use, mostly to surf the web, read and send emails, and even do online shopping. Often, employees forward humorous emails of pictures, links and jokes to friends, co-workers and family. To an employee, it may not seem wrong to send such emails and attachments, but the employer and some recipients may not see it the same way. Some messages may be interpreted as racist, obscene, sexist, pornographic or otherwise objectionable by co-workers. And not all recipients, including those monitoring the employer's server, will get the joke.

Most Canadian companies with a workplace computer policy can track usage, websites visited and key strokes. Their surveillance of seemingly innocent and commonplace workplace activity can produce evidence of violations of internal employment Codes of Conduct.

Likewise, what are employees to do with a business gift offered by a customer, such as a bottle of wine or a seat in the client's corporate box at the hockey game? They would not have been offered these goodies without being in their positions at work, and who knows what integrity and objectivity might be compromised by indulging in these treats. Both inappropriate use of the computer and acceptance of gifts might violate employees' Codes of Conduct, leading to discipline, including termination, by their employers.

Most Canadian companies with a workplace computer policy can track usage, websites visited and key strokes. Their surveillance of these seemingly innocent and commonplace workplace activities can produce evidence of violations of internal employment Codes of Conduct. An employment Code of Conduct or Employee policy manual sets out the private rules of the workplace, including such matters as computer usage policy, agency and signing authority, alcohol and drug use, hiring of family members, abusive interactions such as harassment, receipting and expense accounting, and conflicts of interest around things like gifts and hospitality.

Personal access to blogging at work and to social networking sites like Facebook and Twitter have caught up with people in some high profile cases. The personal use of computers and issues of conflict of interest at work were the focus of a recent Alberta Court of Appeal decision

The Facts: *Poliquin v. Devon*

Claude Poliquin worked for Devon Canada Corporation (Devon) from 1980 until his termination in late 2006, almost all of that time as a supervisor. He was dismissed for cause arising out of non-compliance with his employer's Code of Conduct. Specifically, he was fired for using Devon's workplace computer equipment to access the Internet to view and transmit pornographic and racist material in violation of the Code of Conduct, and for accepting free landscaping services at his personal residence from Devon's suppliers, all in violation of the employment Code of Conduct and Corporate Policies.

Poliquin sued Devon for wrongful dismissal. Devon felt so strongly about its case that it moved to immediately strike Poliquin's lawsuit. Summary dismissal is rarely granted because it quickly closes

the courtroom doors to parties seeking a remedy. It is final judgment without a trial on the ground that there is "no genuine issue of material fact requiring trial". Applications for summary dismissal are based on facts disclosed in affidavits and transcripts of cross-examination on them.

Devon argued that Poliquin's misconduct in breaching its employment Code of Conduct justified immediate termination. The judge found Devon's case wanting and dismissed the motion. The Alberta Court of Appeal took a different view of the facts and law. It upheld Poliquin's firing.

Employee Using Workplace Computer For Personal Use

Modest and discreet personal use of computers, telephones and copiers at work usually will not be noticed or attract discipline. Yet many of us take this privilege for granted. When Devon searched Poliquin's work computer, it found 881 personal pages or files, and many pornographic, obscene or inappropriate photos. All were prohibited under the Code of Conduct.

Poliquin admitted to sending these emails to some of Devon's suppliers, business contacts and fellow employees. He was aware that using his workplace computer in this way was a violation of the Devon Code of Conduct, which expressly prohibited use of email for "sending … pornographic, obscene, inappropriate or other objectionable messages or attachments via email to anyone."

Poliquin had been warned about this in 2001, when it was discovered he had accessed pornographic material on the Internet. He admitted to misusing his workplace computer and promised it would not happen again. He understood "it was not acceptable to use Devon computer equipment to access such sites or to exchange pornographic images."

An employment Code of Conduct or Employee Policy Manual sets out the private rules of the workplace, including such matters as computer usage policy, agency and signing authority, alcohol and drug use, hiring of family members, abusive interactions such as harassment, receipting and expense accounting, and conflicts of interest around things like gifts and hospitality.

Not all policies and rules enjoy the same status. Some are more important than others and many are not monitored or enforced. Can companies fire an employee, especially a supervisor with long service, because he used his work computer and Internet access to view and pass on "objectionable" messages?

A panel of three Alberta Court of Appeal judges agreed: it is possible for an employee to be fired for certain breaches of a Code of Conduct after a warning has issued, even where no palpable physical or financial harm has occurred. Employers have the prerogative to set the ethical, professional and operational standards for their workplaces, which promotes good corporate governance. An employer's reputation can be seriously harmed by such acts, especially from an employee with supervisory status. The Court of Appeal noted that, today, email can be sent to many recipients inside and outside organizations with the click of a mouse. Employers may not only prohibit use of its equipment and systems to protect against pornography and racism, but they may also monitor employees' use of their equipment and resources to ensure compliance.

Employee Solicitation of Services From Employer's Suppliers

A supervisory position at a company brings more familiarity with suppliers or business partners of the employers due to control over contracts. Soliciting goods or services from these suppliers without paying for them, is dishonest and may lead to termination.

Poliquin solicited and received free landscaping services at his personal residence from Devon's suppliers. One supplier, which furnished free landscaping services, admitted it did so because Poliquin was not only a friend but also a business associate. It felt pressured to provide the freebie services because of Poliquin's supervisory position.

Can companies fire an employee, especially a supervisor with long service, because he used his work computer and Internet access to view and pass on "objectionable" messages?

Accepting a secret commission or benefit raises issues of both dishonesty and conflict of interest. Does this constitute sufficient legal cause for firing? According to the *McKinley* principles, a judge will consider whether the employee violated an essential condition of the employment contract, breached the faith inherent in the work relationship, or acted fundamentally or directly contrary to the employee's obligations to the employer. This test focuses upon the employment contract, including the Code of Conduct. Employees are expected to render loyal and faithful service to the employer, and that obligation increases with the level of responsibility attached to the employee's position.

Again, Devon's Code of Conduct admonished employees to avoid behaviour that even potentially creates a conflict between their obligations to Devon and their personal interests. The Code stated: "Employees must avoid the direct or indirect receipt or solicitation of … gifts … or other favours from … firms that exceed what is generally considered nominally valued, common-courtesy items usually associated with ethical business practices."

Outcome

The Alberta Court of Appeal took into account the cumulative effect of Poliquin's misconduct and determined that his summary dismissal was justified. Poliquin was a senior supervisor who was expected to model professional service to others. The misconduct of a senior supervisor will be viewed more seriously.

While no person had complained about Poliquin's pornographic and racist emails, the Court of Appeal "presumed harm from the polluting of Devon's workplace with pornography regardless of whether anyone complained." The Court of Appeal concluded that "after taking into account all circumstances and considering Poliquin's misconduct cumulatively … there is no genuine issue of material fact requiring trial … it is plain and obvious that Poliquin's wrongful dismissal action cannot succeed."

An employee's acceptance of a perk or benefit for his own personal advantage, particularly when the employee is in a responsible position, makes the employer "hostage to a potential contractor." Poliquin's solicitation and receipt of landscaping services from Devon suppliers amounted to

misconduct which alone justified dismissal for cause. Any material diversion to an employee's personal benefit can lead to a loss of employer confidence and legal grounds for summary termination.

A company may reasonably expect its employees, and especially supervisors, to exercise sound judgment in dealings with co-workers and suppliers, including compliance with the workplace Code of Conduct which contains such standards. Poliquin had trampled and abused that trust.

The Alberta Court of Appeal took into account the cumulative effect of Poliquin's misconduct and determined that his summary dismissal was justified. Poliquin was a senior supervisor who was expected to model professional service to others. The misconduct of a senior supervisor will be viewed more seriously.

Lessons Learned

This case demonstrates how a Code of Conduct is an enforceable piece of the employment contract. The law will permit employers to monitor use of its computer equipment for legitimate business objectives. Companies might even block certain websites from view.

Employers should keep their Codes of Conduct up to date and in front of their workforce from orientation onward. They should conduct regular reviews where employees sign off that they have read and understood them. Relatively few rules will warrant summary dismissal when breached, so employers should warn non-compliant employees and give them an opportunity to fall into line. Employers should be even-handed and fair when enforcing the Code. And finally, the *Poliquin* case reminds us that customers and suppliers are assets of the employer, not the employees, even supervisors. Employees should never deliberately insert themselves into a situation where their personal interests conflict with their employer's interests.

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The Ties That Bind:

A Guide to Accommodating Family Obligations in the Workplace

Ayla Akgungor and Terri Susan Zurbrigg

Under both Alberta's *Human Rights Act*, and the *Canadian Human Rights Act*, employees cannot be discriminated against on the basis of "family status" or "marital status". Briefly, "family" has been construed broadly by the legislation, and includes any relationship arising out of blood, marriage or adoption, such that siblings, in-laws, and extended family are all captured by the definition of "family." Marital status in both Acts includes common-law relationships.

Despite a number of recent decisions that consider family status discrimination, the law remains unclear on the legal test to be applied when evaluating such claims. Consequently, employers are often concerned and confused about their obligations as they grapple with the issue of when they must accommodate employees whose job requirements and family obligations conflict.

Human rights tribunals and labour arbitrators have adopted different standards when determining the threshold issue of whether there is a *prima facie* case of discrimination. This divergence has significant implications because without a *prima facie* case, an employer's duty to accommodate is not triggered.

The approach espoused by labour arbitrators, commonly referred to as the *Campbell River* approach (named after the British Columbia Court of Appeal decision in which it was first articulated[1]), requires that a term or condition of employment results in a serious interference with a substantial parental or other family duty or obligation in order that it be found to be *prima facie* discriminatory.

Human rights tribunals and labour arbitrators have adopted different standards when determining the threshold issue of whether there is a *prima facie* case of discrimination. This divergence has significant implications because without a *prima facie* case, an employer's duty to accommodate is not triggered.

On the other hand, many human rights decisions, including the recent CN Rail decisions[2], have rejected this approach and instead held that a *prima facie* case for discrimination on the basis of family status can be established solely on the basis that an employee cannot satisfy a condition of her employment because doing so would conflict with a family obligation. The crucial difference between the two approaches is that the *Campbell River* approach characterizes the nature or extent of the interference that is required in order to establish a *prima facie* case, thereby preventing claims of discrimination in every instance where there is a conflict between family obligations and workplace requirements.

Despite these different approaches, some general principles have emerged that employers can rely on for helpful guidance in navigating this challenging issue:

1. Interference with a parent's subjective preferences is not enough to ground a finding of discrimination.
    - An employee who refused to return to work after her maternity leave because she was unable to make appropriate daycare arrangements was not discriminated against since she insisted that daycare be provided through a regulated daycare facility and did not consider other childcare options.
    - Not being able to attend some of a child's extra-curricular activities is not discrimination.
2. Parents must actively take steps to juggle the competing obligations of workplace demands and family obligations and explore and exhaust all available solutions and alternatives ("self-accommodation").
    - Requiring an employee to work one evening shift per week upon return from maternity leave was not discrimination as childcare alternatives were readily available.
    - Requiring that a female correctional officer work 30 nightshifts per year was not discriminatory as part of parental responsibility involved actively exploring alternatives for occasional night-time childcare, and no evidence was presented that these were not available.

- When parents are sharing custody and are subject to custody agreements with strict terms, "self- accommodation" may be more difficult.

3. Employers must be fair and forthright in determining whether accommodation sought would result in undue hardship and must be open to and consider alternatives proposed by employees.
   - Only those accommodation measures that impose excessive or inordinate demands upon employer's resources will meet the threshold of undue hardship.
   - A subjective concern that accommodation will result in a floodgate of similar requests is not undue hardship.
   - Employees should demonstrate a lack of reasonable alternatives that would enable them to meet their family obligations and, as a result, that they need accommodation.
4. Accommodation is more likely to be required where a child is ill or has medical or behavioural issues that require parental care.
   - A woman whose son had a major psychiatric disorder, and who needed his mother's care after school, was discriminated against when her employer imposed a scheduling change that required her to work until 6:00 pm.
   - A woman who was denied a six-month extension of maternity leave to breast-feed an ill baby who required feedings every three hours should have been accommodated.

Only those accommodation measures that impose excessive or inordinate demands upon employer's resources will meet the threshold of undue hardship.A subjective concern that accommodation will result in a floodgate of similar requests is not undue hardship.

Accommodation as the result of family status can be complex and require employers to balance competing interests. As the legal parameters of family status discrimination continue to evolve and be defined by courts and tribunals, employers may wish to seek specific legal advice on issues they are facing in this growing and challenging area.

Notes

1. *Health Sciences Association of B.C. v. Campbell River and North Island Transition Society*, 2004 BCCA 460.
2. See *Seeley v. Canadian National Railway*, 2010 CHRT 24. Note that CNR is seeking judicial review of the Canadian Human Rights Tribunal's decision.

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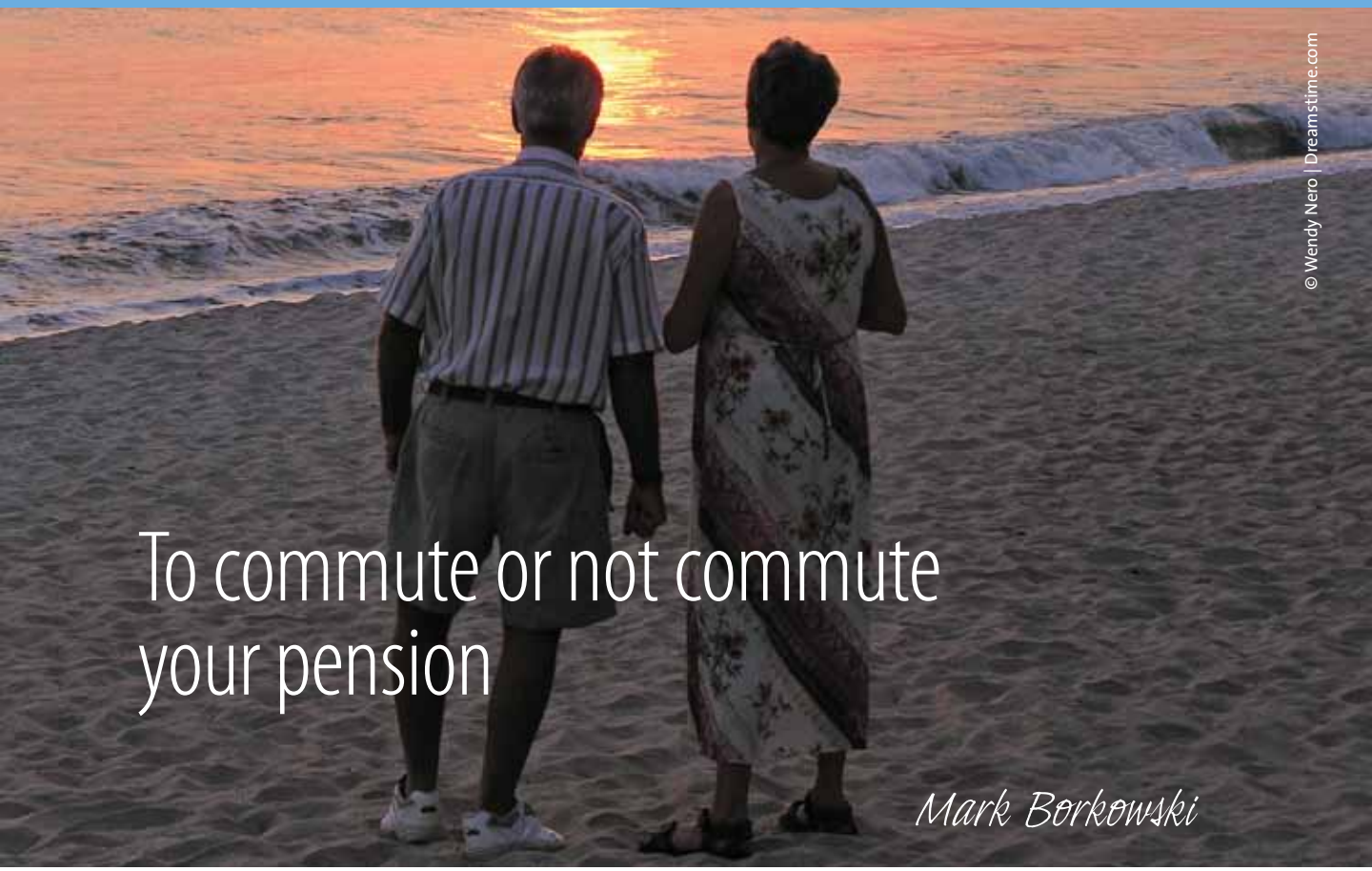

To commute or not commute your pension

Mark Borkowski

Whether you are retiring, starting a new job or taking time off, leaving an employer can often be an emotional time. Financial concerns and the need to make some important decisions, such as what to do with your pension, may add to your stress level.

If you have been a member of a pension plan for many years, the benefits that you have earned in the plan could likely be the largest source of income you will receive in retirement. Deciding what to do with this income involves many variables and can be quite confusing. And, once you make a decision, it is often irreversible.

To learn more about the options and how to approach this decision I sat down with Dan Sexsmith, Investment Advisor at RBC Dominion Securities in downtown Toronto. Here are some of the questions I asked him:

Tell me, Dan, if I have just left my employer, what's the first thing that is going to happen?

"Prior to or shortly after you have terminated employment, your employer should send you a written summary outlining your company pension plan options. You will be required to select one of the options by a specific deadline and if you don't act before the deadline, your employer may consider that you have chosen one of the options by default, which may or may not be the best one for you".

And I then added: *What options are usually offered?*

According to Dan Sexsmith, "there are usually four basic options to select from. Firstly, you can decide to stay in the pension and receive your accrued benefits at retirement age. Secondly, you may opt to purchase an annuity that pays you a set cash flow at a predetermined date in the future. Third, you should have an option to 'commute' your pension amount to a locked-in retirement account (LIRA). Once in this account you control how the investments are managed. And lastly, if available, you can request to transfer your pension amount to another employer pension plan and participate in that plan."

Some employers continue to offer full benefits if you remain with the pension. This is a benefit you should not overlook when making the decision to commute your pension.

What are some of the reasons that you may decide to keep your retirement funds with the pension?

Dan believes that the number one reason to stay in a pension is the high degree of certainty of what you will get in retirement. The employer takes on all the investment risk and the benefit paid is predetermined and sustainable. This decision may not be so straight forward if the company is under financial strain and pension funding is at risk.

Dan added "The next item that I come across is not a financial factor. Rather, it's related to benefits coverage such as medical and dental. Some employers continue to offer full benefits if you remain with the pension. This is a benefit that you should not overlook when making the decision to commute your pension. One course of action that eliminates this is if you have a partner that can add you to their benefits plan."

What are some of the reasons that you may decide to commute your retirement funds to a LIRA?

Dan said, "Getting control is the biggest motivator. When you are in your retirement years you have greater control of how you use your savings. This is further enhanced when you consider special 'unlocking provisions' that allow you to roll funds from your LIRA to your regular RSP account. Again this means more control.

Lump sum withdrawals are not possible when in a defined benefit pension plan but in a LIRA it is (within certain limits). On the other hand, you can decide to take less in a given period to manage around government benefits that have claw backs, such as Old Age Security.

Considering your family and their dependency on your income is another big area to assess. If you pass away prematurely the benefits paid from your pension will be cut by up to 40% for your surviving partner. With a LIRA you are able to roll the funds into the surviving partner's RRSP with no tax consequences.

If you do decide to move your funds to a LIRA you take on the risk of running out of money in retirement. To partly address this you can allocate some funds to specialty insurance products that offer income for life. It's like buying a mini-pension that creates a minimum floor on your retirement income."

Lastly I asked Dan: *What is your advice for approaching this decision?*

He explained that the first step is to get an advisor involved that has access to pension calculation tools and explore the scenarios. The decision involves many complex variables and the details can be overwhelming without the proper tools. Looking at scenarios and understanding the risks of each decision will be the best way to make your decision.

Dealing with pension decisions has long-term implications. Get a professional involved and assess your options.

if you do decide to move your funds to a LIRA you take on the risk of running out of money in retirement. To partly address this, you can allocate some funds to specialty insurance products that offer income for life.

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Once Again Human Rights Commissions are Under Attack

Linda McKay-Panos

In 2008, I wrote a column for LawNow entitled "What's Going On With Human Rights Commissions?" In it, I summarized the debate surrounding the call for abolishment of Human Rights Commissions (mostly fuelled at that time by freedom of expression concerns and provisions in human rights laws that prohibit hateful speech). It appeared that the debate had calmed to a simmer. Yet, in the past several months, there has been a resurgence of discussion, both in print media and on various Internet sites. The debate resurfaced in Alberta with the reported announcement by the Wildrose Party in June 2011 that one of its platforms for the upcoming election in Alberta is the elimination of the Alberta Human Rights Commission ("Commission"). Once again, this has resulted in a stream of letters to the editor, editorials and blogs which largely support abolishment of the Commission.

Unfortunately, instead of embarking on a reasoned discussion about the provisions in our human rights legislation that need improvement or change, most of the discussion centres around inflamed rhetoric that often is based on inaccurate or incomplete information. For example, one common criticism of the existing Commission in Alberta is that the Tribunal's work is done by bureaucrats, and that complaints are adjudicated in a "kangaroo court", with no rules of evidence and no burdens of proof (per Rob Anderson in CBC News, "Wildrose drops 'Alliance' from name" June 26, 2011 online: http://www.cbc.ca/news/canada/edmonton/story/2011/06/26/cgy-wildrose-meeting.html). Most of these assertions are incorrect, and obscure what could be a reasoned examination of current human rights legislation and recommendations for its improvement.

Currently in Alberta, the Commission serves two main functions: education about human rights and enforcement of complaints.

The human rights platform of the Wildrose Party must be looked at carefully. According to the *Edmonton Journal*, the Party wants to retain human rights legislation, but to have a court enforce it rather than the Human Rights Tribunal ("Tribunal") (Jason Fekete, "Wildrose promotes private, non-profit hospitals" June 26, 2011 *Edmonton Journal*, online: http://www.edmontonjournal.com/news/Wildrose+promotes+private+profit+hospitals/5007517/story.html). This could also involve the demise of the Commission (which has a separate function from the Tribunal). Unfortunately, it is not absolutely clear from the news reports whether the policy includes the outright abolishment of the Commission.

Currently in Alberta, the Commission serves two main functions: education about human rights and enforcement of complaints. Complaints must be made to the Commission within one year of the alleged discrimination. Once a complaint is accepted, the Director of the Commission will attempt to settle the complaint. If he or she is not able to do so, an investigator is appointed to look into the complaint, and make recommendations to the Director about whether the complaint has merit or should be dismissed. The Director may dismiss a complaint if he or she believes it is without merit or if the complainant refuses a reasonable settlement offer. If the complaint has merit and the Director is unable to settle the matter, the Chief of Commission and Tribunal will appoint a Tribunal to hear the complaint. The Tribunal decision can be appealed to the Court of Queen's Bench. Presently in Alberta, the Chief of Commission and Tribunal, Blair Mason, is a former lawyer and former Justice of the Court of Queen's Bench. The six part-time Commissioners are all legally trained (Alberta Human Rights Commission, "Biographies of members of the Commission" online: www.albertahumanrights.ab.ca/about/organization/bio_members_of_commission.asp). They are not government bureaucrats.

Therefore the question remains, should the Commission be abolished in Alberta (or anywhere else in Canada)? Perhaps an examination of recent changes in other Canadian jurisdictions will help in answering this question. Saskatchewan, Ontario, British Columbia and Nunavut have recently adopted alternative human rights complaint resolution models.

In 2003, British Columbia abolished its Human Rights Commission. Complaints are filed directly with the Human Rights Tribunal ("direct access model"). The Chair of the Tribunal assigns complaints to be heard and the Tribunal has the authority to make rules to resolve complaints using mediation and offers to settle. The demise of the B.C. Commission has been criticized as eliminating its public functions such as education, research and monitoring systemic human rights issues across B.C. (Kristy Neurauter, "Direct Access to Privatization: The Demise of Human Rights under the British Columbia Human Rights Tribunal" online: www.vihrc.org/doc/DirecctAccessToPrivatization.pdf).

In Ontario, since 2008, there is also direct access to the Human Rights Tribunal. The Ontario Human Rights Commission, however, still exists, can file complaints with the Tribunal, and has education, research and advocacy functions.

A new human rights complaint system is being implemented in Saskatchewan (Bill 160, proclaimed in force July 1, 2011). The Saskatchewan Human Rights Commission is *not* being eliminated. Rather, its work is being refocused to four pillars – effective investigation and prosecution of complaints; alternative dispute resolution of complaints; increased systemic advocacy; and pre-K to 12 education about rights and responsibilities (Saskatchewan Human Rights Commission, "Bill 160 – Proposed Amendments to the Human Rights Code"). The cases that are usually heard by the Tribunal will now be heard by the Court of Queen's Bench. This is to improve the average time that it takes to resolve a complaint (currently 15 months of investigation followed by 21 months before a decision is rendered). The aim is to settle the vast majority of complaints before litigation. In the rare cases that require determination by the Court of Queen's Bench, the Commission will provide lawyers at no cost to the complainants. Courts will adopt a more informal hearing process if appropriate to the circumstances. Most of the Court of Queen's Bench rules will not apply to a human right complaint hearing. For example, no examinations for discovery will be required, courts will be allowed to consider the same type of evidence as tribunals, and will be provided with the same remedies as existed under the former legislation (Saskatchewan Human Rights Commission, "Bill 160 – Proposed Amendments to the Human Rights Code"). It is important to note that existing, often controversial human rights legislation that provides for limits on freedom of expression has not been amended.

> Clearly, there is a need for some type of dispute resolution procedure to deal with discrimination in settings such as workplaces, rental accommodation and services customarily available to the public. What are the difficulties with human rights tribunals and what would be the advantage of using courts instead?

The only truly significant difference between the current human rights regime in Alberta and Saskatchewan's new regime is that, in Saskatchewan, matters that used to be dealt with by a tribunal will be dealt with in the Court of Queen's Bench. Any discussion about abolishing human rights commissions should focus on the reasons for changing courts for complaint resolution, and whether it would be a good idea for Alberta to follow suit.

Should a court deal with human rights matters? It is only fair to note that a great number of our legal disputes are dealt with by administrative tribunals. We have administrative tribunals that deal with matters such as labour and employment, social benefits, securities, energy and resources. Tribunal members with specialized knowledge about these issues resolve them in a quasi-judicial process. People are often not required to have legal representation before tribunals. Usually the procedures are less formal than in court, and the rules of evidence are not as strictly observed. Tribunal members are usually appointed by the government, and must implement the statutes that create them. In addition, in Alberta, the human rights legislation provides for remedies that are not generally awarded in court proceedings, such as an apology, reinstatement or damages for hurt feelings. The legal doctrine of *stare decisis* (precedent) is not binding on tribunals, but members will be persuaded by relevant court decisions.

Clearly, there is a need for some type of dispute resolution procedure to deal with discrimination in settings such as workplaces, rental accommodation and services customarily available to the public. What are the difficulties with human rights tribunals and what would be the advantage of using courts instead? Courts and judges operate with independence. Human rights commissions, as statutory bodies, should be at arm's length from the government, especially since they deal with complaints against the government. However, in Alberta, our Commission reports to the Minister of Culture and Community Spirit, not to the Legislature. This issue could be dealt with by a change to the legislation, rather than moving human rights matters to the courts.

Courts are considered by many people to be more unbiased and more stringent in their application of rules of evidence and procedures. On the other hand, many people are intimidated by court procedures, and since the overall purpose of human rights law is remediation and education rather than punishment, perhaps a tribunal is the better place to adjudicate human rights matters. However, those involved in the current process, especially respondents, often argue that it can be punitive because it takes so long to obtain a resolution, and because it can be costly to hire a lawyer to respond to or defend against a complaint. However, it is not clear how the latter concern would be alleviated by going to court, especially since in Saskatchewan, for example, legal representation in court appears to be provided for complainants but not respondents. Also, if human rights commissions were abolished, there would need to be a new system to sort out complaints made directly to the court. Otherwise, the court would be overwhelmed with complaints, defeating the purpose of using government resources more efficiently and speeding up the process.

Courts are considered by many people to be more unbiased and more stringent in their application of rules of evidence and procedures. On the other hand, many people are intimidated by court procedures, and since the overall purpose of human rights law is remediation and education rather than punishment, perhaps a tribunal is the better place to adjudicate human rights matters.

Finally, if courts were to take on human rights complaints directly, they would have to be given the authority to provide the types of remedies that the current human rights commissions

can provide. Since the overarching purpose is educational and remedial, these remedies do not reflect traditional remedies available in court (e.g., money damages or equitable remedies such as an injunction).

It will be interesting to see whether the new system in other provinces will produce the intended results. None of these new models address whether the law should be amended (e.g. should the discriminatory or hateful speech provisions be eliminated or changed?). Even if we abolished the human rights commissions altogether, courts would then be interpreting and applying the existing legislation.

There are some very serious issues about whether we should abolish human rights commissions. However, these are getting completely lost in hyperbolic references to "kangaroo courts" instead of looking at amending the legislation itself.

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The Spousal Support Advisory Guidelines

Part Two – Fitting in the Ranges

Rosemarie Boll

As discussed in the last issue of LawNow, the Spousal Support Advisory Guidelines (SSAGs) are not a precise measure of a person's support claim. Instead, applying the correct formula (*with child support* or *without child support*) results in two ranges – amount and duration. For example, say the formula forecasts an award between $450 and $700 per month, with a term between 3 and 6 years. The low range is $450 X 36 months = $16,200. The high range is $700 X 72 months = $50,400. The difference, $34,200, is huge. How do you decide what's fair?

A. Section 9 – Using the Spousal Support Advisory Guideline Ranges

Several factors can push the numbers (amount and/or duration) higher or lower – or even outside – the ranges. The factors which can nudge the numbers up or down are:

9.1 Strength of any compensatory claim

- ↑ The quantum goes up if the claimant suffered significant economic disadvantages because of the marital roles (e.g. the claimant gave up job opportunities to benefit the other spouse's education or career).
- ↓ The quantum goes down if, post-separation, the claimant has need but that need does *not* arise from the marital roles (e.g. simply losing the former standard of living).

9.2 Recipient's Needs

↑ The claimant has limited income and/or earning capacity, because of age, health, or other circumstances.

↓ The claimant already has a solid base of employment, other income, or reduced living expenses (living in a mortgage-free matrimonial home, subsidized housing, or family-provided housing, including living with a new partner).

No single factor controls the outcome. Several may operate in any one case, sometimes pulling in different directions.

9.3 Age, Number, Needs and Standard of Living of Children

↑ A child with special needs usually demands more time and resources from the care-giving parent.

↑ The claimant cared for infants or toddlers.

↑ Post-separation, the claimant and the children have a lower standard of living than the payor.

↓ More children means less income is available to pay spousal support ('squeezing' the range); however, there are often strong reasons to go higher within this 'depressed' range.

↓ The claimant cared for an older or an adolescent child.

9.4 Payor's Needs and Ability to Pay

$20,000 is 'the floor' below which the payor has no obligation to pay support.

↓ The payor has difficulty maintaining a modest standard of living.

↓ The payor has large compulsory deductions, including pension deductions, compared to the claimant.

↓ The payor spends significant sums directly on the children's expenses during the payor's parenting time.

9.5 Work Incentives for Payor

The SSAGs recognize the need to motivate the payor to keep working:

↓ The payor has additional out-of-pocket costs of going to work every day which are not subsidized by the employer or tax deductions (e.g. substantial costs for clothing, commuting to work, parking, tools, etc.)

↓ The payor is in the work force and claimant is not (particularly when the claimant has no dependent children).

9.6 Property Division and Debts

↑ There is very little property to divide.

↓ The claimant receives a large amount of property.

↓ The claimant owns sizeable exempt or excluded assets.

When the payor assumes a greater share of debts it reduces the numbers; conversely, when the claimant takes on a greater share it raises the numbers.

9.7 Self-Sufficiency Incentives

↑ The claimant needs money now for retraining or education that will lead to better-paid employment and less support in the long term.

↓ An incentive generally encourages the claimant to make greater efforts to self-sufficiency.

No single factor controls the outcome. Several may operate in any one case, sometimes pulling in different directions. The ranges accommodate local and regional differences, recognizing that awards in some parts of the country are higher than others[1].

B. Section 10 – The Next Step: Restructuring

Having narrowed the range, you may want more flexibility with the actual payments. 'Restructuring' means trading off amount against duration.

There are three ways to restructure an award:

1. increase the monthly payments and shorten the term (front-end loading);
2. lower the monthly payments and extend the term; or
3. make a lump sum payment, which combines amount and duration.

Unlike monthly payments, lump sums are not tax deductible for the payor and not taxable income for the recipient.

10.2.1 Restructuring by front-end loading

Increasing the payment and shortening the term will quickly cut the ties between the spouses and allow them to go their separate ways. It is useful in short marriages without children where the support is meant to let the claimant transition to a lower standard of living. Another way to front-end load is with step-down payments, for example $1,500 per month in year one, $1,000 per month in year two, and $750 per month in the final year. The total value of the award (in this case $39,000) should still fall within whatever global range was generated by the formula.

A lump sum is another type of front-end loading. In very short marriages with a modest support entitlement and sufficient property, a lump sum achieves a clean break. It can be a single payment or a few payments spread over time. Unlike monthly payments, lump sums are not tax deductible for the payor and not taxable income for the recipient.

1 Although the SSAGs are intended to do away with the imprecision and uncertainty of budgets, they are only advisory. Be sure to prepare and submit a budget with your supporting material.

10.2.2 Restructuring by Extending Duration and Reducing Amount

Decreasing the payment and lengthening the term can be practical in medium-length marriages where the claimant has long-term need and would be better off with modest supplements to other income over a longer period (e.g. the claimant has a long-term disability and receives disability benefits). Similarly, the payor might extend the term until the claimant reaches retirement age and pension income kicks in. It is also beneficial when there is a cross-over from the *with child support* formula to the *without child support* formula. This happens when children who were dependent at the time the spouses separated have now become independent.

The only limit to restructuring is that the overall value of the restructured award should remain within the global – or total – amounts generated by the formula when amount is multiplied by duration.

The third and final part of this series on the SSAGS, on Ceilings and Floors, Exceptions, and Self-Sufficiency, will appear in my next column.

Notes

1. The Spousal Support Advisory Guidelines 2008 www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/pdf/SSAG_eng.pdf
2. The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/tool-util/topic-theme/ug_a1-gu_a1/index.html

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Whatever Happened To . . . The Prosecution of Susan Nelles

Peter Bowal and Kelsey Horvat

Introduction

In the 1980s, Canadians were riveted by the news of a succession of babies mysteriously dying at Toronto's world-renowned Hospital for Sick Children. Between June 1980 and March 1981, a troubling increase in baby deaths in cardiac Wards 4A and 4B was observed. Early meetings among hospital staff concluded the problem was not serious. It was thought most of the children had simply died of their conditions and that, if anything, there may have been a need for another Intensive Care Unit at the hospital.

However, in January 1981, the autopsy of 4-month-old Janice Estrella revealed a high level of digoxin in her blood. Digoxin was commonly used in cardiac wards to increase circulation and slow heart rates. Then in March, Kevin Pacsai, only 23 days old, died unexpectedly. His condition was not life threatening upon hospital admission. His autopsy also pointed toward digoxin toxicity.[1] Nurse Susan Nelles had failed to convince doctors to attend to him and was the one to find the baby struggling on the morning of his death. The coroner called in police to investigate the deaths of these two babies.

When another baby, Allana Miller, died soon after with a high concentration of digoxin in her blood, the hospital designated digoxin a "controlled drug" – it was to be locked away and could only

be administered by following strict procedures. Still, the next day twelve-week-old Justin Cook died with elevated levels of digoxin in his blood and tissues despite never being prescribed the drug. The entire Ward 4A nursing team was temporarily relieved of duty. Elective admissions to Wards 4A and B were halted, patients were transferred to other wards, and a full police investigation was launched.

More than 30 years later, we have not obtained answers to what happened during that period that threatened to bring down one of the foremost pediatric hospitals in the world. What did follow was a parade through the criminal and civil courts. In the end, this litigation – much like the medical mysteries that gave rise to it – would produce more drama than meaningful resolution.

Were these babies murdered? If so, who would be held legally responsible for them? In a further twist, should individuals charged with crimes like murder be able to sue the Crown (government), the Attorney General and its prosecutors if they are acquitted? The litigation that ensued from these baby deaths would ultimately serve only to define the liability of prosecutors and the Crown in such matters.

Susan Nelles Charged

On the night he died, baby Justin Cook was under the exclusive care of Susan Nelles – he was her only patient for her entire shift. From a respected family of physicians, Nelles was a nurse who had graduated less than three years earlier from Queen's University in Kingston. Nelles had also cared for babies Miller and Pacsai when they died and she had worked the shift prior to baby Estrella's death. The police, seeing Nelles as the common denominator, focused on her.

More than 30 years later, we have not obtained answers to what happened during that period that threatened to bring down one of the foremost pediatric hospitals in the world.

The police interviewed all members of the Ward 4A nursing team. They spoke with Nelles last, with the intent of arresting her if she could not explain the deaths. Forewarned she would be questioned by police, Nelles consulted her law-student roommate about what to do. Her roommate advised her to "lawyer up" and not to speak to the police without a lawyer present. Three days after baby Cook's death, she was arrested and charged with the murder of the four babies. The suspicious baby deaths then stopped. Nelles volunteered little information in the police interview which further convinced the police of her guilt.

The murder case against Nelles was circumstantial, and the proof required to be shown by the Crown is beyond a reasonable doubt. Either Nelles was a horrible baby killer or she was unjustly and falsely accused.

Nelles had cared for the four infants at the time of their deaths, but she was not the only nurse to do so. Other nurses had access to digoxin. While providing care for Cook, Nelles was relieved by her supervisor for breaks. Exhumed remains of another infant showed digoxin toxicity when Nelles had been off work for several days. While the deaths seemed to end after Nelles' arrest, that could also be explained by the hospital's new restrictions on access to digoxin and other infant care protocols.

The preliminary inquiry in Ontario's Provincial Court addressed the threshold determination of whether all the Crown evidence, if believed, could result in at least one murder conviction against Nelles. If so, she would stand trial before a jury in Superior Court. If not, there would be no further prosecution.

In the end, the judge threw out all four murder charges against Nelles, citing the lack of sufficient Crown evidence. The medical and legal communities were rocked by the news that Nelles would not face trial. And why did these babies die?

The Grange Inquiry

Judge Samuel Grange was appointed to head the Royal Commission of Inquiry into the deaths of the 36 babies between June 1980 and March 1981 at the Hospital for Sick Children.[2] He concluded 8 babies were killed by digoxin toxicity. He called another 15 cases suspicious or highly suspicious.

He also concluded that the police were in a difficult position because they believed that they had found the killer of baby Cook, and because Nelles refused to speak without a lawyer. She stood out among the nurses because she was the only one to act in that way – to the police it further incriminated her. The prosecution pressed on when they believed Nelles was guilty.

On the other hand, Grange found no fault with Nelles. One should be able to ask for legal counsel before being interrogated by police. Such requests should not be seen as a basis for guilt.

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Civil Lawsuit for Malicious Prosecution

Nelles herself did want a trial, but not the kind the prosecutors had in mind. After the preliminary inquiry, and especially after the inconclusiveness of the Grange Inquiry, attention turned to the way the police investigation and prosecution were carried out. The police were criticized for arresting Nelles without fully questioning her, and charging her with the three earlier murders without clear evidence of contact with those babies.

Nelles hired former professional football player, then prominent Toronto civil lawyer, John Sopinka, who would later be appointed to the Supreme Court of Canada. He argued that the Crown of Ontario, the Ontario Attorney General (through his prosecutors who were not personally named in the lawsuit) and police were malicious in their pursuit of Nelles. He commenced a civil suit against all three parties.

Malicious prosecution has long been an infrequently used and controversial tort, largely because many fear it would open the floodgates to lawsuits against individual prosecutors who, in turn, may become so chilled by this litigation that they would be unable to properly do their jobs.

To win a civil lawsuit for malicious prosecution, one must meet a four-part test. One must prove that the prosecution, more likely than not, was:

1. initiated by the (prosecuting) defendant;
2. terminated in favour of the plaintiff;
3. undertaken without reasonable and probable cause; and
4. motivated by malice or a primary purpose other than that of carrying the law into effect.[3]

These requirements give no opportunity to convicted criminals to pursue legal action against their prosecutors. Accused who are later acquitted will not succeed unless they can show bad faith or malice on the part of the prosecutors.

When Nelles' case came to the Ontario courts, the issue of prosecutorial immunity arose. In 1985, she settled with the police for $190,000, paid by the Province of Ontario. She continued on, however, against the Ontario government and the Attorney General. The immunity defence rose to the Supreme Court of Canada.

In August 1989, a divided Supreme Court of Canada ruled that Nelles could continue her action against the Attorney General for malicious prosecution but not the Crown of Ontario itself, which enjoyed immunity under provincial legislation.[4] The distinction between the Crown and a Minister and agents of that Crown was a technical one.

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Nelles' lawyer Sopinka later wrote "a person wrongfully accused or convicted may have suffered the same social stigma, loss of liberty, loss of earnings, costs of defence, and possibly loss of family life that is suffered by the rightfully convicted accused who is responsible for his or her crime."[5] The procedural victory that allowed her case to proceed brought applause from the media for her courage to fight the system that wronged her and a chance to recover damages for the ordeal she suffered.

Two years later, Nelles settled with the Ontario government for what amounted to her accumulated legal costs of $60,000, of which $20,000 endowed a Queen's University scholarship in her name and $10,000 added to the Nelles Family Endowment Fund at Belleville General Hospital. This Fund had been created in honour of her brother and father, both doctors, who passed away during her legal ordeal.

Nelles married James Robert Pine in 1985 and the couple had three children. Her nursing licence was unaffected by the criminal charges and she continued to live near her hometown of Belleville and work as a nurse in Kingston, Ontario. She has also spoken to nursing groups about her experience. In 1999, she was awarded an honorary doctorate in law from Queen's University, her *alma mater*, for her work in promoting integrity in nursing.

The Nelles Legacy

The high profile but short-run *R. v. Nelles* criminal prosecution gave rise to *Nelles v. Ontario*, a civil case that clarified for the first time that cabinet ministers and prosecutors are not shielded from having to defend lawsuits for malicious prosecution. Young nurse Nelles symbolized the human ordeal that can occur at the hand of overwhelming state investigatory and prosecutorial power. There is a civil legal remedy for damages when that power is mis-directed.

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Recently the Supreme Court of Canada, in *Miazga v. Kvello Estate*,[6] had occasion to further refine this tort of malicious prosecution. Crown Attorney Miazga prosecuted parents falsely accused of sexual assault by their foster children. The sexual abuse claims against the parents were grotesque and outrageous, and included alleged ritual killings of babies and animals. The prosecution was continued against the families, even though the allegations were unbelievably preposterous. The children later recanted all allegations.

The Supreme Court of Canada found no liability on the part of the prosecutor in this case, on the grounds that malice was not established. The plaintiff bringing a malicious prosecution lawsuit must prove a negative – an absence of reasonable and probable cause for prosecuting. The prosecutor must actually believe in the guilt of the accused according to one's professional assessment of the legal strength of the case, and that belief must be reasonable in the circumstances.

The Court said malice is a question of fact, requiring evidence that the prosecutor was motivated by an improper purpose. It will be difficult for such evidence to be found. In what appears to be a considerable narrowing of this tort where Crown prosecutors enjoy major leeway, one who brings a malicious prosecution lawsuit today must prove the prosecutor deliberately intended to subvert or abuse prosecutorial powers. Courts will not second-guess decisions made by the prosecutor during criminal proceedings. By requiring proof of an improper purpose, the malice requirement protects prosecutors from incompetence, inexperience, honest mistake, and even gross negligence. In the end, only the most egregious case of bad faith prosecution will be punished by civil damages. Under this new standard, it is unlikely that Nelles would have won her case against the Attorney General of Ontario. The *Nelles v. Ontario* principle that the Attorney General and prosecutors can be sued for malicious prosecution has now been narrowed so much that such a case is now almost impossible to win.[7]

Justice Sopinka might have respectfully dissented from the *Miazga* decision, but he had no vote in it. He died suddenly on November 24, 1997 of complications from a rare blood disease at the age of 64, after serving almost a decade on the Court. Nelles remained one of his highest profile

clients from his lawyer days – that case rocketed his reputation and may have been a factor in his appointment directly from private practice to the Supreme Court of Canada.

Epilogue

Whatever came out of all those Toronto hospital baby deaths between June 1980 and March 1981? Not much.

The hospital's investigation of the digoxin poisoning was later criticized as experimental testing and the number of deaths from digoxin may have been greatly exaggerated. In 1993, a physician released a report blaming the chemical MBT, used to toughen syringes and medical tubing, for the deaths of these babies. He claimed MBT causes severe reactions, especially in children, and can mimic digoxin in autopsies. This report concluded that testing for digoxin used in the early 1980s has since been found to indicate falsely high readings.

After Nelles was exonerated, another nurse was publicly named and fell under suspicion for a time. Given the lessons learned from the Nelles preliminary inquiry, and the very high requirement of proof for crimes, no one else has been charged in the deaths of the babies.

Today, no one can even say with certainty whether any crimes were ever committed on the pediatric cardiac ward.

Notes

1. Samuel G.M. Grange. *Report of the Royal Commission into Certain Deaths at the Hospital for Sick Children and Related Matters* (Toronto: Ontario Ministry of the Attorney General), 133-39.2.
   Some reports put the number of babies poisoned by the heart medication as high as 43.
3. *Miazga v. Kvello Estate*, [2009] 3 S.C.R. 339, 2009 SCC 51
4. *Nelles v. Ontario*, [1989] 2 S.C.R. 170, 1989 CanLII 77 (SCC), 69 OR (2d) 448, 60 DLR (4th) 609, 71 CR (3d) 358, 42 CRR 1, 41 Admin LR 1, 35 OAC 161
5. John Sopinka, "Malicious Prosecution: Invasion of Charter Interests: *Nelles v. Ontario: J v. Jedynack: R v. Simpson*" (1995) *Canadian Bar Review* 74:366.
6. [2009] 3 SCR 339, 2009 SCC 51
7. Rather, the tort of negligent investigation, where one does not have to prove malice, may be a better option for those seeking civil justice from law enforcement: *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 SCR 129, 2007 SCC 41 (CanLII), 87 OR (3d) 397, 285 DLR (4th) 620, 50 CR (6th) 279, 64 Admin LR (4th) 163, 230 OAC 260.

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After 34 years, Canadian Human Rights Commission can consider *Indian Act* issues

John Edmond

Since June 18, persons who believe they have been discriminated against in *Indian Act* matters can complain under the *Canadian Human Rights Act*, 34 years after it became the law of Canada. The "temporary" section 67 exemption was finally repealed, so that the Act no longer states, "Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act." The repeal allows complaints to be filed against First Nation governments as well as the federal government.

Civil rights, post-Second World War, attracted the attention of both international and domestic law-makers. 1948 saw the making of the *Universal Declaration of Human Rights*, to which Canada is a party. On the domestic front, New York led the way in 1945. In the 1960s and '70s, Canadian provinces, led by Ontario, and finally the federal government in 1977, enacted Human Rights Codes to prohibit discrimination on such grounds as race, colour, religion, sex and age. The *Canadian Human Rights Act* (*CHRA*) of that year provided broad recourse, by way of the Canadian Human Rights Commission, for individuals finding themselves discriminated against in matters within federal jurisdiction. Eleven grounds of prohibited discrimination were set out. Virtually every area of federal jurisdiction was amenable to the Commission's scrutiny.

Discrimination against Indians, however, where it arose from the *Indian Act*, was exempt, by the inclusion in the *CHRA* of section 63 (later renumbered as s. 67). The most notorious provision of the *Indian Act* that was insulated from review was s. 12(1)(b), whereby Indian women lost their

status through marriage to a non-Indian, though a male Indian marrying a non-Indian woman not only kept his Indian status, but bestowed it on his new wife. These women had no recourse under the Act. Surely no clearer case of sexual discrimination could be found (though the Supreme Court, in *Lavell* (1973), found no violation of the *Canadian Bill of Rights*). Correction of this injustice had to await the coming into force of the equality provision of the *Canadian Charter of Rights and Freedoms*, and what came to be known as Bill C-31, in 1985.

The prospect of the *Indian Act* being subject to review for discrimination did not appeal to the male-dominated Indian organizations.

This and many lower profile issues were thus outside the realm of the Act; not only those involving the government, but many in which band councils were at odds with members. These could include such matters as: use and occupation of reserve lands; reserve facilities and housing; education, including employment in schools; and issues raised by band by-laws covering a wide variety of topics. This no doubt accounted for the support given the Crown in the *Lavell* case, by way of intervention at the Supreme Court, by the National Indian Brotherhood (now the Assembly of First Nations), and provincial and Yukon Indian organizations. The prospect of the *Indian Act* being subject to review for discrimination did not appeal to the male-dominated Indian organizations. So when the Minister of Justice, introducing the *CHRA* in Parliament in 1977, explained that section 67 was necessitated by a commitment to Indian organizations that there would be no modifications to the *Indian Act* except after full consultation, these bodies did not trouble to point out that the *CHRA* did not purport to modify the *Indian Act*. The excuse was specious. In fact, the concern was that certain provisions of the *Indian Act* might not pass human rights scrutiny and be struck down. The Minister did acknowledge, "Parliament is not going to look favourably on continuing this exemption forever or very long…". The government had been discussing *Indian Act* reform, including repeal of s. 12(1)(b), and preferred a negotiated outcome to one ordered by the courts. Indian women's organizations expressed little confidence in that process, and indeed, it eventually failed. Section 12(1)(b) was not repealed until 1985, and the general *CHRA* exemption continued.

With repeal, both the federal government and First Nation governments are now vulnerable to *CHRA* complaints of discrimination. In the June 24, 2011 *Globe and Mail*, Acting Chief Commissioner David Langtry wrote of the repeal of the exemption,

> This should translate into an onus on first nations governments to ensure better accommodation of people with disabilities, for example, or to provide recourse for those denied the right to vote in band council elections on the basis of race, gender, sexual orientation or family status.
>
> Similarly, it puts an onus on the federal government to ensure that funding for essential services such as health, education and child welfare is equal to the levels of funding available off reserve. On this issue hinges the question of whether the Human Rights Act can be a catalyst for real change.

Consequences are immediate and real. The Assembly of First Nations is asking the Federal Court to determine whether the disparity in funding for child welfare services between federal levels on reserve and provincial funding constitutes discriminatory treatment. The Attorney-General of Canada is challenging the jurisdiction of the Canadian Human Rights Commission to deal with funding for services issues under the amended *CHRA*.

Meanwhile, the Assembly of First Nations expresses mixed feelings: pleased that the government may now be the target of *CHRA* complaints, but concerned at the potential impact on First Nation governments. Observing that "First Nations fully support human rights and fully understand the importance of rights," the AFN goes on to complain that "First Nations governments do not have the financial and governance resources to respond effectively to this change. The federal government has not indicated that it will provide any support or assistance to First Nations governments to deal with this change." Its advice to its members is to review their policies, procedures and practices to ensure compliance with the *CHRA*. This is wise; the best way to avoid complaints of discrimination is not to discriminate. Its next advice, to "consider developing local fair and impartial dispute resolution procedures" is also prudent.

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The Commission will have no shortage of unique issues to consider. Freedom from discrimination is a classic individual right. Special rights of Aboriginal people, on the other hand, are collective. This tension will impose Solomon-like burdens on the Commission. Aboriginal and treaty rights are constitutionally protected. Although the case law has established that they are not absolute, the Constitution immunizes them, as well as "other rights or freedoms that pertain to the aboriginal peoples of Canada," from *Charter* review, including that of s. 15, the equality/anti-discrimination provision. The claimed validity of collective rights that may be asserted to justify discrimination will challenge the Commission's balancing skills. Does, for example, preserving the linguistic and cultural integrity of a community justify discriminating against those who do not meet a certain standard of membership? Given such questions as these, this long overdue change in the law heralds an era of human rights law in which fundamental questions about Aboriginal values and the relation of the larger society to those values will need to be addressed.

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Facing contradictions

Peter Broder

Twenty years or so ago, as a novice international co-operant, I can remember at my in-country orientation, being told of the need to "learn to live with the contradictions". Perhaps that was a fitting message for a bunch of gung-ho international development workers itching to change the world. But, as I have learned since, accepting "the contradictions" is all too often a defining feature of working in the voluntary sector.

Hearing that message two decades ago was brought to mind again by some of the press coverage of the sector this past summer. Most glaringly, stories about two different health charities – one dealing with the inclusiveness of an organization in its fundraising and the other critiquing the resources devoted by a group to its fundraising and suggesting that spending on raising donations was diverting money from its other operations – highlighted the often conflicting expectations of the public of charities.

Reconciling these mixed messages presents a quandary for both those who work in the sector and politicians and administrators trying to regulate it. Unhappily, the temptation for lawmakers to jump on a populist bandwagon and impose one-size-fits-all solutions on complex situations can trump a more measured approach – witness C-470, the effort in the last Parliament to cap the compensation of charity workers.

Salary constraints are just one aspect of the frequently-expressed concern that charities operate "efficiently". There is little doubt that there is a large public appetite for organizations spending as much of their revenues as possible on direct charitable services. But, as the press coverage last summer highlighted, the public wants other things from charities as well.

They want inclusivity. One of the groups that faced adverse publicity in June was an Alberta health charity mounting a fundraising event where participants were required to obtain a minimum amount of pledges before they could take part. The controversy stemmed from a woman, whose circumstances prevented her from gaining enough support to reach the minimum pledge amount, being told she wouldn't be able to participate. In the end, the publicity around the incident generated sufficient pledges for her to qualify, but the organization was painted in a very negative light.

Although this situation relates to a fundraising effort, charities face similar calls for inclusivity in their work all the time. In the public's eyes, it usually isn't an acceptable answer when a charity suggests that providing services or allowing participation isn't economically justifiable. It is the nature of charities that they frequently address market failures, and deal with situations that aren't economically tenable in themselves. That needs to be kept in mind when looking at a charity's financial record to see if it is operating "efficiently".

Though it is not widely appreciated by the public, there is a cost – and a fairly steep one at that – in relying on the private sector to underwrite an increasing portion of the work of charities.

A second thing the public is frequently said to want is fewer charities. Many people argue against what they see as a proliferation of charities: they don't see the need for one organization to support research to cure a disease, another group to educate the public on prevention of it and a third body to provide support services for those suffering from it. In part, no doubt, this is because they would prefer to deal with fewer solicitations for donations.

But this can play out differently when you get down to specifics. A number of broadcast and newspaper reports last summer took aim at supposed erosion of spending on research of another health organization. The reports detailed increased fundraising and administrative costs and described the organization as having diversified its mandate, so it no longer focused solely on research, but was now worked on prevention and treatment as well. Given this change in focus the differences in fundraising and administrative costs may have been quite reasonable, but the reports looked at historical data rather than comparing the group to other organizations operating with a complex mandate. Adoption of this integrated approach by the organization was seen as tangential to the main story of cost increases.

This brings us back to "high" salaries. Aside from the fact that the public expects sophisticated and multi-faceted charities, which may entail more professional – and more expensive – management, administration and fundraising, organizational costs can be driven by a little remarked on (though presumably broadly supported by the public) policy choice to use a mixed public sector/private market model to generate the resources to support health and other public benefit activities in Canadian society. Again, different public expectations are at odds with each other here.

Perhaps because private philanthropy was historically so closely associated with faith-based groups, an expectation endures that the giving and use of funds to charity will occur outside the economic marketplace. But over the last few decades the growth of fundraising as an industry –

and to a lesser extent the professionalization of management and administration within the charitable sector – has been on a market-driven model. And, like most markets, the one the charitable sector deals with has its structural and information imperfections – and the cost distortions associated with those imperfections.

Though it is not widely appreciated by the public, there is a cost – and a fairly steep one at that – in relying on the private sector to underwrite an increasing portion of the work of charities. The freedom of letting people make their own giving decisions, as opposed to making them pay for things through taxes is often touted these days as a rationale for curtailing government support for sector groups. But growth in fundraising costs is, at least in part, a function of increasingly counting on individual donations, rather than on the tax base to fund the charitable sector. With stagnant giving in recent years, many groups have had to invest more and work harder just to maintain their past revenue levels.

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But it is rarely, if ever, mentioned that it might well be more cost-effective to raise and administer at least some of the amounts currently generated by private fundraising through government than through the marketplace. While it is appropriate to balance the cost of privatizing this activity against the impact of compelling everyone to pay for these activities through their taxes, unless we can find a way to return to a model where religious values are again the primary driver of giving and of running charities, the costs associated with relying on the market can't be ignored.

As my international development colleague recognized back in the early 1990s, we ought not to be paralysed by contradictions. But that is a different thing than unthinking acceptance. Success in raising attention to these inconsistencies among lawmakers, regulators and the public will be hugely important if the charitable sector is not to be hobbled by ill-considered legislation like C-470. Learning to live with the contradictions need not just apply to those of us working within the sector.

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