September/October 2012 Tax Credits Gambling Gender Identity and Sport

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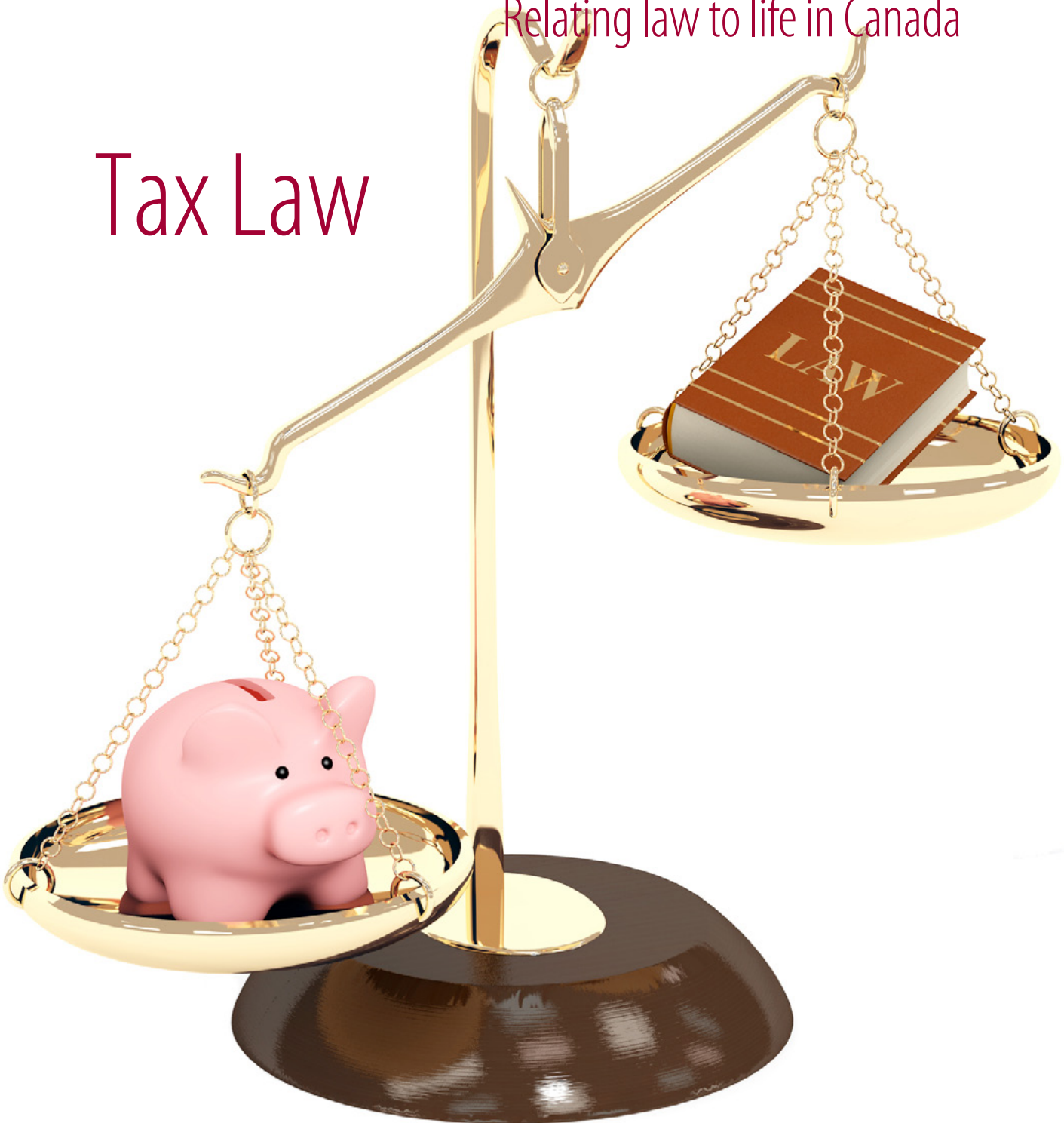
Tax Law



A little knowledge about Canada's tax system and the courts that administer it can alleviate some anxiety if you find yourself with a tax issue to resolve.

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1. The Defence of Provocation

The Supreme Court of Canada has reinstated the 2nd degree murder conviction of a woman who stabbed her sister-in-law 45 times because she insulted her and belittled her level of education. The Quebec Court of Appeal overturned her initial conviction, stating that the defence of provocation should have been put to the jury. However, the Supreme Court wrote "The defence of provocation requires that there be a wrongful act or insult of such a nature that it is sufficient to deprive an ordinary person of the power of self-control and that the accused act on that insult before there was time for her passion to cool…a properly-instructed jury could not conclude that an ordinary person in the accused's circumstances would be deprived of self-control when 'scolded' about her level of education to such a degree that she would stab a person 45 times in a responsive rage. It has no air of reality."

R. v. Mayuran, 2012 SCC 31

2. Marriage or No Marriage?

A Calgary woman wanted a divorce from her husband. The problem: he alleged that they were both already married when they married each other, and so there was no legally valid marriage. The couple married in Pakistan and both conceded that polygamous marriages are allowed there. The wife wanted a divorce rather than nullifying the marriage because it would allow her to claim a monetary settlement and regain her honour. At a trial to determine the granting of a divorce, the judge refused to hear evidence or further argument, and dismissed the application because the wife conceded in her claim that the husband was married at the time of their marriage. The Alberta Court of Appeal decided that this case must proceed to a trial to determine whether or not the wife is entitled to a divorce or a declaration that the marriage is a nullity. Justice Bielby gave numerous reasons, including that Alberta divorce procedure generally requires that a foreign marriage be proved by evidence, and that the wife was entitled to a divorce under Canadian law, instead of resorting to the courts in Pakistan, as the trial judge suggested. Justice Bielby also gave a very interesting review of the law of polygamous marriages in Canada, but the other 2 appeal court judges commented: "While we do not necessarily disagree with the discussion about the status of polygamous marriages in Canada, we prefer not to comment on that topic at this time. Whether the law respecting polygamous marriages remains as it was in 1866 can be left for another day."

Azam v. Jan 2012 ABCA 197

3. Should a "Sperm-dad" Have Access?

A sperm donor father asked an Ontario court for interim access to his 22-month-old son pending a trial scheduled for this fall. The child's biological mother and her partner oppose both interim and long-term access. They point out that the sperm donor, who was a friend of the mother's,

signed an agreement that he would never contact the baby. The mothers feared risk to the child if interim access to the donor father began, only to be discontinued if they are successful in opposing access at trial. Justice Karam of the Ontario Superior Court decided that it is too risky to allow access just yet. He wrote "Despite the child's young age, it is impossible to know what disclosure of his [the father's] status as a parent might mean. All circumstances considered, the risk of there being an adverse effect to the child is too great to ignore."

Deblois v. Lavigne, 2012 ONSC 3949

4. What Qualifies as an Accident?

The Supreme Court of Canada recently examined the question of what constitutes an accident caused by a motor vehicle. A Quebec driver was killed when his car was hit by a falling tree. His family sued the City of Montreal, arguing that it should have properly maintained the tree. The City argued that the family should be seeking compensation from the provincial no-fault insurance program. At trial, the court agreed, and dismissed the claim against the City, and then the Quebec Court of Appeal dismissed the case against the insurance program, ruling that the accident did not involve a motor vehicle. The Supreme Court of Canada ruled that the Appeal Court defined "accident" too narrowly. It wrote "On the facts of this case, the Act applies to R's accident. Although the vehicle may have been stationary or moving through an intersection, the evidence on the record is that R was using the vehicle as a means of transportation when the accident occurred. This is enough to find that the damage arose as a result of an "accident" within the meaning of the Act and that the no-fault benefits of the scheme are triggered."

Only Manitoba and Quebec have no-fault government insurance programs, but the Supreme Court's definition of a motor vehicle accident could have an impact on other cases involving motor vehicles.

Westmount (City) v. Rossy, 2012 SCC 30

5. Right to Assisted Suicide

A B.C. woman suffering from a terminal and debilitating illness has successfully asked the court to give her the ability to have a physician-assisted death in the future, if she so decides. Justice Lynn Smith decided that laws prohibiting physician-assisted death violate Gloria Taylor's *Charter* rights to equality and to life, liberty and security of the person, and that they are discriminatory, disproportionate and overbroad. The judge placed a number of conditions on when and how Ms Taylor can use the ruling, and also suspended its application for one year to give Parliament a chance to change the laws so that they do not violate the *Charter.* The federal government appealed both the decision and the court's exemption to the one-year suspension for Ms Taylor. However, another Justice of B.C.'s Supreme Court ruled that Ms Taylor's exemption should stand, noting that taking it away would cause her irreparable harm which far outweighs any interest of the federal government.

Carter v. Canada, 2012 BCSC 886

Negotiating *Charter* Breaches: *R v Berger*

Mekhala Chaubal

All throughout the first year of law school, while navigating through different subjects, one of the major challenges is to understand just how a particular area of law fits in the great big jigsaw puzzle that is the Law. Through the last couple of years, the workings of these cogs and mechanisms have slowly started becoming clearer to me, but even more importantly, I have come to realize the exalted position that the *Charter of Rights and Freedoms* holds in Canadian law.

Two years, and many, many more *Charter* cases later, I never cease to be amazed by the alacrity with which courts seem to negotiate the protection of an individual's *Charter* rights, when these are alleged to have been breached. And since most change in law is incremental, I am also constantly amazed by the patience exercised by judges when law enforcement agencies and officials attempt to countermand the legal steps and tests put in place, through what must often seem like the most inane slip-ups.

Naturally, a breach of a *Charter* right then, is an infringement of an individual's most basic rights in Canadian law; what is interesting, however, is the struggle the courts face to classify breaches into "more, or less serious" categories, which is something the Alberta Court of Appeal did in the recent decision of *R v Berger* ["Berger"] 2000 ABCA 301. In ruling that the appellant's s. 10(b) *Charter* right to be represented by counsel had been breached through the actions of a police officer, the ABCA pointed out that the seriousness of a *Charter* breach is based not just on extraordinary or dramatic circumstances, but can also happen in the context of more mundane occurrences, such as an officer's compromising an individual's right to counsel, while chasing after the gathering of evidence.

Facts

Michael Todd Berger, the appellant, was stopped by a traffic officer, who thought that Berger's ability to drive might have been impaired by alcohol. To test this theory, the officer gave Berger a roadside examination, which he failed. After this, the appellant was arrested, advised of his right to seek a lawyer's counsel, told that he would need to provide the police office with a breath sample, and taken to the police station. Berger was then left in the designated "phone room" by the officer, after having been provided with the number for a legal aid service, as well as for other lawyers. He tried to contact the legal aid line, and found that it was busy. When the officer entered the room in about 15 minutes, Berger told him that he was still attempting to contact a lawyer, and the officer told him to "[k]eep trying" (at para. 3). Finally, a frustrated Berger told the officer that he could not get legal advice, inquiring about other options available to him. The latter then told him that he could either continue to try and contact legal aid, or go ahead and provide a breath sample to the officer. What Berger was

not told, however, was that he could "hold off" on the sample until he did reach a lawyer (at para. 4); essentially, this third choice, which was never given to him, was what became the major point of contention in the ABCA's ruling.

Eventually, Berger did reach counsel, but only after having provided two breath samples to the officer. However, while doing so, he pointedly mentioned that he did not want to waive his s.10(b) right to counsel, but, given the circumstances, didn't see what else he could do, except provide the officer with the sample. Also, the gathered evidence in the form of the two samples showed the appellant to be in excess of the legal limit allowed, and he was charged with drunk driving.

On appeal to the ABCA, the major issue was whether the breathalyzer evidence that the police officer had gathered from Berger should have been excluded from trial, pursuant to s. 24(2) of the *Charter*, which states that any evidence that has been collected by infringing on the rights and freedoms of an individual must be excluded from trial. Since the breath samples were already deemed to have been collected by infringing on Berger's s.10(b) rights (by the Crown's own admission), the ABCA's analysis of the case consisted primarily of whether the trial judge should have considered the breath samples to be admissible evidence.

Analysis

To determine whether evidence should be excluded from trial, the s. 24 vein of inquiry considers the following three factors: a) the degree of serious of the *Charter*-infringing conduct, b) its impact on the appellant's *Charter*-protected interests, and c) whether societal interest would be harmed on the evidence's exclusion (at para. 10). The ABCA chose not to consider this third arm of the test, choosing instead to focus on the first two.

The ABCA referred to the SCC rulings in *R v Grant*, 2009 SCC 32 and *R v Côté*, 2011 SCC 46 to determine the level of seriousness of *Charter* violations by the police and state-enforcement agencies, which ranged from "inadvertent or minor…. to willful or reckless disregard…." Another factor that was considered was good faith on the part of the state's officer, with deliberateness or intent in conducting the violation on the part of the official being a very strong reason to exclude evidence for being collected improperly.

The case of *R v Luong*, 2000 ABCA 301 established two components of s.10(b) that had to be fulfilled by a state official when detaining an accused. The first is termed the informational component, which is focused around the accused's being given adequate information of the seriousness of the situation (i.e. that he or she might face legal consequences for the alleged act, that the accused is told of the nature of the offence, is provided with the correct legal information to find a lawyer or seek counsel, and that the accused understands the seriousness of the situation and can speak for him or herself). In *Berger*, the ABCA deemed that the officer had carried out his duties fulfilling this component satisfactorily, since Berger was told of the offence, was read his rights, and was given the information and opportunity to contact legal counsel (the legal aid phone number and access to the phone room). This component was not found to be at issue, and the officer's actions were found to be in good faith.

For the second Luong component – the implementational one – to be engaged, the accused should have expressed the desire to seek counsel. In Berger, the appellant's explicit request for counsel instantly engaged this component. The ABCA did not agree with the Crown's argument that Berger's granting of the samples constituted a waiver of his right to request counsel, because he had clearly indicated that the only reason he was granting the sample was because he did not have a choice, since the officer had given him none. Further, the fact that Berger found a lawyer to talk to soon after giving the samples indicated that he had always intended to seek counsel, and this right had not been waived.

The ABCA then held that the officer had "permitted the *Charter* breach to occur" (at para. 15), by not letting Berger know that he had the option of holding back the sample until he could reach a lawyer, and by failing to correct Berger's belief that it was impossible to reach counsel in the circumstances, had "seized the opportunity to gather evidence when it presented itself" (at para. 3). These actions of the officer could not have deemed to be in good faith, because of their deliberate nature, which, as Grant and Côté had already established, negated considerations of good faith on the part of state officers.

Finally, in determining that the officer had breached Berger's *Charter* rights, the ABCA distinguished between an egregious breach and serious one, classifying the one in Berger as the latter. As far as the ABCA was concerned, because the officer could have waited to gain the sample after Berger had spoken to counsel, and because he failed to follow the implementational component properly, he breached Berger's *Charter* rights unnecessarily. In other words, because the *Charter* breach could have been avoided with reasonable due diligence from the officer, his conduct was found to be a serious breach of Berger's rights.

Implications

The ABCA has done two things with this ruling: it has tightened the standard of care that a state official must take, when dealing with an accused's s. 10(b)'s rights, and it has also sent the clear message that *Charter* breaches, even those that are not outrageous or shocking, will be considered serious if they are unnecessary. By making this distinction, the ABCA has upheld the fundamental tenet of our legal system that very little, and nothing else, will be considered a legitimate breach of a *Charter* right; breaching an individual's rights then, is to be seemed as a last resort, when other plausible and reasonable avenues of law enforcement have failed. The standard thus remains high, as it should.

The ABCA also raised the question of proper police conduct, and by bringing in the element of intent when considering the officer's behaviour, the ABCA also emphasizes conscientiousness and due diligence on the part of law enforcement officials – a point that can apparently not be driven home enough.

The Tax Court of Canada: An Introduction

Mike Dolson

While many would share Scarlett O'Hara's belief that there is never a convenient time for taxes, let alone a convenient time for tax problems, Canadians can take great relief in knowing that there is a convenient forum for resolving most tax problems. Although the Tax Court of Canada is one of Canada's youngest courts, it has been described as "the Crown jewel of the federal court system", a title which it has undoubtedly earned.

Brief History of the Tax Court

Canada has not always had a dedicated forum for tax disputes. For the first thirty years following the introduction of the *Income War Tax Act, 1917* (the predecessor of the current *Income Tax Act*), tax assessments could be informally appealed to the Minister of Finance and formally appealed to the Exchequer Court of Canada.

The process of creating the Tax Court began in 1946, when the Income Tax Appeal Board was formed. Although formed as a court of record, the Board was essentially an administrative tribunal whose members were typically lawyers. Its decisions could be appealed to the Exchequer Court *de novo*, which permitted appellants to present a nominal case before the Board in the knowledge that they could present a full case before the Court. In 1970, the Board became the Tax Review Board, which was intended to be an informal forum for resolving tax disputes.

While the Trudeau government believed that the informal nature of the Tax Review Board was its best feature, taxpayers would typically bypass the Board entirely and appeal to the newly constituted Federal Court – Trial Division. To address these concerns, the Tax Court of Canada was formed in 1983 as a court of record, and became a superior court of record in 2003. Since that time, the Tax Court has developed the rules, procedures and forms that are used today, and has become the primary forum for resolving tax-related disputes. The Tax Court is widely respected for its fairness and efficiency.

Jurisdiction of the Tax Court

The Tax Court has the jurisdiction to hear appeals under various statutes, but for most Canadians, it is the Tax Court's power to hear appeals under the *Income Tax Act*, the GST portions of the *Excise Tax Act*, the *Employment Insurance Act* and the *Canada Pension Plan* that is important. The Tax Court is where most disputes under these statutes are resolved.

However, the jurisdiction of the Tax Court comes with some important qualifications. The jurisdiction of the Tax Court does not extend to the "fairness" portions of the *Income Tax Act* and the *Excise Tax Act*, which grant the Canada Revenue Agency (the "CRA") the discretion to waive penalties and interest. Taxpayers who are seeking this discretionary relief and who disagree with the CRA must apply to the Federal Court.

The Tax Court also lacks the power to deal with disputes relating to provincial income taxes and provincial sales taxes, and has no jurisdiction to grant any relief where a taxpayer wishes to sue the CRA for damages. If a tax dispute relates to provincial income or sales taxes, or an aggrieved party wishes to sue, an appeal or action must be brought in the superior court of the relevant province (i.e. for Alberta disputes, in the Court of Queen's Bench of Alberta) or, where appropriate, the Federal Court.

The Tax Court has the jurisdiction to hear appeals under various statutes, but for most Canadians, it is the Tax Court's power to hear appeals under the *Income Tax Act*, the GST portions of the *Excise Tax Act*, the *Employment Insurance Act* and the Canada Pension Plan that is important.

Powers of the Tax Court

Unlike a provincial superior court, the Tax Court's powers are limited to those set out in federal legislation. With respect to the *Income Tax Act*, the *Excise Tax Act* and other fiscal legislation, the *Tax Court of Canada Act* provides for relief from Notices of Assessment issued by the CRA. The Tax Court may only uphold the assessment, vacate the assessment, or direct the CRA to reassess the taxpayer for some other amount based on its conclusions.

The Tax Court's powers are also limited by the statutes that impose the tax in dispute. The Tax Court is not empowered to make decisions on the basis that they will yield a fair result. Rather, the Tax Court can only make decisions based on its interpretation of the legislation. As a consequence, there are often circumstances where the Tax Court must acknowledge that it is rendering an unfair result and that it has no choice but to do so.

. . . a common "trap" is the Tax Court's inability to deal with appeals from assessments where no tax is payable. Since the Tax Court's powers are limited to determining the correct amount of tax payable, and since it is not possible to have less than no tax payable, there is nothing that the Tax Court can do in these cases.

Because of the Tax Court's powers and jurisdiction, a common "trap" is the Tax Court's inability to deal with appeals from assessments where no tax is payable. Since the Tax Court's powers are limited to determining the correct amount of tax payable, and since it is not possible to have less than no tax payable, there is nothing that the Tax Court can do in these cases, and the Tax Court will have no choice but to quash the appeal.

Judges of the Tax Court

As would be the case with any court, the reputation of the Tax Court reflects the quality of its judges. Tax Court Justices are appointed by the Minister of Justice on the recommendation of a Judicial Advisory Committee, and everyone appointed as a judge was a lawyer for at least 10 years prior to their appointment.

Many of the current Tax Court Justices were private-sector tax lawyers , while other Tax Court judges previously worked for the Department of Justice's Tax Law Services group. The Tax Court and taxpayers benefit greatly from the collective expertise and differing perspectives of the Tax Court's judges.

When a lawyer is appointed as a Tax Court Justice, he or she is required to maintain a residence within 40 km of Ottawa, where the Tax Court is based, and judges travel from Ottawa to other cities in order to hear appeals. By structuring the Tax Court as a "circuit" court in this manner, Parliament was able to ensure that each different region of the country would have its cases heard by the same pool of judges, in order to ensure that tax laws are applied consistently across Canada. In addition, the presence of all of the judges in Ottawa facilitates collaboration between the judges.

When a lawyer is appointed as a Tax Court Justice, he or she is required to maintain a residence within 40 km of Ottawa, where the Tax Court is based, and judges travel from Ottawa to other cities in order to hear appeals.

Tax Court Procedure and Appearing in Tax Court

It is important to note that a tax dispute cannot be appealed to the Tax Court until the earliest of 90 days after a taxpayer files a Notice of Objection with the CRA, or within 90 days after they have received a Notice of Confirmation from the CRA after filing a Notice of Objection. Most tax disputes are resolved by the CRA at the Notice of Objection stage, avoiding the time and costs of going to court.

The Tax Court has two procedural streams: Informal Procedure, which is a streamlined, lower-cost process with monetary limits, or the General Procedure, which is a more formal process similar to a traditional court action.

If a Notice of Confirmation has been received and a taxpayer wishes to appeal, the first decision that must be made is under which Tax Court procedure the taxpayer wishes to appeal. The Tax Court has two procedural streams: Informal Procedure, which is a streamlined, lower-cost process with monetary limits, or the General Procedure, which is a more formal process similar to a traditional court action.

In the Informal Procedure, taxpayers may represent themselves or be represented by an agent, such as an accountant. Most procedural rules and rules of evidence are relaxed in order to make the Informal Procedure process more accessible, and most pre-trial procedural steps are eliminated. However, any person willing to appeal under the Informal Procedure must agree to limit the amount of tax in dispute to $12,500, although there are current proposals to raise this maximum amount to $25,000. Most Informal Procedure appeals will proceed to trial within a year of the filing of a Notice of Appeal, unless the taxpayer and the CRA settle before then.

In the General Procedure, taxpayers are typically represented by lawyers, although some taxpayers represent themselves. Many General Procedure cases involve significant amounts of tax or complex legal questions, so a formal process is necessary to ensure that the issues in dispute are understood and that all relevant facts will be presented. There are significant pre-trial procedural steps (i.e. discovery of documents and oral examinations) that must be completed, and significant amounts of time can elapse before General Procedure cases will be ready for trial.

Once a procedural stream is chosen, a Notice of Appeal must be filed within 90 days of the date that the CRA issued the Notice of Confirmation. The form for a Notice of Appeal can be found on the Tax Court's website, and the completed Notice of Appeal may be filed online. If the Informal Procedure is chosen, there is no filing fee for the Notice of Appeal.

Once a Notice of Appeal is filed, the Department of Justice will prepare and file a Reply to the Notice of Appeal within 60 days. For Informal Procedure appeals, the pre-trial process is completed once the Reply is filed, and the Tax Court will schedule a date for the appeal to be heard in the city chosen by the taxpayer.

At an Informal Procedure trial, both the taxpayer and the CRA (through the Department of Justice) will present their evidence and make arguments. Typically, an Informal Procedure trial will last for less than a day, and the judge will often provide an oral decision on the day of the trial or the following morning.

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Conclusion

While thinking about and paying tax may be unpleasant, the Tax Court of Canada allows for tax disputes to be resolved in a manner that minimizes the unpleasantness. The expertise and efficiency of the Tax Court provide a real benefit to Canadian taxpayers, and the future is bright for our youngest superior court.

Notes

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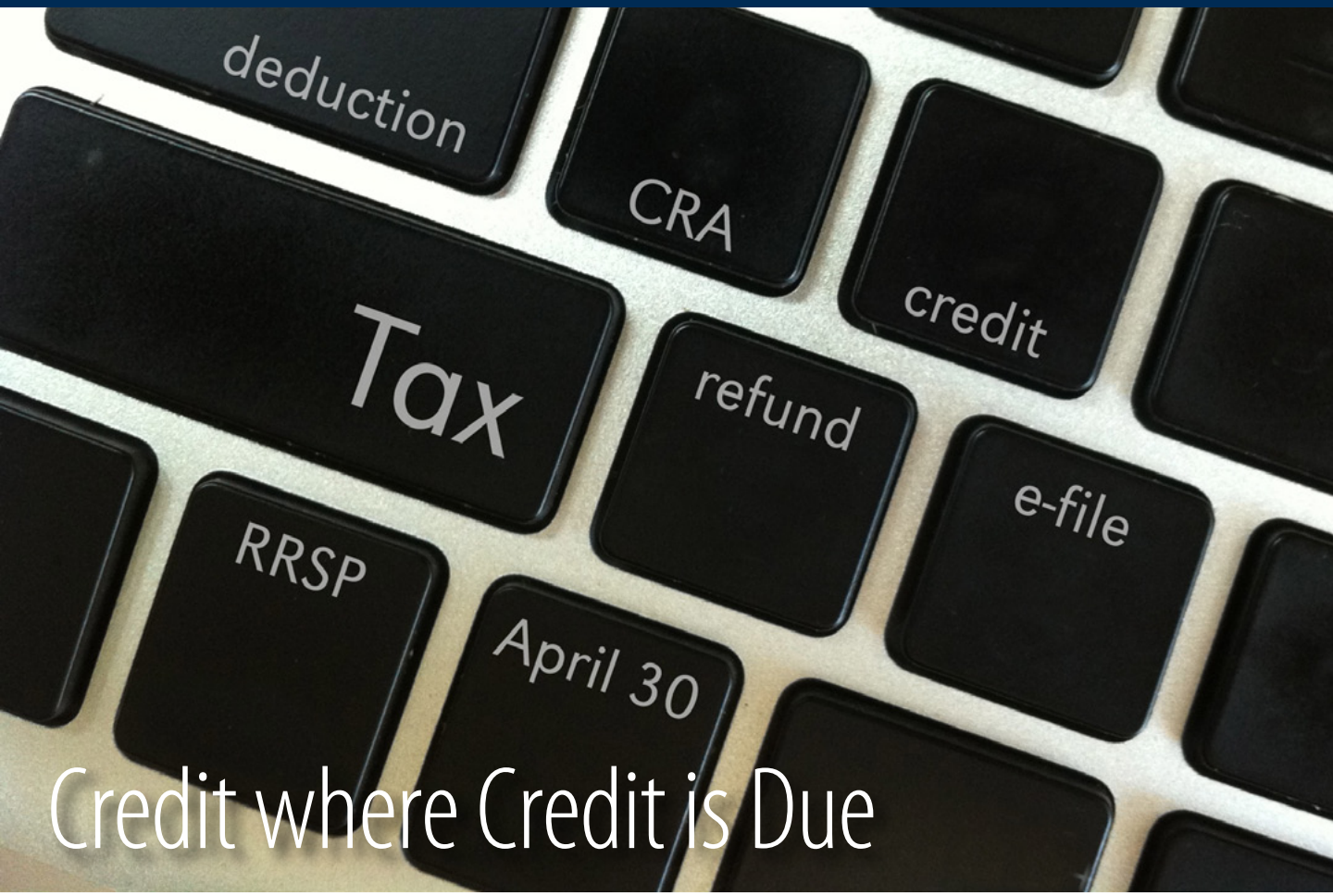

Credit where Credit is Due

Hugh Neilson

2012 is the 25th year of personal credits in the Canadian tax system. Prior to 1988, personal exemptions were deducted from taxable income. Since 1988, credits against taxes payable have been used. This was perceived as more fair, because the benefit of deductions was greater for higher income taxpayers. Credits result in the same tax benefit for every individual, unless their taxes are insufficient to fully use the credits, because they are not refundable.

Most personal credits apply the lowest federal tax rate (presently 15%) to either a value set by law or actual expenditures. The lowest personal tax rate has declined since 1988, effectively reducing the benefits of these credits. Each province also provides an array of credits, often varying considerably from the federal credits, especially in recent years.

Personal credits have become the popular mechanism for providing new tax benefits to individuals. Recent budgets have featured several new credits for various costs and activities. The 2012 budget was the first in several years to feature no new credits.

A full discussion of all the credits, and the specific rules applicable to them, is beyond the scope of this article. The amounts available for many credits are subject to annual indexation, and the 2011 and 2012 amounts can be found at the Canada Revenue Agency website.

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We are Family

An array of credits is available for various dependent family members, including:

- The *basic personal amount,* available to every Canadian resident individual.
- The credit for a *spouse or common law partner* is equal to the basic personal amount, less the spouse's net income. References to married parties in this article also include parties to a common law relationship. A "common law partner" is defined as a person with whom the taxpayer "cohabits at that time in a conjugal relationship" if the couple either has cohabitated for at least a year, or are natural parents of a child.
  In addition to this credit, many credits of one spouse can be transferred to the other, if not needed to eliminate taxes. These include the age, pension, disability and children credits, as well as education-related credits as described elsewhere in this article.
- An *amount for an eligible dependent* equal to a spouse credit is available for a child, sibling, parent, grandparent or grandchild if the claimant is either unmarried or separated from their spouse and maintains a "self-contained domestic establishment" where they live and support the dependent
- *Children under age eighteen* generate a credit.
- A *caregiver credit* can be available for a child, grandchild, parent, grandparent, brother, sister, aunt, uncle, nephew or niece who is at least age eighteen, and either dependent due to infirmity or, a parent or grandparent, provided the dependent resides with the claimant.
- The maximum spouse, eligible dependent, child and caregiver amounts are each increased where the dependent is infirm.
- An *infirm dependent* credit can be claimed, where the claims discussed above are not available.

Won't Somebody Think of the Children?

In the year a child under age 18 is adopted, a credit can be claimed for up to $11,440 of expenses incurred (e.g. agency fees, travel, etc.).

Parents can also claim a "*Children's Fitness Amount*" and "*Children's Arts Amount*" with respect to up to $500 of costs, for each credit, incurred for each child under the age of 16 (age 18 if eligible for the disability credit) during the year. The criteria are similar, including:

- add $500 if at least $100 in costs is incurred for a disabled child;
- programs must run 8 consecutive weeks or a minimum of 5 days;
- activities must be supervised and suitable for children;
- fitness activities must contribute to cardio-respiratory endurance and one of muscular strength, muscular endurance, or flexibility and balance; and
- the arts credit is for "artistic, cultural, recreational or developmental activity", defined broadly, but specifically excludes physical activities (so the same activity cannot qualify for both credits).

"Enrichment or tutoring in academic subjects" is eligible for the arts credit, an aspect surprising to many parents and therefore often overlooked.

When I get Older

Individuals over age 65 by the end of the year receive a credit, with the amount reduced by 15% of the individual's income in excess of $33,884 (2012).

A *pension income credit* applies on a maximum of $2,000 of pension income. Annuities from a pension plan always qualify. For persons over age 65, the credit also applies if they receive amounts as a consequence of a spouse's death; annuity payments from a Registered Retirement Savings Plan or Deferred Profit Sharing Plan; or payments from a Registered Retirement Income Fund. The interest component of annuity payments and some life insurance policies also qualify.

An Apple a Day. . .

There is a credit for *medical expenses*, to the extent they exceed 3% of net income to a maximum ($2,109 for 2012). Extensive regulation defines eligible medical expenses, which can include travel where services are not available locally, and health insurance, such as out-of-country coverage. Expenses can be claimed for any twelve month period ended in the year, so analyzing receipts to pick the period with the greatest cost can be beneficial. Purely cosmetic procedures are not eligible. Expenses of a married couple and their minor children can be combined. Expenses paid for other dependents can be claimed, but are reduced by 3% of the dependent's income.

There is a credit for *medical expenses*, to the extent they exceed 3% of net income to a maximum ($2,109 for 2012). Extensive regulation defines eligible medical expenses, which can include travel where services are not available locally, and health insurance, such as out-of-country coverage.

Individuals with a severe and prolonged impairment resulting in a marked restriction in their ability to perform a basic activity of daily living (defined as perceiving, thinking & remembering; feeding or dressing; speaking; hearing; eliminating (bowel or bladder function); and walking) are eligible for a *disability credit*. An enhancement is available for minor children.

Eligibility for the disability credit requires a T2201 form completed by an appropriate medical practitioner. Where the

disabled person has insufficient income to fully use the credit, the excess can be transferred to his or her spouse or a supporting relative. This credit is not available where costs of nursing home care or many forms of attendant care are claimed as a medical expense, often forcing a choice between the two claims.

Employees are eligible for a credit based on their *employment income*, capped at $1,095 (2012), and their *CPP and EI premiums*. The self-employed receive credit for the portion of premiums they would have paid as employees.

Get a Job

Employees are eligible for a credit based on their *employment income*, capped at $1,095 (2012), and their *CPP and EI premiums*. The self-employed receive credit for the portion of premiums they would have paid as employees.

Get an Education

Tuition, and some additional fees, paid to educational institutions for post-secondary education generate a credit provided the student is over 16 years of age. Fees for examinations to obtain professional status, or for licensing or certification, can also be claimed.

A fixed monthly *education amount* and *textbook credit* is available, with amounts dependent on whether the student is full-time or part-time. Receipts are not required, and the criteria for both credits are identical.

Unused tuition, education and textbook credits can be carried forward for a future claim. Up to $5,000, less the amount needed to eliminate the student's taxes, can be transferred to a spouse, or to a parent. This credit interacts with other credits, and students with other tax credits may find these education credits eliminated with no added tax benefit. It is possible to use credits from prior years before using current credits, to preserve as much of the maximum $5,000 transfer amount as possible.

Interest paid under government *student loan* programs also qualifies for credit, and unused amounts can be carried forward for up to five years.

Give it Away!

Gifts to *registered charities*, the Crown, universities and municipalities generate a different credit. Credit on the first $200 is at the standard 15% rate, with any excess generating a 29R credit. A donation can be claimed in the year it was made, or any of the five subsequent years.

Generally, donation claims are limited to 75% of the individual's income. Donations to U.S. charities not registered in Canada can be claimed, to a limit of 75% of income from the U.S. (e.g. dividends on U.S. stocks). Spouses are allowed to claim donations in either spouse's name.

Where appreciated securities are donated, the general rule is that any capital gains escape taxation. The amount of the charitable donation is not reduced as a consequence of any tax-free gains – the full value of donated securities is eligible for credit.

Contributions to f*ederal and provincial political* parties and election candidates are not charitable, but give rise to a political donation credit (separate from personal credits). The federal

credit rates are higher than charitable donations (75% of the first $400, 50% of the next $350 and 1/3 of the next $525), but these contributions are limited to modest amounts. Provincial credits are generally similar.

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The Odd Men Out

Most tax discussions break issues into categories, one of which is always "other" or "miscellaneous" for items not fitting into neat categories. Here are some examples.

A volunteer performing 200+ hours of *firefighting services* (including responding to fires, being on call, attending fire department meetings, and training) receive a fixed credit (worth $450 of tax). The fire chief is required to certify eligibility.

The cost of *public transit passes*, generally limited to monthly periods (weekly and per trip passes accounting for a month or more can qualify) generates a tax credit. Receipts, including the pass, are required. Passes for the taxpayer, their spouse and children under age 19 may be claimed.

A *first-time homebuyer* is eligible for a fixed credit ($750 of tax relief). This can be shared between co-owners. Each claimant must be on title under the provincial land titles registration system.

A credit for *home renovations* was a one-time opportunity in 2009, the only temporary credit in the 25 year history of the credit system.

Overall

While tax relief is always welcome, one might question the effectiveness of some of these credits. For example, the Children's Fitness and Arts Credits have generated numerous questions to the Canada Revenue Agency (CRA) regarding qualifying programs, and the cost of requesting and reviewing receipts is considerable, especially compared to a maximum tax benefit of $150 per year for most children. Fixed amounts such as the first time homebuyer's and volunteer firefighter's credits, while perhaps less equitable in not scaling with actual costs, carry a much lower administrative burden.

An annual review of Schedule 1, the federal form for personal credits, can help ensure that all relevant credits are identified. The guidebooks produced by the CRA generally provide additional details of these provisions.

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Gambling with your Taxes

Peter Bowal & Jason Ho

During the recent summer Olympic Games we learned that Canadians, Americans and athletes from other countries receive a financial bonus for each medal they win, the size of the bonus depending upon the colour of the medal.[1] This income is also taxed, a fact that is stirring legislators in the U.S. this fall to propose a tax exemption for Olympians. Some decry another tax break for multi-millionaire NBA professional basketball players and other heavily-sponsored athletes. If these earnings are taxable, what deductions might be claimed to earn this income?

Also circulating is the myth that American athletes are even taxed on the metallic value of those same medals. While this is a reasonable technical interpretation of the U.S. *Tax Code*,[2] and the Canadian *Income Tax Act*, this is not happening, if only because the economic value of the mineral content in the medals is rather paltry. In the lead-up to the 2000 Olympics in Sydney, it was also feared that Australian tax authorities would levy tax on these bonuses as income derived from performance that took place in Australia. That did not happen either.

In 2010, according to Statistics Canada, $13.7 billion in net revenue was generated from government-run gaming activities, rendering gambling the largest entertainment industry in this country.

Tax policy ignites passions and debates because, in the process of raising money for public purposes, incentives and disincentives toward various economic activities are created. Infrequent events, such as skill-based Olympic medals or luck-based lotteries can be ramped up from occasional "prizes" to something akin to a regular business. This article examines the Canadian tax treatment of income from winning and losing – not from athletic competition but from gambling.

In 2010, according to Statistics Canada, $13.7 billion in net revenue was generated from government-run gaming activities,[3] rendering gambling the largest entertainment industry in this country. It is useful, therefore, for taxpayers to understand how gambling income and losses are taxed under the *Income Tax Act* of Canada.

Income from Gambling

Are gambling winnings a "prize" under the *Income Tax Act*? Money received as scholarships and bursaries or "a prize for achievement in a field of endeavour ordinarily carried on by the taxpayer" is taxable (s.56). What the *Act* calls "windfalls" – occasional lotteries and sweepstakes, for example – are *not* taxable. "Prescribed prizes" awarded for meritorious achievement in the arts, sciences or public service are also exempt from taxation. This explains why income from a Nobel or literary prize would be non-taxable, but Olympic income (which is not art, science or public service) is taxable.[4]

Canadians who gamble seriously, even for a living, could have their winnings taxable as "prizes" (although no judicial decisions yet confirm that) or more likely as income from *business*. Taxable income encompasses total income from four sources – office, employment, business and property (s.3 (a)). While notions of office, employment and property do not readily apply to gambling activity, *business* is defined as "a profession, calling, trade, manufacture or undertaking of any kind whatever . . ."(s. 248(1))

When gambling is business, one's "income (and loss) for a taxation year from a business … is the taxpayer's profit (and loss) from that business … for the year." (ss.9(1) and 9(2)) Given the broad definition of a business, what is the basis for determining when a gambling activity is in fact and in law a business?

Governing Principles: "Reasonable Expectation of Profit" or "Pursuit of Profit"?

The Supreme Court of Canada stated in the 1978 case of *Moldowan v. The Queen:*

> *In order to have a "source of income" the taxpayer must have a profit or a reasonable expectation of profit. … Whether a taxpayer has a reasonable expectation of profit is an objective determination to be made from all of the facts. The following criteria should be considered: the profit and loss experience in past years, the taxpayer's training, the taxpayer's intended course of action, the capability of the venture as capitalized to show a profit after charging capital cost allowance. The list is not intended to be exhaustive. The factors will differ with the nature and extent of the undertaking.*

This "REOP" test determined if a taxpayer could deduct losses from business. A problem arose because the REOP test did not distinguish between regular business activities and personal hobbies. This "type of activity" issue, which relates to taxation of gambling gains and losses, was resolved a decade ago in the 2002 Supreme Court of Canada case of *Stewart v. Canada*.

As an experienced real estate investor (which some say is itself a form of gambling), Brian Stewart borrowed large sums of money to purchase four condominium units as rental properties in 1986. Owing to unfavourable economic conditions, his rental income was less than projected. Stewart claimed losses of $27,814, $18,673, and $12,306 between the years 1990 and 1992, representing significant interest expenses on his loans. His claims were disallowed by the Canada Revenue Agency, based on the REOP test. The courts concluded that Stewart's flawed investment model did not have a reasonable chance of earning a profit.

When gambling is business, one's "income (and loss) for a taxation year from a business . . . is the taxpayer's profit (and loss) from that business . . . for the year." (ss.9(1) and 9(2)) Given the broad definition of a business, what is the basis for determining when a gambling activity is in fact and in law a business?

The Supreme Court of Canada ruled that the "REOP test is problematic owing to its vagueness and uncertainty of application; this results in unfair and arbitrary treatment of taxpayers. As a result, 'reasonable expectation of profit' should not be accepted as the test to determine whether a taxpayer's activities constitute a source of income" (para 47). The Court adopted a new two-part approach, known as "the pursuit of profit test":

(i) Is the activity of the taxpayer undertaken in pursuit of profit, or is it a personal endeavour? This first stage of the test searches for a source of income; and

(ii) If it is not a personal endeavour, is the income source a business or property? This second stage categorizes the source as either business or property (para 50).

Applying the pursuit of profit test, the Court ruled Stewart was entitled to claim his losses because his real estate investment was undertaken solely for the pursuit of profit even if his business model was flawed.

Application of the Pursuit of Profit Test to Gambling

When is gambling undertaken in pursuit of profit and when is it a mere personal endeavour? There is a clear personal entertainment return on gambling which may outweigh the realistic expectation of winning, but thrill and pleasure are sought in business too.

In the 2006 case of *Leblanc v. The Queen,* the Leblanc brothers won an average of $650,000 per year between 1996 and 1999 by gambling on sports lotteries in Ontario and Quebec. The brothers wagered $10 to $13 million per year, developed a computer program to analyse bets, and negotiated a 2-3% discount from ticket retailers. The Canada Revenue Agency treated this gambling operation as a business, "because it was managed and organized with the object of realizing a profit (para 7)." However, the Tax Court, acknowledging "that certain types of gambling can in some circumstances be a business but it is a rare circumstance (para 36)," characterized these gambling activities as a personal endeavour (para 48):

> *The appellants [the Leblanc brothers] are not professional gamblers who assess their risks, minimize them and rely on inside information and knowledge and skill. They are not like the racehorse-owner, who has access to the trainers, the horses, the track conditions and other such insider information on which to base his wagers. Nor are they seasoned card players or pool players who prey on unsuspecting, inexperienced opponents. Rather, they are more accurately described as compulsive gamblers, who are continually trying their luck at a game of chance.*

The same result obtained in 2011 for Stephen Cohen in a Tax Court of Canada decision in Toronto. Cohen claimed that he was engaged in the full-time business of poker playing and ought to be entitled to claim losses of $121,991.43 during the 2006 taxation year. He had logged more than 2,500 hours of playing time, entered frequently into tournaments, and studied the game through books and seminars. The Tax Court judge denied Cohen the deduction of his poker losses on what was arguably a mistaken application of the *Stewart* "pursuit of profit" test – that there was an element of personal consumption to the gambling. The judge said that poker, "generally recognized as a gambling activity, is not an activity that I or many courts before me, could find has no personal element. (para 18)" It probably did not help Cohen's case that he was also working for at least part of the year as a lawyer at a "large Toronto law firm" and had been a hobby poker player for a dozen years prior.

The last judicial decision, by the Federal Court of Appeal in the case of *Tarascio v. Canada*, was issued in January of 2012. Guiseppe Tarascio, a technician in the employ of Bell Canada in Toronto, said he earned income through a wide range of gambling activities ("horses, slots, casino games, and lotteries") undertaken during evenings and weekends. In his income tax returns in 2002 and 2003, he claimed net business losses of $40,950 and $56,000 respectively after deducting gambling losses from his winnings. These deductions were disallowed because the gambling activities did not constitute a business.

When is gambling undertaken in pursuit of profit and when is it a mere personal endeavour? There is a clear personal entertainment return on gambling which may outweigh the realistic expectation of winning, but thrill and pleasure are sought in business too.

Three reasons were given for denying business status to Tarascio's gambling.

- While he had books and records of his gambling activity, these records were prepared to support his position in Tax Court. They were, therefore, "of little value in proving that he was conducting a business."
- Secondly, it was not a business "because he loved the thrill of gambling."
- Finally, he had "little by way of a systematic method for gambling and spent no time practising his skills." His appeals to the Tax Court and the three-judge Federal Court of Appeal were dismissed.

Conclusion

The *Income Tax Act* and the judicial decisions interpreting and applying it fail to provide a predictable framework for analysing the taxability of gambling wins and losses in the context of a business. This is not surprising, since the "pursuit of profit test" was not developed with gambling businesses in mind. The three cases described in this article all involved taxpayers seeking to deduct gambling losses and it was easy to deny all of them.

The reasons for denying "business" status to occupation gamblers were variable and deviated from the "pursuit of profit test," which admittedly is itself highly subjective. All business activity presumably enjoys a combination of both "pursuit of profit" and "personal endeavour" elements. Investment in real estate – while risky, speculative and by nature a gamble – is consistently viewed as a traditional business. Casino or card gambling, on the other hand, regardless of the risk, is not generally viewed as a business, as much as it is seen as a diversion or entertainment.

This leads to distorted analysis and double standards. Some forms of gambling are arguably as tactical and strategic as some forms of business. Imagine any other commercial venture been disqualified as a business simply because the business person maintained poor books and records, "loved the thrill of" the business too much, or was not "systematic," spending too little "time practising his (business) skills."

We predict that if and when the Canada Revenue Agency someday seeks to tax significant gambling *winnings* of which it is aware, it will discover greater interpretative ease to designate these net winnings as *income from a business.* In doing so, a new analytical precedent will be created, nuanced perhaps around the dichotomy of chance versus skill. For example, lotteries and slot machines, being essentially games of chance, might be non-taxable personal endeavours. Poker and other card games may be more skill-based (but this is debatable) and tax-worthy.[5] In any event, the line-drawing here will be a complex and inherently arbitrary exercise.

Investment in real estate – while risky, speculative and by nature a gamble – is consistently viewed as a traditional business. Casino or card gambling, on the other hand, regardless of the risk, is not generally viewed as a business, as much as it is seen as a diversion or entertainment.

Until then, the Agency and the tax courts remain secure in the knowledge that more gamblers over the long term lose money

than make it. They will disregard occupational gamblers seeking tax deductions as "compulsive gamblers, who are continually trying their luck at a game of chance", imply that authentic business gamblers must "prey on unsuspecting, inexperienced opponents" (*Leblanc*), or dismiss them as "hobbyists" (*Cohen*) or mock them with language like "lifelong gambler . . . he says that gambling is his calling" (*Tarascio*). They will continue to deny the deduction of significant, documented gambling losses on the unarticulated grounds that gambling is insalubrious, unproductive and not to be encouraged as a matter of policy, except as a potentially-ruinous, highly regulated (barely legal) entertainment activity. This conceptual approach logically holds that losses voluntarily incurred in *gambling*, itself still a pejorative pursuit, should not be subsidized by other Canadian taxpayers.

. . . today in Canada gambling winnings and losses are unlikely to be characterized by the tax authorities and courts as prizes or income or loss from business.

To conclude, today in Canada gambling winnings and losses are unlikely to be characterized by the tax authorities and courts as prizes or income or loss from *business*. Consequently, they are neither taxable nor deductible. This is good news for those few taxpayers who do gamble and end on the positive side of the ledger.

Indeed, that is a happier tax result than winning an Olympic medal.

Notes

1. For Canadian medalists: $20,000 (gold), $15,000 (silver) and $10,000 (bronze). American medalists receive $5000 more for each gold medal. Singapore pays $1 million for a gold medal (not yet won). That country has won only 4 medals in its history, two of which (both bronze, paying $250,000 each) were earned in London 2012 in table tennis by a foreign-born athlete. In the U.K., gold medalists get their faces on a postage stamp which, while much harder to tax, seems to have served as adequate incentive for Team G.B.
2. Reg. § 1.74-1(a)(2). See also: Commissioner v. Wills, 411 F.2d 537 (9th Cir. 1969)
3. Canada, Gambling 2011
4. See Lindsay Tedds, "Faster, Higher, Richer: Should Olympic Medal Winners be Taxed?" Globe and Mail, August 13, 2012.
5. Croson R., Fishman P., and Pope D. Poker Superstars: Skill or Luck?

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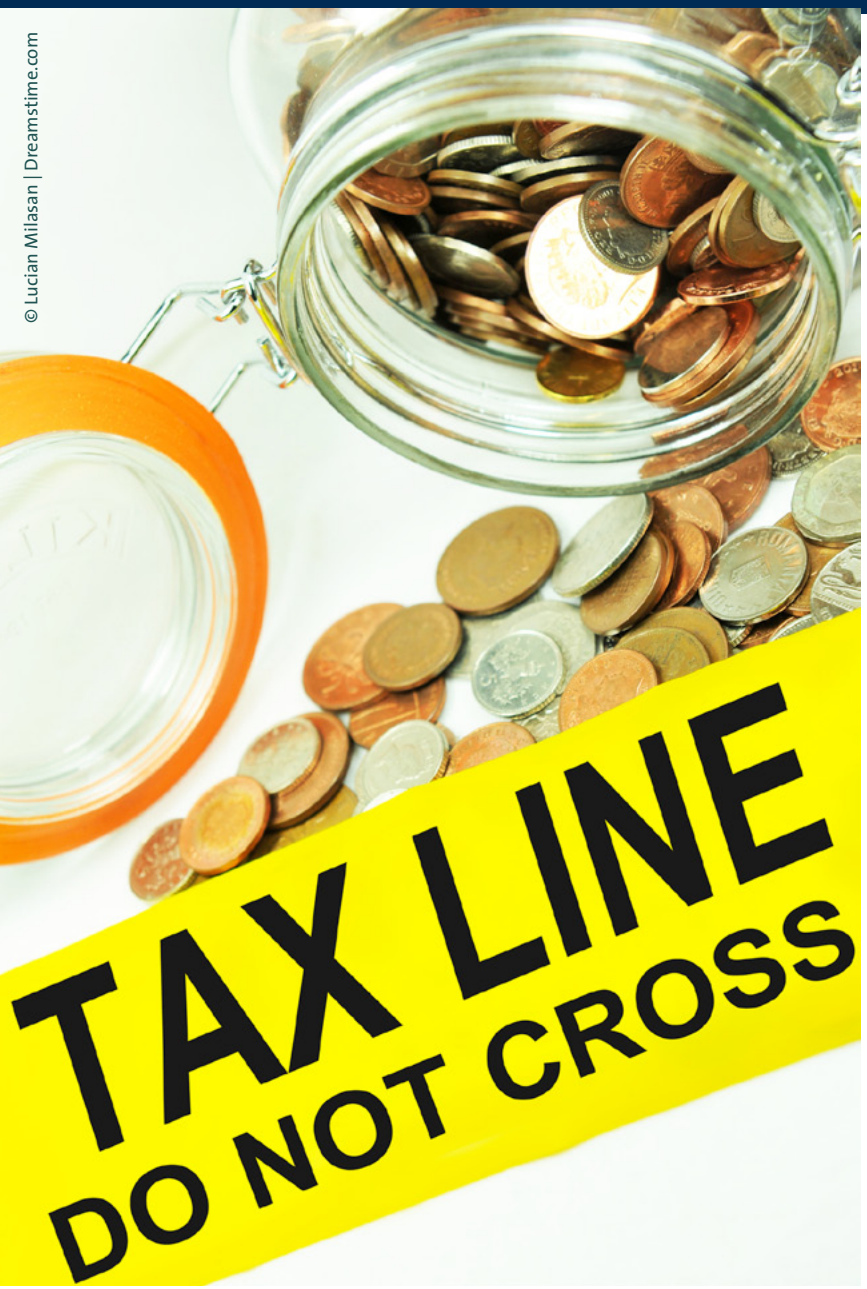

Taxation and the Criminal Law

Chad Brown

At first glance, one might think that tax law and criminal law are mutually exclusive areas of practice. Taxation largely deals with the application of the *Income Tax Act* ("**ITA**") and *Excise Tax Act* ("**ETA**") to financial transactions entered into by individuals, corporations, trusts, and others (referred to collectively herein as "**Taxpayers**") and whether those transactions result in tax becoming due by the Taxpayer to the Minister of National Revenue (the "**Minister**"). A tax lawyer is required to rationalize this complex legislation to debits, credits, and other accounting functions, all of which are closely scrutinized. Those who do not specialize in taxation would probably find much of what we do to be a highly technical game of intellectual chess with the keepers of the public purse; the Canada Revenue Agency ("**CRA**").

Criminal law, on the other hand, has all the excitement and intrigue of a Hollywood film. As aptly stated in *Law and Order*: "In the criminal justice system, the people are represented by two separate yet equally important groups: the police, who investigate crime; and the [Crown Prosecutors], who prosecute the offenders. These are their stories." However, there is a very specialized area where the criminal law and tax law intersect; namely, the investigation and prosecution of tax evasion cases.

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As one of the few lawyers who practices in both areas, I will review (very generally) the investigative process and some of the issues presented when I am defending taxpayers charged with offences under the *ITA* and *ETA*. I will also leave you with some tips for advising taxpayers and other professional advisors who may come into contact with the highly skilled teams tasked with investigating and prosecuting these offences: the Enforcement Division of the Canada Revenue Agency ("**CRA Special Investigations Unit**") and the Public Prosecution Service of Canada's Economic Crime Unit (the "**PPSC**").

CRA Audits and Criminal Investigations

In order to understand how CRA Special Investigations Unit brings its focus and significant resources to bear on a taxpayer who has engaged in "alleged" illegal conduct, one must first understand the regulatory environment governing taxation. For ease of explanation, I will only focus on the *ITA* and evasion of income tax.

The Canadian income tax system is one of self-assessment. Under the *ITA*, every corporation and every taxable individual, estate or trust is required by law to file an annual return of income in prescribed form and to determine the taxes payable for the year. After initial processing and correction of obvious errors made in completing the return, the return may be selected for audit and thus subject to a detailed examination.

The *ITA* requires taxpayers to keep such records and books of account as are required to determine their taxes payable, and authorizes the CRA to audit these records for any purpose related to the enforcement or administration of the *ITA.* The *ITA* further authorizes the Department to inspect, audit, or examine the books and records of a taxpayer and any document of the taxpayer that relates, or may relate, to an amount payable under the *ITA*.

Typically, an offence is identified during the course of a CRA audit as a result of information gathered by the auditor. Since no right to privacy generally attaches to business records which are required to be kept under the *ITA*, and since the *ITA* specifically sets out a regulatory regime which permits audits, an individual's *Charter* rights do not generally apply to audit activities undertaken

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by the CRA. This means that the taxpayer's right to remain silent, freedom from self incrimination, and right to be free from unreasonable search and seizure are not engaged during the course of the audit. The taxpayer is required by law to assist the auditor, at all reasonable times, for any purpose relating to administration or enforcement of the Act (see *ITA* 231 to 231.7 which sets out the general audit powers). That being said, there can be a point where the auditor's function turns from administration or enforcement of the regulatory provisions of the Act to a criminal investigation. In *R. v. Jarvis*, [2002] 3 S.C.R. 757 (S.C.C.) the Supreme Court identified the "predominate purpose test" which sets out the factors to consider in determining whether the purpose of the inquiry is the administration or enforcement of the Act, or the determination of penal liability (liability that arises out of breaking a law or committing a criminal act). Where the predominant purpose of an inquiry is the determination of penal liability, an adversarial relationship exists between the taxpayer and the state, and as such, all of the taxpayer's *Charter* rights are invoked.

To determine whether the predominant purpose of an inquiry is the determination of penal liability, one must look to all factors that bear upon the nature of the inquiry. Apart from a clear decision to pursue a criminal investigation, no one factor is determinative. Even where reasonable grounds to suspect an offence exist, it will not always be true that the predominant purpose of an inquiry is the determination of penal liability, and as such, it is generally accepted that the auditor has the right to complete the audit, even in circumstances where an offence is suspected.

More frequently, however, once the auditor determines that an offence is likely to have been committed, completion of the audit will be referred to CRA Special Investigations Unit. At this point, it is accepted that the CRA has "crossed the Rubicon" into a criminal investigation and the taxpayer is entitled to rely on his or her rights under the *Charter* which, in effect, strips the CRA of its general audit powers. Any information obtained from the taxpayer thereafter must be provided voluntarily, or compelled by law through the issuance of a properly authorized search warrant, production order, or other mechanism permitting authorities to gather evidence under the *Criminal Code*.

The point at which an audit has become a criminal investigation is often a hotly contested issue, since important information obtained by the auditor may be excluded under section 24(2) of the *Charter* if the CRA has, prior to obtaining the information, "crossed the Rubicon" into a criminal investigation. For an example, see the recent B.C. Court of Appeal decision in *R. v. He*, 2012 BCCA 318 (B.C.C.A). In *He*, the CRA embarked on a pilot project called the Electronic Records Evaluation Pilot Project ("**ERE**") which the CRA had stated was, "not an audit, but rather a limited review of your current recordkeeping practices to determine if they are adequate for purposes of the Income Tax Act and Excise Tax Act (GST/HST)." As a result, the Court found that

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the information gathered from the taxpayers was obtained in breach of their *Charter* right to be free from unreasonable search and seizure, as the CRA was not performing a properly authorized audit function when information pertaining to the offence was obtained.

Administrative Interviews v. Investigative Interviews

During an audit, a taxpayer is generally required to provide answers to all reasonable questions posed by the auditor which are relevant to the administration or enforcement of the Act and, in particular, which may assist the auditor in determining the amount payable by the taxpayer under the *ITA.* Of course, many of these questions are posed to, and answered by, the taxpayer's accounting representative during the course of an audit. However, once a matter has been referred to the CRA Special Investigations Unit, the Minister's general audit powers are displaced and the taxpayer's *Charter* rights are invoked. As such, the accounting representative for the taxpayer should re-evaluate his or her obligation to continue answering CRA inquiries regarding the taxpayer.

During an audit, a taxpayer is generally required to provide answers to all reasonable questions posed by the auditor which are relevant to the administration or enforcement of the Act and, in particular, which may assist the auditor in determining the amount payable by the taxpayer under the *ITA*.

Many accountants' professional associations require that information of the client be kept confidential unless compelled by law. As such, although an accounting advisor could be compelled by law to produce records identified in a validly authorized search warrant executed at their premises, they may not be similarly compelled to submit to a "voluntary investigative interview" regarding the taxpayer's confidential business and tax information. Importantly, the accountant may, in fact, be required to keep this information confidential, because to reveal this information without the taxpayer's consent may breach their professional obligations.

In our experience, it appears that many accounting professionals do not fully appreciate their duties under the *ITA* in the context of a criminal investigation, and erroneously assume that CRA Special Investigations Unit, in the course of that criminal investigation, has the right to rely on the general audit powers of the CRA. This is not the case. Before making any such statements to the CRA, therefore, accounting advisors must be satisfied that their "voluntary statements" also comply with their professional obligations. It is suggested that accounting advisors consider retaining counsel and/or reviewing this issue with their professional body.

Proper Representation

In order to adequately represent taxpayers charged with tax offences, a legal advisor must be able to:

- understand complex accounting and tax principles, including year-end adjusting entries and tax return preparation, as well as general accounting practices,
- analyze CRA's audit and investigation working papers, and

- distinguish between personal and corporate income tax concepts and the theory of integration.

Further, the CRA typically produces thousands of documents as part of its disclosure obligations under *Stinchcombe*. These are not your typical criminal files.

Given that the conviction rate for tax evasion offences has never fallen below 94% of persons charged, I would recommend that criminal practitioners who venture into this area consider retaining co-counsel from a respected tax law firm in order to ensure the taxpayer achieves the best possible result. The fines from a criminal conviction, if any, are in addition to any increase in income tax, interest and penalties imposed in these cases, and put the taxpayer at significant financial risk. There is also the possibility of a term of incarceration, conditional sentence order, and term of probation. Only if you are equipped with a concrete knowledge of both taxation and criminal law principles, will you be able to conduct a proper critical analysis of the Crown's case and offer the best defence.

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Prostitution in Canada: The Big Picture

Linda McKay-Panos

Recent developments in Canadian prostitution law prompt an examination of some very important legal, moral and philosophical issues. For many years, the act of selling sex has *not* been illegal in Canada. However, several activities associated with prostitution are illegal: including communicating in a public place for the purpose of prostitution, keeping a common bawdy house (brothels) and living off the avails of prostitution (pimping). In 2010, the Ontario Superior Court

ruled in *Bedford v Canada,* 2010 ONSC 4264 ("ONSC"), that all three of the provisions of the *Criminal Code* dealing with activities related to prostitution were unconstitutional. The government appealed the trial court decision, and the Ontario Court of Appeal overturned parts of the trial decision (*Bedford v Canada (Attorney General),* 2010 ONCA 814 ("ONCA")). The government applied to the Supreme Court of Canada for leave to appeal in May 2012, and Bedford applied for leave to cross-appeal in June 2012.

The *Bedford* case brings to mind the larger philosophical question of whether the government should be criminalizing morality. In one oft-cited quotation, then Justice Minister Pierre Elliott Trudeau commented (per *Globe and Mail* December 22, 1967, p 1): "The state has no business in the bedrooms of the nation." He was commenting on the government's proposals to give recognition to individual rights in several areas, including sexual behaviour. Morality came up in the *Bedford* case when determining whether the *Charter of Rights and Freedoms* was infringed. Justice Susan Himel of the Ontario Superior Court examined the history, interpretation, and legislative objective of each of the impugned *Criminal Code* provisions. Justice Himel noted (ONSC, para 225) that a law grounded in morality could be a proper legislative objective – provided it is in keeping with *Charter* values. She also noted (ONSC, para 227), that adult prostitution has never been a crime in Canada. Rather, Parliament has chosen to control prostitution indirectly through criminalizing many of the acts related to prostitution. Thus, the moral implications could be debated endlessly, but it is a given that whether it is illegal or not, prostitution exists in Canada, and around the world.

For many years, the act of selling sex has *not* been illegal in Canada. However, several activities associated with prostitution are illegal: including communicating in a public place for the purpose of prostitution, keeping a common bawdy house (brothels) and living off the avails of prostitution (pimping).

In striking down three current *Criminal Code* prostitution provisions, Justice Himel focused on the harm prostitutes face as a result of being prevented by law from taking steps to enhance their safety. These include: working indoors, alone or with other prostitutes; paying security staff; and screening customers encountered on the street to assess the risk of violence (ONCA, para 4).

If we accept that prostitution will exist despite laws and moral condemnation, then perhaps we should consider the implications of decriminalization, regulation or stricter criminal laws. Justice Himel thoroughly examined the situation (with respect to prostitution) in Canada and in several other countries.

The Netherlands, for example, allows its sex workers to have protected areas in cities and personal rooms with windows facing the street in order to allow them to remain indoors. There are unions, regular health and sexually transmitted disease checks, and support groups for those wishing to leave. The stated purpose of decriminalization and regulation – Netherlands had laws similar to Canada until 2000 – was to eliminate forced prostitution, de-link

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organized crime and the sex trade, protect prostitutes and address human trafficking (paras 185 to 190). Despite these changes, about one-half of the prostitution in the Netherlands occurs outside of the legal sector, and much of that involves foreign prostitution. Approximately two-thirds of the Netherland's 20,000 female prostitutes are from Eastern Europe and developing countries (ONSC, para 187). The Netherlands has also set up new regulatory reforms to address the continued involvement of organized crime (ONSC, para 187). Decriminalization has resulted in improvements in the licenced sector. The women in that sector are not exploited or underage. Sexually transmitted diseases are less prevalent among prostitutes than the public at large, and about 90 percent of the reported incidents against prostitutes are against women who are working illegally (para 188). Approximately ten percent of prostitution continues to occur on the street. These prostitutes are often drug addicts or suffer from mental illness. Since they are unable to pay the rent for a window and are unwanted in brothels, they are on the street (ONSC, para 189). Social services are provided to help street prostitutes (ONSC, para 189).

New Zealand also had prostitution laws similar to those in Canada until 2003, when it decriminalized consensual adult prostitution in all forms, and implemented a licensing regime for brothels.

New Zealand also had prostitution laws similar to those in Canada until 2003, when it decriminalized consensual adult prostitution in all forms, and implemented a licencing regime for brothels. Brothels that are owner-operated and consist of four or fewer prostitutes are permitted without a licence. New Zealand also created a certification system for brothel operators and made it a summary conviction offence for clients, prostitutes or brothel operators to fail to promote or adopt safer sex practices (ONSC, para 193). Five years after the law was changed, the law was reviewed by the Prostitution Law Review Committee, which noted that incidents of violence, threats, forcible confinement, refusal to pay for services and theft have continued but are infrequent, except among street-based prostitutes. Prostitutes are more likely to report incidents of violence to the police. Under-age prostitution has not increased, and there are no identified incidents of human trafficking (ONSC, para 194). On the other hand, while the sex industry is about the same size, prostitutes are slowly moving from the managed sector (e.g., brothels) to the private indoor sector. In addition, there is little movement to move indoors in the 11 percent of the sex trade that is street-based (ONSC, para 196).

In Germany, before 2002, it was illegal to operate a brothel. Prostitution was deemed immoral and thus contracts for sale of sexual services were unenforceable. Prostitutes had to register with the government and undergo mandatory disease screening (ONSC, para 197). In 2002, Germany decriminalized brothels and lifted the prohibition against promoting prostitution, but pimping (in the absence of a voluntary agreement) remained a crime. Mandatory disease screening was abandoned (ONSC, para 198). The stated goals of these amendments were to prevent crime, improve working conditions for prostitutes, increase their access to benefits and facilitate their exit. It was also hoped that the amendments would protect children from exploitation and reduce human trafficking (para

199). An official report on the legislative reforms in 2007 indicated that there were no measurable improvements in social protection for prostitutes, in their working conditions, in encouraging them to leave the industry or in reducing crime. On the other hand, the fears that decriminalization would result in increased organized crime, human trafficking and the exploitation of minors have not appeared (ONSC, para 201).

In Australia, where jurisdiction over prostitution is a state matter, decriminalization has occurred in six of Australia's eight jurisdictions (ONSC, para 202). In Queensland, the law was changed in 1999 to allow licenced brothels to operate in restricted locations. Escort agencies and street prostitution remain illegal (ONSC, para 202). Stiffer penalties were enacted for street prostitution. In 2004, a review of the new legislation indicated that 75 percent of the sex industry did not elect to move into the legal sector and continues to operate illegally. Nevertheless, decriminalization has not led to an increase in the size of the sex industry (ONSC, para 204).

A study conducted by Barbara Brents and Kathryn Hausbeck of the legalized brothels in Nevada, United States, indicated that legal brothels generally offer a "safer working environment than their illegal counterparts".

Sweden had decriminalized prostitution for decades. In 1999, Sweden introduced measures that criminalized buying sex and pimping, but selling of sex by prostitutes remained legal (ONSC, para 206). Prostitution is treated as an aspect of male violence against women and children. Since the law changed, the number of women involved in prostitution overall and in street prostitution in particular has decreased. Exploitation of foreign women and human trafficking appear to be decreasing (ONSC, para 207). While there was a 300 percent increase in arrests, convictions remain rare (ONSC, para 208).

A study conducted by Barbara Brents and Kathryn Hausbeck of the legalized brothels in Nevada, United States, indicated that legal brothels generally offer a "safer working environment than their illegal counterparts" (ONSC, para 213).

If safety of prostitutes is the paramount concern of our lawmakers, the experience with decriminalization, regulation or other remedies in other countries suggests that the most appropriate approach in Canada would be to decriminalize prostitution, but to criminalize buying sex and exploitative pimping. This would go together with providing increased social supports for prostitutes and incorporating aspects from the approaches to prostitution law in Sweden, Germany and the Netherlands. It is clear that no one approach is perfect and that illegal street prostitution will likely remain a reality. The *Bedford* case demonstrates how difficult it can be to legislate an activity, while respecting *Charter* values at the same time.

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Cry for me Argentina!

The Commercial Sexual Exploitation of Children in South America

Visitors to South America's spectacular Iguazu Falls say you start to hear the roar kilometers away. The falls – actually a series of 275 individual cascades and waterfalls that drop up to 82 metres into a gorge below – are located along the rim of a crescent-shaped cliff that stretches for nearly three kilometers. The borders of three countries, Argentina, Brazil and Paraguay, meet here. The Iguazu Falls lie at the tip of a strip of Argentinean territory that, on a map, resembles a crooked finger jutting away from Argentina's main land mass, with Brazil to the east and Paraguay to the northwest. Long considered to be one of the world's natural wonders, when United States First Lady Eleanor Roosevelt visited them some time prior to the Second World War, she is reputed to have quipped "poor Niagara." The allusion was to a pair of massive waterfalls more familiar to North Americans: the two Niagara Falls straddling the international border between the Canadian province of Ontario and the American state of New York.

The Iguazu Falls and surrounding area is one of the most renowned natural tourism sites in South America, attracting hundreds of thousands of visitors every year. However the area is also the site of a different kind of traffic. Because of lax border controls, the porous borders in this tri-state region make for a smuggler's dream. There is a steady flow of people and goods. Among the blend of cheap electronic goods, jewelry and clothing is an illicit trade in drugs, stolen vehicles and car parts, weapons and even people. Both INTERPOL and the Federal Bureau of Investigation have identified the Paraguayan city of Ciudad del Este – which lies across the Parana River from Brazil and is joined by the Friendship Bridge – as having a major problem with illicit trade. Some estimates place this underground economy as worth up to five times Paraguay's national economy. Various international intelligence and national security agencies have suggested that some of the proceeds from this illicit trade have been supporting criminal gangs located outside the region, including groups that advocate and practise political terrorism.[1] This article focuses on the trafficking of underage minors and children for sexual purposes.

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As of the date this article was written, every member of the United Nations, except for the United States and Somalia, had ratified the *United Nations' Convention on the Rights of the Child*. Yet, horrible abuse of children continues, and one of the most heinous examples of this is child sex prostitution and the international trafficking of children for the purposes of sex. According to the United Nations' International Organization for Migration (IOM), human trafficking in the tri-state region around the Iguazu Falls chiefly involves women, teens and children. Studies for the IOM have shown that young women are usually trafficked for sexual purposes across the borders for short stays of anywhere from a few hours to a day or two.[2] Research projects have also estimated that roughly 6000 unaccompanied children and teens cross the Friendship Bridge between Brazil and Paraguay each year. These young people are at risk of being kidnapped and forced into, or otherwise falling into, the sex trade. Many of them are illiterate and come from extremely poor families in rural areas. Many of these children and minors have had to flee abuse and violence within their homes and have been obliged to move to the cities of the tri-state region to look for work. The incidence of sexual exploitation is staggeringly high. According to a Brazilian children's advocacy group called *Sentinela*,(a Portuguese word meaning "sentry" or "guard") which has an office in the Brazilian border city of Foz do Iguacu, of the 489 children it assisted between the years 2002-07, 410 of them (representing 90% of the girls between the ages of seven to 18) were victims of sexual exploitation. Furthermore, according to Argentinean immigration officers, out of the dozens of girls and young women it assisted between the years of 2004-07 in the border city of Puerto Iguazu, almost all of them were Paraguayan girls or young women who were destined to be shipped to brothels or night clubs in Argentinean cities further south, including Buenos Aires and Cordoba.[3]

Argentina, as a party to both the *Convention on the Rights of the Child* and a protocol called the *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, is obligated under international law to implement programmes and policies that would inhibit the trafficking of children and under-aged youth. However Argentina continues to be the source of a lot of the trafficking in the region, largely because of a lack of resources to address the problem and because many law enforcement and border control officials continue to be complicit in the trade. A reading of media reports about the commercial sexual exploitation of children and the various reports from United Nations' agencies and non-governmental organizations about the issue reveals that the problem is not lack of awareness. Rather, it is the lack of investigatory and prosecutorial resources and initiatives devoted to rescuing children and minors who are caught up in the trade.

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This paucity of resources to address the problem is not just an issue for emerging regional economic powers like Brazil and Argentina, both of which still struggle with widespread poverty. There is also the failure of wealthier countries within the G20 (such as Canada) to allocate adequate resources to investigate so-called "sex tourists" and then bring them to justice within their domestic legal systems. Countries, rich or poor, are failing in their own fashion to live up to their obligations under international law. More than 20 years after the international community brought its focus to the universal rights of children when the *UN Convention on the Rights of the Child* came into force, many of the world's children continue to live lives that are anything but safe and in accordance with the values and requirements set out in that *Convention*. In addressing the situation in Argentina, I am in no way suggesting that Argentina's situation is an isolated, aberrant case: child trafficking for sexual purposes or for cheap labour is an international problem. Argentina is, however, a well-documented, significant destination for "sex tourists," the overwhelming majority of who are adult males from North America and Europe.[4] A Canadian sociologist named Richard Poulin who has studied the international sex trade says that the trade has grown larger and more complex over the last two decades. According to Poulin, human traffickers, all of whom are connected to networks of organized criminal gangs in some way, are responsible for transporting around anywhere from one to four million women and children every year, with the majority of these people destined for the sex trade. "They are being treated as merchandise for the sex industry. They are new and raw resources," Poulin says, in a degrading trade that he has called the "feminization of migration."[5]

Countries, rich or poor, are failing in their own fashion to live up to their obligations under international law.

Outside of the minority of countries which have well-entrenched systems of rule of law the world is still very much a

Hobbesian place. The protection accorded to children on paper is not the reality. And the ugly reality is that the customers for the most vulnerable among us come from those very countries that have the rule of law; Canada among them. The trafficking of children for sexual purposes reveals an international economic system of supply and demand at its basest and most amoral: those with a need that would land them a prison sentence and social shunning in their home countries if caught fly to places where children and young people are sold by their own families into a shadowy world that everyone knows exists, yet continues in spite of the best-intentioned of laws and international conventions.

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Notes

1 "Terrorist Threat in the Tri-Border Area: Myth or Reality?" The U.S. Army Professional Writing Collection September-October 2004; "Hezbollah builds a Western base: From Inside South America's Tri-border area, Iran-linked militia targets U.S." Telemundo and MSNBC.com, May 9, 2007.

2 Organizacion Internacional Para Las Migraciones.

3 "Strengthening Efforts to Counter Trafficking in Argentina, Brazil and Paraguay", International Organization for Migration, June 16, 2009.

4 http://www.globalmarch.org/resourcecentre/world/argentina.pdf

5 "The globalization of sex", CBCNews, June 18, 2009.

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Gender identity and sport

This article is being written on the day of the opening ceremonies of the 2012 Olympic Games. Leading the procession of athletes, coaches and officials from South Africa will be a young female middle distance runner named Caster Semenya. This is her Olympic debut and the controversy will be loud and fierce.

You see, most people say Caster is not female, although her governing body (the IAAF, International Association of Athletics Federations) and the IOC (International Olympic Committee) have cleared her to compete as a woman. Most people might also be right in that assessment of her gender, if one accepts that sex is a binary condition and every human is either male with testes and XY chromosomes, or female with ovaries and XX chromosomes.

In fact, we now know that sex occurs along a continuum. Noted one respected researcher "Nature doesn't actually [draw] a line between the sexes". Two out of every 100 people do not fit the binary model of gender identification. Sex chromosomes can defy the XX/XY model, medical

conditions can produce a body that has the chromosomes of one sex but the anatomy of another, and babies may be born with genitalia that defy gender classification altogether. The old-fashioned term "hermaphrodite" has been replaced with the modern term "intersex" to identify those people who physically fall somewhere between the binary norms of male and female. Caster Semenya is one of these individuals who is not "either/or", and there are also others like her competing at these Olympic Games.

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Added into the mix of how nature may dole out chromosomes, hormones and anatomical characteristics is the separate issue of gender identity. Another old-fashioned term, "transsexual" has been replaced with terms such as "transgender" or "transitioned" to describe persons who meet all the physical conditions of a male or female sex, but whose psychological identity is opposite. A male born child may identify strongly with the female gender, and may take steps to align his sex (male) with his gender identity (female) through lifestyle changes, hormone treatment and/or surgery. One in 500 people identify as the opposite gender to their sex and many of these pursue gender transition at some point in their lives.

The issue of gender identification and sport is a hot topic of discussion these days. Transgender, transitioned and intersex people are increasingly visible, and in many sectors of society are assertively pursuing their right to be treated equitably and to be included in the facilities, programs and services that modern society offers to its members.

Sport is no stranger to these pressures. Organized sport has long sustained a model of gender polarity, and sport activity has always been organized strictly around gender and age categories. But recent years has brought new thinking…

Firstly, we have come to understand that chronological age and physical development are not perfectly aligned and that the development of young athletes requires a focus on physical stages of development, not chronological stages. Secondly, we are gaining understanding of the large variations in skeletal, physiological and hormonal characteristics that exist within genders, in addition to the variations that exist between genders. Thirdly, our laws continue to evolve to recognize the rights of minorities and the disadvantaged, and to correct long-standing inequities that have withheld sport opportunities from women and girls.

In other words, the conventional wisdom that has served us well over generations (that boys who are 14 should play sports with and against other boys who are 14) has begun to fall apart. Now, we are increasingly seeing that girls can compete with and against boys, and that 13- year- olds can compete with 16- year-olds if they are at comparable stages of physical development. We are also seeing doors open to the participation of individuals who do not meet the binary gender norm, or who identify with a gender opposite to the one to which they were born.

But back to elite sport and the rigid rules of sex and eligibility that have existed for many decades. Sex testing in sport from the outset has been a harmful, damaging and humiliating process

spurred on by inaccurate scientific assumptions and a sexist outlook. Historically, many female athletes were not even aware that they possessed intersex characteristics until they failed sex tests and were ejected from sporting competitions amid public ridicule. This happened as recently as at the 2006 Asian Games, when Indian athlete Santhi Soundarajan was stripped of her silver medal in the 800m track event for failing to have XX chromosomes.

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Formal sex testing in sport was first performed in the mid-1960s at track and field championships and other major games, and consisted of visual inspections of female athletes' genitalia to verify that they were not males. The Olympic movement introduced a chromosome test in 1968 which involved taking a swab from an athlete's mouth. If the swab was inconclusive, the athlete had to undergo a DNA test and a physical genital examination.

In all cases, it was only females who were tested, as the thinking of the day was that a competitive advantage could only be gained by a male seeking to pass as a female. In fact, Canada's synchronized swimmers competing in the 1992 Olympics have relayed amusing stories of the sex testers descending upon the synchro swimmers in their sequined speedo bathing suits and waterproof makeup, just to make sure that they were really women!

Such testing continued until the Atlanta Olympics in 1996. Seven athletes at those Games failed the test, but were permitted to compete as women anyway. The IOC has not sex tested since 1996 but has reserved for itself the right to investigate any complaint, and as recently as this year, has introduced a policy to address female "hyperandrogenism" among those female athletes at the London Olympics who are intersex and who may have androgen levels outside the female norm.

The IAAF also has its own policy that allows it to verify the gender of a competitor on the basis of any suspicion or challenge about an athlete. The IAAF carried out such an investigation of Caster Semenya following her resounding victory in the 800m at the 2009 IAAF World Championships, but has since declared her eligible to compete. As with the IOC policies, only women are suspect and there is no gender verification process for males.

I have worked as a policy consultant in the Canadian sport system for 20 years, and in the last ten of these years I have tried to promote greater understanding and awareness of the legal, scientific and policy implications of transgender inclusion in sport. This has been an interesting exercise, as there are many misconceptions about the science of gender transition, as well as false assumptions about its social, cultural and psychological aspects.

For example, it is widely assumed that a physically born male will always have a competitive advantage over a physically born female, even after the male takes sex change hormones to become female. In fact, this has not been proven. Virtually no scientific research has been done in the athlete population, and there is no evidence to either support or refute the position that transitioned athletes compete at an advantage or disadvantage compared with physically born male and female athletes.

Anecdotal information suggests that transitioned males and females fall within normal ranges of hormone levels and physical characteristics for their transitioned gender, and that any competitive advantage quickly disappears. For example, well-known transitioned female Canadian cyclist Michele Dumaresq reportedly lost three inches in height and 33 pounds in weight after transitioning from a male to a female. Anecdotally, I am not aware of any transitioned female athlete who, following gender transition from being male, has dominated her sporting event.

Organizational policies to guide inclusion of transgendered persons in sport have been sorely lacking, in Canada and elsewhere, but in the last two years we have seen progress on this front.

A few recent events are noteworthy to this ongoing debate in sport. In June 2012, the 2012-2022 Canadian Sport Policy was published. This is a collaborative document of the federal government and all its provincial and territorial counterparts, and it sets direction for the next ten years for all governments, institutions and organizations involved in sport at all levels in Canada. This is Canada's second national sport policy, following the one created in 2002 which, in part, has contributed to significant new investments in high performance sport through programs such as Own the Podium.

This new national policy is framed around seven principles, the second of which is *"INCLUSIVE – sport programs are accessible and equitable and reflect the full breadth of interests, motivations, objectives, abilities and the diversity of Canadian society"*. Thus, this policy clearly supports inclusion of gender-diverse individuals in Canadian sport.

Also, the Province of Ontario amended the *Ontario Human Rights Code* in the spring of 2012 to include "gender identity" as a prohibited ground of discrimination. Interestingly, all but a handful of Canadian national sport governing bodies are headquartered in Ontario and are subject to Ontario laws, placing them squarely within the jurisdiction of the newly-revised *Code*.

Organizational policies to guide inclusion of transgendered persons in sport have been sorely lacking, in Canada and elsewhere, but in the last two years we have seen progress on this front. The IOC created the world's first policy in 2004. Called the "Stockholm Consensus", it allowed gender transitioned individuals to participate in the Olympic Games but only if the athlete met three strict conditions: completion of surgery including modification of external genitalia, legal recognition by national authorities, and a minimum of two years of hormone therapy.

This policy was (and remains) restrictive and unreasonable, especially given that genital surgery is only performed in rare cases, and many countries of the world will not grant legal recognition to those who undergo a sex change. However, until 2010, most sport organizations throughout the world and in Canada followed the IOC policy, despite its flaws.

More recently however, the NCAA (National Collegiate Athletic Association in the United States) and the CCAA (Canadian Collegiate Athletic Association in Canada) have implemented pragmatic and equitable policies for inclusion that do not require surgery or legal recognition. All that is necessary to include a gender-transitioned individual in collegiate programs is one year of documented hormone therapy. The NCAA policy was quietly approved before the 2010-2011

competitive season, and the CCAA policy was passed unanimously by the association's member colleges in May 2012.

These developments are having a welcome trickle-down effect. In the spring of 2012 the Ontario Soccer Association (Canada's third largest sport organization, representing nearly half a million Ontario soccer players, from house league to rep) passed a policy modelled after that of the NCAA. In the region of Niagara, a small group has been formed to look at instituting a comparable policy in high school sports, with a view to the policy making its way to the provincial governing body for high school sports, OFSAA (Ontario Federation of School Athletic Associations).

Canada's new sport policy sets out a vision for a dynamic and innovative culture that promotes and celebrates participation and excellence in sport.

Furthermore, national anti-doping agencies are now involved in the debate and are taking their own steps to adjust anti-doping rules so that gender transitioned individuals will not run afoul of them. Female born athletes who transition to males must take artificial testosterone, which is prohibited under anti-doping rules without a therapeutic use exemption (TUE). The reasons for granting TUEs have been broadened to include treatment for gender identity disorder. In the case of the CCAA policy, the Canadian Centre for Ethics in Sport (Canada's anti-doping agency) has allowed that gender-transitioned CCAA athletes may undergo a retroactive Medical Review to address any adverse finding, rather than having to obtain the TUE in advance of competition.

These are all welcome developments.

In closing, sport is a very powerful force. Canada's new sport policy sets out a vision for a dynamic and innovative culture that promotes and celebrates participation and excellence in sport. We know how sport contributes to many things on many levels: excellence, leadership, education, skill development, health and wellness, community engagement, social cohesion, economic prosperity, and national pride. To realize these benefits fully, sport must be inclusive of all, and recent trends in accommodating gender diverse persons using sensible and fair policy tools would suggest that we are moving in the right direction.

But there is still the Olympics to watch, and Caster Semenya's 800m race. We shall see how the world responds …

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UN's Universal Periodic Review of Canada – What's in it for Canadians?

Linda McKay-Panos

Although Canada enjoys a pretty positive reputation internationally, we do have human rights issues here, including the right to housing, women's inequality and Aboriginal issues, among others. A relatively new initiative, the Universal Periodic Review (UPR), provides Canadians with an opportunity to have their say about how Canada is doing on these and other human rights issues.

The United Nations Human Rights Council established the UPR initiative in 2006. The human rights situations of selected Member States are evaluated by the rest of the Member States. The goal of this process is to encourage all Member States to improve their individual human rights circumstances. Reviews of each Member State take place every four years. Significantly, stakeholders, such as non-governmental organizations (NGOs), United Nations agencies and national human rights institutions can and do attend the UPR Sessions. See: "Basic Facts about the UPR" Online at United Nations Human Rights website.

For each review session, groups consisting of three Member States, referred to collectively as "troikas", are selected to perform UPRs. Prior to a particular review session, the "troikas" are given written questions from other Member States, and prepare Working Group reports. These reports contain a summary of the review session dialogue, the responses to the questions and recommendations that are received by the States Under Review, and the recommendations made by the other States (See: "UPR Process" Online).

. . . contacting Canadian NGOs is one way that Canadians can have their say in important human rights issues.

Through the entire UPR process (before the review session, during the review session, and during the period of time between reviews), NGOs have several opportunities to participate in and impact the process. Before a review session, NGOs can participate in national consultation processes with the government of the States Under Review. Governments are encouraged to hold national consultations with relevant stakeholders. Thus, contacting Canadian NGOs is one way that Canadians can have their say in important human rights issues.

NGOs can submit reports and information to the Office of the High Commissioner on Human Rights (OHCHR), before the review, pertaining to the human rights situation in their country. Moreover, NGOs can inform other Member States of the specific human rights issues that they feel are important in their country and lobby these States to address these issues in the interactive dialogue portion of the review session.

Canadian government officials who respond to the UPR process are concerned about Canada's international reputation on human rights and will follow through with the recommendations or some of them.

Canada's first UPR was held in 2009. Canada's Report was prepared in collaboration with the provincial, territorial and federal governments. The report addressed human rights issues such as Aboriginal issues, women's rights, immigration and anti-discrimination. (UPR Process Online). Canada received a total of 68 recommendations made by 42 fellow Member States. Of those, 39 were accepted. Some of the issues brought to Canada's attention included the treatment of Aboriginal peoples, persons with disabilities, homeless persons, children, women, racial minorities and refugees. (Canada's Fourth Session, online.)

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Submissions by Canadian NGOs featured significantly in the first UPR. Forty-nine NGOs submitted reports to the Office of the High Commissioner for Human Rights [Canada, 4th Session]. In addition, immediately after the review, Amnesty International issued a press release highlighting the recommendations received by Canada from other Member States during the review session. Further, NGOs have made submissions to the Canadian government encouraging the implementation of UPR recommendations.

Canada tabled the outcome of the UPR in the House of Commons and the Senate in May 2010. Canada has ratified/signed the following two conventions following the UPR recommendations: the *Convention of Rights of Persons with Disabilities* and *United Nations Declaration on the Rights of Indigenous Peoples*. Also, the Standing Committee on Human Rights has been mandated by the Senate to conduct reviews of issues related to human rights. The Continuing Committee of Officials on Human Rights (CCOHR) has established a permanent committee, with membership of all relevant federal departments, that meets once a month to discuss and track the progress of the accepted recommendations and Canada's commitments. Canada's UPR is now a standing item on the agenda of CCOHR, and provincial and territorial officials provide regular updates on relevant initiatives undertaken by their respective governments. Canada hosted a UPR review midterm side-event in June 2011 for those countries whose UPR occurred alongside Canada. This event generated a constructive dialogue and positive responses from participating states and NGOs (See: "Proceedings of the Standing Senate Committee on Human Rights", 6 February 2012, Online.)

Canada's next national report on the UPR is to be submitted to the OHCHR by 21 January 2013. Canada's UPR review session, its second, will take place in the 16th session, from April 22 to May 3 2013.

Canada's next national report on the UPR is to be submitted to the OHCHR by 21 January 2013. Canada's UPR review session, its second, will take place in the 16th session, from April 22 to May 3, 2013. Individual Canadians can get involved in the process by contacting individual stakeholder organizations. A good place to start is to check the website for NGOs who participated in Canada's first UPR.

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Resistance to Dictatorship and Piercing the Immunity of the General

This column is a continuation of a discussion of these two books.
The first part was published in LawNow March/April 2012.

A look at Carmen Aguirre's *Something Fierce: Memoirs of A Revolutionary Daughter* (2011); Heraldo Mendoza's *The Dictator's Shadow: Life Under Augusto Pinochet* (2008)

Rob Normey

Having completed Aguirre's very fine memoir, *Something Fierce: Memoirs of a Revolutionary Daughter* (2011), I thought it would be useful to compare her experiences with those of Heraldo Muñoz, who lived through the same time period as the "revolutionary family" from Canada in *The Dictator's Shadow,* the title of his memoir. Muñoz worked closely with Salvador Allende in the 1970s as National Supervisor of the People's Stores. When Munoz learned of the coup shortly after returning from Valparaiso, where he was at work on the Allende government's highly effective government-supported food distribution program for shantytowns throughout the country, he was soon assaulted by the sonic boom of a jet fighter flying menacingly over Santiago's skyline. He rushed to the local Socialist Party headquarters with his .32 caliber revolver, prepared to defend the constitutional government against the conspirators. He was in the midst of discussing with his compatriots what lines of defence might be developed when President Allende's voice came over the

radio airwaves. It would be his last speech. Displaying remarkable composure, Allende delivered a truly noble speech, which was interrupted once by the sound of a bullet shattering a window in his office. He talked about his defiance of the demand that he resign. He addressed "the worker, the peasant, the intellectual and those who will be persecuted". He added that History will judge those perpetrating the terrorist attacks and that "the people must not permit themselves to be obliterated, demoralized or humiliated."

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Munoz tells the amazing story of how, in the aftermath of the overthrow of Chile's government, he and his wife escaped arrest, which would have been followed by certain torture and then, if lucky, enforced exile, only due to the fact that the soldiers who arrived to arrest him mistakenly went to his next door neighbour. The memoirist describes the barbaric acts of the army in the period immediately after, when friend after friend is arrested, often never to be seen again.

Muñoz brings his considerable political knowledge to bear on the main players and dramatically recounts the mafia-like machinations behind the putsch and its aftermath as Pinochet ruthlessly consolidates his position in the junta. We learn of the many members of the establishment, including the Catholic Church and the Supreme Court, which to their eternal discredit, provided public displays of support for the new regime. It became apparent early on that there would be only one Don here – Commander-in-Chief Pinochet, whose bulldog countenance would be seen regularly in pictures and on television screens. If you ever wondered why the General in the first years of the dictatorship was almost always seen with his dark glasses, Munoz helpfully supplies the reason – in a moment of candour and arrogance – Pinochet himself is quoted as saying that it is a way of hiding things, as lies can be discovered through the eyes, and he lied a lot.

The last section of the book provides gripping accounts of the efforts in both London and Santiago to investigate and try Pinochet for his numerous crimes against humanity and the various crimes detailed in the "Caravan of Death" and "Operation Condor" and other specific investigations. Amnesty International had been amongst the first organizations to call for Pinochet's arrest, during a trip he made to London in 1994. It noted that Great Britain had, in 1988, signed and ratified the *UN Convention Against Torture*, and therefore had jurisdiction. By the time of the Chilean strongman's next visit to London in 1998, the political landscape had changed. The Conservatives had been defeated and Tony Blair's Labour party was in power, offering human rights advocates a more receptive ear. The Blair government took seriously the documented claims of Spanish Judge Baltasar Garzón as part of an indictment for human rights violations. A famous sequence of lower court rulings and a final ruling by the Law Lords of the House of Lords on March 24, 1999 followed (the judgments of the British courts and of the Judicial Committee of the House of Lords can be found on the British and Irish Legal Information Institute website). Muñoz delineates these truly unexpected and groundbreaking developments in a lively manner. Although, finally, the British

government allowed the General to return to Chile on the basis that he was considered medically unfit to stand trial, the fact that he was detained for many months on the basis that he could be asked to stand trial for torture and other human rights violations, on the basis of the universal jurisdiction that was asserted, was an obvious watershed moment in international law. These rulings overrode the Chilean laws of immunity that were enacted under Pinochet. It has meant that no sitting or former head of state with serious human rights violations to his discredit can leave his own country without potential risk.

These rulings overrode the Chilean laws of immunity that were enacted under Pinochet. It has meant that no sitting or former head of state with serious human rights violations to his discredit can leave his own country without potential risk.

Although the former dictator was not tried in Europe, his legal troubles were far from over. Upon his return to Chile, judicial investigations, particularly under Judge Juan Guzman, continued. The Supreme Court of Chile ultimately removed legislated immunity provisions, given the grave nature of the charges against Pinochet. By the time of his death, General Pinochet faced upwards of 200 charges and was forced to witness the investigations, charges and, in many cases, convictions of his closest associates.

Carmen Aguirre in her memoir closes with the admonition that in Chile, the need to advocate for social justice must carry on, that "the struggle continues." She would, of course, have wanted to see General Pinochet face a full trial in order to bring a truer sense of closure to the many who suffered greatly during his rule, which might well have provided an acknowledgement of what was done to them. If one reflects on the series of legal proceedings in Chile and abroad, though, I think it would be fair to say that such an acknowledgement in essence was provided, given the overwhelming evidence of human rights violations that were uncovered.

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Occupational Health and Safety

Peter Bowal and Ariel Prence

Introduction

This article is the first in a series of columns on the topic of safety at work. Canadians spend most of their economically-productive years in the workforce. Most are spared a serious injury or worse. But there is always danger at work, particularly in the heavy industries that contribute to the Alberta economy.

The employment relationship is regulated by law in many ways. Well known are regulations relating to minimum wage, overtime pay, statutory holidays, child workers, and maternity leave – these are the category of minimum legislated employee rights called *employment standards*.

Since a job is a source of income to support oneself and one's dependents, as well as an important source of esteem and personal well-being, government policy has expanded into social and economic assistance and income supports. This includes the Canada Pension Plan, Old Age Security, Employment Insurance, student loans, manpower training and temporary worker programs. This broad category of government policy and regulation might be called *workforce and social development and security*.

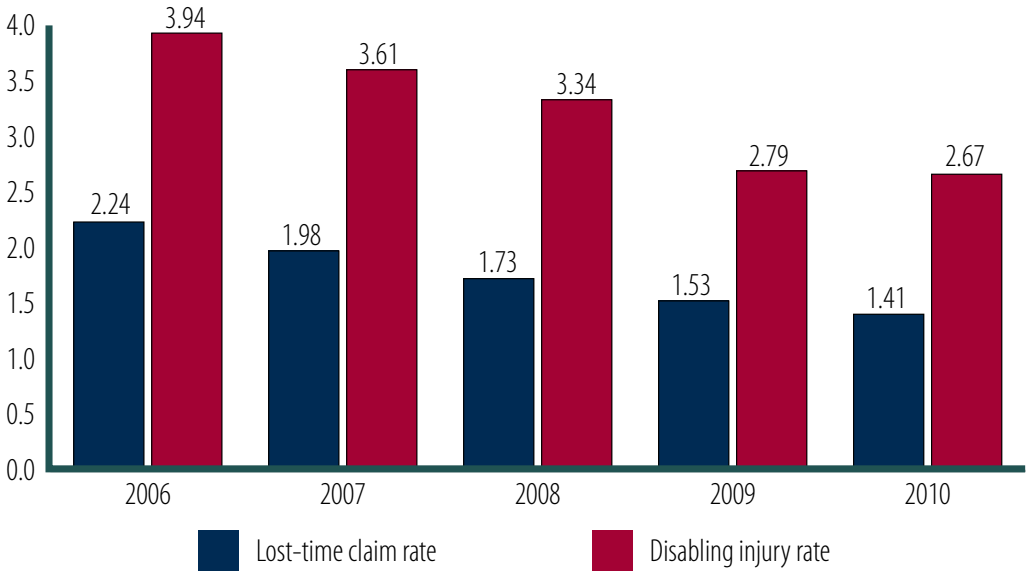
The law is also concerned with reducing and managing workplace hazards that might lead to injury and death. Worker compensation programs, as the name suggests, attempt to compensate and rehabilitate workers during their recovery from work-related injuries. The preventative piece of this regulation is called *occupational health and safety* (OHS).[1]

This first OHS column sets out some recent statistics about workplace injuries and deaths.

Alberta Injury and Lost Work Time Statistics

The Alberta ministry of Human Services, Employment and Immigration branch, maintains and publishes statistics on injury claims and lost worker time at work.[2] As the table below shows, both disabling injuries and lost time have been declining in Alberta since a high in 2006, a year of major economic activity and expansion in the province.

Injury claim rates, Alberta 2006 to 2010[3]



'Lost time' means more than the day of the injury. 'Disabling injury' means the worker could not perform normal duties as a result of the injury. As of 2010, the last year of these statistics, the disabling injury rate is highest in manufacturing and lowest in offices.

Industry Sector	Disabling Injury Rate
Manufacturing, Processing and Packaging	4.21
Transportation, Communication and Utilities	3.41
Construction and Construction Trade Services	3.10
Agriculture and Forestry	3.07
Wholesale and Retail	2.79
Public Administration, Education and Health Services	2.61
Mining and Petroleum Development	1.58
Business, Personal and Professional Services	1.35

The rate here refers approximately to the percentage chance of being injured in that sector. The good news, at least for 2009 to 2010, is that all sectors reduced injury rates *except* mining and petroleum, and agriculture and forestry where the number of injuries increased.

Young workers under the age of 24 are generally thought to suffer a disproportionately higher incidence of lost time claims, disabling injuries and even work-related deaths but this is not borne out in this 2010 Alberta data.

Canadian work-injury data comes from worker compensation "claim accepted" statistics. The WCB is increasingly recognizing and accepting new occupational disease claims arising from terminal cancers such as silicosis and mesothelioma. These form a large part of the "fatality" category. Accordingly, in 2010, over 74% of the fatalities were of workers over the age of 45, although this demographic comprised only 38% of workers.

Men out-number women in the workforce 55%-45%. Yet men experience far greater rates of injury and death on the job than women. In 2010, WCB recorded 136 workplace fatalities in Alberta. Of those, 132 (or 97.1%) were men. This number must be considered in the context of occupational disease which is manifested well into retirement, although they are recorded as today's fatalities.

Workplace Fatalities in Alberta

We know that statistics must be placed into context and can be mind-numbing. Yet workplace injury and fatality facts are not well-known. So we offer just a few more numbers that relate to the modern risk of death at work.

In the 5 years ending in 2010, 689 Alberta workers died from on-the-job causes. This does not include workplaces under federal jurisdiction, such as airlines and the federal public service. Further, when adjusted for the growing number of workers in the province, the workplace fatality *rate* has markedly declined.

Year	Fatalities
2006	124
2007	154
2008	165
2009	110
2010	136

Interestingly, about one-third of those fatalities were caused by sudden workplace "incidents" such as crushing or falling. Some 18% of all Alberta workers killed on the job died as a result of being struck by an object.

A large number of these fatalities, over one-quarter, occurred in the context of operating motor vehicles, most of them highway incidents. The trucking industry reports the highest number of motor vehicle fatalities.

Which industrial sectors overall are responsible for the most workplace deaths? While most disabling injuries come from manufacturing, by far the most workplace deaths (37%) are attributable

to construction and trades. A single fall or equipment failure in construction and trades can be fatal. As well, construction and related trades are responsible for the largest number of occupational disease fatalities.

Transportation, manufacturing and mining and petroleum are the next three most deadly work sectors, but even then at only about one-third the rate as construction and its related trades. Agriculture and forestry recently have seen an average rate of work-related injuries but the lowest number of fatalities by far.

The cause of the remaining approximately 42% of work-related fatalities is identified as longer-term occupational disease, such as exposure to chemicals or air-borne particulates. Occupational disease presents its own unique medical, scientific and policy challenges. We will address this phenomenon in a separate column in the future.

Conclusion

Imagine a plane crash killing 136 people each year in Alberta. Or, more than 46,000 workers suffering disabling injuries so they cannot do their jobs. Naturally, we would say "something must be done about this!"

There will always be risk at the worksite. Some occupations carry more inherent physical danger than others. Firefighters, police, soldiers, furniture movers, and high-rise window-washers come to mind. Even relatively 'safe' office workers must occasionally deal with repetitive strain, exposure to unhealthy air and the emotional abuse of bullies.

This column will feature occupational health and safety issues in some upcoming issues. For example: the structure of the provincial legislation and its enforcement, how federally-regulated workers are protected, employers' implied rights to provide a safe workplace, workers' compensation, occupational disease, criminally unsafe workplaces, how a worker can complain about a safety issue, and current regulatory initiatives.

We will see how the law strives to protect employees from known and unacceptable hazards at work, while at the same time balancing the freedom of employers to save costs and generate profit from their investment and risk.

Notes

1. Increasingly, employers include protection of the natural environment in this category.
2. http://employment.alberta.ca/SFW/129.html
3. http://employment.alberta.ca/documents/WHS/WHS-PUB-OHS-analysis-2010-statistics.pdf

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To Move or Not to Move – that is the Question

Rosemarie Boll

In 2005, Patrick and Serena signed a Separation Agreement that said they would have joint custody of their 4-year old son, Jason (not his real name). Jason would live primarily with Serena and Patrick had specified access. Neither parent would move out of B.C.'s lower mainland without the consent of the other parent or a court order. Serena then married Steven, and they had two children of their own.

Steven lost his job in 2009. Without informing Patrick, he accepted a new job in Edmonton. Serena phoned Patrick and announced they would be moving four weeks later. Patrick objected and got a court order to keep Jason in B.C. Serena cross-applied to vary the Separation Agreement and relocate to Alberta.

The trial judge said no.[1] He said the parents were equal in some respects – both had fine parenting skills, Jason had a strong relationship with both parents and both locations offered good schools. A couple of factors were in mom's favour – the move would keep Jason with his half-brothers and the Edmonton house was more desirable. But the largest number of factors favoured dad – he had better job security, all of the extended family was in B.C., and moving Jason to his dad's house would be less disruptive than a move to Edmonton. Mom offered lots of access – in fact, a completely unrealistic amount, the judge said. She expected Dad and the extended family to make frequent trips

to Edmonton. Mom testified that the move would have absolutely no effect on the relationship between Jason and his other family members. The judge rejected this out of hand and concluded that it was in Jason's best interests to stay in B.C.

Serena appealed. On exactly the same facts, the Court of Appeal let Jason move with his mom[2]. How does this happen?

The primary fault, experts agree, lies with the Supreme Court of Canada in its 1996 decision in *Gordon v Goertz*.[3] The judges said relocation cases must be individualised "best-interests-of-*this*-child" decisions, without any presumptions and with a "full and sensitive inquiry." Although they set out some principles, the case is long on apple-pie statements ("the ultimate and only issue when it comes to custody and access is the welfare of the child whose future is at stake") and short on real legal guidance. The most heavily-criticised principle is the judges' assertion that the reason for the move is generally "irrelevant." Almost every Canadian court has ignored this direction and scrutinized the reason for the move. Unfortunately, this means judges just end up concealing the real reasons for their decisions. So, reading judgments won't necessarily help parents (or lawyers) figure out where they stand. Because outcomes are unpredictable, settlements are harder to negotiate.

Custody status is important, but not in the way you might think. How a court order or separation agreement is worded is of little importance. What matters is how much time the child spends with each parent and the quality of that time . . .

A more helpful way to approach the problem is to review the cases and look for patterns. Nicholas Bala, a leading Canadian legal scholar, summarised his findings in a recent article in the *Canadian Family Law Quarterly*.[4] He observed:

1. Success rates for mothers (51%) and fathers (55%) are similar.
2. Reasons matter. The three most frequent reasons are:
    a. economic, usually for a job transfer or a better employment opportunity – 52% of applications succeed.
    b. to establish a new relationship – 48% succeed.
    c. to have better family support, particularly for a custodial parent who wants to move "back home" – 53% succeed.
3. Proven spousal violence, particularly when children witness it or are directly affected and the judge believes the move will protect them – 81% succeed.
4. Distance — travel time, distance, available resources and the moving parent's willingness to maintain contact are all important. Some provinces are more likely to permit moves (P.E.I. 70%) than others (Newfoundland 38%). Interestingly, international moves are the most successful overall, with a 62% success rate.
5. Custody status is important, but not in the way you might think. How a court order or separation agreement is worded is of little importance. What matters is how much time the child spends with each parent and the quality of that time:

a. 'Joint *legal* custody' means both parents have a say in parenting decisions. This can be preserved even over long distances and is not a strong predictor of success – 50% of applications succeed, 50% fail.
b. 'Joint *physical* custody' means each parent has the child at least 40% of the time. The non-moving parent is more involved and their parent-child relationship is usually stronger. Only 30% of the applications succeed.
c. Sole custody cases are the most successful – 64% succeed.

The applicant's conduct is one of the most important factors. If the judge believes the moving parent is well-behaved and will support the child's continuing relationship with the other parent, the judge is more likely to allow the relocation.

6. Age of the child – these cases are complicated when there is more than one child. The only significant age effect was when the only child (or the youngest child) was aged 0 to 5 years – 49% succeed.
7. The child's wishes – where a child is mature enough to have a clear view and is willing to state a preference:
   a. 76% succeeded when the child favoured the move,
   b. 24% succeeded when the child opposed the move.

   What parents had to say about their children's wishes was often conflicting and of little consequence. However, children's wishes are influential when expressed through their own independent lawyer.
8. The applicant's conduct is one of the most important factors. If the judge believes the moving parent is well-behaved and will support the child's continuing relationship with the other parent, the judge is more likely to allow the relocation. Indifference to maintaining the contact is a negative factor. If the judge believes the move is in bad faith and the applicant intends to undermine the relationship with the other parent, the application will likely fail.
9. A clause in an agreement or order which requires the applicant to get court approval before the move has no effect on the final outcome – 51% succeed.
10. Expert opinions are given less weight in relocation cases than in other cases – a 67% acceptance rate, compared to a 75% - 90% acceptance rate for non-relocation cases.
11. Interim applications are harder to win. Judges are cautious about granting permission to move when not all of the relevant evidence is presented and tested in court.
12. Move first and ask permission later – judges frequently condemn these actions. Nevertheless, they take into account of all of the circumstances and 49% still succeed.
13. Appeals have about the same success rate as trial decisions.

British Columbia is the first Canadian province to enact relocation legislation. Bill 16 is expected to become law sometime in 2013. It is intended to reduce the unpredictability of outcomes and thereby encourage settlement and allow parents to plan their lives better.

For the rest of us, Professor Bala thinks we should have *Relocation Advisory Guidelines – RAGs.* More about *RAGs* in my next column.

Notes

1. Hejzlar v. Mitchell-Hejzlar, 2010 BCSC 1000 (CanLII)
2. Hejzlar v. Mitchell-Hejzlar, 2011 BCCA 230 (CanLII)
3. Gordon v. Goertz ,1996 CanLII 191 (SCC)
4. Nicholas Bala & Andrea Wheeler, "Canadian Relocation Cases: Heading Towards Guidelines" [2012] *30 CFLQ 271*

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More clarity on Program-Related Investment Rules in new CRA guidance on Community Economic Development

Peter Broder

Although the idea that charities ought to be more entrepreneurial is frequently lauded these days, the practical difficulties of doing so are easy to underestimate. One aspect of this is the suggestion that charities could or should engage in more revenue-generating activities as a means of advancing their mandates.

More of such activity would not be out of keeping with the long tradition of many charities selling products or services to recoup all or part of their costs, and in some cases to cross-subsidize money-losing programs. However, it is not readily apparent how much of an untapped market there is for charities to undertake more of this type of revenue-generation.

Many charities are established in response to market failures, so looking for a business-like solution doesn't make a whole lot of sense. If an economic opportunity already existed in a way that could be commercially exploited, there wouldn't be the need for the charity in the first place.

As well, there are regulatory restrictions on charities engaging in business – stemming both from the charity law prohibition of undue private benefit and from concerns over putting charity assets unacceptably at risk – that limit this type of activity. Not to mention complaints of unfair competition occasionally voiced by members of the for-profit business community.

Another way for charities to become involved in commercial or revenue-generating companies or organizations is through investing. That investing can be in entities focusing on profit-

maximization or on a social purpose, environmental purpose or other community benefit. Again, investing by charities in groups mandated for other than purely financial return – commonly known as Program-Related Investment (PRI) – is a practice that has been around for some time. However, it has drawn more attention of late. And given recent ups-and-downs in conventional investments, the appeal of alternatives grows. As with frontline business activity, however, there are regulatory issues to be addressed when charities devote their resources in this way.

Another way for charities to become involved in commercial or revenue-generating companies or organizations is through investing. That investing can be in entities focusing on profit-maximization or on a social purpose, environmental purpose or other community benefit.

In July, the Canada Revenue Agency (CRA) released new guidance on "Community Economic Development Activities and Charitable Registration".

This guidance features an extended discussion on the rules for program-related investing by registered charities. [Full disclosure: the author of this article, both through work with The Muttart Foundation and Charities and Not-for-Profit Section of the Canadian Bar Association, was involved in providing feedback on earlier drafts of the recently-released guidance).

While the previous guidance dealt with PRIs, there were a number of issues in CRA's approach to such investing that were unfavourable or discouraged charities from engaging in the practice. At least some of those issues have been addressed in the new version, which should make it easier for charities wanting to explore this area to do so.

There are various ways that charities can structure PRIs. As well as such securities as equities (whether direct share purchases or participation in mutual funds) or bonds, investments can also be configured as loans or loan guarantees.

The previous guidance indicated that PRIs had to be limited to qualified donees. That is, investments had to be in registered charities or other bodies or organizations recognized under the *Income Tax Act*. The new guidance states that investments can be made in entities other than qualified donees, but where the investment is not in a qualified donee, the charity must put in place sufficient direction and control that the initiative qualifies as the charities' "own activities". That ensures that the funds invested will not be diverted from charitable ends. Where the investment is in a qualified donee, use of the resources for public benefit is assumed.

The guidance sets out some examples of PRI investments in entities that are non-qualified donees to illustrate how such arrangements might work. The oversight requirements parallel those that must be present when a charity operates programs or projects through non-qualified donees domestically or abroad. As well as information on expectations with respect to on-going monitoring and ways to constrain use of the investment, the guidance sets out some suggested measures for withdrawing from PRI commitments if required. As the guidance indicates, even where participation is through share purchases, it ought still to be possible to terminate the investment if there is diversion of the resources from what was intended.

A new section of the guidance addresses the issue of specialized intermediaries to facilitate program-related investments by charities, and suggests such groups could potentially qualify as registered charities on the basis of their promoting the efficiency and effectiveness of charities.

A key difficulty encountered in the past was the treatment of PRIs for disbursement quota purposes. Prior to changes in Budget 2010, charities were expected to spend 80% of receipted revenues on charitable work before the end of its subsequent fiscal year. This resulted in a potential problem if PRIs were not recognized as expended on charitable work. With repeal of the 80% rule, however, this problem will likely be encountered less frequently. The retention of a smaller 3.5% disbursement quota on assets not directly used for charitable activities or administration means, however, that this difficulty has not been entirely eliminated.

While the previous guidance dealt with PRIs, there were a number of issues in CRA's approach to such investing that were unfavourable or discouraged charities from engaging in the practice. At least some of those issues have been addressed in the new version, which should make it easier for charities wanting to explore this area to do so.

The guidance clarifies how various investment vehicles should be accounted for, and deals with how transactions should be treated with respect to meeting the 3.5% disbursement quota. In those instances where the charity has made a PRI and fails to meet its disbursement quota, the guidance states that the Charities Directorate may consider the opportunity costs associated with the investment(s) as equivalent to an expenditure.

Because of the division of powers under Canada's constitution, limitations and procedural requirements for investment decisions by trustees and charities are typically a matter of provincial legislation. The guidance informs charities of this issue, but does not get into specifics.

Even with release of the new guidance, the challenges of charities delving further into the commercial marketplace ought not to be gainsaid. But this is perhaps an opportune time for charities to re-examine PRIs and whether they can play more of role in advancing their work through this type of activity. Doing so may pay off in more ways than one.

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The Taxpayer Bill of Rights

Angie Chénier-Gholamreza

The Taxpayer Bill of Rights is a set of fifteen statutory and administrative rights outlining the service standards that Canadian taxpayers can expect in their dealings with the Canada Revenue Agency (CRA). The Bill was introduced in 2007 on the premise that increased accountability and transparency on the part of the CRA would, in turn, ensure greater compliance with tax laws on the part of taxpayers. The rights within the Bill are protected according to different processes based on whether the right is statutory or administrative. Statutory rights follow the redress process which is laid out in the *Income Tax Act*. For example, right 4 states that you have the right to a formal review and subsequent appeal. According to the Income Tax Act, a taxpayer has the right to object to income tax assessments and reassessments and determinations and redeterminations such as the Goods and Services Tax/harmonized sales tax (GST/HST) Credit, the Canada Child Tax Benefit, and the Disability Tax Credit by filing an objection within 90 days from the date on the notice. If the taxpayer disagrees with the CRA's decision based on his or her objection, then the assessment or determination can be appealed to the Tax Court of Canada.

Administrative rights, such as the right to be treated professionally, courteously, and fairly, govern the relationship that the CRA has with taxpayers. They are service rights which are accorded to taxpayers by the CRA and unlike the statutory rights, they are not included in the *Income Tax Act*.

However, service rights are upheld through the CRA- Service Complaints process and, if necessary, through the Taxpayers' Ombudsman. None of the rights outlined in the Taxpayers' Bill of Rights are legally enforceable under Canadian law and are essentially a set of regulatory standards for the CRA's dealings with taxpayers. They are as follows:

1. You have the right to receive entitlements and to pay no more and no less than what is required by law.
2. You have the right to service in both official languages.
3. You have the right to privacy and confidentiality.
4. You have the right to a formal review and a subsequent appeal.
5. You have the right to be treated professionally, courteously, and fairly.
6. You have the right to complete, accurate, clear, and timely information.
7. You have the right, as an individual, not to pay income tax amounts in dispute before you have had an impartial review.
8. You have the right to have the law applied consistently.
9. You have the right to lodge a service complaint and to be provided with an explanation of our findings.
10. You have the right to have the costs of compliance taken into account when administering tax legislation.
11. You have the right to expect us to be accountable.
12. You have the right to relief from penalties and interest under tax legislation because of extraordinary circumstances.
13. You have the right to expect us to publish our service standards and report annually.
14. You have the right to expect us to warn you about questionable tax schemes in a timely manner.
15. You have the right to be represented by a person of your choice.

In addition to the fifteen individual tax rights, the CRA introduced the CRA Commitment to Small Business which is a five-part statement outlining the ways in which the CRA pledges to support small businesses through effective and efficient interactions. This is done by reducing the amount of paperwork required of small businesses in complying with the CRA.

The Taxpayers' Ombudsman position was also created in 2007 as a recourse mechanism for taxpayers who have filed an objection with the CRA and are not satisfied with the results of their review. The Ombudsman provides an impartial and independent review of taxpayers' complaints only after they have been through the CRA complaint process and remain unresolved. Furthermore, the Ombudsman will only review service-related complaints. A report entitled The Right to Know written by J. Paul Dubé, Taxpayers' Ombudsman, is a response to complaints received by taxpayers regarding their service interactions with the CRA. The Ombudsman's website also includes a tipsheet on what you can expect when dealing with the CRA.

Since its inception, various aspects of the Taxpayer Bill of Rights have been subject to criticism by the Canadian public. The first official taxpayer rights document, the 1984 Declaration of Taxpayer Rights, contained a right pertaining to the presumption of honesty on the part of the taxpayer when substantiating a claim. The omission of this right from the Taxpayer Bill of Rights places the burden of proof squarely on the taxpayer. The Australian Taxpayers' Charter, for instance, directly states that "We presume you tell the truth and that the information you give us is complete and accurate unless we have reason to think otherwise."

However, the main criticism has been that the rights contained within the Taxpayer Bill of Rights are not entrenched within the law and therefore they are not legally protected. The American Taxpayer Bill of Rights by comparison is codified within the Internal Revenue Code thus ensuring greater compliance on behalf of the government and the taxpayer.

If you are interested in reading more about the Taxpayer Bill of Rights, some non-governmental sources of information include the Canada Revenue Agency Report Card by the Canadian Federation of Independent Business and the Chartered Accountants of Canada and CGA-Canada websites which both feature information on general taxation.

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Whatever Happened To . . .

The Edmonton Journal and Freedom of the Press in Canada

Peter Bowal

> Every person who is the proprietor, editor, publisher or manager of any newspaper published in [Alberta], shall when required to do so by the Chairman [of the Social Credit Board], publish in that newspaper any statement furnished by the Chairman which has for its object the correction or amplification of any statement relating to any policy or activity of the Government of the Province published by that newspaper within the next preceding thirty-one days.
>
> – *Alberta Accurate News and Information Act* (Bill 9, 1937)

Introduction

The *Charter of Rights and Freedoms* is 30 years old now and many will mistakenly assume that it was the beginning of human rights in Canada. What did human rights look like in Canada during the 115 years before the *Charter* was passed?

Simply put, if judges did not approve of a law enacted by a certain government – municipal, territorial, provincial or federal – they could creatively disallow it on the ground that it had been passed by the wrong level of government, invoking the *Constitution Act, 1867*. They reckoned that the other, appropriate level of government would not enact the offensive legislation even if it constitutionally could do so. This concept was referred to as the "Implied Bill of Rights" in the *Constitution Act, 1867*. The Supreme Court of Canada tacitly acknowledged it in the 1953 case of *Saumur v. City of Quebec*.

The famous *Alberta Press* case is one of the best examples of this early conception of the Implied Bill of Rights.

Background

The Great Depression of the early 1930s pounded the prairies hard and extreme conditions sometime attract extreme solutions. For Alberta, the solution to the Depression came in 1935 in the form of a new Social Credit party and a landslide government, led by William Aberhart, which captured 56 of the 63 seats in the Alberta legislature. This government believed the Depression was caused by influential eastern-controlled banks unduly limiting credit so that people did not have enough money to spend. Since "the existing means or system of distribution and exchange of wealth is considered to be inadequate, unjust and not suited to the welfare, prosperity and happiness of the people of Alberta," the government sought to inaugurate a "new economic order" upon the theory known as "Social Credit."

Premier Aberhart considered this media coverage unfairly harsh and biased. He bitterly commented during his weekly Christian radio show that he was "glad there will be no newspapers in heaven".

The theory was complicated and radical. A general scheme of Social Credit legislation, based on three bills, created a small, powerful Social Credit Board to oversee wholesale economic reform. Among other tasks, this Board appointed the Provincial Credit Commission to determine the value of "Alberta Credit," defined by the legislation as "the unused capacity of the industries and people of the Province of Alberta to produce wanted goods and services." The Provincial Treasury would maintain the Provincial Credit Account from which $25/month Credit Certificates to increase the purchasing power of Albertans would be issued to stimulate the economy.

The idea was to establish a system of circulating credit that constantly reflected the economic capacity of Alberta to produce goods and services. It set up a new, regulated financial system as a medium of exchange, discounts and payment affecting all commercial, industrial and trading operations. Aberhart also sought to control the money supply (and potentially currency), taxation and banking, which were all federal areas of constitutional responsibility.

The Alberta media were united in strenuous and vocal opposition to these wacky economic and social policies of the new Social Credit government. The newspapers relentlessly criticized and ridiculed the inexperienced government. Premier Aberhart considered this media coverage unfairly harsh and biased. He bitterly commented during his weekly Christian radio show that he was "glad there will be no newspapers in heaven".

In addition to the Bills to excessively tax the Alberta operations of big banks, and license new credit institutions in Alberta, the government in 1937 demanded fair play from the newspapers. This new economic revolution, in the public interest, called for the "true and exact objects of the policy of the Government … to the end that the people may be informed with respect thereto" (preamble of the Bill). This kind of economic revolution could not succeed unless everyone believed in and

supported it. One judge of the Supreme Court of Canada would characterize it thus:

> It is, therefore, essential to control the sources of information of the people of Alberta, in order to keep them immune from any vacillation in their absolute faith in the plan of the Government. The Social Credit doctrine must become, for the people of Alberta, a sort of religious dogma of which a free and uncontrolled discussion is not permissible. The Bill aims to control any statement relating to any policy or activity of the Government of the Province and declares this object to be a matter of public interest . . . and by reducing any opposition to silence or bring upon it ridicule and public contempt.

Under this proposed *Accurate News and Information Act*, the Chairman of the Social Credit Board could demand publication of the government's "correction or amplification" by any newspaper, and identification of all authors of articles and sources within 24 hours.

Under this proposed *Accurate News and Information Act*, the Chairman of the Social Credit Board could demand publication of the government's "correction or amplification" by any newspaper, and identification of all authors of articles and sources within 24 hours. If a newspaper failed or refused to comply, the offending writer or newspaper could be suspended from publication and fined up to $1000 per day.

The reaction was swift and sharp. One British newspaper at the time apparently referred to Aberhart as "a little Hitler."[1] Alberta's Lieutenant-Governor at the time, John C. Bowen, took the unprecedented step of reserving Royal Assent on the three Bills and the federal Governor-General referred the constitutionality of these three Bills to the Supreme Court of Canada It is reported that the Social Credit government was so enraged by Bowen's reservation that it promptly revoked his official residence, vehicle and budget for clerical staff in retaliation.

The Constitutional Decision

Within five months of Lieutenant-Governor Bowen's reservation, the validity of the three challenged Bills – wrapped into a single case called the *Reference re: Alberta Statutes,* [1938] S.C.R. 100 was decided by the Supreme Court of Canada.

The judges of the Court unanimously agreed that the first two bills, relating to the taxation of federal banks and creation of Alberta credit institutions, were not within the power of any provincial legislature. These come under federal subjects of banks and banking, currency or trade and commerce, rather than with property and civil rights or matters merely local or private in the province.

The Press Bill (*Accurate News and Information Act*) was also found to be outside of Alberta's legislative authority. Some judges reasoned that this Bill was unconstitutional because it was part of a broader unconstitutional legislative package, namely the Social Credit economic reforms. The Chairman of the Social Credit Board, for example, who could issue requests and orders to the newspapers, was established under the general Social Credit legislation. If the primary legislation failed, so did the secondary legislation.

Other judges said that, even as an independent enactment, it exceeded Alberta's power under section 129 of the *Constitution Act, 1867* because:

- it attempted to curtail the right of public discussion, or
- it reduced the political rights of Albertans compared with residents of other provinces, or
- it interfered with the workings of Parliamentary institutions – all rights that existed at the time of Confederation.

. . . it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.

This strengthened the construct of an Implied Bill of Rights in the *Constitution Act, 1867,* which itself only generally existed to assign sovereign legislative powers between the federal and provincial levels of government in Canada. The Chief Justice wrote:

> [legislatures] derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.
>
> . . . it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.

The Chief Justice concluded that this right of free political speech is necessarily implied from the *Constitution Act, 1867* as a whole because the Constitution itself must be protected. Since the *Constitution Act, 1867* did not appoint this as an exclusively provincial matter, the power is vested in the federal Parliament. Any attempt by a province to violate these rights of public debate and the press were unconstitutional.

Another judge went so far as to hold that this Press Bill was essentially an enactment of criminal law. Since crimes are exclusively federal jurisdiction in Canada, this legislation was unconstitutional on that ground.

In 1938, the final court for Canadian cases was the Judicial Committee of the Privy Council in England. Four months after the Supreme Court of Canada decision, a panel of five English Law Lords unanimously dismissed the Alberta government's appeal, mostly on the ground that, because of the Supreme Court of Canada decision a few months earlier, the Alberta government had repealed most of the primary economic reform legislation. If this legislation no longer existed, the Press Bill retained "no practical interest." The English Lords, however, added that they had no doubt as to the correctness of the Supreme Court of Canada decision.

Aftermath

The *Edmonton Journal* led this successful fight against the troublesome Social Credit *Accurate News and Information Act*. This highly publicized battle garnered the attention of the Pulitzer Prize organization, which in 1938 awarded the *Edmonton Journal* a special bronze plaque, the first, and to date only, such Pulitzer Prize for a non-American recipient. The citation reads: "for its editorial leadership in defense of the freedom of the press in the province of Alberta, Canada." This was only the second ever Pulitzer Special Award or Citation, and the only one awarded between 1930 and 1941.

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The Implied Bill of Rights doctrine demonstrated how judges in Canada could, and would, fashion human rights such as the freedoms of speech and the press. However, the formal entrenchment of the express *Charter* in 1982 eliminated the need for further judicial development of an implied Bill of Rights.

Interestingly, in a 2010 case, *R. v. National Post*, the Supreme Court of Canada ruled that newspapers' confidential sources may be protected today.[1] Who was the party seeking to compel disclosure of the confidential source of embarrassing information in that case? The Prime Minister of Canada. Perhaps little has changed since 1938 in terms of power struggles between the press and elected politicians, and in freedom of expression and the press.

Notes

1. Barr, John J., *The Dynasty: The Rise and Fall of Social Credit in Alberta.* Toronto: McClelland and Stewart Ltd (1974), page 109

Peter Bowal is Professor of Law at the Haskayne School of Business, University of Calgary, in Calgary, Alberta.