May/June 2013

Children's Commissioner

Married and Moving?

Crime Books

LawNow

Relating law to life in Canada

Families in Flux

Change is life and life is change! Families change and sometimes, the law will be a part of this process.

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Feature: Family Law

Special Report: Resource Development Issues

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Building a Child-Sensitive Canada

As one of the most affluent countries in the world – a country that has weathered the financial crisis better than most – Canada's children should be thriving. Instead, they are more likely than children in most other affluent countries to be poor. We talk about the strength of our economy, but our children are not reaping their share.

In UNICEF's most recent Report Card on child well-being, Canada's child poverty rate ranked 24th out of 35 countries. Canadian children have higher than average rates of injury, suicide, drug and alcohol use, and unhealthy weight compared to their peers in many other industrialized countries.

These rankings are not inevitable – they are influenced by policy decisions.

While these problems are complex, there is a clear step Members of Parliament can take to improve the well-being of our children – supporting Bill C-420, *An Act to Establish the Office of the Commissioner for Children and Young Persons in Canada*.

Independent from government, a National Commissioner will advocate for children at the national level, ensure children are more visible and prioritized in government decisions that affect their lives, and help our children catch up to their peers from other countries.

Putting children at the centre of decision-making is a responsibility of all parliamentarians, regardless of their political stripes.

The idea of an independent national office focused on children is neither radical nor new. Approximately 60 countries have similar positions: New Zealand, England, Scotland, Sweden and others have found it an effective way to promote the rights of children.

For these reasons, most provincial and territorial governments have child and youth advocates. With no national equivalent, the impacts of federal laws, policies and services on children (like marriage and divorce laws, criminal justice, social transfers and immigration) are rarely fully considered.

The only growing child populations in Canada are Aboriginal and immigrant, and many decisions that affect the well-being of these groups are federal in scope. It is these children who are struggling most to improve their quality of life.

Every child deserves the opportunity to develop to his or her full potential. It is not only their right, it is necessary in order to support our aging population and ensure continued economic prosperity. A strong economy and healthy society can be sustained only if we raise strong and healthy children. A National Children's Commissioner would make a lasting contribution to a stronger Canada for all Canadians.

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1. Texting with Telus

Telus is unique among telecommunications companies in that it briefly stores electronic copies of all text messages sent or received by its subscribers. Police in Ontario obtained a warrant obliging Telus to hand over any stored copies of text messages sent or received by two of its subscribers on a daily basis for two weeks. Telus objected. It argued that this amounted to interception of private communications and therefore required a wiretap authorization under the *Criminal Code*. The Supreme Court of Canada agreed. It wrote "Text messaging is, in essence, an electronic conversation. Technical differences inherent in new technology should not determine the scope of protection afforded to private communications. The only practical difference between text messaging and traditional voice communications is the transmission process. This distinction should not take text messages outside the protection to which private communications are entitled under Part VI" (of the *Criminal Code*).

*R. v. Telus Communications Co.,*2013 SCC 16

www.canlii.org/en/ca/scc/doc/2013/2013scc16/2013scc16.html

2. Red Horse/Black Horse

A trademark dispute between Molson Canada and San Miguel Brewing International caused Justice Phelan of the Federal Court of Canada to begin his judgment with "The potential for the use of phrases such as 'this is a horse of a different colour' or equine and beer jokes jump out at one. The Court will refrain from such frivolities for this is a case about beer and beer is a serious matter." At issue was the names of their beers: San Miguel wanted to trademark the name "Red Horse Malt liquor" but Molson objected, arguing that it had owned the trademark "Black Horse" since 1922, and consumers would be confused by the similarity of the names. Justice Phelan sided with San Miguel, stating "One look at the labels of RED HORSE and BLACK HORSE is sufficient to dispel any notion of confusion between RED HORSE (with just a horse's head) and BLACK HORSE (with a horse in profile). He found that there was no evidence that consumers would be confused and "as a matter of common sense, I find it unlikely."

San Miguel Brewing International Limited v. Molson Canada 2005, 2013 FC 156 (CanLII)

www.canlii.org/en/ca/fct/doc/2013/2013fc156/2013fc156.html

3. Conspiracy Theory?

The British Columbia Court of Appeal has ruled that the tort of conspiracy has no place in family law. Jodie Waters sued her ex-husband and his new wife, claiming that they conspired to transfer assets so as to thwart her claim for child support. The Court of Appeal decided that there is comprehensive child support legislation in place to allow Ms. Waters to pursue her claim for

proper child support, without resorting to alleging conspiracy. The Court also found that for reasons of public policy, the tort of conspiracy should not be used in the family law context. It relied on comments made by the Supreme Court of Canada in a 1987 case, in which the judges commented that use of the tort was not in the best interests of children and would do little to encourage the maintenance and development of a relationship between both parents and their children.
Waters v. Michie, 2011 BCCA 364 (CanLII)
www.canlii.org/en/bc/bcca/doc/2011/2011bcca364/2011bcca364.html

4. Judicial Discretion Defended

The Ontario Court of Appeal, along with appeals courts in Manitoba and Nova Scotia, have baulked at having their discretion in sentencing curtailed by provisions in the federal government's *Truth in Sentencing Act.* A unanimous three-judge panel agreed that sentencing judges retain discretion to reduce a sentence by as much as 1.5 days for every one day an accused spends in pre-trial custody when "such credit is necessary to achieve a fair and just sanction." Otherwise, the judges pointed out, accused persons who are allowed out on bail and subsequently convicted of the same offence as those kept in custody pending trial will serve less time. However, the Court said that this enhanced credit is not automatic. Justice Cronk wrote "There must be some basis in the evidence… before the sentencing judge to support the conclusion that this factor merits enhanced credit for a particular offender in a given case."
R. v. Summers, 2013 ONCA 147 (CanLII)
www.canlii.org/en/on/onca/doc/2013/2013onca147/2013onca147.html

5. Give It Up!

A Calgary man, unhappy with the decision a Court of Queen's Bench justice made in his family law case, didn't appeal the decision. Instead, representing himself, he sued the judge, citing malicious misuse of process and malfeasance in public office. He relied on a New Zealand decision, which allowed such an action where a judicial officer in a court of limited jurisdiction acted "knowingly and without or beyond jurisdiction and with malice giving rise to damage causatively linked to that action." A Master in Chambers hearing his action struck it out; a Court of Queen's Bench Justice agreed; and the disgruntled litigant continued on to the Alberta Court of Appeal. The Court of Appeal wrote "*Rawlinson* [the N.Z. case] is readily distinguishable from the case at bar. Here, we are dealing with a judge of a superior court who made the order in open court within the exercise of her jurisdiction. A superior court judge enjoys absolute immunity in such circumstances, as pointed out by the unanimous judgment of the Supreme Court of Canada in *Morier v. Rivard*."
Jordan v. Nation 2013 ABCA 117
www.albertacourts.ab.ca/jdb_new/public/ca/2003-NewTemplate/ca/Civil/2013/2013abca0117.pdf

wedding cake image © Angelo Gilardelli | Dreamstime.com

Common Immigration Mistakes that Canadian Citizens Make When Marrying U.S. Citizens

Douglas Halpert and Christopher M. Pogue

In 1970 the iconic Canadian rock band, The Guess Who, released their hit single, *American Woman*. In it, they warned fellow Canadians, "American woman, stay away from me." Despite their plea, countless Canadian citizens have found love across the Southern border. Each year, large numbers of Canadians marry U.S. citizens and a significant portion of these cross-border couples opt to build their lives in the United States rather than Canada.

A portion of our practice involves counseling U.S. citizens who wish to marry or have married foreign nationals and seek to secure permanent resident status for them in the United States. There are a number of things that Canadian citizens can do to make the process more difficult for themselves. This article explores some of the major ones.

1. Invite 200 Guests to the U.S. wedding, make nonrefundable deposits on the wedding hall, mail invitations, book the honeymoon outside the U.S., and then start exploring how the immigration process works a few months before the wedding.

"Surely you must be joking!" is the common refrain we hear once we describe the normal timeframe for issuance of a K-1 visa. The period from initial filing of the K-1 petition with U.S. Citizenship and Immigration Services (CIS) to issuance of the K-1 visa at the U.S. Embassy in Montreal (which processes all K-1 visas in Canada) often ranges from five to nine months.

Many opt for a small civil ceremony shortly after arrival which meets the legal requirement of marrying within 90 days of entry in K-1 visa status, and later have a reception that constitutes the usual spiritual or religious celebration. Wedding-hall insurance is advisable.

Couples are frustrated to learn that even attorneys cannot predict exactly how long the process will take due to ever-fluctuating government processing times for the various stages involved. Expedited requests are rarely granted. For do-it-yourself couples, there may be an increased possibility that the U.S. government will make additional evidentiary requests that can delay any of the stages.

"What do you mean my fiancé may not be able to visit me in the in the U.S. while the petition is pending!?!" If you thought that applying for a fiancé visa would not impact entry to the U.S. as a visitor, think again. While most Canadians enjoy easy access to the U.S. as a visitor, a pending K-1 petition shifts the scales against an applicant for entry. U.S. Customs and Border Protection (CBP) officers can see the K-1 petition in the CBP computer system and may conclude that the Canadian citizen lacks requisite nonimmigrant (temporary) intent to enter the U.S. prior to receipt of a K-1 visa. CBP can deny entry to such visitors. Many K-1 beneficiaries, especially students, the unemployed and retirees may be unable to visit the U.S. while a K-1 petition is pending.

"How do they expect us to plan our wedding under these circumstances?" Because it is impossible to know with certainty when the K-1 visa will be issued, making marriage plans is difficult. The K-1 visa allows for one entry lasting up to 90 days in which to marry. Therefore, prior to visa issuance, many couples are unable to plan a large wedding a few months before the K-1 applicant's arrival. Many opt for a small civil ceremony shortly after arrival which meets the legal requirement of marrying within 90 days of entry in K-1 visa status, and later have a reception that constitutes the usual spiritual or religious celebration. Wedding-hall insurance is advisable.

"But I just put a non-refundable deposit payment down on our dream all-inclusive vacation in Mexico!" Once the Canadian citizen enters the United States in K-1 status and marries the U.S. citizen within 90 days of arrival, he or she must apply for permanent resident status within that time frame via a process called "adjustment of status." An application for an employment and travel authorization card should be included. The K-1 visa holder may not travel abroad until the earlier of an issuance of this card or a grant of permanent residence. Issuance of the card often takes 60 to 90 days and can be delayed if CIS

Many U.S. citizens are shocked to learn that there is a financial support requirement that attaches to sponsoring their Canadian citizen fiancée for a K-1 visa and permanent resident status.

requests further evidence. If the Canadian citizen applies for permanent residence, and then departs the U.S. without the card or a grant of permanent residence, CIS may deny the adjustment application. The considerable filing fees will be lost and it may take nine months or longer for the Canadian citizen to re-enter the U.S. on an immigrant visa. The K-3 visa "shortcut" typically does not save any time. So it is best to plan the initial honeymoon in the U.S. and avoid cruises that traverse international waters.

Under the U.S. immigration law, petitioners have the burden of proving that they have met their fiancés, the relationship is *bona fide* and the resultant marriage is legitimate and not entered into solely to confer permanent resident status upon the foreign national beneficiary.

2. We are young, we feast on love, and we don't need jobs at this point…

"Why don't they get that it's About Love and Not About Money?" Many U.S. citizens are shocked to learn that there is a financial support requirement that attaches to sponsoring their Canadian citizen fiancée for a K-1 visa and permanent resident status. With regard to the K-1 process, K-1 applicants must prove that they will not have to rely on public benefits upon U.S. arrival. With regard to the permanent residence process, the U.S. citizen must sign a legally binding affidavit of support, submit copies of U.S. tax returns, and prove current and continuing income that meets the threshold specified by a government schedule. Certain types of assets can be substituted for income. If the U.S. citizen lacks the necessary finances, in some instances the Canadian citizen's assets can be factored in, or a relative or other qualifying individual domiciled in the U.S. can be a joint sponsor. The financial sponsorship obligation survives divorce. Couples should examine whether they will have the necessary income or assets to merit K-1 visa issuance and permanent resident status.

3. We love each other, we're getting married, and Canadians are private, not Kardashians, so why submit paper about it?

"Why do they suspect my marriage of being a sham?" Under the U.S. immigration law, petitioners have the burden of proving that they have met their fiancés, the relationship is *bona fide* and the resultant marriage is legitimate and not entered into solely to confer permanent resident status upon the foreign national beneficiary. U.S. immigration officers understandably are suspicious because they regularly uncover instances of immigration fraud perpetrated by both criminal rings and individuals – U.S. immigration is particularly wary of large differentials in age, race, and economic status. Relationships born online and persons who have met and courted very briefly also can draw suspicion. So even though your relationship is a romance for the ages, you have the burden of proof. The key is to collect and retain all evidence of your relationship. If you met online, you should save proof of your emails, Skype chats, your subsequent in-person meetings such as plane tickets, photos, and receipts from hotels. It is also wise to keep phone records, proof of family having met your loved one and their

involvement in the wedding plans, newspaper announcements of the engagement, and the like. Put yourself in the shoes of a skeptical U.S. immigration officer and document your case to the hilt.

4. I wasn't arrested; I got a discharge, so why even list it on the forms, since they'll just make a big deal out of it?

We all make mistakes, but the biggest one you can make is to fail to acknowledge yours to the U.S. immigration authorities; even if you think they may only be minor traffic violations or the crime was expunged. We commonly see problems where Canadians fail to disclose driving while intoxicated or marijuana discharges. Further, foreign nationals are often surprised that what they thought was a long-ago warning or dismissal is on their record that the U.S. government data-mines. The U.S. government's definition of an "arrest" or "conviction" is shockingly broad and encompasses even certain warnings and discharges. If you have ever been stopped by law enforcement or issued a citation, you should consult with an immigration attorney prior to applying for any immigration benefit. Ignorance of U.S. immigration law is not a defence. Failure to disclose an arrest or conviction can result in permanent bars to any U.S. immigration benefit.

We all make mistakes, but the biggest one you can make is to fail to acknowledge yours to the U.S. immigration authorities; even if you think they may only be minor traffic violations or the crime was expunged.

5. The immigration stuff is complicated, so she'll just come in to marry me on a visitor entry, or we'll marry in Canada and then she'll just move in and we'll file for permanent residence here.

U.S. immigration law contains a strong distinction between immigrant (permanent) and nonimmigrant (temporary) intent. A Canadian citizen who intends to immigrate to the U.S. and enters the U.S. in a visitor status may become the subject of fraud charges which can lead to a denial of the permanent residence application without the grant of a discretionary waiver.

Conclusion

As reflected by the lyrics of The Guess Who, a Canadian citizen's failure to plan for the immigration timeframes and issues in advance of marrying a U.S. citizen is "gonna mess your mind." We recommend starting such planning at least a year prior to the wedding if possible.

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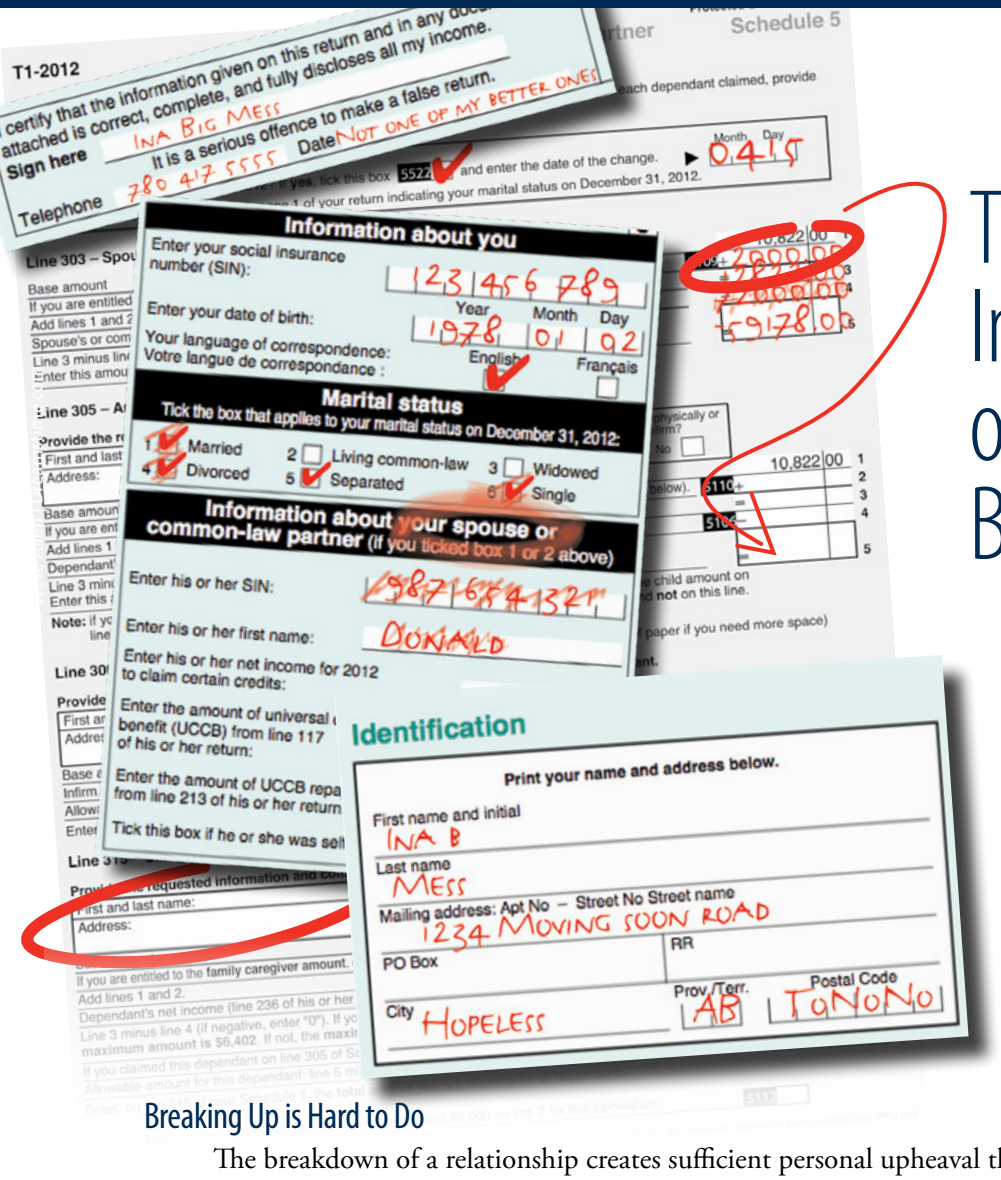

The Tax Implications of Marital Breakdown

Hugh Neilson

Breaking Up is Hard to Do

The breakdown of a relationship creates sufficient personal upheaval that it is unreasonable to throw in the myriad legal implications that also result. Unfortunately, the law is not always reasonable. And, the tax provisions applicable to matrimonial breakup add further complexity. With the likely animosity between the parties, there is a recipe for a potentially unpleasant and difficult situation.

Tax issues are a significant factor in most family law matters. The parties must be aware of the tax implications of property settlement, spousal, and child support, so that the resulting bargain is entered into with full knowledge of the consequences. This article can only scratch the surface of the broadest tax implications of matrimonial matters, and while it refers to spouses and legally married couples, the reader should note that the *Income Tax Act* treats common law partners identically to married couples.

The tax rules that apply to family law are complex and pervasive (some say perverse). Judge Bell of the Tax Court of Canada commented as follows:

> The legislation in this area of tax law was, before the 1997 amendments, complex and bewildering to those unfortunately clutched by its talons. Now, it is almost incomprehensible. Planned legislative abstruseness could not have ascended the Olympian heights scaled by both the substantive and implementing provisions respecting the income inclusion and deduction of maintenance payments. … Thousands of taxpayers are affected by this maze of legislative pitfalls. Many of them, for economic reasons, are obliged to represent themselves in court. What hope do they have of making any sense of these provisions where lawyers and judges are driven to the wall in their attempts to understand and apply them? The agonies of domestic combatant strife are debilitating and depressing. No one in that position needs a torpefying journey through this legislative labyrinth.

…the reader should note that the *Income Tax Act* treats common law partners identically to married couples.

Take the Money and Run: Division of Property

Transferring money to equalize matrimonial property is fairly easy. However, other assets can carry significant tax consequences. In most cases, property transferred between current or former spouses to settle property rights can transfer on a rollover basis. That is, no gains or losses arise, and the recipient of the property receives it at the transferor's cost for income tax purposes. The parties can elect out of this treatment, resulting in a transfer at fair value. This assumes both spouses are Canadian residents – where a non-resident individual is involved, generally any gains or losses inherent in property transferred must be realized at the time of transfer.

Some assets are more problematic. There is no provision for the transfer of assets held as inventory, so such assets must transfer at their fair value for income tax purposes. Transfers of inventory held in a traditional business are uncommon, but assets held with the intention of resale at a profit are considered "inventory" held in an "adventure in the nature of trade". Land acquired on speculation of a rising value allowing resale at a profit is a common example. Such land cannot be transferred on a tax-deferred basis. Of course, these speculative assets also have uncertain values, making a division to equal ownership a common settlement strategy.

In addition, only direct transfers between spouses/former spouses are covered by these provisions. It is not uncommon for spouses to consider themselves to "own" assets that are in fact owned by a corporation. Such assets can be complicated, or even impossible, to transfer without immediate tax cost, and the rules become more stringent where the transfers are not completed prior to the divorce.

Depending on the terms of the pension plan, it may be possible to split the pension at source, so each spouse receives pension benefits directly. However, this maintains a relationship between the parties and there is no money available until the pensioner decides to start collecting.

The valuation of pension plans is subject to many assumptions, including future earnings, rates of return and retirement age. Depending on the terms of the pension plan, it may be possible to split the pension at source, so each spouse receives pension benefits directly. However, this maintains a relationship between the parties and there is no money available until the pensioner decides to start collecting.

As in most aspects of life, children add further complications.

While not common, if the pension plan so allows, it is possible to transfer some or all of the value of a pension plan on a tax-deferred basis. Similarly, RRSPs, RRIFs and Tax-Free Savings Accounts can be transferred between spouses as part of a property settlement. Either party to a divorce may unilaterally apply for a split in their CPP credits. If this occurs, the credits built up by the two parties during each year of marriage are combined, and then split equally.

The Kids are Alright: Issues about Children

As in most aspects of life, children add further complications.

Single parents can typically claim an "eligible dependent" credit for a child, equal to the credit for spouse. The tax benefit depends on the child's income, and can save well over $3,000 of taxes annually. To qualify, the claimant must be:

- either unmarried or separated;
- maintain a "self-contained domestic establishment" (typically a house or apartment); and
- support in that residence (among other possibilities) a dependent child under age eighteen.

Only one person may claim any one dependent, and only one claim is possible per "self-contained domestic establishment". As well, this tax credit is denied to a parent required to make support payments for a child. This final requirement had the potential to cause significant difficulty in the case of shared custody; however, the legislation currently provides that this restriction cannot result in both parents being denied a claim for the same child.

Each minor child also generates a smaller tax credit, which must be claimed by the individual who claims the child as an eligible dependent. It is prudent to address how such claims will be made so there are no later surprises or disputes.

Parents may also be eligible for the Universal Child Care Benefit (UCCB), the Canada Tax Child Benefit and/or provincial programs for children. Where one parent has custody, that parent receives these payments. In shared custody situations, a recent amendment provides each parent half the benefit they would be entitled to as the sole recipient. The UCCB is taxable. However, a single parent may designate it to be income of a child. If an eligible dependent is claimed, that child must report any UCCB so designated.

Child support is not taxable to the recipient, or deductible to the payer, under current law. Support under agreements dating back to 1997 or prior can be an exception, but these are uncommon.

Child care costs can be claimed, within certain limitations, if these costs are incurred in order to earn business or employment income, or attend school. In the case of shared custody cases, each party can claim costs incurred that otherwise meet the

requirements, irrespective of the amount claimed by the other spouse. Only the custodial parent would otherwise be able to advance such a claim.

Child support is not taxable to the recipient, or deductible to the payer, under current law. Support under agreements dating back to 1997 or prior can be an exception, but these are uncommon.

Numerous Tax Court cases address agreements or even court orders purporting to set the tax results of support payments and other matrimonial division issues, with the courts consistently ruling that parties cannot contract out of the income tax rules.

Money Money Money: Support Payments

Spousal support will be deductible to the payer and taxable to the recipient, if it meets the legislative requirements. These include:

- payable on a periodic basis (lump sums do not qualify);
- for maintenance of the recipient and/or children of the recipient;
- the recipient has discretion to use the funds;
- the recipient is the (former) spouse of the payer; and
- payments are under a written agreement or court order.

As well, special provisions can apply to bring third party payments (over which the recipient lacks discretion) and payments prior to a written agreement or court order into the tax regime. These criteria have been the subject of numerous disputes.

Finally, as noted above, child support is not taxable or deductible. The legislation requires payments be exclusively for the support of the recipient to avoid being classified as child support.

A recent Tax Court case highlights that, when these criteria are met, the parties cannot contract out of their income tax status. Numerous Tax Court cases address agreements or even court orders purporting to set the tax results of support payments and other matrimonial division issues, with the courts consistently ruling that parties cannot contract out of the income tax rules.

Lawyers in Love: Legal Fees

With the many complexities of marital breakups, significant legal costs are often incurred by parties to a divorce. Unfortunately, such costs are generally considered a personal expense, and consequently non-deductible. There is one exception, however.

The common law holds that an individual may deduct legal costs incurred to enforce or defend an existing right to support. Based on the state of the law in respect of support, the Canada Revenue Agency (CRA) accepts that custodial parents have a right to child support, and spouses have a right to spousal support. With this in mind, the costs of negotiating agreements or obtaining court orders quantifying such support are deductible. However, CRA considers the costs of increasing support, or converting taxable child support to non-taxable support, to be non-deductible.

While good news for support recipients, as support payers have no source of income related to their legal fees, such costs have never been accepted as a valid deduction before the Tax Courts. The Federal Court of Appeal has said that, while this may seem inequitable, and is based on common law,

not on any legislation, this regime has been accepted by the CRA for many years. As such, in the words of the Court, it would be reasonable to expect legislation to have changed if this were not the intention of Parliament.

The End

This provides only a brief summary of the many tax issues which can arise in a family law context. These tax matters are typically attached to the larger issues of property division, ongoing support and custody and care of the children, and can easily be forgotten, especially in situations when emotions run high.

Ideally, the expected tax results would be explicitly noted in the broader settlement agreements between the parties, so that there are no surprises at a later date. Although even the most comprehensive agreement cannot guarantee CRA will agree with the positions taken, ensuring everyone understands the intended result should reduce future conflicts.

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What's in a Name?

What's in a name? That which we call a rose
by any other name would smell as sweet.

– Romeo and Juliet

Rochelle Johannson

Juliet might have made a convincing argument to dismiss the importance of the label of the name, yet most people see their names as being directly connected with the people that they are. It helps to shape their identity. In Canada, it's a child's guardian(s) who get to decide the child's name, including the first, middle and surname of the child. Usually, parents are the guardians of a child, and guardians can make decisions for a child (including things such as deciding where a child can go to school, who the child can be in contact with, where the child lives, etc.). A name for a child is recorded shortly after birth. But what if a guardian wants to change the child's surname later in life?

How did we get here?

Changing a child's name seems like such a personal decision, so how do these matters end up in court? There are a lot of situations that might happen which mean that one guardian wants to change the child's name. A divorce, a second marriage, an adoption of a child by a new spouse, a removal of one guardian, a lack of significant contact between the child and the guardian, all of these are examples of situations that end up in front of a judge. In essence, the guardians could not agree on what surname the child should have, and one parent applies to change the child's surname even though the other guardian does not consent to the change.

Before commencing any kind of application, the guardians should try to work things out between themselves. Are there alternatives that would work for their situation?

What laws apply?

Each province has a law that sets out the requirements and rules that must be followed in order to change a child's name, and each province is different. Also, there are different rules depending on what kind of custody arrangement is in place (sole custody/guardianship or joint custody/guardianship). Even when guardians agree on the child's name, the guardians will still have to follow the law and register the name with Vital Statistics and show proof that everyone consents to the change. Some provinces require that a child needs to consent to the change as well, if the child is over 12 years of age. Even where the guardian has to start out with an application is different from province to province. The application could be made to the Director of Vital Statistics of the province, or to the Superior Court of the province, depending on the legislation.

Crane v. Boucher illustrates the importance of knowing the law that you are applying under. Crane was the mother and sole guardian of the child. The court ordered that the mother did not need the father's consent to go ahead with an application, and the father did not participate in the hearing. Crane wanted to change the child's surname to her adult interdependent partner's surname, which is allowed under the *Change of Name Act*. In Alberta, common law partners are called adult interdependent partners under the *Adult Interdependent Relationships Act*. Given that the father didn't appear and didn't contest the name change, that Crane and her partner were in a committed relationship and expecting a child together, and that the court had an affidavit in support from Crane's partner, the application may have appeared to be a shoe-in. However, the court, instead of simply relying on Crane's scant evidence about her relationship, requested more evidence on whether the conditions to be adult interdependent partners had been met. The judge found that Crane and her partner were in fact, not adult interdependent partners because they had been living together for only two and a half years, and not three, as is required under the law. The judge refused to change the child's name.

A divorce, a second marriage, an adoption of a child by a new spouse, a removal of one guardian, a lack of significant contact between the child and the guardian, all of these are examples of situations that end up in front of a judge.

Things to think about before making an application

Before commencing any kind of application, the guardians should try to work things out between themselves. Are there alternatives that would work for their situation? So, for example, if one guardian refuses to even think about changing to a hyphenated last name for the child, could the change be that one surname becomes the middle name of the child? What if the dispute is about the order of a hyphenated last name? The mother of the child wants Smith-Jones, and the father of the child wants Jones-Smith and they've reached a stalemate. Well, put the names in alphabetical order, like this judge did in the 2012 B.C. case of *Landa-McAuliffe v. Boland*. Jones-Smith it is.

You should keep in mind that the law in each province regarding changing names is different, and may have different requirements regarding proof of custody, and who can apply or respond to an application.

If the guardians have entered into any type of agreement or have a court order regarding the child, then the parents should look at the agreement to find out what they agreed to do if there was a dispute. If the agreement states that the parties contracted to try mediation first, before commencing an application, then in the absence of an emergency situation, the parties should follow the terms of the agreement. In the 2013 Alberta case of *Pulkinen v. Munden,* the judge held that the parents were bound to follow the dispute mechanism that was included in their settlement agreement, and so had to attempt mediation before bringing another application regarding the child's name.

If the guardians haven't made an agreement or have a court order about guardianship of the child, or guardianship is in dispute, then an application to change the name of the child is premature, according to 2012 Alberta case of *Johnston v. Cunningham*.

What about custody and guardianship?

I discussed custody in my article "Considering Custody" (LawNow Vol. 37, Nov/Dec 2012) if you want some more information. You should keep in mind that the law in each province regarding changing names is different, and may have different requirements regarding proof of custody, and who can apply or respond to an application. Also, the terms that are used in each law can be different. Sometimes a person is a guardian, and sometimes a person is a parent, and sometimes they are both. Sometimes a person will have sole custody or sole guardianship, and sometimes there will be joint custody or joint guardianship.

Sole guardianship and sole custody

Some provinces provide that if the sole guardian wants to change the child's name, then the guardian can simply go ahead and change the name, so long as guardian can prove that he or she is the sole guardian. Other provinces provide that when one parent, who is also the sole guardian of the child, wants to change the child's name, then that parent must give notice of the change to the other parent.

When a person who has sole guardianship ends up in front of a judge because the other parent doesn't want the name changed, then it is up to that parent (who is not consenting to the name change) to prove that the name change is not in the best interests of the child. The reason that this is important is because it will determine the evidence that the parties bring to court. *Pappel v. Bergen* is a Manitoba case that cannot be accessed online, but is referred to in the 2011 Manitoba case of *D. S. v. C. S.*

In a joint guardianship situation, the guardian who wants to change the child's name must have evidence that the change is in the best interests of the child.

The judge refused to change a child's name, even though the mother had sole custody of the child. The child had the surname of the father (Pappel) and the mother applied to have the child's name changed to her new husband's last name (Bergen). In that case, the father proved that it would not be in the child's best interests to have a complete change of last name.

The father raised the points that the child had extended contact with her father's family, and that the child was not moving to a new community to begin a new life (if a child is moving to a new community, the child may be embarrassed to explain why the child has a different last name than the parent the child lives with). Based on the father's evidence, the judge found that it would not be in the best interests of the child to change the child's surname, and dismissed the mother's application. The judge implied that if the mother had applied to hyphenate the last names (Pappel-Bergen or Bergen-Pappel), the outcome might have been different because it might have been in the best interests of the child to have a connection to both parents through the use of their last names. It was made clear, however, in the *Pulkinen* case, that there was no presumption that a hyphenated last name is automatically in the best interests of the child.

Joint guardianship and joint custody

If parents have joint custody, then it is up to the guardian who is making the application to prove that a change of name is in the best interests of the child. This means that the onus is different than in a sole guardianship situation. In a joint guardianship situation, the guardian who wants to change the child's name must have evidence that the change is in the best interests of the child.

What are best interests of the child?

Wintermute v. O'Sullivan (not available online), has been adopted in Alberta by the *Pulkinen* case as outlining factors that the court must consider when determining if changing the child's surname is in the best interests of the child. *Pulkinen* added some further factors that should be considered. Essentially, the judge must decide the following questions, keeping in mind that the welfare of the child is the primary consideration.

Courts are of the view that different last names among family members does not result in social stigma or any administrative difficulty.

- What are the short and long term effects of any change in the children's surname?
- Would the child feel any embarrassment because s/he has a different last name than the parent that the child lives with?
- Would the child be confused about his/her identity if the name is changed? Not changed?
- What effect would changing the child's name have on the relationship between the child and the parent whose name the child had during the marriage?
- What are the effects of frequent or random changes of name on the child?
- Is there a possibility that the name of the parent that the child lives with the majority of the time may change? Would that change confuse the child?
- Would having a different name than other children within the family confuse the child?
- Are there alternatives that the parents could consider?

Courts are of the view that different last names among family members does not result in social stigma or any administrative difficulty (see *Johnston v. Cunningham*). Given that Canada is a multicultural country with many different types of families, judges should treat assertions by parents that a child will face prejudice or embarrassment because of having a different last name with skepticism (from *Lipphardt v. Chan*, 2006 ABQB 511).

If you're thinking of changing a child's name, or you want to fight a change of name, then a good place to start is the Vital Statistics Office in your province. You can find out from them what paperwork you will have to fill out, and what steps you will have to take. Here's a list of the offices across Canada.

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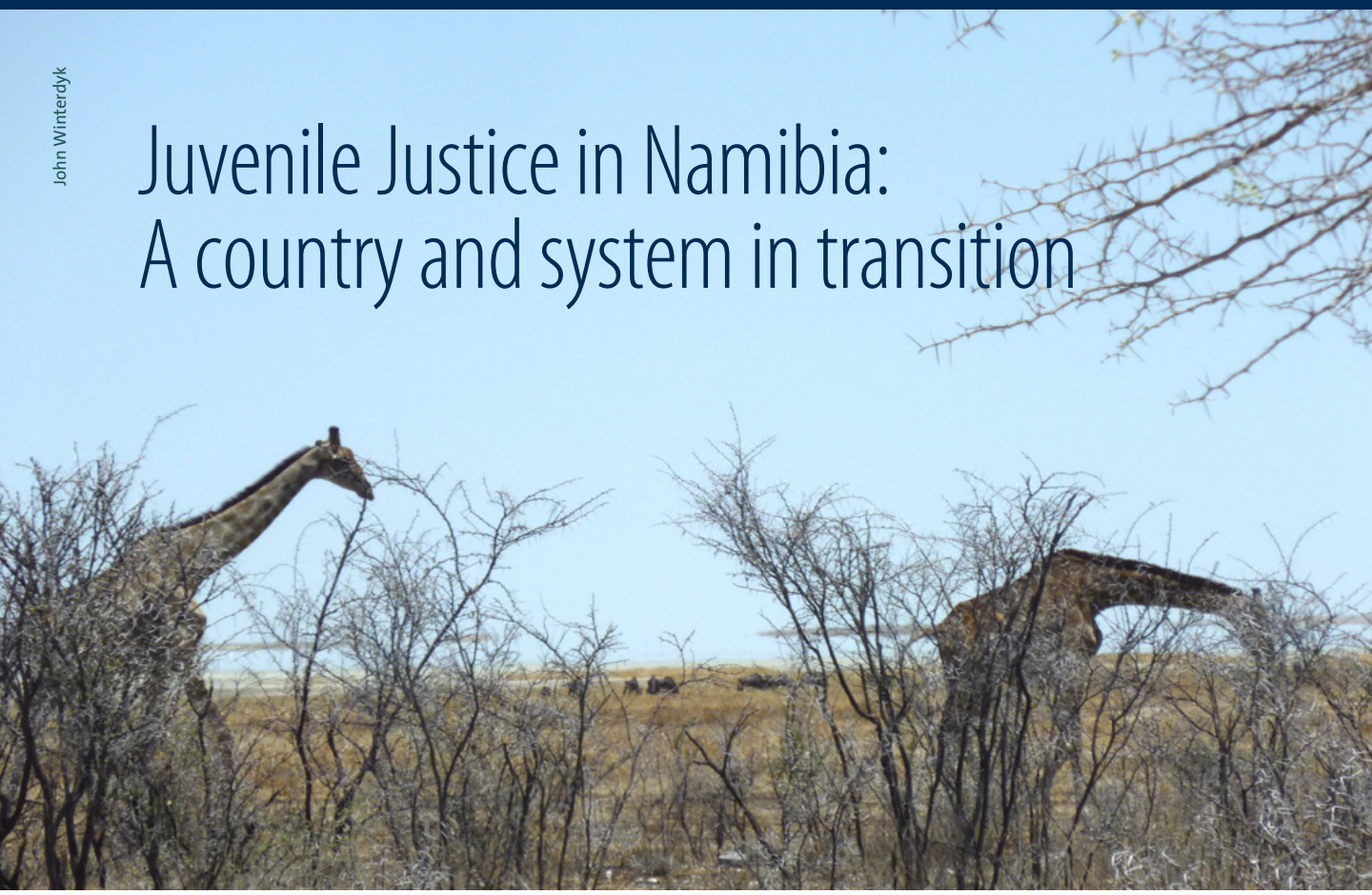
John Winterdyk

Juvenile Justice in Namibia: A country and system in transition



John Winterdyk

Namibia is located on the west side and in sub-Saharan Africa. It is the fourth largest country in Africa but, as of 2011, had a scant population of around 2.3 million inhabitants. It is a country of stark contrasts, perhaps largely due to the fact that Namibia is arid and has limited capacity to sustain much life. From 1884 until 1915 it was a German colony, and thereafter, was first administrated under a C-Mandate of the League of Nations, and later, annexed by South Africa. Namibia attained independence on March 21, 1990, and now has a constituted representative democracy endowed with an independent judiciary and strongly entrenched human rights and freedoms. Like many former colonies, prior to the apartheid administration period, Namibia suffered from the plights of oppression and repressive criminal justice measures. Therefore, it offers a unique opportunity to look at an emerging/evolving justice system.

Namibia attained independence on March 21, 1990, and now has a constituted representative democracy endowed with an independent judiciary and strongly entrenched human rights and freedoms.

In 2012, while on institutional leave, I had the pleasure to be able to visit, teach, and observe various aspects of Namibia's criminal justice system. However, due to limited space, I will confine my observations in this article to their juvenile justice system. First, however, here is a brief overview of crime and justice in the country.

I choose to focus on juvenile justice since as we euphemistically say: "the youth of today are the leaders of tomorrow", and unlike adults, they have no voice in how legislation pertaining to their criminal behaviour is scripted.

According to a number of accounts, Namibia is a comparatively peaceful country but the level of fear and/or apprehension towards personal safety is evident when one visits Windhoek, the capital. Virtually every house is walled and topped with an electrified fence or barbed wire, and virtually every business has security staff (many from the G4S company). The police appear to be under-resourced and only modestly trained to be able to conduct investigations of more serious crimes. One local scholar described the police cells as "hell on earth" and juveniles are often kept together with adult offenders. The court system is marred by delays as magistrates and judges carry an extremely high case load. Finally, corrections, although having come a long way since independence, is still fraught with old technology, considerable pre-independence physical infra-structure, and is poorly resourced. It must deal with issues of overcrowding, HIV, and a general lack of means to effectively deal with inmates. However, not all is gloom, because across the system there is clear evidence that, legislatively, the criminal justice system is taking steps to ensure that the provisions for advancing and improving the administration of justice are in place. What is lacking, however, is the human, resource, and financial capacity to match its stated objectives with its practices. For example, while statistics are gathered by each of the criminal justice components, there is no national crime statistics gathering mechanism in place.

I choose to focus on juvenile justice since as we euphemistically say: "the youth of today are the leaders of tomorrow", and unlike adults, they have no voice in how legislation pertaining to their criminal behaviour is scripted. How the State responds to the plight of its youth is revealing.

A nation of firsts

"No tree can live without roots and no man without his kin" – Namibian saying

Namibia became the first country in Africa to ratify the *Convention on the Rights of the Child (CRC)* in September 1990. In being a signatory of the UN *Convention* (i.e., an international human rights agreement), Namibia expressed its intention to not only create greater awareness of children's human rights, but also to implement legislation to entrench fundamental human rights for young persons. A survey shortly after ratifying the *Convention* revealed that a majority of juvenile offenders had been incarcerated without access to any form of legal counsel. In addition, a majority had been detained in excess of three months during their pre-trial detention period.

In 1994, Namibia became one of the first African countries to establish a Juvenile Justice Forum (JJF) which, during its lifespan, facilitated a range of positive reforms for juvenile offenders.

Unfortunately, mainly due to the withdrawal of foreign funds by Austria in 2006, the program and initiative could not be sustained and it slipped into an abyss.

Namibia also became the first African country to provide a comprehensive written report on how well Namibia was complying with its obligations to the *CRC*. At the time, the UN Committee on the Rights of the Child noted, in particular, its concerns as to the conformity of Namibian practices in dealing with child offenders with the *CRC*, in particular with respect to Articles 37 and 40, as well as other relevant international instruments such as the Beijing Rules and Riyadh Guidelines.

As a continent, Africa recognized that it shared unique social and cultural characteristics that distinguished it from the rest of the world, so it created the *African Charter on the Rights and Welfare of the Child.*

As a continent, Africa recognized that it shared unique social and cultural characteristics that distinguished it from the rest of the world, so it created the *African Charter on the Rights and Welfare of the Child.* Namibia became one of the first countries to ratify the *Charter* ,and in doing so, expressed its commitment to adopting legislation and reform that would honour the *Charter*. The three primary characteristics of the *Charter* are:

- *protection* of young persons;
- *provision* of legal service; and
- *participation* in legal processes.

Finally, Namibia became one of the first few African countries to sign the *Optional Protocol on the Involvement of Children in Armed Conflict* in September 2000. And in 2003, Namibia drafted its Child Justice Bill. Among other things, the proposed Bill would govern cases in which children (under the age of 21) are charged with crimes and reflect elements of *Ubuntu* (a type of communal approach to justice) when dealing with young offenders.

Collectively, it can be said that, in principle, since gaining independence, Namibia has formally expressed a strong commitment to ensure the human and legal rights of its young offenders. However, as Dr. Stefan Schulz, a faculty member in the Department of Criminal Justice and Legal Studies at the Polytechnic of Namibia noted nearly a decade ago, there is still no national legislation to address the needs of young persons who come into conflict with the law. Any such provisions fall under a range of other criminal justice legislation. Hence, while on a paper of promise (i.e., Child Justice Bill) the country embraces what I have described elsewhere as a 'welfare model', in practice and according to the currently relevant

John Winterdyk

Staff at the Windhoek Prison, Namibia

legislation, juvenile justice in Namibia is more representative of a 'justice model' – concerned more with retribution than with resocialization, reintegration, and/or treatment.

A system in (dis)repair

The draft Child Justice Bill stated that children between the ages of 7-14 are not capable of committing a crime because they "do not have the capacity distinguish between right and wrong". Now renamed the Child Care and Protection Bill, the revised Draft Bill clearly is descriptive of a welfare model, but it has yet to replace the *Children's Act 33* from 1960! Under the existing Act parents still have the "right to punish and exercise discipline" of their children. However, under the proposed new Bill, the focus will shift to a parent's obligation to respect a child's physical integrity. Whether the non-specific section of the new Bill will shift to excluding corporal punishment as a disciplinary option may be suspect. A recent national survey found that over 60 per cent of parents admitted to using corporal punishment (i.e., smacking or caning) their children and that it was generally seen to be acceptable especially for the father in the household. And, while the Namibian government also wants to consult with South Africa, which introduced new legislation for juveniles, in order to ensure that it doesn't experience its mistakes, the government has yet to do so.

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Unfortunately, while the Bill continues to languish in Parliament, there are other indications that the country is trying to ensure the well-being and welfare of its youth. For example, school attendance and the national literacy rate are higher than in most other African nations, polio among children and youth has all but been eliminated since 1990 and the incident rate of HIV transmission has been steadily declining among children and young people. Similarly, the inclusion of a clause on the rights of the child in the Namibian *Constitution (1990)* (Article 15) offers some promise for a constructive law reform process.

As much of the Namibian population is essentially rural, the government has established mobile teams to educate, service, and provide support for young persons throughout the country. Admittedly, there are fewer than 90 social workers to service the entire country, but, based on available data, juvenile delinquency is not a serious problem. However, it may arguably be a growing concern in such cities as Windhoek where people from the rural areas are migrating with the hope of finding better opportunity. Once there, comparatively high rent and/or house prices dramatically limit access to even the most basic of accommodations, and hence, there are an expanding number of shanty homes. In such communities as Katatura there is no running water, no electricity, and no formal infrastructures to provide even the most basics of quality of living. Opportunities for young people are further jeopardized by the high unemployment rate in the country.

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John Winterdyk

Shantytown

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Namibia also has no dedicated juvenile institution, but instead, has allocated sections of their prisons to housing juveniles. While not ideal, it is an attempt to keep young offenders separate from adults. Correctional staff are not specifically trained to work with this population and there are no specialized programs within the institutions for youth.

Finally, although there has been discussion of establishing a probation system for juveniles, it does not currently exist, even though UNICEF has provided a toolkit for establishing a probation system for sub-Saharan countries. In addition, there are, in principle, provisions for community-based programs, but again, none have been established.

In summary, during the late 1990s and early into the new millennium, Namibia seemed well on its way to creating a progressive juvenile justice system that complied with many of the international and continental African standards. However, as seems to be the case with many developing countries, those who have no voice or power do not have priority in the political arena. Namibia has much it can be proud of, but based on my experience, there is much that can and still needs to be done to ensure the rights, needs, and safety of delinquent youth in Namibia are respected. Again, as Dr. Schulz noted a few years ago: "it is high time for the role players and stakeholders in the Namibian CJS… to reinvigorate the process which had been so promising."

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Griffiths Energy Violates the Canadian *Corruption of Foreign Public Officials Act*

Peter Bowal and
Karen Lynn Perry

Calgary-based Griffiths Energy International Inc. (Griffiths) was created in August 2009 to obtain oil and gas production sharing contracts in the Republic of Chad. Within two years, the corporate leadership had changed, the corporate founder Griffiths was dead, and the company faced a major corruption scandal.

In November 2011, when it was conducting due diligence for an initial public offering scheduled to occur the next month, Griffiths detected a few dubious "consulting" agreements. It promptly struck a committee of independent directors, hired outside professionals to comb through 212,000 documents, and interviewed many people related to the transactions.[1]

At a cost of over $5 million, Griffiths' internal investigation revealed that between August 30, 2009 and February 9, 2011, prior management had entered into two contracts with a Chad foreign public official, Mahamoud Adam Bechir, and his wife, Nouracham Niam. Mr. Bechir was Chad's ambassador to Canada and the United States at the time.

These contracts, a U.S. $2 million cash payment and four million "founders" shares of Griffiths, were bribes to obtain exclusive drilling rights in two oil and gas properties in Chad. The consulting services promised in return by the ambassador's wife were about "providing advisory, logistics, operational and other assistance with respect to implementing Griffiths' oil and gas projects in Chad". She formally arranged a meeting between Griffiths and Chad's president through the embassy. The drilling rights were a big win for the fledgling Griffiths, which had failed in several earlier attempts to purchase rights to produce oil and gas in Chad's rich southern oil fields.

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The $2 million was transferred to Ms. Niam's Washington-based company Chad Oil Consultants LLC.[2] The shares, transferred at a price of less than one cent each, were by the start of 2013 trading at over $6, so that the value of the original four million shares now exceeded $20 million.

Although there is no self-reporting obligation in Canada, Griffiths handed the entire incriminating file over to the Royal Canadian Mounted Police, the Public Prosecution Service of Canada and the United States Department of Justice.[3]

At the time of the illegal bribes, Griffiths had been receiving legal advice from the law firm in Toronto that employed former Canadian Prime Minister Jean Chrétien. While Mr. Chrétien had helped numerous Canadian companies in their dealings with African countries, there was no evidence he had specific input into, or knowledge of, the Griffiths bribes.

On January 25, 2013, two years after signing the drilling rights contract with Chad, Griffiths pleaded guilty to bribery under section 3(1)(b) of the Canadian anti-corruption legislation with an Agreed Statement of Facts in the Court of Queen's Bench in Calgary, Alberta.[4] The "negotiated resolution" was a guilty plea accompanied by a fine of $9 million and a 15% victim fine surcharge, for a total of $10.35 million dollars, and an obligation for Griffiths to assist prosecutorial authorities "in other processes or legal remedies that the Crown may pursue that are relevant to this matter."

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Griffiths was not placed on probation. All of its directors and senior executives had changed since the time of the offence. The company, under new management, had adopted an anti-corruption compliance program and strengthened its internal controls. The fact that Griffiths had initiated the internal investigation and turned

itself in to law enforcement authorities was viewed as a mitigating factor.[5] This is the first instance under the Canadian anti-corruption legislation where a company has voluntarily disclosed its own corruption after an internal investigation.

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There is no maximum fine set out in the Canadian federal anti-corruption legislation and no limitation period for the most serious category (indictable) offence. In addition to corporate liability, directors and officers can be sanctioned with fines and imprisoned for up to five years, although no individual has been charged under this legislation in Canada yet.

In July 2011, a few weeks after the new management took over at Griffiths , founder Brad Griffiths, a former investment banker, fell out of his fishing boat and drowned in the lake outside of his Ontario cottage.[6] It was shortly after his death that the bribes were discovered by the new management. No charges were laid against other members of the original Griffith management team.

Mahamoud Bechir continues to dispute the Griffiths bribe, and disclaims any benefit from the $2 million given to his wife. Nevertheless, he was relieved of his duties as Chad's ambassador (to South Africa, by this time) on January 26, 2013.[7]

Griffiths continues to operate with 44 workers in Chad. The company began to spud its third well on January 24, 2013 and expected to be testing the well within a month.[8] It hopes to start pumping oil from one of these properties within a few months. It maintains rights to explore and extract resources over a total area of 26,103 square kilometres in southern Chad.

The prosecutor in the Griffiths case is seeking to reclaim both the $2 million payment and the shares. Some of the proceeds have already been spent – on a luxury house in the suburbs of Washington D.C., investments, and a car for a teenager, one of the couple's nine children.

Griffiths plans an initial public offering in London this spring at a 50% premium on its current grey market price, which would value the company at more than $1.1-billion.[9] If this European IPO is successful, it would tend to vindicate the new management's strategy in voluntarily dealing with this corruption. The company may be seen as replacing its management, investigating its own previous malfeasance, blowing the whistle on itself, co-operating with legal authorities and paying the fine. A full corruption clean-up cost of significantly less than $20 million is a miniscule price to pay for a $1.1 billion market reset valuation of the company.

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Shortly after this guilty plea to corruption, on February 5, 2013, the Government of Canada introduced *An Act to Amend the Corruption of Foreign Public Officials Act* (Bill S.14). Promising to "redouble" its fight against corruption, the federal government proposes by this amendment to increase the maximum jail term to 14 years (from 5 years) for individuals, permit prosecutions against Canadians and their companies regardless of where the alleged

bribery took place, enact a new records crime of falsifying records or hiding payments related to bribery of foreign public officials, and stage out the exemption for facilitation payments.

Notes

1. *Globe and Mail*, "Getting to the bottom of the Griffiths Energy bribery case", February 2, 2013.
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3. *Petroleum Africa*. "Griffiths Works to Close Investigation". January 18, 2013.
4. *Corruption of Foreign Public Officials Act*, SC 1998, c 34, Canada NEWSWIRE. *Griffiths Energy International Announces Settlement*. January 25, 2013.
5. *Canadian Press*. "Griffiths Energy to pay $10.35M fine for bribing officials in Chad", January 22, 2013.
6. *Financial Post*. "Energy, Judge approves $10.35M fine for Griffiths Energy in Chad bribery case". January 25, 2013.
7. *Globe and Mail*. "Fired Chadian ambassador defends 'done in the daylight Griffiths deal'," Press release. January 31, 2013.
8. Griffiths Energy International. *Griffiths Energy Provides Development and Exploration Update*. January 28, 2013.
9. *Globe and Mail*, "In wake of scandal, Griffiths Energy plans IPO in London", February 04, 2013

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http://www2.macleans.ca/2013/01/11/idle-no-more-ottawa-protest/

Tessa Crosby

The Yukon's Open Entry Mining System

Declared a Breach of the Duty to Consult with First Nations

Ross River Dena Council v Government of the Yukon 2012 YKCA 14

As Canada's MPs returned to the House of Commons this January they were greeted by jingle dancers on Parliament Hill. The gathering was one of more than 30 to be held across Canada as part of a national day of action in support of the Idle No More movement. Among other things, the movement seeks to raise awareness about aboriginal rights, treaty rights and self governance.

The equitable resolution of these issues is becoming more urgent as resource development becomes increasingly important to the Canadian economy. Much of the natural resources are found in treatied territory, traditional territory of First Nations, or areas of asserted but unproven land claims. In addition to having a

Mining is big business in the Yukon. As the sector expands, the risk of conflict between First Nations and exploration companies increases. The issues are complex.

strong moral and equitable interest in what development – if any – occurs on these lands, many First Nations (as inhabitants of remote regions) are uniquely placed to either support the development by providing much needed labour, or disrupt these activities through non-cooperation. Moral arguments aside, arriving at an equitable arrangement is increasingly just good business sense.

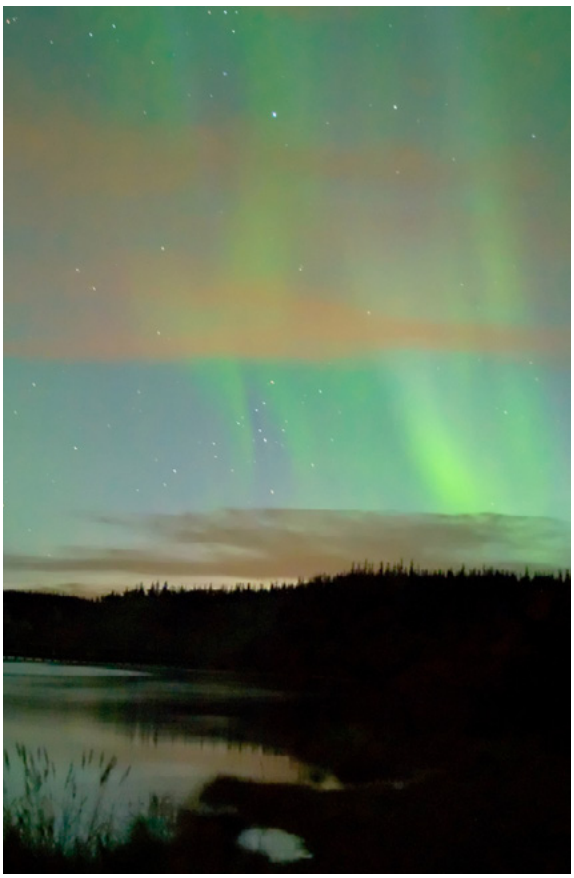
While many of these issues must be addressed politically, the courts are increasingly asked to determine the scope of aboriginal rights. In the context of resource development, much of the litigation centers on the duty to consult with First Nations. As established in Haida Nation v British Columbia 2004 SCC 73 ("Haida"), the duty requires the Crown to consult with First Nations where proposed Crown conduct may adversely affect claims to aboriginal interests in land.

In Ross River Dena Council v Government of the Yukon 2012 YKCA 14 the Yukon Court of Appeal ("YKCA") found that the Yukon Government had breached its duty to consult with Ross River Dena First Nation (RRDC). The breach occurred when the Government registered new mining claims under the Quartz Mining Act SY 2003 c 14. Registration has two effects which RRDC submits trigger the duty to consult:

(1) it transfers subsurface rights to claims holders, arguably threatening RRDC's asserted aboriginal title, and

(2) it entitles the claimholder to engage in class 1 exploration activities without further permission or notice, arguably threatening RRDC's surface aboriginal rights (of which hunting is the most important).

The YKCA upheld the lower court finding that the registration system does not meet the Haida consultation requirements. However, it disagreed with the lower court on the question of what regime would satisfy the duty; while the lower court held that the duty would be discharged if the Yukon Government were to notify RRDC of any newly recorded quartz mining claims, the YKCA held that mere notice is insufficient. It also accepted that the duty was triggered both by the threat posed to aboriginal title by the transfer of subsurface rights and the threat to aboriginal rights by class 1 exploration activities. While declining to specify an appropriate consultation mechanism, the Court of Appeal ruled that consultation must occur before the adverse impact.



Aurora over Yukon River, near Whitehorse, Yukon

The decision is particularly damaging to the Yukon Government, coming as it did just weeks after the repeal of provisions in the Yukon Oil and Gas RSY 2002, c 162 which required the prior consent of any First Nation who has not concluded a land claim agreement to the disposition of oil and gas rights in its traditional territory. The repeal was unsuccessfully opposed by RRDC, one of three Yukon First Nations which has not yet signed a land claim agreement.

Where the duty to consult is triggered, the consultation must be *bona fide* with a view to accommodating the claimed interests. The nature of the consultation depends on the apparent strength of the aboriginal claim and the degree of intrusion by the proposed conduct.

The Open Entry Mining System in the Yukon

Under the *Quartz Mining Act*, a claim to resource rights is acquired by staking the parcel. The system is "open entry", meaning any individual may claim un-staked land without prior approval by the government. A staked claim must be registered with the Mining Recorder, but registration may only be refused on technical grounds.

Once the claim is registered, the claim holder is entitled to all minerals in the bounds of the staked claim for a year, subject to annual renewals. This entitles the claim holder to undertake class 1 exploration on the claim without notice to or approval by the Yukon Government or affected First Nation(s). Class 1 exploration activities include clearing the land, constructing lines, corridors and trails, using explosives and removing subsurface rock.

Mining is big business in the Yukon. As the sector expands, the risk of conflict between First Nations and exploration companies increases. The issues are complex. On the one hand, there are the rights of increasingly powerful First Nations, some of whom have land claims agreement and others who have unresolved, but strong claims to Aboriginal title. The interests of individual First Nations vary but most concern First Nation participation in and control over the resource development which take place on their land.

Although frequently characterized as a conflict between First Nations who oppose resource development and industry which craves it, the conflict is more complex than that. For example, RRDC is not opposed to resource development; on January 30 it was announced that it has signed an exploration agreement with Golden Predator Corp. What RRDC objects to is resource development without their consent, participation, and ultimate benefit.

On the other hand, there are the interests of resource companies and those which would benefit from the economic development promised by mining. Mining companies, as represented in this case by the intervenor Yukon Chamber of Mines, argue that an open entry registry system is essential to the Yukon mining industry due to the secret nature of mineral staking claims. If a mining company must publicize its interest in a particular claim before it actually acquires rights in it, it becomes vulnerable to predatory competitors who seek to acquire the rights first.

The Yukon Chamber of Mines' argument about the absolute necessity of open entry claims is undermined by the fact that Alberta does not have an open entry mining system. Despite this apparent deficiency, the Fraser Institute Survey of Mining Companies 2011/2012 ranked Alberta as the third most attractive jurisdiction to mining companies in the world.

The Duty to Consult

The triggering event for the duty to consult was restated in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 (*Rio Tinto*) as follows:

- the Crown has knowledge, actual or constructive, of a potential aboriginal claim or right; and
- there is contemplated Crown conduct; and
- there is potential for the contemplated conduct to adversely affect the aboriginal claim or right.

The Yukon Government conceded that it had actual knowledge of RRDC's interest in the territory. The two parties have been involved in land claims negotiations for several decades.

On the second branch of the *Rio Tinto* test, the Yukon Government submitted that registering a claim does not qualify as "contemplated Crown conduct". They point to how the Recorder has no discretion under the statute to refuse to register a claim, and argue that the position is merely ministerial.

In the Yukon Government's submission, if the duty were triggered, it could only have been when the Yukon legislature passed the *Quartz Mining Act*, and not when an individual claim is registered. The question of whether legislative action may trigger the duty to consult was left open by the Supreme Court of Canada in *Rio Tinto*. The Yukon Government submitted that this was not an appropriate case to decide the issue, or in the alternative, that the legislative action cannot or did not trigger the duty.

While declining to determine the legislative action question, the YKCA found that the duty to consult had been triggered in this case. Transferring mineral rights to claim holders by registration is Crown conduct capable of triggering the duty, regardless of the discretion of the Recorder under the legislation. As the duty to consult lies upstream of legislation, the terms of the legislation are no defence to a First Nation's claim that the duty has been triggered and breached. The failure to provide discretion in the legislation is not an answer to the First Nations claim but rather the source of the problem.

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The YKCA further noted that the legislation does give the government broad discretion to prohibit the staking of claims on particular lands. This discretion could have been used to prohibit any staking in the disputed Ross River territory. If the Government wishes to permit claim staking in the territory, it may only do so if it respects the rights (including the right to be consulted) of RRDC.

Divide Lake, Yukon

Consultation is a constitutional imperative which cannot be limited by ordinary legislation to accommodate non-constitutional concerns.

On the third point, the Court accepted two separate types of adverse effect. Firstly, transferring the mineral rights had an adverse effect on the aboriginal title claims of RRDC. This is exceedingly interesting, as it accepts that subsurface rights may be included in aboriginal title. While aboriginal title has not yet been proven in a Canadian court, the jurisprudence is growing and this finding may prove important.

The second adverse effect is on aboriginal rights to use the land, most importantly for hunting. Carrying out class 1 exploration activities has the potential to adversely affect these rights by restricting access and influencing local wildlife.

What is Adequate Consultation?

Where the duty to consult is triggered, the consultation must be *bona fide* with a view to accommodating the claimed interests. The nature of the consultation depends on the apparent strength of the aboriginal claim and the degree of intrusion by the proposed conduct. Appropriate consultation can range from notification to full consent.

In this case, RRDC's claim to aboriginal title and aboriginal rights is strong; they have occupied the territory since time immemorial and have never ceded it in treaty. While the degree of intrusion of class 1 exploration into aboriginal rights is considerable, it is surpassed by the intrusion into aboriginal title caused by the transfer of mineral rights.

On the question of what constitutes sufficient consultation in this case, the YKCA rejected the trial judge's holding that notice may be sufficient. It found the trial judge had given too much weight to arguments about the importance of an open entry system to the Yukon mining industry, a factor which is irrelevant to determining appropriate consultation. Consultation is a constitutional imperative which cannot be limited by ordinary legislation to accommodate non-constitutional concerns.

While declining to specify an appropriate consultation scheme, the Court of Appeal made two statements which will be useful in designing an appropriate scheme.

- Mere notice is insufficient in the circumstances, given the strength of RRDC's asserted aboriginal rights and title, and the intrusiveness of class 1 explorations and the transfer of subsurface rights.
- Consultation must occur before claimed aboriginal title and rights are adversely affected. *Ex poste facto* consultation does not satisfy the duty.

In amending the *Quartz Mining Act* in light of this decision, the Government of the Yukon would be wise to consider the experience of Ontario. In 2009 the open entry system of the Mining Act RSO 1990 c m 14 was amended, partly in response to concerns about potential claims of First Nations. Although it does not impose a duty to consult prior to the transfer of mineral rights, the new *Mining Act* recognizes and affirms existing treaty and Aboriginal rights including the duty to consult and includes detailed consultation requirements at each stage in the mining process, including early exploration. Additionally, First Nations must be notified when mining claims are recorded within their traditional territories, and they may apply to have sites of cultural significance withdrawn from claim staking.

The Yukon Government will likely introduce similar provisions to provide for consultation before class 1 exploration adversely affects aboriginal rights. There is no similar roadmap for consultation prior to adverse effect on aboriginal rights. Although 11 of the 14 Yukon First Nations have surrendered their aboriginal title in land claims agreements, large portions of the resource-rich territory remain subject to unsurrendered aboriginal title claims. Inventing an adequate consultation mechanism – which is required in order to grow the resource economy of the territory – will require considerable innovation and creativity.

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Equality Case Seems to Have Fractured the Supreme Court of Canada

Linda McKay-Panos

A recent decision of the Supreme Court of Canada (SCC) *Quebec (Attorney General) v A*, 2013 SCC 5, seems to have divided the Court on the issue of discrimination and equality in a manner somewhat reminiscent of the fractured Court of the mid 1990s (see the "equality trilogy": *Miron v Trudel*, [1995] 2 SCR 418; *Egan and Nesbit v Canada,* [1995] 2 SCR 513; and *Thibaudeau v Canada*, [1995] 2 SCR 627).

The *Quebec v A* decision is 450 paragraphs long. To understand the legal reasoning behind the outcome (as was the case in the 1990s) one might have to draw a detailed chart. Lawyers, courts and the public are going to find it difficult to follow the principles set down in the case. The equality issue was whether excluding *de facto* (common law) spouses from the *Civil Code of Quebec* provisions that mandate property sharing and spousal support when either a marriage or civil union breaks down violates section 15(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). Then, the Court had to decide whether the violations were saved by *Charter* s 1.

Charter s. 15 provides:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Court's reference to "prejudice" and "stereotyping" in *Kapp* has raised concerns because it implies that other ways that people experience disadvantage may not be recognized in this test.

Justice Abella (writing for herself), concurred with by Justice Deschamps (also writing for Justices Cromwell and Karakatsanis), and Chief Justice McLachlin (writing for herself) all agreed that there was a violation of *Charter* s. 15(1). Justice LeBel (also writing for Justices Fish, Rothstein and Moldhaver), wrote the dissenting judgment, holding that there was no discrimination.

On the second issue of whether the violation of *Charter* s. 15(1) could be saved by *Charter* s. 1, Justice McLachlin held that it was saved. Thus, the final outcome of the case that there was no discrimination.

The challenge for students of equality rights in this case was the test for a violation of equality/discrimination in s. 15(1) that was the focus of the majority and minority judgments. Chief Justice McLachlin and Justice Abella both confirmed that the test for discrimination as outlined in *R v Kapp*, 2008 SCC 41 (*Kapp*) should be followed to determine whether s. 15(1) is violated:

(1) Does the law create a distinction based on an enumerated to analogous ground?

(2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

The Court's reference to "prejudice" and "stereotyping" in *Kapp* has raised concerns because it implies that other ways that people experience disadvantage may not be recognized in this test. For example, sometimes the adverse effects of a law or government action are based on harms other than prejudice or stereotyping – these could include oppression or denial of basic goods.

Justice Abella held that the exclusion of *de facto* spouses from the legal protections for support and property that are given to spouses in formal unions violates *Charter* s 15(1). She noted that many *de facto* spouses share the same characteristics that led to the protections for spouses in formal relationships. For example, they form long-standing unions, they divide household responsibilities, they develop a high degree of interdependence, and the economically dependent spouse is faced with the same disadvantages when the relationship dissolves. Yet, the *de facto* spouses in Quebec have no right to claim support or right to divide family property and are not governed by any matrimonial regime. Justice Abella also noted that, in some cases, the decision to live together unmarried is no choice at all, which addressed the minority assertion that individuals have chosen to live in *de facto* relationships, when they could choose marriage and the benefits that adhere to that choice.

Justice Abella noted that the SCC's reference in *Kapp* to "prejudice and stereotyping" was not intended to "create a new s. 15 test" nor to impose any "additional requirements" on those claiming equality. Instead, stereotyping and prejudice are merely two indicators that are relevant to deciding whether substantive equality (e.g., adverse effects discrimination) is violated. This analysis seems to recognize that the Court is not going to focus merely on direct discrimination, but is

also willing to focus on laws that are neutral on their face, but actually have an adverse effect on a particular group. On the other hand, the minority, led by Justice LeBel, indicated that prejudice and stereotyping were "crucial factors" in the identification of discrimination, although they did note that they are not the only factors.

Justice Deschamps, agreeing with Justice Abella that there was discrimination, noted that while society's perception of *de facto* spouses has changed in recent decades and there is no indication that the Quebec legislature intended to stigmatize them, the denial of the benefits had the effect of perpetuating the historical disadvantage experienced by *de facto* spouses.

Justice Abella also noted that, in some cases, the decision to live together unmarried is no choice at all, which addressed the minority assertion that individuals have chosen to live in *de facto* relationships, when they could choose marriage and the benefits that adhere to that choice.

Justice McLachlin held that although "prejudice and stereotyping" are useful guides to determine discrimination, one must perform a contextual analysis, taking into account a pre-existing disadvantage of the claimant group, the degree of correspondence between the differential treatment and the claimant's group reality, the ameliorative impact or purpose of the law and the nature of the interests affected. She agreed that the Quebec law is discriminatory. However, she also held that the law was saved by *Charter* s. 1 ("reasonable and justifiable in a free and democratic society").

Justice LeBel held that the regime in Quebec dealing with support and property division is available only to those who consent to it by getting married or entering into a civil union. While Justice LeBel was prepared to find that the law created a distinction based on marital status, he held that the distinction was not discriminatory because it did not create a disadvantage by expressing or perpetuating prejudice or by stereotyping. Although *de facto* spouses were historically the subject of hostility and social ostracism, nowadays they are respected and accepted. If partners participate in marriage or civil unions, they are consenting to the obligations of support and property division. The fact that there are different frameworks for private relationships between partners does not indicate the expression or perpetuation of prejudice, but instead demonstrates respect for the various types of relationships.

The varying approaches to the requirements for proving a violation of *Charter* s 15(1) are reminiscent of the early days of the *Charter* when Justice McIntyre in *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, said that equality is "an elusive concept" that "lacks precise definition". Although there have been many twists and turns in the SCC with regard to *Charter* s. 15(1), it appears the Court is not yet settled on the exact considerations involved in the test for equality and discrimination.

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Cronaca Nera: Two True Crime Books From Italy

Rob Normey

The Fatal Gift of Beauty: The Trials of Amanda Knox by Nina Burleigh

I had largely finished this book when the news came that the Italian Appeals Court – the Court of Cassation – had, on March 26 ruled that American university student Amanda Knox and Italian student Raffaele Sollecito, briefly her boyfriend, are to be retried for the murder of British student Meredith Kercher. This ruling comes more than five years after the 21-year-old from Surrey, England was found in her room, with her throat slashed and with evidence of a sexual encounter, in the university town of Perugia. The first appeals court had, in 2011, overturned the original convictions for murder and substituted acquittals for the co-accused. A new trial – at the first appellate level – will be held in Florence. Media reports strongly suggest that Knox will not attend that trial (although perhaps she will nonetheless be represented?) and interesting issues relating to extradition might arise should she be convicted a second time. Sollecito, who continues to reside in Italy, would seem to have no option but to attend the new trial.

In light of the many passionate utterances on the fate of these two accused since the 2007 murder of Meredith Kercher – but wait, the vast majority of comments concern only Amanda Knox, the attractive young student who came from Seattle to study Italian in the beautiful hilltown

of Perugia – I will inject a note of caution into my response to Burleigh's book. I agree with her conclusion that Knox and Sollecito are innocent of the charges and that the third individual involved, Rudy Guede, who was tried separately and convicted, was the only individual that we know to have been culpable. However, I think that the author feels the need to make hard-hitting statements about the foolishness of the original verdict that go beyond what a reasonable and thoughtful analysis warrants.

Of the numerous books about the case, Burleigh's may well be the best-written. Burleigh is a veteran journalist and has written for a number of magazines including *Time*. She offers tart and candid observations about the rich cultural history of Italy, and in particular, the Umbrian town of Perugia and the unique aspects of life there. Perugia has an amazing history and as someone who has travelled there and marveled at the outstanding art and architecture, I can imagine showing up in the capital city of this central Italian region of Umbria for the Knox/Sollecito trial and wandering the winding streets at the end of the day, stopping at the Arch of Augustus, the famed Etruscan Arch that serves as a gateway into the city centre. I would reflect on the fact that the so-called primitive lifestyle of the Etruscans, albeit capable of great cultural production, at least operated without the media circus that accompanies trials of this kind. Burleigh is one of many American writers who decry the inflammatory headlines and newscasts that cast considerable suspicion on the accused in the months leading up to the trial.

Two other parts of *A Fatal Beauty* that I found of particular interest were her discussion of the sexual objectification and exploitation of women in Italy. The country ranks very low indeed in the Gender Equality ratings for an advanced Western European nation.

Two other parts of *A Fatal Beauty* that I found of particular interest were her discussion of the sexual objectification and exploitation of women in Italy. The country ranks very low indeed in the Gender Equality ratings for an advanced Western European nation. Perugia has, in recent decades, developed a dark side as a criminal hub, operating as a crossroads for the heroin coming up from Naples and being then transported by low-level dealer gangs to Rome and elsewhere. Further, as one of the most important locations for Masonic lodges and the unusual rituals engaged in by the Freemasons, the city apparently is prone to extravagant conspiracy theories. In any event, Burleigh makes a plausible case that where one of the accused, Knox, is a beautiful woman, brash and yet a relatively inexperienced newcomer to Italy, the rumour mills will work overtime and prejudices may come into play once the trial starts. However, while the author does a good job of painting a vibrant picture of contemporary Perugia and the culture clash that ensued when Knox became first, a suspect and then, an accused facing trial, I am not sure that she accomplished her goal of linking the culture clash to the deliberations of the professional and lay judges (the latter sometimes called jurors). Can individuals hearing testimony day in and day out and charged with the awesome responsibilities they possess in a murder trial not develop a fair-minded and relatively unbiased approach to the evidence? If the allegation is that they do not, what is it based on?

It is a difficult task for a writer of a book for a general audience to explain the intricacies of a foreign legal system to the target audience – American and other Anglo-American countries) – and

go on to describe the major moments in the trial itself. However, given that this is not the type of true crime book where the main mystery to solve is capturing the right person and putting together a solid case, it would have been helpful to have devoted more than 30 pages to the trial itself. As well, at times Burleigh descends into standard journalese. She tells us that the chief judge is a "Woody Allen look-alike" and that not only was Amanda a hippie, but the trial is taking place on the very spot where St.Francis of Assisi was held prisoner and that he was the "Western world's original hippie."

I would, for all of these flaws, recommend *The Fatal Gift of Beauty* as a lively and at times insightful account of a fascinating trial that has captured the imagination of millions around the world. Of course, a definitive account will only be achieved by some future writer and the plot continues.

Blood on the Altar: In Search of a Serial Killer, by Tobias Jones

Nina Burleigh actually begins her first chapter with a quote from the outstanding account of recent Italian history and culture, *The Dark Heart of Italy*, by Tobias Jones. Jones states, in relation to postwar Italian history:

> … surrounding any crime or political event, there are always confusion, suspicion, and "the bacillus of secrecy." So much so that dietrologia has become sort of a national pastime.

Blood on the Altar is, like the Knox case, a classic *cronica nera,* or black crime because it has lurid or sensational elements, mysterious presences and an impenetrable aspect. So, for a very long time, conspiracy theorists in Italy of all sorts can weigh in and know that it is most unlikely that they will be definitely refuted.

Blood on the Altar is one of the best true crime books and true justice books I have read. The story involves the shocking disappearance of Elisa Chaps, last seen in a church on a lazy Sunday afternoon in Potenza in 1993. She was the deeply loved 16-year-old daughter of a hardworking tobacconist and his ever-hopeful wife. Elisa was an idealist who dreamed of working for *Medicin Sans Frontieres*. I was particularly moved by the portrait Jones gives us of the family, whom he got to know over the years, and particularly of Elisa's brother Gildo. The young man who had to mature beyond his years from the date of the disappearance – he was a few credits short of a law degree but gave that up to concentrate on finding his missing sister – emerges as a true hero. Gildo not only shouldered the ongoing misery of not knowing what vile act had been done to his sister but, seeing the need to help others, founded the *Associazione Penelope* for missing persons. He realized that many others in Italy needed a support network to help keep their courage up in the ongoing struggle to carry on in the absence of an opportunity to mourn in a truly meaningful way.

The book gives a finely etched portrait of Lucania in Southern Italy. It seems somehow fitting that this deeply sorrowful tale takes place in this remote region, immortalized by Carlo Levi when he was sent there under confinement by Mussolini. In *Christ Stopped at Eboli*, Levi describes it in haunting terms as a land "hedged in by custom and sorrow, cut off from history and the State… a land without comfort or solace." The book also contains a rather eerie villain, a likely suspect whom authorities seem to fail to pursue diligently even though the family offers invaluable information to them.

By a rather remarkable coincidence Jones, sometime after failing to find the phantom criminal, moves to England. He reads in astonishment that a despicable murder has been committed in Bournemouth which will be linked directly back to the disappearance that had occurred a full, agonizing 17 years earlier. What follows is a moving account of the tracking down of Elisa's body back to the very church where the family had suspected the murder had occurred all those years earlier. The obstacles placed in the way of a full investigation, including the baffling actions of the Roman Catholic Church, lend credence to the notion that Italy is a country governed by mysterious and at times sinister forces. What shines through is the author's love of the unlovely region and of the poor, grieving family which suffered what no family should suffer but carried on with heads held high and in solidarity with others in their situation.

Rob Normey is a lawyer who has practised in Edmonton for many years and is a long-standing member of several human rights organizations.

Helping Children and Teens Deal with Separation and Divorce

Marilyn Doyle

In 2008 Statistics Canada estimated that 41% of Canadian marriages would end in divorce before the 30th year of marriage. Most agree that the divorce of parents has a profound impact on the emotional well-being of children. The legal system has recognized this issue and family justice services across the country offer parent education programs (sometimes on a mandatory basis, sometimes voluntary) to help families adjust (Inventory of Government-based Family Justice Services).

Beyond this, there are a variety of interesting online resources to help children and teens navigate this difficult passage in their lives. Note that because the issues addressed are general in scope and because divorce is governed by federal legislation, resources produced in one province can be useful in any part of the country except for sections listing support services, which tend to have a more local focus.

The Department of Justice Canada provides "What happens next? Information for kids about separation and divorce". The text can be read as web pages while the downloadable PDF version is colourful with appealing illustrations. The booklet aims to help children between the ages of nine and twelve learn about family law, and realize that it is normal for them to have an emotional response to their parents' separation.

From the Public Health Agency of Canada comes a guide for parents called "Because Life Goes On – Helping Children and Youth Live with Separation and Divorce". Again, it is available in either a webpage version or as a PDF. Topics addressed include: strategies for co-operative parenting, tips for communicating effectively with children and specific suggestions for supporting children at various ages and stages of development. The resources section includes a list of books and videos for parents, children and youth.

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Families Change is an attractive and colourful suite of websites developed by the Justice Education Society of B.C. in partnership with the British Columbia Ministry of the Attorney General. It is available in both English and French and is divided into four sections. The Kids' Guide to Separation and Divorce is aimed at children aged five to twelve. Using clickable images, a cast of characters and simple text, it addresses the law, changes, feelings, tools for coping, and the question of why. The Teen Guide to Parental Separation and Divorce deals with similar issues using more advanced text and appropriate photographs. The Parent Guide to Separation and Divorce looks at these same issues from the perspective of the adults who are trying to cope with their own feelings while supporting and communicating with their children. It also provides a section to help parents make an agreement about child support without going to court. Finally, the Parenting After Separation section presents an online course in a choice of three languages: English, Mandarin and Punjabi.

For children ages six to twelve, the interactive website Changeville (also from the Justice Education Society of B.C.) offers an interesting way to explore the changes that divorce and separation can create in a family. The user creates an avatar who can visit the Park, Legal Street, Break Up Street and the Mall, gathering information and doing activities along the way.

"Family Law Handbook: Don't Get Lost in the Shuffle" is a publication from the Alberta Civil Liberties Research Centre and the Children's Legal and Educational Resource Centre. The question and answer format of this 33-page PDF allows young people to zero in on the issues that concern them the most.

Also using a question and answer format is a small booklet from the Ontario Ministry of the Attorney General, "Where Do I Stand? A Child's Legal Guide to Separation and Divorce". Answers are short and to the point. Attractive pastel illustrations make the PDF version appealing.

The turmoil of divorce is a challenge for anyone. Children, and teens in particular, need information and support during this stressful time.

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Overhead overdone?

Peter Broder

During my youth collecting hockey cards was a rite of passage – and a few of my contemporaries continued to amass collections into adulthood. I am not a hobbyist by nature, but I do collect junk mail from cable companies. That's because I so frequently hear complaints about the number of direct mail charity solicitations that people receive, or that charities don't spend enough of their resources on programming and services. Such complaints are apt to lead into a rant about the fundraising and administrative costs of voluntary sector organizations.

People often remark that such spending is wasteful. The reason I collect the cable TV offers, which arrive every couple of weeks or so, is that I know they are wasteful. Since I don't own a television, it is rather unlikely I'm ever going to subscribe to cable. So those for-profit companies are incurring unnecessarily high administrative costs – and some of those glossy marketing efforts must be quite pricey – in the vain hope of winning me over as a customer.

And when my friends and family raise the issue of charities not devoting all their resources to front-line work, I have a ready answer.

Sometimes it is suggested that charities, because they are exempt on tax on their income and because their donors can receive

> . . . sometimes groups simply misstate their administrative costs as program expenses. If you look hard enough, it is always apparent that someone is paying to keep the lights on.

tax credits or deductions for contributions to them, ought to be more prudent in the use of their resources. It is said that we all bear the cost of charities' administrative expenses through the tax system.

More difficult, perhaps, is tackling the idea that charitable work ought to be predominantly, if not exclusively, the province of volunteers.

But under the *Income Tax Act* (*ITA*), cable companies can write their marketing costs off. Section 18 of the *ITA* provides for deduction of expenses "incurred by the taxpayer for the purpose of gaining or producing income from the business or property". So their wasteful spending is a tax expenditure too.

All this is brought to mind by two recent media reports. In one, British philanthropist Gina Miller called for a cap on the amount charities can spend on administration (including fundraising). She also took aim at what she considered high salaries in some organizations and said the sector had too many "careerists".

Meanwhile, an Edmonton group announced a for-profit initiative to offer back office services to charities at lower cost than their current administrative spending. The initiative is to be called NPO Zero.

This name plays on the unfortunate but widespread public misconception that charities can achieve zero spending on administrative costs. There are certainly groups that claim to spend nothing on back office work, and in the case of small all-volunteer organizations that might be true, but those are few and far between.

More common are medium-size or large organizations that – under accounting and Canada Revenue Agency rules – can understate or ignore their administrative costs because they are covered by in-kind corporate or personal donations. And sometimes groups simply misstate their administrative costs as program expenses. If you look hard enough, it is always apparent that someone is paying to keep the lights on.

Rather than play into misconceptions about costless administration, sector organizations and the public can take concrete steps to reduce unnecessary costs and promote a more accurate notion of the overhead entailed in running an effective charity.

Among the measures that could be taken:

- encouraging donors to make fewer, but larger gifts (since it usually costs charities the same amount to administer a donation whether it is $25, $100 or $1,000);
- encouraging adoption of standardized government and/or foundation reporting mechanisms (by having foundations such as Ms. Miller's require the same information from grant recipients, charities' paperwork could be reduced); and
- discouraging the practice of charities under-reporting their administrative costs (so that the public develops more realistic expectations about overhead expenses).

. . . charities also need to be encouraged to present a fuller picture of their work to the public so they can be judged on more than their inputs.

More difficult, perhaps, is tackling the idea that charitable work ought to be predominantly, if not exclusively, the province of volunteers. The starkest argument cited against such an approach is the suggestion that by giving a donation directly to the beneficiary, rather than the charity, one can be certain of the entire amount of the gift going to the end user, rather than being eaten up by a charity's overhead. Few people think that is an adequate solution to addressing complex social problems. There are no administration costs but there is also no value-added.

The alternative – developing sophisticated, multi-faceted organizations dealing with issues pro-actively and holistically – necessarily entails incurring overhead costs, and yes, may be more effectively accomplished by people who have made a career in the field and are remunerated in keeping with their skills and experience. Such organizations ought to be expected to keep administrative costs reasonable, but not to make a fetish of them.

Because charities' traditional reporting through the T3010 and their financial statements can give a distorted picture of their operations, and downplay organizational accomplishments that may not be fully reflected in the numbers, charities also need to be encouraged to present a fuller picture of their work to the public, so they can be judged on more than their inputs. Imagine Canada's recently launched Charity Focus provides charities with the opportunity to upload success stories and other details about their activities.

As I read the two news reports, I couldn't help thinking how those in the sector are often told to act more like their counterparts in business. That led me to wondering what the overhead costs of the new Edmonton initiative would be. But then that wouldn't be the sole criteria one used to decide whether it would be a good investment, would it?

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Whatever Happened to . . . Moore and Bertuzzi?

Peter Bowal

Introduction

Steve Moore grew up in Thornhill, Ontario. After graduating high school in 2001, he played hockey with Harvard University for a few years. In the 2003-04 season, he broke through to sign with the Colorado Avalanche of the National Hockey League (NHL), playing defense on the third and fourth lines.

In a game on February 16, 2004, he blindsided and injured Markus Naslund during play away from the puck. Naslund was the captain of the opposing Vancouver Canucks and the leading scorer in the league at the time. No penalty was called on what many thought was a cheap shot, a dangerous head shot on Naslund, who suffered a concussion and missed the next three games. Vancouver coach, Marc Crawford, was livid.

Enter Todd Bertuzzi, raised in Sudbury, Ontario. As a teenager, he stood out for the Guelph Storm of the Ontario Hockey League. After four years of playing for the OHL, he was drafted to the New York Islanders in the 1995-96 season. In addition to Vancouver, he has played on many NHL teams, including Florida, Detroit, Anaheim, Calgary and now Detroit again.

The check on Naslund turned out to have significant personal and legal repercussions for both Moore and Bertuzzi. Three weeks later, on March 8, 2004, the same teams – Colorado and Vancouver – met for another regular season game in Vancouver. During this game, Naslund's Vancouver teammate, Todd Bertuzzi, tried several times to draw Moore into a fight. Moore refused to engage.

Bertuzzi continued to pursue Moore on the ice. Finally, Bertuzzi grabbed Moore from behind and deliberately "sucker" punched him on the side of the head. The force of this blow caused Moore to immediately fall on his face to the ice, and Bertuzzi fell on top of him. Very soon, other players piled on as the benches cleared and both teams brawled.

Professional athletes are assumed to voluntarily consent to all foreseeable elements of the game. It can be said that when one plays hockey at an elite competitive level one accepts the working conditions which includes vigorous intentional physical contact.

Moore's face was lacerated and several vertebrae in his neck were broken. From this, Moore claimed to never have recovered sufficiently to play another minute of professional hockey.

The case is interesting in demonstrating how one event like this can give rise to private regulatory sanction from the league as well as criminal and civil liability.

NHL Sanctions

The NHL regulates its own member teams and players so that incidents do not get out of hand and flow over into the legal system. On-ice checking and fighting are well-accepted components of the game of hockey. Fans expect strong, tough players to protect their marquee franchise stars. Fights and player bravado, in the form of venting pent-up competitive frustrations or settling accounts, help galvanize a team and re-energize its fans, especially when it is down on the scoreboard. The NHL regulates its teams and players so that incidents do not get out of hand and flow over into the legal system. It tries to keep violence at a safe level while keeping the traditions and spirit of the game.

In this case, Bertuzzi was ejected from the game and suspended indefinitely pending final league disciplinary review and sanction. He apologized to Moore at his NHL hearing. On March 11, 2004, three days after the attack, the league continued his suspension at least through the rest of that season (20 games). His team, the Canucks, was fined $250,000. The next NHL season was suspended by a lockout and the contrite Bertuzzi was prohibited from playing overseas. Some calculated Bertuzzi's suspension to have cost him over a half million dollars in salary and approximately $350,000 in lost endorsements.

The NHL reinstated Bertuzzi on August 8, 2005.

Criminal Liability

One of the first criminal charges for professional hockey violence was the 1970 case of *R. v. Maki*, [(1970) 1 C.C.C. (2d) 333 at 336] in which the trial judge confirmed that hockey is not in a world apart from the general law:

> Although no criminal charges have been laid in the past pertaining to athletic events in this country, I can see no reason why they could not be in the future where the circumstances warrant and the relevant authorities deem it advisable to do so. No sports league, no matter how well organized or self-policed it may be, should thereby render the players in the league immune from criminal prosecution.

This voluntary assumption of the inherent and ordinary risk of the activity is known by the Latin phrase: *volenti non fit injuria*.

On December 22, 2004, Bertuzzi pleaded guilty to the crime of assault causing bodily harm after reaching a plea bargain with prosecutors in Vancouver. He was conditionally discharged, pending one year of probation during which he was not to play in any sporting activity that Steve Moore was participating in and the completion of 80 hours of community work in Vancouver. He completed his probation and avoided a criminal record.

Civil Liability

What still remains more than nine years later is the matter of civil compensation. It appears that this will not be resolved without a trial, presently scheduled to start in April 2013.

Professional athletes are assumed to voluntarily consent to all foreseeable elements of the game. It can be said that when one plays hockey at an elite competitive level one accepts the working conditions which includes vigorous intentional physical contact. The rough and tumble nature of hockey is well known. If the players do not consent to bruising contact by signing waivers, they can be taken to impliedly consent when they voluntarily step onto the ice. This voluntary assumption of the inherent and ordinary risk of the activity is known by the Latin phrase: *volenti non fit injuria*.

It is when the contact goes beyond what might be understood as the game of hockey, that the *volenti* bar to recovery meets its limits. If a player were to kick or stomp another with his skates or beat him with his stick, that would be an actionable civil battery.

A bizarre example from the boxing ring was Mike Tyson biting off pieces of both ears of his opponent Evander Holyfield in a 1997 fight. Tyson's boxing licence was suspended for about one year and he was fined $3 million by the State Athletic Commission. No civil or criminal action was taken, although legal grounds were present for monetary compensation and criminal punishment.

The sport of football has players charging and tackling other players as decisively as possible, yet these rugged physical contacts rarely break out into fights. If a fight between players does occur, the consequences imposed by the Canadian Football League are severe. Fighting is not taken lightly in the CFL. Why are fighting and violence more tolerated in hockey? Perhaps society accepts, indeed expects, that behaviour.

After Bertuzzi's plea to the crime, Moore filed a civil suit in Ontario against Bertuzzi, the Canucks team and its parent company. At preliminary hearings called discoveries, evidence suggested that Canucks' head coach, Marc Crawford, told his players that Moore had to "pay the price."

Accordingly, other parties have been added by cross-claims. The media are poised for a long civil jury trial this spring.

Some reports have Moore seeking $60 million (approximately equivalent to Bertuzzi's professional hockey earnings) to compensate him for his pain and suffering, loss of professional hockey income and aggravated and punitive damages.

Fighting is not taken lightly in the CFL. Why are fighting and violence more tolerated in hockey?

Nine years later, Moore says he continues to suffer from concussion-related symptoms. Bertuzzi continues to play at a high level for the Detroit Red Wings. Both men's lives have been deeply affected by that one punch to the head in March 2004 at the Vancouver hockey game.

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Co-Tenants and Co-Responsibilities

Rochelle Johannson

Kim and Tim are in love. They decide to move in to a new place together, and they both sign the lease. Kim and Tim fall out of love, and Kim moves out. Tim stays living in the apartment for three years, and then he falls behind on his rent payments. Three years after Kim moved out, she gets sued by the landlord for $5,000 in unpaid rent. She doesn't think this is fair. She hasn't lived in the property for three years and when she left, the rent was paid up in full. Why should she have to be responsible for an old boyfriend's debt? He's the one that didn't pay the rent, not her.

So why is Kim responsible for paying the unpaid rent? Because she signed a lease, and the lease contains a clause stating that the tenants are joint and severally liable for any debts arising from the lease. Joint and several liability essentially means that the landlord can collect the debt from all of the tenants (joint), or from one tenant alone (several). In other words, both tenants are individually responsible for the total amount of the debt. In Tim and Kim's case, Tim doesn't have any money, so instead of enforcing the debt against Tim, the landlord chooses to enforce the debt against Kim.

What does a joint and several liability clause look like? There are several forms that this kind of clause can take, for example:

> When two or more persons comprise the Tenant for the purpose of this Agreement, the Landlord may collect the rents due to the Landlord pursuant to this Agreement from any one, some or all of them. Each tenant is equally responsible for the payment of the rent. The obligations of the Tenant hereunder are joint and several.

A tenant could always ask a landlord to remove this kind of term from the lease. Chances are, however, that a landlord will refuse to do so, so the tenant will be stuck with this clause. And sometimes it won't even matter if this kind of clause is there or not, because some provinces include joint and several liability in the renting law. In other words, some laws say that if the tenants move into the same property at the same time and both sign the same lease, then the tenants are automatically joint and severally liable for debts arising from the lease.

There is an Alberta case that suggests that if a tenant provides proper written notice to the landlord to terminate the lease, then the tenant may no longer be responsible to pay the rent after the notice period.

There are few things that Kim might have been able to do to avoid this situation.

- **She could have found out about the law in her province.**
  Some provinces allow one tenant to terminate a periodic lease for all of the other tenants. There is a policy in British Columbia, for example, that a co-tenant can give written notice to end the lease, and that notice will be effective to terminate the lease for all of the co-tenants living in the property, even if the other co-tenants have not signed the notice.
- **She could have given written notice anyway.**
  Even in provinces that do not allow for one tenant to give notice to terminate the lease on behalf of all of the tenants, it might still have been a good idea for Kim to have provided proper written notice to the landlord. There is an Alberta case that suggests that if a tenant provides proper written notice to the landlord to terminate the lease, then the tenant may no longer be responsible to pay the rent after the notice period. The case was a bit different, in that the lease was originally for a fixed term and then lapsed into a periodic tenancy, but the judge essentially said that if tenants are joint and severally liable to pay the rent, then the tenants remain responsible for the debt even though the tenancy changed from fixed term to periodic. A tenant might be able to be released from this obligation to pay by providing proper written notice of termination to the landlord.
- **She could have tried to get a release from the landlord.**
  Kim could have let the landlord know that she was moving to see if the landlord would have approved her removal from the lease. In some provinces, in order to remove a tenant from a lease, all parties to the lease must agree that the tenant can be released. If Kim had had some kind of proof that the landlord had consented to release her, even if Tim did not consent, she might have been able to defend against the landlord's claim for the unpaid rent.
- **She could have talked to the landlord.**
  At the very least, Kim could have talked to the landlord. Kim might have found that her landlord was sympathetic if Kim had actually taken steps to talk about leaving. It's the

landlord who ultimately makes the decision about who they are going to sue for unpaid rent, so the landlord could have chosen not to sue Kim at all.

The Canada Mortgage and Housing Corporation has information about the renting laws in each province. There are fact sheets about the law in each province, and those sheets contain links to organizations that can help tenants who find themselves in a dispute with their landlord over debt.

Joint and several liability essentially means that the landlord can collect the debt from all of the tenants (joint), or from one tenant alone (several).

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Post-Employment Legal Obligations

Peter Bowal and Dušan Kuzma

Introduction

As with most relationships, employment relationships end. This may be by mutual parting, the employee quitting, or the employee being dismissed. The end of a relationship can mean that a few legal obligations continue. In this article, we briefly discuss the three principal post-employment obligations of workers.

1. Confidentiality Agreements

Employees often come into contact with confidential information, such as business and manufacturing processes, customer lists, and proprietary formulations that are strategic, if not essential, to business operations. Employers try to protect these interests and may take legal action against ex-employees to prevent them from sharing this information with their new employers or taking advantage of it in other ways. This is typically done by signing a Confidentiality Agreement when the employment starts.

The general rule was set out in *Tree Savers International Ltd. v. Savoy* [1991 CanLII 3952 (AB QB).

> An employee has a basic common law obligation to render faithful and loyal service to his employer during his employment. As a general rule, an employee may leave his employment and lawfully compete against his former employer, taking with him knowledge gained in his former employment, but he may not take or use against his employer any of his employer's trade secrets, confidential information or customer lists, whether during or after his employment. If he was top or senior management or a key employee, he owes a fiduciary duty to his employer, which not only encompasses the

> ordinary duties of an employee but is an enlarged, more exacting duty which endures after termination.

Violations of employment confidentiality agreements typically result in damages awarded to the employer for loss of profit to the date of trial and the value of future loss of business, goodwill and reputation.

What if the employee does not physically remove any confidential information from the employer's premises? Confidential information does not necessarily need to be physically removed by the terminated employee – the rules apply to commercially-valuable knowledge learned or memorized just as well. The employer should obtain a signed written Confidentiality Agreement from the employee before termination to ensure the strongest claim of restraint against the employee. The best time to get the confidentiality agreement signed is at the beginning of the employment in order to satisfy the common law contract requirement of consideration.

What if the employee does not physically remove any confidential information from the employer's premises? Confidential information does not necessarily need to be physically removed by the terminated employee

2. Non-competition Agreements

In appropriate cases, employers will require employees to sign a Non-Competition Agreement which prevents the employee from directly competing with the former employer after the employment has terminated. The employer's legal remedy is an injunction, although free competition is widely valued and a convincing case must be made to exclude former employees from competing:

> … if a plaintiff seeks injunctive relief on the basis of a restrictive covenant so as to inhibit the ability of a person to make a livelihood, he or she must establish a strong *prima facie* case (*Ipsos S.A. et al v. Angus Reid et al*).

Courts recognize that non-competition restrictions distort market freedoms and they ought not to be enforced unless there is strong evidence that such competition would threaten the essential survival of the employer's business. Moreover, restrictions must not be unreasonable and overly broad. In *J.G. Collins Insurance Agencies Ltd. v. Elsley Estate* [1978 CanLII 7 (SCC), [1978] 2 S.C.R. 916], the Supreme Court of Canada said employers must establish that the restrictive covenant is reasonable and in the public interest. The 1998 British Columbia decision of *Aurum Ceramic Dental Laboratories v. Wang* [1998] B.C.J. No. 190 (SC)] set out the requirements to render restrictive covenants enforceable:

(a) it protects a legitimate proprietary interest of the employer;
(b) the restraint is reasonable between the parties in terms of:
  (i) length of time;
  (ii) geographical area covered;
  (iii) nature of activities prohibited; and
  (iv) overall fairness;
(c) the terms of the restraint are clear, certain and not vague; and

(d) the restraint is reasonable in terms of the public interest with the onus on the party seeking to strike out the restraint.

The length and geographical area of the restriction are dependent on the industry. A typical restriction on time is 6 to 24 months and the area can be as small as a local neighbourhood or as expansive as province-wide.

Courts recognize that non-competition restrictions distort market freedoms and they ought not to be enforced unless there is strong evidence that such competition would threaten the essential survival of the employer's business.

3. Non-solicitation Agreements

Employees often naturally wish to maintain relationships with their former co-workers or customers, often without any speculative interests. Is it legal to ask an ex-colleague to join the new employer? Is it legal to ask the customers that ex-employees perhaps acquired for the previous employer to follow them to a new employer?

This type of solicitation of former co-workers and customers is not legally acceptable for senior employees who have departed an employer. In the case of *Anderson, Smyth & Kelly Customs Brokers Ltd. v. World Wide Customs Brokers Ltd.* [1996 ABCA 169], the Alberta Court of Appeal stated, "Direct solicitation of the former employer's clients by the departing or departed employee is not acceptable where the employee is a fiduciary of the employer."

Non-senior, non-fiduciary employees are more free to solicit from the former workplace unless there is a specific, written non-solicitation agreement in place.

Conclusion

Most employees should have few concerns about ongoing legal obligations to their employers after they end their employment. More restraint and discretion will be expected of departing senior, key workers (called "fiduciaries").

Employers should be aware that courts try to balance the individual employee's right to move on and earn a living with the former employer's need for protection of its legitimate proprietary business interests. Employers should consider whether they need, and can enforce, any post-termination restraints on employees. If so, they should approach restraint by considering the least intrusive to the most intrusive; namely from non-solicitation to confidentiality to non-competition. These post-termination obligations should always be justifiable, reasonable and contained in a written contract, preferably the original contract of employment.

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