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## Viewpoint

Senator Grant Mitchell

# Climate Change and Human Rights

Perhaps one of the most striking things about the relationship between human rights and climate change is that we have not heard more about it. In fact, unless you are a serious student of the philosophy of rights or of the seemingly infinite number of reports and studies issued by the United Nations, chances are that you have heard almost nothing about it.

This is odd, really, because there is what seems to be an obvious causal link between actual and predictable climate change effects and the human rights impacts they incur. Climate change effects include violent storms, drought, rising sea levels, floods, forest destruction, glacier melt, disease, employment and excessive heat, among others. Classic and commonly accepted human rights include the right to life, water, health, housing, security, and food.

The two lists do not complement one another; they collide head on to establish the link between effects and rights. Matching any of the effects to pretty much any of the rights makes the point. Floods wreck farm land and destroy homes, challenging rights to food and housing. Rising sea levels have much the same impact along coastal communities. Excessive heat challenges the right to health and to water. Any number of the effects can displace people or diminish critical resources like water, creating the conditions for “climate wars” and the profound impact that wars have on human rights of all kinds. Most of these effects also damage economies, affecting their ability to provide for rights such as food, water, employment, security, etc.

Underlining the human rights impact of climate change is the fact that those whose rights are already most challenged are those who will be most vulnerable to climate change. It is estimated that the poor of the world will suffer the greatest harm because they will not have the resources to adjust. Considering that 70% of the world’s poor are women, women may well bear a disproportionate burden of climate change effects.

Why has this link not become more apparent in either the debate on climate change and human rights? There has certainly been a debate amongst human rights philosophers about whether climate change has human rights implications, but it has been inconclusive. Critical in this discussion is the notion that rights involve an obligation between two parties, begging the question of whether there can be an obligation to someone who is not yet alive over a harm that may occur in the future. Yet, if someone 50 years from now is

*Generally, the climate change debate has dealt with the effect of climate change on states and economies and seldom seems to relate the impacts directly to people. Human rights are about people and often their suffering, bringing to bear a critical and perhaps more human and compelling element in arguments for climate change action.*

required to repay a debt incurred by their grandparents today or lose their house, surely there is an irrefutable, intergenerational obligation that sustains a rights relationship.

Reference to human rights in the climate change debate may well have been subdued by the prominent focus on the responsibility of people to take environmental action. Here, the omission is less one of definition than it is of tactical advantage. A focus on human rights, in addition to making sense and being the right thing to do, brings a new and compelling element to the argument for climate change action, at a time when those arguments seems to have reached the limit of their ability to convince. (It might be said that we do not need new technologies to reduce GHG emissions; we need new technologies to convince people that we need to take action on climate change).

Generally, the climate change debate has dealt with the effect of climate change on states and economies and seldom seems to relate the impacts directly to people. Human

rights are about people and often their suffering, bringing to bear a critical and perhaps more human and compelling element in arguments for climate change action. Like climate change, human rights theory and practice transcend borders, reinforcing the arguments that climate change brings with it international obligations and the need for leadership internationally. The human rights community is also populated with articulate activists experienced in making difficult cases, constituting a needed source of climate change reinforcements.

Consistent with the promise of this approach in making the climate change case, the focus on human rights and climate change is beginning to build. The United Nations Human Rights Council, the Council of Europe, the Australian Human Rights Council and the International Council on Human Rights have all issued reports and/or resolutions dealing with this issue in the past few years. There is some academic work that is making this case as well. However, the arguments they make have not been inte-

grated into the mainstream of the climate change debate.

Perhaps the most trying feature of the climate change debate is that there are so many who do not accept that it is occurring, or that human activity is causing it (To which it should be said that if we are not causing it, then we have a real problem because we therefore have no chance of fixing it). Once we accept it and get started on fixing it, experience tells us that the opportunities are great, the costs will be far less than predicted and the world will be improved. Considering human rights in this context will reflect an important reality of climate change, should heighten our sense of obligation to others, many less fortunate than us, both at home and internationally, and aid in making the case for climate change action.

*Senator Grant Mitchell, of Edmonton, Alberta is the co-chair of the Senate Committee on Energy, the Environment and Natural Resources, in Ottawa Ontario.*

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## Bench Press

Teresa Mitchell

### The Media and Publication Bans

The Supreme Court of Canada has settled the question of automatic bans on media reporting of bail hearings if the accused person asks for one under s. 517 of the *Criminal Code*. One of the cases before the Supreme Court was an appeal of an Edmonton man, Michael White, convicted of the murder of his pregnant wife. The Court stated that publication bans are sometimes necessary and whether or not they are justified depends on the context. It noted that one reason for such bans is to ensure that accused persons are not punished at a time when they should be presumed innocent. While such bans may infringe the Charter guarantee of freedom of expression, the infringement can be justified as a reasonable limit in a free and democratic society. The majority wrote "...on balance, the deleterious effects of the limits on the publication of information are outweighed by the need to ...avert the disclosure of untested prejudicial information – in other words, to guarantee as much as possible trial fairness and fair access to bail. While not a perfect situation, the mandatory ban represents a reasonable compromise." *Toronto Star Newspapers Ltd. v. Canada* Supreme Court of Canada June 10, 2010 <http://scc.lexum.umontreal.ca/en/2010/2010scc21/2010scc21.html>

### Was it Negligent or Intentional Harm?

Employers may face an action by employees for intentional infliction of mental suffering but not for the negligent infliction of mental suffering, according to the Ontario Court of Appeal. It recently decided that there are public policy considerations that prevent the extension of the tort in negligence, noting "...no Canadian appellate court has recognized a free standing cause of action in tort against an employer for negligent infliction of mental suffering by an employee..." It noted that abusive behaviour which occurs in the course of employment already can lead to an action for constructive dismissal, for which

damages are available. Intentional infliction of mental suffering is another matter, and the Court of Appeal ruled that employees may sue their employers for this conduct. The Court said that to prove this tort, there must be conduct which shows reckless disregard for the emotional well-being of the plaintiff, and that is calculated to cause harm. *Piresferreira v. Ayotte*, Court of Appeal for Ontario May 28, 2010 [www.canlii.org/en/on/onca/doc/2010/20100nca384/20100nca384.html](http://www.canlii.org/en/on/onca/doc/2010/20100nca384/20100nca384.html)

### The Right to Defend Property

Canadians have the right to defend their personal property under s. 39 of the *Criminal Code*, but they must use only reasonable force to do so, the Supreme Court of Canada has ruled. A Lieutenant-Colonel in the Canadian military was court-martialed for assaulting his wife in a dispute. She threw his framed graduate degree on the floor and he retaliated by pushing her down the stairs. He appealed his court-martial, arguing that he had the right to defend his property. The Supreme Court of Canada rejected his appeal, agreeing that he had used disproportionate force in all of the circumstances of this case. Justice Abella wrote "... He used force because his wife threw to the floor a framed and easily replaced piece of paper of sentimental value." *R. v. Szczerbaniwicz* Supreme Court of Canada May 6, 2010 <http://scc.lexum.umontreal.ca/en/2010/2010scc15/2010scc15.html>

### Grandparents v. Parent

The mother and the paternal grandparents of a little New Brunswick boy recently asked the Court of Appeal to decide custody and access. The child had been living with his father and his paternal grandparents when the father was killed in a car accident. His mother asked for custody arguing that, in a custody dispute between a parent and a non-parent, the court should first decide the fitness

of the parent by determining if the safety and development of the child is in danger, and then decide custody on the best interests of the child test. The grandparents argued that the best interests test is the only test. They also suggested that this child's safety and development was threatened because the mother refused to get rid of her numerous pets despite the child's severe respiratory problems. The Court of Appeal ruled that the sole test for custody is the best interests of the child, noting that the provincial *Family Services Act* states that the best interests of the child are paramount to all other considerations, including the family unit. It quoted an Ontario case which said that "The right of a biological parent is thus a secondary consideration to the best interests of the child." The Court of Appeal also ruled that, in this case, the child's safety and development was threatened by the mother's behaviour.

*J.F. v. T. E. and G.E.* Court of Appeal for New Brunswick February 25, 2010 [/www.canlii.org/en/nb/nbca/doc.2010/2010nbca14/2010nbca14.html](http://www.canlii.org/en/nb/nbca/doc.2010/2010nbca14/2010nbca14.html)

### Alberta Company Prevails

An Alberta oilfields supply company was recently successful in blocking an arbitration award obtained by a Russian construction company for approximately \$1 million because the limitation date had passed. The Russian company obtained the arbitration award in a hearing held in Russia by the International Commercial Arbitration Court. It asked the courts in Alberta to enforce the award, but the Court of Appeal ruled that it was barred by the Alberta Limitations Act. The Supreme Court of Canada agreed. It wrote "The only Alberta law applicable to the recognition and enforcement of foreign arbitral awards is the Limitations Act... the scheme of the Limitations Act and its legislative history indicate that the Alberta legislature intended to create a comprehensive and exhaustive limitations scheme applicable to all causes of action except those excluded by the Act itself or covered by other legislation. Foreign arbitration awards are not so excluded and are therefore subject to the Limitations Act".

*Yugraneft Corp. v. Rexx Management Corp.* Supreme Court of Canada May 20, 2010 <http://scc.lexum.umontreal.ca/en/2010/2010scc19/2010scc19.html>

# Greenhouse Gas Roundup: Canadian Climate Law from Sea to Sea

**Adam Driedzic**

The much-anticipated Copenhagen Accord has come and gone. Whether a success, a failure, or irrelevant, the international climate change regime has had one significant impact on domestic policy: of all the ways in which the law could respond to a changing climate, the prevailing approach is to regulate human emissions of greenhouse gas (GHG). There is consensus that one unit of GHG equals one ton of carbon dioxide but mass disagreement over how much to reduce and where to count from. Consider the table to the right:

These differing aspirations receive much more attention than they deserve. In the words of Ontario's Environment Commissioner: "Having targets is important ... but having tools and techniques to meet those targets is critical." The question is not what, but how.

The options are to release less or store more. The option to control releases to date has focused on burning fossil fuels. This approach will prove to be incomplete as we learn to account for emissions from agriculture, forestry, and other land use changes, but it is addressing the biggest sources first. The storage, or "sequestration", approach is more inclusive. GHG can be captured with technology or removed from

	2020 Target	Baseline
British Columbia	33%	2007
Alberta	50%	Business as usual
Saskatchewan	20%	2006
Manitoba	6% (2012)	1990
Ontario	15%	1990
Quebec	20%	1990
Nova Scotia	10%	1990
Canada (Kyoto Protocol)	6% (2012)	1990
Canada (Copenhagen Accord)	17%	2005
Canada (Government Policy)	20%	2006
Canada (Bill C-311)	25%	1990

the atmosphere by plants and soils. For example, Alberta's *Climate Change and Emissions Management Act* defines a "sink" as: "1(e)(i) a component of the environment that removes or captures specified gases from the atmosphere through natural processes and includes, without limitation, plants and soil, and (ii) a geological formation or any constructed facility, place or thing that is used to store specified gases."

When it comes to storage, natural and industrial features are equal under the law.

An emissions regime can combine approaches, but to have credibility, it must mandate real reductions. The available tools include voluntary measures, market instruments, state command and control, and even litigation. Market instruments are the most widely used. One type is an incentive; for example, investment in renewable energy. The other type is a charge, like a carbon tax. Cap and trade is a combination of incentives and charges. Emitters who stay under the limit will have permits to sell, while those who go over are forced to buy. Offsets add an extra dimension. Allowing emitters to negate their own releases by funding storage elsewhere provides incentives for climate-friendly projects, but an ill-conceived program jeopardizes real reductions. All of these tools need legislation, and examples of such laws are emerging across Canada.

## A Cross Country Checkup

British Columbia is addressing both releases and storage. A carbon tax is in effect and cap and trade legislation is partly in force. Trading would take place at the regional level with the other provinces and U.S. states that comprise the Western Climate Initiative (WCI). B.C. has also lauded its wealth of forests as a carbon sink and has passed a *Zero Net Deforestation Act*. B.C. is a legislative pioneer but will face pressure to be even more creative. Consider the mountain pine beetle epidemic, itself aggravated by climate change, which could release more GHG than Alberta's oil sands.

Alberta is relying primarily on storage, specifically "industrial carbon capture and storage" (CCS). For this initiative, two billion dollars in public funds has been awarded to four large projects in advance of regulations. Unresolved liability issues are significant both for storage failure and the risks associated with concentrating industrial pollution. Alberta was first in Canada to regulate releases, requiring that large facilities reduce the intensity of their emissions relative to production. The options for those facilities that do not improve performance include paying into an investment fund, buying credits from a compliant facility, or buying offsets from an unregulated party. Some, like low-till cropping, aim to make land

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a better sink, but others directly target farm emissions from livestock and waste. Recognizing that agriculture is its own source of GHG is an important step that can open the door to future compliance obligations. The immediate concern is an offset program that favours industrial agriculture, which could negate any real reductions. Alberta Environment claims to be “leading on the climate change file among Canadian jurisdictions” but the Pembina Institute for Appropriate Development has accused the province of making false reduction claims. CCS remains speculative and the intensity approach actually allows emissions to increase. Alberta might have done the most but accomplished the least.

Saskatchewan’s approach resembles Alberta’s: leading on some measures and following on others. Saskatchewan has a model CCS facility and hosted Canada’s first pilot project to develop agricultural offsets. Whether it will control releases is uncertain, as the proposed Bill-126 (*Management and Reduction of Greenhouse Gases Act*) defers the matter to private agreements between government and regulated emitters.

Manitoba has done something completely different. Its recently amended *Environment Act* now requires that GHG and energy efficiency be considered in assessing the impacts of any proposed development. This provision basically makes climate change a substantive component of environmental assessment, meaning that good planning decisions could result in less releases and more storage. The amendments also define “pollutant” as anything that harms the environment and provide for enforcement in that case. A *Climate Change and Emissions Reductions Act* targets both coal and unconventional GHG sources including landfills and petroleum use by off-grid communities. A private members’ bill on stronger reporting requirements would facilitate participation in the WCI. Manitoba is easy to overlook but it is already wielding a spectrum of tools.

Ontario resembles Manitoba in that it is pursuing carbon trading, but must phase out coal to meet its targets. The *Green Energy and Green Economy Act* is in force as are amendments to the *Environmental Protection Act* for reporting and reduction obligations. There is little action on storage from this province with significant agriculture, forestry, and land use change. Ontario’s Environment Commissioner has issued a report finding that the plan is unlikely to succeed due to over-reliance on timely implementation.

Quebec is also relying on the market, having passed carbon tax legislation and released draft cap and trade legislation. This strategy prioritizes transportation emissions because 48% of provincial energy use is already from renewable sources. Quebec is a unique province as it enjoys high per-capita energy consump-

*All provinces are doing better than the federal government. With a policy that shows no intention or ability to comply with the Kyoto Protocol, Canada has made failure a success.*

tion but low per capita GHG. These numbers might be different if the current regime accounted for emissions from land use change, for example the loss of boreal sinks to hydroelectric mega-projects.

Nova Scotia is targeting numerous emission types from provincially owned power plants. Legislation was passed after much consultation and is accompanied by formal agreements to facilitate municipal involvement. The proposed cuts are ambitious for a coal-dependent province that cannot immediately avail itself of CCS. Nova Scotia must rely on the power of public participation, but by making the connection between GHG and industrial pollution, it can offer better quality of life as an incentive.

Jurisdictions with no emissions law in force include New Brunswick, Prince Edward Island, Newfoundland and Labrador, Yukon, the Northwest Territories, and Nunavut, but there are few without a climate change plan or activities strategy.

Self-interest is fairly evident in provincial approaches. Fossil fuel-dependent provinces prefer intensity management and CCS. Hydroelectric provinces support carbon charges. If we explored responses to climate change other than emissions regulation we would find a similar pattern: petroleum importers have transportation strategies, grain growers make biofuel mandatory, and coastal provinces are already focused on adaptation.

As with the case of differing targets, different approaches are not necessarily a problem. “Harmonization” and “integration” are primarily concerns for those provinces pursuing interjurisdictional carbon trading. For the rest, Alberta Environment correctly notes that the right approach is dictated by the source. The concern, however, is that jurisdictions are simply cherry-picking. Alberta chooses to charge producers while B.C. charges consumers, but does Alberta really have lower vehicle emissions than British Columbia? It is encouraging to see the most action coming from the largest emitting provinces, but the most encouraging action is coming from the smaller ones. A movement calling for leadership from the top finds the best examples at the bottom.

All provinces are doing better than the federal government. With a policy that shows no intention or ability to comply with the Kyoto Protocol, Canada

*To properly consider adaptation, governments will have to admit that these same practices reduce ecosystem resilience. The award for good climate law would then go to those regimes that conserve, protect, reclaim, and enhance the environment. These are the basic objectives of environmental law, and are missing from much current legislation.*

has made failure a success. The last federally proposed reduction program basically replicates the Alberta regime with even more compliance options. Federal regulations, real or proposed, will be under the *Canadian Environmental Protection Act (1999)*.

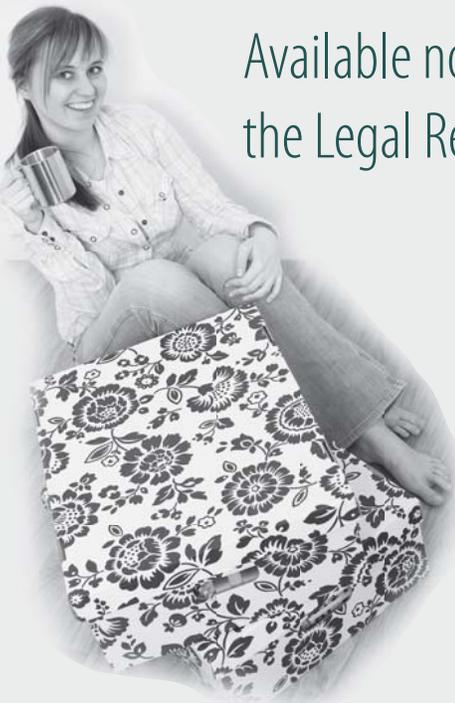
The most significant action on climate change at the federal level is an assault on government policy. *Friends of the Earth v. Canada (Minister of the Environment)* featured an attempt to force state compliance with the *Kyoto Protocol Implementation Act (KPIA)*. The Federal Courts held that the Act was unenforceable and the Supreme Court of Canada denied leave to appeal. This dispute could be repeated in the matter of Bill C-311 (*Climate Change Accountability Act*). This private members' bill replaces political considerations with scientific ones, but in its basic scheme and on the strength of its language, it largely replicates the *KPIA*. Bill C-311 was still in the House of Commons when *Friends of the Earth* met its end, which would have been the time to prescribe actual reduction measures.

## Who Will Guard the Homestead?

No matter what jurisdiction or approach is taken, emissions regulation is damage control. The need to adapt to a changing climate will surpass the need to reduce emissions before sufficient progress is made on that front. Existing climate policy barely recognizes that the same practices of consumption and expansion are responsible for increasing emissions and decreasing sinks. To properly consider adaptation, governments will have to admit that these same practices reduce ecosystem resilience. The award for good climate law would then go to those regimes that conserve, protect, reclaim, and enhance the environment. These are the basic objectives of environmental law, and are missing from much current legislation. It is also an approach where the international climate change regime provided little guidance. As the year of Copenhagen gives way to the International Year of Biodiversity, the jurisdictions leading on the climate file will be the ones who connect the issues.

*Adam Driedzic is a lawyer with the Environmental Law Centre in Edmonton, Alberta.*

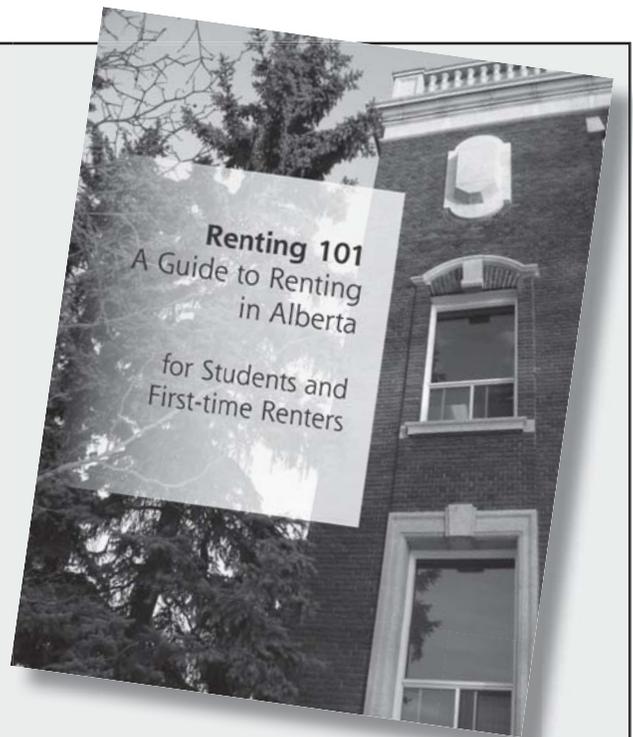
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# The Right to Water

## World water scarcity makes the right to access a key question

Sheryle Carlson

As we enter into yet another year facing a global water crisis, March 22nd marks the United Nations designated World Water Day. The UN reports an estimated 1.1 billion people still rely on unsafe drinking water, despite the fact that since 1990, 1.6 billion people have gained access to safe water. Vandana Shiva, author and environmental activist, believes, “Water wars are not a thing of the future. They already surround us.”

Melting glaciers, rising sea levels, droughts, water pollution, and a global population explosion charged the warnings and notions for the water wars many predicted. And while world-wide water shortages are being blamed on climate change, mismanagement, corruption and contamination play large factors in who has access to clean drinking water. Obtaining water rights is a high political priority and lobbying for water human rights is major popular movement and Alberta is no different.

Last summer, 10 Alberta counties declared states of drought emergency and 2010 is being predicted as the

seventh year of below average water supplies in the last decade. CBC reported that the last major drought in 2001 – 02 was one of Canada’s most expensive natural disasters, costing the Canadian economy \$5.8 billion.

Alberta Environment recorded last year’s major river basins water flows as being below to much below average, including the North Saskatchewan and Bow Rivers. In January 2009, low flows in the Athabasca River finally spurred Alberta Environment to recognize the need to cap oil sand companies’ water withdrawal during low flow times.

And the Alberta government has noticed. In September 2008, Minister of the Environment Rob Renner announced a re-examination of Alberta’s water allocation system. In 2003 the “Water for Life: Alberta’s Strategy for Sustainability” was released to provide the government with a roadmap focused on three main goals: safe, secure drinking water, healthy aquatic ecosystems and reliable, quality water sup-

*Canada does not recognize water as a human right. By law, this protects the right for governments to allow the selling of water in bulk and via licenses.*

plies for a sustainable economy. It also included evaluation of the use of economic instruments to manage water demand.

Its predicted legislative changes may happen in this fall's sitting, although the government is uncertain about the exact timeline. Why a re-examination? Alberta Environment spokesperson, Cara Tobin answered, "Everyone knows that water is a scarce resource, so what we're trying to do here is develop an allocation system that takes that into consideration. This is to bring us forward to the next 100 years."

In the wake of the announcement, Alberta Environment commissioned reviews this last winter to examine current water allocation systems by three groups: the Alberta Water Council, the Alberta Water Research Institute, and a Minister's Advisory Group.

Environmental organizations have released their own reports and campaigns and are concerned changes to the province's water allocation will fail to protect water as a human and ecosystem right by allowing water licenses to enter into a deregulated private market.

Under the current allocation system, water licenses are distributed by first-in-time, first-in-right principles, known as FIT FIR, or the system of prior allocation. Industries and municipalities all own licenses, some over a hundred years old. Senior license holders have the first priority and new licenses must be negotiated.

In times of water shortages, this system of allocation presents potential water-sharing problems. Water licenses are not allocated by percentages but by amounts, and senior license holders have first priority to water regardless of what they use it for.

Presently the Alberta *Water Act* includes a transfer system that allows the accommodation of new or alternative users in an area where the allocation

of water has reached its limit. These transfers can involve a financial transaction.

When asked whether there were any problems of over-allocation, Tobin stated, "I don't think that there were problems; we just understood that there needs to be a more robust system that could accommodate the allocation and re-allocation of water to high value users."

"One of the fundamental questions to what is unclear is whether the government is going to open up the seniority system for water licenses holders in the FIT FIR system," Jason Unger from the Environmental Law Centre conveys. "It's of primary concern and interest because the South Saskatchewan River basin is considered over-allocated. There is potential for continued environmental harms to occur with a lack of easy or efficient mechanisms to protect the environment. The large licenses are for irrigation and cover a large chunk of the licenses."

According to Tobin, in the government's review of the allocation management system, the Environment Minister said that everything's on the table.

Sheila Muxlow from the Sierra Club (Prairie) believes this is a very encouraging remark which she says could suggest an opportunity for effective policy change to happen and bring our water policy into the 21st century. Muxlow however, is sceptical that FIT FIR will be evaluated. "Senior licenses were not given because of a higher ordained purpose. License holders were given this water because they needed it for a diversity of uses and essentially they got there first. The transfer system which allows water licenses to be bought, sold and traded in a water market is giving them the right to make a profit on a public good that was given to them for free. The FIT FIR system provides no protections that ensure enough water is kept in our rivers and streams—meaning that legally a license holder could run a river dry."

At the 5th World Water Forum in Istanbul in March of last year, the ministerial meeting released a statement that recognized "access to safe drinking water and sanitation is a basic human need" while dissenting country members called for water to be recognized as a human right within the United Nations *Charter*.

According to the UN, "this right has not been clearly defined in international law and has not been expressly recognized as a fundamental human right; rather, a right to water is interpreted as being an implicit component of either existing fundamental human rights, or is expressly included in non-binding instruments that are designed to achieve specific ends."

Of course, Canada does not recognize water as a human right. By law, this protects the right for governments to allow the selling of water in bulk and via licenses. Historically, Canadian water law has been held

*The global water market is estimated to be worth between \$400 and \$500 billion. Water is considered a market of the future; while its demand is soaring, reserves are being over-allocated and ecosystems around the globe are suffering.*

by common law, which claimed Crown ownership over any water in Canada, and licenses over water use were established on a first-come, first served basis, as they have continued to be here in Alberta also.

Council of Canadians and water activist Maude Barlow contends in her book *Blue Gold* that “because the world’s fresh water supply is a global commons, it cannot be sold by any institution, government, individual or corporation for profit.”

The global water market is estimated to be worth between \$400 and \$500 billion. Water is considered a market of the future; while its demand is soaring, reserves are being over-allocated and ecosystems around the globe are suffering.

Barlow recently wrote that the privatization model has proven to be a failure, “high water rates, cut-offs to the poor, reduced services, broken promises and pollution have been the legacy of privatization.”

When asked whether the Alberta government considers water access a human right, Tobin replied, “I can’t answer a question like that. That’s a policy-related question that you have to ask the Minister. We already acknowledge that water is important for people and our recommendations will reflect that.”

Today, Unger believes we are “caught in a situation where allocation decisions contribute to a system whereby gaining environmental flows will be difficult to achieve. This raises ethical issues in terms of purchasing flows back to the river, and the money people will obtain for selling licenses will be considered as private gains.”

While the government won’t make clear whether they will adopt a deregulated water market license system, Water Matters and Ecojustice have forthcoming recommendations in adopting a “share based” system currently being used in Australia and Colorado, which “would provide an entitlement to a “share” of the available water rather than to a fixed volumetric amount in acknowledgement of priority of water set aside for environmental protection, Aboriginal rights, and basic human needs.” However, this proposed system would still incorporate FIT FIR and still allow senior license holders to make a profit from the transfer of their licenses.

Of the three groups that provided reports to the Environment Minister, the Minister’s Advisory Group concluded that, overall, FIT FIR “continues to be a reasonable basis for allocating and reallocating water in Alberta at this time,” and recommended the removal of “barriers to the transfer of water allocations except those that are genuinely required to protect the environment and the rights of other water users.”

Twenty-five organizations from across the prairies criticize the FIT FIR system for not prioritizing human water needs and the environment, outlined

*[Jason] Unger, with the Environmental Law Centre which participated as a stakeholder in the Alberta Water Council, hopes “that the general public will become engaged in an informed and broad discussion in amending some fundamental issues to our water law.”*

in a 2009 report “The Prairie Water Directive.” The groups compare Manitoba’s licensing system that operates on a modified FIT FIR assigning priority to domestic water use. Saskatchewan no longer uses FIT FIR.

Another of the three recommending bodies, the Alberta Water Council—a multi-stakeholder group—advocated an active water allocation transfer market that must be fair to all participants. Interestingly, the committee struck by the Alberta Water Council was given the restrictions that they weren’t able to do away with the FIT FIR system and had to give recommendations on how to improve the present allocation system by building upon it.

In Sierra Club Prairie’s “Got Thirst?” campaign addressing these issues, presentations are being made to the public. Muxlow says people’s reactions are of shock and concern.

“This government is not new to making adverse decisions to the interests of the public. This is just another example of where the Alberta government is working in the interest of a narrow economic agenda and not in the general public interest. When it comes to the impacts government decisions are having on water, maybe we’ll start seeing people taking more direct action when it comes to demanding their rights are protected by the government.”

Unger, with the Environmental Law Centre which participated as a stakeholder in the Alberta Water Council, hopes “that the general public will become engaged in an informed and broad discussion in amending some fundamental issues to our water law.”

According to the Sierra Club, Alberta Environment will be deciding upon public consultations for the water allocation review and that official recommendations considered by the government will likely be put out within the next few weeks.

*Sheryle Carlson is Associate Director with the Sierra Club Prairie Chapter. The Sierra Club is a member-based organization involved in environmental advocacy.*

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# Ancient Wisdom Matters in the Modern World

John B. H. Edmond

*The Wayfinders: Why Ancient Wisdom Matters in the Modern World* by Wade Davis,  
2009, House of Anansi Press, Toronto, Ontario

We live in, not only a physical but also a cultural environment, the latter always involving relationships between man and the natural environment. For Wade Davis, author of *The Wayfinders: Why Ancient Wisdom Matters in the Modern World*, the “departure points for all inquiry” are the “*how* and *why*” of these relationships: “Our entire existential experience as a species over the past 50,000 years may be distilled into [these] two words.” This is his embarkation point for a sweeping review of diverse cultural adaptations, from the San of the Kalahari to the Anaconda people of the Amazon to Australian Aborigines to the Buddhists of Nepal. Ultimately, for Davis, the preoccupation of the “rational mind” of the Enlightenment with *how* ignores the *why*, reducing “the world to a mechanism, with nature but an obstacle to overcome, a resource to be exploited.”

This work is the published version of the 2009 Massey lectures, the annual CBC Radio Ideas series

presented by noted scholars. Wayfinders are less navigators than leaders able to find their way – literally or figuratively – by reading clues whose meaning is ancient cultural lore. “Primitive” is not in Davis’ vocabulary: “all cultures share essentially the same mental acuity. Technology is “the great achievement of the West” (*a* great achievement might be more accurate), while Australian Aborigines instead untangle “the complex threads of memory inherent in a myth.” In the Amazon, the norms and ceremony of harvesting and hunting create “what is essentially a land management plan inspired by myth.” Davis is at his most absorbing when he draws on his training as an ethnobotanist and anthropologist, revealing and interpreting for us the intricacies of the many cultures he knows intimately from his travels.

Davis’ ultimate purpose is political. As it emerges in the final lecture, it is to explain “why ancient wisdom matters in the modern world.” His answer:

“Two words will do. *Climate change*.” “To define perpetual growth on a finite planet as the sole measure of economic well-being is to engage in a form of slow collective suicide.” The nearly a score of cultures Davis discusses “are very much alive and fighting not only for their cultural survival but also to take part in a global dialogue that will define the future of life on earth.” Their voices matter “because they can still be heard to remind us that there are indeed alternatives.” Though we are not asked to “naively ... mimic the ways of non-industrial societies” or renounce “the genius of technology,” little guidance is offered for a middle way. To be fair, his topic is not economics or even ecology, so to expect specific remedies may be to ask too much. Yet except in the sense that we are undoubtedly wiser to know of other cultures, they can hardly, even on Davis’ own terms, truly be alternatives.

Closer to home, Canada’s First Nations and Inuit are by no means left out of Davis’ account of cultures and places on the threshold of change. Davis is an admirer of Nunavut, “a homeland roughly the size of western Europe now under the administrative control of 26,000 Inuit people.” Its “very existence is a powerful statement to the world that Canada recognizes that unique ethnicities, indigenous peoples, First Nations, do not stand in the way of a country’s destiny; rather they contribute to it, if given a chance.” A recent report, though, raises a dilemma for Davis. It seems the Nunavut government does not support listing polar bears as a threatened species, as, according to Inuit traditional knowledge, they can adapt to climate change. This puts them at odds with scientists of the Polar Bear Study Group of the International Union for the Conservation of Nature who accuse the government of “mis-statements [warranting] direct rebuttal.” On climate change, Davis writes, “There is no serious scientist alive who questions the severity and implications of this crisis.” It would be interesting to know which side Davis would support.

Davis is less generous to resource policies of British Columbia where he was born and spent much of his youth. As the National Geographic Explorer-in-Residence in Washington, D.C., he finds time to spend in the north of the province. With perhaps a degree of dramatic licence, he asserts, “the Stikine is where I live.” Davis is at his most political when most local. The Stikine, the most northerly of B.C.’s Pacific rivers and home of the Tahltan Indian Band, has as its major tributary the Iskut. The Iskut and two other major northern rivers, the Nass and the Skeena, share as their source the Togadin Plateau. This area is known to conservationist First Nations people and other aficionados

*Davis’ ultimate purpose is political. As it emerges in the final lecture, it is to explain “why ancient wisdom matters in the modern world.” His answer:*

*“Two words will do. Climate change.”*

as the Sacred Headwaters. It has come to be one of the more controversial regions in B.C. as a result of several industry proposals to extract copper, gold, and coalbed methane, and operate a run-of-river power development. In 2005, elders were arrested for a road blockade. The National Geographic published a lengthy article by Davis critical of the proposals. Davis has also created a 60-second radio spot that can be found at [www.sacredheadwaters.com](http://www.sacredheadwaters.com).

But Davis shades the truth when he writes, “Against the wishes of all First Nations, the Government of British Columbia has opened the Sacred Headwaters to industrial development.” In fact, the Tahltan demonstrate in microcosm the perpetual tension in British Columbia between preservation and development. Elders may be concerned at change, but their elected chief, Jerry Asp, founded the Tahltan Nation Development Corporation in 1985. The Tahltan and Iskut bands and the Tahltan Central Council are its owners. It has cleared roads into remote mines, built mine sites, and operated an open-pit mine. The company claims to be the largest First Nations-owned and operated heavy construction company in western Canada. Shell explored for coalbed methane under contract with the company and agreed to a two-year moratorium to facilitate consultation. Asp’s role is controversial in the communities, but he has been re-elected chief. He is also vice-president of the Canadian Aboriginal Minerals Association. Ironically, community income from mining – the unemployment rate is six percent (almost unheard of among First Nations) as a result of Barrick Gold’s Eskay Creek mine, where Tahltan hold over a third of the jobs – may well underpin the luxury of opposition by some members to more development. As Eskay Creek runs out, the Tahltan miners want new mines opened. Davis mentions none of this.

*Davis is an admirer of Nunavut, “a homeland roughly the size of western Europe now under the administrative control of 26,000 Inuit people.”*

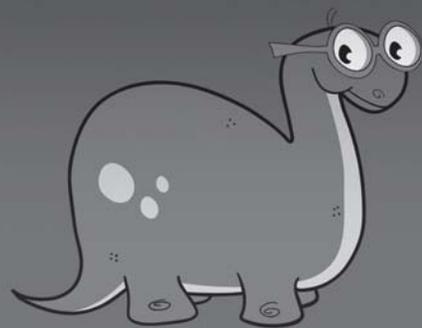
*Where the assessment process is wanting, the courts have a role. This spring, the Supreme Court of Canada found inadequate the federal assessment of the Red Chris porphyry copper-gold mine project, located on the Togadin Plateau – the “Sacred Headwaters.”*

It is not as if progress in British Columbia is unbridled. In 2007, the province and the Tahltan Nation announced a Restoration Plan to “assess and address the impacts of past mineral exploration and development activity within Tahltan territory.” Despite the cynicism of some, the environmental assessment process addresses the social and cultural effects of proposals. In 2007, a joint federal-provincial panel concluded that the proposed Kemess North copper-gold mine should not proceed, to avoid contamination by tailings of the waters of Duncan (Amazay) Lake in north central B.C., largely because they were held to be sacred by the Tse Kay Nay people. Over considerable industry objection, this decision was accepted by both governments. Where the assessment process is wanting, the courts have a role. This spring, the Supreme Court of Canada found inadequate the federal assessment of the Red Chris porphyry copper-gold mine project, located on the Togadin Plateau – the “Sacred Headwaters.” Noting that “Red Chris did nothing wrong” and co-operated

fully in the assessment and in public consultation, the Court declined to order a reassessment but gave guidance for future assessments, leading Pierre Gratton, president and CEO of the Mining Association of British Columbia, to say, “The Court ruled as Solomon might have.” The clarity brought by this decision was also welcomed by the Association for Mineral Exploration of British Columbia. The province’s ban last February on all mining and petroleum extraction in another environmental battleground, the Flathead Valley of the East Kootenays, was less welcome for industry. Balance is hardly lacking in these matters, Davis’ opinion to the contrary. Indeed, many in industry would argue that tables are tilted against them, so that costs to the consumer are raised.

Resource industries create products – metal, wood, petroleum – because people want them. They want copper wires in their houses and computers, they want to live in wood houses, and they want to drive their cars. A person who wants to boycott British Petroleum doesn’t quit driving, he just switches brands. Davis has a more rarefied and idealistic purpose than to attack industry; he wants wholesale change in the culture of the West. But what, as an anthropologist, he believes that culture would be like without mines, logging, or oil and gas production, he does not tell us. It is far easier to roil the public against production than against consumption.

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# Water Rights and Water Stewardship: What About Aboriginal Peoples?

David K. Laidlaw and Monique Passelac-Ross

## Introduction

The Province of Alberta is currently reviewing its approach to the allocation, licensing and transfer of water rights. The government has received advice from a number of groups of experts established under various government initiatives and concerned citizens have come forward with their own recommendations. In addition, the government has announced that it will hold public consultations on the proposed review of its water allocation and management system in the summer of 2010.

One striking feature of the reports received by the Alberta government is the absence of attention paid to the issue of Aboriginal uses of, and rights to, water. First Nations are only mentioned, along with other designated groups, in passing in a single rec-

ommendation (at #12 of the 15 recommendations) in the report submitted by the Minister's Advisory Group dealing with governance of water management and allocation: Minister's Advisory Group, *Recommendations for Improving Alberta's Water Management and Allocation*, August 2009. ([environment.gov.ab.ca/info/library/8239.pdf](http://environment.gov.ab.ca/info/library/8239.pdf)).

One reason for this lack of attention is Alberta's long-standing position that Aboriginal water rights have been extinguished and the province has exclusive jurisdiction over water in the province. (see Nigel Bankes, "Water Law Reform in Alberta: Paying Obeisance to the 'Lords of Yesterday', or Creating a Water Charter for the Future?" (1995) 49 *Resources* 1 at 5, (<http://dspace.ucalgary.ca/bitstream/1880/47097/1/Resources49.pdf>).

*In common law, riparian lands lay along the shores of non-tidal rivers and streams. The owners of riparian rights were entitled, among other things, to divert waters for domestic consumption and any other reasonable purpose.*

Alberta's position has been challenged by several First Nations in several lawsuits alleging that their water rights still exist, both on and off reserve, and those rights now receive the benefit of constitutional protection. In connection with these rights Aboriginal peoples assert that they must be adequately consulted by the government on proposed reviews of the water allocation system and on ongoing land and water initiatives that impact their rights. In response, the government has stated that it will seek input from First Nations on water use and watershed planning initiatives through an undefined separate "yet parallel process": Government of Alberta, *Water for Life: Alberta's Water Allocation Management System Review*, under Who is involved in the Water Allocation System Review? ([www.waterforlife.alberta.ca/564.html](http://www.waterforlife.alberta.ca/564.html)).

In November 2009, the Canadian Institute of Resources Law (CIRL) convened a small workshop, funded by the Alberta Law Foundation and the Canadian Boreal Initiative, to discuss the issue of Aboriginal rights to water in Alberta. The meeting was attended by First Nations elders and councillors, community leaders, lawyers and scholars. This article draws in part from the proceedings of this workshop and a CIRL Occasional Paper #29, "Defining Aboriginal Rights to Water in Alberta: Do They Still 'Exist'? How Extensive are They?" by Monique M. Passelac-Ross and Christina M. Smith (2010) (<http://cirl.ca/OP>).

### Different Approaches to Water

Settler society and Aboriginal conceptions of water rights differ in many respects. At common

*Aboriginal conceptions of water usually deem waters to be sacred givers of life. Water must be shared respectfully without any use being paramount.*

law water could not be owned but *riparian* doctrines have in the past maintained a semblance of communal ownership and guarantees of water quality. In common law, riparian lands lay along the shores of non-tidal rivers and streams. The owners of riparian rights were entitled, among other things, to divert waters for domestic consumption and any other reasonable purpose. Downstream owners along the watercourse were entitled to obtain waters not significantly diminished in quantity or quality by upstream uses: Alastair Lucas, *Security of Title in Canadian Water Rights* (Calgary: Canadian Institute of Resources Law, 1990) at 5-7.

Water scarcity and the commoditization of water have led the Crown to claim ownership of almost all waters. In Western Canada, the assertion of federal Crown ownership in and control over waters occurred in the late 19<sup>th</sup> century with the *North-west Irrigation Act* *The North-west Irrigation Act*, S.C. 1894 c.30, s. 4, am. by S.C. 1895 c. 33, s.2. (*NWIA*). This ownership was transferred to the province under the 1930 *Natural Resources Transfer Agreement (NRTA)* being a Schedule to the *Alberta Natural Resources Act*, S.C. 1930, c. 3. Riparian rights were then extinguished under provincial land grants unless confirmed by a court before June 18, 1931 or by the terms of the grant: *Public Lands Act*, R.S.A 2000, c. P-40, s. 3. This would include regulating the right for water diversion of riparian property owners: *Water Act*, R.S.A. 2000, c. W-3, s.22. The current model is for the Crown to allocate (license) fixed amounts of water to municipal or private interests, on some priority basis, usually first in time: David R. Percy, *The Framework of Water Rights Legislation in Canada* (Calgary: Canadian Institute of Resources Law, University of Calgary, 1988) at 12-14. The individualism of modern settler society and the market imperative have resulted in limited self-regulation and limited regulation of water uses with consequent dangers to the environment, fisheries, water quality and quantity. Current water legislation does not even impose a "beneficial use" requirement as in Western U.S. Water Law, see: Arlene J. Kwasniak, "Waste Not Want Not: A Comparative Analysis and Critique of Legal Rights to Use and Re-Use Produced Water – Lessons for Alberta" (2006-2007) 10 U. Denv. Water L. Rev. 357.

Aboriginal conceptions of water usually deem waters to be sacred givers of life. Water must be shared respectfully without any use being paramount. The use of water for sacred purposes, hunting and fishing, transportation, recreation and domestic consumption is a shared responsibility, and must address current needs, the needs of the land and future generations. The use of waters is governed by a natural

law, by which the taking of waters without due regard to the environment and the needs of current and future generations can only lead to disaster. Aboriginal peoples see themselves as caretakers with responsibilities to preserve water and life.

### Aboriginal Rights/Responsibilities to Water: Do They Still Exist?

Aboriginal peoples were here first. Water rights in Aboriginal conceptions flow from their use and occupation of their traditional lands from time immemorial. Waters were not separable from the land and the rights to water have long been asserted by Aboriginal peoples as part of their rights to live on their lands.

The difficulty faced by Aboriginal peoples in seeking recognition of their water rights is that there has never been a court ruling in Alberta (or for that matter, in Canada) that has unequivocally established or denied Aboriginal rights to water. As discussed below, First Nations in Alberta assert their rights to water in Canadian law under either claims of Aboriginal title, Aboriginal rights, treaty rights or even riparian rights.

The Supreme Court of Canada has described Aboriginal title as a right in “land” that gives Aboriginal peoples the right to exclusive use, occupation and possession of the land for a broad range of purposes. In the seminal case of *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (*Delgamuukw*), at paragraph 111 Chief Justice Lamer for the majority stated that common law Aboriginal title: “encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be [traditional practices].” Insofar as water is considered an integral part of land, then Aboriginal title gives Aboriginal peoples the right to the lands submerged by water and entitles them to make use of the waters for a wide variety of purposes not restricted to traditional occupations. Aboriginal title also imparts the right to make decisions with respect to water, and the right to apply Aboriginal law systems to water uses. In *Delgamuukw*, Chief Justice Lamer’s comments on the test for infringement of Aboriginal title at para. 166, were as follows: “[...] Three aspects of aboriginal title are relevant here. First, aboriginal title encompasses the right to *exclusive* use and occupation of land; second, aboriginal title encompasses *the right to choose* to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable *economic component*” [emphasis in original].

*Given that Aboriginal rights to waters have existed from time immemorial, on what basis could the government claim to have extinguished these inherent rights?*

Even in dissent, in an earlier case, *R. v. Van der Peet*, [1996] 2 S.C.R. 507, Justice McLachlin, at paragraph 275 had described the Aboriginal interests recognized by the common law as “interests in the land and waters” and suggested that: [...]the interests which Aboriginal peoples had in using the *land and adjacent waters* for their sustenance were to be removed only by solemn treaty with due compensation to the people and its descendants. This right to use *the land and adjacent waters* as the people had traditionally done for its sustenance may be seen as a fundamental Aboriginal right. It is supported by the common law and by the history of this country. It may safely be said to be enshrined in s. 35(1) of the Constitution Act, 1982. [emphasis added].”

As to Aboriginal rights, they confer the right to engage in site-specific activities on a tract of land to which Aboriginal people may not have title. Aboriginal rights can exist independently of Aboriginal title: *R. v. Adams*, [1996] 3 S.C.R. 101, para. 25 to 30. Aboriginal rights are characterized as being founded on actual practices, customs or traditions of the group claiming the rights, practices that were ‘integral to the distinctive culture’ of the group. Canadian jurisprudence confirms that the uses of water directly associated with the particular way of life of an Aboriginal community and necessary for its survival are protected as Aboriginal rights. The uses of water that are vital to the life of an Aboriginal community are quite extensive. They may include rights to travel and navigation, rights to use water for domestic uses such as drinking, washing, tanning hides and watering stock, as well as rights to use water for spiritual, ceremonial, cultural or recreational purposes. In addition, the use of water is connected with harvesting activities such as

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fishing, gathering country food, hunting, trapping, and lumbering. The Supreme Court in *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686 at para. 51 has recognized that “all harvesting activities are land and water based.”

Given that Aboriginal rights to waters have existed from time immemorial, on what basis could the government claim to have extinguished these inherent rights? According to settler law, Aboriginal rights can only be extinguished through treaty, surrender or express legislation that states a “clear and plain intention” to do so. A number of questions arise in this context: Did Aboriginal peoples in Alberta agree to give up their water rights through statements in treaties? Did the Crown extinguish Aboriginal water rights by legislation? Were Aboriginal rights to water extinguished by the 1930 *Natural Resources Transfer Agreement (NRTA)*? If the answers to these questions are negative, then Aboriginal water rights still exist.

The first question to address is whether Aboriginal water rights were extinguished or modified by treaty. Even though they all contain a so-called “land surrender clause”, the text of the older treaties (including the Alberta Numbered Treaties) does not expressly mention waters, with the exception of a clause in Treaty 7 reserving to the Crown certain rights to the rivers of the reserves set aside for the First Nations. This was understandable in that water was not viewed as separate from the land promised to First Nations, and the promise of the treaties was to build sustainable communities and to ensure

both a traditional and an agricultural livelihood from the land. It appears to have been the common intention of the parties to the Alberta treaties that the First Nations would remain economically self-sufficient, by practicing agriculture and stock raising, and/or by continuing to gain a livelihood from traditional activities such as hunting, trapping and fishing: see Richard Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* (Calgary, Canadian Institute of Resources Law, 1988), at 25-28 (Bartlett, *Aboriginal Water Rights*) and Graham Statt, “Tapping into Water Rights: An Exploration of Native Entitlement in the Treaty 8 Area of Northern Alberta”, (2003) *Canadian J. L. & Soc.* 103, at 115-116 (Statt, “Tapping into Water Rights”). This is confirmed by the written provisions of the treaties and by historical evidence of oral promises made at the time of treaty-making. Indeed, it may be suggested that the right to water was affirmed as an incidental right, given the fundamental need for water to exercise the treaty rights granted.

The second question to be debated is whether Aboriginal water rights have been extinguished by legislation. The test for extinguishment of Aboriginal rights before 1982, as stated in *Calder* and confirmed by Chief Justice Dickson (as he then was) and Justice La Forest in *Sparrow*, is “that the Sovereign’s intention must be clear and plain if it is to extinguish an Aboriginal right”: *Calder v. British Columbia (A.-G.)*, [1973] S.C.R. 313, 34 D.L.R. (3<sup>rd</sup>) 145; *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1099. The simple answer is that there has been no competent legislation that expresses a “clear and plain intention” to eliminate Aboriginal rights to water. The *Indian Act* (1876), S.C. 1876, c. 18 and the successor legislations were passed by the federal Parliament in accordance with its constitutional authority under subsection 91(24) of the *Constitution Act*. The *Indian Act* did not mention Aboriginal water rights (aside from Band Councils’ powers to approve the construction and maintenance of watercourses and the construction and regulation of water supplies), let alone extinguish them. The *NWIA* which asserted federal ownership of surface waters (1895 amendment) in the Prairie Provinces, was passed to ensure access to irrigation and encourage settlement. The *NWIA* did not mention, let alone expressly revoke, Aboriginal water rights. Indeed, the declaration in section 2 of an exclusive property interest was made subject to prior rights inconsistent with the Crown’s deemed vesting. Section 2 of *NWIA* (S.C. 1895, c. 33) reads: The property in and the right to the use of all the water at any time in any stream ... be deemed to be vested in the Crown *unless and until and except so far as some right therein, or to the use thereof, inconsistent with the right of the Crown and*

*The modern uses of water on reserves cannot be restricted to those uses (e.g. irrigation) that sustain agriculture or cattle raising. They may include other water uses needed to support commercial or industrial developments that may provide a livelihood for First Nations.*

which is not a public right or a right common to the public is established; and, *save in the exercise of any legal right existing at the time.* [emphasis added] The *NWIA* was enacted while treaty negotiations were ongoing in what is now Alberta. The lands to which the Act applied were either subject to Treaty (the lands encompassed within Treaties 6 and 7, signed respectively in 1876 and 1877), or subject to subsisting Aboriginal title (the lands later encompassed within Treaty 8, signed in 1899). As Richard Bartlett has suggested, it would take “a highly disenchanting view of federal policy” to suggest that the *NWIA* aimed to extinguish Aboriginal water rights while treaty negotiations were ongoing and while government representatives were promising Aboriginal peoples continued use of and access to waterways for transportation, fishing, and everyday use as well as promoting reserve lands for agricultural uses which would require adequate water in order to be successful (Bartlett, *Aboriginal Water Rights* at 163 to 164).

The third question that arises is whether Aboriginal water rights were extinguished or modified by the *Natural Resources Transfer Agreement (NRTA)*. Alberta was established in 1905 by the *Alberta Act*, S.C. 1905, c. 3, but the province did not have authority over lands and resources within its borders. An agreement was reached to transfer certain lands and resources to the province under the *NRTA*. The list of resources transferred did not specifically include waters and it was not until 1938 that the agreement was amended to “clarify” that surface water was included in the transfer in the *Natural Resources Transfer (Amendment) Act 1938*, S.C. 1938, c. 36. Further, groundwater was originally not included. It was not until 1962 that Alberta claimed jurisdiction over all surface and subsurface waters by simply including ground water in the types of water regulated by provincial legislation: *Water Resources Amendment Act*, S.A. 1962, c., s. 2.

All of these transfers were qualified as the resources were transferred in Clause 1 as being “subject to any trusts existing in respect thereof, and to any interest other than that of the [federal] Crown in the same.” This clause is similar to s. 109 of the *Constitution Act, 1897*. In *Delgamuukw*, Chief Justice Lamer confirmed in para. 175, that s. 109 of the *Constitution Act, 1867* “qualifies provincial ownership by making it subject to the “any Interest other than that of the Province in the same” and he refers to the *St. Catherine’s Milling* case, where the Privy Council held that Aboriginal title was such an interest and found that Provinces can only acquire beneficial title upon the surrender of Aboriginal lands by treaty and characterized Aboriginal title as a prior burden on Crown title: *St. Catherine’s Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46, pp. 118 and 123-124. Aboriginal

title and Aboriginal rights to water, to the extent that they were unextinguished, are clearly interests “other than that of the Crown” and thus protected from extinguishment under Clause 1 of the *NRTA*.

Clause 10 of the *NRTA* speaks of Indian reserves then existing, and the resources located on the reserves as continuing to be vested in the federal Crown. That clause goes on to say that further Indian reserves may also be set aside: “[...] to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way *in all respects as if they had never passed to the Province under the provisions* hereof.” [emphasis added]. This suggests that any transfer of resources, including water, were revocable by the federal Crown and hence there was no effective transfer of resources of any kind on reserve lands whenever the reserve was established.

Justice Cory, in dissent on a different point in *Canada (Director of Soldier Settlement) v. Snider Estate*, [1991] 2 S.C.R. 481 noted that: “This Agreement has been incorporated into the Constitution of Canada as Schedule 2 of the *Constitution Act, 1930*. Paragraph 1 of the Agreement transferred the federal government’s interest “... in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom...” to Alberta. Certain lands were excluded from the transfer. These included *Indian reserves, national parks...*” [emphasis added].

We can conclude from the preceding discussion that it is highly unlikely that Aboriginal and/or treaty rights to water were ever ceded or extinguished. If anything, the treaties actually confirmed existing water rights, although they admittedly modified these rights. And neither the *NWIA* nor the *NRTA* show a clear and plain intention to extinguish the water rights held by Aboriginal peoples.

### What is the Nature and Scope of the Water Rights Asserted by Aboriginal Peoples?

Aboriginal peoples in Alberta assert that they have water rights both on reserve lands and on traditional

*The simple answer is that there has been no competent legislation that expresses a “clear and plain intention” to eliminate Aboriginal rights to water.*

*The ongoing uncertainty surrounding the legal recognition of their asserted rights to water has compelled First Nations in Alberta to resort to the courts. In 1986, the Piikani launched a lawsuit against the Alberta government as a result of Alberta's proposed construction of a dam and reservoir (the Oldman River Dam) upstream from its reserve.*

lands. While the existence of some of these rights is accepted by government, many others are not. In the various lawsuits that they have launched against the Alberta and the federal governments (as outlined below), First Nations are claiming an extensive array of rights to water. Asserted water rights can be categorized as outlined below.

First, there are rights to a traditional livelihood, including rights to hunt, fish, trap and gather, but also domestic uses (drinking, washing, watering animals), navigation, as well as cultural, spiritual, ceremonial uses. As stated earlier, the treaties guaranteed that Aboriginal peoples would retain the right to live off the land, either by relying on their traditional activities or by engaging in stock raising and agriculture. Aboriginal peoples were promised that their way of life would remain substantially the same, and that they would not be confined to reserves. Water was essential to that way of life. Not only is the survival of fish and wildlife populations dependent on water, access to waterways is also indispensable for the exercise of the above-mentioned uses. These rights exist both on and off reserves (on lands not "taken up"). Implicit in the treaty rights to water is the continued ability to exercise the rights. This means that water must be of a sufficient quantity and quality to support these uses. In addition, water rights give rise to governance rights: the right and responsibility to make decisions grounded in Aboriginal laws and customs.

In the second category, are rights to the use of water for agricultural, commercial and industrial pur-

poses, e.g. irrigation, hydroelectric development. These rights exist on reserve lands. The treaties contained no express reference to water or water rights in the surrender or in the reservation of lands, but declared that the object of the reserves was to encourage agriculture and cattle raising. Scholars have argued that there is a presumption that water rights were appropriated along with reserve lands. In particular, Bartlett wrote in 1988 that the object of the provision of reserves was "to enable the Aboriginal people to become a settled and "civilized" people in the European manner, and to encourage the adoption of non-traditional as well as traditional uses of the land and water" (Bartlett, *Aboriginal Water Rights* at 20). He noted that the water rights on reservations in the United States are founded upon interpretive principles that are similar to the ones adopted by the Supreme Court in Canada. The leading U.S. case in this respect is the *Winters v. United States*, 207 U.S. 564 (1908) case, involving the construction of dams or reservoirs on the Milk River in the state of Montana. In his view: "The treaties and agreements with Indians in Canada promised lands for farming and other developments, and the maintenance of hunting, trapping and fishing. Ordinary principles of interpretation require that water rights be implied in the undertakings given by the Crown. Without water rights, the promises made by the Crown cannot be fulfilled. Reference to principles requiring a "fair, large and liberal construction and regard for the Indian understanding of the treaties and agreements affirm that conclusion." (Bartlett, *Aboriginal Rights to Water* at 35). The modern uses of water on reserves cannot be restricted to those uses (e.g. irrigation) that sustain agriculture or cattle raising. They may include other water uses needed to support commercial or industrial developments that may provide a livelihood for First Nations.

The third category of water rights asserted by Aboriginal peoples are riparian rights. In addition to the above-mentioned water rights, Aboriginal peoples benefit from riparian rights on reserves (Bartlett, *Aboriginal Water Rights* at 49-51). At the time Treaties 6 and 7 were negotiated, the common law was the law of riparian rights. Because reserve lands are held for the use and benefit of the respective First Nations, First Nations are the lawful riparian land owners and holders of riparian rights. Riparian rights include rights of access to water, rights to drain surface water from adjacent land into the water body, rights to the natural flow of water, rights to the quality of water, rights to use the water for both "domestic" and "extraordinary" purposes (with some limitations), and rights of accretion: Statt, "Tapping into Water Rights" at 111.

*To date, any framework that acknowledges Aboriginal concerns and rights to water have not been forthcoming from either the provincial or federal levels of government.*

A fourth category of rights is based on ownership of the waterbeds. There is a common law rule of presumption of riparian ownership of the beds of non-tidal rivers and streams. Riparian owners own the bed of the river in equal half *ad medium filum aquae* – to the centre thread or channel of the stream. In Western Canada, the common law presumption has been held to only apply to non-navigable waters. It is unclear whether the presumption applies to Indian Reserves, see: *R. v. Lewis* [1996] 1 S.C.R. 921 at paragraphs 61 to 62; and *R. v. Nikal* [1996] 1 S.C.R. 1013. In 1988, Bartlett suggested that the granting of reserves to Indian bands “was made upon the understanding that traditional hunting, fishing and trapping would entail substantial use and dependence upon the water-bed or foreshore and, accordingly, it may be considered to pass with the setting apart of riparian lands, *irrespective of a presumption to the same effect*” (Bartlett, *Aboriginal Water Rights* at 93). The rights arising from ownership of the waterbed and the foreshore are quite extensive. They include the right to erect anything thereon: wharf, bridge, dam or diversion projects. In addition, the owner of the bed has the exclusive right to hunt, trap and fish over the waters, subject to applicable game and fishing laws. The question of Aboriginal ownership of the beds and shores of rivers and lakes on reserve lands remains unsettled. As stated below, this issue has recently been brought to the courts by the Stoney Nakoda Nations.

### Alberta Cases in Relation to Asserted Aboriginal and Treaty Water Rights

The ongoing uncertainty surrounding the legal recognition of their asserted rights to water has compelled First Nations in Alberta to resort to the courts. In 1986, the Piikani launched a lawsuit against the Alberta government as a result of Alberta’s proposed construction of a dam and reservoir (the Oldman River Dam) upstream from its reserve. The Band claimed that it had rights to appropriate water for its reasonable needs, that the riverbed of the Oldman River formed part of the reserve, and that the construction of the dam and reservoir would change the flow and quality of the Oldman River through the reserve and interfere with the Band’s water or riparian rights: *Peigan Indian Band v. Alberta*, [1998] A.J. No. 1108 (QB), paras. 14-16. However, the issue of the nature and extent of the Piikani’s water rights, including their ownership of the riverbed, was never resolved by the courts. All legal challenges against Alberta and Canada were discontinued when the Piikani entered into a settlement agreement with both levels of government in 2002: *Settlement Agreement dated the 16<sup>th</sup> of July 2002 among: Her Majesty the*

*More recently, other First Nations have initiated legal challenges against both the provincial and the federal government in relation to their asserted water rights.*

*Queen in Right of Canada and the Piikani Nation and Her Majesty the Queen in Right of Alberta*, Section J – The Action. (24.1 and 24.2).

More recently, other First Nations have initiated legal challenges against both the provincial and the federal government in relation to their asserted water rights. The Stoney Nakoda Nations are advancing an express challenge to Alberta’s assertion of ownership and jurisdiction over lands and waters under the *NRTA*: Alberta Court of Queen’s Bench, Action No. 0601-14544. The First Nations are claiming ownership of lands and waters, including waterbeds, on reserves. This is a broad and extensive challenge to the validity of Alberta’s position. Another action claims Aboriginal title, Aboriginal rights and treaty rights in surface and subsurface waters in lands off reserve within the traditional territory of the Nations: Alberta Court of Queen’s Bench, Action No. 0301-19586.

Further, the Tsuu T’ina and Samson Cree have challenged the Water Management Plan for the South Saskatchewan River, on the grounds that the Plan has been developed and adopted without proper and adequate consultation with them, and does not adequately accommodate their existing rights to use and enjoy their reserve lands, their hunting and fishing rights, and their asserted Treaty water rights: ACQB 0701-02170 and 0701-02169. The Chambers decision, handed down in 2008, rejected the claims of the First Nations: *Tsuu T’ina First Nation v. Alberta*, [2008] ABQB 547. The Chambers judge held, in part, that the Water Management Plan was a completed approval not an anticipated one, and further that it had minimal, if any, adverse impact on the water use of the First Nations. For a comment on the decision, see Nigel Bankes, “Water management planning and the duty to consult. A comment on *Tsuu T’ina First Nation v. Alberta* [2008] ABQB 547”, Law Faculty, ([ablawg.ca](http://ablawg.ca)).

An appeal of the decision was heard in November 2009, with reasons delivered on April 28, 2010 in *Tsuu T’ina Nation v. Alberta (Environment)*, 2010 ABCA 137. The Court of Appeal noted the separate ongoing litigation over the substantive claims

*The boreal forest, which is the homeland of the First Nation, is an intricate ecosystem of bogs, fens, marshes and forest in which water is a key component of the ecosystem. The clear cumulative consequences from multiple development projects on the environment have been the loss of fishing and hunting rights (in that waters in the boreal forest are needed to support wildlife) in violation of treaty rights that affirm existing Aboriginal rights.*

brought by the Tsuu T'ina First Nation in a Statement of Claim filed in 2007. The case under appeal was an administrative law challenge to the adequacy of the consultation launched by way of Originating Notice. The Court of Appeal dismissed the Appeal, with some misgivings about the negotiating tactics of Alberta Environment (at para. 129). The decision included an *obiter* clarification as to the Chamber judge's characterization of a completed action, as the Court of Appeal said that completed legislative actions were *not* immunized from a consultation requirement (para. 56 and 57). For a comment on the decision, see Nigel Bankes, "Water management planning and the Crown's duty to consult and accommodate: the Court of Appeal rejects First Nations' application for judicial review of the South Saskatchewan Water Management Plan", Law Faculty, [ablawg.ca](http://ablawg.ca)]

For its part, the Beaver Lake Cree Nation has commenced an action against the provincial and federal governments on different grounds: *Beaver Lake Cree Nation v. Alberta and Canada*, ACQB Action No. 0803-06718. The significant legal argument is that, while particular resource development approvals may have included some consultation with First Nations (although the bulk have not), the cumulative impacts of multiple project approvals have resulted in

a denial of and infringement of treaty rights to hunt, fish, trap for subsistence and for cultural, social and spiritual needs. The boreal forest, which is the homeland of the First Nation, is an intricate ecosystem of bogs, fens, marshes and forest in which water is a key component of the ecosystem. The clear cumulative consequences from multiple development projects on the environment have been the loss of fishing and hunting rights (in that waters in the boreal forest are needed to support wildlife) in violation of treaty rights that affirm existing Aboriginal rights.

## Conclusion

Aboriginal conceptions of water stewardship and governance have much to contribute to Canadian law. The concept of water stewardship as a collective responsibility, embraced in the North West Territories' *Northern Voices, Northern Waters NWT Water Stewardship Strategy* reflects Aboriginal understandings: ([www.enr.gov.nt.ca/\\_live/documents/documentManagerUpload/NWT\\_Water\\_Stewardship\\_Strategy.pdf](http://www.enr.gov.nt.ca/_live/documents/documentManagerUpload/NWT_Water_Stewardship_Strategy.pdf)). The Strategy is founded on a collaborative partnership approach that includes Aboriginal governments and states its intention to support existing rights and improve the decision-making processes of all parties involved in water stewardship in the NWT. To date, any framework that acknowledges Aboriginal concerns and rights to water have not been forthcoming from either the provincial or federal levels of government.

Why this is so is puzzling. The continued existence of Aboriginal water rights highlights the need for negotiation and consultation with Aboriginal peoples leading to true accommodation of their rights and involvement regarding water use and management. Until this happens, Aboriginal peoples will have little recourse to but engage in continuing litigation.

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Lorine Sweeney

# Guardianship Custody and Abuse

## To the Teacher

These lesson activities are designed with the new Alberta CTS course Legal Studies 2010 Family Law in mind; however, it can be adapted to any legal studies or Career and Lifestyles course.

The objectives of the activities are to examine the legal responsibilities of a parent, step parent or guardian with relationship to child access, guardianship and custody and to research laws designed to protect victims of child abuse.

Students will be asked to:

1. demonstrate an understanding of guardianship, custody, and abuse;
2. demonstrate an understanding of the legal responsibilities of parents and guardians;
3. examine the information available to youth and evaluate its usefulness and clarity; and
4. create additional information and /or support systems to assist in ensuring that students in their school, community, or province have access to clear and available information and support.

## To the Student

This lesson provides some information about child custody, guardianship, and abuse. During this activity you will:

1. critically examine this information through prioritizing and evaluating;
2. research further information;
3. respond to specific fictitious scenarios; and
4. create a product to present the information in a new, accessible and youth-friendly manner.

## What is Guardianship?

Guardians are adults, including parents, who are responsible for making major decisions regarding their children. When a family is living together, the parents share guardianship. In the case of divorce or separation, guardianship can be left in the hands of one parent, or shared between the parents.

## Why do Non-Parents of a Child Become Guardians?

Parents and guardians are responsible to care for their children, but sometimes the home they provide is not safe and secure and does not serve the best interest of the child. If this happens, the child may be placed with a temporary, or after a time, a permanent guardian. This may be a private

arrangement between family members or an arrangement with the government for a child in permanent government care. In Alberta, it is the job of Alberta Children and Youth Services to step in and arrange needed guardians.

## Assignment A.1.

What are the responsibilities of guardians?

The following table's Column A lists some legal responsibilities of guardians. In the space provided in Column B prioritize the list according to what you believe are the most important responsibilities of the guardian. Be sure to consider the best interest of the child in determining your decisions.

Column A	Column B
Some Responsibilities of Guardians (Including Parents)	Prioritize the parent or guardian responsibilities at the left from what you think are most to the least important. Put the letter of the responsibilities from first to eleventh priority.
A. nurture the child’s physical development	1.
B. nurture the child’s psychological development	2.
C. nurture the child’s emotional development	3.
D. ensure the child has medical care	4.
E. ensure the child has food	5.
F. ensure the child has clothing and shelter	6.
G. make day-to-day decisions affecting the child and supervise the child’s daily activities	7.
H. make decisions about the child’s education, including the school attended and the participation in extracurricular school activities	8.
I. make decisions regarding the child’s linguistic upbringing ( what languages are spoken and studied)	9.
J. make decisions regarding the child’s religious and spiritual upbringing	10.
K. decide whether the child should work and, if so, the nature and extent of the work, and for whom the work is to be done	11.

**Assignment A.2.**

**Critical Thinking**

1. In a short paragraph, explain the reasons for your decisions to prioritize the way you did in the above table.

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2. In a second short paragraph, explain what you think is the guardian’s responsibility that causes the most conflict between a guardian and a teenager.

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**What is Custody?**

When a family is living together, the parents share custody of their children and together are responsible for providing food, shelter and clothing. After separation or divorce, custody is used to describe who will live with the children and be responsible for providing daily care.

Custody will usually be given to the person asking for it if there is no dispute. If both parents want custody of the child, the court will place the child according to what it feels is in the “best interests” of the child.

According to the Alberta *Family Law Act*, in determining what is in the best interests of a child, the court shall

1. ensure the greatest possible protection of the child’s physical, psychological and emotional safety, and
2. consider all the child’s needs and circumstances.

**Assignment B.1**

Using the websites recommended at the end of this article, research the difference between sole custody and shared or joint custody. Imagine that the child or youth in question is sixteen years old and in grade ten. Write a scenario where you think sole

custody would be in the best interests of the child. Write another scenario where you believe the child’s interests would be best served by awarding joint custody.

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**Assignment B.2**

Imagine custody is given to parents of a six-year-old. Write what you think would be the advantages and disadvantages of awarding sole custody to one of the parents.

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### Assignment B.3

Section 18 of the Alberta *Family Law Act* lists some needs and circumstances that are considered when determining the best interests of a child. Below are listed four of these needs or circumstances. Age is also considered in determining a child's best interests.

In a short paragraph, list and explain which two of those needs or circumstances you think would be the most important in deciding that the mother of a youth of 16 should be awarded sole custody.

1. The child's views and preferences
2. Any family violence, including its impact on
  - a. the safety of the child and other family and household members,
  - b. the child's general well-being,
  - c. the ability of the person who engaged in the family violence to care for and meet the needs of the child
3. The nature, strength and stability of the relationship
  - a. between the child and each person residing in the child's household and any other significant person in the child's life, and
  - b. between the child and each person with respect to whom an order under this Part would apply
4. the ability and willingness of each person with respect to whom an order under this Part would apply
  - a. to care for and meet the needs of the child, and
  - b. to communicate and cooperate on issues affecting the child.

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### What is Access?

Access refers to the time the children spend with the parent with whom the children do not normally live.

1. Specified access is a court order or private agreement that determines when and for how long the children will be with their other parent.
2. Supervised access is an arrangement that specifies when children are allowed to spend time with the other parent only with another adult present.

### Assignment D.1

Write a paragraph describing the need, advantages and disadvantages of specified and supervised access.

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### What is Child Abuse?

Families have the right to make most decisions about how to raise their children. However, Alberta's *Child, Youth and Family Enhancement Act* protects children from neglect, physical abuse, sexual abuse and emotional injury.

Physical abuse includes beating, slapping and punching and is a criminal offence. Emotional abuse includes abusive criticism, threats, denying friendships, and destruction of possessions. Neglect is also a form of abuse.

### Assignment E.1

Read the three fictitious scenarios below and, using your current knowledge and research, follow the directions beneath the scenarios.

*Scenario One:* Your friend Eric, who lives with his mom, has been quieter than normal lately. You have noticed that he is bringing only an apple and a bag of chips for lunch and that he has worn the same shirt for the last three days. This week the class finalized plans for a mountain camping trip and each student needed parental permission to attend. Eric explained to you that he couldn't get a parental note because he hadn't seen his mom for two weeks and he didn't have a clue where she is. He told you that it wasn't the first time that his mom had done this, and he wasn't worried because she always came back.

*Your Task:* Using your knowledge or further research about family law, write the advice you would give to Eric, including his rights and who he should contact. Do you have any responsibility in the matter?

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*Scenario Two:* Kristin: A friend of yours is an 18-year-old single mom. Her baby is nine months old and crawling. You frequently drop in at Kristin's and keep her informed about the latest goings on. Last week, you were in her living room with Kristin and her baby when, as you looked out the window, you noticed some boys from your class. The boys were hanging out around Kristin's house listening to music played on the stereo in their parked half-ton truck. Both you and Kristen went out to the street to socialize with the boys. After about 30 minutes, you realized that Kristin had left her baby alone in the house.

*Your Task:* Using your understanding or further research about parent and guardian responsibilities, write the advice you would give to Kristin. Where would you advise her to go to for help? Do you have any responsibility in the matter?

## What Resource Could You Create?

1. Choose a topic  
From any topic related to custody, access or child abuse.
2. Brainstorm  
With classmates, brainstorm what you think are the most important questions that students from grades nine to twelve need answered.
3. Research  
Look for answers to your questions from the sites listed at the end of this article or from your own sites. You also may use information from your library or counsellor's office. Remember, as you do your research, you may think of more questions to add to your list.
4. Create a Resource  
Create a resource that can be shared in your school (library, counsellor's office, website, and so on).
  - The resource must be useful to fellow students.
  - The resource must be accurate.
  - The resource must be attractive and readable.Examples of resources that you could create could be a blog, pamphlet, poster, directory, bibliography, play, poem, question and answer sheet, movie or interview.
5. Share  
Share your resource with your classmates and arrange for your resource to be shared throughout the school.
6. Evaluate  
Evaluate your resource by co-operating with your teacher and classmates in creating a rubric to be used for evaluation. Or, write an evaluation of your creation to share with your teacher.

## Websites

Below are some recommended websites, but there are many other sites that can be found separately or are linked to these sites.

Access to Justice Network Alberta  
[www.acjnet.org/abnews/default.aspx?id=16912](http://www.acjnet.org/abnews/default.aspx?id=16912)

Student Legal Services of Edmonton  
[www.slsedmonton.com/family/custody-access-divorce/#GUARDIANSHIP](http://www.slsedmonton.com/family/custody-access-divorce/#GUARDIANSHIP)

Government of British Columbia Website  
[www.ag.gov.bc.ca/family-justice/resources/legal\\_terms/index.htm](http://www.ag.gov.bc.ca/family-justice/resources/legal_terms/index.htm)

Canadian Legal Information Institute  
[www.canlii.org/en/ab/laws/stat/sa-2003-c-f-4.5/latest/sa-2003-c-f-4.5.html](http://www.canlii.org/en/ab/laws/stat/sa-2003-c-f-4.5/latest/sa-2003-c-f-4.5.html)

Child and Youth Advocate  
[http://advocate.gov.ab.ca/youth\\_rights\\_474.html](http://advocate.gov.ab.ca/youth_rights_474.html)

Alberta's official immigration website  
<http://albertacanada.com/immigration/living/familyandthelaw.html>

National Clearinghouse on Family Violence  
[www.phac-aspc.gc.ca/ncfv-cnivf/index-eng.php](http://www.phac-aspc.gc.ca/ncfv-cnivf/index-eng.php)

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*Scenario Three:* Your friend Ramsay is continuously wearing long-sleeved shirts. During gym class last week, when Ramsay was changing, you noticed bruising and welts on his arms and back. You know Ramsay's father and suspect that he might be hitting or beating Ramsay.

*Your Task:* Using your understanding or further research about parent and guardian responsibilities, write the advice you would give to Ramsay. Where would you advise him to go for help? Do you have any responsibility in the matter?

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*Lorine Sweeney, EdD is an educational speaker and writer with a background in curriculum and instruction.*



# Step-parents and Support

Rosemarie Boll

*“The course of true love never did run smooth.”*

William Shakespeare wrote these words about the entanglements of romance – but he could have been writing about the turbulence that lovers face when love ends and step-parents are called on to pay child support.

The obligation to pay child support is regulated at two levels – federal and provincial. The *Divorce Act* is federal legislation and cases decided under that Act apply everywhere in Canada. Each province also has its own laws about step-parents and child support, and the definitions and wording may differ. This article focuses on divorce cases. I will use the following terms:

- *step-parent* means the unrelated new spouse;
- *natural parent* means the biological parent who lives with the child (and usually has custody); and
- *absent parent* means the biological parent who does not live with the child (and may or may not have access).

## Who pays?

Section 2(2) of the *Divorce Act* says a *child of the marriage* includes a child to whom the step-parent *stands in the place of a parent*. But what does this mean?

The analysis begins with the Supreme Court of Canada’s 1999 decision in *Chartier*. That case estab-

lishes the underlying principles: “... the provisions of the *Divorce Act* dealing with children focus on what is in the best interests of the children of the marriage, not on biological parenthood, or the legal status of children ... The interpretation that will best serve children is one that recognizes that when people act as parents toward them, the children can count on that relationship continuing and that these persons will continue to act as parents towards them.”

The Court lists factors which help distinguish parental from non-parental figures:

- whether the step-parent includes the child in his extended family the same way as his own biological child;
- whether the step-parent financially supports the child (depends on ability to pay);
- whether the step-parent disciplines the child as would a parent;
- whether the step-parent represents himself to the child, the family, and the world, that he is responsible as a parent to the child; and
- whether the child still has a relationship with his absent parent.

The critical time to assess parental standing is during the marriage, not after the separation. The analysis is objective – what would an onlooker think? The

opinions of the step-parent and the child are factors, but not the most important ones. The court will look at the big picture – did the step-parent assume parental responsibility over a time period long enough to reflect a significant committed parental relationship?

In the decade since *Chartier*, the courts have approached the issue in two different ways:

- the *high threshold* approach – this test requires

## Evidence Tending To Prove a Parental Relationship

### Before separation

- a lengthy relationship, particularly with a younger child
- a good relationship
- birth or adoption of more children into the family
- both parents lead the child or others to believe the step-parent is the biological parent
- little or no involvement by the absent parent, or deliberately excluding the absent parent
- relocating the family so the natural parent must give up support from the absent parent
- discussing or starting adoption or guardianship proceedings
- wanting to change the child's surname, either legally or illegally (e.g., falsifying the birth registration to name the stepfather as the natural father)
- baptizing the child in the step-parent's church and naming the step-parent as the parent on the baptismal certificate
- the child calls the step-parent "dad" or "mom"
- wanting the child's affection and responding with affection
- taking a significant role in discipline
- the child comes to rely on the step-parent's money for her overall welfare and standard of living
- including the child in the step-parent's extended family gatherings
- sharing everyday family activities – meals, going out, playing games, driving to and taking part in activities, buying gifts, and celebrating special events, appearing together in family photographs, helping at the child's summer camp, taking vacations together, going to church
- participating in the child's education – driving to school, attending parent-teacher interviews, helping with homework, signing permission forms, listing the step-parent as a parent on school forms
- providing child care while the natural parent works, or taking a leave of absence from work to care for children when the natural parent is ill
- taking the child to medical appointments
- writing letters referring to self as the parent
- taking various legal steps – declaring the child as a dependent on an application form or for income tax, naming the child in a Will, agreeing to be appointed a guardian in case of the natural parent's death, naming the child in an insurance policy, seeking benefits for a child on a disability insurance policy

### After separation

- acknowledging self as a parent by consenting to a child support order or agreement
- applying for custody or access, or having access by consent

solid evidence of a strong parental relationship. In essence, the step-parent must have substantially replaced the absent parent. This approach appeals to step-parents who want to reduce or eliminate their child support obligation. But one must not ignore the flip-side of parental standing: once a step-parent achieves parental status, the step-parent also acquires rights to custody and access. If the biological parents want to prevent this, they may also prefer the high threshold approach.

- the *low threshold* approach – the step-parent need not *replace* the absent parent. The court's focus is to assess whether the step-parent acted as a parental figure. The level of the absent parent's involvement is of secondary concern. Then, once the parental relationship is proven, there is a strong presumption that the step-parent should pay the *Child Support Guidelines* amount just as a biological parent would.

According to the eminent Canadian scholar Professor Nicholas Bala,<sup>1</sup> judges most frequently apply the high threshold test. This generally means a person will not stand in the place of a parent if the child also maintains a significant relationship with the absent parent.

Each judge decides which approach to follow, then scrutinizes the evidence to see if it meets that standard. The test is highly discretionary. The outcome depends on what facts are supported by the evidence.

## How much and how long?

So you stand in the place of a parent – what next?

Section 5 of the *Child Support Guidelines* says:

“Where the spouse against whom an order for the support of a child is sought stands in the place of a parent for a child or the parent is not a natural or adoptive parent of the child, the amount of the order is, in respect of that parent or spouse, such amount as the court considers appropriate, having regard to these guidelines and any other parent's legal duty to support the child.”

Again, the courts have approached the issue in two different ways:

- the narrow interpretation of s. 5 – the court presumes that a step-parent should pay the full guideline amount until the child reaches adulthood. Judges who apply this presumption strictly limit their inquiries to the two matters specifically listed in the statute: first, the guideline table amounts, and second, the legal duty of any other parent to support the child. Other factors, such as the natural parent's financial means and the quality of the relationship, are not relevant. This approach is based on two principles: first, judges should not do what Parliament did not direct them to do, and second, judges should

apply the principle of equality between biological and stepchildren that the SCC established in *Chartier*. Consequently, step-parents must present compelling evidence to overcome the presumption they should pay the Guideline amount.

- the flexible interpretation – the step-parent’s support obligation is always secondary to the absent parent’s. The condition, means, needs, and circumstances of the parties and the child are all relevant. The court can take into account:
  - the duration and quality of the pre-separation relationship;
  - the duration and quality of the post-separation relationship and whether there has been an intention to terminate it;
  - the child’s age;
  - whether the step-parent is denied access;
  - whether the child has other sources of income (e.g., CPP survivor or disability benefits);
  - the natural parent’s financial means (this is controversial); and
  - whether there is a pattern of multiple partners (serial marital and marriage-like relationships).

Professor Bala prefers the flexible approach. He says it is appropriate to order the full Guideline amount for a relatively short term following separation, and the judge need not closely inspect the absent parent’s actual or potential obligation during this time. This protects the child who can continue to rely on the step-parent’s support. However, over the longer term, the natural parent should be obligated to seek support from all potential payors. At that point, the court can reduce the step-parent’s payments to reflect the primacy of the absent parent’s obligation.

Some legal scholars<sup>2</sup> suggest that the British Columbia Court of Appeal may have charted a new middle way in its 2008 decision *U.V.H. v. M.W.H.* The Court applied two elements in the following order:

- first, a strict requirement that the absent parent pay the full Guidelines amount. This means that the absent parent him/herself, or all available evidence of that parent’s income, must be before the court. The judge first calculates the absent parent’s financial obligation.
- then the judge uses a flexible, child-focused enquiry to see what, if any, top-up child support the step-parent should pay. This means the natural parent must produce a child care budget. The absent parent has the primary obligation, and the step-parent makes up any shortfall.

This approach avoids piling of child support awards that would lead to an unfair windfall for the natural parent yet does not shrink from providing the higher standard in appropriate cases.

## Evidence Tending To Disprove a Parental Relationship

- the absent parent is involved in the child’s life
- the natural parent opposes the step-parent’s parental role
- poor relationship with the child *prior to separation*, particularly if it was a major factor in the parties’ separation
- the child is older when the relationship begins
- a short relationship, or periods of separation during the relationship
- the child calls the step-parent by first name
- the step-parent always introduces the child as the natural parent’s child
- the relationship is more like a friend than a parent
- the step-parent acts like a new spouse, not a new parent
- the step-parent acts like a babysitter, not a parent
- the step-parent follows the natural parent’s instructions in discipline decisions
- school records list the step-parent as a contact person, not a parent
- the step-parent merely shows kindness and affection in the course of the child’s daily life

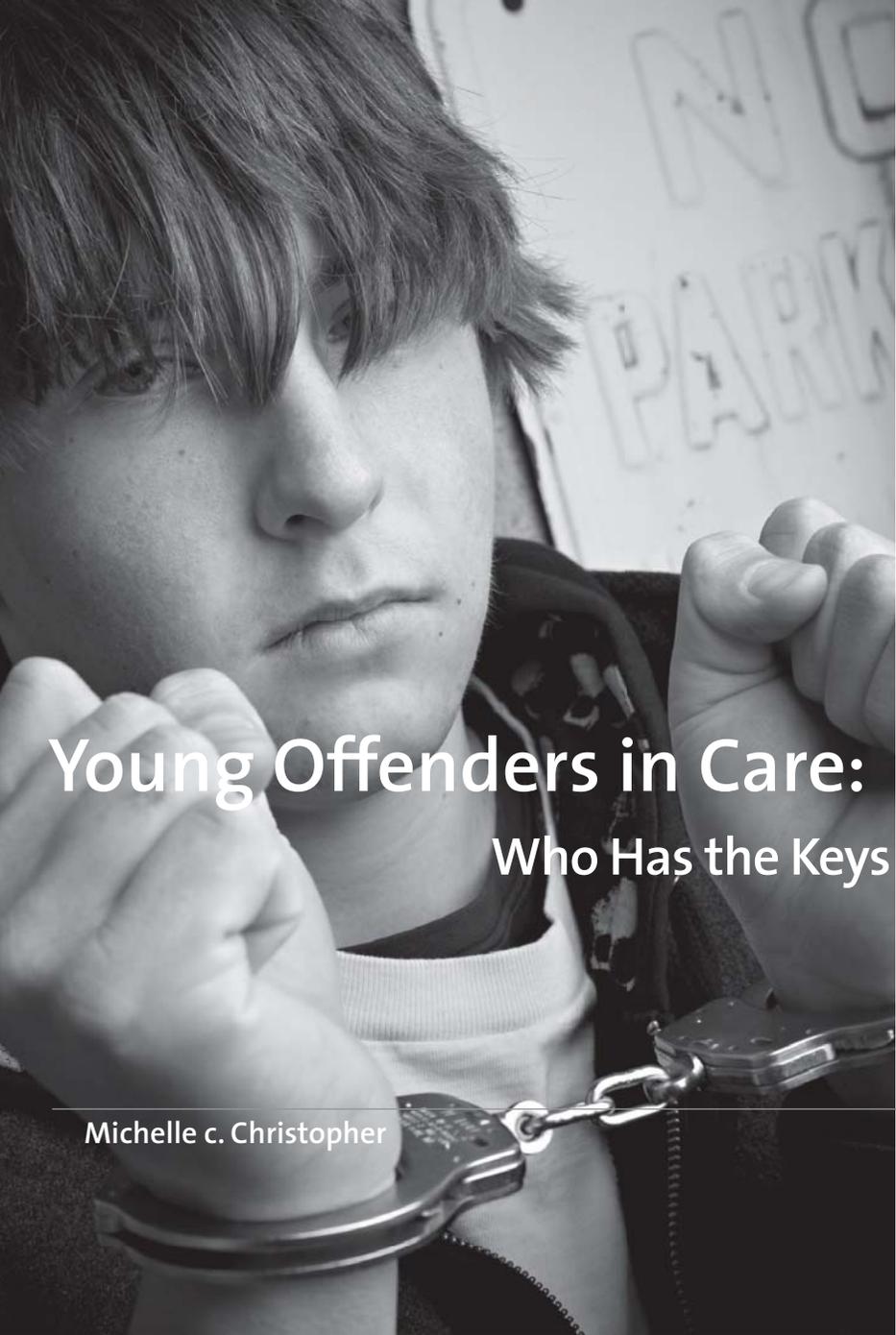
## Conclusion

When a relationship fails and children are involved, it is in their best interests that their parents find happiness in their next relationship. To encourage the formation of second families, society must balance the needs of the children with the needs of their parents’ new partners. New partners should not be penalised for acting kindly or giving emotional, physical, and financial support to natural parents who would otherwise be single parents. However, when the new partner makes an indefinite unconditional commitment to stand in the place of a parent, he or she cannot simply walk away. As the Supreme Court of Canada put it, spouses “are entitled to divorce each other, but not the children who were part of the marriage.”

## Notes

1. Bala, Nicholas, “Who is a ‘Parent’? ‘Standing in the Place of a Parent’ & Child Support Guidelines s.5”, a paper presented at the Law Society of Upper Canada Continuing Education Program, April 3, 2006
2. Burke, Brian, and Chipeur, Stephanie, “The More the Merrier? – Multiple Parents and Child Support”, a paper presented at the LSUC Six-Minute Family Law Lawyer, 2009

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# Young Offenders in Care: Who Has the Keys When They are Locked Up?

Michelle c. Christopher

The Government of Canada has recently introduced amendments to youth criminal law aimed at strengthening legislation dealing with violent and repeat young offenders. Proposed amendments would make protection of society a primary goal of the legislation, simplify rules for the pre-trial detention of violent and repeat young offenders, enhance the Crown's ability to seek adult sentences for youth convicted of serious crimes, and enable the courts to consider more onerous, or deterrent, sanctions in cases involving violent, repeat young offenders. In addition, the amendments suggest, in certain cases, lifting the publication ban on offenders' names. Are these changes in the best interests of young people or of society? Based on more than two decades of work with young people in Alberta Family and Youth Courts, in the context of both child welfare and youth criminal matters, I suggest that the federal government has got its' focus wrong for a number of reasons, particularly with respect to kids in government care.

As a society, we need to get back to basics, which does not mean locking kids up and throwing away the keys. We could start, I believe, by taking a look at the existing law – the *Youth Criminal Justice Act* – and paying attention to the statute’s opening words: “members of society share a responsibility to address the developmental challenges and needs of young persons and to guide them into adulthood.” This law calls for “communities, families, parents and others concerned with the development of young persons ... to take reasonable steps to prevent youth crime by addressing its underlying causes, to respond to the needs of young persons, and to provide guidance and support to those at risk of committing crimes.” Those of us in the trenches of the youth justice system understand that the “teenage brain” continues to develop well beyond adolescence and into young adulthood. This reality also reflects, for many, what Hillary Clinton alluded to years ago when she wrote “it takes a village to raise a child”. In healthy families, as in healthy communities, we are better at living up to the task of making sure our children grow up to be productive, responsible members of society, educated and ready for employment as they transition to adulthood. But what happens when young people don’t measure up, end up in trouble, in court, and in jail? Will harsher laws fix the problem?

At the outset of any conflict, the tendency is to point fingers: to attribute blame to others instead of examining one’s own responsibility and/or underlying interests. In youth matters, the tendency is to blame family, particularly parents, when youth spiral out of control. Many parents, in turn, are quick to blame their child’s peers, claiming undue influence and/or external factors – such as drugs or alcohol – for negative behaviours that get kids into trouble. The difficulty with this kind of thinking about the problem of youth crime is that without teaching kids to understand the connection between act and consequence, kids who make mistakes are doomed to repeat them. “Outing” troubled kids by revealing their names in public or using deterrence as a sanction for people whose brains are not fully developed will serve no purpose – other than perhaps satisfying electoral needs – if we do not first help those kids to make the connection between act and consequence.

For kids in care, the problem takes on critical dimensions, since the reason many kids end up in care is very often (but not always) linked to parents who are either absent or are themselves unable to make the link between their actions and what is happening around them. Once in care – where “family” is your social worker or the team leader and residents of your group home and where your “parent” is the government – there is often a further disconnect as service

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providers struggle to fulfill their duties and provide stable placements with consistent “parenting” and all that entails.

As the drafters of our current law recognized, youth criminal law has three primary goals: to prevent crime by addressing the circumstances underlying young persons’ offending behaviours, to rehabilitate young persons who commit crimes and to reintegrate them into society, and to ensure youth are subject to meaningful consequences for their offences. In order to ensure that these goals DO serve to protect the public, we don’t need legislative changes. We need, instead, to provide better support for parents in general and in particular for the caregivers of kids in care. This is even more important for kids who have been arrested and charged with criminal offences.

Once a young person – aged 12 to 17 – is arrested, the parent(s) must be notified, and depending on the offence and/or whether the young person has a record, may be subject to conditions on release pending the resolution of the charge(s) in court or in an extra-judicial program, if available. If the young person is not able to be released to a parent with a simple notice to attend court, he may be subject to a bail hearing – also known as judicial interim release – in order to determine conditions for release, and/or whether there is a need for supervision while on release pending the resolution of the charge(s). In these cases, parents wield a tremendous amount of power over young people. In some cases, parents

*Although the Youth Criminal Justice Act prohibits the use of custody as a substitute for appropriate child protection, mental health, or other social measures, the reality is that young people with child welfare status frequently languish in jail while their social workers work on release plans and revised placement options.*

*... we need to give governments a clear message that it is time to stop criminalizing the mistakes of young people and time to start supporting parents and families, enabling them to spend more time with their kids engaged in positive activities well into and beyond adolescence.*

refuse to sign their children out of jail and/or have lost their authority over and/or ability to effectively parent their children. In these cases, a Youth Court judge can make a referral to child welfare authorities who may initiate an investigation into the need for child welfare intervention. Sadly, however, kids in care seem to bear the brunt of a system which criminalizes their mistakes instead of providing them with the tools to make better decisions.

Although the *Youth Criminal Justice Act* prohibits the use of custody as a substitute for appropriate child protection, mental health, or other social measures, the reality is that young people with child welfare status frequently languish in jail while their social workers work on release plans and revised placement options. Unfortunately, it is not uncommon for these kids to be told – on being arrested for minor group home incidents, for example – that their assigned social worker will not sign them out of jail because they need “a cooling off period” before they are allowed “back home.” It is also not unheard of for the Crown to refuse to agree to bail for kids in care where there has been a group home incident with the result that something as minor as shoving someone against a wall can mean a weekend or more in jail. When kids in care learn that someone their age with a comparable offence – but in an intact family – is allowed home right away, is it any wonder

they are confused and angry about the consequence they experience? Is it any wonder that they cannot make meaning of what has happened and therefore, re-offend, sometimes with alarming frequency?

I am not suggesting that violent, repeat offenders – whether in care or not – receive the same treatment as first-time offenders. What I propose is simply this: that when a child in care comes into the criminal justice system, those making decisions for the child take notice of the legislative requirements defining the “best interests” of the child. Surely the best interests are paramount, particularly when the child is troubled. Where child welfare authorities are required to intervene, Alberta’s *Child, Youth and Family Enhancement Act* enumerates a number of factors to be considered. Chief among these is an acknowledgment that “the family is the basic unit of society and its well-being should be supported and preserved.” It is also understood that “stable, permanent and nurturing relationships for the child” are important along with services that are the “least disruptive” to the child. In youth criminal matters, if we take notice of and marry these factors with the youth criminal justice ideals of “rehabilitation, reintegration and accountability” using the least restrictive measures possible, we will all no doubt be further ahead as we raise our children to succeed in life.

However, to put this into practice, we need to give governments a clear message that it is time to stop criminalizing the mistakes of young people and time to start supporting parents and families, enabling them to spend more time with their kids engaged in positive activities well into and beyond adolescence. If we support parents and families first, and if we provide the same support for caregivers of kids in care, then my bet is we will see fewer kids in court. I look forward to that day.

*Michelle C. Christopher is a lawyer with the Youth Criminal Defence Office in Calgary, Alberta.*

# Alberta Child Welfare Legislation

## Unique with Respect to Permanent Guardianship

Riley D. Gallant

Alberta's *Child, Youth and Family Enhancement Act (CYFEA)*, R.S.A. 2000, c. C-12 provides the Department of Child and Family Services ('the Department') with the authority to address child protection concerns where a child is found to be in need of intervention services. The legislation acknowledges that the family is the basic unit of society and purports to support and preserve its well-being. However, *CYFEA's* approach to the issue of Permanent Guardianship calls this focus on the family into question. An examination of the legislation in other Canadian common law jurisdictions shows that the family unit is not being adequately supported by the legislation in Alberta.

When a child protection concern exists and cannot be addressed by offering the family supports, the court often becomes involved. An *ex parte* Apprehension Order may be applied for where there are reasonable and probable grounds to believe that a child is in need of intervention services. The Department must then return the child to the parent or guardian within two days, or apply for a further court order with respect to that child. An application for a Supervision Order may be made where it is believed that the child can remain in the home, but the parent or guardian must be supervised and must comply with terms of the

Order to ensure that the child's security is adequately protected. An application for a Temporary Guardianship Order may be made where it is believed that the survival, security or development of a child may not be protected if the child remains in the home, but it is anticipated that the child will be able to return to the home within a reasonable amount of time. An application for a Permanent Guardianship Order may be made where it is believed that the child is in need of intervention or is already subject to a Temporary Guardianship Order; the survival, security or development of the child cannot adequately be protected by the parent; and it cannot reasonably be anticipated that the child should or could be returned to the parent within a reasonable amount of time.

When the Department obtains a Temporary Guardianship Order, the child will remain in the Department's care for a specified period of time. The parent or guardian then has that length of time to address specific concerns. The parent or guardian may be required to address issues such as drug or alcohol abuse, mental illness, prostitution, homelessness, domestic violence, parenting skills, or physical, emotional or sexual abuse. If the parent addresses the concerns to the Department's satisfaction, the

*An examination of the legislation in other Canadian common law jurisdictions shows that the family unit is not being adequately supported by the legislation in Alberta.*

child can be returned at the expiry of the Temporary Guardianship Order. If the parent has not addressed the concerns to the Department's satisfaction, the Department may apply to extend the Order for a longer period of time.

The length of time that a child is in care is significant, as *CYFEA* states that the total cumulative time in care under a Temporary Guardianship Order shall not exceed 9 months if the child is under 6 years of age, and 12 months if the child is 6 years of age or older. There is the possibility of an additional 6 month extension in some circumstances. If the Department believes that it cannot reasonably be anticipated that the child could be returned to the parent within a reasonable amount of time, or the child has reached his or her maximum amount of time in care under previous orders, an application for Permanent Guardianship will be made. This means that a parent or guardian may be limited to only a 9-12 month period in which to fully address a whole host of very difficult issues, before he or she permanently loses guardianship rights.

In some cases, a 9–12 month period of a Temporary Guardianship Order does not provide the parent or guardian with enough time to adequately address the protection concerns. It may be that a parent or guardian takes more time to address the concerns, but does become able to care for the child after a Permanent Guardianship Order has been granted. In this situation, section 35(1) of *CYFEA* says that the Director may apply to the court for an order terminating the Permanent Guardianship Order if the Director is satisfied that the child should be returned to the guardianship of the previous guardian. This section does not allow a parent or guardian to bring an application for an order terminating a Permanent

Guardianship Order. If a parent or guardian does not have the support of the Director, there is no mechanism under *CYFEA* for that parent or guardian to bring an application to terminate the order.

This is not the case in other Canadian common law jurisdictions. The other provinces and territories deal with the issue as follows:

- In British Columbia, the *Child, Family and Community Service Act* R.S.B.C. 1996, c. 46 allows a party to the continuing custody proceeding to apply for a cancellation of a continuing custody order.
- In the Northwest Territories and Nunavut, the *Child and Family Services Act* S.N.W.T. (Nu.) 1997, c. 13 allows the child's parents to apply to discharge a permanent custody order.
- In Nova Scotia, the *Children and Family Services Act* S.N.S. 1990, c. 5 allows a party to a proceeding to apply to terminate an order for permanent care and custody.
- In Manitoba, the *Child and Family Services Act* C.C.S.M. c. C80 allows the parents of a child to apply to terminate an order for permanent guardianship.
- In New Brunswick, the *Family Services Act* S.N.B. 1980, c. F-2.2 allows the former parent of a child to apply to terminate a guardianship order.
- In Newfoundland and Labrador, the *Child, Youth and Family Services Act* SNL 1998, c. C-12.1, permits a party to a hearing at which a continuous custody order was made may apply for rescission of the order.
- In Ontario, the *Child and Family Services Act* R.S.O. 1990, c. C11 permits a parent of a child to make an application to review the child's status as a ward of the Crown.
- In Prince Edward Island, the *Child Protection Act* R.S.P.E.I. 1988, c. C-5.1 provides that a parent may apply to terminate a permanent guardianship and custody order.
- In Saskatchewan, the *Child and Family Services Act* S.S. 1989-90 c.C-7.2 allows a party to the original protection hearing to apply to terminate an order permanently committing the child to the care of the minister.
- In Yukon, the *Children s Act* R.S.Y 2002, c. 31 provides that a parent may apply for termination of an order committing a child to the permanent care of the Director.

In some provinces, certain conditions must be met before the parent or guardian can make his or her application. For example, leave of the court is required to apply in British Columbia, Nova Scotia, Newfoundland and Labrador, and Ontario. In Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Saskatchewan, and Yukon, an appli-

*The Supreme Court of Canada held in New Brunswick (Minister of Health and Community Services) v. G.(J.) [1999] 3 S.C.R. 46 that section 7 of the Canadian Charter of Rights and Freedoms, being the protection of life, liberty and security of the person, can be engaged in child protection proceedings.*

cation cannot be made once the child is placed for adoption. Some of the Acts contain timelines detailing when an application may be brought and how often an application may be brought. While procedurally different, each piece of legislation provides a mechanism for the application to be made. The Alberta child protection legislation is the only legislation of its kind in Canada that restricts the reunification of families so significantly.

Another reason the Alberta legislation falls short is that it does not protect the rights of the child. *CYFEA* does not allow a child to request a review of a Permanent Guardianship Order. Once again, other Canadian jurisdictions are addressing a right that Alberta fails to address. In New Brunswick, a child may apply for termination or review of an order. In Ontario, the Northwest Territories, and Nunavut, a child can apply to terminate an order if that child is at least 12 years of age. In Yukon, a child can apply if he or she is at least 14 years of age. In Nova Scotia and Prince Edward Island, a child can apply if the child is at least 16 years of age.

It is clear that *CYFEA*'s approach to Permanent Guardianship does not support the preservation of the family unit in the same way that the legislation in other jurisdictions does. So what can be done?

The Supreme Court of Canada held in New Brunswick (*Minister of Health and Community Services v. G.(J.)* [1999] 3 S.C.R. 46 that section 7 of the *Canadian Charter of Rights and Freedoms*, being the protection of life, liberty and security of the person, can be engaged in child protection proceedings. The Court found that the stigmatization, loss of privacy, and disruption to the family that occurs in the course of child protection proceedings does restrict the parent's security of the person contrary to section 7 of the *Charter*. Therefore, a constitutional challenge of section 35(1) of *CYFEA* may be successful. The argument could be made that legislation which permanently separates a parent and child is contrary to the parent's section 7 rights, and the inability of the parent to subsequently request a review of a permanent order is contrary to the principles of fundamental justice. A constitutional challenge is necessary to ensure that Alberta's legislation complies with the *Charter*, and to ensure that the rights of Alberta's parents are protected.

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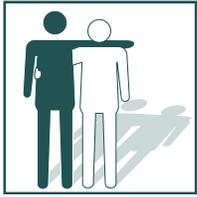
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# Human Rights Law

Linda McKay-Panos

## Access to Justice:

## Human Rights and Legal Aid

Legal Aid is defined as a system which provides individuals with access to the legal system (and more specifically to legal representation) who otherwise might not have had the means to do so (Department of Justice Canada. Legal Aid: [www.justice.gc.ca/eng/pi/pb-dgp/arr-ente/lap-paj.html](http://www.justice.gc.ca/eng/pi/pb-dgp/arr-ente/lap-paj.html)). Because Canadians see a great deal of American television, we often are misinformed about the right to legal counsel in Canada. Under the *Canadian Charter of Rights and Freedoms (Charter)*, s. 10(b), everyone who is detained or arrested has the right “to retain and instruct counsel without delay and to be informed of that right”. There is nothing in the *Charter* with regard to being entitled to paid representation nor is there mention of legal representation in civil matters.

Some legislation and legal decisions indicate situations where the government must provide Canadians with legal counsel. Most of these involve criminal matters. For example, the *Youth Criminal Justice Act* (section 25(4)) provides that a judge can order legal representation for a young person in a criminal matter. In addition, *Criminal Code* sections 684 and 694.1 state that judges at the Court of Appeal or the Supreme Court of Canada can assign state-funded lawyers to an accused if the

judge determines that legal representation is desirable in the interests of justice, and if the accused demonstrates that he or she is unable to afford the costs of private counsel.

The Supreme Court of Canada (SCC) ruled in the 2007 case of *Christie v. British Columbia* that there is no constitutional right of access to counsel. Nevertheless, under certain circumstances, publicly funded legal counsel must be given to a person who is charged with a criminal offence. In the 1988 case of *R. v. Rowbotham*, the SCC ruled that s. 7 and s. 11(d) of the *Charter* give criminal defendants the right to counsel if legal representation is necessary to ensure that the accused obtains a fair trial. The Court also concluded that judges have the right to appoint counsel for accused in criminal cases where the lack of legal representation would compromise the accused’s right to a fair trial (even if he or she has been denied legal aid). When deciding that an accused person needs legal counsel in a criminal matter, judges determine if the accused has financial need, is facing complex trial proceedings and is facing the possibility of imprisonment.

There are also limited circumstances where it may be necessary in a civil matter for a party to have government-funded legal

representation. In the 1999 New Brunswick case (*Minister of Health and Community Services v. G.(J.)*), the Government of New Brunswick was seeking temporary custody of the appellant’s children. She was denied a legal aid certificate, on the grounds that the program did not cover cases involving custody. The SCC held that in the specific circumstances of the case, the Government of New Brunswick had a constitutional obligation to provide G.J. with state-funded counsel. Although this case was considered by many people to be a landmark case, it has been narrowly applied to situations involving only government action and not to cases between private parties.

Poverty activists, bar associations and other stakeholders have argued that, although there is no right to counsel *per se* under the Canadian Constitution, access to justice and rule of law considerations require that, at minimum, access to legal counsel is an important policy matter (Adrian Scotchmer, “The Right to Counsel: Policy Reasons for Fundamental Reforms to Promote Access to Justice in Light of the Christie Decision” 2008 1(1) Osgoode Hall Review of Law and Policy). However, despite a Canadian’s right to legal counsel, or the policy reasons why they should have adequate legal representation, the legal aid programs in some Canadian jurisdictions appear to take a narrow interpretation of the right/policy.

In 2007, Chief Justice (SCC) Beverly McLachlin publicly noted concerns about access to justice and the court system when she said, “the most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve”. She said that access to justice is critical but that, “unfortunately many Canadian men and women find themselves unable, mainly for financial reasons, to access the Canadian justice system.” She also pointed out that people representing themselves before judges are delaying other cases as judges try to explain complex legal proceedings to unrepresented litigants. The lack of access to legal representation doesn’t only affect poor people. Increasingly, middle class Canadians are unable to access courts because of rising legal costs. (Remarks of the Right Honourable Beverly McLachlin, P.C., presented at the Empire

*When deciding that an accused person needs legal counsel in a criminal matter, judges determine if the accused has financial need, is facing complex trial proceedings and is facing the possibility of imprisonment.*

Club of Canada, Toronto, March 8, 2007: [www.scc-csc.gc.ca/court-cour/ju/spe-dis/bmo7-03-08-eng.asp](http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bmo7-03-08-eng.asp)).

If legal aid is akin to health care and education – it is a social right that should be accessible to all Canadians regardless of financial status – then the current trend in cutting legal aid programs is very troubling. In Alberta, for example, the legal aid program is funded by the provincial government, federal government (through contribution agreements and Social Transfer) and the Alberta Law Foundation. Funding to the legal aid program in Alberta was recently reduced and the program changed. Starting June 28, 2010, Legal Services Centres (LSCs) operating in Edmonton and Calgary perform an upfront assessment of the clients' legal needs. In many cases, the client will be given a referral to another agency. If a single person's monthly net income is above \$2,700, they will be given a referral to another agency and no other assistance. If the monthly net income is between \$1,750 and \$2,700, then the client will be eligible for legal advice by staff lawyers, brief assistance (e.g., assistance with court forms), information that will help the person resolve the issue or better deal with the justice system, or referrals to other agencies for assistance. These clients will not be eligible for "full representation by a lawyer in court". Individuals whose net income is below \$919 a month (annual net income level \$11,000) are eligible for "full representation". If the individual earns between \$919 and \$1,225 a month, he or she will be required to contribute to a portion of their costs for legal representation. As a result of the changes, the eligibility guidelines for full representation were decreased by 30% (Legal Aid Alberta website: [www.legalaid.ab.ca/](http://www.legalaid.ab.ca/)).

In addition to financial eligibility requirements, there are limits to the types of cases that Legal Aid Alberta can take. Legal aid is "most often offered for serious criminal charges (where there is a strong likelihood of someone going to jail or losing their job); charges laid under the *Youth Criminal Justice Act*," family law (e.g. child support, child welfare, parenting/guardianship) or immigration cases. Clients facing legal problems in civil areas such as wills and estates, dependant adult and trustee matters,

*In 2007, Chief Justice (SCC) Beverly McLachlin publicly noted concerns about access to justice and the court system when she said, "the most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve".*

employment, income support, landlord-tenant disputes and debt are no longer offered full certificates. They are eligible for brief services and legal advice through a central service centre in Edmonton (Legal Aid Alberta website: [www.legalaid.ab.ca](http://www.legalaid.ab.ca)).

Finally, Legal Aid Alberta changed its "Choice of Counsel Policy". Clients no longer have the right to choose their lawyer. Clients can indicate a preferred lawyer, but Legal Aid reserves the right to appoint a lawyer from a list of lawyers who take legal aid cases (Legal Aid Alberta website: [www.legalaid.ab.ca](http://www.legalaid.ab.ca)).

Underfunding an already inadequately funded program denies access to justice to many Albertans. What can be done about this crisis? While there are some legal services provided *pro bono* by lawyers, law schools, and community legal organizations (e.g., Calgary Legal Guidance), these agencies cannot absorb the additional needs created by the lack of government funding for legal aid. The Canadian Bar Association launched a test case in an effort to expand legal aid programs. In 2006, the Canadian Bar Association launched a test case in British Columbia in an effort to expand legal aid programs. Its legal challenge to cuts in legal aid programs was denied because the judge held that the CBA did not have standing to make the challenge (*Canadian Bar Association v. British Columbia et al.*) Leave to appeal to the Supreme Court of Canada was denied. In addition, stakeholders across Canada have made recommendations for ways that governments, lawyers, law societies and others could contribute to a solution.

In the meantime, many Canadians are being denied access to justice, which if not a human right, is certainly a moral right and a policy worthy of support.

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## Criminal Law

Deborah R. Hatch

### The Duties of Prosecutors

As officers of the court and agents of the Crown, prosecutors are subject to ethical and legal obligations flowing from various sources. The powers of Crown prosecutors are such that limitations are imposed to prevent the improper exercise of discretion which has fundamental implications for accused persons, witnesses, complainants, and society generally. The conducting of criminal litigation involves far more than the conduct of the trial process. The powers of Crown prosecutors extend also to the decision to prosecute, pre-trial disclosure, the ability to stay proceedings or withdraw charges, the powers to elect the mode of trial, prefer indictments, join counts or accused persons, consent to re-elections, and consent to the waiver of charges between jurisdictions<sup>1</sup>. Such broad discretionary powers have implications for both the liberties of accused persons and the integrity of the criminal justice system and society's conception of it.

The extent of prosecutorial power is exemplified by several recent decisions. In the now infamous 1995 case of *R. v. Morin*, following the accused's acquittal by a jury, Crown counsel chose once again to prosecute the accused. Mr. Morin

was subsequently convicted and incarcerated for a crime which he did not commit. The 2002 case of *Krieger v. Law Society of Alberta*, in which the applicant prosecutor challenged the jurisdiction of the Law Society to discipline prosecutors with respect to the exercise of their discretion, the prosecutor's decision in terms of withholding DNA results which exonerated the accused was in issue. *R. v. Cook*, a 1997 decision of the Supreme Court of Canada, also exemplifies the reach of prosecutorial discretion. The Court held that although there are limits on such discretion, it would not lightly interfere with it even where such discretion was exercised in choosing not to call the complainant to testify. These cases hold that the powers of the Crown prosecutor must be exercised fairly, impartially, and with integrity.

Courts will generally not interfere with the exercise of discretion unless it has been used for an oblique motive, amounts to an abuse of process, or offends the right to a fair trial (*Lemay v. The King*, Supreme Court of Canada, 1952). Crown counsel are thus given wide latitude, subject to certain minimal limitations.

Law enforcement considerations and the relentless pressure of public opinion merit

the maintenance and, where necessary, enforcement of the duties of the prosecutor. It is imperative that the prosecution does not become a mere extension of police interests, which do not always reflect the interests which Crown prosecutors must uphold. Prosecutorial decisions must be made only on the basis of the sufficiency of evidence and the public interest<sup>2</sup> and cannot be allowed to be influenced by irrelevant considerations such as political implications.

#### Governance of the Duties of Prosecutors

The duties of Crown prosecutors are governed by statute, common law, and the Law Society of Alberta pursuant to the *Alberta Code of Professional Conduct*. The *Criminal Code of Canada* contains various provisions which govern the duties of Crown prosecutors with respect to, among other things, disclosure obligations, notice provision, appeals, and bail. The *Canadian Charter of Rights and Freedoms* also has provisions which relate to the duties of prosecutors. Sections 7 and 11 of the *Charter*, dealing with fundamental justice and the right to a fair trial, impose responsibilities and limitations upon the Crown.

If there was any dispute as to whether the *Alberta Code of Professional Conduct* applied to prosecutors, the issue appears to have been settled in *Krieger*. The Court held that policy considerations dictate that the public is entitled to assurances that those who practise law will conduct themselves with honesty and good faith.

Numerous provisions of the *Alberta Code of Professional Conduct* apply to prosecutors. In particular, Chapter 10, Rule 28 of the *Code* provides that:

28. When engaged as a prosecutor, a lawyer exercises a public function involving much discretion and power. Accordingly:
- (a) a lawyer's prime duty is not to seek to convict, but to see that justice is done through a fair trial on the merits;
  - (b) a lawyer must act fairly and dispassionately;
  - (c) a lawyer must not do anything that might prevent an accused from being represented by or communicating with counsel;

*For example, references by the prosecutor in the 1991 case of R. v. Romeo to the defence expert's evidence being composed of "fairy tales" were held to be unduly prejudicial and inflammatory and to have resulted in a miscarriage of justice.*

- (d) a lawyer must make timely disclosure to the accused or defence counsel (or to the court if the accused is not represented) of all known facts and witnesses, whether tending towards guilt or innocence.

*... fairness does not preclude firmness, and a prosecutor is entitled to, and should be expected to conduct, a vigorous and thorough prosecution. A good and fair Crown prosecutor is not to be equated with a weak lawyer.*

## Role of the Crown Prosecutor

The quintessential conception of the role of the prosecutor was enunciated in the 1952 Supreme Court of Canada case of *Boucher v. The Queen* which stated: “It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done so firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with a greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.”

Rule 28(b), which encapsulates the duty to act fairly and dispassionately, also reflects common law conceptions of the role of the prosecutor. Part of this duty entails not influencing the trier of fact with inflammatory language or by presentation of facts not justified by the evidence. For example, references by the prosecutor in the 1991 case of *R. v. Romeo* to the defence expert’s evidence being composed of “fairy tales” were held to be unduly prejudicial and inflammatory and to have resulted in a miscarriage of justice. In reversing this decision of the New Brunswick Court of Appeal, Chief Justice Lamer of the Supreme Court of Canada endorsed the proposition that there is a duty on prosecutors not to use their position of power to influence juries artificially. A strong presentation of the facts was said to be acceptable provided it is fair. The duty of fairness also dictates that the prosecutor not express personal opinions, in court or in public, on either the evidence (including the credibility of witnesses) or on the guilt or innocence of the accused.

Fairness also requires that Crown counsel not exercise their discretion pursuant to

departmental policy which leads to excess rigidity. Accordingly, in the 1992 case of *R. v. K.(M.)*, where the accused had disciplined his son with relatively trivial physical force, the Manitoba Court of Appeal ruled that the Crown’s duty of fairness was breached by prosecuting the accused. It held that it was an abuse of discretion to prosecute an accused pursuant to a policy which effectively required the prosecution of *all* cases of domestic violence.

The decision to prosecute must also be made in accordance with the duty of fairness. There are two considerations. First, the sufficiency of the evidence must be examined. A reasonable prospect of conviction is essential to the initiation *and continuation* of proceedings<sup>3</sup> (emphasis added). The second consideration is whether the public interest requires a prosecution to be pursued. It is not the rule that all offences for which there is sufficient evidence should be prosecuted<sup>4</sup>. A variety of factors must be taken into account in determining whether the public interest merits prosecution, such as the relative seriousness of the offence, the factors in mitigation, and the degree of responsibility of the accused individual.

Fairness also dictates that the prosecutor not attempt to use evidence which is known to be inadmissible. If Crown counsel knowingly ask irrelevant questions or seek to introduce evidence which they know was obtained in the course of a breach of the accused person’s *Charter* rights, they are acting unethically.

However, fairness does not preclude firmness, and a prosecutor is entitled to, and should be expected to conduct, a vigorous and thorough prosecution. A good and fair Crown prosecutor is not to be equated with a weak lawyer.

Rule 28(c) imposes the duty not to prevent accused individuals from being

represented by or speaking with counsel. Accordingly, it is improper for Crown counsel to speak with an accused person when he is aware that the accused is represented by counsel. Plea negotiations under such conditions, then, are inappropriate and unethical. So too, by implication, is prodding an unrepresented individual to plead guilty in exchange for a minimal sentence. An uncertain accused may be contemplating discussing his predicament with counsel, and any aggressive prompting would surely contradict the aims of Rule 28(c).

The duties of the prosecutor are many and the implications significant. The exercise of prosecutorial discretion affects not only the liberties of accused persons but also, public conceptions of the legitimacy of the justice system. A strong democracy requires not only a vigorous defence bar, but dispassionate, impartial, and fair prosecutors who conduct themselves with integrity. As Winston Churchill once said, “We shape our buildings; thereafter, they shape us.”

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## Notes

1. *Crown Counsel Policy Manual* (Ottawa, Ministry of Justice and Attorney General of Canada, 1993), p. I-9-5.
2. *Supra*, note 1 at p. II-1-2.
3. *Supra*, note 1, at p. II-1-1.
4. *Supra*, note 1, at p. II-1-3.



## Not-for-Profit Law

Peter Broder

### The Best Policy

Notwithstanding his reputation as a lynchpin of conservative economic thought, Adam Smith quietly warned of the danger of ceding authority over regulation of the public weal to business interests. That warning comes to mind in light of the recent news of the likely termination of Canadian International Development Agency (CIDA) funding of the Canadian Council for International Co-operation (CCIC).

Though the decision not to renew its funding had not been confirmed at the time of writing, earlier this spring, CCIC began laying off staff and considering the sale of some of its assets in view of the prospect of losing a significant portion of its budget. The downsizing marked another milestone in the systematic erosion in recent years of policy capacity within Canada's voluntary sector.

Perhaps the high water mark in recognition of the value of sector organizations in contributing to public policy was the adoption in 2002 of *The Code of Good Practice on Policy Dialogue* as part of the Voluntary Sector Initiative. The *Code* was put in place, along with similar commitments on government-sector dealings and funding practices, in part because of past instances where governments unilaterally cut support for the

sector or abandoned collaborative policy-making processes.

It set out the principles and attributes of development of sound law and policy. Underlying the specifics is the view that an effective regulatory and policy framework requires research, meaningful consultation, and input from stakeholders.

Those days are long gone. The present government seems to have no interest in or use for the *Code*. It sees organizations that espouse positions that don't align with its agenda as troublesome and thinks it is better off if they are not on the landscape.

No single factor is responsible for the demise (or scaling back) of sector policy groups seen in recent years. Beyond financial challenges, the geography and diversity of Canada pose huge difficulties for groups mandated to conduct comprehensive research and undertake inclusive policy-making processes. Without the economies of scale and more plentiful sector funding sources available to their U.S. counterparts, it is not surprising that these organizations often struggle.

As well, the common governance, staff retention, and strategic planning shortcomings that affect the broad charitable sector also apply to these groups.

On the funding side, the preference of

many foundations and other funders to support direct service rather than policy infrastructure, which no doubt left many of these organizations over-reliant on government grants or contracts, cannot be overlooked. That said, a principal reason for their downfall in many cases has been calculated funding reductions by the federal government.

Often under the guise of moving money to frontline work or initiatives more in line with government priorities, this de-funding has stifled research and policy development that historically has helped generate ideas to improve, or offer an alternative to, the federal government's approach in tackling social and economic issues.

The list of groups that have become financially unsustainable or have had to curtail their activities is lengthy. Grassroots organizations doing advocacy, umbrella bodies, and think tanks have all been targeted for cuts. Among those who have lost funding are a number of women's organizations, such as the Canadian Research Institute for the Advancement of Women, and international development agencies, such as Kairos, as well as groups more known for their policy and leadership work such as the Canadian Policy Research Network, the Canadian Council for Social Development, and CCIC.

Policy groups heavily funded by corporate contributions are in the ascendancy as those dependent on government funding are reduced or eliminated. While it is sometimes said that this is a triumph of the "marketplace" and a demonstration of the superiority of the ideas of such groups, the better view is that these ideas will have to prove themselves in practice before any triumph ought to be proclaimed. And, in the meantime, we ought to keep Adam Smith's warning in mind: corporate interests are not always public interests.

While eliminating the funding of these groups may serve the government's short-term fiscal and ideological objectives, losing their voices is a setback for development of sound and effective policy over the longer term. Robust debate over alternatives in public policy may be inconvenient, but it is naïve to assume that optimal policy will be developed by narrowing the debate. The green movement is better for the vigorous

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(and sometimes heated) discussion among environmentalists of the relative merits of market-based approaches and prescriptive government regulation.

During the 2008 economic crisis, it became conventional wisdom that preserving confidence in the banking and financial system – no matter what the cost – would avert a depression and was a prerequisite for a speedy recovery. So governments put a safety net in place to protect this crucial infrastructure.

For social infrastructure, the federal government seems to be taking the exact opposite tack. It ought to look again at the economic impact of the \$36 billion – \$100 billion counting universities, colleges, and hospitals – voluntary sector (2007 figures). Given the sector's size and impact, does it really believe that this is prudent? Failures in the realm of social policy might not be as catastrophic as credit markets seizing up, but they are bound to tarnish the government associated with them.

For too many years, the legal, regulatory, and policy framework that sector

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organizations operate within in Canada was a product of afterthought. The Voluntary Sector Initiative and *The Code of Good Practice on Policy Dialogue* were an effort to change that.

The premium on Parliamentary time – exacerbated in the last few years by the constant politicking associated with minority governments – means that sector issues are frequently given less legislative attention than they merit. In that kind of environment, it may be tempting to have ideology rather than information drive statutory

initiatives. That, no doubt, has short-term political advantages. Set against this is the view, better supported by history, that well-informed policy is much more likely to accrue to the benefit both of the party in power and of the country as a whole.

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## Sports Law

Hilary Findlay

# The tragic death of Georgian luger Nodar Kumaritashvili reminds us of some important legal lessons

The 2010 Winter Olympic Games in Vancouver/Whistler received high praise indeed. And although these winter Olympics were one of the best, any evaluation cannot (and will not) forget the tragedy of the Games. John Furlong, VANOC chairman, in a recent talk with the Vancouver Board of Trade said, “I don’t think you can talk about the Games without talking about Nodar [Kumaritashvili]. He affected the Games. He is part of the story of Vancouver 2010.”<sup>1</sup>

Success is a great platform for learning, and there are many enduring positive lessons to take away from these Olympic Games. But tragedy can also be a powerful teacher. The devastating death of Georgian luger, Nodar Kumaritashvili, highlights a number of learnings — some new, some we know, and some we may have put away. The sorrow and pain felt by everyone (athletes, sport people, the general public) was real and palpable. But not far behind these feelings were questions: What went wrong? Who was to blame? These are both legitimate and important questions (though the motives for them may vary depending on who’s asking).

It is equally important to not simply compartmentalize this tragedy as a part of a high-risk, high-performance sport. There are some important lessons to be learned — both in the situation itself and in peoples’ responses to the tragedy. This article will focus on one example from each perspective.

### Citius, Altius, Fortius

Citius, altius, fortius (faster, higher, stronger) is the motto of the Olympic Games. It also represents the evolution in sport, whether natural or otherwise. Arguably, it was the innovative swimsuits worn by swim-

mers at the 2008 Beijing Olympics and the 2009 World Championships in Rome that re-wrote the record books — not the increased skill of the athletes. Hundredths of seconds have been shaved off times due to technological changes in many sports including cycling, speed skating, and alpine skiing. Force and endurance capabilities have similarly been increased by technological changes in sports such as tennis and golf, and training and dietary regimes have had a dramatic effect on strength and power.

The luge track at Whistler is an example of the impact of technology. Luge is a sport of risk. Indeed, speed is an ubiquitous part of the sport of luge. The Whistler track was designed to be both fast and difficult. Its location was chosen for its degree of drop, its tight turns, and its speed. As it turned out, the track ran even faster than it was ever designed to go. The course was designed for a maximum speed of 135 km/h. Athletes came out of corners at speeds of 154 km/h, or 19 km/h over the maximum designed speed. Nodar Kumaritashvili reportedly came out of the final curve (curve #16) at 144.81 km/h, or at least 9 km/h over the maximum designed speed.

Was Kumaritashvili to blame for the tragic crash? Some point to his lack of experience on the Whistler track and his lack of experience and skill in lugging. Kumaritashvili was ranked 44th in the season-long World Cup series and had participated in five World Cup Events. He had taken 26 runs at Whistler, with six starting from the start. He had crashed four times during those six runs, and it was on his 6th practice run that he was killed. Was this a sufficient number of training runs for an athlete with his skill and experience? Was he sufficiently skilled to compete? Was 44th in the world a good

enough ranking to participate on such a tricky course? How is one to judge — and who should make such a judgment?

Was the course designed, or constructed, to be too fast and too difficult? The projected speed of the course was nearly 9 km/h faster than the prevailing world record set in 2000. The course was steeper and narrower, meaning that its curves were short and tight and generated tremendous gravitational forces against the drivers. Was the course sufficiently safe given the extreme speeds? Had sufficient precautions been taken given the inherent dangers of the sport and this specific course? Were other factors involved, such as the alleged closing of the shade blinds during Kumaritashvili’s run? These are important questions and, at least to some extent, they will be answered, or at least discussed, through a number of investigations and reports that are forthcoming.

What is clear is that technology is making sport more demanding and often, more dangerous. As my colleague, Rachel Corbett recently wrote: “Risks do not exist in a vacuum. There is an entire underlying context that must shape our thinking about what level of risk is acceptable or tolerable in a given set of circumstances.”<sup>2</sup> Was the risk created by the speed and degree of difficulty of the luge track appropriate for the level of competition of the Olympic Games? Perhaps. The safety of athletes at such an elite level of competition cannot be ‘guaranteed’. Athletes take on risk in their desire to excel and athletes must know and appreciate the degree of risk. Risk must be responsibly handled by event managers and others. Performance standards need to reflect the degree of difficulty of the particular event. As the degree of difficulty of the luge run was escalating, for example, was there proper consideration as to what this might mean for qualification standards? Should they have been raised?

Whether one is dealing with Olympic Games or more local competitions, the principles remain similar. Event managers, coaches, instructors and others responsible for the care and safety of athletes have a responsibility to ensure that risks are ‘reasonably managed’ given the level of skill and circumstances of an event. This is the foundation of the legal concepts of

the 'duty of care' and 'standard of care' required to avoid negligence. The tragedy at the luge track demonstrates how complex a task it is to manage risk properly - starting with the planning and design of the course, its construction, the management of the event itself, and finally all of the administrative issues, including ensuring athletes have sufficient practice runs and a proper skill level to manage the risks.

### Managing psychological risk

A second aspect of Nodar Kumaritashvili's tragedy that struck me was the reaction of athletes, and others around the athletes, to the incident. A number of athletes expressed fear and recognized the danger of the luge run. Edwin van Calker, pilot of the Dutch four-man bobsleigh withdrew from the competition, having lost confidence in his ability. According to one psychologist, "Van Calker left the 'bubble' that sports psychologists train elite athletes to train in."<sup>3</sup> I recall a friend saying something similar when he left the elite levels of a very fast and very dangerous sport in Canada — he said he thought, just for a nanosecond, about the danger. The fear, ever so slight, had crept in and the edge was lost. It was time to retire, he said. In Van Calker's case he was mocked by his coach, who told reporters: "I've never seen someone get to a major event and not compete because they were scared. You keep your inner feelings to yourself and do it."<sup>4</sup> He said Van Calker would be ridiculed in Holland and predicted he might live to regret his decision.

Other sleds withdrew, including Australia and Switzerland's top teams (between them they had suffered three concussions and a cervical injury).<sup>5</sup> Some athletes were supportive ("Standing at the top, if you're not 100 percent confident, I could see why" said Steven Holcomb, the pilot of USA-1, referring to Van Calker's the withdrawal <sup>6</sup>), others not ("If you don't want to be part of it, shut up and don't be a part of it," a Canadian crewman said <sup>7</sup>).

I am sure the sport psychologists could weigh in on this. But there is a legal issue here as well - not with regard to third party comments, but with regard to the comments and actions of a coach in such circumstances. The issue arises in circumstances where an individual might be experiencing fear and a loss of confidence. It doesn't happen often at elite

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levels of sport, but it can (as witnessed by this case). But it does happen frequently at less extreme levels. In the British Columbia case of *Smith v. Horizon Aero Sports* <sup>8</sup>, a student in a parachuting class got 'cold feet' during her live jump exercise from an airplane. The court found the jump master negligent in his conduct towards the frightened jumper. The court emphasized that the jump instructor needed to verify the student's skills, needed to challenge her when she lost her nerve, not just simply to "give her an opportunity to settle herself" and, finally, needed to recognize the peer pressure that might be on her to complete the jump and let her know "that no one will think the worse of her if she declines [to jump]". In the decision, the court described the expected duty of the instructor/coach:

He [the jump master] failed to supervise her jump by not challenging her once she became alarmed in the aircraft to ensure that she knew how to execute the jump, and that he failed to exercise his duty as a jump master to forbid her from jumping when he knew or ought to have known that her ability was seriously in question. It was the instructor's duty to probe her by close and extensive questioning to ensure that she had a thorough understanding of the elements of canopy control. He did not do that adequately. It was his duty in the aircraft, once she became alarmed, not simply to give her an opportunity to settle herself down and leave it to her to decide whether to jump, but to have challenged her then with questions to determine whether she still recalled what she must do and to ensure that she was physically and emotionally in a condition to exercise clear and quick judgment. Having gone through the training and come to the point of the jump there are probably strong peer group pressures on the student to complete the task. I find it to be part of a jump master's duties to tell an alarmed student that she does not have to jump unless she is quite ready and that

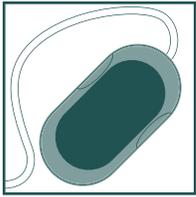
no one will think the worse of her if she declines. Although the fact did not occur here, I think it relevant to go on and say that in my opinion if the student still wishes to jump but the jump master is not satisfied of her ability to do so he should prevent her in spite of her wish. (para. 19)

Dealing with risk is a complex legal issue. In sport we cannot simply rely upon a participant's "voluntary assumption of risk" or a waiver of liability for the consequences of that risk. The risk needs to be managed and the people assuming the risk need to be properly prepared to assume that risk. In the tragedy of Nodar Kumaritashvili, perhaps some of that 'management' got lost between the cracks.

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### Notes

- 1 Mickleburgh, R. From grief, Olympics grew stronger. *Globe and Mail*, April 17, 2010, A7.
- 2 Corbett, R. Olympic Reflections. *Imagine Canada Risk Management Experts' Columns*. March 2010. Last viewed April 18, 2010 at [http://nonprofitrisk.imaginecanada.ca/files/insuranceinfo/en/publications/rachel\\_corbett\\_mar\\_2010.pdf](http://nonprofitrisk.imaginecanada.ca/files/insuranceinfo/en/publications/rachel_corbett_mar_2010.pdf).
- 3 Bramham, Daphne. Dehumanizing, and damaging our athletes. *The Vancouver Sun*. March 15, 2010.
- 4 *Ibid*, page 1.
- 5 *Ibid*.
- 6 Abraham, J., Dutch Pilot Withdraws Over Safety Concerns, *New York Times*, Feb. 24, 2010.
- 7 *Ibid*.
- 8 1981 CanLII 300 (B.C.S.C.).



## Online Law

Marilyn Doyle

### “Green Law” on the ‘Net

Think GREEN! From the deaths of ducks in oil sands tailings ponds to the protection of the boreal forest, from climate change to clean water, environmental issues are regularly in the news and have become part of our consumer consciousness. Although individuals are encouraged to take action and responsibility for their part, much of the control over how our natural world is handled comes from a wide range of legislation, regulations, case law and policy. Anyone who wants to get seriously involved in environmental issues will find themselves dealing with the law: striving to meet the requirements of the law, calling for the enforcement of existing laws or advocating for changes to the law. This is an area richly represented in the online world. Some key sources are described below, grouped under five headings: Organizations engaged in research, education and advocacy; Organizations engaged in legal action; Organizations which focus on a specific issue; Publications dealing with jurisdiction; Blogs and other media.

#### Organizations engaged in research, education and advocacy

The Environmental Law Centre in Alberta ([www.elc.ab.ca](http://www.elc.ab.ca)) aims to provide

“an objective source of information about environmental and natural resources law and policy”.

Similarly, the primary mission of the Environmental Law Centre, University of Victoria ([www.elc.uvic.ca](http://www.elc.uvic.ca)) is “to provide research and advocacy on public interest environmental issues.”

The Canadian Environmental Law Association (CELA) based in Ontario, ([www.cela.ca](http://www.cela.ca)) works “to use existing laws to protect the environment and to advocate environmental law reforms”.

A national organization, Pollution Probe, (<http://www.pollutionprobe.org/>) “defines environmental problems through research; promotes understanding through education; and, presses for practical solutions through advocacy. Pollution Probe is dedicated to achieving positive and tangible environmental change.”

A national think-tank focused on research and education is The Canadian Institute for Environmental Law and Policy (CIELAP) ([www.cielap.org](http://www.cielap.org)). By meeting and corresponding with “leaders and opinion-makers from the legal, corporate, and academic fields, and from across the wide-spectrum of society, [they endeavor] to produce quality research that is objective, practical and solutions-focussed.”

*When speaking about the law, the question of jurisdiction (which level of government or court has authority) is significant. With environmental law this can be particularly confusing.*

On the international front, the Center for International Environmental Law (CIEL) which is based in US and Switzerland ([www.ciel.org](http://www.ciel.org)) is “dedicated to advocacy in the global public interest, including through legal counsel, policy research, analysis, education, training and capacity building.” Program areas include Biodiversity, Chemicals, Climate change, Human rights and environment, International financial institutions, Law and communities, and Trade and sustainable development. Within each area, links are provided to relevant international conventions, treaties and other agreements.

On the websites of all of these organizations you will find a wealth of publications ranging from highly technical research documents to basic fact sheets.

#### Organizations engaged in legal action

Of the above organizations, two also operate clinics that provide legal representation for environmental concerns: the Environmental Law Centre, University of Victoria, and the Canadian Environmental Law Association (CELA).

Two other Canadian organizations are known for their involvement in legal action. West Coast Environmental Law ([wcel.org](http://wcel.org)) describes their organization as “dedicated to safeguarding the environment through law... [using] hard-hitting legal analysis to engage citizens, mobilize allies, and influence decision-makers.” One of their services is Environmental Legal Aid which is provided in two ways. Legal advice may be given to members of the public facing an environmental problem. They also offer financial assistance through the Environmental Dispute Resolution Fund for individuals and community groups to hire lawyers “to represent environmental interests in the courts or before government tribunals or to engage in mediation or negotiation with other stakeholders to develop win-win solutions that protect the environment.”

Ecojustice Canada ([www.ecojustice.ca](http://www.ecojustice.ca)), formerly Sierra Legal Defence Fund, takes on “cases with the potential to set legal precedents and strengthen laws in support of four goals: fighting global warming, the protection of clean water and natural

spaces (parks, wilderness and wildlife), and the promotion of healthy communities.” Its website also includes “in-depth investigative reports and legal and scientific submissions that Ecojustice has researched and produced.”

### Organizations which focus on a specific issue

POLIS Project on Ecological Governance: Water Sustainability Project ([www.watersdm.org/policy](http://www.watersdm.org/policy)) produces research and publications in the areas of Water Conservation, Water–Energy Nexus (the interconnections between water and energy), and Water Law, Policy and Governance.

[cleanair.ca](http://cleanair.ca) ([www.cleanair.ca](http://www.cleanair.ca)) provides succinct and readable information which helps people understand the law and policy related to air pollution and ways to take action on this issue.

The Canadian Parks and Wilderness Society ([www.cpaws.org](http://www.cpaws.org)) advocates for laws and policies that establish and effectively manage parks and protected areas.

The Pembina Institute ([www.pembina.org](http://www.pembina.org)) focuses on Canada’s transition to sustainable energy. This includes working with partners in other countries to influence key international decisions.

### Publications dealing with jurisdiction

When speaking about the law, the question of jurisdiction (which level of government or court has authority) is significant. With environmental law this can be particularly confusing. The following two documents provide some insight into this topic. Although each one is directed to a specific province, they each also present information relevant to the national scene.

*The ABC’S of Environmental Jurisdiction: An Alberta guide to federal, provincial and municipal responsibility* (198 p.) produced by the Environmental Law Centre (Alberta) can be downloaded as a PDF at [www.elc.ab.ca/pages/services\\_programs/InformationServices.aspx?id=610](http://www.elc.ab.ca/pages/services_programs/InformationServices.aspx?id=610). Of particular interest is the coverage of the nature and impact of government policies, the concept of statutory authorizations, and the matter of ownership of land and natural resources.

Blake, Cassells and Graydon LLP have written *Environmental law in Ontario and*

*Canada* (29 p.) ([www.blakes.com/pdf/EnvLawOntCan.pdf](http://www.blakes.com/pdf/EnvLawOntCan.pdf)) It is addressed primarily to businesses and includes sections on Personal and Corporate Environmental Liability and Emergency Response, and Government Investigations.

### Blogs and other media

Many of the organizations listed above also publish blogs which can be accessed from their websites. As well, there are some individuals writing about environmental law. The following are four blogs written by Canadian lawyers.

Zizzo Allan Climate Law LLP writes about the evolving legal and advisory landscape surrounding climate change at the national and international levels. <http://zizzoclimate.com>.

A blog titled “Environmental Law and Litigation” provides “news and analysis (not advice)” from Ontario environmental lawyer, Diane Saxe. [www.envirolaw.ca](http://www.envirolaw.ca)

“Graystone Environmental Blog” imparts the insights of Roxie Graystone, an environmental lawyer, environmental engineer, and policy analyst.

<http://climatechangelawyer.wordpress.com/>

Lawyers from the national firm Davis LLP share their perspectives through the “Environmental, Energy and Resources Law” blog. [www.davis.ca/en/blog/Environmental-Energy-and-Resources-Law](http://www.davis.ca/en/blog/Environmental-Energy-and-Resources-Law).

In other media, the site of “Terra Informa” is of interest. Billed as a weekly environmental news program covering issues from across Canada and around the world, this podcast is based out of the CJSR news department in Edmonton and is made available for listening online or to download. <http://terrainforma.ca>.

There is plenty to explore if one wants to investigate “green law” on the ‘net!

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# YOUR GUIDE THROUGH CHARITY LAW

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