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The Reasonables

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Table of Contents

Featured Articles: The Reasonables

There are hundreds of ways that the concept of “reasonableness” plays out in Canadian law and society. Let’s look at a few.

Special Report: Environmental Law

Departments

Columns

Dozens of Legal Reasonables

By Peter Bowal

The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

> *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*,
> (Supreme Court of Canada, 1979, p. 325)
> http://canlii.ca/t/1mkvl

Introduction

If all the considerable bend in the Canadian legal system was to be reduced to one word, that single word would be "reasonable." Legislators, law students, lawyers and judges all know they can safely qualify what they intend to communicate by inserting the word "reasonable" in their legislation, exam answers, written and oral submissions and judicial decisions.

The universality of "reasonableness" in the law reflects the uncountable nuances and gradations of life itself. Law and legal procedure can rarely set down strict rules and standards for human behaviour because they cannot predict what people will do and for what reasons. People and their individual lives are not a "one size fits all" proposition and – if there is to be fairness and justice – the law must also be elastic in its governance of human behaviour.

This article takes a tour through the reasonableness concept in legislation, common law and equity. The purpose is to convey an idea of the range of law and procedure that is mediated by the reasonableness standard, or even double standards of reasonableness as the *Nicholson* test prescribes above.

The Spectrum of Legal Reasonableness

Reasonableness inhabits the full span of Canadian law as the following categories demonstrate.

Property Law

In real estate law, land use zoning and development criteria and approvals are subject to reasonableness. Both the common law and legislation in residential tenancies law provide that consent to an assignment and sub-let cannot be unreasonably withheld by the landlord. The reasons for refusal must be reasonable. The Alberta *Residential Tenancies Act* also creates objective standards of a "reasonable landlord" and a "reasonable tenant" (http://canlii.ca/t/52s97. The landlord may not enter the premises without consent unless there are reasonable grounds that an emergency exists or that the tenant abandoned the premises. It would be impossible for the legislature to generate a conclusive list of evidence that an emergency exists, so landlords must use their own judgment and be able to defend their decisions and actions as reasonable.

In intellectual property, the *Copyright Act* [http://canlii.ca/t/52sf0] defines "commercially available" work as "available on the Canadian market within a reasonable time and for a reasonable price and may be located with reasonable effort". Other parameters in the *Copyright Act* are reasonable price, reasonable demands, reasonably applicable, reasonable extract, reasonable diligence, and reasonable requests.

Similarly, the *Patent Act* [http://canlii.ca/t/52sdt] refers to "reasonable commercial terms and conditions" and "reasonable returns", "reasonable compliance", "reasonable compensation", "reasonably related uses", "reasonable intervals", "reasonable advantage" and "reasonable profit".

Administrative Law

The legal standard for disqualifying judges and administrative decision-makers is a reasonable apprehension of bias: "To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias": *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, (Supreme Court of Canada, 1979).

Family Law

The *Family Law Act* [http://canlii.ca/t/52vn6] refers to someone in "reasonable fear" of one's safety, "reasonable . . . financial or other support", and "reasonable contribution" to one's education. In cases of family separation, courts grant access orders simply to state that the non-custodial parent is to have "reasonable access" to the child(ren). The parents can informally agree on a workable schedule that can be changed whenever there is a change in circumstances. The parents are expected to contribute to "reasonable expenses" associated with supporting the child(ren). The *Divorce Act* speaks of "reasonable arrangements" for the support of children and spouses [http://canlii.ca/t/52f27].

Criminal Law

One can avoid criminal liability with a reasonable excuse. The *Criminal Code* [http://canlii.ca/t/52xw4] refers to assertion of "reasonable excuse" twenty times, but does not define it. Reasonable excuses include losing documents through flood, theft, fire, etc., serious illness, bereavement, and computer or electrical faults.

Dozens of Reasonables

Proof of the requisite elements of the crime must be beyond a reasonable doubt in order to convict the accused. The judge or jury must be certain beyond a reasonable doubt. Police may arrest and detain someone on "reasonable grounds" that an offence has, or will be, committed". "For a peace officer to have reasonable and probable grounds for believing in someone's guilt, his belief must take into account all the information available to him": *Chartier v. Attorney-General of Quebec* (1979), 48 C.C.C. (2d) 34 at 56 (S.C.C.). The courts have been reluctant to rigidly define what is reasonable and probable, preferring flexibility to decide on specific facts.

Parents and teachers may apply physical force that is "reasonable under the circumstances" to discipline children. The 2004 decision from the Supreme Court of Canada of *Canadian Foundation for Children, Youth and the Law v. Canada* [http://canlii.ca/t/1g990] concluded that minor educative or corrective force that lasts only for a short time and is not harmful ("transitory and trifling"). Reasonable force must pass an objective test. It is not reasonable force – rather it is criminal assault – to spank a child under two years or a teenager. Nor is it reasonable to use an object to discipline a child or strike the head.

Reasonable conditions are restrictions imposed on accused or convicted persons by way of probation orders or terms of interim release awaiting trial. Young offenders might be ordered to comply with conditions not to have contact with certain individuals, to not go to certain locations, to obey curfews, etc.

Regulatory Legislation

Much of legislation is regulatory and the term "reasonable" is found in this legislation so that it is applied in a common sense manner. All statutes pertaining to commercial, immigration, corporate, admiralty, labour and employment, international and competition regulation contain reasonableness standards.

Compliance with federal and provincial privacy legislation gives way to an overriding standard of reasonableness. Organizations may only collect, use and disclose personal information for the purposes that a reasonable person would consider appropriate in that circumstance.

In bankruptcy and insolvency, the *reasonable notice* doctrine calls for time to be given by a creditor to a debtor to repay the debt. To curtail abuse of the creditor's or receiver's power, the reasonable time allows the debtor to pay off debts before these assets are seized: *R.E. Lister Ltd. v. Dunlop Canada Ltd*., [Supreme Court of Canada, 1982, http://canlii.ca/t/1lpc0].

The Alberta *Environmental Protection and Enhancement Act* [http://canlii.ca/t/52x2d] regulates "reasonably foreseeable adverse effects" and mandates "reasonable measures" to repair and remedy effects of harmful releases into the environment, and "reasonable assistance" to inspectors. "Reasonable foreseeability," "reasonable knowledge," "reasonable care," "reasonable time," "reasonable belief," "reasonable notice," "reasonable cause," "reasonable inquiries," "reasonable steps," and "reasonable requirements" are also invoked.

In the law of insurance, insured persons are entitled to their reasonable expectation surrounding the insurance contract, such as whether it is enforceable, interpretative benefit when the contract is ambiguous, and other terms. Reasonable expectation replaces literal meanings that "would bring about an unrealistic result" in insurance contracts. It facilitates insureds receiving the coverage they expected: *Brissette Estate v. Westbury Life Insurance Co.* [http://canlii.ca/t/1fs8c, Supreme Court of Canada, 1992]

Tax legislation has developed the "reasonable expectation of profit" doctrine to determine whether a business seeks to make a profit or merely serve as a vehicle to deduct expenses. Factors have been developed to determine whether a particular activity was undertaken with a reasonable expectation of profit. The flexibility balances tax evasion with the reality that not all businesses will be profitable all years.

Procedural Law

Civil procedure is replete with reasonableness doctrines. For example, class action legislation prescribes "reasonable determinations" and "reasonable disbursements" [*Class Proceedings Act* http://canlii.ca/t/52d7k].

Contract Law

There are many terms in contract law which embrace reasonableness principles. If there is no deadline, an offer will lapse after a reasonable time. What is reasonable will depend upon the mode of the communication of the offer, and the price volatility and perishability of the subject matter.

Recoverable damages must be reasonably foreseeable. Innocent parties to a breach of contract are under a duty to take reasonable steps to mitigate their losses. The terms of restrictive covenants (non-competition clauses) must be reasonable in respect of activity proscribed, time and territorial restriction, in order to be enforceable.

Charter of Rights Law

The *Charter's* rights are subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Reasonable residency requirements may be stipulated in order to qualify to receive social services. We have the right against "unreasonable search or seizure." Persons charged with an offence have the rights to be tried "within a reasonable time" and to "reasonable bail".

Canadians have access to reasonable bilingual services at federal public institutions and a reasonable quality of essential public services. Governments have committed to providing "reasonably comparable levels of public services at reasonably comparable levels of taxation.

Employment law

An employee who is dismissed without cause is entitled to a reasonable notice of termination from their employer under common law. This is the length of time or amount of pay in lieu that an employer must provide to a former employee. What notice is reasonable will depend on context such as: duration of employment, the employee's age, position, salary, and likelihood of finding comparable employment elsewhere: *Honda Canada Inc. v. Keays* [http://canlii.ca, Supreme Court of Canada, 2008]

Employers also have a duty to reasonably accommodate employees with disabilities up to the point of undue hardship.

Standard of Review

The standard of review by appellate courts of decisions of administrative tribunals is reasonableness. According to the 2008 *Dunsmuir* decision of the Supreme Court of Canada http://canlii.ca/t/1vxsm at para 47:

> [S]tandards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Tort Law

The intentional tort of false imprisonment is made out by proof that you were restrained by the defendant, leaving "no reasonable means of escape." In negligence law, the average, reasonable person is a fictional person who supplies an objective standard of care in any scenario. In 2008, the Supreme Court of Canada affirmed in *Mustapha v. Culligan* [http://canlii.ca/t/1wz6f] that injuries from negligence must be reasonably foreseeable.

Conclusion

This article identifies a few instances of the doctrine of reasonableness in action in Canadian law. There are so many more. For example, the *Criminal Code* contains 850 sections, many sub-sections thereto, and Schedules and Forms. Some 536 separate reasonableness standards are embedded in the *Criminal Code*.

Even the Alberta *Residential Tenancies Act*, which has a focused provincial scope, makes 36 specific and separate references to reasonableness.

Frequently, legislation or the common law will state an open-ended standard generally of 'what is reasonable in the circumstances.' This leaves considerable space for justice to be fashioned according to the facts of individual cases.

As there can be no 'one size fits all approach to life', because law is part of life, this 'one size' approach also cannot be applied to the law. Indeed, the concept of *reasonableness* is the essence upon which justice can flourish in practice.

The research assistance of Bilal Siddiqui, a student at the University of Calgary, is acknowledged. He found the bankruptcy and insurance examples.

The Reasonable Person

By Aaida Peerani

Tort law is an umbrella field of law, which aims to correct injustices that have happened between individuals. The courts assess whether the victim, who is often the plaintiff, has been harmed by another person and if the victim is entitled to compensation for injuries suffered. Where the harm has occurred unintentionally or due to carelessness, the court will apply the *reasonable person standard*.

History and Background

Canada inherited the reasonable person standard from England in *Vaughn v. Menlove,* 1837 132 ER 490. In this case, an individual of "lower intelligence" (as noted in the case) built a shoddy haystack too close to the plaintiff's land. The defendant was warned that the haystack was poorly constructed, but ignored this advice. Unfortunately, the haystack spontaneously combusted and destroyed some of the plaintiff's property.

The court rejected the defendant's argument that he had acted honestly and in good faith even though he built a shoddy haystack. The court also rejected the idea that imposing liability on the defendant would unfairly punish him because of his lower intelligence. Instead, the court found the defendant liable and stated that the defendant must "adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe". This is the basis of the reasonable personal standard. Characteristics of a reasonable person standard include:

- A person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances to avoid liability;
- It is an objective standard. No consideration is given to the defendant's thought process or personal awareness of danger. Individual characteristics are excluded such as intelligence, strength, maturity, or temperament;
- The reasonable person is not a particular person. Rather, the standard takes into account both the practicalities of what ordinary people do and what the judges believe they should do;

- It is not a standard that requires perfection or removal of every possible danger – it is a standard that requires reasonableness; and
- Everyone is held up to the reasonable person standard, including the victim.

What Do the Courts Look at To Determine Reasonableness?

Judges make many assessments to determine the reasonableness of the behaviour in question and whether the defendant was negligent. According to the Supreme Court of Canada (SCC), "what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards" (*Ryan v. Victoria (City*), [1999] 1 SCR 201).

Reasonably Foreseeable Risk

According to the courts, a reasonable person carefully avoids creating a foreseeable risk of injury to others. In *Moule v. New Brunswick Electric Power Commission,* (1960) 24 DLR (2d) 305 (SCC), the defendant power company removed branches of trees to be able to install high voltage wires on telephone poles in a wooded neighbourhood. A 10-year-old climbed up the tree and fell out. During his fall, he reached out and touched the live wires. The court found that children climbing trees and coming into contact with closely hung live wires was a foreseeable risk that power companies should address by making the wires visible. However, because the power company placed the wires above ground and removed the tree branches, the court found that the power company took adequate precaution. In doing so, the court held: "The defendant should not be held guilty of negligence for not having foreseen the possibility of the occurrence of such an unlikely event as happened in this case and provided against it by the removal of the maple tree."

These cases demonstrate that reasonably foreseeable risk is an essential component of liability and context is important in determining if negligence occurred.

Likelihood and Severity of Damage

A reasonable person takes greater care when the likelihood and/or severity of damage are strong and less care when the likelihood and/or severity of damage are minimal. *Bolton v. Stone*, a 1951 United Kingdom case is still a leading decision on this and other points. In *Bolton,* a person was hit on the head with a cricket ball while standing on a highway adjoining a cricket ground. This cricket ground had been used for 90 years at the time of the case. The Court noted that in the previous six years, the ball had only been hit onto the highway six times and no one had ever been injured. The court found that the cricket club did not breach the reasonable person standard because the risk of damage was so small. The court stated that: "[i]n order that the act may be negligent there must be not only a reasonable possibility of its happening, but also of injury being caused."

Cost of Preventing Injury

Courts consider the cost of preventing a liability in determining negligence. In *Wilde v. The Cambie Malone Corporation*, 2008 BCSC 704, a woman was hit on the head by a restaurant's patio umbrella that was blown toward her by the wind. The court found the restaurant negligent because it was foreseeable, given its location right by the water, that a powerful gust of wind could lift away the umbrella, even though this had never happened before. Moreover, the court considered that it would cost very little to set up an inspection checklist and repair system for the employees putting up the umbrellas. Therefore, the restaurant did not sufficiently safeguard the plaintiff from harm. This decision highlights the need to balance the likelihood of damage with the consideration of cost measures needed to reduce or neutralize the risk.

Public Benefit

Often, in cases where governmental services are provided, courts consider that an increased risk of injury to an innocent person is justifiable if the services provide direct and necessary benefits to the public. For example, in *Priestman v. Colangelo*, [1959] SCR 615, a police officer who was involved in a high speed chase was sued for shooting the suspect. When shot, the suspect was rendered unconscious and his car hopped onto a curb and killed two pedestrians. The court determined that the police officer was not liable for the death of the pedestrians, because he was empowered to take certain risks in his line of duty.

Exceptions to the Reasonable Person Standard

The justice system has recognized that there are certain characteristics that either exempt groups of people from liability or place stricter liability on them.

Mental Disability

If a defendant's mental abilities render the actions involuntary or prevent a person from complying with the normal standard of care, then there may be no liability in negligence. In addition, a defendant may be found not to have been negligent if they are suddenly afflicted, without warning, with a mental disability that renders them incapable of either:

- understanding and appreciating their duties of care or responsibilities; or
- discharging their duties because they had no meaningful control over their actions (*Fiala v Cechmanek* (2001), 201 DLR (4th) 680 (ABCA)).

This exemption will not apply to negligent behaviour due to voluntary intoxication.

Children

A two-stage test is applied to children in the rare cases that they are sued for negligence. The first stage analyzes whether the child is capable of negligence having regard to age, intelligence, experience and other personal factors. The second part considers if the child exercised the standard of care to be expected of a child of the same age, intelligence and experience. However, if the child engages in adult-

like activity such as operating a sea-doo or powerboat, he/she will be held to the stricter reasonable person standard (Philip H. Osborne, The Law of Torts, 5th ed (Toronto: Irwin Law, 2015 at 47 [Irwin])).

Physical Disability

A specific standard of care is applied to a person with a physical disability. However, even this exception is limited. For example, the standard applies if a person is blind, deaf or a paraplegic. The standard does not apply if a person is short-sighted, poorly co-ordinated, slow, elderly, or arthritic. Individuals with physical disabilities must take care to mitigate their vulnerabilities. In *Ryall v. Alsa Road Construction Ltd.,* 2004 ABPC 101, a construction company was sued by a visually impaired jogger who fell over a wooden barrier warning sign while running prior to sunrise. The court found that the construction company was not liable because the jogger withheld disclosure of her physical impairment at trial and did not see a doctor until an infection had already set in.

Superior Skill and Knowledge

Those with superior skill and knowledge, such as doctors, lawyers, architects, engineers and police officers, are held to a higher standard taking into account their expertise. (*Wilson v. Swanson*, [1956] SCR 804). They are judged based on the average or general skills or knowledge of their particular group. For example, a lawyer will be held to the standard of a reasonably competent lawyer (*Central Trust Co. v. Rafuse,* [1986] 2 SCR 147) and police officers are held to the standard of a reasonable police officer (*Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 SCR 129). Behaviour that is consistent with established practices in a person's profession is less likely to be seen as negligent (*ter Neuzen v. Korn*, [1995] 3 SCR 674). Note, however, there are no separate standards of care for beginners. They are expected to act according to the same standard as a reasonable professional in their field.

Subtle Subjectivity

Subjectivity gives rise to inconsistency which is not desirable in administering justice. One way that subjectivity may be introduced in the justice system is through judges. Judges have an innate sense of fairness or may show an instinctive response to facts of a case which may influence a judge to apply a certain degree of conscious or unconscious subjectivity (Irwin at 41). Sometimes, a judge's preconceived notions can result in errant subjectivity. In a highly publicized sexual assault case, former Justice Robin Camp made comments that implied that the sexual assault could have been prevented by the victim and advocated other rape myths. Generally, the justice system attempts to address issues of judicial subjectivity by providing special training and professional development to judges. In former Justice Camp's case, however, a disciplinary panel found that his comments deserved dismissal and he subsequently resigned.

Subjectivity can also be introduced through hindsight bias. Psychological studies have shown that people tend to overstate the predictability of past events (Irwin at 42). When judges or juries are asked to assess the risk that a reasonable person would have foreseen at the time of an accident and how s/he should have acted, they are already aware that the defendant's assessments may have been

inadequate. This may result in assessing reasonableness on a stricter basis (Irwin at 42). Except in very limited circumstances, the subjectivity introduced by judges and hindsight bias may be difficult to identify.

A review of the reasonable standard reveals its dependence on the facts of the situation. Therefore, reliance on a judge or jury's interpretation of facts and application of an objective standard of care is sometimes problematic. Still, in a world where rights and wrongs swim in a sea of greys, the reasonable person standard is the best we have to balance consistency in the law with the nuances of life.

Reasonable Doubt in Criminal Law

By Charles Davison

Canadian law recognizes different states of mind for decision-makers in various situations. Police officers and others engaged in an investigation are authorized to act where they have "reasonable grounds to believe" an offence has been committed and a particular person may be guilty. In some situations, the standard is even lower. For example, a police officer may demand a breath sample from a vehicle driver where the officer has a "reasonable suspicion" that the driver has consumed alcohol.

The highest "standard of proof" under our law is reserved for decision- making in criminal cases. Although lower standards sometimes apply to questions which are not at the very center of the dispute, upon the final and most important issue – that is, whether the Crown has proven the accused person is guilty of committing an offence – nothing less than "proof beyond a reasonable doubt" will do. As our judges tell juries every day, this means that the decision-maker must ultimately be sure that the accused is guilty before he or she can be convicted of a crime.

These two concepts form the most fundamental pillars of our criminal decision-making process: that the Crown bears the onus of proving its case and that the onus is high: proof beyond a reasonable doubt. These are tied to a third essential principle: that the accused is presumed by law to be innocent, and does not have to testify, call any other witnesses to testify, or prove anything at all.

The reason for these principles is because of the high value our society places upon individual freedom. Someone who is charged with committing a criminal offence stands in jeopardy of losing their freedom and liberty. Historically, conviction of a crime almost always meant imprisonment, and sometimes worse!

In more modern times, even where a convicted person is not sent to jail, a finding of guilt almost invariably brings restrictions on freedom, even if only in the form of an order to pay a fine, or by way of a probation order placing the accused under supervision. Conviction also usually leads to a criminal record, and other orders being made against the offender. Depending on the crime, these can include prohibitions on driving and handling weapons, and a requirement to provide DNA for the national forensic data bank. In the case of sexual offenders, they may have to register with the police annually

and obey various restrictions on heir activities, whereabouts and contacts with other persons, especially children. So, only where an independent decision-maker (a judge or jury in court) is left *sure* that we are guilty of the crime alleged, can we be punished and our freedom restricted or removed.

Judges have long struggled with how best to explain the concept of "proof beyond a reasonable doubt" to jurors. In times past they would equate this standard to ideas such as "moral certainty", but in the case of R. v. Lifchus in 1997, the Supreme Court of Canada ruled that such wording should not be used because different jurors might give different meanings to the idea of a "moral certainty". The Court rejected virtually all of the other, traditional ways of explaining the concept of "proof beyond a reasonable doubt" to juries, and formulated a new way to tell juries how to use this standard.

The Supreme Court directed that jurors should be told that a "reasonable doubt" is not a frivolous or imaginary doubt. It is not a doubt which a juror might conjure up as a result of sympathy towards, or prejudice against, the accused or anyone else involved in the case. A "reasonable" doubt is a doubt which arises from reason or logic or common sense. It can be based in the evidence presented, or it can arise from the lack of evidence on a particular point, or in the case overall. Jurors are to be reminded that the Crown need not prove its case to an "absolute" certainty, as almost nothing in the daily lives of human beings can meet this unattainable standard. However, in the spectrum of decision-making, proof beyond a reasonable doubt will be closer to the very high level of "absolute certainty" than mere probabilities.

At the end of the decision-making process, the judge or the jury can only find the accused person guilty of an offence if they are "sure" he or she committed the crime alleged. Nothing less than being "sure" will do: being suspicious, or thinking the accused "likely" or "probably" committed the offence is not enough, and a judge or jury which only reaches this level of certainty will be duty bound to find the accused "not guilty".

Proof beyond a reasonable doubt is the standard applied to the decision about guilt or innocence. Most other decisions which must be made by a court in the process of deciding whether the Crown has proven the guilt of the accused are not subject to the same very high standard. However, there are a few other situations in which the same very high level of proof must be met by the Crown. One of these is in relation to the use of anything an accused person has said to state officials or any other person in authority. This, too, is rooted in our high value for human liberty.

In order to ensure that the state does not improperly force a suspect to speak, the law requires that before the Crown can make use in court of something the accused has said to a person in authority over him (a police investigator, a prison guard, and so on) the Crown must prove beyond a reasonable doubt that the accused made the statement:

- voluntarily;
- without undue influence by way of threats made against him or her, and

- without promises of benefit, favour or advantage being held out.

The Crown must also prove the accused had an “operating mind” at the time he or she spoke. Someone who is under the influence of drugs or alcohol at the time of speaking to the police may, for example, be found to not have understood the option of remaining silent or the results of speaking.

Finally, the Crown must prove beyond a reasonable doubt that the general setting and circumstances of the accused were not unduly harsh or “oppressive”. Our law recognizes that if individuals are subjected to conditions which are unpleasant enough, that alone might undermine their free will when it comes to deciding whether to speak to the police. For example, someone who has been deprived of food or water or sleep for many hours may decide to speak to the police in the hope of being freed from those conditions and either released, or at least housed in more humane surroundings. These are factors that may leave a judge in doubt about the truly free and voluntary nature of the decision to talk to the police. Where the Crown cannot provide proof which leaves the judge “sure” the accused gave a statement voluntarily, evidence of what the accused said will not be allowed in court. This right exists through the entire process until the end of the trial. Just as a suspect has the right to refuse to answer police questions or to assist the investigation, he or she has the continuing right to remain silent during the court proceedings and does not have to call evidence or testify at trial.

The other common situation where the Crown must prove a point beyond a reasonable doubt is where some aspect of the criminal offence is considered to make the crime especially serious, and therefore worthy of a more severe sentence. Such additional elements are called “aggravating factors”. Because they are likely to increase the severity of the punishment for the accused, like the concept of guilt itself, they must be proven beyond a reasonable doubt. The sentencing judges must be “sure” the offence includes the aggravating factor before they can rely upon that factor to increase the sentence for the offender.

Some examples may help to illustrate this point.

It is considered an assault to touch another person without their consent. However, the crime of assault covers a wide variety of conduct. A deliberate brushing against, or pat with a hand, by one person upon another is a very minor form of assault, while repeated deliberate, forceful punches is a more serious form of the same crime. Sometimes, an accused will admit to a less serious form of assault, while the Crown alleges something more significant. The Crown must prove to the sentencing judge that the more serious form of the offence took place if it seeks a more severe sentence. If the judge is not “sure” the more serious misconduct took place, the sentence imposed cannot reflect that aspect of the allegations.

Another example concerns theft. While it is always wrong to take the property of another person, if the thief was entrusted by the owner with special responsibilities regarding the property, the crime will be considered more significant and the punishment is likely to be more severe. Thus, employees who steal from their employers are usually sentenced more harshly than someone not in that special position of trust. If the accused does not admit to being in a position of trust, the Crown must prove this beyond a

reasonable doubt. If it cannot do so, the punishment will be less severe than if the aggravating factor was proven.

In all of these situations:

- proving the guilt of an accused person;
- entering into evidence against the accused something he or she has told a person in authority; and
- establishing aggravating factors with a view to having a more severe sentence imposed upon a convicted person,

the law demands “proof beyond a reasonable doubt”. The common element: the state is attempting to obtain a result which is significantly contrary to the interests of the individual. Because our society places the highest value upon individual freedom and liberty of its citizens, in each of these situations the Crown must prove its case to the highest standard known to our law: proof beyond a reasonable doubt.

Taxes? Reasonable?

By Hugh Neilson

Although many Canadians may disagree when reading various media reports or when filling out their own returns, the government and the Department of Finance generally consider our tax system to be reasonable. The term "reasonable" shows up with surprising frequency in our tax legislation and jurisprudence.

Is That Deduction Reasonable?

The *Income Tax Act* (*ITA*) limits deductions to amounts which are reasonable in the circumstances *(ITA* Section 67). This concept is often expressed in conjunction with other requirements, such as whether an expense was incurred to earn income, or whether it was personal in nature. However, this is an independent test, not of the nature of an expense, but of its magnitude.

> *As a simple example, it seems that any business must maintain and clean its premises. Therefore, engaging an individual to, say, sweep and mop the floor on a weekly basis seems to be a legitimate expense, incurred to earn income. The business owner might well hire his or her child to perform this service without jeopardizing the deductibility of the expense. However, the business owner should anticipate a challenge if the compensation for two hours a week of cleaning services is set at a $150,000 annual salary. This seems an amount in excess of what is reasonable.*

In applying this restriction, many court decisions cite the following statement, from a 1968 decision (*Gabco Limited v. Minister of National Revenue (MNR*), 68 DTC 5210):

> It is not a question of the Minister or his Court substituting its judgment for what is a reasonable amount to pay, but rather a case of the Minister or the Court coming to the conclusion that no reasonable business man would have contracted to pay such an amount having only the business consideration of the appellant in mind.

Many cases deal with the reasonableness of amounts paid on a non-arm's length basis, such as payments to family members, or between related parties. For example, one Federal Court of Appeal decision (*Les Produits pour Toitures Fransyl Inc. v. Her Majesty the Queen (HMQ),* 2006 FCA 112, upheld a lower court conclusion "that no reasonable business person would have made these payments, which were almost three times the normal rental payments that could be obtained for the properties under ordinary circumstances".

However, these questions do not always deal with related parties. In one case (*William Hammill v. HMQ,* 2004 TCC 595), the court denied expenses paid to an unrelated third party on the basis that the circumstances of these payments, which related to a venture involving precious gems. The court concluded that a reasonable businessman would have asked more questions and taken more significant steps to secure his assets. Similarly, payments to secure release of an alleged container full of cash were held to be unreasonable in light of the many inconsistencies in the story given to the taxpayer (*Charles Ruff v. HMQ*, 2012 TCC 105).

Not all taxpayers are unsuccessful. In one case (*Fred & Ted's Construction Ltd. v. MNR,* 84 DTC 1530), the owner paid his son, Larry, who was in his early to mid-teens, about $10 to $11 per hour for work done. While acknowledging the evidence was less than perfect, the court also recognized Larry was a likely successor to the corporation, and had worked in the company business for many years. The court was "leery of making any adjustment to the deductions claimed by the appellant in respect of amounts paid to Larry." This reflects a common issue in such cases, that the courts are reluctant to substitute its own business judgment for that of the business owner.

Reasonable Expectation of Profit

Many cases have questioned whether a taxpayer had a source of income against which expenses could be deducted, creating a loss to offset other income, or was carrying on a personal activity, such as a hobby. Here again, the courts have been reluctant to second-guess a taxpayer's business acumen, especially with the benefit of hindsight.

The Supreme Court of Canada established the benchmark test of a "reasonable expectation of profit" in 2002 (*HMQ v. Jack Walls and Robert Buvyer*, 2002 SCC 47 and *Brian J. Stewart v. HMQ*, 2002 SCC 46). It stated that the first question to be asked was whether the activity might be undertaken for some reason other than generating income. Where such a reason might exist, then the actions of the taxpayer are evaluated to assess the commerciality of the activity. Some activities which have been challenged on this basis in recent years include the breeding and racing of horses (*Gibbs vs. Her Majesty the Queen,* 2016 TCC 249), online poker activities (*Radonjic vs. CRA,* 2013 FC 916), and rental activities, especially those with a personal element such as a vacation property, and a property occupied by a relative (*Masse vs. M.N.R*, 2003 FCA 351) and (*Tremblay vs. H.M.Q.*, 2004 TCC 424).

Reasonable by Law

In some cases, the legislation makes the determination of "reasonable" amounts. For example, individuals provided with an automobile by their employers are taxable for a benefit computed as a "reasonable standby charge". The *Income Tax Act* itself sets out in great detail the manner in which a reasonable standby charge is computed (*ITA* Subsection 6(2)).

Similarly, some employees are entitled to claim "reasonable" allowance paid for travel expenses related to their employment. This can often be a subjective determination, although the Canada Revenue Agency (CRA) has suggested that National Joint Council allowances, which are set for employees of the federal government, might form an acceptable basis for a reasonable allowance. However, many employers and employees have been surprised to learn that an allowance for use of a motor vehicle is, by law, not reasonable if calculated on any basis other than distance travelled (*ITA* Paragraph 6(1)(b)). The CRA has been actively reviewing automobile allowances, and reassessing employers (for CPP and EI which should have been withheld) and employees (adding the allowance to their income) where allowances are not based on distance travelled.

Reasonable Belief

Many provisions of the legislation require a determination of whether it is reasonable to reach certain conclusions. For example, were certain transactions motivated by tax, rather than legitimate business considerations? This often arises in the context of anti-avoidance provisions, or that a loan was advanced, or a benefit conferred, on an individual by virtue of their employment, rather than for some other reason, such as being a shareholder (or related to a shareholder) of a corporation conferring the benefit.

Other provisions require taxpayers make reasonable efforts to make determinations relevant to income tax filings in order to be exempted from liability or penalty which might otherwise arise. An example would be whether a person is a non-resident of Canada and therefore qualifies for benefits under an Income Tax Treaty.

Still other provisions require a reasonable conclusion as to the intentions of a taxpayer in entering into certain transactions. The taxpayer's intentions must be established based on evidence as some taxpayers may possess a "selective memory", or be less than forthcoming as to their intentions, due to a desire to achieve a certain tax result.

Non-Tax Use of Reasonable

Often, the income tax system looks to other legislation in making its own determinations. For example, where a taxpayer has made a misrepresentation attributable to carelessness, neglect or willful default, the usual time limits for CRA to reassess income taxes are overruled. The courts have held that the determination of whether the taxpayer met the standard of a "reasonable person" should be consistent with the common law as it relates to negligence.

Where a taxpayer has, under circumstances amounting to gross negligence, failed to properly report their income, and pay taxes on it, a penalty of 50% of the tax understatement can apply. Here again, the concept of a "reasonable person" is drawn from the law of negligence to determine whether a taxpayer has departed far enough from that standard to be considered "grossly negligent". As an example, the courts have often held that a reasonable person would review his or her tax return, and that failure to do so constitutes gross negligence.

Taxpayers usually think their claims are reasonable, while the CRA maintains that denial of their claims was similarly reasonable. This highlights the challenge – even reasonable people often disagree on what might be reasonable. Perhaps the only reasonable conclusion is that the determination of what is reasonable a fact-driven issue, precluding any simple test. It is certainly reasonable to conclude that the courts will continue to be faced with disagreements between taxpayers and the CRA as to what truly is reasonable.

Top Ten Ways to be Reasonable in Estates (otherwise known as how to have your family get together for Christmas the year after you die)

By Doris Bonora and Erin Lafuente

As estate litigators, we see far too often what happens when reason gets thrown out the window and disputes – big and small – tear families apart. Here are some practical tips that can be used to make an estate plan as well as tips for personal representatives to follow to try to avoid uncomfortable family dinners in the future.

1. When drawing up your Will, be reasonable in selecting a personal representative (formerly known as an executor) by carefully considering whether that person can do the job. Be reasonable about the expectations that you are placing upon this person in light of family dynamics. If your children have never gotten along during your lifetime, your death is not going to improve the chances of them getting along now. Your children will find new (*read expensive*) ways to argue and things to argue about. Remember, this is a *job*, not an *honour*. For example, don't assume that your eldest child is suitable for the job. Consider their capabilities in communication and their relationships with the other beneficiaries. If possible, pick a family member who is neutral or diplomatic. If that is not possible, consider someone outside of the family or a professional advisor. The last thing that you want to do is start out of the gate with a war between the personal representative and the beneficiaries, because things can only go downhill from there.

2. Be reasonable about the plan for your valued treasures and even those items you never knew people wanted. Who knew grandma's patchwork quilt was the item that all three of your children were going to desperately want after you die? Plan for these disputes and help your family be reasonable by giving them a system. Put a mechanism in your Will that tells the personal representative how these suddenly desirable items are to be divided among your beneficiaries, with a way to resolve those disputes. Maybe use a hockey style draft pick system.

In round 1, children choose an item in birth order and in round 2 they reverse the order and so on. Or, everyone picks the items they want and if there is duplication, pulling a name out of a hat leads to a lucky recipient. These may seem like simple ideas, but it can be very difficult for your personal representative to come up with a way that everyone accepts to resolve these disputes. It is best if the plan comes from you and is set out in your Will.

3. One of the most common arguments among children is about what is "fair". Unfortunately, as parents we realize that this desire for fairness doesn't wane as our children grow older and, as estate litigators, we see that this desire for perceived fairness rears its head again after death. One of the most important ways that you can prepare for this problem is to identify any sources of potential "unfairness" and address them in your Will. For example, perhaps you lent one of your children some money during your lifetime for the purchase of their own home, or to get them out of trouble. Make it very clear in your Will whether you expect the personal representative to collect this debt on your death, or whether it is to be forgiven. Otherwise, this can be a very difficult decision for personal representatives to make and they will have one side or the other upset with their decision. To avoid this, make it clear in your Will whether the loan is to be forgiven and make sure that you keep accurate records of any payments you receive towards that loan during your lifetime.

4. Don't be a Superhero! This tip applies equally to those making their Wills and the personal representatives charged with following it. Work with your lawyers and financial advisors to draft your Will and create an estate plan. Their help can ensure that your plan is clear, appropriate and reasonable. Personal representatives often think they should shoulder responsibility to save the estate money. They shouldn't try to be superheroes – attempting to do tax returns without the advice of an accountant can lead to missed deductions or incurring penalties. Similarly, trying to prepare the probate application without the assistance of a lawyer can lead to a very frustrating experience and delays. Be reasonable and use the assistance of accountants, lawyers, and financial advisors. This professional help can keep the personal representative on track and can save time and money overall.

5. Reasonable communication is key. For personal representatives, early, often and clear communication with beneficiaries is the number one thing that they can do to reduce the risk of conflict. As estate litigators, the majority of calls we get from beneficiaries are due to suspicions raised when the personal representative won't respond in a timely manner to requests for information. Avoid the suspicion. Personal representatives should provide reports, answer questions, and be clear about what steps they are taking and the expected time line. This can reduce conflict dramatically.

6. As a personal representative, remember your role. You are not there to right the wrongs of the past, to make things more fair or to distribute the property as you think should be done. You

are there to follow the terms of the Will. If you are unclear about what they are, seek professional assistance.

7. What about fees for personal representatives? There is nothing wrong with personal representatives expecting a fee for all the work that they do. Personal representatives should be compensated for their time. However, personal representatives can't set their own fees, so first look to the Will to see whether the deceased has set out the basis for calculating the fee. If not, seek the assistance of your lawyer to determine what would be reasonable in the circumstances. A simple estate usually pays a lower fee, but a more complex estate with litigation and other matters to deal with may necessitate a higher fee. The range is usually between 1-5% of the value of the estate. Remember that personal representatives cannot pay fees to themselves without the agreement of the beneficiaries or an order from the court. When it comes time to assess what is reasonable for the work done, a personal representative must rely on notes and records. How many hours were spent? What are the out-of-pocket expenses? Keeping track of these items consistently will help the personal representative deal more reasonably with the beneficiaries later.

8. The funeral is another area where fights begin. Memorial plans can cause huge problems for families, perhaps because emotions are so raw. The personal representative's first step shouldn't be an ugly one! He or she has the right to make these decisions, but should be reasonable in considering the opinions of all those who want to say goodbye and accept suggestions for how to celebrate the deceased's life, so that everyone can be accommodated, if possible. Using a reasonable manner will help ensure that there won't be long lasting hostilities and grudges about how to say a final farewell to mom. In our estate practice, we very often see that disputes surrounding the funeral can set the tone for the rest of the estate administration.

9. Be realistic. Disputes are not uncommon. First, look to the Will. Does it tell you how to resolve a dispute? If not, consider estate mediation. Mediation is a wonderful way to solve a dispute. In court there must be winners and losers. The judge has to apply the law and applying the law usually means picking one side or the other. Someone is going to be unhappy. However, in mediation any solution is possible and parties are only limited by their imagination. Choosing mediation allows the parties to be reasonable and creative. They can reach a solution that is acceptable to everybody and that will hopefully preserve their ongoing relationships.

10. Above all – have a plan! There is nothing more helpful in keeping families together than making sure that you have your estate planning documents done properly. A good lawyer will assist in ensuring that the Will matches your family's needs. When you are making your Will, you should ensure that you have discussed the need for an Enduring Power of Attorney and a Personal Directive with your lawyer, as those are equally important estate planning documents.

In estates, each step that you take sets the tone for the next. If you start out with a reasonably prepared plan, you set yourself on the right path. If you are the personal representative, take your first steps in a reasonable way, communicate early and often with beneficiaries, and include them in funeral planning. If you make sure that everyone feels that they have a voice and that they have your ear, then you are the best equipped for a reasonably confrontation-free estate. Disputes will arise, but it is how you approach them that will rule the day.

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Alberta's Climate Leadership Plan: An Update on Law and Policy Developments

By Brenda Heelan Powell

Over the past 18 months we have seen a rapidly changing law and policy landscape for climate change mitigation in Alberta.

The Climate Leadership Plan

Changes began in November 2015 with the release of the long anticipated Climate Leadership Plan (the "Plan"). The Plan, based upon recommendations made in the Climate Change Advisory Panel Report (the "Report"), focuses on four key areas:

- implementing a new carbon price on greenhouse gas (GHG) pollution;
- phasing out coal-generated electricity and developing more renewable energy;
- legislating an oil sands emissions limit; and
- employing a new methane emissions reduction plan.

As described in the Report, carbon pricing forms the "backbone of [the] proposed architecture". The carbon levy is to be applied across all sectors and its revenue will be used for defined purposes designed to reduce GHG pollution.

Another key element of the Plan is to phase out coal-fired electrical generation by 2030. The goal is to replace two-thirds of this electrical generation capacity with renewable energy and one-third with natural gas. In the meantime, coal-fired generators will be subject to the carbon levy on emissions above those created by Alberta's cleanest natural gas-fired plant producing the same amount of electricity.

The Plan includes a transition to performance-based standards and a legislated limit to oil sands emissions. This means the carbon levy will be applied to oil sands facilities based upon results already achieved by high performing facilities. Further, an annual limit of 100 Mt from the oil sands sector will be imposed by legislation.

The Plan seeks by 2025 to reduce methane emissions from oil and gas operations by 45%. It applies new emissions design standards to new oil and gas operations, and addresses emissions arising from venting and flaring and fugitive emissions from existing facilities.

Carbon Levy

The *Climate Leadership Act* came into force on January 1, 2017 and enables the carbon levy. The current carbon price is $20 per tonne and will increase to $30 per tonne in January 2018.

The *Climate Leadership Regulation* provides details on the implementation and application of the carbon levy. The *Regulation* specifies which activities are subject to the carbon levy and at what stages of the fuel supply chain the carbon levy is payable. This includes locomotive diesel, aviation gas and jet fuel, and raw gas and natural gas. The determination of the amount of fuel on which the carbon levy is payable must be done using a method acceptable to the Minister.

The *Regulation* indicates the following fuels are exempt from the carbon levy:

- A consumer is exempt from paying a carbon levy on fuel used in the operation of a specified gas emitter if the emissions from the fuel are direct emissions as defined in the *Specified Gas Emitters Regulation* (only if marked fuel is used);
- A consumer is exempt from paying the carbon levy on fuel used in a production process before 2023 if the fuel is not flared or vented (only if marked fuel is used); and
- A consumer is exempt from paying the carbon levy on fuel that is flared or vented in a production process before 2023.

The *Regulation* provides details on the carbon levy rebates under the *Act*. It also sets out requirements for the remittance, refund and recovery of the carbon levy along with administrative matters such as record-keeping and reporting.

Coal Phase-Out & the *Renewable Electricity Act*

The *Renewable Electricity Act* is the legislative vehicle for promoting renewable electricity generation in Alberta. The *Act* sets a target that at least 30% of electricity produced in Alberta will be from renewable energy sources by 2030. A renewable energy source is defined as:
an energy resource that occurs naturally and that can be replenished or renewed within a human lifetime, including, but not limited to:

- moving water;
- wind;
- heat from the earth;
- sunlight; and
- sustainable biomass.

In conjunction with this *Act*, the government released and accepted the Recommendations on Renewable Electricity Program prepared by the Alberta Electric System Operator (AESO). The AESO made recommendations on:

- the Renewable Electricity Program (REP) design;
- the form and content of the competitive process that will be used to implement the Program; and
- key features of the first competition, including a payment mechanism.

The goal of the Renewable Electricity Program is to increase the amount of renewable electricity generation on Alberta's grid without jeopardizing the performance and reliability of Alberta's electric system. The AESO recommends an Indexed Renewable Energy Credit (REC) as the payment method for this competitive process. The AESO explains the Indexed REC at page 16:

… a winning bidder is paid a $/MWh payment for renewable attributes produced as follows:

- Winning bidder bids a price that is, in essence, its lowest acceptable cost for the renewable project the bidder plans to advance;
- The dollar value of support paid to the winning bidder for renewable attributes produced by that project is not the bid price. It is calculated by subtracting a reference price12 (e.g. the pool price) from the bid price.

In other words, if the reference price (i.e. the pool price for electricity) falls below the bid price, the government provides a support payment for the difference. If the reference price increases above the bid price, the operator pays the difference to the government. The Indexed REC is designed to minimize the program costs for Alberta consumers and to avoid windfalls for operators while still creating an attractive market for investors.

Oil Sands Emissions Limit

The *Oil Sands Emissions Limit Act* places an annual 100 MT emissions limit on the oil sands industry. Several aspects of the oil sands industry will not be considered in calculating whether or not this limit has been reached. These include:

- co-generation emissions attributable to the electric energy portion of the total energy generated;

- upgrading emissions attributable to upgraders that complete their first year of commercial operation after December 31, 2015 or attributable to the increased capacity resulting from the expansion (after December 31, 2015) of upgraders that complete their first year of commercial operation on or before December 31, 2015;
- prescribed experimental schemes;
- prescribed primary production; and
- prescribed enhanced recovery operations.

There are no legislative definitions of experimental schemes, primary production, and enhanced recovery operations. These will come in a later regulation.

The *Act* grants the provincial cabinet authority to make regulations "establishing and governing mechanisms to keep greenhouse gas emissions from oil sands within the limit". This includes prescribing thresholds (including limits, triggers, ranges, measures or indices) and establishing a system of greenhouse gas emissions allowances for purchase, auction, trade and retirement.

Other Developments

It would be remiss to discuss the changes in Alberta's legal and policy landscape without referencing at least some of the significant international and national climate change developments.

The historic *Paris Agreement* is the latest international action flowing from the *United Nations Framework Convention of Climate Change (the "UNFCCC").* The *Paris Agreement* is designed to enhance the implementation of the *UNFCCC* by strengthening the global response to climate change. Among other things, the parties agreed to:

- hold the increase in the global average temperature to well below 2.0^{o}C with efforts to limit the change to 1.5^{o}C;
- increase the ability to adapt to adverse impacts of climate change and foster climate resilience and low GHG emissions development; and
- make finance flows consistent with a pathway to low GHG emissions and climate resilient development.

Canada is among the 147 countries that have ratified the *Paris Agreement*.

In order to meet its climate change mitigation commitments, the Government of Canada issued the Pan-Canadian Framework which establishes benchmarks for a national price on carbon including:

- All jurisdictions will have carbon pricing by 2018;
- Carbon pricing must be based on GHG emissions and applied to a common and broad set of sources (at a minimum, carbon pricing should apply to substantively the same sources as B.C.'s carbon tax);

- Jurisdictions must implement either (i) an explicit price-based system or (ii) a cap-and-trade system;
- If a jurisdiction adopts an explicit price-based system, the carbon price should start at a minimum of $10 per tonne in 2018, and rise by $10 per year to $50 per tonne in 2022;
- If a jurisdiction adopts a cap-and-trade system, there must be a (i) 2030 emissions reduction target equal to or greater than Canada's 30% reduction target (ii) declining annual caps to at least 2022 that correspond to the projected emissions reductions resulting from the carbon price that year in price-based systems (at a minimum);
- The federal government will introduce an explicit price-based carbon pricing systems to apply in jurisdictions that do not meet the benchmarks; and
- Each jurisdiction is required to provide regular, transparent and verifiable reports on the outcomes and impacts of carbon pricing policies.

The Government of Canada recently released its Technical Paper on the Federal Carbon Pricing Backstop which proposes the carbon pricing scheme applicable to those jurisdictions that do not meet the carbon pricing benchmark set in the Pan-Canadian Framework.

As can be seen, the climate change legal and policy landscape has undergone significant changes in the past 18 months. More changes can be expected, on both the provincial and federal front, designed to further mitigate GHG emissions and to deal with the impact of climate change.

Recovering the *Species at Risk Act*

By Institute for Research on Public Policy (IRPP)

Northern Spotted Owl

Wildlife is central to the Canadian identity. From Indigenous communities to the urbanites of our largest cities, an overwhelming majority of Canadians want the federal government to protect and restore species at risk of extinction.

The principal federal instrument that provides for this protection is the *Species at Risk Act* (*SARA*), passed by Parliament in December 2002. *SARA*'s purposes are to prevent extinction, to recover species currently threatened directly or indirectly by humans and to manage other species to prevent them from becoming endangered or threatened in the future. Judged against these objectives, *SARA* has underachieved because of withering political interest and weak policy prescriptions.

The federal cabinet decides which species are listed under *SARA*, a statutory process that begins with the government's receipt of assessments from an independent national advisory body called COSEWIC (Committee on the Status of Endangered Wildlife in Canada). COSEWIC advises the listing of a species when there is compelling evidence of a dramatic reduction in abundance caused by threats such as habitat loss, overexploitation, pollution, non-native species and climate change.

More than 520 Canadian species (plants, birds, mammals, fishes, amphibians, reptiles, insects, lichens) have been listed under *SARA*. Some of these now number in the tens of individuals (such as the northern

spotted owl); many others have experienced declines of more than 90 percent, such as the 12-metre-long basking shark, Canada's largest fish.

Despite initial good intentions, all has not gone well in protecting and recovering species at risk. The listing-decision process ground to a halt after 2010; COSEWIC continued to communicate its advice but the government did not act on it. Backlogs in finalizing recovery strategies for previously listed species have been severe. *SARA*'s List of Wildlife Species at Risk has long been biased against marine and northern species. Limited use has been made of *SARA*'s conservation agreements to broaden the engagement of citizens, business and civil society in stewardship activities. Few quantifiable benchmarks exist for evaluating recovery successes (and failures).

However, recent efforts by Environment and Climate Change Canada (ECCC, which has primary responsibility for *SARA*) suggest a renewed commitment to protecting species at risk. The Minister has re-invigorated the stalled listing process and dramatically accelerated the rate of production of proposed recovery strategies.

At the policy level, ECCC has released a suite of eight draft documents for public consultation. These aspirational documents provide greater clarity, rigour and guidance for a number of key decision elements under *SARA*. If comprehensively and rigorously brought into effect, they will almost certainly strengthen the implementation of *SARA* and increase the chances of effective protection and recovery of species at risk.

For example, the draft Policy on Survival and Recovery addresses a surprising ambiguity in the legislation: *SARA* does not clearly differentiate between what it means for a species to "survive" and what it means for it to "recover." The new draft policy makes this distinction clear. It states explicitly that the goal is not to keep endangered species endangered (survival) but to build toward self-sustaining populations (recovery). Moreover, this policy and several others explicitly recognize the importance of the precautionary principle in light of scientific uncertainty: when data are lacking about the efficacy of alternative actions, recovery objectives will "err on the side of precaution by not foreclosing opportunities for recovery."

Despite these laudable attempts to improve *SARA* implementation, critical issues remain in the draft documents. We have outlined in table 1 some of the strengths we find in the documents as well as several of our concerns and recommendations, and three issues are highlighted here.

Table 1
Draft policies for implementation of Species at Risk Act (SARA): Strengths and recommendations

Policy document	Strength	Key recommendation
Species at *Risk Act* Policy Principles	Commitment to efficacy, evidence and transparency	Add a principle of **accountability** to ensure that *SARA* and the proposed principles are enacted as intended
Policy Regarding the Identification of Anthropogenic Structures as Critical Habitat under the *Species at Risk Act*	Recognizes that human-built structures can be critical to the survival and recovery of species at risk	Invoke the **precautionary principle** explicitly if it is unknown whether there is sufficient natural habitat available
Species at Risk Act Permitting Policy	Clarifies the standards to apply when considering permit applications	Acknowledge **cumulative impacts** of previous permits when evaluating permit applications
Approach to the Identification of Critical Habitat under the *Species at Risk Act* when Habitat Loss and Degradation Is Not Believed to Be a Significant Threat to the Survival or Recovery of the Species	Takes a pragmatic approach to species that are at risk for reasons not associated with habitat loss or degradation	Highlight the importance of connectivity and maintaining **access** to available habitat, even when sufficient habitat exists
Policy on Survival and Recovery	Specifies minimum thresholds for survival and recovery,[1] which we consider a major step forward in implementing *SARA*	Set **quantifiable and verifiable targets** for the survival threshold, the recovery threshold and spatial goals for species distribution
Listing Policy for Terrestrial Species at Risk	Explicitly states the current timelines and policies used by Environment and Climate Change Canada prior to adding at-risk species to *SARA*	**Close the loophole** that has caused delayed listing by specifying when files received from the Committee on the Status of Endangered Wildlife in Canada will be transmitted to cabinet
Policy on Critical Habitat Protection on Non-federal Lands	Outlines steps to justify a protection order when species at risk are not sufficiently protected on non-federal lands	Require more **effective action** in response to gaps (current policy requires reporting only every 180 days)
Policy on Protecting Critical Habitat with Conservation Agreements under Section 11 of the *Species at Risk Act*	Outlines conditions for entering into a conservation agreement to benefit a species at risk	Set explicit **standards of evidence** when establishing whether a conservation agreement is effective

[1] "Survival" is interpreted by the draft policy to imply that the species has a high probability of persistence, with stable or increasing population sizes, sufficiently large population size to provide resilience, sufficient spatial distribution to withstand catastrophic loss, connectivity and low levels of human-induced threats. "Recovery" is interpreted as, at a minimum, survival plus three additional requirements: representation of the species across its historical range, improvement in condition relative to first listing and ability to persist naturally without further intervention.

An evidence-based approach

The first — the commitment to an "evidence-based approach" to decision-making as a policy principle — might seem self-evident and uncontroversial. The draft policies are, after all, intended to "emphasize sound approaches that are supported by credible scientific and technical data, aboriginal traditional knowledge and community knowledge." But who decides what constitutes a "sound" approach? What constitutes "credible" data and knowledge?

An evidence-based approach entails the gathering and weighing of evidence. But it also requires specifying how that evidence will be used (presumptions), specifying the thresholds that must be met by evidence to influence decisions (standards of proof) and specifying who has responsibility for demonstrating that these thresholds are reached (burden of proof). Here, clarity is key: even with the same scientific evidence, decision outcomes can differ dramatically depending on what the presumption is, what the standard of proof is and who bears the burden of proof. Indeed, these factors figured prominently in four judicial reviews of *SARA* implementation, all of which focused on what evidence should be gathered and how it should be used.

To improve clarity, the draft *SARA* policy suite should state what is meant by an evidence-based approach. As a concrete first step, it could specify that ECCC's evidence-based approach, when it receives advice from COSEWIC, will adhere to the principles and guidelines established in a Council of Science and Technology Advisors report on just this issue (*Scientific Advice for Government Effectiveness*, or *SAGE*), approved by cabinet in 2000.

Listing delays

A second issue concerns listing delays, which ought to be addressed in the draft Listing Policy for Terrestrial Species at Risk. For a species to be protected under *SARA*, it must first be assessed by COSEWIC. Listing advice from COSEWIC is then provided to the minister of ECCC, based on the best available information on the biological status of each species, including scientific knowledge, community knowledge and Indigenous traditional knowledge. The minister may then consult with provincial and territorial governments, Indigenous organizations and wildlife management boards, industry, civil society and citizens. These consultations in turn inform the minister's recommendation to cabinet, which ultimately decides whether to accept or reject COSEWIC's advice (or, in rare cases, to send the assessment back to COSEWIC).

More than 100 species now await listing decisions. Some have been waiting for more than a decade, caught between scientifically proffered advice and politically motivated procrastination. During the first few years following *SARA*'s proclamation, the listing process was usually completed within 24 months. Since then, the time taken to act upon COSEWIC's advice has ballooned. The longer the listing delay, the longer a species awaits legal protection, thereby increasing the chance of further decline, causing its recovery prospects to fade and recovery costs to mushroom. Birds such as the bobolink, the barn

swallow and the eastern meadowlark — declining at rates of about 20 percent per decade — are among those trapped in "listing limbo."

Having species languish in this legislative purgatory was clearly not the intent of *SARA*'s architects. It has come about because there is no provision in *SARA* that specifies a timeline for the environment minister to send COSEWIC's advice to cabinet. This has resulted in ministerial discretion to determine when, and in practice *if*, a COSEWIC assessment is communicated to cabinet. In 2008, Parliament's Standing Joint Committee for the Scrutiny of Regulations characterized this discretion as a "defect" of the Act, concluding that "failure to provide for the delivery to, and receipt of, an assessment by the Governor in Council [the cabinet] reflects an unintended gap in the scheme established by the Act."

Unfortunately, the proposed Listing Policy for Terrestrial Species at Risk fails to fix this gap, raising the spectre of continued or prolonged listing delays in the future. To close the loophole, at least at the policy level, ECCC should revise this draft policy to specify a timeline for sending COSEWIC's assessments to cabinet, consistent with Parliament's original intent that listing action be taken within a fixed period of time. Only by so doing can the current minister fulfill the explicit directive in her mandate letter to protect species at risk "by responding quickly to the advice of scientists."

An absence of targets

A third critical issue relates to *SARA*'s overarching goal of improving the condition of species at risk. While the draft Policy on Survival and Recovery is scientifically sound and clarifies the distinction between survival and recovery, it does not require that recovery strategies include quantitative targets. Currently, most recovery strategies set vague targets (such as "increase the number of individuals" without setting a quantitative goal). This lack of specificity makes it difficult to track recovery progress and to determine whether protection and recovery actions are effective. Indeed, the absence of quantitative targets is not unique to the draft Policy on Survival and Recovery; other documents in the policy suite are also missing this element. As a remedy, ECCC should establish measurable targets for defining thresholds for species survival and recovery, the extent of protection on nonfederal lands, and the quantity and quality of critical habitat implicated in conservation agreements.

Establishment of quantitative targets will require more effective use of the monitoring programs that should accompany recovery efforts. Moreover, in keeping with the government's commitment to greater openness and transparency, all data gathered in support of *SARA*-mandated actions should be freely available unless there are compelling reasons for restricting it. This will allow any Canadian to independently assess how species are doing, making it possible to determine which protective actions and policy approaches have the greatest impact on Canada's species at risk.

David Anderson, Canada's longest-serving minister of the environment (1999-2004), described the long process that culminated in the passage of *SARA* as being akin to pushing a massive boulder uphill, very slowly. Over the past decade, waning political will and a lack of precise, prescriptive implementation policies have resulted in significant slippage. The recent suite of draft policies — suitably amended and

rigorously implemented — should go some way toward ensuring a smoother, if still slow, ascent to the summit of full species protection and recovery.

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http://policyoptions.irpp.org/magazines/february-2017/recovering-the-species-at-risk-act/

Syncrude Ducks Produce Creative Sentence

By Peter Bowal and Devon Slavin

Introduction

Syncrude Canada Ltd, formed as a joint venture, is currently one of the earliest and largest producers of crude oil from Canada's oil sands. The consortium was initially formed in 1964 to mine oil from the Athabasca oil sands. It operates a large oil sand mine, utilities plant, bitumen extraction plant and upgrading facility that processes bitumen and produces value-added light, sweet crude oil for domestic consumption and export. Syncrude's production accounts for about 15% of Canada's consumption.

In July 2000, Syncrude started depositing tailings in the Aurora Settling Basin located around 75 kilometers north of Fort MacMurray, Alberta. This pond occupies a huge area of about 640 football fields. Transported through pipes from the extraction plant to the pond, the tailings, formed mainly by water, sand and bitumen, are left in the pond until reclamation. When masses of bitumen accumulate on the surface of the pond, they form a tar – a thick, cohesive and viscous bitumen.

The Aurora tailings pond did not receive environmental approval until June 2007. According to the approval, that same year Syncrude submitted its first Waterfowl Protection Plan for the Aurora mine, undertaking to monitor and deter access of wildlife (especially birds) from the tailings pond. The Plan proposed using an eight-person Bird and Environmental Team (BET) to provide full coverage, as well as 67 scare cannons, 27 effigies, 17 rafts and 13 boats.

The Athabasca river region and the Aurora Settling Basin tailings pond are on an important route for migratory birds during breeding season. Migratory birds are prone to mistaking tailing ponds as natural bodies of water. Most species of waterfowl depend on water for rest and foraging stopovers, and are attracted to open waters because the vegetation around them acts as a breeding ground.

Since the 1970s, major oil sands operators, including Syncrude, have invested heavily in research, protocols, and equipment to discourage birds from landing in or near the toxic water. They face marked challenges to bird deterrence due to various factors such as the high volume of migratory birds passing through the region, and the fact that tailings ponds tend to thaw early, causing the artificial ponds to

become preferential landing sites during the early spring break up in April and May. At that time, the migration of birds is at its peak and the unfrozen natural water body makes tailings ponds the only open sources available for birds. This impact was especially significant in spring of 2008 as the break-up of ice on nearby water bodies did not occur until early May.

At 9 a.m. on April 28, 2008 Robert Colson, a heavy equipment operator, noticed a large number of dead waterfowl floating on the surface of Syncrude's Aurora tailings ponds. After he counted about "300 lumps", he reported the incident to his supervisor. Meanwhile, Todd Powell, a senior biologist with the provincial government had come upon the same scene and was trying to contact Syncrude's wildlife officer, but he could not reach her. He called his colleagues at Alberta Sustainable Resources and Environment instead. Dave Mathews, the leader of Syncrude's Birds and Ecology Team (BET) called the provincial regulators to confirm the serious bird problem on Syncrude property.

The protection and deterrent systems had failed. The birds were trapped within the floating bitumen in the pond, which pulled the birds down and they eventually sank. What was initially reported to be about 500 dead ducks on Syncrude's tailing ponds soon turned out to be about 1600."

The Oil Sands Industry and Tailings Ponds

In 2008, the oil sands industry was one of the largest and fastest growing industries in Canada. Located primarily in northern Alberta, the oil sands reserves are approximately 173 billion barrels of recoverable crude. This quantity is second only to Saudi Arabia and is capable of meeting Canada's oil needs for the next 500 years.

There are currently three large oil sands mining operations in Alberta run by Syncrude Canada Limited, Suncor Energy and Albian Sands. Among them, Syncrude is the largest one by production of crude oil. Syncrude operates outside Fort MacMurray in the Athabasca Oil Sands, 440 kilometers northeast of Edmonton, Alberta (see diagram).

Oil sands in Alberta are extracted from the earth in essentially one of these two methods: in-situ extraction and open-pit mining. In open pit mining, massive open-pit mines are constructed, along with associated extraction facilities to separate the bitumen from the sand by breaking it down and mixing it with water so that it can be pumped easier. After the ore is excavated from the ground, warm water is added to wash the thick and sticky bitumen off the sand and clay. The water and solids that remain at the "tail end" of the bitumen extraction process are referred to as tailings.

Owing to their composition, tailings are very toxic. At high concentrations, salts and naphthenic acids would potentially affect fish and other aquatic life. Over time, small amounts of tailings water will seep from the coarse sands and possibly pollute the groundwater. Small amounts of diluents and bitumen found in tailings can form patches of oil on the surface of tailings ponds. If birds land on the tailings ponds and are contaminated by oil, their feathers will no longer be able to keep them warm and enable them to fly. A heavily oiled bird will almost certainly die. The bitumen mat found on April 28, 2008,

covered a significant portion of the basin's surface and was described as being "several inches thick, viscous and cohesive with the consistency of frothy roofing tar."

Environmental Prosecution

Syncrude was charged with failing to store a hazardous substance in a manner that ensured that it did not come into contact with any animals, contrary to Alberta's *Environmental Protection and Enhancement Act*, section 155, and with depositing a substance harmful to migratory birds in an area frequented by migratory birds, contrary to Canada's *Migratory Birds Convention Act,* section 5.1(1).

Source of graphic unknown

On June 25, 2010, after an eight-week trial, a judge of the Provincial Court of Alberta rendered guilty verdicts on both charges. The Court determined that the oil sands operator failed to establish the defence of due diligence. While it was impossible ensure waterfowl would not land on the tailings pond, the probability could have been significantly reduced. Syncrude did not establish a proper system to ensure that wildlife would not be contaminated by the pond, and did not take reasonable steps to ensure the effective operation of such a system.

While Syncrude had a bird deterrent system, it had deficiencies. Employees had documented a decline in the company's resources dedicated to bird deterrence. They had no formal training in dealing with bird behaviour or deterrence, there were too few staff and they were not equipped with the latest technology.

"Full weekly coverage' was only implemented Monday through Thursday, and the deployment of deterrence methods did not commence until April 14, 2008. Syncrude's Plan for 67 cannons was too few, the functioning ones were wrongly installed, and they were not deployed along the perimeter of the basin before the birds were discovered. By contrast, two of Syncrude's competitors, Shell and Suncor set up their deterrence programs at least two weeks earlier than Syncrude, and both companies' land cannons were in place before April 8.

Proper written documentation and procedures were not in place at Syncrude. Industry and government data collection, systematic monitoring and research on bird landing, oiling and mortality rates on the tailings pond all fell short, which led to ineffective deterrent methods.

Syncrude was found to have handled and stored harmful substances and failed to establish proper precautions and protective mechanisms to prevent the contamination of wildlife. The Company did not act with all the due care and diligence that were required to prevent this disaster.

Creative Sentencing

The judge imposed a total $3,000,000 penalty. This included the maximum provincial fine of $500,000 and the maximum federal fine of $300,000. Some of the fine went to the Wildlife Management Technician Diploma Program at Keyano College in Fort MacMurray. $1.3 million went to the University of Alberta for research into migratory birds and deterrence technology (the Avian Project). A further $900,000 was used for a wetlands conservation project on 60 acres near North Cooking Lake, a key stopover point for migratory birds. The Alberta Conservation Association used the money to acquire land for the Golden Ranches Waterfowl Habitat Project.

Conclusion

While Syncrude's sentence is not the largest penalty ever imposed in Canada for an environmental offence, it did serve as an impetus toward higher penalties and the increased use of creative sentencing. This case was highly publicized on local, national, and international levels. Although certain environmental damage may be unavoidable, companies in extractive industries face a high legal responsibility to mitigate risk and damage.

There are two ironic postscripts to this story. Mere days after the judge sentenced Syncrude to this $3 million penalty in late October 2010, another 230 birds died in Syncrude's Mildred Lake tailings pond. And, in the United States, as of December 2013, a new federal rule permits wind energy companies selected by the federal government to allow their large turbine blades to kill bald and golden eagles, free of prosecution, for 30 years in the name of green energy.

Appealing to Consciousness and Conscience: The Effects of Climate Change on the World's Most Vulnerable Populations

By Edward Apolonio

Recently, I have become more attuned to the effects of climate change. The forest fires in Portugal, the declining levels of the salmon that were once abundant in the Atlantic, heat warnings and tornado watches in the Prairies, risk of forest fires in Jasper, Alberta because of the massive pine beetle infestation, and the significant ice surface melt on the Antarctic ice sheet all point to the effects of our changing climate due to global warming.

I am not an expert on climate change, but over the last few weeks, my understanding and appreciation of its effects, particularly on our societies' most vulnerable has grown considerably. Climate change has been dubbed "the defining (and greatest) challenge of the 21st century"; "the defining moral issue of the century"; "a profound denier of freedom of action and a source of disempowerment"; a threat multiplier for vulnerable populations, and a threat to national security (according to the U.S. and the U.K.).

My purpose then is to convey my experience and realizations as I researched this topic. I hope to move my readers into action, even in simple ways: to become part of the solution, and not the problem.

The harsh reality is that the world will be experiencing catastrophic climate events more frequently. Across the globe, sea levels will continue to rise, storms/ typhoons will appear more frequently, intense and sustained droughts and floods will be more common, as will extreme weather events such as tornadoes and heat waves, which now affect one-third of the world's population.

On a global scale, the effects of climate change vary depending on latitudinal location, and the region's capacity to adapt. In Northern Canada, a 4°C-5°C temperature increase by the end of the century is projected, causing irreversible changes to ice and snow conditions. Some regions such as Africa and Southeast Asia are more vulnerable because of low capacity to adapt, lack of infrastructure, and a corresponding unmitigated exposure to the elements. Climate change by its nature is indiscriminate and

will affect everyone. In the summer of 2003 for example, approximately 70,000 deaths were reported in Europe due to a summer heat wave. Imagine that an entire city disappeared in one summer: the death toll was roughly 5,000 more than the entire populations of the Alberta cities of St. Albert or Fort MacMurray.

Studies anticipate Canada to be at a low risk, considering our capacities to adapt. In fact, Canada may see some benefits due to climate change, including longer growing seasons and milder winters. Studies have found that with the current climate situation, by 2050, growing seasons around Whitehorse and Yellowknife would be similar to conditions of present-day Edmonton. But the benefits do not come without the negative effects of climate change. Coastal communities will face more risks from stronger waves in winter due to reduced sea ice cover, and intense storm surges will become more likely. In the next 100 years, all three of Canada's coasts could see rising sea levels of up to 90 cm, causing floods, erosion, and submerged settlements. Heat waves and droughts will increase in intensity and duration, leading to poor air quality, smog, and degradation of water quality. At the same time, while floods become more intense due to increased precipitation in the summer, Canada's freshwater supply, particularly south of the 60th parallel, will see a decrease in quantity and quality.

In the Prairies, the effects of climate change show similar patterns: intense and sustained droughts; heat waves; increased precipitation; pollution; severe storms and floods; more frequent extreme weather events such as hail and tornadoes; and increased risk of forest fires. These effects are already happening. The forest fires in Slave Lake in 2011, and the more recent disaster in Fort MacMurray are examples. The 2013 flooding in Alberta due to heavy rainfall was described as the worst in the province's history, and the second-costliest disaster in Canadian history after the Fort MacMurray fire.

The United States under the Trump administration, on June 1, 2012 announced its withdrawal from the *Paris Agreement.* Article 2 of the *Agreement* sets out its main aims, including holding the global average temperature increase in the coming decades to 2°C above pre-industrial levels. This is important since studies have determined that adaptation and mitigation measures to address climate change will likely be inadequate if this threshold is not met. To achieve the aims of the *Paris Agreement*, the rate at which the average global temperature is increasing must be slowed down almost to a halt. Conservative projections indicate that this will be very difficult, if not impossible. In any case, the withdrawal of the United States, the world's second-largest GHG emitter, from the *Paris Agreement* will only contribute to the problem.

While most Canadians would agree that Mr. Trump poses significant problems for environmental protection, populations, he is not the problem here. Our focus should be on the effects of climate change. Put simply, such effects snowball for the world's most vulnerable populations including:

- the elderly;
- children and infants;
- those with disabilities and pre-existing illnesses;

- significant numbers of women;
- those who have low socio-economic status (SES) especially the homeless;
- immigrants; and
- Indigenous peoples.

Almost every discussion of the effects of climate change acknowledges that these groups are disproportionately affected even though they contribute the least to global warming. With that reminder, every time I turn on the air conditioning, or use power to watch Netflix, shower for more than fifteen minutes, or buy a cold drink, I reflect on the idea that for every need that I quite easily satisfy, and for every privilege that I choose, I affect someone else's life in a negative manner by way of climate change. It might sound trivial but this is how I have become more conscious and conscientious about the effects of climate change. Quite frankly, it is simply unfair.

So, how will vulnerable populations fare under the projected circumstances?

According to Professor Kirk R. Smith, an expert on health and climate effects, "The poor will die." Even conservative climate change scenarios do not dispute this outcome. It applies not only to the poor but also to other vulnerable groups. The shortness and simplicity of Prof. Smith's explanation, I think, also points to the lack of research, discussion, and consideration of the effects of climate change on the most vulnerable, and how that should fit into climate change adaptation and mitigation policies. Indeed, the majority of research on the topic concentrates on the effects of climate change on the environment, and how middle-class populations in developed countries will be affected. Unfortunately, the perspective of Indigenous elders during a 2004 Elder's Forum in Prince Albert still rings true: that global [environmental] change has been the focus of western scientists, with the result that the human realm (in terms of both impacts and responsibilities), has been largely removed.

The literature on the topic produces a common thread: members of vulnerable groups are far less able to adapt to the changing climate, and are less capable of mitigating the impacts. Their capacity to adapt in terms of their physical characteristics such as youth or age, and access to information and financial and other resources is inherently lacking.

For example, the elderly, children and infants experience physiological issues and limitations that make them more vulnerable to heat waves and water-borne and food-borne diseases caused by water degradation and warm temperatures. They are also more susceptible during severe weather events that necessitate evacuations, because of mobility issues (which also affects those with physical disabilities). We saw this in the aftermath of Hurricane Katrina in New Orleans, where almost half of the death toll of 1,000 people, were aged 75 years or older.

Women, especially in developing countries, are also prone to the negative effects of climate change. Women's experiences and ability to adapt and mitigate against climate change are disproportionately hampered by gender differences in social, economic and cultural roles; in property rights, political

participation, and access to information and various resources. And in this country, in 2015, Canadian women earned 87 cents an hour for every dollar made by men. In practical matters, this can affect their ability to enhance their adaptive capacity, for something as simple as buying an air conditioner.

Indigenous peoples are particularly affected by climate change because of their unique relationship with the environment. Not only are their livelihood and survival at stake, but their culture and practices are also at risk of disappearing. Indigenous women and men living in urban locations are more likely to experience poverty and homelessness compared to the average white Canadian. The reasons for this are systemic, historical, political and also cultural; and the solutions by way of reconciliation and policy change are long-term. In the meantime, many Indigenous people will continue to be exposed to the effects of climate change.

Generally, members of vulnerable groups focus on their day-to-day needs, simply to survive. I see it almost every day in inner-city Edmonton, where I volunteer with the homeless population. It would not be a surprise if the first casualties from an extreme weather event such as a heat wave or severe flooding come from the poor and the homeless. They should not be an invisible population. These are the lives of real people.

Every time we contribute unnecessarily to global warming, and hence to climate change, I truly believe that we are putting someone else's life on the line; someone who is more vulnerable than us. That belief is enough for me to be more conscious and conscientious about my actions.

BenchPress – Vol 41-6

By Aaida Peerani

1. Damages for Future Surrogacy Fees

For the first time in Canada, a car crash victim has been awarded financial compensation for the future cost of surrogacy. The case, *Wilhemson v. Dumma,* centered on Mikaela Wilhemson who was the sole survivor of a "horrendous, high-speed, head-on" collision that killed three other people including her boyfriend.

In Canada, the law prohibits payment for a woman to carry another woman's eggs or act as a surrogate. However, in her 109-page decision only on the issue of damages, British Columbia Supreme Court Justice Neena Sharma awarded Mikaela Wilhemson almost $4,000,000 of which $100,000 was included for surrogacy fees.

Justice Sharma relied on expert testimony to find that Ms. Wilhemson would have significant difficulties and put her health and welfare at risk to an unreasonable degree if she were to conceive and carry a child after the accident. Justice Sharma also relied on legal precedents to award damages for the cost of private clinics and U.S. health care expenses and to determine that compensating an American surrogate is lawful. Notably, both parties agreed that the loss of Ms. Wilhemson's ability to carry a child was compensable.

https://www.canlii.org/en/bc/bcsc/doc/2017/2017bcsc616/2017bcsc616.pdf

2. Costly Delays for Lawyers

Veteran criminal lawyer Robert Jodoin of Quebec was personally slapped with $3,000.00 in costs after he made two sets of motions against two judges. The motions challenged the jurisdiction of the judges on the grounds of bias in hopes of causing them to recuse from cases that Mr. Jodoin was set to defend. Mr. Jodoin was attempting to postpone trials of ten of his clients who were facing impaired driving charges. The case went all the way up to the Supreme Court of Canada ("SCC").

The SCC agreed with the lower court decision and stated that a lawyer can be personally liable on an exceptional basis where they have seriously undermined the authority of the courts or interfered with the administration of justice. This decision reflects the SCC's recent trend to speak out against complacency towards trial delays which can impair the efficiency of the criminal justice system as in the SCC's 2016 *R v. Jordan* decision. However, the dissenting judges expressed concerns. They agreed with the majority in principle that judges can penalize abusive advocates, but found that Mr. Jodoin's actions were not rare or sufficiently exceptional to justify punishment. Moreover, the dissent argued that in the criminal context, personal costs awarded against lawyers could have a chilling effect on defence counsel's ability to properly defend their client.

https://www.canlii.org/en/ca/scc/doc/2017/2017scc26/2017scc26.pdf\

3. Brain Games

Awareness of the long-term impacts of professional sports-related injuries has spurred litigation and public concern in recent years. However, Canadian courts have twice quashed claims made by former CFL players for compensation. In the most recent case in the British Columbia Court of Appeal, former B.C. Lions player Arland Bruce alleged that concussions from playing football, resulting in numerous health problems, were due to the negligence, negligent misrepresentation, and failure to warn on the part of the CFL, CFL clubs and several individuals.

Unfortunately for Bruce, the B.C. Court of Appeal unanimously dismissed his appeal and agreed with the lower court judge that the case arose from the "unusual" collective agreement between the CFL and football players. Therefore, the claim was outside of the jurisdiction of the courts and should be sent to arbitration.
Bruce and his lawyers plan to appeal to the Supreme Court of Canada.

https://www.canlii.org/en/bc/bcca/doc/2017/2017bcca186/2017bcca186.pdf

http://www.cbc.ca/sports/football/cfl/cfl-bruce-concussion-lawsuit-1.4113112

4. Golf Fore-sight

Golfers beware: be careful who you leave your clubs with. In a recent case at the Alberta Provincial Court, *Bloomer v. Connaught Golf Club*, an unhappy golfer sued his golf club after the pro shop lost his golf clubs and settlement negotiations failed.

Judge Redman penned a noteworthy passage on the value of clubs:

The game of golf presents a myriad of opportunities to practice one's perseverance, persistence, and perhaps most of all, patience. One is expected to contend with the wind and the rain, the roll of the greens and unusual lies, and slices, hooks, whiffs and yips; there are also the hazards – bunkers, berms, traps and trees. But one thing that can be counted upon is your clubs, the bag to carry them in and the accoutrements one collects over a lifetime of managing this sometimes miserable, but always memorable, game.

The Judge reviewed an annual application form signed by Bloomer and a membership handbook, which, when taken together, excluded the golf club from liability for loss or damage for their members' property. However, because the exclusion clause was not specifically incorporated or referenced in the

application form and was not otherwise brought to the attention of Bloomer, the Court held that it did not form part of the contract between Bloomer and the golf club.

Bloomer claimed $5,500 as the value of loss and testified that much of his equipment were gifts with sentimental value. However, the Judge relied on testimony of two of Bloomer's witnesses who claimed that the value of the loss was $1,145 and $1,150, respectively. In refusing to put a price on sentimental value despite his above-noted comments, the Judge awarded Bloomer $1,350 for his lost clubs and accoutrements and $200 in court costs.

https://www.canlii.org/en/ab/abpc/doc/2017/2017abpc105/2017abpc105.pdf

http://ablawg.ca/2017/05/18/for-golfers-a-classic-bailment-case-with-an-exclusion-clause-issue/

5. Drunk Dunk

The Alberta Court of Appeal recently struck down a section of Alberta's *Traffic Safety Act* pertaining to impaired driving in *Sahaluk v. Alberta (Transporation Safety Board)* 2017 ABCA 153.

In the 2-1 decision, with Justice Slatter writing for the majority, the Court struck down the mandatory roadside suspension of a licence of any driver charged with an alcohol-related driving offence under the *Criminal Code of Canada* until the charge has been dropped. The Court found that this suspension violated fundamental constitutional rights of all accused drivers under the *Charter of Human Rights and Freedoms.*

In making this decision, the Court examined statistics which showed that 22% of drivers subject to the mandatory suspension were eventually found not guilty, but were still prohibited from driving for significant periods of time while they waited to go to trial. Moreover, the Court relied on "evidence and logic" in finding that drivers were induced to plead guilty and therefore surrender their constitutional right to presumption of innocence and right to a trial. If drivers plead guilty, they are able to apply to start driving much earlier with an alcohol sensing device installed in their cars, called an ignition interlock, than if they decided to wait for trial. Furthermore, the Court shut down the Province's argument that the mandatory suspension is effective by noting that the fundamental rights of Canadians take precedence over efficacy.

Finally, the Court noted that the Province has gradually been increasing the reach and impact of the administrator licence suspension regime, but stated clearly that there must be a limit.

Justice Paperny, writing for the dissent, noted that the mandatory suspension regime does not infringe on *Charter* rights because there is no constitutional right to drive. She wrote that the jurisprudence is

clear that a licence is a privilege, not a right and a lack of a driver's licence does not amount to a restriction of one's freedom of movement.

With respect to the majority's concern regarding the inducement to file a guilty plea, Justice Paperny stated that if an accused pleads guilty out of his/her free will, then the motivation for such a decision does not matter.

The law, having been declared unconstitutional, will remain in place for one year until the Province can amend it or file an appeal at the Supreme Court of Canada.

https://www.canlii.org/en/ab/abca/doc/2017/2017abca153/2017abca153.pdf

http://www.cbc.ca/news/canada/edmonton/alberta-court-appeal-drunk-driving-licence-1.4121760

Viewpoint 41-6: Chief Justice McLachlin: The Supreme Court's steady hand

By David Butt

The Supreme Court of Canada homepage opens with, "Canadians are privileged to live in a peaceful country." With Chief Justice Beverley McLachlin retiring in December, that homepage opener is too modest. It should read, "Canadians are privileged to live in a country with an outstanding chief justice." History will cast an approving gaze on the McLachlin court, for four reasons.

First, Chief Justice McLachlin guided the Supreme Court with a steady hand through long periods of both Liberal and Conservative government. Sound judicial equilibrium during political ebb and flow is an under-appreciated imperative whose value to the country is enormous.

People initially come to court because they are in a fighting mood, and cannot make peace among themselves. People make it all the way to the Supreme Court because their fights also raise far-reaching questions of national importance, often ideologically or politically charged. Thus the peace-making role of the Supreme Court is not limited to deciding for or against one of the litigants before it. The court's decisions must also build consensus on large social or legal issues for the entire country.

The Supreme Court's work is nothing short of nation-building through the law. Its work must not be buffeted by changing political winds. It must always chart a course based on enduring values that will continue to unite us as governments come and go. In accomplishing this difficult but essential task, Chief Justice McLachlin's guidance has been deft and perceptive. Throughout her tenure, judges have been appointed by both Liberal and Conservative governments, to decide many controversial cases. Despite the potential for divisiveness, we witnessed virtually no ideological posturing that devalues the work of the United States Supreme Court. Instead, the McLachlin court has been prudent, and although sometimes underwhelming, always carefully reasoned and reasonable. The McLachlin court built out solid legal foundations for social cohesion. In its understated but strong approach to the law, the McLachlin court was prototypically Canadian and Canada is stronger for her court's work.

Second, the McLachlin court laid crucial groundwork for the core *Charter of Rights and Freedoms* challenge for the 21st century: reconciling competing rights. Shortly after our *Charter* arrived in 1982, the Supreme Court led by then-Chief Justice Brian Dickson had to give the new document meaning and

substance. Chief Justice Dickson, another Canadian legal giant, rose to the task. His court made our *Charter* both vigorous and flexible.

But by giving such commendably expansive content to *Charter* rights and freedoms, the Dickson Court created an imposing second-generation challenge: What to do when two or more of those wide-reaching rights or freedoms clash? It fell largely to the McLachlin court to start wrestling with that challenge, and the McLachlin court responded admirably. Her court rejected the simplicity of an either/or approach to conflicting rights, and instead embraced a much richer, more nuanced perspective that interprets competing rights with great sensitivity to how they actually impact the real lives of the people affected and, most importantly, gives each competing right as much scope as possible. The McLachlin message on competing rights is one of maximum generosity and maximum accommodation. Her Court has left our approach to rights and freedoms imbued with compassion, common sense, inclusivity, balance and breadth. Those are praiseworthy guiding principles with enormous promise.

Third, as our first female chief justice, she shattered the glass ceiling so forcefully, yet so elegantly, that not a shard remains protruding to deter any woman from aspiring to rise as high. With seeming effortlessness that was really a winning combination of grace and acuity, she made gender in high office a non-issue in the best possible sense. This is no small accomplishment in the legal profession, whose thought patterns and practitioners often remain far too deeply traditionalist and stubbornly retrograde.

Fourth, Chief Justice McLachlin brought a symbolically instructive personal style to her role as the country's top jurist. The pressure of appearing in the imposing, cold, art-deco surroundings of our Supreme Court is enough to make any lawyer's knees weak. But from the middle of the long dais where all nine judges sit seemingly ready to pounce, Chief Justice McLachlin would set the tone for each case with an earnest, warm, pragmatic demeanour, making those appearing before her feel like they were figuring out an interesting everyday problem. Her courtroom style should be emulated everywhere, because embedded in it is a valuable lesson that transcends style: Working with the law is not about fighting to win, it is about collegial engagement in pursuit of constructive resolution.

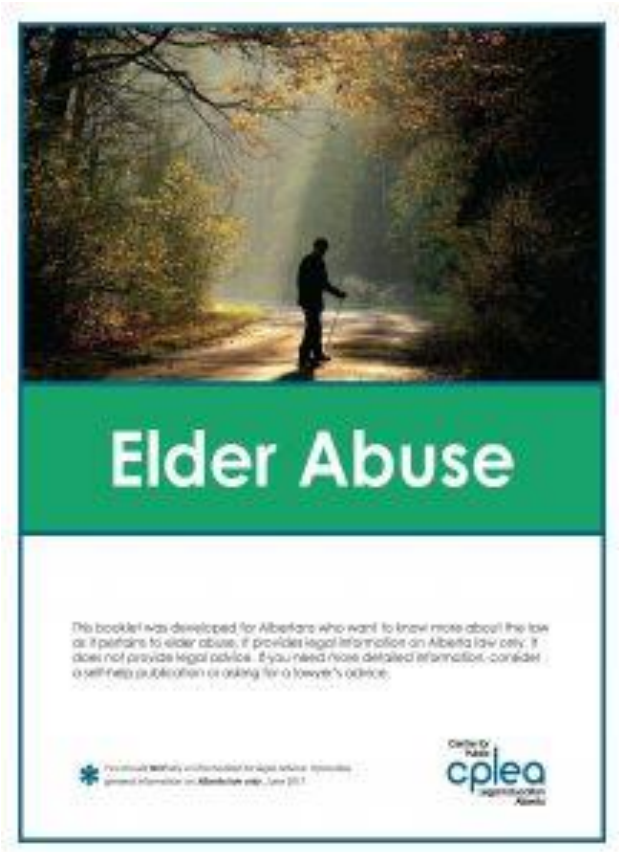
The McLachlin legacy is multidimensional and well-built. It will serve us ably long after its architect steps down.

New Resources at CPLEA – Vol. 41:6

By Teresa Mitchell

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

CPLEA has produced a new, extensive booklet on Elder Abuse. This resource covers the different forms that elder abuse can take and looks at the legal tools available to help older adults and those who care about them caught in this difficult and dangerous situation.



Bankruptcy Increases Among the Young and Old

By J. Doug Hoyes

A recent bankruptcy study by my firm found that the average person who files for bankruptcy in Canada is 44 years old. He is likely to be married, may have a mortgage, and owes almost $53,000 in unsecured debt. In fact, the clear majority of insolvent debtors, 77%, are between the ages of 30 and 59.

However, averages are deceiving and don't always reveal what's happening right now. Digging deeper into our study, we found that two age groups were filing for insolvency at a rate higher than in the past several years: millennials and seniors.

Millennials and Bankruptcy

According to Statistics Canada, roughly 75% of young people in 2011 attended some level of college or university by the age of 21 and this rate may be even higher today. The problem is that some of these young people are graduating with massive student debt; an average of $28,000. Paying off this level of debt over ten years requires an average payment of around $350 a month, depending on whether the student debtor takes advantage of any interest grace period. A lot must go right over those ten years for someone to keep up with that level of debt repayment, like finding a well-paying, stable job and not taking on any other substantial debt in the meantime. However, a lot can go wrong between the ages of say 25 and 35: you get married; you or your spouse take time off for maternity leave; you buy a home and take on a mortgage; you lose your job or you relocate. Any of these events can put your student debt repayment plan in jeopardy. This is the dilemma faced by an increasing number of millennials who find themselves filing for bankruptcy due to student debt.

Today, 15% of all insolvencies involve student debt. The average insolvent student debtor is 35 years old. They have been making payments on their student loans for an average of 10 years and yet still have a balance owing of almost $14,000. They are working, but are not earning enough to repay their student loans and make ends meet. They often turn to credit card debt and payday loans, making their financial situation worse.

There are special rules governing student debt and bankruptcy in Canada. The most important: you must have been out of school for more than seven years for student debt to be automatically discharged through a bankruptcy or consumer proposal.

Seniors Filing Bankruptcy

The fastest growing risk group among all age groups filing bankruptcy continues to be seniors aged 60 and older. This group now makes up 12% of all insolvent debtors filing a bankruptcy or consumer proposal. They carry an enormous amount of debt, built up over a lifetime. On average, they owe more than $64,000 in credit card and other debt.

The biggest risk factor for seniors is carrying debt into retirement. Once retired, their income generally drops, making it difficult to keep up with repaying pre-existing debt. Often seniors end up borrowing even more money as their mortgage or credit card bills consume a significantly higher percentage of their now fixed, and lower, income. If you are approaching retirement, commit to lowering your debt as much as possible to reduce your risk.

An alarming trend is the growing use of payday loans among seniors. More than one in ten insolvent seniors owed money to payday loan companies and they had the highest level of payday loan debt of any age group. Payday lenders are happy to lend against any source of stable income, including pension income. However, this is not a good borrowing option because, more often that not, it postpones the cash flow problem. Caught in this trap, insolvent seniors who used payday loans ended up with more than three payday loans outstanding to three different payday loan lenders.

Consumer debt levels have risen dramatically in Canada. Carrying high levels of credit card debt, lines of credit, bank loans and relying on payday loans is a sign that you may be experiencing financial problems that could lead to bankruptcy. No matter your age, take stock of your situation. Make a list of your debts. Build a budget that accounts for debt reduction. Make a plan to eliminate your debt.

Do we need the Court of Appeal to Weigh in About the Importance of Internet Use in Modern Society?

By Melody Izadi

Why *R. v. Brar [2016] ONCA 724* is a waste of court time, money and resources

Mr. Brar was a 35-year-old who was convicted of sexual assault, child luring and prostituting a person less than 18 years old and a breach of his bail conditions. He was first time offender. He was convicted of these offences because he used social networking sites to lure young persons into having sex with him in exchange for payment. He was sentenced to six years imprisonment for his crimes. In addition, a section 161(1)(d) order was imposed, pursuant to the *Criminal Code of Canada*, that restricted Mr. Brar from using the Internet for 20 years except when he is at work. Mr. Brar was also prohibited for 20 years from owning a cell phone that had "Internet capabilities." Mr. Brar appealed his sentence to the Ontario Court of Appeal with respect to his 20 year Internet-use ban.

Mr. Brar argued that section 161(1)(d) does not allow the court to rule on owning a mobile device and that the restrictions on Internet use were too broad and overbearing. The Crown argued that the prohibition was appropriate in the circumstances given the nature of the charges, and that Mr. Brar could apply at a later date to vary the terms of his Internet ban, if there was a change in his life that warranted a variance of the terms in the next 20 years. What?

It is almost impossible to imagine that the Crown believed that Mr. Brar could function and be a productive member of society upon his release from custody without the ability to check his email or look for job postings.

Unsurprisingly, The Court of Appeal agreed with Mr. Brar and set aside the 161(1)(d) order, found that the sentencing judge erred in using section 161(1)(d) to regulate ownership of mobile devices, and changed the terms of the order to restrict Mr. Brar from accessing websites with illegal content, from using or creating a profile on social media, and from participating in forums or chatrooms. The order is still to last for 20 years.

The Court of Appeal found that "increasingly, applying for employment requires access and use of the Internet and many positions require use and access of the Internet even when not at the employer's premises," and that people often use the Internet for "accessing services and finding directions." Moreover, the Court found that people use the Internet for "shopping, corresponding with friends and family, transacting business, finding employment, banking, reading the news, watching movies, attending classes and so on."

So, what the Court is saying is that in order for Mr. Brar to find a job, keep a job, and function normally in society, he needs the Internet for innocent purposes.

What's incredibly puzzling is why the litigation of this matter was so strongly opposed by the Crown Attorney's Office. Hours of work were spent by counsel preparing for this hearing, and surely hours were spent on this case by the honourable justices who heard the appeal and then had to prepare their written decision. These resources were spent on the contemplation and litigation of the use and importance of the Internet in modern day society, only to have the Court of Appeal come to the unanimous decision that the Internet has now become a basic tool of survival. So, 20 years without it would be an unduly harsh sentence on Mr. Brar. Did we really need three wise and experienced judges to make this finding? Yet, here we are. The Ontario Court of Appeal has made a finding that people use the Internet to do things like watch movies and shop, and the Internet is an integral part of the interconnectivity of our population.

It is unfortunate that cases like these call into question the quality of decision-making in the adversarial process. Are we just fighting for the sake of fighting? Or should there be more of a premium placed on the ability to know when to put our swords down, and come to a reasonable and proportionate compromise that can balance the needs of the accused and society, in lieu of wasting tax payers' money on litigation that produces obvious results. Perhaps litigating a 20-year, near-absolute Internet ban could have been re-jigged a little to reflect the impossible situation an individual would face in our society without the use of the Internet. But no, a much better idea must be to have some of the greatest legal minds of our time hear arguments on why Mr. Brar may need to use the Internet at some point in the next 20 years to do something better with his life. Maybe *Googling* "cost benefit analysis" would have helped.

No Time Limitations on Sexual Harassment Lawsuits

By Peter Bowal and Devon Slavin

Introduction

Many readers will recall the recent Bill Cosby trial for sexual assault. The crime was allegedly committed in 2004, the criminal charge was laid on December 30, 2015 and the trial occurred in June 2017. It ended in a mistrial because the jury did not return a unanimous verdict. The prosecutor promises another trial.

While this is a criminal trial – where generally no limitations periods apply for indictable offences– it reveals the numerous challenges facing the witnesses, prosecutor, defence counsel and jurors, of taking matters to trial long after the wrongdoing is alleged to have occurred.

Civil lawsuits in Canada must normally be filed within two years of the event complained of. This is called the limitations period. It is set out in legislation and is strict. The lawsuit will not be heard and completed in those first two years, but it must be commenced within that time.

Recently, the Alberta government amended the *Limitations Act* [http://canlii.ca/t/52xm7] to eliminate the limitations periods for civil claims of "any misconduct of a sexual nature". This will potentially impact the workplace.

Reasons for Limitations Periods

There are three purposes of limitations periods. Knowing that evidence degrades over time, it is important to move a case forward sooner rather than later. Witnesses forget things. They move away and they die. Documentary evidence also gets lost, destroyed or is discarded.

The second purpose is that everyone should enjoy "peace and repose" after a certain date. When the limitations period has passed and no lawsuit has been filed, others (potential defendants and witnesses) can dispose of files and other records. They can safely move on in their lives without fear of being sued on that issue.

Finally, it is fair that alleged wrongs should be decided in the era in which they arose. If something was acceptable, or at least not repulsive and legally actionable at the time it occurred, it should not be judged and condemned by significantly different social standards decades later. For example, there is more clarity and sensitivity around behaviour of even a minor sexual nature today in Canada than there was, say, thirty years ago.

No Limitations Periods for Sexual Misconduct

Bill 2, *An Act to Remove Barriers for Survivors of Sexual and Domestic Violence,* eliminated the two-year limitation period for:

- sexual assault;
- any sexual misconduct involving a minor, intimate relationship or dependent; and
- any non-sexual assault or battery involving a minor, intimate relationship or dependent.

Employees who allege "misconduct of a sexual nature" can file lawsuits against co-workers, customers, contractors, vendors and employers without any time limitation period. Corporate employers are vicariously liable for the actions of their employees in the course of the employment, so they also could face a lawsuit decades after an alleged incident of sexual misconduct.

"Sexual violence" and "sexual misconduct" were intended to be construed very broadly according to the Minister. In legislative debates, she stated: "[w]e were very clear in selecting incredibly broad and inclusive language. This, in fact, puts Alberta, which was behind every other province in the country, out in front so that we have the most inclusive language of any province…" (*Hansard*, March 22, 2017).

The Minister added: "to the term 'sexual misconduct'… these behaviours would include but are not limited to . . . sexual harassment" (*Hansard*, April 19, 2017 at p. 678). However, sexual harassment is a human rights concept. The *Alberta Human Rights Act* has its own limitation periods for filing complaints. Sexual harassment is not yet an established tort on its own, that would be subject to the *Limitations Act*.

Ontario recently passed Bill 132, *Sexual Violence and Harassment Action Plan Act*, which likewise abolished time limits for suing for sexual assault, domestic violence, or child abuse. The recent Alberta legislation goes even further and may expose employers to unanticipated liability for long-past actions of their former employees by making the amendment apply retroactively. The assertion of an old claim will violate all the three principles of limitation periods.

Conclusion

Sexual misconduct and sexual harassment claims are already troubled with a high degree of subjectivity and opposing evidentiary perspectives. These disputes will now be further destabilized by the addition of unlimited time in which to launch the allegation.

There is little employers can do about old complaints of sexual misconduct. However, because this amendment potentially increases liability, it does compel employers to discourage future incidents. Employers can start by ensuring that their sexual harassment policies are clear and authoritative. When incidents do happen, they should be carefully investigated, addressed and documented.

Conflict Between Parents, Part 1: The Effect of Conflict on Children

By John-Paul Boyd

When parents separate, they must find ways of answering a lot of difficult questions about how they will care for and manage their children. *Where will the children live? How much time will each parent spend with them? How will decisions about the children be made? Who will pay child support, and how much will be paid?*

Many couples are able to resolve these questions on their own. However, these questions are hard because they're about the thing that is most important to most people – their children – and so the questions often trigger powerful fears and anxieties about the future. *What if he tries to take the children away from me? What if she doesn't pay enough support and I can't make ends meet? What if she changes the children's names? What if his new girlfriend wants to play mommy?* As a result, many other couples can only manage these problems with the help of lawyers and mediators, and sometimes only with help of the court.

There's nothing wrong with needing help. Resolving these issues is *hard*. What I worry about is the conflict the unanswered questions arising from separation can create between parents, and the effect this conflict can have on their children.

Separation is always difficult for children. Although children are generally resilient and will usually get over the turmoil and disruption created when parents move apart, separation still undermines children's sense of stability and the security of their relationships. Separation is often the first real crisis they have experienced.

The "normal" negative outcomes for children of their parents' separation – and by *normal*, I mean outcomes that happen often enough that they're not unusual – include:

- mental health problems like depression and anxiety;
- emotional problems like sadness and anger;
- problems at school like falling behind or dropping out; and
- social problems like delinquency and falling in with the wrong crowd.

With support, lots of communication, and healthy parent-child relationships, the likelihood that these outcomes will happen can be minimized. Some children even thrive during and after their parents' separation, and experience benefits like improving ability to talk about their feelings and to be independent, patient and compassionate.

However, the likelihood that one or more of the negative outcomes will occur, and the severity of their impact, increases when children are exposed to conflict between their parents. Almost every kind of parental conflict can have a harmful effect on children, including:

- aggressive behaviour, such as threats, yelling, and violence;
- verbally and emotionally abusive behaviour;
- constantly arguing and blaming each other; and,
- going to court to resolve disagreements.

Things can get even worse for children when conflict like this happens and a parent displays contempt toward the other parent, blames the other parent for every problem or has mental health issues, issues with substance abuse, a weak relationship with the child or an authoritarian approach to disciplining the child. However, conflict also has an effect on parents and the overall quality of the parenting they provide. Fathers sometimes withdraw from their relationship with their children, become less engaged in their day-to-day lives and provide less discipline. Mothers sometimes become less nurturing and display less warmth in their behaviour toward their children. Mothers and fathers often become angry more easily or may discipline their children in less predictable, more coercive ways.

What's really important to know is that the effects of conflict on children are the same whether the parents have separated or not. Parents who stay together "for the sake of the children" aren't doing their kids any favours if they're having a lot of conflict with each other. (Sometimes it *is* best to separate, making sure, of course, that the children are protected as much as possible from the negative effects of separation.) The research shows that the two factors that best predict how children will adjust to their parents' separation are:

1) the quality of the child's relationship with each parent; and,

2) the nature of the conflict between their parents and how long that conflict lasts.

As mentioned previously however, many parents manage to navigate their separation well and resolve all of these difficult questions about the care of the children in short order. Most of the parents who need help to answer these questions find resolution through negotiation or mediation and get it all wrapped up in anywhere from six to 18 months.

The real problems tend to come up with parents who have to go to court and have a judge make decisions about parenting for them. The research on parents who go to court shows that about 5 to 20%

are “high conflict,” meaning that they profoundly disagree about almost every issue in their case. The claims they raise about the other parent are inflammatory and extreme, as are the orders they’re asking the judge to make. As a consequence, they are in court many times before getting to trial, their trials take more time than most, and they are in court many times after trial.

The legal battles of high-conflict parents can take *years* to wrap up. (A federal study of court files in divorce cases found 83,482 files that were more than two years old in the 2014/2015 study year. Of those cases, 29% were two to three years old and a whopping 55% were four years old and older!) You can imagine how difficult such persistent, long-term conflict can be on both the parents and their children.

The point I am trying to make here is about the critical importance of protecting children from conflict between their parents, whether the questions arising from separation are answered relatively quickly or get bogged down in endless litigation. I’ve written elsewhere about how lawyers should approach conflict when they’re in court on behalf of a parent, and Sarah Dargatz has written about appointing lawyers to represent children when the conflict between their parents is out of hand. In the next part of this series, I’ll write about some easy steps parents can take to help protect children from conflict.

Murdoch v. Murdoch

By Peter Bowal and Devon Slavin

[I did] "haying, raking, swathing, moving, driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding, anything that was to be done. I worked outside with him, just as a man would…"

Irene Murdoch's evidence

Introduction

Murdoch v. Murdoch is a 1973 Supreme Court of Canada decision from Alberta [http://canlii.ca/t/1xv6k]. It shows law as a blunt instrument when adapting to social change. The case involved the application of old property law principles to emerging matrimonial property realities.

In Canada, marriage was traditional up to the late 1970s. The spouses were male and female, divorce was rare by modern standards and property was mostly held in the husband's name. In the 1970s this started to change as divorce increased after divorce laws were liberalized and people lived together and separated without formal marriage. Women found they had a tenuous claim to share in the property they had acquired and contributed to during the cohabitation.

Women argued that under standard trust law, they had acquired a beneficial interest in matrimonial property to which they indirectly contributed.

Facts

Irene and Alex Murdoch married in 1943 and worked for four years on Alberta ranches as a hired couple. Multiple properties of increasing value were bought and sold in succession by Alex, culminating in a substantial ranch at Black Diamond, Alberta. Throughout the marriage Irene worked on the property alongside her husband. She operated the ranch during her husband's substantial absences while he was tending other businesses.

When the marriage ended in 1968, Irene claimed a half interest in the ranch and other assets, the titles of which were in her husband's name. This amounted to about $95,000. She said she was an equal in the ranching business during their 25 years of marriage.

At the Supreme Court of Canada

There had been a few decisions where, in exceptional circumstances of labour and sacrifice, wives could be entitled to a proprietary interest merely from marriage and cohabitation, and without financial contribution. The legal principle was resulting or constructive trust.

Four of the five male judges concluded that Irene's work did not exceed that which is expected of a typical ranch wife. A trust would be found if she had contributed money or if there was a common intention at the time of property acquisition to hold equal shares in trust. Irene could prove neither of these things. Therefore, she was granted no beneficial interest in the property and she was ordered to pay some of her husband's legal bills.

The dissenting judge saw Irene's work contributions as "extraordinary." He said the pooled wages earned early in the marriage should be counted as sufficient financial contribution to the property acquisition. A denial of her interest would be an inequitable and unjust enrichment of her husband.

Impact on Canadian Matrimonial Property Law

The *Murdoch* decision stoked a significant increase in public and political support for matrimonial property law reform. Irene's story was the socio-economic reality of many Canadian farm wives – indeed most married women in Canada at that time. Women could identify with Irene. Women's groups pushed for reform of matrimonial property regimes. The case represented a watershed event in the Canadian women's movement.

The political response was to create commissions with the mandate to examine existing matrimonial property law and to propose reforms. All Canadian provinces and territories enacted new legislation within six years of the *Murdoch* decision. An example was Ontario's *Family Law Reform Act* of 1978.

Gone was the separation of property principle where each spouse owned only that in which they could establish a proprietary interest through rigid rules of property and trust law, and where the wife received nothing upon separation if her name was not on the title. The new legislative regime mandated a presumption of equal sharing of property acquired during marriage or cohabitation, regardless of the financial or labour contribution to its acquisition. Indeed, there was more legally required sharing after marriage breakdown than during marriage itself.

What Happened to Irene Murdoch?

After the decision, Irene found work as a cleaning lady. Her divorce was final in 1975. Her lump sum financial settlement for maintenance was $65,000.

Women's groups rallied behind Irene and set up a trust fund in 1974 to "thank [Murdoch] from all women because her courage and tenacity have brought the unjustness of our laws on matrimonial property out into the open… [and to be] a public gesture, a token of disapproval of the way the Supreme Court of Canada interpreted the law" (from a November 1975 speech). The Murdoch fund mobilized

grassroots interest in Irene Murdoch's case and provided a means for ordinary women to demonstrate their support. The trust fund was endorsed by the newly established Alberta Human Rights Commission, which sent a letter to the Supreme Court of Canada seeking a revision. The story was taken up by the press and the Advisory Council on the Status of Women, both of which provided additional endorsement.

Irene re-emerged in May 1983 to author a letter to the editor of *Chatelaine.* Now remarried, she replied to an article in which she had been featured: "since my divorce, what I have said over and over again is that . . . I have a new life now and I want to forget the old."

By the mid-1980s, Irene was clearly wary of the media and sought to return to her private life. A reluctant heroine who shunned the spotlight, she drifted away from the women's organizations that had helped her.

Irene Murdoch's case will always be seen as a rallying focus for matrimonial property law reform. It served as the impetus for the quest for legal equality between spouses

Human Rights Laws and Inclusion of New Grounds—Criminal Record

By Linda McKay-Panos

Various provincial and federal jurisdictions choose to protect people from discrimination on various grounds in areas such as employment, services customarily available to the public and tenancy. In some cases, the grounds protected are the same across jurisdictions. In others, court challenges have resulted in court orders that grounds are to be read into human rights law. For example, "sexual orientation" was read into Alberta's human rights law by the Supreme Court of Canada in the *Vriend* case in 1998. In addition, over time, provincial legislatures and the federal Parliament come to realize there are vulnerable individuals who experience discrimination, and who should be protected by human rights laws. These governments add grounds to their legislation to address the discrimination. For example, over the past twenty-five years, several grounds have been added to Alberta's human rights law—family status, marital status, sexual orientation, gender identity and gender expression—to name a few.

Protection from criminal record discrimination provides a remedy if a person is denied a benefit, such as employment or services, because he/she has a criminal record. However, this protection is not provided everywhere in Canada. The following jurisdictions do not provide any protection from discrimination on the basis of criminal record:

- *Alberta Human Rights Act* (RSA 2000, c A-25.5)
- *Saskatchewan Human Rights Code* (SS 1979, c S-24.1)
- New Brunswick *Human Rights Act* (RSNB 2011, c 171)
- Nova Scotia *Human Rights Act* (RSNS 1989, c 214)
- Prince Edward Island *Human Rights Act* (RSPEI 1988, c H-12)

Manitoba's legislation—*The Human Rights Code*—does not list criminal record as a protected ground (CCSM c H175); however, the Manitoba Human Rights Commission will accept complaints on this basis (Policy #I-12, effective August 16 2002; online http://www.manitobahumanrights.ca/publications/policy/policy_criminal-record.html)

The following jurisdictions provide protection from discrimination on the basis of criminal record in all areas (e.g., services customarily available to the public, tenancy, and employment):

- Canada: *Canadian Human Rights Act* (RSC 1985, c H-6) prohibits discrimination on the basis of a "conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered". This Act applies to federally regulated companies and undertakings (e.g., banks and transportation companies).
- Northwest Territories *Human Rights Act* (SNWT 2002, c 18) "conviction that is subject to a pardon or a record suspension".
- Nunavut *Human Rights Act* (SNu 2003, c 12) "conviction for which a pardon has been granted".
- Yukon *Human Rights Act* (RSY 2002, c 116) "criminal charges or criminal record".

Four provinces provide protection in the area of employment. In Quebec, *The Charter of Human Rights and Freedoms* (CQLR c C-12) provides protection in the area of employment: "18.2. No one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence." In British Columbia, the *Human Rights Code* (RSBC 1996, c 210) section 13(1) provides that "a person must not (a) refuse to employ or continue to employ a person, or (b) discriminate against a person regarding employment or any term or condition of employment …because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person." In Ontario, the *Human Rights Code* (RSO 1990, c H.19) section 5 protects against discrimination in employment based on "record of offences" which is defined as "(a) an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked, or (b) an offence in respect of any provincial enactment". Finally, in Newfoundland and Labrador, the *Human Rights Act* (SNL 2010, c H-13.1) section 14 provides that "An employer, or a person acting on behalf of an employer, shall not refuse to employ or to continue to employ or otherwise discriminate against a person in regard to employment or a term or condition of employment …..because of the conviction for an offence that is unrelated to the employment of the person."

Because legislating in relation to civil rights matters is under the jurisdiction of individual provinces and territories, there may be differences in legislation across Canada. The question is whether there *should* be some provinces where human rights protection for people with criminal records is not available.

Why provide human rights protection for people with criminal records? Most people who have committed crimes and served their sentences will re-enter society and hope to become constructive citizens. This means they need to obtain employment. Currently, in many Canadian jurisdictions it is not illegal to ask during an employment interview whether a person has a criminal record. This creates a huge barrier for individuals who have served their sentences and are seeking to rehabilitate and become productive citizens. When the nature of the offence for which the person has served their sentence has nothing to do with the employment they are seeking, it should be illegal to discriminate against that person. If the offence is related to the proposed employment, it would always be available to defend discrimination as a good faith employment requirement. For example, if the person has been convicted of embezzlement from a bank, employers or potential employers may well want to exclude that person

from working in a job that requires being responsible for financial matters. In sum, if protection from discrimination on the basis of criminal record is not provided, people with criminal records who cannot find legitimate work may resort to illegal activities or will rely on social assistance to support themselves, both of which cost all taxpayers and have other negative consequences for everyone.

The Calgary John Howard Society has launched a new initiative entitled: “I am More than My Criminal Record” (see: https://iammorethanmycriminalrecord.com/). The purpose is to reduce the stigma associated with a criminal record. It is also meant to encourage employers to exercise good faith and consider taking the initiative not to ask about criminal records unless it is relevant to the job. However, some employers will not change their practices unless the law requires them to do so. This means that a legislative amendment will be required to ensure everyone has a fair chance for employment. In the end, everyone will benefit.

Mr. Green from The Company Brings Bloodshed to the Republic

By Rob Normey

George Orwell famously sought to make writing on politics into an art. It's important to remember that he wasn't the only one. So too did a radically different kind of writer, the cocksure American Gore Vidal. I bring up Orwell because I continue to ponder the notion that his dystopian novel *1984* time and again serves as the go-to book for citizens in the West looking for insights into ever more frightening examples of the abuse of political and legal power. Once again, this year the novel rocketed up the bestseller charts as the enormity of the election of Donald Trump began to manifest itself. Truckloads of the book were on their way to people's homes the day after they witnessed Trump spinmeister and spokeswoman Kellyanne Conway refer to a false claim made by the Trump team about the size of the inauguration crowd as "alternate facts."

Much as I admire Orwell as an essayist and early exemplar of participatory journalism, I would like to tell friends and fellow lovers of literature that, while *1984* works well within the parameters of the dystopian novel of ideas genre, it has some very real limitations as a warning and a guide to contemporary political trends. Sure, Orwell was able to brilliantly depict the means by which totalitarian or, at least authoritarian rulers could maintain a firm grip on power. But other aspects of the novel seem to me to be quite remote from what we witnessed in the years after its 1949 publication. In the decade after the novel appeared, did the United States and Britain would become the drab, joyless societies depicted in the novel? Then or now, do they appear on the verge of becoming totalitarian or even authoritarian states run by a band of ruthless rulers hidden behind the stern visage of Big Brother? It seems to me that as the 1950s advanced and the American economy roared along, it developed in manner quite unlike the dark world Orwell envisioned. The bulk of the citizenry were no doubt too distracted by all the bright new shiny toys and sheer abundance of goods on offer to need to be controlled in the heavy-handed way Orwell dramatizes.

I consider that the novels of Gore Vidal capture important aspects of the postwar world that would soon be effortlessly dominated by the United States in the West, facing off in the Cold war with the Soviet Union, which had developed its own form of imperialism. An early novel of Vidal's, *Dark Green, Bright Red* gives a sense of the way in which the author's political realism, served up with a pungent dash of cynicism, is able to dramatize the urge-to-Empire of the United States in the Truman and Eisenhower eras. Later Presidents continued to build upon this super-state with its military-industrial complex and its ever-intrusive secret service, the CIA.

In his note at the end of the novel Vidal tells us that he completed it in Antigua in 1949, the very time that *1984* exploded in the world. Vidal had lived in Guatemala for considerable periods of time over the preceding three years.

The novel certainly has a cinematic quality. Unfortunately, some of the characters, particularly the Indians and Spanish- Americans of the fictional land referred to simply as "the Republic", a stand-in for Guatemala, resemble the stock characters of a B movie from Hollywood struggling to escape from their stereotypical origins. As a reader, I suspect that Vidal is toying with me, expecting me to buy into the myths and stereotypes of Central Americans that the mainstream media and an ostensibly de-politicized Hollywood employed in that era. The three significant characters are the American protagonist, Peter Nelson, a young and energetic figure with a mysterious past as a soldier in the U.S. army; the General, in whose army Nelson is now employed and the General's beautiful and vivacious daughter, Elena. She is engaged to George Green, nephew of the Director of "The Company" and himself a rising official in a powerful fruit company. The Company is clearly modelled on the hugely financially successful United Fruit Company, known popularly in Guatemala and the rest of the Americas as the Octopus because its hands reached into virtually every sector of their societies.

The plot involves the planning for a coup against the existing government along with an early push into Guatemalan towns, as the volunteer army gathers strength and courage. There is considerable talk of the General's desire to establish laws and programs for the poor, primarily the Indians who make up the majority of the country's population. However, Vidal deftly allows us to see that there is likely to be a significant gap between the promises made to the most vulnerable and hence gullible citizens in this very unequal society, and the eventual results. The novel has a unique quality of parody. This seems at first quite inappropriate for a novel that purports to explore the power relations of a poor Third World country and the suffering endured by the majority of the population due to unjust laws and unfair land grabs. However, by novel's end I acquired a sense that there might be method in the madness. Vidal wished to find an unusual means of telling us how futile and foolish all talk of land reform and the creation of a just set of laws, with courts to uphold them in a principled manner, will inevitably be. The reasons for this are located in the slightly sinister and genuinely dangerous Mr. Green, the head of the (United Fruit) Company and his nephew. They are the puppet masters and they will determine who will rule. All opportunity for reform will be stymied because they have not the slightest intention of allowing their profits form the large estates they own to be placed at risk in any way.

A strong scene in the novel occurs when Peter Nelson, as captain of the General's troops, engages in a confused sequence of shooting before routing a group of looters in the town the rebel's troops have just secured. Peter's order to fire on the unruly mob saves the life of a man who had a rope around his neck. The fellow turns out to be a lawyer who was being terrorized by the mob because, he explained, he had been part of the successful middle class whose family operated a business. Envy on the part of the group of troublemakers led to an attempt to confiscate all his family's assets. The lawyer talks about the necessity of restoring order and plans to "deal with" the men responsible for his near-murder. We learn,

in other words, that in a country riven by disparities of wealth and power, there is a brutal struggle for power and material gain and little time for high-minded idealism.

As I read the novel, I found the ironies piling up one after another. The society is in desperate need of reform and yet any attempt to achieve it seems only to lead to more violence and bloodshed. Further, the country that clearly dominates the region, the United States, through its multinational corporation, was far from being a guarantor of liberty and justice. It simply ensured that the misery would continue without cease. In the actual history of the country, a further irony is that just at the time the novel was published; Guatemala was actually beginning a remarkable transformation. The government of Arevalo had replaced a long-time dictator who had been forced to flee because of a genuine rebellion uniting the middle class and the poor. Over the next three years, the talented and compassionate President, Jacobo Arbenz Guzman, together with his brilliant wife, engaged in a number of progressive measures to create a more equal society. He modelled his reform program on President Franklin D. Roosevelt's New Deal of two decades earlier.

Vidal's novel of an attempted coup, masterminded by The Company with the obvious support of the U.S. government, turned out to be amazingly prescient. The Eisenhower administration, working covertly through the CIA, responded to the requests of the United Fruit Company to destabilize, punish and if necessary destroy the democratically elected government of Jacobo Arbenz. It did just that, ultimately forcing Arbenz and his family to flee the country. The dictator that it installed in power ensured that all legal and political reforms were rolled back. An era of bloodshed and a brutal denial of basic rights was unleashed. This continued over the next several decades, with support from the United States, because the dictator was willing to burnish his anti-Communist credentials, meaning opposition to all leftist and progressive thought and organization, and to leave the lands and profits of United Fruit Company untouched.

The very title of this novel – *Dark Green, Bright Red*, captures the colors of The Company. It symbolizes the headlong rush out of the green world of lush forest into the "bright red" world of authoritarian Guatemalan society, the colour of the blood of all those Guatemalan citizens made to pay with their lives and liberties for the return to rule by the mighty, all under the yoke of American corporate and political interests.

The novel is an insightful depiction of the ways in which the United States as a new super-power would thwart the aspirations of small countries in Central America and make a mockery of the Four Freedoms that President Roosevelt had so recently promised. In the 1950s the United States aggressively supported the interests of the United Fruit Company in a manner that undermined the one hopeful development in Guatemala during the Arbenz administration. This was the establishment of a functioning legal system, respect for the rule of law, and rights for all Guatemalans, no matter how poor. The coup engineered from Washington ensured that any attempt thereafter to exercise human rights would be met with imprisonment or outright murder. Only in 1999 would an American President, Bill Clinton, apologize for the enormous wrong-doing that occurred. As for United Fruit, as the great poet Pablo Neruda wrote, it constituted a "dictatorship of flies."

Innovation and the Charitable Sector

By Peter Broder

The merger of the Canadian Cancer Society and the Canadian Breast Cancer Foundation announced on February 1, 2017 has been welcomed by many. The hope is that by joining forces the two organizations can have greater impact on cancer research and support programs.

For those who lament the large number of charities in Canada and what's dubbed (without any widely-accepted metric) the "inefficiency" of many organizations, this type of move is self-evidently a good thing.

In the case of the Canadian Cancer Society and the Breast Cancer Foundation, because of their similar mandates, there are likely organizational synergies that can be realized by the merger. There will certainly be some donors that will be happy not to receive solicitations from similar charities, so bringing the two together may be the right move. Even so, it may be worthwhile questioning the assumptions that fewer is inevitably better and bigger is always more efficient.

At common law, charities – along with meeting certain other criteria in how they are constituted – are granted status because their purpose is to do good or to relieve disadvantage. On this basis, unless one is willing to argue that in 21st century Canada there is already enough good or no further need to relieve disadvantage, it is hard to make a case that there are too many charities.

Moreover, although the common law contains measures to discourage the wasting of charitable assets – or more precisely to hold accountable those responsible for the stewardship of charitable resources for carelessness or misuse of the property in their care, it pays little heed to "efficiency". Instead, it values prudence and caution over getting the biggest bang for the buck. This leads directly to charities being expected to limit themselves in what business activities they undertake.

In some jurisdictions common law restrictions on putting charitable assets at risk are reinforced in legislation. Such statutes, however, are frequently little known and little enforced.

Adding confusion to this is the better-known fact that registered charities and their donors are granted highly favourable treatment under the federal *Income Tax Act* (*ITA*). From this *ITA* recognition often flows preferential treatment under tax and other statutes at the federal, provincial and municipal levels.

Even though, in the aggregate, less than 10% of charity revenues flow from personal and corporate donations, and of that percentage only about 50% is subsidized by government in the form of foregone taxes, the preferential treatment leads to registered charities being viewed primarily as a "tax expenditure". In the public imagination this generally translates into a rationale for a robust regulatory regime to control what charities do, and how they do it.

More particularly, preferential treatment helps give rise, or at least contributes, to complaints about "too many charities" or that "many charities are inefficient". Since charities' successes frequently can't be gauged in financial terms, it is easy to find this worldview compelling. While in some jurisdictions there has been a move to impute a monetary value to the benefits arising from tax expenditures, as well as to the costs, that is not yet the norm. So, one is only looking at one side of the balance sheet.

This leaves us with characterizations of the charitable sector that are not only ill-considered, but may be at odds with what should actually be happening.

There is much discussion these days about economic disruptors, and how many traditional industries are being undermined, replaced or rendered unrecognizable by nascent technologies and new ways of working. In the face of this, the federal government sees innovation as key to future Canadian economic success. In its last budget it identified several sectors where it will be actively supporting development of new products, services and technologies.

Because of their tax status, charities are not eligible for Research and Development Tax Credits that are available for their for-profit counterparts. Many of the government programs that support private sector innovation are also closed to them. Yet, historically, the sector has been a fount of innovation. Many features of contemporary Canadian society – whether in social welfare, health, education, environmental protection, human rights or other areas – have been pioneered in the charitable sector.

That makes it doubly important that we do not stifle organizations because of an impression that they are too numerous or because they apparently don't operate with requisite efficiency in financial terms.

Only time will tell whether the amount of fundraising and research capacity – to name only two key elements of the work – of the merged cancer groups will equal that of the two old organizations.

Clearly, institutional players and large corporations have a role to play in innovation. However, recent economic history shows that transformative ideas often originate in small organizations and unexpected places. That suggests that, in the charitable sector, we should merge with caution.